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RECENT DECISIONS OF RELEVANCE FROM THE NORTH CAROLINA APPELLATE COURTS DECIDED FROM SEPTEMBER 2, 2021 TO MAY 17, 2022

NCADA | NORTH CAROLINA ASSOCIATION OF DEFENSE ATTORNEYS

2022 ANNUAL MEETING
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A. Negligence

(1) Economic Loss Doctrine

In Cummings v. Carroll, 379 N.C. 347, 866 S.E.2d 675, 2021-NCSC-147, the supreme court considered whether the economic loss rule barred negligence, negligent misrepresentation, and fraud claims that two homeowners asserted against the seller of their beach house, the seller's owner, and the seller's real estate agents after the homeowners discovered structural damage to their house.

The homeowners purchased an oceanfront beach house. Id. at ¶ 1. Several months after closing on the house, the homeowners discovered significant structural damage to the house that had been caused by past water intrusion. Id. The homeowners asserted several claims, including (a) negligent misrepresentation and fraud against the seller and the seller's owner and (b) negligence and fraud against the real estate agents who represented the seller in the sale of the house. Id. at ¶¶ 1–2. All defendants moved for summary judgment in their favor. Id. at ¶ 19. The trial court granted the motion, and the court of appeals affirmed in part and reversed in part. Id. at ¶¶ 19–20. The parties appealed several issues to the supreme court. One of the issues that the seller, the seller's owner, and the seller's real estate agents (the "selling parties") appealed was the determination by the court of appeals that the economic loss rule did not bar the homeowners' tort claims against these defendants.

The supreme court ruled that the court of appeals did not err in holding that the economic loss rule did not bar the homeowners' claims against the selling parties for negligence, negligent misrepresentation, and fraud.

"[T]he economic loss rule bars recovery in tort by a plaintiff against a promisor for his simple failure to perform his contract, even though such failure was due to negligence or lack of skill." Id. at ¶ 23 (quoting Crescent Univ. City Venture, LLC v. Trussway Mfg., Inc., 376 N.C. 54, 58, 852 S.E.2d 98 (2020)). The homeowners' negligence, negligent misrepresentation, and fraud claims against the selling parties were based on these defendants' alleged failure to disclose the house's long history of water intrusion problems and to adequately repair those problems. Id. at ¶ 24. According to these defendants, the residential property disclosure statement "upon which these claims rely constitute[d] a part of the purchase contract, so that claims relating to the disclosure statement implicate[d] contractual duties for purposes of the economic loss rule." Id. at ¶ 25. The supreme court disagreed.

After examining the contents of the disclosure statement and the purchase contract, the supreme court held that the "substance" of the disclosure statement was not incorporated into the purchase contract, and therefore, the disclosure statement could not be used to apply the economic loss rule in this case. Id. at ¶ 26. The supreme court also distinguished its Crescent University City Venture decision, explaining that it applied the economic loss rule in that case "in the context of a large commercial real estate transaction in which the rights and responsibilities of the parties were comprehensively controlled by a series of inter-related contracts and sub-contracts." Cummings, 2021-NCSC-147, at ¶ 27. That decision did "not control in this instance given that the present case arose in the context of a subsequent sale of an existing residence between individuals or privately held entities that the individual participants controlled." Id.

In addition, the supreme court declined to adopt a categorical rule exempting fraud claims from the economic loss rule, like the court of appeals has done in the past, since the disclosure statement did not require the application of the economic loss rule in the first place. Id. at ¶¶ 28–29. Furthermore, the supreme court agreed with the conclusion of the court of appeals that the seller's real estate agents could not avail themselves of the protection of the economic loss rule because they were not parties to the purchase contract. On this issue, the supreme court distinguished a court of appeals decision, Simmons v. Cherry, 43 N.C. App. 499, 259 S.E.2d 410 (1979), where, unlike in this case, there was evidence that the president of a corporation that contracted with a real estate appraiser had bound himself personally to the contract. Cummings, 2021-NCSC-147, at ¶¶ 30–31. Here, the seller's real estate agents lacked the privity of contract necessary for them to rely on the economic loss rule. Id. at ¶ 31.

For these reasons, the supreme court affirmed the determination by the court of appeals that the economic loss rule did not bar the homeowners' tort claims against the selling parties.

(2) Duty

In Copeland v. Amward Homes of N.C., Inc., 379 N.C. 14, 863 S.E.2d 585, 2021-NCSC-118, the supreme court granted the defendants' petition for discretionary review and the plaintiffs' conditional petition for discretionary review of the decision of the court of appeals in Copeland v. Amward Homes of N.C., Inc., 269 N.C. App. 143, 837 S.E.2d 903 (2020). The supreme court heard oral argument on September 1, 2021. Then, on October 29, 2021, the supreme court determined that discretionary review had been improvidently allowed, thus ending the appeal.

The decision of the court of appeals addressed whether a residential developer owed a duty to routinely inspect construction performed in its subdivision, take precautions against negligent construction work, or sequence and manage the construction of homes on hilly terrain.

A residential developer purchased more than 100 acres of steep, hilly land on which to develop a community. 269 N.C. App. at 145, 837 S.E.2d at 905. The developer then sold the lots to builders. Id. Prior to selling the lots, the developer did not ensure that the earth on which the construction would take place was level or appropriately sloped for the necessary construction, a process called "grading," nor did the developer sequence the construction of the community so that uphill lots were built before downhill lots. Id. As a result, a family and their child moved into a home in the community while some lots uphill had yet to be graded. Id. The child was playing outside the home when an overloaded dump truck rolled away from an uphill home construction project, striking and killing the child. Id. at 145–46, 837 S.E.2d at 905.

The child's estate brought negligence claims against the developer, claiming that it owed a duty to (1) routinely inspect the construction going on its community, including the unsafe grading work being done on the uphill lot; (2) take precautions against negligent construction work, a duty arising from the developer's undertaking and course of conduct in developing the community; and (3) sequence the construction or conduct mass grading to limit the risk that bystanders downhill might be harmed by foreseeable roll-away accidents. Id. at 146–50, 837 S.E.2d at 905–08. The trial court granted summary judgment for the developer, concluding that the developer owed no legal duty to the child. Id. at 146, 837 S.E.2d at 905.

The court of appeals reversed and remanded. The court of appeals concluded that the developer did not owe a duty to routinely inspect the construction occurring in its subdivision or a duty to take precautions against negligent construction work. Id. at 146–49, 837 S.E.2d at 906–08. However, the court of appeals held that a material question of fact existed as to whether the developer owed a duty to sequence the construction or conduct mass grading to limit the risk that bystanders downhill might be harmed by foreseeable roll-away accidents. Id. at 149–50, 837 S.E.2d at 908. Thus, summary judgment for the developer was not appropriate at this stage.

(3) Independent Contractor

In Osborne v. Yadkin Valley Economic Development District, Inc., 279 N.C. App. 197, 865 S.E.2d 307, 2021-NCCOA-454, petition for disc. rev. filed, No. 371P21 (N.C. Oct. 8, 2021), the court of appeals considered whether a school board was liable for the actions of its independent contractor that provided busing services to special needs students.

A school board provided bus transportation, with safety monitors on board, to its special needs students for many years. Id. at ¶ 3. In 2013, the school board contracted with a transportation company to provide bus transportation for some of the school district's special needs students. Id. at ¶ 4. The contract did not include safety monitors. Id. at ¶ 5. The transportation company had its own procedures for vetting and training potential bus drivers. Id. at ¶ 6. On two separate days, a bus driver hired and trained by the transportation company, sexually assaulted one of the special needs students while she was riding the bus. Id. at ¶ 9. The bus was equipped with video cameras and the transportation company discovered the sexual assault, notified law enforcement, and terminated the bus driver's employment. Id. at ¶ 10. The special needs student, through her mother, filed suit against

the school board, the transportation company, and others, alleging various negligence claims. Id. at ¶ 11. The trial court granted summary judgment to the school board on the student's claims and the student appealed. Id. at ¶ 13.

The court of appeals affirmed the trial court's ruling in an opinion written by Judge Wood.

First, the court of appeals found that while the school board was required to exercise a heightened duty of care in making decisions regarding special needs pupils, the school board properly delegated its duty to safely transport these students under section 115C-253 of the North Carolina General Statutes. Id. at ¶¶ 36-38. Section 115C-253 provides that school boards may contract "with any person, firm or corporation" to transport public school students. Id. at ¶ 38 (citing N.C. Gen. Stat. § 115C-253). Moreover, the court of appeals found "no evidence in the record to suggest the [school board] retained the right to control the manner in which [the transportation company] would transport students such as [the special needs student]." Id. at ¶ 38. Because the transportation company hired and controlled its drivers, owned its own vehicles, and set its own policies, the school board "did not exercise the degree of control over [the transportation company] necessary to convert [the transportation company] from an independent contractor to an employee." Id.

Next, the court of appeals found no support for the argument that the duty to transport students safely is nondelegable. Id. at ¶¶ 39-40. The court of appeals noted that while no North Carolina court had considered the issue, other jurisdictions had done so and had expressly rejected such arguments. Id. at ¶ 40. Thus, the court of appeals held that, "[a]bsent guidance from our Supreme Court or our legislature," the school board was "not an 'insurer of student safety,'" because it delegated its duty to the transportation company.

Id. "To hold otherwise," according to the court of appeals, "would be to ignore the independent contractor rule that states when an employer properly delegates a duty pursuant to a statutory authority, its duty ceases." Id. at ¶ 43.

Nevertheless, the court of appeals noted that there was no genuine dispute as to the foreseeability of the student's injury due to her special needs. Id. at ¶ 41. Accordingly, the student's injury "was one that could have been prevented" because the school board's "customary practice had been to provide transportation for [the special needs student] on a . . . bus staffed with a safety monitor." Id. at ¶ 42.

Judge Dietz concurred in a separate opinion. Judge Dietz doubted that "the felony sexual assault of a vulnerable special needs student is always foreseeable to school officials as a matter of law. Criminal acts ordinarily are not foreseeable under tort law principles." Id. at ¶ 51. Judge Dietz agreed that, under the independent contractor rule, the school board passed to the transportation company the duty to provide the same heightened level of protection the school board owed to the student. Id. at ¶ 52.

Judge Arrowood also concurred in a separate opinion, expressing "concerns with the interaction between the statutory scheme and our caselaw." Id. at ¶ 53. According to Judge Arrowood, section 115C-253 "effectively permitted boards of education to contract out of the heightened standard of care that this Court has previously held them to." Id. Judge Arrowood argued that "together" section 115C-253 and the "right to control" element of the independent contractor rule articulated in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991) "effectively eliminate the [school board's] duty to any public student unfortunate enough to find themselves in a vehicle operated by an independent contractor." Id. at ¶¶ 55-56. While Judge Arrowood questioned "whether this was the result that was intended

when the statute was enacted," he saw "no avenue for relief from this conundrum absent legislative action or our Supreme Court's revisiting of the Woodson doctrine." Id. at ¶ 58.

(4) Gross Negligence

In Estate of Graham v. Lambert, ___ N.C. App. ___, 871 S.E.2d 382, 2022-NCCOA-161, appeal docketed, No. 113A22 (N.C. Apr 14, 2022), the court of appeals considered whether an estate sufficiently established gross negligence by a police officer to overcome governmental and public official immunity. Judge Gore wrote for the majority.

A citizen was struck and killed by a police cruiser while crossing a road in Fayetteville just before midnight on July 24, 2018. Id. at ¶¶ 1–4. The officer driving the police cruiser was responding to a domestic violence incident involving a firearm. Id. at ¶ 2. In June 2019, the citizen's estate filed a complaint against the officer, the police department, and the city alleging negligence, gross negligence, and wrongful death. Id. at ¶ 5. The officer, police department, and city asserted defenses of sovereign, governmental, and public official immunity. Id. The defendants then filed a motion for summary judgment. Id. at ¶ 6.

The trial court denied the motion for summary judgment. Id. at ¶ 7. The defendants appealed.

The court of appeals considered a number of issues on appeal including whether the gross negligence standard was appropriately applied. The court of appeals reversed, holding that the estate failed to present evidence of gross negligence, entitling the officer and city to summary judgment. Id. at ¶ 8.

The estate argued that the officer was grossly negligent in operation of the police cruiser. Id. at 18. However, by statute, police officers are exempted from speed laws when engaged in the apprehension of a "law violator." Id. at 19 (citing N.C. Gen. Stat. § 20-145). The officer here was responding to a domestic violence incident involving a firearm. Id. In such an instance, courts apply the gross negligence standard. Id. at ¶ 20 (citing Parish v. Hill, 350 N.C. 231, 238, 513 S.E.2d 547, 551 reh'g denied, 350 N.C. 600, 537 S.E.2d 215 (1999)). "North Carolina's standard of gross negligence, with regard to police pursuits, is very high and rarely met." Eckard v. Smith, 166 N.C. App. 312, 323 603 S.E.2d 134, 142 (2004), aff'd, 360 N.C. 51, 619 S.E.2d 503 (2005).

To determine whether an officer's action constitutes gross negligence, a court considers (1) the reason for the pursuit, (2) the probability of injury to the public due to the officer's decision to begin and maintain the pursuit, and (3) the officer's conduct during the pursuit. Est. of Graham, 2022-NCCOA-161 ¶ 21 (citing Greene v. City of Greenville, 225 N.C. App. 24, 27, 736 S.E.2d 833, 836, review denied, 367 N.C. 214, 747 S.E.2d 249 (2013)).

Analyzing each of the prongs in turn, the court first reiterated that the officer was responding to a domestic violence incident involving a firearm, and therefore had a "valid and lawful" reason to drive above the speed limit. Id. at ¶ 23. The court noted the officer was driving on a seven-lane highway on a night when the road was clear and was traveling as at a speed of 58 miles-per-hour on a road with a 45 mile-per-hour speed limit, indicating a low probability of injury to the public. Id. at ¶ 24. For the final prong, while noting that the officer did not utilize his lights and sirens and video footage indicated the officer looked at his laptop and touched its touchpad while driving, these actions did not rise to the level

of gross negligence. Id. at ¶ 25. The court found persuasive an analysis of a series of cases under analogous circumstances. Id. at ¶ 25–26.

With all three prongs satisfied, the court of appeals held there was no genuine issue of material fact whether the officer was grossly negligent. Id. at ¶ 28. As the gross negligence issue was dispositive on the matter as a whole, the court of appeals held that the trial court erred in denying summary judgment to the officer, police department, and city. Id. at ¶ 28.

Judge Jackson offered a dissent in part, arguing that the record presented a genuine question whether the officer was grossly negligent. Id. at ¶ 29 (Jackson, J., dissenting). The dissent argued that use of the laptop while driving could be sufficient to establish gross negligence. Id.

The dissent noted that "[a] person's use of a computer or handheld electronic device while operating an automobile presents unique risks to public safety." Id. at ¶ 33. While agreeing that the officer's use of the laptop, coupled with operating the cruiser without lights and sirens, did not amount to gross negligence as a matter of law, "[the record] certainly shows that a jury could conclude that he was." Id. at ¶ 38.

(5) Negligent Infliction of Emotional Distress

In Cauley v. Bean, ___ N.C. App. ___, 871 S.E.2d 870, 2022-NCCOA-202, the court of appeals considered whether a bicyclist, who observed a minivan hit her father who died from injuries sustained in the accident sufficiently pleaded a claim for negligent infliction of emotional distress against the minivan's driver. Finding itself bound by precedent, the court of appeals affirmed the trial court's dismissal of the bicyclist's claims.

A bicyclist, her father, and two friends went cycling on a road near Blowing Rock in October 2019. Id. at ¶ 2. A minivan approached the group from the opposite direction. Id. The minivan's driver was "driving erratically," crossed the center lane and continued across toward the cyclists, before veering back onto the road. Id. The minivan struck the bicyclist's father but did not hit the bicyclist. Id. The bicyclist's father was ejected from his bicycle and landed on the road, leading to his death. Id. The minivan driver fled the scene. Id.

In April 2020, the bicyclist filed a complaint against the driver alleging, among other things, negligent infliction of emotional distress ("NIED"). Id. at ¶ 3. The driver filed a Rule 12(b)(6) motion to dismiss the bicyclist's claims. Id. After a hearing, the trial court dismissed each of the bicyclist's claims. Id. The bicyclist appealed the dismissal of her NIED claim. Id. at ¶ 4.

The court of appeals first recognized that a viable NIED claim must allege (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable the conduct would cause the plaintiff severe emotion distress, and (3) the conduct did in fact cause the plaintiff severe emotional distress. Id. at ¶ 6 (citing Johnson v. Ruark Obstetrics, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990)). As the parties agreed the complaint sufficiently alleged the driver engaged in negligent conduct, the court of appeals focused its analysis on whether it was reasonably foreseeable the negligence would cause severe emotional distress and whether it did in fact cause severe emotional distress. Id. at ¶ 7.

Turning to the issue of reasonable foreseeability, the court of appeals recognized that factors for consideration include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the directly injured party, and whether the plaintiff

personally observed the negligent act. Id. at ¶ 9 (citing Ruark Obstetrics, 327 N.C. at 305, 395 S.E.2d at 98). The list of factors is non-exhaustive and should be determined on a case-by-case basis. Id. (citing Ruark Obstetrics, 327 N.C. at 305, 395 S.E.2d at 98).

The court of appeals found several factors weighed in favor of foreseeability, including that the directly injured party was the bicyclist's father, the bicyclist was in close proximity to the accident, and she personally observed the accident. Id. at ¶¶ 11–12. "Considering the totality of the facts and circumstances alleged, we conclude [the bicyclist's] allegations are sufficient to establish the reasonable foreseeability of her severe emotional distress." Id. at ¶ 12.

The driver argued that the bicyclist failed to allege reasonable foreseeability because the driver did not have actual knowledge of the relationship between the bicyclist and her father. Id. at ¶ 13. The driver relied on a case where the court of appeals held severe emotional distress was not reasonably foreseeable when a driver hit a car driven by the plaintiff's mother while the plaintiff was in another car. Id. at ¶¶ 13–15 (citing Fields v. Diery, 131 N.C. App. 525, 509 S.E.2d 790 (1998)). The court of appeals found this reasoning unpersuasive because, as here, the bicyclist was riding in close proximity to her father, whereas in Fields the plaintiff and her mother were in two different cars. Id. at ¶ 16. The court held that the bicyclist alleged sufficient facts for a jury to conclude her severe emotional distress was reasonably foreseeable. Id.

The court of appeals next turned to the issue of whether the bicyclist sufficiently pleaded the driver caused her severe emotional distress. Id. at ¶ 17. "Severe emotional distress has been defined as 'any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling

emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.'" Id. at ¶ 18 (citing Ruark Obstetrics, 327 N.C. at 304, 395 S.E.2d at 97).

Prior to 2008, North Carolina courts had not required a plaintiff to plead severe emotional distress with detail. Id. at ¶¶ 19–20 (citing McAllister v. Ha, 347 N.C. 638, 496 S.E.2d 577 (1998); Chapman ex rel. Chapman v. Byrd, 124 N.C. App. 13, 475 S.E.2d 736 (1996)). "More recently, however, this Court has required a complaint for NIED to contain some factual allegations to support an allegation of severe emotional distress." Id. at ¶ 21 (citing Holleman v. Aiken, 193 N.C. App. 484, 668 S.E.2d 579 (2008); Horne v. Cumberland Cnty. Hosp. Sys., Inc., 228 N.C. App. 142, 746 S.E.2d 13 (2013)). Finding itself bound by Holleman and Horne, the court found insufficient detail in the bicyclist's complaint on the issue of whether the driver's alleged negligence actually caused severe emotional distress. Id. at ¶ 22.

Accordingly, the court of appeals held that the bicyclist's allegations were sufficient to establish that it was reasonably foreseeable that the minivan driver's negligence would cause severe emotional distress. "However, as [the bicyclist's] complaint is devoid of factual allegations regarding the type, manner, or degree of severe emotional distress she claims to have experienced, [the bicyclist] has not sufficiently pled that Defendant's negligence caused her severe emotional distress." Id. at ¶ 23.

B. Intentional Infliction of Emotional Distress

In companion cases Clark v. Clark, ___ N.C. App. ___, 867 S.E.2d 743, 2021-NCCOA-652, and Clark v. Clark, ___ N.C. App. ___, 867 S.E.2d 704, 2021-NCCOA-653,

the court of appeals considered whether a trial court erred in allowing a wife's intentional infliction of emotional distress ("IIED") claim to proceed against her husband and the husband's paramour. (Note: The opinion regarding the husband's appeal is available at 2021-NCCOA-652. The opinion regarding the paramour's appeal is available at 2021-NCCOA-653. As both appeals arise from the same facts, and both opinions are largely identical, this summary cites to the husband's appeal, 2021-NCCOA-652, unless otherwise noted.)

A couple married in 2010. Clark, 2021-NCCOA-652 at ¶ 2. Despite a rocky start to their relationship, the couple attended marriage retreats and eventually had two children. Id. at ¶¶ 2–3. In 2016, the husband, an Army officer, met another Army officerwho stayed in the same barracks and attended the same training. Id. at ¶ 4. The two began a relationship. Id. at ¶¶ 4–5.

When the husband returned home for a long weekend, the wife found the paramour's phone number in the husband's phone. Id. at ¶ 8. A few months later, the wife discovered text messages between the husband and the paramour, including sexually explicit pictures of the husband. Id. at ¶ 9. The wife threatened to call the paramour, leading to a fight between the couple, and the husband left their marital home in September 2016. Id. at ¶ 10.

Despite the husband's departure, he and the wife maintained an "emotionally and sexually intimate relationship." Id. at ¶ 11. In March 2017, the husband and wife executed a separation agreement including monthly support payments by the husband for their children. Id. However, throughout June and July 2017, the husband and wife continued a sexual relationship "and recorded themselves doing so." Id. at ¶ 12.

Also in July 2017, the husband and the paramour conceived a child together via in vitro fertilization. Id. In August 2017, the husband traveled to Boston for training. Id. When the husband ceased responding to the wife's messages, she "sent him a topless photo," which she claimed she did not send to anyone else. Id. The husband and wife ended their sexual relationship in September 2017. Id. at ¶ 13. A month later, the wife sent "a picture of female genitalia" to the husband in a text message. Id. The same month, she also discovered that the paramour was pregnant with the husband's child. Id.

In January 2018, the wife discovered an online advertisement she believed was about her:

> Liz is super hot! Shows you what plastic surgeons and eating disorders can do for you in 2018. There's a reason she's been divorced twice and can't take care of her kids. She's a plaything, nothing more. Hope you fellas are wearing condoms, she's got herpes.

Id. at ¶ 14. The wife responded to the ad and observed the associated username was linked to the husband's personal email address. Id. at ¶ 15.

In March 2018, the wife began communicating on a social media platform with someone she believed was the husband. Id. ¶ 16. The individual sent the wife the same topless photograph the wife had sent to the husband, claiming the photograph was "all over the place." Id. In May 2018, the wife discovered a social media "weight loss" advertisement featuring a post-pregnancy photograph of her and the same topless photograph. Id. at ¶ 17.

Throughout 2018, the wife's friends and associates contacted her regarding postings on social media platforms and chatrooms soliciting "no strings attached sex." Id. at ¶ 18.

Business records from the social media platform indicated the postings could be traced to an IP address matching a residence shared by the husband and paramour. Id.

When the wife messaged the individual on the platform, the individual replied, "We are going to do continue doing everything in our power to make your life miserable." Id. at ¶ 19.

In August 2018, the wife filed claims against the husband and the paramour for IIED, among other things. Id. at ¶ 20. After a jury trial, the trial court entered judgment against the husband, id. at ¶ 23, and the paramour, Clark, 2021-NCCOA-653 at ¶ 22, on the IIED claim. After the denial of post-trial motions by the husband and paramour, both appealed. Id. at ¶ 23; Clark, 2021-NCCOA-652 at ¶ 23.

On appeal, the husband and paramour argued the claims should not have proceeded because the conduct was "subsumed by other causes of action," and further that there was insufficient evidence to submit the claim to the jury. Id. at ¶ 31. The court of appeals held that the husband and paramour could not argue on appeal that the cause of action was subsumed because they failed to plead an election of remedies defense prior to or during trial, or in post-trial motions. Id. at ¶ 34. (citing N.C. Fed. Sav. & Loan Ass'n v. Ray, 95 N.C. App. 317, 323, 382 S.E.2d 851, 856 (1989) ("Election of remedies is an affirmative defense which must be pleaded by the party relying on it.")).

The next court of appeals considered whether the wife presented sufficient evidence for the IIED claims to be submitted to the jury. Id. at ¶ 37. To state a claim for IIED, a plaintiff must allege (1) extreme and outrageous conduct (2) which is intended to and does

cause (3) severe emotional distress. Id. at ¶ 39 (citing Norton v. Scotland Mem'l Hosp., Inc., 250 N.C. App. 392, 397, 793 S.E.2d 703, 708 (2016)).

The court first considered whether the wife presented evidence of severe emotional distress. Id. at ¶ 40. The court of appeals observed that severe emotional distress means any emotional or mental disorder, including neurosis, psychosis, chronic depression, or other severe and disabling condition. Id. (citing Waddle v. Sparks, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992)). While these conditions may be recognized by a medical professional, expert testimony is not necessary and testimony from plaintiff's "friends, family and pastors can be sufficient to support a claim." Id. (quoting Williams v. HomEq Serv. Corp., 184 N.C. App. 413, 419, 646 S.E.2d 381, 385 (2007)). The court of appeals held that testimony from the wife herself that she "cried hysterically, hyperventilated and sought out a counselor" coupled with corroborating testimony from one of the wife's friends was sufficient to support the severe emotional distress element. Id. at ¶ 41.

Next the court considered causation. Id. at ¶ 42. The husband and paramour argued the wife failed to show a causal link because the wife had testified to certain symptoms of distress before the conduct she alleged supported her IIED claim -- primarily the online activity. Id. at 44. While the court of appeals recognized it was undisputed the wife showed some symptoms of distress before the husband and paramour began their online harassment, the trial court did not solely rely on those prior occurrences or prior symptoms in its findings. Id. at ¶ 45. As the wife offered evidence that at least some of the later-occurring symptoms were linked to later actions by the husband and paramour, the court of appeals held the wife provided "more than a scintilla of evidence" necessary to submit the issue to the jury. Id.

Finally, for the IIED claims, the court of appeals considered whether the husband's and paramour's conduct was outrageous. Id. at ¶ 46. The husband argued that his conduct was a "mere trading of insults" and did not give rise to the wife's IIED claim. However, conduct becomes "extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. at 47 (quoting Chidnese v. Chidnese, 210 N.C. App. 299, 316, 708 S.E.2d 725, 738 (2011)). Viewing the evidence in a light most favorable to the wife, the court of appeals held that the evidence showed that the husband harassed and stalked the wife, humiliated her, and frightened her – rising beyond the "mere insults" to extreme and outrageous behavior. Id. at ¶ 48.

The paramour argued that the wife had failed to establish any extreme and outrageous conduct by the paramour, by failing to show that she had engaged with the wife at all. Clark, 2021-NCCOA-653 at ¶ 46. Again, viewing the evidence in a light most favorable to the wife, the court of appeals noted the paramour began a sexual relationship with the husband with knowledge he was married and conceived a child with the husband, and that the paramour told the wife in at least one email that she was a "bad mother," "uneducated," and a "bad wife." Id. at ¶ 48. Further, the court recognized that the paramour lived with the husband for the period of the online harassment, and therefore had access to the computer used to communicate with the wife and create the salacious advertisements. Id. The court held this evidence, too, was sufficient to submit the issue to the jury.

Finding no error, the court of appeals affirmed the trial court's findings. Id. at ¶ 74.

C. Alienation of Affection

In companion cases Clark v. Clark, ___ N.C. App. ___, 867 S.E.2d 743, 2021-NCCOA-652, and Clark v. Clark, ___ N.C. App. ___, 867 S.E.2d 704, 2021-NCCOA-653, the court of appeals considered whether a trial court lacked subject matter jurisdiction to consider a wife's claim for alienation of affection where the paramour asserted her Fifth Amendment right to avoid testifying regarding whether she and the husband had sexual relations in North Carolina. (Note: The opinion regarding the husband's appeal is available at 2021-NCCOA-652. The opinion regarding the paramour's appeal is available at 2021-NCCOA-653. As both appeals arise from the same facts, and both opinions are largely identical, this summary cites to the husband's appeal, 2021-NCCOA-652, unless otherwise noted.)

A couple married in 2010. Clark, 2021-NCCOA-652 at ¶ 2. Despite a rocky start to their relationship, the couple attended marriage retreats and eventually had two children. Id. at ¶¶ 2–3. In 2016, the husband, an Army officer, attended training in Virginia. Id. at ¶ 4. There he met another Army officer who stayed in the same barracks and attended the same training. Id. The two began a relationship over "homework or papers" and would often be "all alone in each other's rooms." Id. at ¶¶ 4–5.

When the husband returned home for a long weekend, the wife found the paramour's phone number in the husband's phone. Id. at ¶ 8. A few months later, the wife discovered text messages between the husband and the paramour, including sexually explicit pictures of the husband. Id. at ¶ 9. The wife threatened to call the paramour, leading to a fight between the couple, and the husband left their marital home in September 2016. Id. at ¶ 10.

Despite the husband's departure, he and the wife maintained an "emotionally and sexually intimate relationship." Id. at ¶ 11. In March 2017, the husband and wife executed a separation agreement including monthly support payments by the husband for their children. Id. However, throughout June and July 2017, the husband and wife continued a sexual relationship "and recorded themselves doing so." Id. at ¶ 12.

Also in July 2017, the husband and the paramour conceived a child together via in vitro fertilization. Id. In August 2017, the husband traveled to Boston for training. Id. When the husband ceased responding to the wife's messages, she "sent him a topless photo," which she claimed she did not send to anyone else. Id. The husband and wife ended their sexual relationship in September 2017. Id. at ¶ 13. A month later, the wife sent "a picture of female genitalia" to the husband in a text message. Id. The same month, she also discovered that the paramour was pregnant with the husband's child. Id.

In January 2018, the wife discovered an online advertisement she believed was about her:

> Liz is super hot! Shows you what plastic surgeons and eating disorders can do for you in 2018. There's a reason she's been divorced twice and can't take care of her kids. She's a plaything, nothing more. Hope you fellas are wearing condoms, she's got herpes.

Id. at ¶ 14. The wife responded to the ad and observed the associated username was linked to the husband's personal email address. Id. at ¶ 15.

In March 2018, the wife began communicating on a social media platform with someone she believed was the husband. Id. ¶ 16. The individual sent the wife the same topless photograph the wife had sent to the husband, claiming the photograph was "all over

the place." Id. In May 2018, the wife discovered a social media "weight loss" advertisement featuring a post-pregnancy photograph of her and the same topless photograph. Id. at ¶ 17.

Throughout 2018, the wife's friends and associates contacted her regarding postings on social media platforms and chatrooms soliciting "no strings attached sex." Id. at ¶ 18. Business records from the social media platform indicated the postings could be traced to an IP address matching a residence shared by the husband and paramour. Id.

When the wife messaged the individual on the platform, the individual replied, "We are going to do continue doing everything in our power to make your life miserable." Id. at ¶ 19.

In August 2018, the wife filed a claim against the paramour for alienation of affection, among other things. Id. at ¶ 20. After a jury trial, the trial court entered judgment against the paramour, Clark, 2021-NCCOA-653 at ¶ 22, on the IIED claim. After the denial of post-trial motions, the paramour appealed. Id. at ¶ 23.

On appeal, the paramour asserted that the trial court lacked subject matter jurisdiction because alienation of affection is a "transitory tort," and the wife failed to show injury occurred in North Carolina. Id. at ¶ 50. The court of appeals recognized that for a successful alienation of affection claim, a plaintiff must establish that the "alienating conduct occurred within a state that still recognizes alienation of affections as a valid cause of action." Id. at ¶ 52 (quoting Jones v. Skelley, 195 N.C. App. 500, 506, 673 S.E.2d 385, 389-90 (2009)). The court of appeals held the wife provided sufficient evidence the alienation of affection occurred in North Carolina: at the time the husband and paramour met, the wife lived in North Carolina; the wife discovered text messages between the

husband and paramour in North Carolina; and the wife testified the husband had sent the paramour a sexually explicit photograph from North Carolina. Id. at ¶ 54. Further, while the paramour had invoked her fifth amendment privilege when asked whether she and the husband had engaged in sexual activity in North Carolina, the court of appeals recognized that "the finder of fact in a civil case may use a witness's invocation of [her] fifth amendment privilege against self-incrimination to infer that [her] truthful testimony would have been unfavorable to [her]." Id. (quoting In re Trogdon, 330 N.C. 143, 152, 409 S.E.2d 897, 902 (1991)). Accordingly, the court of appeals held the wife provided sufficient basis to establish alienating conduct occurred in North Carolina, providing subject matter jurisdiction for the trial court. Id.

D. Breach of Implied Warranty of Workmanship

In Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison, ___ N.C. App. ___, 869 S.E.2d 34, 2022-NCCOA-27, the court of appeals considered whether expert testimony was needed for a homeowner to prove his claim against a plumbing and HVAC contractor for breach of the implied warranty of workmanship.

In connection with renovations at his home, the homeowner entered into two separate contracts with the contractor, one for plumbing work and one for HVAC work. Id. at ¶¶ 3–4. The homeowner was dissatisfied with the quality of some of the contractor's work. Id. at ¶¶ 13–14. The homeowner made some payments to the contractor, but he did not pay the remaining balance that the contractor claimed it was owed. Id. at ¶ 15. As a result, the contractor sued the homeowner in small claims court. Id. at ¶ 16. After the contractor's small claims case was dismissed, the contractor appealed to the district court, and the homeowner then filed several counterclaims against the contractor. Id. at ¶¶ 16–17.

At trial, the jury found in favor of the homeowner, and the trial court entered judgment in favor of the homeowner. Id. at ¶¶ 19–22. As relevant here, the contractor appealed the trial court's denial of the contractor's motion for a directed verdict on the homeowner's breach of contract claims, which included a claim for breach of the implied warranty of workmanship. Id. at ¶ 2.

The court of appeals concluded that the trial court erred in failing to grant the contractor's motion for a directed verdict on the homeowner's claim for breach of the implied warranty of workmanship.

The court of appeals addressed the homeowner's workmanship claim, which was based on the homeowner's allegation that the contractor's re-piping and insulation work was substandard. Id. at ¶¶ 68–69. "In actions for breach of building or construction contracts, a plaintiff may bring a claim for 'failure to construct in a workmanlike manner.'" Id. at ¶ 73 (citation omitted). This claim arises from "an implied warranty that the contractor or builder will use the customary standard of skill and care based upon the particular industry, location, and timeframe in which the construction occurs." Id. (internal quotation marks and citation omitted). The contractor argued that the homeowner was required, but failed, to present expert testimony to establish the standard of care relevant to his workmanship claim. Id. at ¶ 74. The homeowner countered that the jury could properly assess the quality of the work at issue here without expert testimony. Id.

The court of appeals held "that at least some expert evidence must be presented to sustain a claim such as this." Id. In reaching this conclusion, the court of appeals examined two of its prior decisions on workmanship claims, including one in which the court declined to apply the common knowledge exception. Id. at ¶¶ 75–79. Under this exception, "where

the common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care, expert testimony is not needed." Id. at ¶ 78 (quoting Delta Env't Consultants of N. Carolina, Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 168, 510 S.E.2d 690, 695–96 (1999)). The common knowledge exception, however, is "reserved for cases where the complained-of professional conduct 'is so grossly negligent that a layperson's knowledge and experience make obvious the shortcomings of the professional'—such as a medical malpractice case in which 'an open wound was not cleansed or sterilized' before being placed in a cast." Id. (quoting Delta, 132 N.C. App. at 168, 510 S.E.2d at 696).

In this case—which involved "$16,324 worth of extensive plumbing work" that one employee of the contractor described as "massive" in scope—the court of appeals determined that the common knowledge exception did not apply. Id. at ¶ 82. Therefore, the evidence offered by the homeowner, in the form of his own lay testimony and photographs of the allegedly substandard work, was insufficient to show a breach of the implied warranty of workmanship by the contractor. Id. at ¶ 83. Because the homeowner was required, but failed, to present expert testimony to support his workmanship claim, the trial court erred in not granting the contractor's motion for a directed verdict on this claim. Id.

E. Unfair and Deceptive Trade Practices

In Nobel v. Foxmoor Group, LLC, 380 N.C. 116, 868 S.E.2d 30, 2022-NCSC-100, the supreme court considered whether an investor's claim was within the scope of section 75-1.1 of the North Carolina General Statutes where the investor's claim was based on

money that the investor loaned to a company and the company's failure to repay the loan in accordance with the terms of a promissory note.

The investor loaned money to the company after the company's owners, who were personal friends of the investor, encouraged her to invest in the newly formed company. Id. at ¶¶ 2–3. In exchange for the loan, one of the owners executed a promissory note. Id. at ¶ 5. The investor received an initial payment on the loan, but she did not receive any additional payments after that. Id. at ¶ 6. The company was eventually administratively dissolved by the secretary of state, and the investor sued the owners and the company for an alleged violation of section 75-1.1, which prohibits unfair and deceptive trade practices in or affecting commerce. Id. at ¶¶ 6–7, 10. Following a bench trial, the trial court concluded that the owners and the company had violated section 75-1.1 and awarded treble damages to the investor. Id. at ¶ 7. The owners and the company appealed to the court of appeals, which reversed the trial court's judgment, reasoning "that the conduct at issue related to an investment for the purpose of funding [the company] and therefore was not 'in or affecting commerce.'" Id. at ¶ 8 (citation omitted). The investor appealed the decision of the court of appeals to the supreme court.

The supreme court affirmed the decision of the court of appeals with Justice Berger writing the majority opinion.

To recover under section 75-1.1, a plaintiff must prove, among other elements, that "the action in question was in or affecting commerce." Id. at ¶ 11 (quoting Dalton v. Camp, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001)). As used in the statute, the term "commerce" generally "includes all business activities, however denominated." Id. (quoting N.C. Gen. Stat. § 75-1.1(b)). In a prior case, the supreme court explained that

"business activities," for purposes of section 75-1.1, "connotes the manner in which businesses conduct their regular, day-to-day activities, or affairs, such as the purchase and sale of goods, or whatever other activities the business regularly engages in and for which it is organized." Id. (quoting HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991)). In that case, the supreme court established that "utilization of financial mechanisms for capitalization merely enable an entity to organize or continue ongoing business activities in which it is regularly engaged and cannot give rise to a [section 75-1.1] claim." Id. at ¶ 12 (citing HAJMM, 328 N.C. at 594–95, 403 S.E.2d at 493).

Relying on this precedent, the supreme court determined that the conduct at issue here involved a capital-raising device (the promissory note), which placed the conduct outside the scope of section 75-1.1. Id. at ¶¶ 13–14. The supreme court concluded that the investor's claim also failed because the underlying conduct occurred within a single business. Id. at ¶ 16. As the supreme court explained, section 75-1.1 extends to "(1) interactions between businesses, and (2) interactions between businesses and consumers." Id. at ¶ 15 (quoting White v. Thompson, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010)). Stated differently, the statute is "not focused on the internal conduct of the individuals within a single market participant, that is, within a single business." Id. (quoting White, 364 N.C. at 53, 691 S.E.2d at 680). According to the supreme court, the investor was not a "consumer" of the company, "nor engaged in any commercial transaction with the company," and the "interaction" giving rising to her claim "occurred entirely within a single market participant, i.e., within a single business." Id. at ¶ 16.

For these reasons, the supreme court held that the court of appeals did not err in reversing the trial court's judgment on the investor's section 75-1.1 claim.

Justice Earls wrote a dissenting opinion with Justice Hudson joining this opinion. Justice Earls disagreed with the majority's application of the precedent that the majority relied on in reaching its conclusion that the investor's claim fell outside the scope of section 75-1.1. Id. at ¶¶ 25–29. In her view, when applying this precedent, the supreme court "should do [its] best to respect the General Assembly's decision to enact a broad remedial statute designed to protect the general public." Id. at ¶ 29. According to Justice Earls, the conduct at issue here was "clearly encompassed within the [statute's] plain language." Id.

F. Tortious Interference with Contract

In Button v. Level Four Orthotics & Prosthetics, Inc., ___ N.C. ___, 869 S.E.2d 257, 2022-NCSC-19, the supreme court considered whether the plaintiff's employer was justified in terminating his employment at the suggestion of one of its corporate shareholders.

Plaintiff entered into an agreement to serve as CEO of the defendant employer, a North Carolina corporation with its principal place of business in Winston-Salem, North Carolina. Id. at ¶ 2. This agreement allowed the employer to terminate the CEO's employment with or without cause and defined "cause" to include "any willful misconduct or gross negligence which could reasonably be expected to have a material adverse [e]ffect on the business and affairs of" the employer. Id. at ¶ 5. The CEO had negotiated in his contract that the interest rate on certain debts owed by the employer to one of its corporate shareholders would be lowered to 2.5%. Id.

Once in his position, the CEO sought an additional loan from the shareholder, and the shareholder conditioned the loan on an 8% interest rate, applicable both to the new loan and retroactively to the previous loans. Id. at ¶ 10. The CEO objected that this would violate his employment agreement, but the shareholder nonetheless wired the funds to the employer and presented an associated promissory note at 8% interest. Id. at ¶¶ 10–11. When the CEO refused to sign the note, the shareholder who had loaned the money (represented by one of the individual defendants, who was simultaneously also a director of the employer and a manager at the employer's parent company), see id. at ¶ 3, informed the CEO that he was being terminated for cause. Id. at ¶ 12.

The CEO filed a complaint seeking (in relevant part) relief for tortious interference with his employment contract by the shareholder, two of its individual representatives, and the employer's parent company. Id. at ¶ 13. The trial court dismissed the CEO's tortious interference claims without prejudice, determining that allegations of malice were insufficiently pleaded. Id. at ¶ 14. The CEO and all defendants cross-appealed these rulings directly to the supreme court. Id. The CEO also filed a petition for writ of certiorari in the alternative. Id. at ¶ 1. The supreme court determined that an interlocutory appeal was premature on the tortious interference claims, since they were dismissed without prejudice. Id. at ¶ 17. However, it addressed the CEO's petition for certiorari and denied it. Id. at ¶ 20.

Justice Berger authored the court's opinion. The court analyzed the tortious interference claim, focusing on the fourth of five elements: namely, whether in terminating the CEO's employment the employer acted without justification. Id. at ¶¶ 27–28. The court first explained that when a corporate defendant allegedly interfering with the claim has "a

legitimate business interest of his own in the subject matter," the court applies a presumption that this "non-outsider" defendant acted in the corporation's best interest. Id. at ¶ 29. To overcome this presumption, the CEO would need to show that the non-outsider acted with malice, entailing that the "defendant's actions were not prompted by legitimate business purposes." Id. The court stressed that these allegations must rise above generalized and conclusory assertions of malice but must "allege with specificity how each [defendant] acted in their own personal interest." Id. at ¶¶ 32–34. Holding that the CEO had failed to do so, it affirmed the dismissal of the claims below. Id. at ¶ 34.

Justice Earls (joined by Justices Hudson and Ervin) issued a separate concurrence in part, disagreeing as to the discussion of the CEO's petition for certiorari. Id. at ¶ 50. Justice Earls highlighted that the majority denied certiorari, but that its decision seemed to rule on the merits of the claims nonetheless. Id. at ¶ 51. While Justice Earls acknowledged that the merits of a plaintiff's claim are properly considered at a more basic level in deciding whether or not to grant certiorari, certiorari is intended as a preliminary gate that comes before the full resolution of the case on the merits. Id. at ¶ 54.

Considering only these more basic criteria, Justice Earls would have granted certiorari for reasons of judicial economy. Id. at ¶ 57. Justice Earls stated that she would have affirmed the dismissal of the declaratory judgment claim on the merits but would have allowed the tortious interference claim to proceed. Id. at ¶¶ 58–59. Justice Earls asserted that the need to specifically allege malice conflicted with principles of notice pleading. Id. at ¶ 59. Further, she highlighted several details not mentioned by the majority that provided more detail. Id. at ¶¶ 62–63.

G. Uniform Voidable Transactions Act

In Cherry Community Organization v. Sellars, ___ N.C. ___, 871 S.E.2d 706, 2022-NCSC-62, the supreme court considered whether the buyers of property subject to a lawsuit were good faith purchasers for value under the North Carolina Uniform Voidable Transactions Act where the buyers and the seller were co-principals in a joint real estate development venture, and the seller intended to defraud its creditors by conveying the property to the purchasers.

The seller, a real estate development company, initially purchased the property at below-market rates from a nonprofit dedicated to the preservation and enhancement of a historically black Charlotte neighborhood in exchange for the seller's promise that it would build affordable housing units on the property. Id. at ¶ 2. Several years later, the buyers, two real estate development companies with the same owners, entered into an agreement with the seller to develop the property (along with other properties that the buyers owned) into a mixed-use project. Id. at ¶ 3. Under this agreement, the buyers and seller "were the principals of a general partnership engaged in a joint venture for the development of the mixed-use project, with [the buyers] enjoying an insider status to [to the seller's] dealings with the subject property." Id. The seller failed to build all the agreed-upon affordable housing units, so the nonprofit sued the seller for breach of contract and filed a notice of lis pendens on the property. Id. at ¶¶ 2, 4. While that lawsuit was pending, the seller conveyed the property to the buyers through an insider sale—without the nonprofit's knowledge and despite a warning from the nonprofit to the buyers that the title of the property was at issue due to the nonprofit's lawsuit against the seller. Id. at ¶¶ 5–9.

After learning about the insider sale, the nonprofit sued the buyers under the Uniform Voidable Transactions Act, seeking avoidance of the conveyance of the property and damages for the buyers' alleged violation of the statute. Id. at ¶ 9. At a bench trial, the trial court determined that the seller had engaged in "a calculated scheme . . . to fraudulently liquidate the subject property and to hide the monetary proceeds from legitimate creditors," while also concluding that the buyers "did not engage in fraudulent activities." Id. at ¶ 11. The trial court further concluded that the buyers "had 'established and met [their] burden of proof to show that [they were] good faith purchaser[s] of the Subject Property.'" Id. As a result, the trial court dismissed the nonprofit's lawsuit against the buyers and declared that the notice of lis pendens on the property was ineffective.

The nonprofit appealed the trial court's dismissal of its lawsuit against the buyers to the court of appeals, and the court of appeals unanimously affirmed the trial court's judgment. Id. at ¶ 12. The nonprofit then successfully petitioned the supreme court for discretionary review of the decision of the courts of appeals. Id.

The supreme court reversed the decision of the court of appeals regarding the trial court's dismissal of the nonprofit's lawsuit against the buyers with Justice Morgan writing the majority opinion.

The supreme court first explained that the Uniform Voidable Transactions Act "renders 'voidable as to a creditor' any 'transfer made or obligation incurred' when that transfer—in this case, the conveyance of the subject property—is consummated by a debtor with the 'intent to . . . defraud any creditor of the debtor.'" Id. at ¶ 15 (quoting N.C. Gen. Stat. § 39-23.4(a)). A transfer, however, "is not voidable against a transferee 'that took in good faith and for a reasonably equivalent value given the debtor.'" Id. (quoting N.C. Gen.

Stat. § 39-23.8(a)). As the transferees of the property, the buyers had the burden of proving that they were good faith purchasers for value of the property. Id.

The supreme court held that the buyers had not met their burden because the "facts and circumstances" in this case led "to the imputation of knowledge on the part of [the buyers] that their business partner [the seller] had engaged in fraudulent activity by obfuscating [the nonprofit's] access to the subject property which [the seller] had finagled from the sole ownership of [the nonprofit] years ago." Id. at ¶ 15.

As the supreme court explained, under "the doctrine of imputed knowledge[,] . . . 'a principal is deemed to know facts known to his or her agent if they are within the scope of the agent's duties to the principal, unless the agent has acted adversely to the principal.'" Id. at ¶ 17 (quoting Doctrine of Imputed Knowledge, Black's Law Dictionary (11th ed. 2019)). In addition, North Carolina statutory and common law establish that "[e]very partner is an agent of the partnership for the purpose of its business" and that "[t]he creation of a business partnership 'constitut[es] each member an agent of the others in matters appertaining to the partnership and within the scope of its business.'" Id. (quoting N.C. Gen. Stat. § 59-39(a) and Rothrock v. Naylor, 223 N.C. 782, 786, 28 S.E.2d 572 (1944)).

Here, the buyers and seller were business partners who entered into a joint venture to develop the property for a mixed-use project. Id. at ¶ 18. Therefore, as co-principals in this joint venture, the buyers and seller were agents for one another under North Carolina law. Id. Further, the supreme court determined that the buyers' acquisition of the property from the seller was within the scope of their partnership and that the buyers did not argue or present evidence that there was an adverse interest between them and the seller. Id. As a result, the buyers were "charged with the knowledge of [the seller's] fraudulent

relinquishment of title to the subject property, as [the buyers were] deemed to know the facts which [were] known by [the seller]" surrounding the seller's scheme to prevent the nonprofit from reaching the property. Id.

Furthermore, the supreme court held that the findings by the trial court, along with the supreme court's application of the factors listed in the Uniform Voidable Transactions Act for determining intent, supported the conclusion that the seller had intended to defraud the nonprofit by transferring the property to the buyers. Id. at ¶¶ 22–31.

For these reasons, the supreme court held that the trial court erred in its conclusion that the buyers were good faith purchasers for value of the property under the Uniform Voidable Transactions Act, and the supreme court accordingly reversed the decision of the court of appeals on this issue.

Justice Barringer wrote a dissenting opinion on the good faith purchaser for value issue with Chief Justice Newby joining this opinion. Justice Barringer would have held that the court of appeals correctly determined that the trial court's conclusion that the buyers were good faith purchasers for value was supported by competent evidence. Id. at ¶ 35. According to Justice Barringer, "[w]hether a party has acted in good faith is a question of fact for the trier of fact," and therefore, the trial court's determination on the buyers' good faith purchaser for value defense was a finding of fact, which limited the supreme court's review to analyzing whether this finding was supported by competent evidence. Id. at ¶ 38 (citation omitted).

In Justice Barringer's view, the evidence presented to the trial court was competent to support its finding that the buyers were good faith purchasers for value. Id. at ¶¶ 52–55.

In particular, Justice Barringer emphasized that the buyers were made aware that the notice of lis pendens on the property had been cancelled by the time that the conveyance of the property took place, that the buyers conducted an independent investigation to ensure that the property's title was unencumbered, and that buyers paid more than a reasonably equivalent value for the property. Id. at ¶ 55.

II. PRETRIAL PROCEDURE

A. Jurisdiction

In Cryan v. National Council of Young Men's Christian Associations of the United States of America, 280 N.C. App. 309, 867 S.E.2d 354, 2021-NCCOA-612, appeal docketed, No. 424A21 (N.C. Dec. 14, 2021), the court of appeals considered whether a trial court properly transferred a defendant's motion to dismiss to a three-judge panel tasked with resolving the defendant's constitutional challenge to section 1-17(e) of the North Carolina General Statutes that the General Assembly enacted in 2019 as part of the SAFE Child Act.

Several men alleged that they were sexually assaulted by an employee of a youth organization when the men were minors. Id. at ¶¶ 1, 4. Under the previously applicable statute of limitations, the men's claims were time-barred as of 2015. Id. at ¶ 2. However, section 1-17(e) allows a plaintiff "to file a civil action within two years of the date of a criminal conviction for a related felony sexual offense against a defendant for claims related to sexual abuse suffered while the plaintiff was under 18 years of age." Relying on this statute, the men filed suit against the youth organization in 2020, within two years of the employee's alleged conviction for certain sex offenses. Id. at ¶ 3. The youth organization

filed a Rule 12(b)(6) motion to dismiss, challenging the constitutionality of section 1-17(e). Id. at ¶¶ 3, 5. The men, in turn, filed a motion under section 1-267.1(a1) of the North Carolina General Statutes and Rule 42(b)(4) of the North Carolina Rules of Civil Procedure, requesting that the youth organization's motion to dismiss be transferred from Forsyth County Superior Court (where the suit had been filed) to Wake County Superior Court, where a three-judge panel would determine the constitutionality of section 1-17(e). Id. at ¶¶ 6–7.

A Forsyth County Superior Court judge heard the two motions, deferred ruling on the youth organization's motion to dismiss, and granted the men's motion to transfer. Id. at ¶ 8. The youth organization appealed to the court of appeals. The court of appeals vacated the trial court's order granting the men's motion to transfer with Judge Gore writing the majority opinion.

As a threshold matter, the court of appeals addressed whether it had jurisdiction over the appeal. Id. at ¶¶ 9–10. The men argued that the trial court's order was an interlocutory order that did not affect a substantial right, and thus, the appeal should be dismissed. The youth organization countered that the order changed the venue of the case, which affected a substantial right conferred by statute. The youth organization also petitioned the court of appeals for a writ of certiorari under Rule 21 of the North Carolina Rules of Appellate Procedure.

The court of appeals noted that the right to venue created by statute is, in fact, a substantial right. Id. at ¶ 13. However, as the court of appeals explained, the trial court's order did not grant, deny, change, or otherwise affect venue. Id. at ¶ 13. Instead, the order addressed a subject matter jurisdiction issue—whether a three-judge panel in Wake County

Superior Court had the statutory right to decide the youth organization's constitutional challenge—and subject matter jurisdiction is legally distinct from venue. Id. at ¶¶ 13–14. Moreover, as reflected in the transcript of the hearing on the two motions and on the face of the trial court's order, the trial court only transferred the constitutional challenge to Wake County; Forsyth County remained the venue for the lawsuit. Id. at ¶¶ 15–16. As a result, the court of appeals held that the appeal was interlocutory and not immediately reviewable.

Nevertheless, the court of appeals granted the youth organization's petition for a writ of certiorari because this appeal raised a "significant" and "important" issue, namely, "what the appropriate requirements for a trial court are to transfer a case to be heard by a three-judge panel," and because granting the petition would "promote judicial economy" by giving trial courts "guidance on a novel and complex statutory scheme." Id. at ¶ 18 (citations omitted).

Having resolved the jurisdictional question, the court of appeals analyzed whether the trial court properly transferred the youth organization's motion to dismiss. The court of appeals first clarified that the statutory scheme under section 1-267.1 for transferring a constitutional challenge to a three-judge panel in Wake County Superior Court "only appl[ies] to 'facial challenges to the validity of an act of the General Assembly, not as applied challenges.'" Id. at ¶ 19 (citation omitted). Furthermore, under Rule 42(b)(4) of the North Carolina Rules of Civil Procedure, "the facial challenge must be raised by a claimant in the claimant's complaint or amended complaint or by the defendant in the defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading." Id. at ¶ 19.

Applying these principles to the record before it, the court of appeals determined that the youth organization had not raised a facial challenge to the constitutionality of section 1-17(e). Although both the trial court's order and the men asserted that the youth organization had made a facial challenge, the record reflected that the youth organization had specifically used as applied language in its motion to dismiss and that it had argued at the hearing on the motion that it was only raising an as applied challenge. Id. at ¶¶ 20–23. Moreover, the nature of the youth organization's challenge, i.e., whether section 1-17(e) can properly be applied to claims that were already time-barred when the statute was enacted, also demonstrated that the organization was only asserting an as applied challenge. Id. at ¶ 22. Accordingly, because no facial challenge was made in this case, the trial court improperly transferred the youth organization's motion to dismiss to a three-judge panel in Wake County Superior Court.

For these reasons, the court of appeals vacated the trial court's order and remanded for further proceedings.

Judge Carpenter, writing in dissent, would have denied the youth organization's petition for a writ of certiorari. Id. at ¶ 32. In Judge Carpenter's view, the issue of whether the youth organization had raised an as applied challenge or a facial challenge should have been decided by the trial court or the three-judge panel under the statutory scheme created by the General Assembly. Id. at ¶ 28. Judge Carpenter also wrote that this issue was not "so pressing that the denial of [the youth organization's] petition would negatively affect the 'efficient administration of justice' or work against our judicial economy." Id. at ¶ 27. Finally, Judge Carpenter expressed concern that by granting the youth organization's writ of certiorari petition, the majority had created a precedent providing that the court of appeals

would now be freely granting certiorari to review challenges to trial court orders transferring constitutional challenges to three-judge panels. Id. at ¶ 31.

(1) Personal Jurisdiction

In Button v. Level Four Orthotics & Prosthetics, Inc., ___ N.C. ___, 869 S.E.2d 257, 2022-NCSC-19, the supreme court considered whether two of the defendants— the employer's Florida-based parent company and an agent of one of the employer's Florida-based corporate shareholders—had established minimum contacts with North Carolina to establish personal jurisdiction.

Plaintiff entered into an agreement to serve as CEO of the defendant employer, a North Carolina corporation with its principal place of business in Winston-Salem, North Carolina. Id. at ¶ 2. This agreement allowed the employer to terminate the CEO's employment with or without cause and defined "cause" to include "any willful misconduct or gross negligence which could reasonably be expected to have a material adverse [e]ffect on the business and affairs of" the employer. Id. at ¶ 5.

After a dispute arose regarding a promissory note, the shareholder who had loaned the money (represented by one of the individual defendants, who was simultaneously also a director of the employer and a manager at the employer's parent company), see id. at ¶ 3, informed the CEO that he was being terminated for cause. Id. at ¶ 12.

The CEO filed a complaint seeking (in relevant part) relief for tortious interference with his employment contract by the shareholder, two of its individual representatives, and the employer's parent company. Id. at ¶ 13. The parent company and one of the individual representatives of the shareholder moved to dismiss all claims for lack of personal

jurisdiction. Id. The trial court denied the motions to dismiss for lack of personal jurisdiction. Id. at ¶ 14.

On appeal, the supreme court set forth the well-established two-part test that requires jurisdiction to be warranted both by North Carolina's long-arm statute and under federal due process. Id at ¶ 37. The latter required a showing that the defendant had "purposefully avail[ed] itself of the privilege of conducting business in North Carolina." Id. at ¶ 38. The court held that in this case, both of the defendants who had contested personal jurisdiction were "engaged in substantial activity within North Carolina" by virtue of their control of the employer (a North Carolina entity), and thus jurisdiction was proper under section 1-75.4(1)(d) of the North Carolina General Statutes. Id. at ¶¶ 40–42. It further held that, regarding the employer's parent company, the above contacts, as well as the choice of North Carolina law under the choice of law provision in the relevant agreements and the requirement for the North Carolina employer to hold specific insurance, were sufficient to meet the requirements of due process. Id. at ¶ 46. Regarding the individual defendant, the court acknowledged that it could not simply rely on his position as a corporate officer. Id. at ¶ 47 (quoting Saft Am., Inc. v. Plainview Batteries, Inc., 189 N.C. App. 579, 595, 659 S.E.2d 39, 49 (2008) (Arrowood, J., dissenting), reversed for reasons stated in dissent, 363 N.C. 5, 673 S.E.2d 864 (2009) (per curiam)). However, the supreme court agreed with the trial court that the defendant's contacts with the state such as negotiating the terms of the CEO's employment with the North Carolina employer, negotiating the interest-rate provision at issue in the employment contract, discussing the performance of the employer company with the CEO by phone and email several times, increasing the interest rate of the loan to the employer, and terminating the CEO through a communication into North

Carolina, sufficed to show minimum contacts with the forum for purposes of due process. Id.

In Cohen v. Continental Motors, Inc., 279 N.C. App. 123, 864 S.E.2d 816, 2021-NCCOA-449, rev. denied, 868 S.E.2d 859 (N.C. March 9, 2022), the court of appeals considered whether a defendant waives the defense of lack of personal jurisdiction by participating in discovery and litigation for three years after raising the defense in its answer, and whether a forum state may exercise specific personal jurisdiction over a defendant that has contacts with the state that are indirectly related to the claims.

Two decedents died when their airplane crash landed after a mid-flight malfunction. Id. at ¶ 2. The decedents' estates sued the manufacturer of the airplane engine. Id. at ¶ 11.

The manufacturer, a Delaware corporation with its principal place of business in Alabama, designed and manufactured the engine in Alabama and then sold and shipped the engine to a company in Oregon. Id. at ¶¶ 3,7. While the manufacturer sold its products to distributors rather than to the general public, it marketed products to the general public and sold products in every state. Id. at ¶¶ 3, 4. A North Carolina distributor made nearly 3,000 component part sales with a value of nearly $4,000,000 in an approximately three-year period preceding the decedents airplane crash. Id. at ¶ 4. During the same time period, the manufacturer shipped twelve products directly to a distributor's customer in North Carolina. Id. at ¶ 5. In addition, the manufacturer's subscription-based online library of instructions and technical documents relating to its products had fourteen North Carolina subscribers. Id. at ¶ 6.

The manufacturer answered the complaint and asserted the affirmative defense of lack of personal jurisdiction. Id. at ¶ 12. Over the next three years, the manufacturer participated in discovery before filing a motion to dismiss for lack of personal jurisdiction. Id. The trial court held the manufacturer did not waive its personal jurisdiction defense because it was raised in the answer and the manufacturer had participated in limited discovery without requesting relief. Id. at ¶ 14. The trial court also concluded that the manufacturer's contacts with North Carolina were insufficient to confer specific personal jurisdiction. Id. at ¶ 15.

On appeal, the court of appeals affirmed the finding that there was no waiver of the personal jurisdiction defense and reversed the trial court's conclusion that it lacked personal jurisdiction over the manufacturer.

First, the court of appeals addressed whether the manufacturer waived its personal jurisdiction defense by participating in the litigation for three years. Id. at ¶ 22. The court explained that, because the defense was raised in the manufacturer's answer in accordance with Rule 12(b) of the North Carolina Rules of Civil Procedure, Rule 12(h) provides that the defense was not waived. Thus, the trial court properly considered the motion to dismiss.

Second, the court of appeals addressed whether the manufacturer was subject to specific personal jurisdiction. It noted that after the trial court ruled, the Supreme Court of the United States issued Ford Motor Co. v. Montana Eighth Judicial District Court, ___ U.S.___, 141 S. Ct. 1017 (2021), which clarified that a constitutional exercise of specific jurisdiction does not require the defendant's contacts with the forum state to have caused the plaintiff's claims. See Cohen, 2021-NCCOA-449 at ¶ 28. The court of appeals held that the manufacturer here was analogous to the defendant in Ford, who the Supreme Court

held was subject to personal jurisdiction, because the claims arose from the manufacturer's contacts with North Carolina, directly or indirectly, as the manufacturer served the North Carolina market. Id. at ¶¶ 29-31. Among other things, the manufacturer marketed products to the public at large including in North Carolina, sold parts in North Carolina, and provided reference materials to North Carolina. Id. at ¶ 29. Under Ford, the court of appeals held these contacts sufficient to confer specific jurisdiction.

For these reasons, the court of appeals affirmed the trial court's order to the extent it found the manufacturer did not waive its personal jurisdiction defense and reversed the order to the extent it found that personal jurisdiction did not exist.

Judge Tyson concurred with the analysis and result regarding waiver. Id. at ¶ 33 (Tyson, J. concurring). He also concurred in the result that the manufacturer was subject to specific personal jurisdiction. Id. He wrote separately to delineate the manufacturer's contacts with North Carolina, and to explain that those particular contacts—the sales into and revenue derived from the forum, and the subscription materials and North Carolina subscribers—conferred specific personal jurisdiction under North Carolina rather than its nationwide contacts or presence. Id. at ¶ 56.

In Ponder v. Been, ___ N.C. ___, 869 S.E.2d 193, 2022-NCSC-24, the supreme court considered whether a North Carolina court could exercise personal jurisdiction in an alienation of affection action over an out-of-state paramour based on his exchange of text messages with a married woman living in North Carolina.

The supreme court held that personal jurisdiction was established "[f]or the reasons stated in the dissenting opinion" in the court of appeals. Id. When a North Carolina couple

legally separated, the husband accused the wife of having an affair with a Florida resident. Ponder v. Been, 275 N.C. App. 626, 627, 853 S.E.2d 302, 304. He alleged that the wife's paramour had sent her frequent communications by email, text message, and telephone, as well as airline tickets so that she could travel to Florida. Id. Following the separation, the wife moved with her children to Florida and began living with the paramour. Id. The husband filed an action for alienation of affection against the paramour in a North Carolina court. Id.

The paramour moved to dismiss the action for lack of personal jurisdiction. Id. He argued that North Carolina's long-arm statute and the Due Process Clause of the Fourteenth Amendment did not permit North Carolina to exercise personal jurisdiction over him. Id. In opposition to the motion, the husband alleged that the wife and the paramour had communicated by telephone "476 times" during a six-month period. Id. The trial court held that these communications were "significant." Id. at 634, 853 S.E.2d at 308. Based on these communications, the trial court held that personal jurisdiction existed because the paramour had "availed himself to the laws of the State of North Carolina by actively communicating electronically with [the wife] on or before the date she and [her husband] separated[.]" Id. Thus, the court denied the motion to dismiss. Id.

The court of appeals reversed, with the court of appeals majority observing that the long-arm statute provides for personal jurisdiction if a "solicitation" is carried on within the state by the defendant. Id. at 629, 853 S.E.2d at 305 (citing N.C. Gen. Stat. § 1-75.4(4)(a)). However, the court ruled that no solicitation had occurred. See id. at 634, 853 S.E.2d at 308. Thus, the court of appeals held that the trial court's findings failed to meet the threshold for the exercise of personal jurisdiction over the defendant. Id.

The supreme court reversed the court of appeals and adopted the dissent's approach. Ponder, 2022-NCSC-24. Under this approach, the paramour's electronic communications with the wife were sufficient to establish personal jurisdiction. Ponder, 275 N.C. App. at 636, 853 S.E.2d at 309 (Stroud, J., dissenting). The dissent, as adopted by the supreme court, found that, despite the paramour's argument that he did not initiate contact with the wife, the paramour's actions sufficiently established a "solicitation" of the wife, which would allow for an exercise of personal jurisdiction under the long-arm statute. Id. at 643–44, 853 S.E.2d at 313-14. The dissent observed that the plain language of the long-arm statute does not require a defendant to initiate contact in order to conclude that a solicitation occurred. Id. at 644–45, 853 S.E.2d at 315.

The dissent's approach, adopted by the supreme court, also observed that in a previous supreme court decision, personal jurisdiction existed over a defendant whose only contacts with North Carolina were telephone calls and emails to the plaintiff's wife. Id. at 641, 853 S.E.2d at 312 (citing Brown v. Ellis, 363 N.C. 360, 678 S.E.2d 222 (2009)). The dissent stated that, here, the evidence showed an even greater connection between the paramour and North Carolina than in Brown: The wife was undisputedly in North Carolina when she received the text messages, unlike the wife in Brown. Id. at 642–43, 853 S.E.2d at 313. Moreover, the paramour had purchased and was paying the bill for a cell phone with a North Carolina zip code for the wife. Id.

The dissent further stated that the husband was not required to prove the precise content of the communications between the paramour and the wife to establish personal jurisdiction. Id. at 645–46, 853 S.E.2d at 315. The dissent also observed that the paramour had sent plane tickets to the wife and her children for them to visit him in Florida, and that

the paramour had admitted to loaning the wife $85,000. Id. at 647–48, 853 S.E.2d at 315-16. The dissent's approach, as adopted by the supreme court, held that the numerous communications and other evidence of contacts sufficed to meet the requirements of both the long-arm statute and the Due Process Clause. Id. at 648, 853 S.E.2d at 316.

In Miller v. LG Chem, Ltd., ___ N.C. App. ___, 868 S.E.2d 896, 2022-NCCOA-55, appeal docketed, No. 69A22 (Mar 28, 2022), the court of appeals considered whether a North Carolina trial court properly dismissed an international manufacturing company and its United States subsidiary for lack of personal jurisdiction without compelling further discovery requests. Judge Tyson authored the majority's opinion.

An international manufacturing company headquartered in South Korea produced and manufactured lithium-ion batteries. Id. at ¶ 2. The international manufacturing company alleged it had no meaningful contacts in or connections with North Carolina. Id. The international manufacturing company also held a Delaware corporation as its United States subsidiary. Id. at ¶ 3. While the United States subsidiary did conduct sales and distribution in North Carolina, those activities were limited to petrochemical products. Id.

In 2016, the international manufacturing company became aware that lithium-ion cells it manufactured were being used as "unauthorized standalone rechargeable batteries" in e-cigarette devices. Id. at ¶ 4. The company also knew that at least one battery of this type had caused a fire inside an e-cigarette user's bag. Id. In response, the international manufacturing company added warning labels to the batteries, added a warning to its website against unauthorized use of the batteries, and took steps to limit sell and distribution of the batteries for e-cigarette devices. Id. at ¶ 5.

A customer bought two of the batteries from stores in North Carolina in late 2016 or 2017. Id. at ¶ 6. One of the batteries exploded in the customer's pocket in 2018, causing "severe burns along his left leg." Id.

The customer filed suit in 2019 against the international manufacturing company, its United States subsidiary, and the North Carolina stores where he purchased the batteries, alleging various theories of products liability, negligence, and breach of implied warranties. Id. at ¶ 7. In his complaint, the customer alleged that personal jurisdiction was proper in North Carolina as to the international manufacturing company and its subsidiary because the company caused the batteries to be distributed in the state, the subsidiary did substantial business in North Carolina, and the manufacturing company placed the batteries in the stream of commerce with "knowledge, understanding, and/or expectation that they will be purchased by consumers" in the state. Id.

The international manufacturing company and the subsidiary moved to dismiss for lack of personal jurisdiction. Id. at ¶ 8. The customer served interrogatories and requests for production, but the manufacturing company and subsidiary only provided limited responses. Id. The customer then made a motion to compel. Id. at ¶ 9.

Prior to a hearing on the motion to compel and motion to dismiss, the international manufacturing company and subsidiary filed affidavits attesting the batteries were "never designed, manufactured, distributed, advertised or sold" for use by consumers in e-cigarette devices, and that no distributor or retailer had ever been authorized to sell for that use. Id. at ¶ 10. The customer filed affidavits attesting to the widespread availability of the batteries in North Carolina, noting that the subsidiary had authorized shipment of the batteries to the state and that online marketing materials were available in the state. The affidavits also

referred to a press release from an unrelated North Carolina company announcing a deal related to the batteries, and to decisions from other courts rejecting the company's and subsidiary's arguments against personal jurisdiction in related contexts. Id. at ¶ 11.

The trial court granted the motion to dismiss for the international manufacturing company and subsidiary. Id. at ¶ 13. The trial court's order listed in its findings of facts that the company never designed, manufactured, distributed, advertised, or sold the batteries for use by consumers in e-cigarette devices. Id. at ¶ 13. The customer appealed, asserting the trial court abused its discretion in dismissing the case for lack of personal jurisdiction without compelling further response to the discovery requests. Id. at ¶ 15.

The court of appeals began its consideration by discussing the recent decision of the Supreme Court of the United States in Ford on the issue of personal jurisdiction. Id. at ¶ 16. "Plaintiff's claims against a non-resident defendant 'must arise out of or relate to the defendant's contacts with the forum.'" Id. (quoting Ford Motor Co. v. Mont. 8th Jud. Dist. Ct., ___ U.S. ___, ___, 209 L. Ed. 2d 225, 234 (2021)). "Under this 'arise out of or relate to' standard, 'some relationships will support jurisdiction without a causal showing,' but that does not mean anything goes.'" Id. at ¶ 17 (quoting Ford, 209 L. Ed. 2d at 236). Instead, personal jurisdictional analysis in a products liability action must be limited to the "precise product at issue." Id. at ¶ 18 (citing Ford, 209 L. Ed. 2d at 238). This serves the purpose of protecting product defendants in foreign forums. Id. at ¶ 17 (citing Ford, 209 L. Ed. 2d at 236).

The court of appeals held that the customer's arguments for jurisdiction "show the anything goes danger Justices Kagan, Alito, and Gorsuch warned of in Ford: no real limits on unlimited liability in a foreign jurisdiction over a non-resident defendant with no contacts

thereto." Id. at ¶ 19. The "mere fact" that a defendant was connected to the manufacture or distribution of a product available in the state is not sufficient to establish that it purposefully availed itself of North Carolina jurisdiction. Id. (citing Cambridge Homes of N.C., Ltd. v. Hyundai Const., Inc., 194 N.C. App. 407, 416, 670 S.E. 2d 290, 297 (2008)). Instead of a causal connection between the international manufacturing company's activities in North Carolina and the customer's claims, the customer had merely established that the company had injected products into the stream of commerce. Id.

Absent such a causal connection, a plaintiff must establish that the defendant "deliberately," "systematically," and "extensively" serves a market in the forum state "for the very [product] that the plaintiffs allege malfunctioned." Id. at ¶ 21 (quoting Ford, 209 L. Ed. 2d at 237–38).

On this issue, the court of appeals found its own recent opinion instructive. Id. (recognizing Cohen v. Cont'l Motors, Inc., ___ N.C. App. ___, 2021-NCCOA-449). In Cohen, the court of appeals found personal jurisdiction was proper over a Delaware aircraft parts manufacturer that routinely engaged in sales in North Carolina, offered a paid subscription-based online service for North Carolina customers, and maintained close relationships with maintenance subscribers in the state. Id. at ¶ 22 (citing Cohen, 864 S.E. 2d at 819–820). Conversely, the international manufacturing company "ha[d] no contacts whatsoever with or within North Carolina" other than the batteries it manufactured being available in the state "solely through the actions of unrelated third-parties of its products for uses the [manufacturing company] never intended." Id. at ¶ 25.

The court of appeals also found Ford instructive in considering whether personal jurisdiction was proper. In Ford, the Supreme Court "emphasized that Ford 'advertised,

sold, and serviced those two car models [the Ford Explorer and Ford Crown Victoria]'" in the forum states for many years. Id. at ¶ 34 (quoting Ford, 209 L. Ed. 2d at 238). The court of appeals observed that the lithium-ion batteries at issue in the instant case were different than the Ford vehicles because the batteries were never marketed, manufactured, or sold as consumer products by the manufacturing company or subsidiary in North Carolina or elsewhere. Id. at ¶ 35.

The court of appeals held that the trial court properly dismissed the action for lack of personal jurisdiction and did not err in not compelling further discovery on jurisdiction-related issues. "Plaintiff's 'injecting its products into the steam of commerce' theory of jurisdiction over Defendants violates due process, is contrary to established precedents, and is invalid." Id. at ¶ 39.

In a dissenting opinion, Judge Inman argued that the customer's complaint contained allegations sufficient to establish minimum contacts with North Carolina for specific personal jurisdiction. Id. at ¶ 41 (Inman, J., dissenting). Rather than affirm, Judge Inman would have remanded the case to the trial court to reconsider in light of the Ford opinion, which was issued after the trial court's findings, whether the facts presented for its jurisdictional analysis were sufficient. Id. at ¶ 78.

The dissent also found Ford instructive, as well as the recent decision of the supreme court in Mucha v. Wagner. Id. at ¶45 (recognizing Mucha v. Wagner, 2021-NCSC-82). The dissent observed that under Ford specific personal jurisdiction analysis still begins with whether the defendants "purposefully availed themselves of North Carolina's laws" and whether the "claims arise out of relate to that purposeful availment." Id. at ¶ 60.

For the "purposeful availment" prong, the dissent observed that the issue should not be whether the international manufacturing company "intended" for the batteries to be used in e-cigarette devices, but whether it knowingly caused batteries to be sold and distributed in the state. Id. at ¶ 63. The fact that the customer "is not in the North Carolina market intended by the [company] does not negate the allegations they serve a market for batteries here." Id. at ¶ 65. According to the dissent, knowingly serving a market in a forum state with a particular product is purposeful availment of that jurisdiction's laws. Id. at ¶ 65 (citing Ford, 209 L. Ed. 2d at 236).

For the "arising out of or relating to" prong, the dissent argued that contrary to the majority's opinion, Ford clarified causation was not a required element. Id. at ¶ 68. The dissent observed that the company and subsidiary served a market for lithium-ion batteries in North Carolina, including the sale of the batteries at issue; the customer bought one of those batteries in the state; and the customer was injured by the battery Id. at ¶ 70. According to the dissent, this factual chain was sufficient to establish that the claim is "related to" activity in the state. Id. The dissent recognized the fact that the batteries were not sold for consumer use was relevant to the case, "[b]ut any alleged alteration or misuse of [a battery] is a defense on the merits . . . not a dispositive factor in the specific jurisdiction analysis." Id. at ¶ 71.

As the trial court granted the motion to dismiss based on findings of facts before the Ford opinion was issued, the dissent would have remanded for the trial court to determine if it had sufficient factual basis to grant the motion in light of Ford or if more discovery may be required. Id. at ¶ 77.

In Dow-Rein v. Sarle, ___ N.C. App. ___, 869 S.E.2d 359, 2022-NCCOA-92, the court of appeals considered whether a horse seller in Florida and his corporate entity purposefully availed themselves of the privilege of conducting activities in North Carolina sufficient to establish personal jurisdiction.

A buyer purchased a horse from a seller and his corporate entity in Florida. Id. at ¶ 7. The seller signed a bill of sale in Florida and sent it to the buyer in North Carolina. Id. The buyer wired the purchase price to Florida. Id. The buyer took possession of the horse in Florida and arranged shipment to North Carolina herself. Id. Shortly after arriving in North Carolina, "the horse was diagnosed with chronic lameness that made him unsuitable for [the buyer's] intended use." Id. at ¶ 9.

The seller arranged for a second horse to be shown to the buyer in Maryland but had no further involvement in that sale. Id. That horse too was determined to be unsuitable for the buyer's use due to behavioral issues. Id. The buyer brought suit against several defendants including the seller, alleging on the seller's part that he knew of the issues with the two horses and concealed them to fetch higher prices. Id. at ¶ 10. The seller and his corporate entity moved to dismiss for lack of personal jurisdiction. Id. at ¶ 11. The trial court denied the motion, and after the seller succeeded on appeal, the matter was remanded for additional findings regarding personal jurisdiction, and the trial court again denied the seller's motion to dismiss for personal jurisdiction. Id. at ¶¶ 12–14.

On appeal for the second time, applying the "purposeful availment" standard applicable to specific personal jurisdiction cases as in Mucha v. Wagner, 378 N.C. 167, 2021-NCSC-82 ¶¶ 10–11, 861 S.E.2d 501, the court noted that a defendant "must expressly aim his or her conduct at th[e] state" or "must have targeted the forum state specifically. Id.

at ¶ 17 (citing Mucha, 2021-NCSC-82 ¶¶ 16, 20). The court contrasted two previous cases involving out-of-state sales of horses: in the first, the seller targeted North Carolina with advertisements, shipped the horse to North Carolina, and signed a contract mandating that the horse be examined by a North Carolina veterinarian prior to the sale being final. Id. at ¶ 18 (citing Watson v. Graf Bae Farm, Inc., 99 N.C. App. 210, 213, 392 S.E.2d 651, 653 (1990)). In that case, the seller had purposefully availed himself of North Carolina as a forum. Id. In the second, the North Carolina buyers made initial contact with a seller in Florida, and all key aspects of the sale took place in Florida. Id. at ¶ 19 (citing Hiwassee Stables, Inc., v. Cunningham, 135 N.C. App. 24, 29, 519 S.E.2d 317, 321 (1999)). In that case, the seller had not purposefully availed itself of the forum. Id.

The court also distinguished the facts of the instant case from those in Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC, 373 N.C. 297, 306, 838 S.E.2d 158, 164 (2020), in which an out-of-state entity established an "ongoing business relationship" with an in-state plaintiff and thus purposefully availed itself of the forum. Dow-Rein, 2022-NCCOA-92, at ¶ 21 (citing Beem, 373 N.C. at 306, 838 S.E.2d at 164).

Here, that the buyer initiated the relationship, that the seller did not travel to North Carolina, and that the horse was delivered to the buyer in Florida weighed against finding such a relationship. Id. at ¶ 22. Other business between the buyer and seller for other unrelated matters, which the trial court stated established such a relationship, should not have impacted the analysis. Id. at ¶ 23.

The court of appeals reversed the trial court's denial of the seller's motion to dismiss for lack of personal jurisdiction and remanded for an entry of dismissal.

(2) In Rem Jurisdiction

In Carmichael v. Cordell, ___ N.C. App. ___, 869 S.E.2d 350, 2022-NCCOA-26, the court of appeals considered whether a North Carolina court had in rem jurisdiction over accounts and funds a California decedent purportedly transferred to her North Carolina son.

A couple married in California in 1961. Id. at ¶ 2. The husband was born in California and lived there his entire life. Id. The couple lived in California throughout their marriage and had two daughters there. Id. The wife also had a son from a previous relationship. Id. The son was a resident of North Carolina. Id. The husband never traveled to, conducted business in, or had any others ties to North Carolina. Id.

The wife died in January 2020 in California. Id. Throughout their 58 years of marriage, the couple had acquired assets in California, which, according to the husband, would be classified as community property by that state. Id. After the wife died, the husband learned that the wife had set up separate accounts for her son, purportedly leaving the son as the sole beneficiary and changing the associated address to the son's North Carolina address. Id. at 3.

The son claimed ownership of three accounts, "which named him as the sole beneficiary for twenty years." Id. at 4. In April 2020, the husband threatened and soon thereafter filed suit against the son in California. Id. In his first amended complaint, filed in July 2020, the husband sought declaratory relief and made claims against the son related to elder abuse and breach of fiduciary duty. Id. at 5. Less than a week later, the son filed suit in North Carolina seeking declaratory relief regarding disposition of the accounts. Id. at 6.

The husband filed a motion to dismiss the son's North Carolina suit for lack of personal jurisdiction, which the trial court granted. Id. at ¶ 7. The son appealed. Id.

The court of appeals considered whether the trial court erred by failing to find North Carolina possessed jurisdiction over the husband or the property and proceeds at issue. Id. at ¶ 10.

The court of appeals began its personal jurisdiction analysis by recognizing the plaintiff carries the burden of establishing a prima facie statutory basis for jurisdiction upon challenge from the defendant. Id. at ¶ 11 (citing Williams v. Inst. for Comput. Stud., 85 N.C. App. 421, 424, 355 S.E.2d 177, 179 (1987)). This is a two-step process, with consideration first for North Carolina's long-arm statute and then to the Due Process Clause of the federal constitution's Fourteenth Amendment. Id. Even if jurisdiction would be proper under the long-arm statute, the Due Process Clause limits a state's power to assert jurisdiction over a non-resident defendant. Id. at ¶ 12 (citing Beem USA Ltd. v. Grax Consulting, LLC, 373 N.C. 297, 302, 838 S.E.2d 161162 (2020)).

The court of appeals first considered whether a North Carolina court had in personam jurisdiction over the husband. Id. at ¶ 13. For this analysis, the court recognized the husband was a resident of California and considered the extent the husband purposefully availed himself of the privilege of conducting activities in the North Carolina, whether the son's claims arose out of the husband's actions directed at the state, and "whether the exercise of personal jurisdiction would be constitutionally reasonable". Id.

The court of appeals held in personam jurisdiction would not be proper as the husband had not purposefully availed himself of activities in North Carolina. Id. at ¶ 15.

The court recognized the husband had never been to or conducted business in North Carolina, rendering in personam jurisdiction "unreasonable" because the husband had no contacts with the state, except for his relationship with the son. Id.

Next, the court considered the sufficiency of in rem or quasi in rem jurisdiction based on the location of the property. Id. at ¶ 16. Like in personam jurisdiction, in rem jurisdiction "should be evaluated in accordance with the minimum contacts standard," requiring the property to have minimum contacts with the state. Id. (citing Ellison v. Ellison, 242 N.C. App. 386, 390, 776 S.E.2d 522, 525526 (2015)).

By statute, in rem jurisdiction is proper "[w]hen the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein." N.C. Gen. Stat. § 1-75.8(1). The court of appeals noted it had previously held in rem jurisdiction as properly established when a decedent's property was located in North Carolina, and the action sought to exclude a defendant from interest in the property. Carmichael, 2022-NCCOA-26, at ¶ 17 (citing Lessard v. Lessard, 68 N.C. App. 760, 762, 316 S.E.2d 96, 97 (1984)). The court also found Ellison analogous, which had held that "[w]hen the subject matter of the controversy is property located in North Carolina, the constitutional requisites for jurisdiction will generally be met." Id. at ¶ 18 (citing Ellison, 242 N.C. App. at 391, 776 S.E.2d at 526).

"Here, [the husband] initiated the controversy by threatening to sue [the son] claiming an interest in the accounts in North Carolina." Id. at ¶ 19. The court of appeals held that through the lens of the son's interest, the father's actions, and the property's location, in rem jurisdiction was sufficiently and reasonably established in North Carolina because the father's complaint in California sought to exclude the son from property in

North Carolina. Id. The court reasoned the husband "essentially reached into North Carolina" in asserting claim to the wife's accounts and proceeds, "which were being held in this state by a citizen of this state." Id.

The court of appeals held that while the trial court properly declined to find in personam jurisdiction, it erred in granting the motion to dismiss because in rem jurisdiction was sufficiently established. Id. at ¶ 24. "[The son's] interest in the bank accounts and funds located in North Carolina permits the courts of this state to exercise in rem jurisdiction over his declaratory judgment action to address his claims." Id.

B. Standing

In The Society for the Historical Preservation of the Twentysixth North Carolina Troops, Inc. v. City of Asheville, ___ N.C. App. ___, 872 S.E.2d 134, 2022-NCCOA-218, temporary stay allowed, 871 S.E.2d 103 (N.C. Apr. 22, 2022), the court of appeals considered whether a historical interest group had standing to sue a city and county over removal of a monument.

A historical interest group filed suit against the city of Asheville and Buncombe County over a plan to remove and deconstruct the Vance Monument in Asheville. Id. at ¶ 2. The group alleged that it undertook a project to restore and preserve the monument in 2015 pursuant to a contract with the city. Id. The group claimed it raised nearly $140,000 to pay for the restoration of the monument. Id. The group sought a temporary restraining order, injunction, and declaratory judgment to prevent removal of the monument. Id. at ¶ 4.

The group included a "Donation Agreement" with the city as an exhibit to its complaint. Id. at ¶ 5. The agreement specified that the city agreed to accept the restoration work subject to certain terms and conditions, estimated the value of the work at $115,000, and reserved the right of the city to reject any work or materials that failed to meet site specifications. Id.

In January 2021, the group filed a petition to preserve the monument with the North Carolina Historical Commission. Id. at ¶ 6. The group filed suit in March 2021, and the city immediately filed a motion to dismiss. Id.

The trial court granted the motion to dismiss. Id. at ¶ 9. The trial court reasoned that any agreement between the parties had been fulfilled, and that further the group's claims were not sufficiently "apposite to those" of United Daughters of the Confederacy v. City of Winston-Salem, 275 N.C. App. 402, 853 S.E.2d 216 (2020), which was then pending review by the supreme court. Soc'y for Hist. Pres., 2022-NCCOA-218, at ¶¶ 7–9. The group appealed. Id. at ¶ 11.

The court of appeals considered whether the trial court erred in dismissing the group's complaint for lack of standing and failure to state a claim, and further whether United Daughters was appropriately applied. Id. at ¶ 11.

The court of appeals first considered the issue of standing as it relates to the group's declaratory judgment request. Id. at ¶ 13. The court observed that historically a plaintiff was required to demonstrate three elements to establish standing [1] "injury in fact, a concrete and actual invasion of a legally protected interest; [2] the traceability of the injury to a defendant's actions; and [3] the probability that the injury can be redressed by a

favorable decision." Id. at ¶ 13 (citing Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 51-52 (2002)) (cardinals added).

However, the supreme court held the North Carolina Constitution "does not include an injury-in-fact requirement for standing where a purely statutory or common law right is at issue." Id. at ¶ 14. "When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, . . . the legal injury itself gives rise to standing." Comm. to Elect Dan Forest v. Emps. Pol. Action Comm., 2021-NCSC-6, ¶ 82, 376 N.C. 558, 853 S.E.2d 698. The word "injury means, 'at a minimum, the infringement of a legal right; not necessarily injury in fact or factual harm.'" Soc'y for Hist. Pres., 2022-NCCOA-218 ¶ at 14 (quoting Comm. To Elect Dan Forest, 2021-NCSC-6 ¶ 81).

"Accordingly, to establish standing, a plaintiff must demonstrate the following: [1] a legal injury; [2] the traceability of the injury to a defendant's actions; and [3] the probability that the injury can be redressed by a favorable decision." Id. at ¶ 15 (cardinals added). In pursuing a declaratory judgment regarding rights to the monument, the group must demonstrate it possessed some legally protected interest the city and county invaded. Id. at ¶ 16 (citing United Daughters, 275 N.C. App. at 407, 853 S.E.2d at 220).

The group put forth a number of arguments for its legally protected interests, including that it had standing under a breach of contract theory, that it possessed representational standing for its members as individual taxpayers, and that it had succeeded the interests of those who designed, funded, and erected the monument. Id. at ¶ 17.

The court of appeals considered whether the donation agreement established standing for the group. Id. at ¶ 18. The court held that it did not, as the agreement was limited to restoration "and does not contemplate ongoing preservation efforts." Id. at ¶ 19. The agreement established the relationship between the parties for the restoration of the monument but did not bind the city or county to any preservation action after the monument the restoration was complete. Id. at ¶¶ 20–22. Accordingly, the group could not establish standing under a breach of contract theory. Id. at ¶ 22.

The court then turned to the group's claims for a temporary restraining order and preliminary injunction. Id. at ¶ 24. The court found it "somewhat unclear what legal injury [the group] asserts, and noted its brief included "non-sequitur discussion of chattels" and the assertion that the group has "an abiding and cognizable legal interest in the Vance Monument because it is a legacy organization." Id. at ¶ 26.

"None of these arguments establish a legal injury suffered by [the group] sufficient to establish standing." Id. at ¶ 27. The court of appeals held the fact that the group had filed a petition with the Historical Commission did not establish standing, as that matter was for the commission to decide. Id. Further, the assertion of a legal interest as a "legal organization" was specifically rejected in United Daughters. Id. at ¶ 28. "Similarly in this case, [the group] has not alleged any ownership rights to the statue, and accordingly has failed to demonstrate any legal interest in the statue." Id.

The court of appeals further held that the trial court had not erred in dismissing the group's claims because the agreement between the parties did not bind the city or county to "maintain[] the Vance Monument in place for all eternity." Id. at ¶ 30–31.

C. Res Judicata

In Doe 1K v. Roman Catholic Diocese of Charlotte, ___ N.C. App. ___, 2022-NCCOA-287, petition for disc. rev. filed (N.C. May 31, 2022), the court of appeals considered whether res judicata served to bar claims that were earlier dismissed because the trial court deemed them abandoned. Id. at ¶ 5.

In 2011, the plaintiff had sued the Diocese for alleged sexual abuse by one of its former priests that occurred in 1977–78 while the plaintiff was a teenager. Id. at ¶ 1. The trial court dismissed the plaintiff's claims (sounding in negligence, conspiracy, and intentional infliction of emotional distress) in their entirety. Id. The court of appeals affirmed that dismissal, and also concluded that the plaintiff had "abandoned" most of these claims since he dropped them from an amended complaint. Id.; see also Doe 1K v. Roman Cath. Diocese of Charlotte, NC, 242 N.C. App. 538, 542 & n.2, 775 S.E.2d 918, 921 (2015).

In 2019, the General Assembly passed the SAFE Child Act, which purported to revive previously time-barred claims for child sexual abuse. Id. at ¶ 2. In 2020, the plaintiff filed a similar set of claims against the Diocese, including the ones he previously "abandoned." Id. at ¶ 3. The Diocese moved once more to dismiss these claims. Id. In addition to opposing the motion, the plaintiff also moved to transfer the case to a Wake County three-judge panel pursuant to section 1-267.1 of the North Carolina General Statutes. The trial court dismissed the action and denied the motion to transfer. Id.

The court of appeals affirmed this second dismissal. Id. at ¶ 10. It held that the claims were barred by res judicata. Id. at ¶ 12. The dismissal of the 2011 Complaint was a final judgment, and that judgment was affirmed on appeal. Id. at ¶ 13. While the plaintiff

did bring new legal claims in the 2020 lawsuit, these claims all arose out of the "same core factual allegations," and therefore the 2020 lawsuit merely served to assert new legal theories, rather than new claims entirely. Id. at ¶ 14. The parties were, of course, identical between the 2011 and 2020 complaints. Id. at ¶ 15. Therefore, the claims were barred. Id.

The court added in dicta that had res judicata not applied, these claims would have fallen within the Revival Provision of the SAFE Child Act. Id. at ¶ 16. However, because the claims were barred, the court did not reach the issue of whether denying transfer to the three-judge panel was erroneous. Id. at ¶ 17.

The court issued a nearly identical decision in Doe v. Roman Catholic Diocese of Charlotte, ___ N.C. App. ___, 2022-NCCOA-288, petition for disc. rev. filed (N.C. May 31, 2022).

D. Service of Process

In County of Mecklenburg v. Ryan, ___ N.C. App. ___, 871 S.E.2d 110, 2022-NCCOA-90, the court of appeals considered whether service by publication was proper by Mecklenburg County on a visually impaired, wheelchair-confined homeowner when the homeowner had informed the county email was the best way to reach her, and the county failed to email her notice of pending litigation.

A homeowner had been confined to a wheelchair since 1989 and legally blind since 1992. Id. at ¶ 2. The homeowner owned and lived at a property in Charlotte. Id. In 2018, Mecklenburg County, through outside counsel, instituted a civil action to foreclose on the property for past due property taxes. Id.

A summons was issued in January 2018, but never served. Id. at ¶ 3. An alias and pluries summons was issued in April. Id. Mecklenburg County, through the sheriff's department, attempted personal service but was unsuccessful. Id. The deputy reported the property "appeared vacant." Id. Mecklenburg County's attempts at service via certified mail and via delivery service were likewise unsuccessful. Id. The homeowner had previously informed the county that "because of her disabilities, it can be difficult for her to access mail, and the best way to reach her was via email." Id. The county made no attempt to email her regarding the pending litigation. Id.

After these failed attempts, the county served the homeowner by publication, which was completed in late May 2018. Id. at ¶ 4. In August, Mecklenburg County filed an "Affidavit of Jurisdiction and Failure to Plead," motion for entry of default, and motion for default judgment. Id. The entry of default and default judgment were entered against the homeowner the day they were filed. Id.

In December 2019, the homeowner moved to set aside the August 2018 default judgment among other things. Id. at ¶ 12. The trial court entered an order in relevant part finding Mecklenburg County exercised due diligence prior to the default. Id. at ¶ 13. The homeowner appealed. Id.

The court of appeals considered a number of issues, including whether to set aside the default judgment due to insufficient service of process.

On the issue of service by publication, the court of appeals observed that the North Carolina Rules of Civil Procedure allow "service of process by publication on a party that cannot, through due diligence, be otherwise served." Id. at ¶ 19 (quoting Dowd v. Johnson,

235 N.C. App. 6, 9, 760 S.E. 2d 79, 83 (2014)). Due diligence "dictates that plaintiff use all resources reasonably available" to reach a defendant, and when the method for proper service is within plaintiff's knowledge or ascertainable with due diligence, service by publication is improper. Id. (citing Fountain v. Patrick, 44 N.C. App. 584, 587, 261 S.E. 2d 514, 516 (1980); N.C.R. Civ. P. 4(j)).

While there is "no restrictive mandatory checklist for what constitutes due diligence," a party "must use all reasonably available resources to accomplish service of process." Id.

The homeowner argued that the county failed to exercise due diligence because it made no attempt to serve her via email. Id. at ¶ 21. The court found a 2017 case regarding a homeowner's association's attempts to assert a lien while the property owner was in Africa analogous and binding. Id. (citing In re Foreclosure of Ackah, 255 N.C. App. 284, 804 S.E. 2d 794 (2017), aff'd per curiam, 370 N.C. 594, 811 S.E. 2d 143 (2018)). In Ackah, a homeowner's association attached a lien to a property due to the owner's failure to pay association dues. 255 N.C. App. at 296, 804 S.E. 2d at 796. Certified letters to the address and to family members were returned "unclaimed." Id. The homeowner's association then posted a notice on the door of the property. Id. The court of appeals held that the homeowner's association failed to exercise due diligence as it had the property owner's email address and made no attempt to at least notify her via email of the pending litigation, "rather than simply resorting to posting a notice on the [p]roperty." Id. at ¶ 287, 804 S.E. 2d at 796.

As in Ackah, the court of appeals held that in the instant case Mecklenburg County could have notified the homeowner via email but failed to do so. Ryan, 2022-NCCOA-90

at ¶ 22. The court observed it was "undisputed that the Mecklenburg County Tax Office had [the homeowner's] email on file." Id. Further, the trial court found that the county had prior notice from the homeowner that email was the best means to reach the homeowner due to her disabilities. Id. Accordingly, the court of appeals held that the service by publication was improper, as the county failed to exercise the due diligence required.

E. Discovery

(1) Depositions

In Hall v. Wilmington Health, PLLC, ___ N.C. App. ___, ___ S.E.2d ___, 2022-NCCOA-204, the court of appeals considered whether a trial court's order prohibiting a medical center's counsel from being physically present with the center's own witnesses during remote depositions violated the center's constitutional right to due process.

A patient sued the medical center for medical malpractice. Id. at ¶ 4. In June 2020, the patient filed a motion under Rules 30(b)(7) and 26(c) of the North Carolina Rules of Civil Procedure, requesting that depositions be conducted remotely based on concerns that she and her counsel had related to the ongoing COVID-19 pandemic. Id. at ¶ 7. The trial court granted the patient's motion, ruling that all future depositions would be taken remotely and that no counsel could be physically present with deponents during remote depositions. Id. at ¶¶ 11–12. The trial court entered this order, despite neither side raising in their filings or at the hearing on the motion the issue of whether counsel should be allowed to be physically present with deponents. Id. at ¶ 12. The medical center appealed the trial court's order to the court of appeals.

The court of appeals reversed the trial court's order with Judge Stroud writing the majority opinion.

The court of appeals first addressed whether the trial court's order, which was interlocutory, was immediately appealable. On this issue, the court of appeals explained that it "has recognized 'that civil litigants have a due process right to be heard th[r]ough counsel that they themselves provide.'" Id. at ¶ 19 (quoting Tropic Leisure Corp. v. Hailey, 251 N.C. App. 915, 920, 923–24, 796 S.E.2d 129, 133, 135 (2017)). Relying on this precedent, the court of appeals reasoned that because "counsel at depositions represent clients by objecting to improper questions and protecting privileges, among other things, that due process right could apply here." Id. As a result, the court of appeals determined that the trial court's order affected a substantial right—the medical center's constitutional right to due process—rendering the order immediately appealable. Id. at ¶¶ 20–21.

The court of appeals next addressed whether the trial court's order violated the medical center's constitutional right to due process. Relying on a line of cases that have recognized a due process right to retained counsel in civil cases, the court of appeals held that this right "extends to having the assistance of retained counsel at depositions." Id. at ¶ 42. According to the court of appeals, these cases "emphasize[d] the importance of having retained counsel's assistance throughout the legal process including fact-finding phases such as discovery." Id.

Having determined that there is a due process right to retained counsel at depositions, the court of appeals then concluded that this right "supports a narrower right to have counsel physically present" during depositions. Id. at ¶ 47. The court of appeals reasoned that counsel's physical presence at a deposition is important for purposes of

objecting to improper questions and protecting privileges and that counsel's physical presence provides greater protection to a witness than counsel's remote presence. Id. To support its reasoning, the court of appeals gave the example of a technological glitch that could occur when counsel is attempting to instruct a witness not to answer a question on privilege grounds. Id. at ¶ 48.

The court of appeals also ruled that the trial court's order was not narrowly tailored, as was required given the constitutional right involved. Id. at ¶ 50. In particular, the court of appeals observed that the trial court could have allowed remote depositions to address the patient and her counsel's concerns without also prohibiting the medical center's counsel and its witnesses from being physically together during a deposition. Id. at ¶¶ 50–51.

Finally, the court of appeals determined that the trial court "failed to consider the specific circumstances of the particular witnesses and locations at issue," noting that there were different travel restrictions for the two locations (North Carolina and Chicago) where the depositions that prompted the patient's motion were going to take place. Id. at ¶ 52. The trial court's order also failed to account for possible changes in the circumstances surrounding the pandemic, such as the availability of vaccines. Id. at ¶ 53.

The court of appeals thus held that the trial court's order violated the medical center's constitutional right to due process by prohibiting the center's counsel from being physically present with the center's own witnesses during remote depositions. Id. at ¶ 58.

For these reasons, the court of appeals reversed and remanded.

Judge Dillon wrote a dissenting opinion. Judge Dillon did not believe that the order affected a substantial right, since there was "nothing in the appealed order prohibiting [the

medical center's] counsel to be present and fully participate in depositions, albeit remotely." Id. at ¶ 62. And even if a substantial right had been implicated by the order, the medical center, according to Judge Dillon, did not show that the right would be lost without an immediate appeal, as there were measures that could have been implemented to protect the center's rights, such as remote deposition protocols. Id. at ¶¶ 65–66.

(2) Sanctions

In Dunhill Holdings, LLC v. Lindberg, ___ N.C. App. ___, 2022-NCCOA-125, the court of appeals considered whether and to what extent sanctions were warranted against a holding company and its owner for discovery violations related to litigation with the owner's former spouse.

In July 2017 a holding company filed suit against its owner's former spouse asserting various claims including theft, fraud, conversion, and breach of fiduciary duty. Id. at ¶ 3. During discovery, the former spouse challenged the sufficiency of the discovery responses provided by the holding company and owner, and in June 2018, the trial court entered an order compelling discovery. Id. at ¶ 8. After the holding company and owner were unsuccessful in seeking a stay of discovery, the former spouse again filed a motion to compel discovery, and the trial court entered a second order compelling discovery in March 2019. Id. at ¶ 18.

The former spouse then noticed depositions of the holding company under Rule 30(b)(6), and of the owner individually. Id. at ¶ 20. A few days before the Rule 30(b)(6) deposition, the owner and holding company produced an additional 129,000 pages of documents. Id. at ¶ 22. At the deposition, the corporate representative was "completely

unprepared" to address many of the designated topics. Id. The former spouse filed a motion for sanctions against the holding company. Id.

The owner was then deposed. Id. at ¶ 23. The owner repeatedly refused to answer questions, refused to comment on documents he or the holding company had produced, made personal attacks on the former spouse's counsel, was tardy on numerous occasions, and "improperly assert[ed] attorney-client privilege when there was clearly no communication between lawyer and client." Id. The former spouse amended her motion for sanctions to include the owner. Id.

In August 2019, the trial court entered an order sanctioning the holding company and owner. Id. at ¶ 25. In the August 2019 order, the trial court "[c]haracterized the 129,000-page document production on the eve of [the holding company's] depositions as a 'document dump,'" and found the unprepared Rule 30(b)(6) witness violated the court's prior order compelling discovery. Id. The trial court further found that the owner and holding company had "jointly violated" the court's prior orders and "worked together to intentionally evade discovery obligations." Id. at ¶ 26. The holding company and the owner appealed the sanctions order. Id. at ¶ 28.

The court of appeals considered whether the trial court abused its discretion in sanctioning the holding company and owner for their document productions. Id. at ¶ 37. The holding company and owner argued that "the fundamental problem with these orders . . . is that there was no predicate violation of a court order." Id. Specifically, the holding company and owner argued that the March 2019 order did not show a violation of the June 2018 order, and likewise that the August 2019 order did not show a violation of the March 2019 order. Id.

For the August 2019 order, the court considered, among other issues, whether the 129,000 pages of document produced immediately prior to the 30(b)(6) deposition was itself an indication that the holding company and owner failed to comply with the prior orders. Id. at ¶ 61. If the documents were responsive, then production itself put them in violation of the order "unless all of the documents produced were supplemental." Id. (emphasis added). Among the documents, 29,000 pages were emails from accounts of individuals who worked at the holding company. Id. at ¶ 62.

The court noted that the holding company "clearly had possession, custody, or control over the email accounts of its own employees," and thus these documents could not be supplemental. Id. The remaining 100,000 pages were bank and credit card statements. Id. at ¶ 63. The court held that these, too, could not be supplemental as either the holding company or owner had the "legal right to obtain . . . on demand" these documents." Id. (citing Pugh v. Pugh, 113 N.C. App 375, 380, 438 S.E.2d 214, 218 (1994)). As the holding company had possession, custody, or control over the documents, they should have been produced under one of the earlier discovery orders.

Second, the court considered whether the trial court abused its discretion in sanctioning the holding company and owner for their deposition conduct. Id. at ¶ 68. Identifying, amongst other facts, that the owner delayed the deposition by five hours and forty-seven minutes through "repeated tardiness," the court affirmed the sanctions against the owner. Id. ¶ 83. "Thus, the court sanctioned [the owner] for his deposition misconduct alone and had ample support for its decision to do so." Id.

For the holding company, the court rejected arguments its corporate representative testified to matters known or reasonably known to it "without addressing the scope of Rule

30(b)(6) under North Carolina law." Id. ¶¶ 89–90. The court observed that even assuming the law offered by the holding company was good law—consisting, as it was, of mostly unpublished federal district court opinions—the arguments made would fail applying the undisputed facts of the case to even that law. Id. ¶ 90.

To conduct this analysis, the court applied the "unchallenged, and therefore binding" findings of fact to each of the holding company's five legal arguments related to Rule 30(b)(6) depositions, lifted verbatim from the holding appellate company's brief. Id. ¶ 90.

For example, the company's first argument focused on preparation of Rule 30(b)(6) deponents. Id. The company argued:

> When it comes to preparation for the deposition, the touchstone of this Rule is reasonableness. See, e.g., Brazos River Auth. v. GE Ionics, Inc., 469 F.3d 416, 432-33 (5th Cir. 2006).[footnote omitted] Recognizing that "an individual cannot be expected to know every possible aspect of the organization's inner workings," courts have invariably acknowledged that the "standard for sanctions in this context is high." Runnels v. Norcold, Inc., No. 1:16-cv-713, 2017 WL 3026915, at *1 (E.D. Va. Mar. 30, 2017) (unpublished) (citing cases). A designee is not expected to present "a fully reliable and sufficiently complete account of all the bases for the contentions made and positions taken by the corporate party." Stoneeagle Servs., Inc. v. Pay-Plus Sols., Inc., No. 8:13-CV-2240-T33MAP, 2015 WL 12843846, at *2 (M.D. Fla. Apr. 29, 2015) (unpublished).

Id. ¶ 91. "The cases Dunhill presents indicate that reasonableness means that the designated individuals do not have to know everything completely but rather must know a reasonable amount and be reasonably prepared to answer questions." Id. ¶ 92. Applying the undisputed facts to even the holding company's best-case-scenario legal framework, the court found no merit to an argument the Rule 30(b)(6) witness was reasonably prepared as

the witness was unprepared to answer many questions and took no steps to learn information required by the deposition topics. Id. at ¶¶ 92–93.

The court of appeals likewise rejected arguments based on best-case-scenario law where the witness showed preparation by vaguely referencing documents, lacked any information whatsoever on others, and could not point to any evidence to support any of the holding company's claims. Id. at ¶¶ 93–102. "Put another way, this was not an imperfect deposition; as to certain topics on which the designees provided no answers, this deposition in effect did not happen at all." Id. at ¶ 98.

Finding no error by the trial court, the court of appeals upheld all of the deposition-related sanctions. Id. ¶ 102.

F. Immunity

(1) Sovereign Immunity

In Cedarbrook Residential Center, Inc. v. N.C. Department of Health & Human Services, ___ N.C. App. ___, 868 S.E.2d 623, 2021-NCCOA-689, appeal docketed, No. 36A22 (N.C. Jan. 25, 2022), the court of appeals considered whether sovereign immunity precluded negligence claims by a senior living facility against a state agency. Judge Arrowood authored the majority's opinion.

The North Carolina Department of Health and Human Services ("DHHS") conducted surveys of a senior living facility in 2015 and 2016. Id. at ¶ 2. Documented deficiencies from these surveys included supervision issues, reports of "prostitution and sexual acts in exchange for sodas," and cockroach infestations. Id. at ¶ 42 (Tyson, J., dissenting). Based on those surveys, DHHS issued statements of deficiencies, suspended

admissions to the senior living facility, and eventually formulated a "directed plan of protection" against the facility. Id. at ¶ 2. In 2018, the senior living facility filed an affidavit and claim for damages with the Industrial Commission, alleging negligence by DHHS in formulating remedial actions. Id.

DHHS filed a motion to dismiss with the Industrial Commission under Rules 12(b)(1), 12(b)(2), and 12(b)(6), as well as a motion to stay discovery. Id. at ¶ 3. A deputy commissioner denied DHHS's motions. Id. DHHS then appealed to the full commission, which affirmed the denial of DHHS's motions. Id. DHHS filed notice of appeal to the court of appeals. Id.

The court of appeals considered, among other things, whether the Industrial Commission erred in denying DHHS's motion to dismiss because sovereign immunity barred the senior living facility's claims. Id. at ¶ 4.

DHHS first argued that the North Carolina Tort Claims Act did not apply, garnering protection for the agency under the doctrine of sovereign immunity. Id. at ¶ 10. The court of appeals recognized that the state and agencies have "absolute and unqualified" immunity from suit, barring waiver of consent. Id. (citing Guthrie v. N.C. State Ports Auth., 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983)). However, the Tort Claims Act provides limited waiver of sovereign immunity for suit "under circumstances where the State of North Carolina, if a private person, would be liable to the claimant." Id. (quoting N.C. Gen. Stat. § 143-291). DHHS argued that the Tort Claims Act did not apply because a private person cannot be held liable for regulatory actions, and therefore a state agency could not be held liable for the same. Id. at ¶ 12.

The court of appeals held that DHHS's interpretation misconstrued the meaning of "private person" under the Tort Claims Act. Id. Rather than limiting the scope of what types of claims may be brought, the court held that the Tort Claims Act "will be construed so as to effectuate its purpose of waiving sovereign immunity so that a person injured by the negligence of a State employee may sue the State as he would any other person." Id. (quoting Zimmer v. N.C. Dep't of Transp., 87 N.C. App. 132, 136, 360 S.E.2d 115, 117–18 (1987)) (emphasis added). Therefore, inclusion of the phrase "private person" in the Tort Claims Act "pertains to the nature of the proceedings but does not operate to bar waiver to sovereign immunity." Id.

DHHS further contended that the Tort Claims Act was inapplicable because the North Carolina Administrative Procedure Act provides mechanisms for challenging penalties in the regulation of adult care facilities. Id. at ¶ 13. The court of appeals held that the availability of an administrative remedy did not preclude seeking remedy under the Tort Claims Act. Id. at ¶ 14. The court of appeals recognized its own recent opinion providing that an entity regulated by DHHS had an "adequate state remedy" under the Tort Claims Act. Id. (citing Nanny's Korner Day Care Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs., 264 N.C. App. 71, 80, 825 S.E.2d 34, 41, appeal dismissed, review denied sub nom., Nanny's Korner Day Care Ctr., Inc. v. N.C. Dep't of Health & Hum. Servs., Div. of Child Dev. & Early Educ., 372 N.C. 700, 831 S.E.2d 89 (2019)). Recognizing itself bound by precedent, the court of appeals reasoned that the Tort Claims Act was applicable to the senior living facility's claims against DHHS and affirmed the Industrial Commission's denial of DHHS's motion to dismiss. Id. at ¶ 33.

Judge Tyson dissented, arguing that the senior living facility's claims did not fit within the limited exceptions within the Tort Claims Act. Id. at ¶ 39 (Tyson, J., dissenting).

On the issue of sovereign immunity, the dissent argued inclusion of the phrase "private person" in section 143-291 was a limiting factor in whether the facility could bring a claim. Id. at ¶ 54. According to the dissent, DHHS's actions in inspecting and disciplining the senior living facility arose from its duties under statute. Id. As no "reasonable private person" owed a duty to inspect or discipline a senior living facility, the scope of DHHS's acts were inherently governmental and regulatory in nature, and therefore protected by the doctrine of sovereign immunity. Id. at ¶ 57.

(2) Governmental Immunity

In Baznik v. FCA US, LLC, 280 N.C. App. 139, 867 S.E.2d 334, 2021-NCCOA-583, the court of appeals considered whether engineers and supervisors with the North Carolina Department of Transportation should be entitled to public official immunity from individual liability for negligence in the construction of an intersection.

A minor child was traveling in a car on Fox Road in Wake County, which approached the intersection with U.S. Highway 401. Id. at ¶2. The intersection required vehicles traveling eastbound on Fox Road to cross seven lanes of traffic and a median divider to continue travel on the road. Id. Natural and manmade objects rendered such a vehicle's driver unable to see portions of U.S. Highway 401 from the intersection, in violation of federal and state sight distance standards. Id. While traveling through the intersection, the car carrying the minor child was struck by another vehicle. Id. The minor

child survived; however, a manufacturing defect in the car in which he was riding caused fuel to ignite, resulting in severe injuries to the child and his eventual death. Id.

The child's father brought suit on behalf of the child's estate naming NCDOT engineers and a supervisor in their individual capacities. Id. at ¶ 3. Each of the NCDOT engineers and supervisor contributed to the construction of the intersection. Id. The NCDOT engineers and supervisor filed motions to dismiss, citing "public official immunity and/or qualified immunity, as well as the doctrine of sovereign immunity." Id. The trial court denied the motions but did not specify its reasoning. Id. The NCDOT engineers and supervisor appealed.

The court of appeals considered whether the engineers and supervisor were entitled to public official immunity through their employment with NCDOT. Id. at ¶ 6. The court noted that when a government worker is sued individually, North Carolina courts distinguish between public officers and public employees to determine negligence liability. Id. (citing Reid v. Roberts, 112 N.C. App. 222, 224, 435 S.E.2d 116, 119 (1990)). Public employees can be held individually liable for mere negligence in performing their duties, while public officials cannot be held liable for mere negligence in the performance of governmental or discretionary duties. Id. (citing Meyer v. Walls, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997)).

The court relied on a three-part test to analyze whether the engineers and supervisor were public employees or public officials: (1) whether the public office was created by the constitution or statute; (2) whether the person exercises a portion of the state's sovereign power; and (3) whether the person exercises discretion or performs ministerial duties. Id. (citing Isenhour v. Hutto, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999)). A party asserting

public official immunity must establish all three factors. Id. Additionally, the court observed that public officials generally take an oath of office, though such an oath is not dispositive. Id.

The engineers and supervisor argued they were public officials because their positions were created pursuant to sections 143B-345, 143B-346, and 136-18 of the North Carolina General Statutes. Id. at ¶ 7. The court disagreed. Id. The court observed that "[a] person occupies a positioned created by legislation if the position 'ha[s] a clear statutory basis or the officer ha[s] been delegated a statutory duty by a person or organization created by statute.'" Id. (quoting Fraley v. Griffin, 217 N.C. App. 624, 627, 720 S.E.2d 694, 696 (2011)). In reviewing sections 143B-345 and 143B-346, the court noted that the statutes "are void of any created positions and only speak to NCDOT as an entity in and of itself." Id. at ¶ 8. The court held that the engineers and supervisor could not rely on these statutes as creating their positions within NCDOT "as these statutes do not establish any position within NCDOT." Id. Turning to the remaining statute, the court of appeals identified that this provision merely defined the powers allotted to NCDOT. "The existence within a statute of a 'statutory definition does not constitute [the] creating . . . [of a] position.'" Id. at 9 (citing Fraley, 217 N.C. App. at 627, 720 S.E.2d at 696.

The court held that none of the statutes cited by the engineers and supervisor created their positions, or indeed any positions, within NCDOT. Id. "Thus, Defendants have not established a clear statutory basis for their positions within NCDOT and are considered public employees, not public officials." Id. at ¶ 10.

Accordingly, the court of appeals affirmed the trial court's denial of the NCDOT employees' motions to dismiss. Id.

G. Rule 41

In M.E. v. T.J., ___ N.C. ___, 869 S.E.2d 624, 2022-NCSC-23, the supreme court considered whether the trial court retained jurisdiction over a pro se plaintiff's domestic violence action after she struck through her notice of voluntary dismissal of her original complaint and handwrote "I do not want to dismiss this action."

The plaintiff and the defendant were in a same-sex dating relationship. Id. at ¶ 5. After the plaintiff ended the relationship, the defendant allegedly became verbally and physically threatening toward the plaintiff, so the plaintiff, without the assistance of counsel, sought a domestic violence protective order against the defendant. Id. The plaintiff filled out the paperwork that the clerk of court's staff provided to her to initiate a complaint against the defendant. Id. at ¶¶ 5–7. After the trial court informed the plaintiff that she was not eligible for the type of domestic violence protective order that she had requested (a protective order under Chapter 50B of the General Statutes) because she was in a same-sex dating relationship, the plaintiff conveyed to the clerk's staff what the trial court had told her. Id. at ¶¶ 8–9. The clerk's staff gave the plaintiff new forms to complete, including forms for a different type of domestic violence protective order for which she was eligible (a Chapter 50C protective order) and a notice of voluntary dismissal of her original Chapter 50B complaint. Id. at ¶ 9. The plaintiff completed the forms and gave them to the clerk's staff for filing.

After filing the plaintiff's notice of voluntary dismissal, the clerk's staff informed the plaintiff that she could still request a Chapter 50B order, even if the trial court was going to ultimately deny it and gave the file-stamped notice of voluntary dismissal back to the plaintiff. Id. at ¶ 10. The plaintiff then struck through the file-stamped notice and handwrote

"I do not want to dismiss this action." Id. The clerk's staff wrote "Amended" at the top of the file-stamped notice and refiled it thirty-nine minutes after the plaintiff's original filing. Id. The trial court heard the plaintiff's request for a Chapter 50B order and denied it on the basis that Chapter 50B did not include same-sex dating relationships within its definition of covered personal relationships. Id. at ¶¶ 11–14.

The plaintiff, now represented by counsel, appealed to the court of appeals, arguing that the trial court's denial of her request for a Chapter 50B domestic violence protective order violated her rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution, as well as her rights under the North Carolina Constitution. Id. at ¶¶ 16–17. A majority of the court of appeals agreed with the plaintiff's constitutional arguments. Id. at ¶ 20. Judge Tyson dissented. Id. at ¶ 21. The defendant appealed the decision of the court of appeals to the supreme court based on Judge Tyson's dissent. Id. at ¶ 29.

Among other issues, the defendant argued that the trial court had been deprived of its jurisdiction over the plaintiff's action when she filed the notice of voluntary dismissal of her original complaint. Id. at ¶ 30. And because the plaintiff "never formally filed a new Chapter 50B complaint and no request for Rule 60(b) relief was sought or granted by the trial court," the defendant further argued that the trial court never regained its jurisdiction over the action. Id.

On appeal, in a majority opinion written by Justice Hudson, the supreme court held that the trial court retained jurisdiction over the plaintiff's action after she filed the notice of voluntary dismissal of her original complaint.

The supreme court first held that the plaintiff's "Amended" notice of voluntary dismissal "functionally served as a motion for equitable relief under Rule 60(b)" of the North Carolina Rules of Civil Procedure. Id. at ¶ 40. The supreme court next held that the plaintiff's later amendment to her complaint, to which the defendant had consented at a hearing on the plaintiff's request for a Chapter 50B order, "functionally served as a refiling." Id. at ¶¶ 12, 40.

In reaching these conclusions, the supreme court explained that "rather than erecting hurdles to the administration of justice, '[t]he Rules of Civil Procedure [reflect] a policy to resolve controversies on the merits rather than on technicalities of pleadings.'" Id. at ¶ 43 (quoting Quackenbush v. Groat, 271 N.C. App. 249, 253, 844 S.E.2d 26 (2020)). The supreme court reasoned that the policy behind the Rules of Civil Procedure was especially important for domestic violence protective orders under Chapter 50B, since these remedies were enacted with pro se litigants in mind. Id. at ¶ 44. As the supreme court noted, "survivors of domestic violence who turn to courts for protection typically do so shortly after enduring physical or psychological trauma, and without the assistance of legal counsel." Id. at ¶ 44. The supreme court further noted that Rule 60(b) gives trial courts broad discretion to grant equitable relief from a final judgment, order, or proceeding for "mistake, inadvertence, surprise, or excusable neglect." Id. at ¶ 46 (quoting N.C. Gen. Stat. § 1A-1, Rule 60).

Applying these principles, the supreme court stated that there was "plainly no doubt as to plaintiff's intentions as expressed through the amended form: she "d[id] not want to dismiss th[e] action." Id. at ¶ 47. In addition, when the trial court allowed the plaintiff to amend her complaint, with the defendant's consent, "it reasonably could have considered

this amendment as, in essence, a refiling after a voluntary dismissal." Id. And though a formal Rule 60(b) motion or a new Chapter 50B complaint would have been preferable, the supreme court declined to elevate form over substance in this situation, taking into account that the plaintiff had followed all the instructions that the clerk's staff had given her. Id. at ¶¶ 47–48. Finally, the supreme court acknowledged that it was unlikely that the plaintiff had intended for her amendments to serve as a formal Rule 60(b) motion or a formal refiling, but the court nevertheless concluded that it was within the trial court's broad discretion to treat the amendments as a functional Rule 60(b) motion or refiling based on the plaintiff's "plain intention to move forward with her Chapter 50B complaint." Id. at ¶ 48.

For these reasons, the supreme court held that the trial court did not err in exercising jurisdiction over the plaintiff's action.

Justice Berger wrote a dissenting opinion with Chief Justice Newby and Justice Barringer joining. Justice Berger would have held that under Rule 41(a) of the North Carolina Rules of Civil Procedure, the trial court was deprived of its jurisdiction over the plaintiff's complaint after she filed her notice of voluntary dismissal of her original complaint. Id. at ¶¶ 70–76. Justice Berger also disagreed with the majority's decision to treat the plaintiff's amendments as functional equivalents of a Rule 60(b) motion and refiling because the "plaintiff filed no motion with the Court, there was no final judgment, and her attorneys never requested the relief granted by the majority today." Id. at ¶ 77.

H. Rule 45

In Wing v. Goldman Sachs Trust Company, N.A., ___ N.C. App. ___, 868 S.E.2d 321, 2021-NCCOA-662, rev. allowed, cert. dismissed, 868 S.E.2d 852 (N.C. Mar. 9, 2022),

the court of appeals considered whether Rule 45(d1) of the North Carolina Rules of Civil Procedure required a party who issued a subpoena to produce all the documents that the party received in response to the subpoena upon a request by adverse parties.

In a lawsuit involving the validity of certain testamentary instruments, the defendants served the plaintiff with discovery requests. Id. at ¶¶ 2–4. The plaintiff believed that some responsive documents were in her ex-husband's possession. Id. at ¶ 4. After unsuccessful attempts to recover the documents from her ex-husband, the plaintiff served a subpoena on him, and the ex-husband produced documents in response to the subpoena. Id. at ¶¶ 5–8. The plaintiff informed the defendants that she had received a complete response to the subpoena, and the defendants requested all the documents that she had received. Id. at ¶ 9. The plaintiff objected to the defendants' request and only produced documents that she claimed were non-privileged and responsive to the defendants' prior discovery requests. Id. at ¶¶ 9–10.

The defendants filed a motion to compel production of all the subpoenaed documents, which the trial court granted. Id. at ¶¶ 11–12. The plaintiff appealed the trial court's discovery order to the court of appeals.

The court of appeals vacated the trial court's discovery order and remanded with instructions to enter an order requiring the plaintiff to only produce non-privileged and responsive documents.

As a threshold matter, the court of appeals determined that although the trial court's discovery order compelling production of alleged privileged and non-responsive documents

was interlocutory, the order affected a substantial righta privilege claim. Id. at ¶¶ 14–16. The court of appeals thus allowed the appeal, even though it was interlocutory.

The court of appeals next analyzed Rule 45(d1)'s scope. Rule 45(d1) states that a party who issues a subpoena must "serve all other parties with notice of receipt of the material produced in compliance with the subpoena and, upon request, shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party." Id. at ¶ 20 (quoting N.C. Gen. Stat. § 1A-1, Rule 45(d1)) (emphasis omitted). Although Rule 45(d1) does not mention Rule 26, the court of appeals determined that Rule 45(d1) must be read together with Rule 26. Id. at ¶¶ 21–24. According to the court of appeals, Rule 26 protects a "party who has received privileged or non-responsive documents as a result of the subpoena, at no fault of their own." Id. at ¶ 23.

The defendants argued that the plaintiff waived any objections to producing all the subpoenaed documents by serving the subpoena in the first place. Id. at ¶¶ 11, 25. However, the court of appeals disregarded the defendants' argument, holding instead that the plaintiff "undertook and complied with the statutorily required steps to protect her privileged and non-responsive and irrelevant documents from disclosure." Id. at ¶ 27. She produced the documents that she deemed were non-privileged and responsive to the defendants' prior discovery requests, provided a log of the documents that she withheld based on her privilege claim, and asserted that some documents were neither relevant nor responsive to any discovery request. Id. at ¶¶ 25–27.

In addition, the court of appeals consulted Rule 45 of the Federal Rules of Civil Procedure, which "has no counterpart to subsection (d1)," concluding that there is no automatic discovery of all subpoenaed documents under the federal rule. Id. at ¶ 29. The

court of appeals also analyzed Rule 45(d1)'s legislative history. In particular, the court of appeals reasoned that by "codifying the notice-and-request procedure [in Rule 45(d1)], the General Assembly expressly reaffirmed the federal process and left the questions about the propriety of interparty requests for documents to be governed by the existing discovery rules." Id. at ¶ 31.

Based on its interpretation of Rule 45(d1)'s scope, the court of appeals disagreed with the defendants' argument that Rule 45(d1) gave defendants unlimited access to the subpoenaed documents upon their request. Id. at ¶¶ 28, 33. In the view of the court of appeals, adopting the defendants' position would cause Rule 45(d1) to "become the only discovery device not subject to assertions of privilege and limitations." Id. at ¶ 33. The court of appeals also expressed concern that ruling in the defendants' favor would mean that "[a] party would never be able to use a subpoena to recover her own confidential and privileged documents, and a subpoena recipient would be free to harass the requesting party by producing sensitive, embarrassing, irrelevant and privileged documents that are not responsive to the discovery request." Id. Lastly, the court of appeals was not persuaded by the defendants' argument that they could access all the subpoenaed information by deposing the plaintiff's ex-husband, stating that this argument was not supported by the rules governing depositions. Id. at ¶ 35.

For these reasons, the court of appeals vacated the trial court's discovery order compelling production of all the subpoenaed documents and remanded.

I. Rule 56

In Blue v. Bhiro, ___ N.C. ___, 871 S.E.2d 691, 2022-NCSC-45, the supreme court considered whether inclusion of additional facts not in the pleadings converted a trial court's order on a Rule 12(b) motion to dismiss to a motion for summary judgment under Rule 56. Chief Justice Newby wrote for the majority.

In January 2012, a physician assistant ordered a prostate screening test for a patient. Id. at ¶ 3. Although the results from the lab work were above normal levels, the physician assistant and his partner never informed the patient. Id. Six years later, the patient received a second prostate screening test. Id. The results from this second test were more than 400 times higher than normal levels. Id. The patient was soon thereafter diagnosed with metastatic prostate cancer. Id. The patient filed suit against the physician assistant, his partner, and their clinic for failure to diagnose the prostate cancer from the 2012 exam. Id.

The physician assistant, his partner, and the clinic jointly filed a motion to dismiss, arguing that the patient's claim was barred by the three-year statute of limitations and four-year statute of repose in section 1-15(c) of the North Carolina General Statutes. Id. at ¶ 4. At the hearing, the defense counsel argued that "when a motion to dismiss is brought, we must look at the four corners of the complaint." Id. At the end of the hearing, counsel for the patient made an oral motion for leave to amend the complaint. Id. The trial court "implicitly" denied the motion to amend and dismissed the patient's complaint. Id.

At the court of appeals, the patient argued that the trial court erred by converting the motion to dismiss to a motion for summary judgment without sufficient opportunity for discovery and presentation of evidence; or by granting the motion to dismiss, assuming it was not converted; or by denying the oral motion for leave to amend the complaint. Id. at

¶ 5. A divided court of appeals agreed with the patient that the court converted the motion and should have provided additional time for discovery and presentation of evidence. Id. The court of appeals reasoned that the trial court's order indicated that the trial court considered the parties memoranda and oral arguments, "both of which contained facts not alleged in the [c]omplaint." Id. at ¶ 6. A dissent in the court of appeals would have held that the trial court did not consider matters outside the pleadings, and that the facts not alleged in the complaint were merely the arguments of counsel. Id. at ¶ 8.

The supreme court considered whether the court of appeals erred by holding that the trial court considered matters outside the pleading. "Matters outside the pleading refers to evidentiary materials used to establish facts." Id. at ¶ 12. The supreme court identified such "evidentiary materials" as including affidavits, discovery documents, live testimony, stipulated facts, and documentary evidence in a court's file. Id. However, it is "axiomatic that the arguments of counsel are not evidence." Id. (quoting State v. Collins, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996)). Therefore, memoranda, points of authorities, briefs, and oral arguments "are not considered matters outside the pleading." Id.

Accordingly, while the trial court considered the facts in briefs and oral arguments, the supreme court held that these did not constitute "matters outside the pleading." Id. at ¶ 13. "Though [the patient's] counsel made several factual assertions in his memorandum and during the hearing, these statements by [the patient's] counsel were not evidence and thus are not matters outside the pleading." Id. As the trial court's review was limited to the complaint, it did not convert the motion to dismiss to a motion for summary judgment. Id. at ¶ 14. The supreme court therefore reversed and remanded the remaining questions to the court of appeals for further consideration. Id.

Justice Earls concurred in part and dissented in part. While agreeing with the majority on the issue of whether the trial court converted the motion, "I believe resolving the outstanding legal questions rather than remanding for further proceedings would be the disposition most consistent with our responsibility to foster the fair, evenhanded, efficient, open, and meaningful administration of justice." Id. at ¶ 15 (Earls, J., concurring in part and dissenting in part). While the majority in the court of appeals did not reach the two outstanding legal questions presented by the patient on appeal, the dissent did. Id. at ¶ 18. "Under the circumstances of this case, jurisprudential and administrative reasons justify proceeding to resolve the two remaining outstanding issues, which were both addressed by the dissent below, briefed by the parties, and are thus properly before us." Id. at ¶ 20.

In Bryant v. Wake Forest Univ. Baptist Med. Ctr., ___ N.C. App. ___, 870 S.E.2d 269, 2022-NCCOA-89, the court of appeals considered whether a doctor had sufficiently shown an absence of material fact necessary to receive summary judgment on his former patient's claims against him for actual and constructive fraud, res ipsa loquitur, breach of fiduciary duty, and medical malpractice.

The patient had received surgery from the doctor to treat her advanced-stage endometriosis, an often painful or uncomfortable reproductive system disorder. Id. at ¶ 4. Part of the treatment procedure involved implantation of a Gore-Tex adhesion barrier at the site where a fibroid had been removed. Id. The barrier was attached with non-absorbable sutures, signaling that it was intended to remain indefinitely. Id. The patient saw the doctor for a few follow-up visits, but discontinued treatment a few months after the surgery. Id. at ¶ 5. The patient and doctor disagreed as to whether, during these follow-up visits, the doctor communicated his recommendation that she undergo an additional procedure. Id. 18. Nearly

a decade later, the patient returned to the same hospital for additional reproductive treatment, where her surgeon found the Gore-Tex barrier still attached. Id. at ¶ 6. The patient sued the doctor who implanted the Gore-Tex and the hospital at which she was treated for actual and constructive fraud, res ipsa loquitur, and medical malpractice. Id. at ¶ 7. The patient's expert's corrected deposition testimony mentioned that Gore-Tex barriers were intended to be removed two to eight weeks after the procedure patient received. Id. at ¶¶ 8–9. The doctor and hospital moved for summary judgment, which the trial court granted, dismissing the patient's claims with prejudice. Id. at ¶ 10.

The court of appeals, in reviewing the findings and holdings of the trial court, first addressed the patient's actual fraud claim. Id. at ¶ 16. It found no evidence in the record below to support that the doctor concealed the implantation of the Gore-Tex, as it was noted in the operative note to the procedure and the post-operative record. Id. The patient had also failed to show any evidence that the doctor did not intend to remove the barrier after eight weeks, or that he falsely represented or concealed this intention.[1] Id. at ¶ 17. In fact, the doctor continued to state even in litigation that he fully intended for the Gore-Tex to remain inside the patient permanently. Id. In addition, the court did not find that there was any evidence showing that the doctor fraudulently concealed the need for a second procedure from the patient. Id. at ¶ 18.

[1] The opinion states: "[a]lthough [the patient] presented expert testimony that the Gore-Tex barrier needed to be removed after eight weeks, she did not present any evidence tending to show that it was [the doctor]'s intention to remove the Gore-Tex barrier after eight weeks, or that he falsely represented or concealed this from [the patient] with the intent to deceive her." Id. at ¶ 17 (emphasis added). This is likely a typographical error, since the patient would damage her own fraud case by showing evidence that the doctor intended to remove the barrier. The court likely meant to write that the patient did not present evidence that this was not the doctor's intention.

Next, the court addressed the patient's constructive fraud/breach of fiduciary duty claims. Id. at ¶ 19. These two claims are similar, constructive fraud being in essence a specific type of breach of fiduciary duty in which the breach is intentional and operates to the benefit of the fiduciary. Id. at ¶ 20. The court disposed of this claim because there was no evidence showing a benefit conferred on the doctor. Id. at ¶ 21–22. The mere continuation of the patient-doctor relationship was not sufficient. Id. at ¶ 22.

The court addressed res ipsa loquitur next. It held that—unlike cases in which the negligence is self-evident due to the precise malpractice that occurred—in the ordinary medical malpractice case, "the question of injury and the facts in evidence are peculiarly in the province of expert opinion." Id. at ¶ 25 (citing Bluitt v. Wake Forest Univ. Baptist Med. Ctr., 259 N.C. App. 1, 5, 814 S.E.2d 477, 480 (2018)). The court of appeals agreed with the trial court that the decision of whether and when to properly remove a Gore-Tex barrier after a surgical procedure was not something a layperson could determine without the assistance of expert testimony. Id. at ¶ 27.

The patient's medical malpractice claim centered on which of three statutes of limitations for medical malpractice applied, and specifically whether the patient's claim satisfied the "one-year-from-discovery period for foreign objects subject to a ten-year period of repose[.]" Id. at ¶ 29 (citing N.C. Gen. Stat. § 1-15(c); Black v. Littlejohn, 312 N.C. 626, 634, 325 S.E.2d 469, 475 (1985)). For this "foreign object" limitations period to apply, the Gore-Tex barrier would need to be a "foreign object" within the definition of the statute, i.e., one with "no therapeutic or diagnostic purpose or effect[.]" Id. at ¶¶ 29–30 (citing N.C. Gen. Stat. § 1-15(c)). Addressing an issue of first impression for the court of appeals, the court held that, in line with canons of statutory construction, "no therapeutic or

diagnostic purpose or effect" means that the object never served such purpose or accomplished such effect. Id. at ¶¶ 35–36. It also noted that this result comported with public policy and legislative intent. Id. at ¶ 39.

The court finally summarily disposed of the patient's claim for punitive damages, as that claim could not stand alone once all of her other claims were dismissed. Id. at ¶ 43.

The court of appeals affirmed the trial court's grant of summary judgment in favor of the doctor and hospital. Id. at ¶ 44.

III. TRIAL

A. Jury Selection

In State v. Campbell, 280 N.C. App. 83, 866 S.E.2d 325, 2021-NCCOA-563, the court of appeals considered whether a trial court judge's statements about race and religion during jury selection created reversible error in a criminal trial. Judge Stroud authored the majority's opinion.

A man was indicted for several traffic-related offenses and attaining habitual felon status. Id. at ¶ 2. During jury selection for the man's criminal trial, the prosecutor asked the panel of potential jurors whether any held strong personal beliefs, potentially based in religion, ethics, or morals, that would render them unable deliver a verdict based on the evidence presented. Id. One juror raised his hand and stated that his religious beliefs would preclude him from determining whether the state had met its burden of proof. Id. The prosecutor moved to challenge the juror for cause. Id.

The judge asked the juror his religion. Id. at ¶ 3. The man stated he was "Non-denominational. A Baptist." Id. The juror then affirmed that he would not be able to decide whether the man was guilty or not guilty. Id. The judge then stated:

> [W]e're going to excuse him for cause, but let me just say this, and especially to African -Americans: Everyday we are in the newspaper stating we don't get fairness in the judicial system. Every single day. But none of us—most African-Americans do not want to serve on a jury. And 90 percent of the time, it's an African-American defendant. So we walk off these juries and we leave open the opportunity for—for juries to exist with no African-American sitting on them, to give an African-American defendant a fair trial. So we cannot keep complaining if we're going to be part of the problem. Now I grew up Baptist, too. And there's nothing about a Baptist background that says we can't listen to the evidence and decide whether this gentleman, sitting over at this table, was treated the way he was supposed to be treated and was given––was charged the way he was supposed to be charged. But if your—your non-denomina[tional] Baptist tells you [that] you can't do that, you are now excused.

Id.

The jury was impaneled, the trial proceeded, and the man was found guilty of some of the traffic charges, pleaded guilty to attaining habitual sentence status, and was sentenced to more than seven years imprisonment. Id. at ¶¶ 3–4. The man appealed. Id. at ¶ 4.

The man argued that he "was denied a fair trial in an atmosphere of judicial calm before an impartial judge and a jury with free will in violation of his rights" because his due-process rights were violated, the judge intimated the jurors, and the judge "gratuitously interjected" race into the trial. Id. at ¶ 5. The court of appeals agreed, ordering a new trial. Id. at ¶ 5.

As a threshold consideration, the court noted that the man had not objected to the judge's statements during jury selection. Id. at ¶ 6. The man argued his appeal was

preserved as a matter of law under section 15-1222 of the North Carolina General Statutes, which prohibits a trial judge from expressing opinion in the presence of the jury on facts to be decided by the jury. Id. Alternatively, the man asked the court of appeals to invoke Rule 2 of the North Carolina Rules of Appellate Procedure and review the appeal despite the lack of objection. Id. The court held that the trial judge's opinions on race and religion did not go to "fact[s] to be decided by the jury," leaving Rule 2 as the only viable vehicle for review. Id. at ¶ 7. The court held that the case presented the "exceptional circumstances" required to invoke Rule 2 and reviewed the merits of the man's arguments in the court's discretion. Id.

The court then considered whether the judge's statements to the jury on race and religion entitled the man to a new trial. Id. at ¶ 8. The state, as opposing party, conceded that the statements constituted structural error and the man was entitled to a new trial. Id. "Structural error is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." State v. Garcia, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004). The court observed that a biased trial judge creates a structural error entitling a defendant to a new trial because every person "has a right to a trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm." Campbell, 2021-NCCOA-563 at ¶ 8 (citing State v. Cousin, 181 N.C. 461, 462, 233 S.E.2d 554, 556 (1997)).

The court of appeals noted that the trial court judge's comments appeared based in a desire to encourage juror participation, particularly amongst African-Americans, to ensure that the man, who was also African-American, would have a representative jury and fair

trial. Id. at ¶ 9. Even so, the "probable effect or influence upon the jury, and not the motive of the judge" determines whether a defendant's right have been impaired. Id. (quoting State v. Bryant, 189 N.C. 112, 114, 126 S.E. 107, 108 (1925)). The court of appeals restated the supreme court's caution that "jurors must be engaged with the greatest of care and that the judge must be careful not to make any statement or suggestion likely to influence the decision of the jurors." Id. (quoting State v. Carriker, 287 N.C. 530, 533–34, 215 S.E.2d 134, 137–38 (1975)).

"Further, courts have cautioned that irrelevant references to religion, race, and other immutable characteristics can impede a defendant's right to equal protection and due process." Id. at ¶ 10. The court of appeals held that the trial judge's statements to the dismissed juror "negatively influenced" the other jurors because the panel as a whole may be reluctant to truthfully and openly respond to jury selection questions. Id. The court noted this silencing effect may be particularly heightened for African-American jurors and those with religious concerns, based on the judge's statement. Id. Accordingly, the court ordered a new trial for the man. Id. at ¶ 11.

Judge Dillon dissented to the court's invocation of Rule 2 to reach the merits and the majority's holding that the judge's statements amounted to a structural error requiring a new trial for the man. Id. at ¶ 13 (Dillon, J., dissenting). Judge Dillon agreed with the majority that the trial judge's "word choice was inappropriate," but identified a "low likelihood that the trial judge's comments caused prejudice" to the man. Id.

According to the dissent, constitutional errors are generally subject to harmless error analysis; however, structural errors "are reversible per se." Id. at ¶ 15. The man argued that a structural error was present because the trial court judge was biased. Id. at ¶ 16. However,

according to the dissent, the Supreme Court of the United States has held bias is present when a judge "has a direct, personal, substantial, pecuniary interest in reaching a conclusion against [the defendant] in his case." Id. (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)). As the man offered no argument that the trial court judge held any personal interest in the outcome of the case, the judge's statement would at most amount to constitutional error affecting the impartiality of the jury, according to the dissent. Id. at ¶¶ 17–18. As this type of constitutional error would not amount to structural error, "there must be analysis concerning prejudice caused by the comments." Id. at ¶ 18. According to the dissent, as the majority failed to conduct prejudicial analysis, its holding fell short of the analytical requirements identified in North Carolina jurisprudence. Id. (citing State v. Crump, 376 N.C. 375, 392, 851 S.E.2d 904, 917–18 (2020)).

Further, the dissent argued the man waived his right to assert that the trial court judge's statement constituted structural or constitutional error. Id. at ¶ 19. The man had opportunity to object to the judge's comments at the time they were made and request a new jury pool but failed to do so. Id. The man did not show that the trial court judge demonstrated or expressed any bias toward the man or that any juror was biased by the judge's statements. Id.

The dissent offered that "[t]hough the trial judge may have had good intentions . . . she did cross the line in her word choice during voir dire." Id. at ¶ 28. Even so, the trial court judge's statements did not amount to structural error, no objection was made, and the man did not show the judge's comments were "egregiously prejudicial against [the man]" to warrant invocation of Rule 2. Id. Therefore, the dissent argued the court should not have

reviewed the appeal on the merits, and that once it did so, the majority failed to apply the correct analytical framework. Id.

(1) Batson Challenge

In State v. Clegg, 380 N.C. 127, 867 S.E.2d 885, 2022-NCSC-11, the supreme court considered whether a prosecutor's exclusion of two African-American prospective jurors violated an African-American criminal defendant's constitutional right to equal protection of the laws.

The defendant, an African-American man, was charged with robbery with a dangerous weapon and possession of a firearm by a felon. Id. at ¶ 2. During jury selection, the prosecutor used his peremptory strikes to remove two African-American women from the jury. Id. The defendant, through his counsel, challenged these two peremptory strikes under Batson v. Kentucky, 476 U.S. 79 (1986), which prohibits racial discrimination in jury selection. Clegg, 2022-NCSC-11, at ¶¶ 1–2. In response to the defendant's Batson challenge, the prosecutor asserted that he excluded both prospective jurors "based on their body language[ ] and . . . their failure to look at me when I was trying to communicate with them." Id. at ¶ 2. The prosecutor further asserted that he excluded one of the prospective jurors because of her potential bias toward the defendant and the other one because she answered "I suppose" in response to a question about whether she could be fair and impartial. Id. The defendant argued that the prosecutor's stated reasons for the peremptory strikes were pretextual. Id. The trial court overruled the defendant's Batson challenge, concluding that he had failed to establish that race was a significant factor in the peremptory strikes. Id. The jury found the defendant guilty of robbery with a dangerous weapon, and he was sentenced to imprisonment. Id. at ¶ 3.

The defendant appealed his conviction to the court of appeals, which held that the trial court did not err in overruling the defendant's Batson challenge. Id. at ¶¶ 3–8. The defendant then appealed the decision of the court of appeals to the supreme court. Id. at ¶ 9. The supreme court issued a special order, remanding the case to the trial court for "reconsideration of defendant's Batson challenge based upon the existing record and the entry of a new order addressing the merits of defendant's Batson challenge in light of the United States Supreme Court decision in Foster v. Chatman, [578] U.S. [488], 136 S. Ct. 1737, 195 L.Ed.2d 1 (2016)," a case that that was decided after the trial court's ruling. Clegg, 2022-NCSC-11, at ¶ 10. The supreme court also retained jurisdiction to "undertake any necessary additional proceedings." Id.

On remand, the trial court held a new hearing on the defendant's Batson challenge. Id. at ¶ 11. The trial court ultimately concluded that it could not find, based on the record before it, that the prosecutor had engaged in "purposeful discrimination" and therefore overruled the defendant's Batson challenge again. Id. at ¶¶ 30–33. The defendant appealed the trial court's ruling to the supreme court. Id. at ¶ 34.

Based on the three-part test set out in Batson and the applicable clearly erroneous standard of review, the supreme court reversed the trial court's ruling on the defendant's Batson challenge with Justice Hudson writing the majority opinion.

At step one of the Batson test, "a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race[.]" Id. at ¶ 51 (citation omitted). This showing is not "a high hurdle for defendants to cross." Id. (citation omitted). Moreover, the first step becomes moot if a prosecutor moves to the second step by offering a race-neutral explanation for a peremptory strike and the trial court issues a ruling on the

explanation. Id. at ¶ 52. That is what happened here. The prosecutor did not argue that the defendant had failed to make a prima facie showing of discrimination; instead, he offered race-neutral explanations for his peremptory strikes, thus rendering step one moot. Id. at ¶¶ 53–54. For this reason, the supreme court determined that it did not need to analyze whether the defendant had met his initial burden. Id. at ¶ 54.

At step two of the Batson test, "the burden shifts to the state to offer a facially valid, race-neutral rationale for its peremptory challenge." Id. at ¶ 55 (citation omitted). As the supreme court explained, the state need not offer "an explanation that is persuasive, or even plausible." Id. (citation omitted). During the second Batson hearing, "the prosecutor offered slightly different reasons for his peremptory strikes." Id. at ¶ 57. This time, the prosecutor asserted that he excluded one, not both, of the prospective jurors for body language and lack of eye contact. Id. As for the "I suppose" response that one of the prospective jurors had given, the prosecutor acknowledged that the juror had given this response to a question about her confidence in her ability to focus on the trial, not in response to a question about being fair and impartial, as the prosecutor had asserted when his peremptory strikes were first challenged. Id. at ¶¶ 58–59. Nevertheless, the prosecutor argued that this prospective juror's exclusion was appropriate because her "I suppose" response, her short and equivocal answers to follow-up questions on the issue, and her body language and lack of eye contact together created a concern about whether she could remain engaged throughout the trial. Id. at ¶ 58.

The trial court accepted the prosecutor's stated race-neutral reasons for the peremptory strikes (concern of bias, body language and lack of eye contact, and concern of lack of focus), even though they were slightly different from those that he had asserted

during the first hearing, finding that the state had met its burden under step two of the Batson test. Id. at ¶¶ 60–62. The supreme court held that the trial court did not err in reaching this finding. Id. at ¶ 62. However, the supreme court was "clear" that the analysis at step two "is limited only to whether the prosecutor offered reasons that are race-neutral, not whether those reasons withstand any further scrutiny; that scrutiny is reserved for step three." Id.

At step three of the Batson test, the trial court must "determine if the defendant has established purposeful discrimination." Id. at ¶ 63. To make this determination, the trial court "carefully weighs all of the reasoning from both sides to ultimately 'decid[e] whether it was more likely than not that the [peremptory] challenge was improperly motivated.' " Id. (citation omitted). The supreme court held that the trial court erred in its step three analysis and conclusion regarding the prospective juror who was excluded on the stated grounds of body language and lack of eye contact and concern about lack of focus. Id. at ¶¶ 64, 74.

For this prospective juror, the trial court found that "both race-neutral justifications offered by the prosecutor fail[ed]." Id. at ¶ 83. Specifically, the trial court determined that the lack of focus reason failed because the "prosecutor mis-remembered the question to which [the juror] responded 'I suppose'" and that the body language and lack of eye contact reason failed because the trial court had not made "sufficient findings of fact to establish a record of [the juror's] body language." Id. at ¶ 67. According to the supreme court, after reaching this conclusion, the trial court should have ruled that the defendant had established a Batson violation because, at that point, "the only valid reasoning remaining for the court to consider was evidence presented by defendant tending to show that the peremptory

challenge of [that prospective juror] was motivated in substantial part by discriminatory intent." Id. at ¶¶ 83–84.

The trial court also erred by holding the "defendant to an improperly high burden of proof." Id. at ¶ 85. The supreme court reasoned that the trial court failed to properly apply the defendant's burden by looking for "smoking-gun evidence of racial discrimination similar to what has been present in previous U.S. Supreme Court cases that have found Batson violations." Id. at ¶ 86. The supreme court explained that there was no need for such smoking-gun evidence here because the direct and circumstantial evidence presented by the defendant—including statistical evidence about the disproportionate use of peremptory strikes against African-American prospective jurors and evidence of disparate questioning and acceptance of comparable white and African-American prospective jurors—sufficiently supported the defendant's Batson challenge. Id. at ¶¶ 81, 84, 86–87.

The supreme court further concluded that the trial court erred by considering certain reasoning about the prospective juror's ability to focus on the trial that was not presented by the prosecutor. Id. at ¶¶ 88–89. As the supreme court explained, "[i]f the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false." Id. at ¶ 88 (citation omitted). Lastly, the supreme court determined that the trial court failed to "adequately consider the disparate questioning and disparate acceptance of comparable white and Black prospective jurors." Id. at ¶ 90. Although disparate questioning alone does not give rise to a Batson violation, when viewed with other evidence, it can "inform the trial court's evaluation of whether discrimination occurred." Id. at ¶ 94 (citation omitted).

Accordingly, the supreme court held that a Batson violation occurred when one of the prospective jurors was excluded, which rendered the trial court's contrary ruling clearly erroneous. Id. at ¶¶ 95–96. In light of this holding, the supreme court determined that it did not need to consider whether the trial court's ruling as to the other prospective juror was also clearly erroneous because "[t]he Constitution forbids striking even a single prospective juror for a discriminatory purpose." Id. at ¶ 64 (citation omitted).

The supreme court next addressed the proper remedy for the Batson violation. The supreme court explained that although a new trial would ordinarily be the remedy for a Batson violation, another trial was not appropriate here because the defendant had already served his entire sentence of active imprisonment and had been discharged from all post-release supervision. Id. at ¶¶ 96–97.

For these reasons, the supreme court vacated the defendant's conviction and remanded the case to the trial court.

Justice Earls wrote a concurring opinion. Justice Earls agreed with the majority's conclusion that there was a Batson violation as to one of the prospective jurors and that the proper remedy for the violation was to vacate the defendant's conviction. Id. at ¶ 101. However, Justice Earls would have also held that there was a Batson violation as to the other prospective juror. Id. at ¶ 102. Noting that this was the first time the supreme court had vacated a conviction based on a Batson challenge, Justice Earls also urged the supreme court to use the "variety of tools at [its] disposal" because there was an "urgent" need to do so. Id. at ¶¶ 114, 116. In her view, "the Batson framework makes it very difficult for litigants to prove intentional discrimination." Id. at ¶ 113.

Justice Berger wrote a dissenting opinion with Chief Justice Newby and Justice Barringer joining. Justice Berger would have affirmed the trial court's ruling. Id. at ¶ 121. According to Justice Berger, the prosecutor's explanation for excluding the prospective juror in question was a mistake acknowledged by both the trial court and the majority. Id. at ¶¶ 119–20. In Justice Berger's view, "[t]he mistaken explanation provided by the prosecutor cannot, by definition, be purposeful discrimination." Id. at ¶ 120. In addition, Justice Berger believed that the majority did not give the trial court's findings the deference to which those findings were entitled on appellate review. Id. at ¶¶ 129, 147.

In State v. Bennett, ___ N.C. App. ___, 871 S.E.2d 831, 2022-NCCOA-212, the court of appeals considered the question of whether the trial court had clearly erred in (1) its acceptance of the prosecutor's race-neutral explanations for striking two black jurors, and (2) its determination that defendant had not met his burden of proving purposeful discrimination.

The defendant had been charged with possession of a precursor chemical with intent to manufacture methamphetamine, two counts of trafficking methamphetamine, and one count of possessing a firearm by a felon. Id. at ¶ 2. The defendant made Batson objections after the prosecutor struck black potential jurors R.S. and V.B., in succession, but not a third juror who was not black. Id. at ¶ 3.

Potential juror R.S. told the prosecutor during selection that he had been the victim of a breaking and entering though he thought the police handled it in a satisfactory manner, and that he recognized another potential juror from around town though that would not affect his ability to be impartial. Id. The prosecutor used a peremptory challenge to strike R.S. from the jury. Id. Potential juror V.B. told the court that she had never been the victim

of a crime, a defendant or witness in any case, that neither she nor any close relative or friend had a negative experience with police, and she reiterated several times that nothing was preventing her from being impartial in the case if she were selected. Id. at ¶ 4. The prosecutor used another peremptory challenge to strike V.B. from the jury. Id.

Potential juror R.C., who was not black, told the prosecutor essentially the same thing that V.B. did. Id. at ¶ 5. She also said that she had work obligations and needed to take her daughter-in-law to a doctor's appointment but conceded that these were not serious problems. Id.

The defendant challenged the strikes of R.S. and V.B. under Batson, arguing that there was no reason for them to be stricken other than their race. Id. at ¶ 6. The trial court, noting that the prosecutor had accepted three black jurors already, denied the motion. Id. This denial was appealed to the court of appeals (which affirmed) and then to the supreme court (which reversed the denial). Id. at ¶¶ 7–8. The supreme court rejected the argument that the acceptance of some black jurors necessarily negated a prima facie showing of discrimination. Id. at ¶ 8. The supreme court remanded with instructions to proceed through the remaining two steps of the Batson analysis. Id. at ¶ 9. On remand, the prosecutor explained that R.S. had withheld information that he had been previously convicted, despite the jury as a whole being asked twice to disclose any prior convictions. Id. at ¶ 10. The prosecutor further explained that V.B. had given inconsistent and unclear answers regarding his question whether she would be comfortable passing judgment on a crime she did not witness, and further noted that V.B.'s business was part of a drug investigation. Id. at ¶ 11.

After these explanations, the defendant argued that the explanations were pretextual under the third step of Batson. Id. at ¶ 14. He argued that R.S.'s undisclosed conviction

and V.B.'s business's involvement in the drug investigation were pretext because the prosecutor never directly asked them about these issues (the prosecutor responded that he did not want to embarrass them). Id. at ¶¶ 15–16. The prosecutor further explained that while a non-black juror had a similarly inconsistent/unclear answer on a different question, that question was not as central to the case as the one on which V.B. had stumbled. Id. at ¶ 17. The defendant also argued that the trial court should consider the susceptibility of racial bias in the case as the defendant was black and charged with a drug offense – to which the prosecutor responded that there were no victims here, so cross-racial crime could not bias the jury. Id. at ¶ 18. Finally, the defendant argued based on statistical studies that peremptory challenges had been used in racially biased ways in Sampson County overall; the prosecutor challenged the methodology of the studies and disputed that it was fair to impute these findings to him even if they were valid. Id. at ¶ 19. The trial court overruled the defendant's Batson objections for both prospective jurors. Id. at ¶ 21. It held that under the second step of the Batson analysis, the prosecutor had met his burden to provide race-neutral reasons for using peremptory challenges. Id. Under the third step of the analysis, it found that the totality of the circumstances indicated the prosecutor's proffered reasons were the actual reasons for the challenges. Id. at ¶ 22. The trial court again credited the prosecutor's acceptance of other black jurors in discounting the allegation of biased selection. Id. at ¶ 23. The defendant appealed directly to the supreme court, which remanded to the court of appeals to resolve the remaining Batson questions under the trial court's order. Id. at ¶ 24.

The court first set forth the three-step Batson analysis:

> First, the party raising the claim must make a prima facie showing of intentional discrimination under the totality of the

> relevant facts in the case. Second, if a prima facie case is established, the burden shifts to the State to present a race-neutral explanation for the challenge. Finally, the trial court must then determine whether the defendant has met the burden of proving purposeful discrimination.

Id. at ¶ 25. It noted that the supreme court had already found that the defendant met the first step, and that it would therefore review the trial court's decisions as to steps two and three. Id. at ¶ 26. A trial court's ruling under a Batson analysis is subject to clear error review, requiring the reviewing court to have a "definite and firm conviction that a mistake has been committed" before it may properly reverse the decision below. Id. at ¶¶ 27–28.

Under Batson step two, the court first addressed the State's argument that the defendant had not preserved the step two challenge. Id. at ¶¶ 29–30. The court held that on its review of the trial transcript, the defendant began to challenge a lack of evidence under step two, but the court cut his attorney off before he could finish his sentence – therefore, the argument was preserved. Id. at ¶ 32. The court also rejected the State's argument that by challenging the race-neutral explanation as more properly a for-cause strike, the defendant contradicted himself on appeal by accepting that the State offered a race-neutral explanation. Id. at ¶¶ 33–34.

The court explained that the requirements of the second step of Batson are less stringent than what is necessary to exercise a "for cause" strike of a juror. Id. at ¶ 35. However, the prosecutor must go beyond a simple denial of discriminatory motive or averment of his own good faith. Id. at ¶ 36. Further, this offered explanation need not be "persuasive, or even plausible." Id. The Supreme Court of the United States had even held that Batson step two is satisfied where "the State produces only a frivolous or utterly nonsensical justification for its strike." Id. at ¶ 38 (citing Johnson v. California, 545 U.S.

162, 171, 125 S. Ct. 2410, 2417, 162 L.Ed.2d 129 (2005)). Scrutiny of the explanation provided is step three; step two merely requires provision of that explanation. Id. In this light, the court of appeals affirmed the trial court's ruling on step two. Id. at ¶ 39. The Supreme Court had previously held that it was error to combine steps two and three, focusing on not just the existence of a race-neutral reason but its persuasiveness as a threshold inquiry. Id. at ¶ 43.

Turning to step three, the court explained that this step was the appropriate place to inquire as to the persuasiveness of a prosecutor's race-neutral explanation. Id. at ¶ 44. The court must consider that explanation "in light of all of the relevant facts and circumstances, and in light of the arguments of the parties." Id. at ¶ 45 (quoting State v. Hobbs, 374 N.C. 345, 352, 841 S.E.2d 492, 499 (2020)). The court may properly consider statistical evidence of a prosecutor's use of peremptory strikes; evidence of disparate questioning and investigation; side-by-side comparisons of black prospective jurors who were struck and white prospective jurors who were not; misrepresentation of the record when defending strikes during a Batson hearing; relevant history of the State's strikes in past cases; and other circumstances. Id. at ¶ 46. However, the court ruled that the prosecutor did not need to turn over the results of his office's investigation into the criminal histories of each potential juror – the Batson analysis is heavily influenced by the court's evaluation of the prosecutor's credibility, and its decision not to ask for those results to be produced simply demonstrated that it found the prosecutor's statements credible. Id. at ¶ 50–51. It further highlighted that the defendant was given the opportunity to recess and conduct his own investigation, but that he declined. Id. at ¶ 51. The same considerations counseled that the trial court was correct to deny his objection as to the striking of V.B. for the drug investigation

consideration. Id. at ¶ 52. While the court agreed that disparate investigation on voir dire with a potential juror on a subject later used to justify a strike could be pretextual, it was not necessarily so. Id. at ¶ 56. Here, the prosecutor gave a sufficient explanation of why he did not broach these issues – he did not want to embarrass the potential jurors. Id. at ¶ 57. This embarrassment could be avoided by separate voir dire, but this would be time-consuming, and the trial court did not err in not requiring that to be conducted. Id. at ¶ 57.

The court also addressed the defendant's proffered comparative juror analysis between the two black jurors who were stricken and others in the venire and on the jury. Id. at ¶ 60. It rejected the argument that because the supreme court had already determined that there was no significant dissimilarity between the answers given by another juror and V.B., as the court examined that dissimilarity only in the context of step one, at a much lower burden. Id. at ¶ 63. It held that the prosecutor gave sufficient explanation for his strike, and that it was not simply based on the demeanor of the black prospective juror. Id. at ¶¶ 65–69.

The court explained that under the third step, North Carolina courts consider the susceptibility of the particular case to racial discrimination, and that they focus on whether the racial makeup of key figures such as the defendant(s), victim(s), attorneys, and witnesses "crosses racial lines[.]" Id. at ¶ 72. The court expressly disclaimed that the susceptibility analysis should include broader considerations of systemic racism in the justice system as a whole or in certain types of cases. Id. at ¶ 73–75. In this case, the defendant was black, there were no victims, and none of the witnesses' races had been identified. Id. at ¶ 74. On that basis, the trial court did not err in holding that the case was not susceptible to racial discrimination. Id. at ¶ 75.

Addressing the defendant's argument that the trial court erred in disregarding the history of discriminatory strikes by the State, the court agreed with three of the four challenges to the trial court's reasoning. Id. at ¶ 77. The trial court had discounted the studies that showed a history of biased usage of peremptory challenges on the basis that law students performed the work, but the court of appeals could find no clear reason that this would make a study unreliable – indeed, in his concurrence in a seminal Batson case, Justice Breyer favorably cited a study where law students provided research assistance. Id. (citing Miller-El v. Dretke (Miller-El II), 545 U.S. 231, 268, 125 S. Ct. 2317, 2341, 162 L.Ed.2d 196 (2005) (Breyer, J., Concurring)). Further, the court of appeals disagreed with the trial court's assertion that the lack of prosecutorial opinions made the conclusions of little value. Id. at ¶ 78. It also disagreed with the trial court's assertion that the study being based on a cold record is a methodological weakness, pointing out that this is how all Batson precedents (and indeed all appellate case law ever made in this country) have proceeded. Id. at ¶ 79. Finally, while it agreed with the defendant's fourth challenge—that the trial court improperly discounted the studies because they did not include the specific prosecutor involved in the case—the court also outlined that the office's policies had changed since the years of the study and that these changes were not examined in the studies. Id. at ¶ 83. Nevertheless, the court of appeals found the other factors already examined in its analysis to be more persuasive than the exclusion of the study and held that the trial court did not err in holding that the defendant failed to meet his burden under Batson step three. Id.

Defendant's final argument was that the trial court gave improper weight to the fact that black jurors were ultimately accepted by the State. Id. at ¶ 84. The court of appeals disagreed, explaining that the defendant's authorities on this point were cases in which the

last-minute acceptance of one black juror after dismissing several did not sanitize discriminatory behavior. Id. at ¶¶ 84–88. Here, five of the twelve jurors empaneled were black, which was greater than proportional representation compared to the demographics of Sampson County. Id. at ¶ 88.

In light of this analysis, the court of appeals affirmed the trial court's denial of the defendant's Batson objections.

B. Evidence

(1) Lay Witness

In companion cases Clark v. Clark, ___ N.C. App. ___, 867 S.E.2d 743, 2021-NCCOA-652, and Clark v. Clark, ___ N.C. App. ___, 867 S.E.2d 704, 2021-NCCOA-653, the court of appeals considered whether a trial court erred in admitting expert witness testimony. (Note: The opinion regarding the husband's appeal is available at 2021-NCCOA-652. The opinion regarding the paramour's appeal is available at 2021-NCCOA-653. As both appeals arise from the same facts, and both opinions are largely identical, this summary cites to the husband's appeal, 2021-NCCOA-652, unless otherwise noted.)

A couple married in 2010. Clark, 2021-NCCOA-652 at ¶ 2. Despite a rocky start to their relationship, the couple attended marriage retreats and eventually had two children. Id. at ¶¶ 2–3. In 2016, the husband, an Army officer, met another Army officer-, who stayed in the same barracks and attended the same training. Id. at ¶ 4. The two began a relationship. Id. at ¶¶ 4–5. After learning about the relationship, the wife threatened to call the paramour, leading to a fight between the couple, and the husband left their marital home in September 2016. Id. at ¶ 10.

Despite the husband's departure, he and the wife maintained an "emotionally and sexually intimate relationship." Id. at ¶ 11. Throughout June and July 2017, the husband and wife continued a sexual relationship "and recorded themselves doing so." Id. at ¶ 12.

Also in July 2017, the husband and the paramour conceived a child together via in vitro fertilization. Id. In August 2017, the husband traveled to Boston for training. Id. When the husband ceased responding to the wife's messages, she "sent him a topless photo," which she claimed she did not send to anyone else. Id. The husband and wife ended their sexual relationship in September 2017. Id. at ¶ 13. A month later, the wife sent "a picture of female genitalia" to the husband in a text message. Id. The same month, she also discovered that the paramour was pregnant with the husband's child. Id.

In January 2018, the wife discovered an online advertisement she believed was about her:

> Liz is super hot! Shows you what plastic surgeons and eating disorders can do for you in 2018. There's a reason she's been divorced twice and can't take care of her kids. She's a plaything, nothing more. Hope you fellas are wearing condoms, she's got herpes.

Id. at ¶ 14. The wife responded to the ad and observed the associated username was linked to the husband's personal email address. Id. at ¶ 15.

In March 2018, the wife began communicating on a social media platform with someone she believed was the husband. Id. ¶ 16. The individual sent the wife the same topless photograph the wife had sent to the husband, claiming the photograph was "all over the place." Id. In May 2018, the wife discovered a social media "weight loss" advertisement featuring a post-pregnancy photograph of her and the same topless photograph. Id. at ¶ 17.

Throughout 2018, the wife's friends and associates contacted her regarding postings on social media platforms and chatrooms soliciting "no strings attached sex." Id. at ¶ 18. Business records from the social media platform indicated the postings could be traced to an IP address matching a residence shared by the husband and paramour. Id.

When the wife messaged the individual on the platform, the individual replied, "We are going to do continue doing everything in our power to make your life miserable." Id. at ¶ 19.

In August 2018, the wife filed claims against the husband and/or the paramour for, among other things, intentional infliction of emotional distress and alienation of affection. Id. at ¶ 20.

The trial court barred the wife from use of expert witness testimony, due to a late filing, but allowed the witness, a digital forensics examiner, to testify as a lay witness. Id. at ¶¶ 21–22. At trial, the witness laid the foundation for entry of a flash drive and "demonstrated that [the wife] had only sent the 'topless photo' of herself to [the husband]." Id. at ¶ 22. After a jury trial, the trial court entered judgment on all claims against the husband, id. at ¶ 23, and some of the claims against the paramour, Clark, 2021-NCCOA-653 at ¶ 22. After the denial of post-trial motions by the husband and paramour, both appealed. Id. at ¶ 23; Clark, 2021-NCCOA-652 at ¶ 23.

The court of appeals considered whether the trial court erred by admitting evidence and testimony from the digital forensic witness, even though he was not qualified as an expert witness. Clark, 2021-NCCOA-652 at ¶ 25. Finding no error, the court of appeals affirmed. Clark, 2021-NCCOA-652 at ¶ 67; Clark, 2021-NCCOA-653 at ¶ 74. The court

reviewed the issue of whether the digital forensic witness testified as an expert de novo but reviewed whether the trial court erroneously admitted his testimony for an abuse of discretion. Id. at ¶ 27. The court observed that the witness testified about the general process for making a forensic or digital copy of an electronic device, and specifically how he made a copy of the wife's devices. Id. at ¶ 29. The witness then laid the foundation for a flash drive containing the wife's files and demonstrated that the wife did not send the topless photograph to anyone other than the husband. Id. Based on review of the testimony, the court of appeals held the forensics witness testified as a lay witness, not an expert. Id. "[The digital forensics witness] testified as to what he 'saw or experienced' in creating copies of [the wife's] devices . . . [h]e did not interpret or assess the devices or accounts but explained the process he used for [the wife's] devices was one that he did daily." Id.

The court of appeals further noted that even presuming arguendo the digital forensics witness had testified as an expert, the husband and paramour failed to demonstrate prejudice. Clark, 2021-NCCOA-652 at ¶ 30. The wife herself testified about the text messages, emails, and social media postings. Id. Therefore, the digital forensics witness's testimony was not "pivotal in determining whether [the husband and paramour] posted the wife's pictures," but merely corroborated the wife's own testimony. Id. Accordingly, the court of appeals found no error in the trial court's decision to allow the digital forensics witness to testify. Id.

(2) Hearsay

In State v. Thomas, ___ N.C. App. ___, 867 S.E.2d 377, 2021-NCCOA-700, the court of appeals considered whether a witness's statements to the police, made during an audio-recorded interview and in an email that a third party transcribed for her, were

admissible at a criminal trial under the hearsay exceptions for past recorded recollections and former testimony.

A man was accused of murder. Id. at ¶ 1. At trial, the state sought to introduce two statements that the witness had previously made to a police investigator. Id. at ¶¶ 5–6, 10. The witness made the first statement during an interview by the investigator that the investigator recorded on a digital recorder. Id. at ¶ 5. She made the second statement in an email to the investigator that a family member of the witness transcribed for her. Id. at ¶ 6. The state argued that the statements were admissible under Rule 803(5) of the Rules of Evidence, as a past recorded recollection, and under Rule 804(b)(1), as former testimony. Id. at ¶ 10. Over the man's objections, the trial court admitted into evidence the two statements. Id. The man was convicted, and he appealed the trial court's ruling on the witness's statements, among other things, to the court of appeals. Id. at ¶¶ 13–14.

The court of appeals affirmed, holding that the trial court did not err in admitting into evidence the witness's statements.

As it did at trial, the state argued on appeal that the witness's statements were admissible under both Rule 803(5) and Rule 804(b)(1). Id. at ¶ 15. "Rule 804(b)(1) only reaches '[t]estimony given as a witness at another hearing of the same or a different proceeding.'" Id. (quoting N.C. Gen. Stat. § 8C-1, Rule 804(b)(1)). The witness's statements were admitted at a prior trial of the man. Id. at ¶¶ 10 n.1, 15. However, the state did not introduce the prior trial testimony reflecting those statements; instead, the state only introduced and read into the record the witness's actual statements. Id. at ¶ 15. As a result, Rule 804(b)(1) did not apply in this case. Id. Furthermore, the trial court admitted the

statements into evidence under Rule 803(5), not Rule 804(b)(1), so the court of appeals limited its analysis to Rule 803(5). Id. at ¶ 16.

"Rule 803(5) provides that a type of out-of-court statement labeled 'recorded recollection' is admissible as an exception to the general rule against hearsay." Id. at ¶ 18 (quoting N.C. Gen. Stat. § 8C-1, Rule 803(5)). Rule 803(5) has been construed broadly to include audio recordings. Id. Rule 803(5) has three requirements. Id. at ¶ 19. In this case, only the third requirement, whether the witness's statements reflected her knowledge correctly, was at issue. Id. at ¶ 20.

The court of appeals first observed that the witness's statements "involve[d] a set of facts in the middle of the spectrum" because the witness did not testify that the statements reflected her knowledge correctly, but she also did not disavow the statements. Id. at ¶ 23. Nevertheless, the court of appeals determined that both statements were admissible under Rule 803(5).

As for the audio-recorded statement, the witness testified at trial that she knew it was her voice in the recording, even though she did not know she was being recorded at the time. Id. She also testified that she was telling the police investigator in the recording what she "had been through" and was "laying it all out." Id. Based on this testimony, the court of appeals concluded that the audio-recorded statement reflected the witness's knowledge correctly, despite the witness's other testimony that she was "just ranting" in the recording, which the court characterized as an indication of the witness's emotional state, not the truthfulness of her statement. Id.

The email statement was also properly admitted into evidence. That the witness had dictated the statement to a family friend did not make the statement inadmissible, since the court of appeals has previously allowed statements written by others to be admitted into evidence when the declarant had a chance to review the statement. Id. at ¶ 24. Although the witness did not testify that she reviewed the email statement, she did sign and date it when she hand-delivered it to the police investigator and confirmed that it was her writing. Id. This sufficiently supported a finding that the statement reflected the witness's knowledge correctly, though it was "a close call." Id.

For these reasons, the court of appeals held that the trial court did not err in its ruling on the admissibility of the witness's two statements.

In State v. Reid, ___ N.C. ___, 869 S.E.2d 274, 2022-NCSC-29, the supreme court considered whether hearsay evidence may be considered competent evidence for a Motion for Appropriate Relief ("MAR") following a criminal trial.

A criminal defendant was found guilty of first-degree murder and common law robbery, and subsequently filed a series of post-conviction motions. Id. at ¶ 7. One of those was a motion for appropriate relief on the grounds of newly discovered evidence, based upon a witness's affidavit. Id. at ¶¶ 9–10. The affidavit provided that an individual other than the defendant had admitted to committing the crime in a conversation with the affiant/witness. Id. at ¶ 9. Later, at a hearing on the motion for appropriate relief, the affiant/witness testified to hearing this individual's admission. Id. at ¶ 12. Though both statements were hearsay, the trial court found that the State was on notice that the criminal defendant would offer such evidence at trial, and admitted them under the residual exception to hearsay, Rule 803(24) of the North Carolina Rules of Evidence. Id. at ¶¶ 12, 42. Based

on this evidence, the trial court vacated the murder conviction and ordered a new trial. Id. at 12.

The court of appeals reversed the trial court, holding the trial court abused its discretion in granting a new trial. Id. at ¶ 14. The court of appeals reasoned that because the criminal defendant failed to provide written notice of an intent to offer hearsay evidence pursuant to Rule 803(24), the hearsay evidence was inadmissible and therefore not competent. Id.

In a wide-ranging opinion, the supreme court reversed the court of appeals, holding the trial court did not abuse its discretion. Id. at ¶ 50. Justice Earls wrote for the majority. On the issue of the competency of hearsay evidence, the supreme court identified two flaws in the reasoning offered by the court of appeals. Id. at ¶¶ 42–43

First, the supreme court held that if the court of appeals was correct in its analysis that admissibility of the hearsay evidence was dispositive of the competency of that evidence, then the issue of Rule 803(24) notice was not properly preserved for appellate review. Id. at ¶ 42. The supreme court observed that the record reflected no objection had been made to the evidence at the time it was offered. Id. "Evidence that is admitted without objection is competent evidence." Id. Therefore, the court concluded that because no objection was made, the hearsay evidence would be competent evidence if admissibility were the appropriate standard. Id.

Second, the supreme court held that the court of appeals applied the incorrect standard to determining whether the hearsay evidence was competent. Id. at ¶ 43. The

correct standard for a MAR hearing is whether the evidence is "material, competent, and relevant in a future trial," and not in the hearing itself. Id.

To determine whether the evidence was competent, the supreme court then enunciated a six-factor test for the admissibility of evidence under Rule 803(24):

> (1) whether proper notice has been given, (2) whether the hearsay is not specifically covered elsewhere, (3) whether the statement is trustworthy, (4) whether the statement is material, (5) whether the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (6) whether the interests of justice will be best served by admission.

Id. at ¶ 44 (quoting State v. Valentine, 357 N.C. 512, 518, 591 S.E.2d 846 (2003)). "We have deemed the third factor, whether the testimony was trustworthy, the 'most significant requirement." Id. (quoting State v. Smith, 315 N.C. 76, 93, 337 S.E.2d 833 (1985)).

The supreme court recognized the trial court applied this same six-factor analysis to determining the admissibility of the hearsay evidence for the hearing. Id. at ¶ 45. The supreme court found that based on this hearsay analysis and other issues considered, the trial court was within its discretion and committed no legal error and did not abuse its discretion in allowing a new trial based on the MAR hearing. Id. at ¶¶ 46, 50.

Chief Justice Newby dissented and would have affirmed the court of appeals but did not reach the hearsay issue. Id. at ¶ 51 (Newby, C.J., dissenting).

(a) Authentication

In Hill v. Boone, 279 N.C. App. 335, 865 S.E.2d 722, 2021-NCCOA-490, rev. denied, 871 S.E.2d 529 (N.C. May 4, 2022), the court of appeals considered whether video

surveillance of a patient relating to her current health condition was properly authenticated and admitted into evidence at a bifurcated trial on liability for the purpose of impeaching the patient's testimony about her alleged injury.

The patient sued a physician and his clinic for malpractice, alleging that the physician negligently performed surgery on her right foot. Id. at ¶¶ 2–3. The trial court granted the patient's motion to bifurcate the issues of liability and damages under Rule 42 of the North Carolina Rules of Civil Procedure. Id. at ¶ 4. During the bifurcated trial on liability, and over the patient's objection, the trial court admitted as impeachment evidence video surveillance introduced by the physician and the clinic, which showed the patient doing the types of activities she claimed she could longer do after her surgery. Id. at ¶¶ 5–9. The jury found that the physician and the clinic were not liable, and the patient appealed the trial court's ruling on the admissibility of the video surveillance. Id. at ¶¶ 11–12.

On appeal, the court of appeals affirmed, holding that the trial court did not err in admitting the video surveillance as impeachment evidence.

As a threshold matter, the court of appeals applied a de novo standard of review, despite the parties' insistence that the court should apply an abuse of discretion standard. Id. at ¶¶ 14–18. In this case, the patient was not appealing the trial court's decision to bifurcate the issues of liability and damages, which would otherwise require an abuse of discretion review. Id. at ¶¶ 14–15. Instead, the patient was challenging whether the video surveillance was admitted for a relevant purpose (impeachment) and whether the video was properly authenticated, both of which required a de novo review. Id. at ¶¶ 15–17.

The court of appeals next addressed the patient's contention that the physician and the clinic did not properly authenticate the video surveillance. To begin, the court of appeals observed that the video surveillance "was not properly authenticated under typical requirements[,]" since the physician and the clinic "offered no testimony from the creator of the video to show that the recording process was reliable and 'that the matter in question is what its proponent claim.'" Id. at ¶ 20 (citation omitted).

Further, the patient's admission alone on cross-examination that the video surveillance apparently showed her doing certain physical activities in late 2017 and early 2018 (based on the video's date and time stamps) did not sufficiently authenticate the video. Id. at ¶¶ 21–22. According to the court of appeals, however, that admission—together with the patient's additional testimony that the video showed the patient carrying her grandchild, who the patient testified was born in late 2017 and about six months old in early 2018—was enough to authenticate the video. Id. at ¶¶ 1, 21–23, 34.

Having determined that the video surveillance was properly authenticated, the court of appeals turned to whether the trial court properly admitted the video surveillance as impeachment evidence. Under Rule 42, evidence relating to damages, such as the video surveillance, is normally inadmissible during a bifurcated trial on liability. Id. at ¶ 19. However, a plaintiff may open the door to evidence that is otherwise inadmissible. Id. at ¶¶ 19, 26. Here, the court of appeals first concluded that the patient opened the door to questions on cross-examination about her current health condition upon giving testimony on direct examination about the nature of her allegedly injured right foot. Id. at ¶ 27. The court of appeals also determined that the patient opened the door to the video surveillance through her cross-examination testimony that her toes could not currently touch anything

due to the surgery; the video impeached this testimony, given that the video showed her doing things like walking, lifting, and driving following the surgery. Id. at ¶ 28.

For these reasons, the court of appeals held that the trial court did not err in its ruling on the admissibility of the video surveillance.

C. Contempt

In Hirschler v. Hirschler, ___ N.C. App. ___, 868 S.E.2d 619, 2021-NCCOA-690, the court of appeals considered whether a trial court may sua sponte issue an order for civil contempt when notice has only been provided for a criminal contempt hearing. Judge Wood authored the majority's opinion.

In 2017, a trial court entered a custody order granting a mother primary physical custody of a then-teenaged minor. Id. at ¶ 2. In late June 2020, the teenaged minor informed the mother of the minor's desire to stay with the father in Florida, rather than return to North Carolina. Id. The mother, father, and teenaged minor exchanged texts and emails, but the minor remained in Florida. Id. The father told the mother that he would not "forcibly put [the minor] into a car and drive [the minor] to the exchange against [the minor's] will." Id. at ¶ 3. In late July 2020, the mother filed a motion for contempt and an "Ex Parte Motion for Emergency Court," requesting the trial court to hold the father in criminal contempt. Id. By September, despite the mother's travels to Florida to speak to the teenaged minor, the minor remained in Florida. Id.

The trial court held a hearing in September 2020, directing the father to appear and show cause why he should not be held in criminal contempt. Id. At the conclusion of the hearing, the trial court sua sponte held the father in civil contempt for violating the custody

order and ordered the father to be immediately taken into custody and jailed, until he returned the minor to the mother. Id. at ¶ 4. The father immediately filed a notice of appeal and motion to stay the contempt order. Id. The teenaged minor turned eighteen before the court of appeals considered the father's appeal. Id. at ¶ 5.

The court of appeals considered whether a trial court may sua sponte issue an order of civil contempt when a defendant has received notice of only a criminal contempt hearing. Id. The court recognized that it may not, though dismissed the case as moot. Id.

The court of appeals observed there are "three permissible methods for when a civil contempt proceeding can be initiated:" (1) by a motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a civil contempt hearing, (2) by order of a judicial official directing the alleged contemnor to appear at "at a specified reasonable time" and show cause why he should not be held in civil contempt, or (3) by notice of a judicial official that the alleged contemnor will be held in contempt unless he appears "at a specified reasonable time" and shows cause why he should not be held in civil contempt. Id. at ¶ 7 (citing N.C. Gen. Stat. § 5A-23). As applicable, the motion, order, or notice must be served on the alleged contemnor "at least five days in advance of the hearing unless good cause is shown." Id. (quoting N.C. Gen. Stat. § 5A-23(a)–(a1)).

The court of appeals offered that the father operated under the "reasonable assumption" the September 2020 hearing was for criminal contempt, and not civil contempt, because the mother's motion mentioned only criminal contempt, the district court's order and notice only mentioned criminal contempt, and at the hearing the mother's attorney recognized and agreed the hearing was only for criminal contempt. Id. at ¶ 8. "Essentially,

at no point was Defendant given any required notice he could be subjected to civil contempt." Id. at ¶ 9.

The court of appeals further recognized that the trial court erroneously concluded that civil contempt was a lesser form of criminal contempt. Id. at ¶ 10. While such an interpretation "may have been appropriate under prior versions of the contempt statute, the change in the statute in 2021 does not support this conclusion." Id. The court of appeals observed under the revised contempt statute, an alleged contemnor expressly "shall not" be held in criminal contempt for the same conduct as he is held in civil contempt, and vice versa. Id. (citing N.C. Gen. Stat. §§ 5A-12(d), 5A-23(g)). "In other words, civil contempt is not a lesser form of contempt than criminal contempt and the trial court erred here in concluding otherwise." Id. at ¶ 11.

Finally, the court of appeals dismissed the case as moot as the custody order was no longer in force as the minor had reached eighteen years old. Id. at ¶ 12.

> While we recognize the error of the trial court in holding Defendant in civil contempt after conducting a hearing only on criminal contempt, we dismiss this appeal as moot. [The teenaged minor] has reached the age of maturity, and the court no longer has jurisdiction to enforce the custody order.

Id. at ¶ 13.

Judge Inman concurred in a separate opinion stating that the issue of the validity of the contempt order need not be reached. Id. at ¶ 14. "Because we have dismissed the appeal as moot, however, I would not address the merits of Defendant's challenge to the sua sponte civil contempt order." Id.

D. Enforcement of Judgments

In Milone & MacBroom Inc. v. Corkum, 279 N.C. App. 576, 865 S.E.2d 763, 2021-NCCOA-526, the court of appeals considered whether a trial court had subject matter jurisdiction to issue orders in supplemental proceedings in aid of execution where "no writ of execution was issued or returned unsatisfied in whole or in part."

A corporation petitioned the Wake County clerk of court for entry of a confession of judgment against the manager of several limited liability companies for an unpaid debt. Id. at ¶ 3. The clerk entered judgment in the corporation's favor based on an affidavit from the corporation and a statement authorizing entry of judgment, to which the manager of the LLCs agreed. Id. However, no writ of execution was issued by or returned to the court, and no effort was made to execute on the judgment. Id. at ¶ 4.

Instead, six months later, the corporation served "interrogatories to supplemental proceedings" and a request for production of documents on attorneys that the corporation "believed were the [LLCs' manager's] counsel." Id. In response to a quickly withdrawn motion to compel filed in district court, the LLCs' manager filed a motion to dismiss and a motion for a protective order. Id. at ¶¶ 4–5. The corporation, in turn, filed a new motion to compel. Id. The district court granted the corporation's motion to compel and denied the LLCs' manager's motions. Id. at ¶ 6. The trial court also awarded attorneys' fees to the corporation as a Rule 11 sanction against the manager of the LLCs for seeking a protective order but did not set the amount for the fees. Id.

On appeal, the court of appeals vacated the trial court's order that granted the motion to compel and issued sanctions. The court of appeals held that the trial court lacked subject matter jurisdiction for the supplemental proceedings. Id. at ¶ 16.

Initially, the court noted that the award of attorneys' fees was interlocutory, and therefore not appealable, as no amount for the fees had been set. Id. at ¶ 9 (citing In re Cranor, 247 N.C. App. 565, 569, 786 S.E.2d 379, 382 (2016)). Further, the LLCs' manager failed to file a separate writ for certiorari. Id. at ¶ 10. However, the court of appeals elected to "treat [the] appeal as a writ for certiorari" and consider de novo the motion to compel, and the supplemental proceedings as a whole. Id. at ¶¶ 10–11 (citing State v. Grundler, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959); N.C.R. App. P. 2, 21). The court of appeals heard the appeal "because this case raises serious questions of how and when a trial court may exercise jurisdiction in supplemental proceedings that may otherwise escape review leading to manifest injustice to a party subjected to supplemental proceedings improperly instituted contrary to the express statutory requirements." Id. at ¶ 10.

Subject matter jurisdiction may only be conferred to a North Carolina court by the state constitution or by statute. Id. at ¶ 11 (citing Burgess v. Burgess, 205 N.C. App. 325, 327-28, 698 S.E.2d 666, 668 (2010)). While the parties did not raise subject matter jurisdiction, the court raised the issue sua sponte because it "discern[ed] a fundamental jurisdictional defect in the institution of the supplemental proceedings." Id. at ¶ 12.

The court looked to Article 31 of the North Carolina General Statutes to determine whether the trial court had subject matter jurisdiction for the supplemental proceedings. Id. at ¶¶ 14–15. The court found it "apparent from both the plain language of the statutes and our prior case law" that a writ of execution must be issued or returned unsatisfied for a court

to have subject matter jurisdiction to issue orders in supplemental proceedings of an unsatisfied judgment. Id. at ¶ 15.

The court of appeals found that by the plain text of the statute, a judgment creditor may seek supplemental proceedings only when an execution is issued and "returned wholly or partially unsatisfied." Id. at ¶ 14 (quoting N.C. Gen. Stat. § 1-352). A creditor may only seek supplemental proceedings, issue interrogatories, or conduct other discovery "within three years from the time of issuing [the] execution." Id. (quoting N.C. Gen. Stat. §§ 1-352–52.2) (emphasis in the original) (the text of the three quoted statutes varies in the use of "the" execution or "an" execution). Further, the court of appeals noted that the supreme court has previously construed a prior version of the statutes and held that supplemental proceedings may only be brought after issuance of an execution. Id. at ¶ 15 (citing Int'l Harvester Co. of Am. v. Brockwell, 202 N.C. 805, 806, 164 S.E. 322, 322 (1932)). Here, the court of appeals recognized that nothing in the record reflected a writ of execution was ever issued or returned unsatisfied. Id. at ¶ 16. Therefore, the court of appeals found the trial court lacked subject matter jurisdiction for the supplemental proceedings as the statutory requirements for the proceedings were not met. Id.

Because the trial court lacked subject matter jurisdiction, the court of appeals vacated the trial court's order granting the corporation's motion to compel and awarding attorneys' fees. Id. at ¶ 17.

E. Attorneys' Fees

In Bandy v. A Perfect Fit for You, Inc., 379 N.C. 1, 864 S.E.2d 221, 2021-NCSC-117, the supreme court considered whether the business court erred in refusing to authorize

a court-appointed receiver for a medical equipment company to pay a law firm for certain legal services that the firm's lawyers provided to the company.

In 2016, a superior court judge appointed the receiver to take possession of and manage the medical equipment company's property, and the case was then designated to the business court. Id. at ¶ 4. The receiver eventually became concerned that the medical equipment company may have fraudulently billed almost $12 million in Medicaid claims, so the receiver hired the law firm to audit the company's records. Id. at ¶ 5. For a period of time, the receiver paid the law firm's fees without seeking court approval, but in 2018, the business court entered an order directing the receiver to request authorization from the court before paying any additional legal fees. Id. at ¶ 6. The business court later clarified that the receiver, not the law firm, should submit the requests to authorize payment for the firm's fees. Id. at ¶ 6. Following a status conference in 2019, during which the business court asked why it had not received any invoices for the law firm's fees since 2018, the receiver submitted several late requests for authorization to pay the firm's fees. Id. at ¶¶ 8–9. The business court authorized payment for the fees except for those fees pertaining to services that a specific lawyer had rendered. Id. at ¶ 9. The business court declined to authorize payment for these fees based on the receiver's and the lawyer's "flagrant disregard" for the procedure that the court had established for seeking authorization for fee payments. Id. at ¶ 9.

The medical equipment company, the receiver, and the law firm appealed to the supreme court. While this initial appeal was underway, the receiver submitted additional requests for authorization to pay the law firm for its work on the appeal. Id. at ¶¶ 10–11. The business court denied these requests as well, concluding that the fees connected to the

appeal were for services rendered for the law firm's benefit, not for the company's benefit, since the appeal, if successful, would reduce the company's assets. Id. at ¶ 11. The company, the receiver, and the law firm appealed these additional rulings by the business court, which the supreme court consolidated with the initial appeal.

The supreme court reversed. The supreme court explained that a trial court's discretion to grant or deny a receiver's request for authorization to pay attorney's fees "is generally limited to (1) determining whether outside counsel rendered 'services which require legal knowledge and skill and which were rendered to the receiver for the benefit of the receivership' and (2) determining the amount which comprises 'reasonable and proper compensation for' the services outside counsel performed." Id. at ¶ 14 (citation omitted). The business court, however, did not make any findings addressing either of these two issues. Id. at ¶ 15. Instead, the business court denied the receiver's request for authorization to pay fees associated with a particular lawyer based solely on the court's finding that the receiver and the lawyer had flagrantly disregarded the applicable court procedure. Id. at ¶ 15. But the business court failed to explain how this finding related to the court's assessment of the services that the lawyer provided to the receiver or to the reasonableness and proper compensation for those services. Id. at ¶ 15. As a result, the business court's order denying the request to authorize payment for the lawyer's services "was an abuse of discretion because it was based on a legally extraneous factual finding." Id. at ¶ 13.

In addition, the supreme court construed the business court's order denying authorization for fee payment as an order that improperly imposed sanctions against the law firm. Id. at ¶ 17. Before a party is sanctioned, the party "must be provided with notice of the basis upon which sanctions are being sought and an opportunity to be heard." Id. at ¶

18. Also, a trial court's decision to sanction a party "must be 'supported by its findings of fact,'" and such "findings of fact [must be] supported by a sufficiency of the evidence." Id. at ¶ 18 (citation omitted). As the supreme court observed, the business court never provided the law firm or the lawyer with any notice that it was considering imposing sanctions, i.e., denial of authorization for fee payment, based on a failure to comply with a court order. Id. at ¶ 19. The most the business court did was express "frustration" with the receiver's and the lawyer's tardiness in submitting the requests for fee payment authorization. Id. at ¶ 19. Nor was there any evidence in the record that the lawyer engaged in conduct that violated a court order. Id. at ¶ 20. Although the business court apparently penalized the lawyer for not submitting the requests in a timely manner, the business court had previously entered an order that specifically prohibited the law firm and its lawyers from submitting such requests on the receiver's behalf. Id. at ¶ 20.

As for the business court's finding that authorizing payment for the law firm's fees relating to the appeal would deplete the medical equipment company's assets, the supreme court determined that this was not a sufficient basis for denying the receiver's request to authorize the payment. Id. at ¶ 26. The supreme court noted that it has "not previously considered whether outside counsel is entitled to compensation for work on litigation related to the fees originally incurred for legal services rendered to a receiver." Id. at ¶ 23. Nevertheless, the supreme court has previously ruled that a receiver is only entitled to reasonable and proper compensation for legal services provided to the receiver for the benefit of the receivership. Therefore, "a trial court's decision to grant or deny a receiver's request to pay outside counsel's fee-litigation fees requires a fact-intensive inquiry. It is not susceptible to a per se rule." Id. at ¶ 23. Here, the business court did not perform the

required analysis. Id. at ¶ 26. Moreover, the business court's finding that the appeal, if successful, would reduce the company's assets was based on the "erroneous presumption" that legal services that result in the diminution of a receivership's assets are always contrary to the receivership's interests. Id. at ¶ 24.

For these reasons, the supreme court reversed and remanded the case to the business court.

F. Appeals

(1) Violation of the Rules

In Mughal v. Mesbahi, 280 N.C. App. 338, 867 S.E.2d 695, 2021-NCCOA-615, the court of appeals considered whether sanctions were appropriate for substantial failure to follow or for gross violation of the North Carolina Rules of Appellate Procedure when the parties repeatedly included unredacted confidential information in filings made via the court's publicly accessible online filing system.

A couple with three minor children divorced in 2019. Id. at ¶ 2. The trial court entered a permanent child support order based on the North Carolina Child Support Guidelines and the parents' incomes, with the father required to pay approximately $600 per month. Id. at ¶ 3. The mother appealed, arguing that the trial court erred in calculating the father's monthly income. Id.

The mother served her proposed record on appeal on the father, and the father served amendments to the record on the mother. Id. at ¶ 4. The mother did not request judicial settlement of the proposed record on appeal. Id. Instead, a few days before the proposed record would have been deemed settled as a matter of law pursuant to Rule 11 of the North

Carolina Rules of Appellate Procedure, the mother filed the record with the court omitting the father's amendments and documentary exhibits. Id. at ¶¶ 4–5. The father filed a motion for leave to amend the record and requested inclusion of the document exhibits, and the mother subsequently filed an amended record and her opening brief. Id. at ¶ 5.

The court of appeals entered an order sua sponte striking the documents in the amended record and the mother's brief for "inclusion of unredacted identification numbers" in violation of Rule 42 of the Rules of Appellate Procedure. Id. at ¶ 6. The court identified that the documents submitted and the mother's opening brief contained unredacted confidential information, including the parties' social security numbers, bank account information, credit card numbers, employer identification numbers, and the three children's social security numbers. Id. The court determined these violations "constitute both substantial failures and gross violations" of Rule 42 because of the "exposure to public inspection" of identification numbers related to the parties and their minor children. Id. The court further ordered the mother to show cause as to appropriate sanctions. Id. The mother argued that the unredacted documents were all supplied by the father but admitted that the mother's counsel "did not conduct a thorough search" of the documents to ensure proper redaction. Id. at ¶ 7. The mother suggested "both [the mother's and father's] attorneys are responsible for the nonredacted information" and conceded that "[m]onetary damages may be appropriate." Id.

The court of appeals determined that the appropriate sanctions were to dismiss the appeal and tax double costs, with one-half of the costs taxed each to the mother's and father's attorneys, individually. Id. The court observed that ordinarily if a party defaults under the rules, then it has forfeited right to review on the merits; however, "noncompliance

with the appellate rules does not, ipso facto, mandate dismissal of the appeal." Id. at ¶¶ 8–9 (quoting Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co., 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008)). The court identified a three-part test from Dogwood to determine when a nonjurisdictional default, such as a Rule 42 violation, warranted dismissal: (1) "whether the noncompliance is substantial or gross under Rules 25 and 34," (2) whether any sanction under Rule 34(b) should be imposed, and (3) if the court determines dismissal is the appropriate sanction, whether the circumstances justify invoking Rule 2 to reach the merits despite the noncompliance. Id. at ¶ 9 (quoting Dogwood, 362 N.C. at 201, 657 S.E.2d at 367.

The court held that the first element of the test was satisfied, as the court's prior order identified the violations related to the unredacted information "constituted[d] both substantial failures and gross violations of a nonjurisdictional rule." Id. at ¶ 10. The court then noted that Rule 34(b)'s enumerated possible sanctions include dismissal, monetary damages, and any other sanction the court deems just and proper. Id. The court then considered whether dismissal was "appropriate and justified" based on the circumstances present. Id. at ¶ 11. The court held that dismissal was appropriate because even though the father was in position to protect his own information, the minor children "were not in a position to protect themselves from [the harm associated with identify theft], and it was the parties' duty to shield this confidential information from public disclosure." Id.

Accordingly, the court reasoned that dismissal was appropriate "[d]ue to the severity of this violation and to 'promote compliance with the appellate rules.'" Id. (quoting Dogwood, 362 N.C. at 199, 657 S.E.2d at 366). Further, the court held that "both parties' attorneys [we]re at fault for the violations," rendering a tax of double costs imposed

individually on both the father's and mother's attorneys an appropriate additional sanction. Id. Finally, the court considered whether to invoke Rule 2 to review the merits of the review despite the dismissal. Id. at ¶ 12. The court declined to invoke Rule 2 noting nothing in the circumstances that indicated exceptional or manifest injustice. Id.

Due to the severity of the "substantial failures and gross violations" of Rule 42, the court of appeals dismissed the mother's appeal. Id. at ¶ 13. The court declined to invoke review under Rule 2 and found the "attorneys for both parties" responsible for the violations, warranting both the father's and mother's attorneys liable for the double costs taxed. Id.

(2) Interlocutory Appeals

In Greenbrier Place, LLC v. Baldwin Design Consultants, P.A., 280 N.C. App. 144, 866 S.E.2d 332, 2021-NCCOA-5844, the court of appeals considered whether a trial court's grant of summary judgment against a plaintiff's unfair and deceptive trade practices and fraud claims affected a substantial right and created a possibility of inconsistent verdicts, warranting interlocutory review, when plaintiff's claims of negligence, negligent misrepresentation, and breach of contract remained.

A limited liability company obtained a cost estimate to develop a residential neighborhood from a design consultation firm in August 2015. Id. at ¶ 2. The limited liability company purchased the property to develop the neighborhood, then some months later the design consultation firm provided an updated estimate allegedly reflecting a significant increase in estimated costs. Id.

The limited liability company filed suit in 2017 asserting claims of negligence, negligent misrepresentation, breach of contract, unfair and deceptive trade practices, fraud,

and constructive fraud. Id. In 2019, the trial court heard competing claims for summary judgment, partially granting summary judgment in favor of the design consultation firm, which disposed of the limited liability company's unfair and deceptive trade practices and fraud claims. Id. at ¶¶ 5–7. The trial court order did not provide certification for appeal. Id. at ¶ 7. The limited liability company filed written notice of appeal, asserting the trial court erred in granting partial summary judgment, and the design consultation firm moved to dismiss the appeal as interlocutory. Id. at ¶¶ 7–9.

The court of appeals noted that before addressing the limited liability company's appeal, it must first consider the motion to dismiss the appeal as interlocutory. Id. at ¶ 10. The court observed that review of an interlocutory appeal is proper if the trial court certifies the case pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure or if the ruling deprives the appellant of a substantial right that is lost without immediate review. Id. (citing N.C. Gen. Stat. §§ 1-277(a), 7A-27(b)(3). The burden is on the appellant to "demonstrate why the order affects a substantial right." Id. (quoting Hoke Cnty. Bd. of Educ. v. State, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516 (2009)). A "substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which [one] is entitled to have preserved and protected by law: a material right." Id. at ¶ 11 (quoting Gilbert v. N.C. State Bar, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009)).

The court recognized that the "inconsistent verdicts doctrine is a subset of the substantial rights doctrine and is 'often misunderstood.'" Id. at ¶ 12 (quoting Shearon Farms Townhome Owners Ass'n II, Inc. v. Shearon Farms Dev., LLC, 272 N.C. App. 643, 646, 847 S.E.2d 229, 233 (2020), disc. rev. denied, 377 N.C. 566, 858 S.E.2d 284 (2021)). Under

the inconsistent verdicts doctrine, the appellant must show that the same factual issues are present in both trials and that the appellant faces prejudice by risk of inconsistent verdicts. Id. The fact that multiple claims arise from a single event, transaction, or occurrence does not, without more, rise to the level of a threat of inconsistent verdicts. Id.

The limited liability company argued that the summary judgment affected a substantial right because of common factual issues to all claims, including injury causation and certain facts related to code requirements, the exclusion of disclaimers, and whether the firm should have obtained updated subcontractor estimates. Id. at ¶ 15. The design consultation firm argued that the unfair and deceptive trade practices and fraud claims of which the trial court disposed required different proof than the negligence, negligent misrepresentation, and breach of contract claims remaining, therefore no substantial right was affected. Id. at ¶ 16.

The court of appeals recognized that prior holdings indicated negligence claims require different proof than unfair and deceptive trade practices or fraud claims. Id. Likewise, the court had also previously held that "actions for unfair or deceptive trade practices are distinct from actions for breach of contract and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C. [Gen. Stat.] § 75-1.1." Id. (quoting Branch Banking & Tr. Co. v. Thompson, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992)). Finally, the court noted that breach of contract does not "standing alone" provide a basis for a fraud claim. Id.

The court of appeals held that the limited liability company's identification of an overlap of facts, alone, "failed to carry the burden of showing that the inconsistent verdict doctrine applies." Id. at ¶ 17. The court reasoned that the remaining claims required different proof than those disposed by the trial court in granting partial summary judgment, and accordingly the limited liability company failed to demonstrate that a substantial right had been affected. Id. As the limited liability company failed to show a substantial right was affected, the court granted the design consultation firm's motion to dismiss the appeal as interlocutory. Id.

In Lakins v. Western North Carolina Conference of United Methodist Church, ___ N.C. App. ___, 2022-NCCOA-337, the court of appeals considered whether (1) interlocutory appeal was proper for an order granting a motion to transfer pending motions to dismiss to a three-judge panel, and (2) whether a grant of certiorari was nevertheless proper. Id. at ¶ 1.

In 2019, the General Assembly passed the SAFE Child Act, which purported to revive previously time-barred claims for child sexual abuse. Id. at ¶ 2. It also extended the statute of limitations for child sexual abuse to ten years and added a provision by which a claim for child sexual abuse would be revived for the two years following a felony conviction for conduct related to the sexual abuse suffered by the plaintiff. Id.

Plaintiff brought suit against the United Methodist Church (the "Church") and The Children's Home (the "Orphanage") in April 2020, alleging child sexual abuse committed against him in the 1970s. Id. at ¶ 3. His claims sounded in negligence; negligent hiring, retention, and supervision; breach of fiduciary duty; and constructive fraud. Id. The Church and Orphanage moved to dismiss under Rule 12(b)(6); the Church also sought dismissal

under Rule 12(b)(1) for lack of subject matter jurisdiction. Id. at ¶ 4. While these motions were pending, plaintiff moved to transfer the case to a three-judge panel. Id. at ¶ 5. The trial court granted this motion due to the constitutional challenges raised in the defendants' 12(b)(6) motions but did not rule on the remainder of the 12(b)(6) challenges or the Church's 12(b)(1) challenge. Id. Defendants appealed. Id. In the alternative, they sought certiorari to decide the matter. Id. at ¶ 6.

The court of appeals first dismissed the appeals as interlocutory and not (yet) affecting a substantial right. Id. at ¶ 14. While defendants were correct that the denial of proper venue to hear an action is a substantial right under North Carolina law, transferring to a three-judge panel of the Wake County Superior Court did not implicate or threaten this right. Id. at ¶¶ 10–11. Further, while the Church was correct that a violation of "ecclesiastical entanglement" doctrine and the ensuing violation of the First Amendment does affect a substantial right, since this motion had not yet been ruled upon, the appeal was nonetheless premature. Id. at ¶¶ 12–13.

However, the court of appeals allowed defendants' request for certiorari. Id. at ¶ 14–15. Certiorari may be granted in cases where there is no right of appeal from an interlocutory order, when "review will serve the expeditious administration of justice or some other exigent purpose." Id. at ¶ 16. The court held that such a purpose was served by allowing certiorari here. Id. at ¶ 17.

On the merits, the court held that North Carolina law requires transfer to a three-judge panel of Wake County Superior Court whenever a party properly advances a facial challenge to a statute's constitutionality. Id. at ¶ 19 (citing N.C. Gen. Stat. § 1-267.1(b2). The court reviewed the subject matter jurisdiction and statutory construction issues

presented de novo. Id. at ¶ 19. A review of the three-judge panel statutes—and Rule 42(b)(4) implicating them—made clear that all facial challenges were to be transferred to the panel. Id. at ¶ 22.

The court did not decide whether defendants' challenges were facial or as applied, but it did highlight that defendants expressly stated their challenges were solely as applied throughout their motions. Id. at ¶¶ 23–27. Since the court's decision in Cryan v. Nat'l Council of YMCAs of United States issued after the trial court's transfer order, the court vacated the trial court's judgment and remanded for further proceedings in light of that change in law regarding facial and as-applied challenges. Id. at ¶¶ 28–29.

Finally, the court turned to the Church's ecclesiastical entanglement 12(b)(1) motion. Id. at ¶ 30. While it agreed with the Church that it was premature to decide the merits of the claim, it also agreed that the trial court should have resolved the merits before transferring any of the matter to a three-judge panel, since it was "not contingent upon the outcome of the challenge to the [SAFE Child Act]'s facial validity." Id. at ¶ 31. Rule 42(b)(4) states that no transfer to a three-judge panel should occur until "all other matters" beyond the facial challenge are resolved. Id. at ¶¶ 32–33. The court noted in dicta that if the trial court determined that the Church's ecclesiastical entanglement arguments had merit, the trial court would have a duty to "stay, quash or dismiss the suit[,] at least with respect to [the Church]." Id. at ¶ 36 (internal quotation marks omitted). It noted that while Rule 42(b)(4) allows a court to decline to rule on a motion "based solely upon Rule 12(b)(6)" and instead send the matter to a three-judge panel, that language excluded the possibility that the trial court could likewise decline to rule on the Church's

12(b)(1) motion regarding ecclesiastical entanglement. Id. at ¶ 38. The court remanded this claim to the trial court for resolution on the merits. Id. at ¶ 40.

Finally, the court turned to the Church's ecclesiastical entanglement 12(b)(1) motion. Id. ¶ 30. While it agreed with the Church that it was premature to decide the merits of the claim, it also agreed that the trial court should have resolved the merits before transferring any of the matter to a three-judge panel, since it was "not contingent upon the outcome of the challenge to the [SAFE Child Act]'s facial validity." Id. ¶ 31. Rule 42(b)(4) states that no transfer to a three-judge panel should occur until "all other matters" beyond the facial challenge are resolved. Id. ¶¶ 32–33. The court noted in dicta that if the trial court determined that the Church's ecclesiastical entanglement arguments had merit, the trial court would have a duty to "stay, quash or dismiss the suit[,] at least with respect to [the Church]." Id. ¶ 36 (internal quotation marks omitted). It noted that while Rule 42(b)(4) allows a court to decline to rule on a motion "based solely upon Rule 12(b)(6)" and instead send the matter to a three-judge panel, that language excluded the possibility that the trial court could likewise decline to rule on the Church's 12(b)(1) motion regarding ecclesiastical entanglement. Id. ¶ 38. The court remanded this claim to the trial court for resolution on the merits. Id. ¶ 40.

IV. INSURANCE

A. UIM

In North Carolina Farm Bureau Mutual Insurance Co. v. Dana, 379 N.C. 502, 866 S.E.2d 710, 2021-NCSC-161, the supreme court considered the amount of underinsured

motorist coverage that should be distributed to a husband and his deceased wife's estate to compensate for injuries sustained in an automobile accident. Justice Ervin authored the majority's opinion.

In 2016, an intoxicated driver collided with a vehicle owned by the deceased wife, seriously injuring and eventually killing the wife, injuring the husband, and killing a passenger in the intoxicated driver's vehicle. Id. at ¶ 2. A man in a third vehicle was also injured. Id. At the time of the accident, the intoxicated driver carried an insurance policy with bodily injury limits of $50,000 per person and $100,000 per accident. Id. at ¶ 3. Subject to court approval, the intoxicated driver's insurer proposed payments of $43,750 to the wife's estate, $32,000 to the husband, $23,500 to the passenger's estate, and $750 to the other injured man. Id.

The wife was also insured by an underinsured motorist carrier with limits of $100,000 per person and $300,000 per accident. Id. at ¶ 4. The underinsured motorist carrier proposed to pay the $100,000 per person limit to both the husband and the wife's estate, less payments from the intoxicated driver's insurer. Id. The underinsured motorist carrier's proposal yielded underinsured payments of $68,000 to the husband and $56,250 to the wife's estate, each totaling with the payments from the liability carrier, coverage to the $100,000 per-person limit. Id.

The husband argued that his and the wife's estate were entitled to the full amount of the per-accident coverage, less the amounts paid by the intoxicated driver's insurer. Id. at ¶ 5. Under the husband's proposal, the underinsured motorist carrier would be obligated to pay a total of $200,000 in underinsured motorists coverage—$74,750 more than under carrier's own proposal—which consisted of the underinsured policy's $300,000 per-

accident limit less the $100,000 in liability coverage provided by the intoxicated driver's insurer. Id.

The underinsured motorist carrier sought a declaratory judgment concerning the amount of coverage it must provide in 2017. Id. at ¶ 6. A year later, after competing motions for summary judgment, the trial court found for the husband and wife's estate that the per-accident limits applied. Id. The underinsured motorist carrier appealed. The court of appeals affirmed, relying on an approach articulated in North Carolina Farm Bureau Mutual Insurance Co. v. Gurley, 139 N.C. App. 178, 181, 532 S.E.2d 846 (2000), whereby how liability coverage was exhausted determined the applicable underinsured coverage limit. Id. at ¶ 7. Under the Gurley approach, if a liability policy was exhausted on a per-person basis, then the per-person limit of the underinsured coverage applies; if a liability policy was exhausted on a per-accident basis, then the per-accident limit of the underinsured coverage applies. Id. (citing Gurley, 139 N.C. App. at 181, 532 S.E.2d 846).

The supreme court granted discretionary review. Id. at ¶ 7. The supreme court centered its analysis on the provision of the general statutes detailing underinsured motorist coverage, "to say the least, a lengthy and complicated statutory subsection that contains a considerable amount of language that seems to bear upon the proper resolution of the issue that is before us in this case." Id. at ¶ 12 (discussing N.C. Gen. Stat. § 20-279.21(b)(4)). The court observed that "repeated references to the issue of the limitation of liability" in the statutory provision further evidenced its applicability. Id. at ¶ 14.

The supreme court then turned to construing the statutory provision at issue. Id. The court noted that unlike a prior subsection, the provision detailing underinsured coverage does not expressly discuss per-accident and per-person limits. Id. at ¶ 15. Further, the

provision at issue refers to both a "limit" and "limits" of liability. Id. These facts precluded the court from determining the statutory language was clear and unambiguous. Id. The supreme court then considered the legislative intent of the Financial Responsibility Act, identifying that the statute served the purpose of protecting "innocent victims who may be injured by financially irresponsible motorists." Id. at ¶ 16 (quoting Proctor v. N.C. Farm Bureau Mut. Ins. Co., 324 N.C. 221, 224, 376 S.E.2d 761 (1989)). Accordingly, the court held the provision should be construed liberally to accomplish that beneficial purpose. Id. (citing Moore v. Hartford Fire Ins. Co. Grp., 270 N.C. 532, 535, 155 S.E.2d 128 (1967)).

The supreme court noted that while the terms "limit of liability" and "limits of liability" were not statutorily defined, the terms have well-understood meanings in insurance-related contexts. Id. at ¶ 17. Further, the court was "not persuaded" based on the relative complexity of the statute "that too much emphasis should be placed upon the General Assembly's use of the singular, rather than the plural, in attempting to construe the relevant statutory language." Id.

With these principles and providing a "careful reading of the relevant portions," the supreme court held that the provision incorporated "at least by implication" both per-person and per-accident liability limits within the underinsured motorist coverage provision. Id. at ¶ 18. This led the court to a "common sense resolution" that the total amount of underinsured coverage available when multiple claimants is limited by the per-accident limit, with the total amount of coverage available to any individual claimant constrained by the per-person limit. Id. at ¶ 19.

Rather than relying on a rule where the per-person or per-accident limit applied in all circumstances, or the more rigid framework of Gurley, the supreme court embraced this

"hybrid approach" it identified as "most reflective" of legislative and shareholder expectations of the amount of coverage available. Id. at ¶ 21.

The court noted that while the rule in Gurley had been relied on for approximately twenty years—even throughout General Assembly revisions to the statute at issue—the Gurley court itself cautioned against results when an injured party covered under an underinsured motorist policy would receive "more compensation than if [the tortfeasor] had been either fully insured or uninsured altogether." Id. at ¶ 22 (citing Gurley, 139 N.C. App. at 182, 532 S.E.2d 846). "In view of the fact that applying the rule adopted in Gurley to the facts in this case would have exactly the effect that the rule in question was explicitly intended to avoid," the supreme court found no reason to perceive the fact the General Assembly had not modified the provision as a basis for concluding the legislature embraced a mechanical application of the Gurley rule, which would yield a result the Gurley court specifically cautioned against. Id.

The supreme court held that the statutory language supported an approach where the amount available to any claimant treated the per-accident limit as the sum available to all claimants, subject to a caveat that payment to any individual claimant is limited to the per-person amount. Id. at ¶ 23. Accordingly, the supreme court reversed the court of appeals and remanded to the trial court, with coverage for the husband and the wife's estate collectively capped at the per-accident limit, with both individual claimants limited to the per-person limit of the underinsured motorist policy. Id.

In a concurring opinion, Justice Berger agreed with the outcome reached by the majority but disagreed on the majority's reasoning. Id. at ¶ 34–35 (Berger, J., concurring). Justice Berger offered that, unlike the majority's approach, "the [Financial Responsibility

Act] does not address the particular question at issue in this case." Id. 35. Instead, under Justice Berger's approach the terms of the underinsured policy alone should control. Id. While the majority cautioned against reliance on the policy terms alone, Justice Berger offered that this was a "false flag" because the insurance industry is heavily regulated, with issued policies "virtually uniform" and each requiring approval by the Insurance Commission. Id. at ¶ 49.

In Osborne v. Paris, ___ N.C. App. ___, 2022-NCCOA-338, the court of appeals considered the interplay between the uninsured and underinsured motorist coverage provisions in North Carolina's financial responsibility act and whether an insurer acted in bad faith or engaged in unfair trade practices in denying additional coverage to a motorcycle passenger.

A motorcycle attempted to pass a car on the left in a non-passing zone. Id. at ¶ 3. The car was signaling a right turn but turned left instead. Id. The motorcycle and car collided, ejecting the passenger from the motorcycle. Id. The passenger sustained serious injuries, which required extensive medical treatment. Id.

The motorcycle was uninsured. Id. at ¶ 4. The car was insured at the North Carolina minimum of $30,000 per person for liability coverage. Id. Three days after the liability insurer tendered its limits, the passenger, through counsel, sent a letter to the same insurer demanding $160,000 of uninsured motorist coverage and $70,000 of underinsured motorist coverage, for a total of $230,000. Id. at ¶¶ 5–6. The liability insurer had also issued three other policies: one to the passenger ($30,000 uninsured coverage), one covering a different motorcycle not involved in the accident (another $30,000 uninsured coverage), and one for

the passenger's parents with whom she lived ($100,000 combined uninsured/underinsured coverage). Id. at ¶ 6.

Four days after demanding payment, the passenger filed suit against the driver of the car, the operator of the motorcycle, and the insurer. Id. at ¶ 7. She alleged the insurer breached its obligation to pay uninsured and underinsured coverage to her, displayed bad faith in refusing to settle, and engaged in unfair and deceptive trade practices. Id.

Within the month, the insurer issued three checks totaling $130,000. Id. at ¶ 8. The insurer then moved for summary judgment, which the trial court granted. Id. at ¶ 9. The passenger appealed. Id.

The court of appeals considered whether the passenger was entitled to uninsured and underinsured coverage under the passenger's parents' combined policy, and whether the insurer improperly credited the amount paid under the two uninsured-only policies by the amount of the driver's liability coverage. Id. at ¶ 2. The court further considered the passenger's direct claims against the insurer. Id.

Turning to the first issue of the combined policy, the court recognized that statutes dealing with the same subject matter must be read in pari materia and "harmonized, if possible, to give effect to each." Id. at ¶ 12 (citing Hoffman v. Edwards, 48 N.C. App. 559, 564, 269 S.E.2d 311, 313 (1980)). Further, while the purpose of North Carolina's financial responsibility law "is to protect the innocent victims of vehicle negligence, 'that fact does not inevitably require that one interpret the relevant statutory language to produce the maximum possible recovery for persons injured as a result of motor vehicle negligence

regardless of any other consideration.'" Id. at ¶ 15 (quoting N.C. Farm Bureau Mut. Ins. Co. v. Dana, 2021-NCSC-161 ¶ 20) (emphasis added).

The passenger argued that as section 20-279.21(b)(4) of the North Carolina General Statutes provides that underinsured motorist coverage must be provided "in addition to" liability and uninsured coverage, an insurer is required to pay to both uninsured and underinsured limits for a combined policy. Id. at ¶¶ 17–20. Here, the passenger claimed she should have received under her parents' single, combined policy $100,000 in uninsured coverage plus $100,000 in underinsured coverage. Id. at ¶ 17.

The court of appeals observed that "[w]e are not persuaded that Subsection (b)(4) requires insurance companies to pay the combined limit amount for both uninsured and underinsured coverage regardless of the insurance policy language." Id. at ¶ 21. The court reasoned that this provision of subsection (b)(4) reiterates that a policy must meet minimum liability and uninsured motorist coverage requirements, and that drivers simply have the option to purchase additional underinsured motorist coverage. Id. Finding no issue with the trial court's grant of summary judgment related to the $100,000 tendered from the combined uninsured/underinsured policy, the court of appeals affirmed on the first issue. Id. at ¶ 22.

Turning to the second issue, the court of appeals considered whether the insurer properly setoff the $30,000 in liability coverage against the two uninsured policies covering the passenger. Id. at ¶ 24. Here, the court again looked to section 20-279.21(b) of the North Carolina General Statutes. Id. at ¶¶ 26–30. The court recognized that while subsection (b)(4) allows crediting the amount recovered from a liability carrier for underinsured motorist coverage, subsection (b)(3) allows no such credit for uninsured motorist coverage.

Id. at ¶ 30. Relying on the canon of construction that the General Assembly acts with full knowledge of prior and existing law, the court of appeals concluded that the setoff was not appropriate for the uninsured motorist policies. Id. Therefore, the court of appeals modified the trial court's judgment and ordered the insurer to pay the additional $30,000 of the setoff.

Finally, the court of appeals considered whether the trial court's grant of summary judgment should be reversed on the passenger's claims of bad faith refusal to settle and unfair practices against the insurer. Id. at ¶ 32. The court of appeals refused to entertain the claims or allow for further discovery under Rule 56(f) of the North Carolina Rules of Civil Procedure, considering the court's own detailed analysis of the policies and statutes required to come to a determination, and the lack of controlling case law. Id. at ¶¶ 32–33. "[W]e cannot conclude that [the passenger] has raised or even forecast evidence to raise a dispute issue of genuine fact regarding whether [the insurer] acted in bad faith or engaged in unfair trade practices in denying further coverage." Id. at ¶ 33.

V. WORKERS' COMPENSATION

In Moye-Lyons v. N. Carolina Dep't of Pub. Instruction, ___ N.C. App. ___, 2022-NCCOA-260, the court of appeals considered the question of whether the plaintiff failed to file a timely claim under the Worker's Compensation Act; and therefore, whether the Industrial Commission erred in finding that it had no jurisdiction over her claim.

The plaintiff was a part-time unlicensed teacher who, after being denied the ability to obtain an advanced teaching license due to deficiencies in her credentials, allegedly suffered a stroke and developed Bell's Palsy in April 2007 due to the distress this news

caused her. Id. ¶ 5. The teacher then suffered from a spiral of gradually worsening mental health issues, which saw her involuntarily and voluntarily committed for mental health treatment several times over the course of the years 2007–2017. Id. ¶¶ 5–8. In October 2018, the teacher initiated a claim for workers' compensation benefits based on her April 2007 injury. Id. ¶ 9. The Deputy Commissioner dismissed her claim with prejudice in June 2019, determining that she had not filed the claim in a timely manner. Id. ¶ 10. On appeal, the full commission affirmed the decision to dismiss her claims. Id. It further held that the two-year limitations period to bring her claims under N.C.G.S. § 97-24 was not tolled due to her incompetence, because the evidence showed that the teacher was no longer mentally incompetent as of November 2009. Id. ¶ 11.

The court reviews decisions of the commission de novo, including its jurisdictional factual findings. Id. ¶ 14 (citing Capps v. Southeastern Cable, 214 N.C. App. 225, 226-27, 715 S.E.2d 227, 229, (2011)). It must make determinations of jurisdictional facts by the greater weight of the evidence. Id. ¶ 15.

The court had previously held that the two-year filing window is not a statute of limitation, but rather a condition precedent to the right to compensation. Id. ¶ 16 (citing Reinhardt v. Women's Pavilion, Inc., 102 N.C. App. 83, 84, 401 S.E.2d 138, 139 (1991)). Where there was no evidence of the timely filing of the claim or of the submission of a voluntary settlement agreement, dismissal would be proper. Id. There was no evidence of either condition being met, so the teacher's claims would be dismissed unless the filing window had tolled due to incompetence. Id. ¶ 17. Incompetence is the lack of "sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property[.]" Id. ¶ 19. It is not sufficient that a

person exhibits these symptoms; the state must first adjudge her incompetent. Id. Plaintiff had not undergone this process. Id. ¶ 20. However, the court noted that the commission was also able to make such an adjudication for the purposes of its own time limitations, and so looked to its findings below. Id.

The full commission had determined that the teacher was not mentally incompetent during the relevant time period. Id. ¶ 22. The court also determined, from its own review of the extensive records the teacher provided before the commission, that there was in fact ample evidence of her competence during this time period. Id. ¶ 24–26. It noted that while she was diagnosed with schizophrenia, this diagnosis was not sufficient since she was successfully and responsibly seeking treatment and participating in her own treatment. Id. ¶ 26. Further, she had been cleared to return to part-time work by her psychiatrist in November 2009. Id. She did not experience a hospitalization until more than three and a half years from her previous episode. Id. ¶ 27.

The court also declined to follow the findings of the proceedings the teacher underwent in the course of being involuntarily committed at various times from 2009 to 2015. Id. ¶ 29. It held that these proceedings were designed to determine whether a person was a danger to themselves or others, not whether she was competent to manage her own affairs. Id. ¶¶ 29–30. The court found the commission was also able to disregard findings by the Social Security Administration ("SSA") that the teacher was incompetent during the time period in question, as the commission had broad authority to consider all relevant evidence and draw its conclusions. Id. ¶ 31. Further, the Court noted positively the commission's conclusion that SSA would have made that decision based on federal laws and standards, rather than the state authorities properly considered in determining

incompetence under North Carolina law. Id. ¶ 34–35. Nor was the commission bound by the SSA's assignment of a representative payee for the teacher in relation to her claim for benefits. Id. ¶¶ 37–39.

In sum, the court held that the commission exercised its broad discretion permissibly and made its decision on the basis of the entire record, including the teacher's medical records, the SSA decisions, and the teacher's involuntary commitment proceedings. Id. ¶ 41. It agreed that the weight of the evidence demonstrated that the teacher was not mentally incompetent during the two years following her April 2007 injury, and thus her claim was not timely filed. Id. ¶¶ 41–42.

In McAuley v. North Carolina A&T State University, ___ N.C. App. ___, 868 S.E.2d 131, 2021-NCCOA-657, appeal docketed, No. 9A22 (N.C. Jan. 10, 2022), the court of appeals considered whether section 97-24 of the Workers' Compensation Act permitted the industrial commission to exercise jurisdiction over a wife's claim for death benefits that she filed more than two years after her husband passed away where the husband had filed a workers' compensation claim before he died.

In January 2015, the husband injured his back while working for a university. Id. at ¶ 2. The following month, he filed a workers' compensation claim with the university. Id. The husband passed away shortly after filing his claim. Id. Almost three years after her husband's death, the wife filed a claim for death benefits with the industrial commission. Id. at ¶ 3. The university filed a response to the wife's claim, arguing that the industrial commission lacked jurisdiction to hear her claim under section 97-24 and also filed a motion to dismiss the claim as time-barred under sections 97-22 and 97-24. Id. The industrial commission dismissed the wife's claim with prejudice, concluding that it lacked jurisdiction

to hear the claim. Id. at ¶¶ 1, 4–5. The wife appealed the industrial commission's decision to the court of appeals. Id. at ¶ 5.

The court of appeals affirmed the industrial commission's determination that it lacked jurisdiction to hear the wife's claim with Judge Carpenter writing the majority opinion.

As the court of appeals explained, "the timely filing of a claim for compensation is a condition precedent to the right to receive compensation and failure to file timely is a jurisdictional bar for the Industrial Commission." Id. at ¶ 9 (citation omitted). Accordingly, the court of appeals analyzed whether the wife's claim was timely under section 97-24, which establishes a two-year deadline for filing certain claims. Id. at ¶ 10. Although section 97-24 does not specifically mention death benefits, the court of appeals reasoned that the statute's two-year deadline contemplates and applies to claims for death benefits based on the statute's reference to "compensation," a term that the Workers' Compensation Act defines to include funeral benefits. Id. at ¶ 11.

In addition, the court of appeals determined that the wife's "claim for death and funeral benefits arose only upon [her husband's] death, not concurrent with [her husband's] own, separate filing of a Form 18 for workers' compensation benefits. Id. at ¶ 13. As a result, the husband's claim, which he filed within section 97-24's two-year deadline, "had no effect" on the wife's claim in this case, and the court of appeals therefore rejected the wife's argument that her claim was timely based on the filing of her husband's claim. Id. at ¶¶ 12–13.

The court of appeals also declined to apply the relation-back doctrine set out in Rule 15(c) of the Rules Civil Procedure to the wife's claim, concluding that the court's case law did not permit relation back in this case because the wife's claim did not exist when the husband filed his claim, and the statute of limitations had expired on the wife's claim. Id. at ¶¶ 14–15. Finally, the court of appeals explained that section 97-38, which states that an employer will make payments when "death results proximately from a compensable injury or occupational disease and within six years thereafter," did not save the wife's claim because "a compensable injury would not be at issue prior to a timely filing of a claim for workers' compensation benefits." Id. at ¶¶ 16–17.

For these reasons, the court of appeals held that the industrial commission lacked jurisdiction under section 97-24 to hear the wife's claim for death benefits because the claim was untimely.

The dissent, written by Judge Arrowood, would have held "that under N.C. Gen. Stat. § 97-24(a), a dependent is not required to file a separate and distinct claim within the two-year statutory period, so long as an initial claim satisfies the limitation period." Id. at ¶ 19. According to Judge Arrowood, the plain language of section 97-24 only requires that "a claim" be filed "within two years after the accident," which the wife's husband did when he filed his claim. Id. at ¶ 23 (quoting N.C. Gen. Stat. § 97-24(a)). In Judge Arrowood's view, his interpretation of section 97-24 was supported by a prior amendment to section 97-24 that removed language requiring that a separate claim be filed for death benefits. Id. at ¶¶ 26–27. Lastly, Judge Arrowood reasoned that the law surrounding wrongful death claims, including the application of Rule 15(c) to such claims, further supported a holding that the industrial commission had jurisdiction to hear the wife's claim. Id. at ¶¶ 28–29.

In Cunningham v. Goodyear Tire & Rubber Co., ___ N.C. ___, 871 S.E.2d 724, 2022-NCSC-46, the supreme court considered whether a worker's return visit to her employer's medical dispensary in 2017 related back to a 2014 injury in the context of timely filing her worker's compensation claim. Justice Hudson wrote for the majority.

A worker worked nearly continuously for a tire manufacturer for at least seventeen years. Id. at ¶ 2. On May 27, 2014, during a twelve-hour shift, the worker was attempting to pick up a tire off a truck when the tire was struck, causing her to injure her back. Id. at ¶ 4. The worker filed an internal report with her employer, was placed on light duty, and returned to full duty six weeks later without missing any work. Id. She never completed state workers' compensation forms; however, the worker testified she thought they were already completed, and the record reflected her employer's insurer was on notice of her injury. Id. at ¶ 5.

During the light duty period, the worker sought treatment through the employer's onsite medical facility and via a physical therapist. Id. at ¶ 6. She saw the physical therapist again in early 2015. Id. at ¶ 7–8. She began experiencing foot pain and was referred to a podiatrist, who diagnosed her with plantar fasciitis. Id. at ¶ 9. The worker did not return to the on-site facility again until 2017. Id. After extensive treatment, the podiatrist told the worker her "problems did not come from her feet but were caused by her back problems stemming from her May 27, 2014 injury." Id. at ¶ 9.

In April 2017, when the worker returned to the on-site medical facility related to the prior injury and a more recent injury, she was informed that the insurer had closed her file related to the 2014 injury. Id. at ¶¶ 10–11. In May 2017, the worker filed separate Form 18s for the 2014 and 2017 injuries. Id. at ¶ 13.

The commission denied the 2017 claim and found the 2014 claim time-barred. Id. The worker appealed the denial to the full commission, alleging that the most recent payment under the 2014 injury was in 2017. Id. The full commission again denied the 2017 claim and found the 2014 claim time-barred. Id. The worker appealed to the court of appeals. Id. at ¶ 14.

The court of appeals held that the full commission erred, finding by a greater weight of the evidence the 2017 visit was related to the 2014 injury. Id. at ¶ 15 (citing Cunningham v. Goodyear Tire & Rubber Co., 273 N.C. App. 497, 506–07 (2020)). The dissent in the court of appeals argued that whether the claim was time barred by section 97-24(a) of the North Carolina General Statutes should be considered under the same standard of review as an award, (1) whether competent evidence exists and (2) whether the commission's findings of facts justify its conclusions of law. Id. The employer and insurer appealed.

The supreme court considered whether the court of appeals erred in holding that the worker's 2017 visit related to the onsite facility related back to her 2014 injury. Id. at ¶ 28. The supreme court affirmed the court of appeals. Id.

Recognizing that de novo review was appropriate, the supreme court looked to the record. Id. at ¶ 29. Testimony from the worker's physical therapist tended to show that the worker never fully recovered from the 2014 injury. Id. Further, testimony from the worker's later treating physician indicated she suffered from chronic back pain, stemming from the time of the 2014 injury. Id.

Conversely, the supreme court found that the commission pointed to no evidence that the worker had ceased seeking treatment prior to 2017. Id. at ¶ 30. Accordingly, the

supreme court held that by the greater weight of the evidence the worker's claim was not time barred as she received payment in 2017 related to her 2014 injury. Id. at ¶ 32.

Chief Justice Newby dissented arguing, like Judge Tyson in the court of appeals dissent, that the appropriate standard of review was whether the commission issued its finding under competent evidence. Id. at ¶ 34 (Newby, C. J., dissenting). The dissent argued that precedent had established the industrial commission to be the fact-finding body for workers' compensation claims. Id. at ¶ 35 (citing Gore v. Myrtle/Mueller, 362 N.C. 27, 40, 653 S.E.2d 400, 409 (2007)). "This Court reviews 'an order of the Full Commission only to determine whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law.'" Id. (quoting Medlin v. Weaver Cooke Constr., LLC, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014)). Therefore, in his view, the majority, and the court of appeals, erred in granting insufficient deference to the full commission's findings. Id. at ¶ 45.

In Nay v. Cornerstone Staffing Solutions, 380 N.C. 66, 867 S.E.2d 646, 2022-NCSC-8, the supreme court considered whether the industrial commission's method to determine that an injured worker's weekly wages were "fair and just to both parties" presented a question of fact or of law. Justice Ervin wrote for the majority.

In August 2015, an employee began working for a staffing agency. Id. at ¶ 2. Most of the workers employed by the staffing agency were placed in "temp-to-perm" positions, where a temporary worker is placed with an employer in the hopes of a permanent position. Id. at ¶ 3. The employee began work at a temp-to-perm position with a company that updates athletic fields and performs landscaping work. Id. at ¶ 4. In November 2015, the employee and another worker attempted to lift a "heavy machine" into a truck. Id. at ¶ 5.

The employee suffered from back pain after the accident and applied for and was awarded temporary disability. Id. at ¶¶ 6–7.

In July 2017, the employee requested a hearing with the industrial commission, asserting that the staffing agency "unilaterally lowered the amount" of disability benefits he had been receiving. Id. at ¶ 8. The industrial commission filed an opinion and award finding that the staffing agency acted appropriately in reducing the benefit amount. Id. at ¶ 9. In making this determination, the industrial commission reviewed the five methods for calculating an employee's average weekly wages set out in section 97-2(5) of the North Carolina General Statutes. Id. The industrial commission determined in a finding of fact that "exceptional reasons exist" for employing the fifth method for unique circumstances. Id. So applied, the employee's five months with the landscaping company would be divided over an entire 52-week year to determine weekly pay. Id. It reasoned this method was fair to both the employee and staffing agency because the employee was a temporary worker. Id.

The employee appealed. Id. Before the court of appeals, the employee argued the commission erred in finding the fifth method was appropriate, that the third method – where the employee's wages for less than 52 weeks would be divided by the number of weeks he did work – would be fair and just to both parties, and that the staffing agency benefitted from a windfall because the wrong method was applied. Id. at ¶ 10. The court of appeals agreed, holding that the industrial commission's decision to use the fifth method was subject to de novo review. The court of appeals reasoned that the industrial commission's finding that the fifth method was "fair and just" was actually a conclusion of law. Id. The court of appeals reversed and remanded to the industrial commission with guidance that the methods

in section 97-2(5) of the North Carolina General Statutes were ranked by order of preference. Id. at ¶¶ 11–12. The court of appeals further opined that the third method would fair and just. Id. at ¶ 12. The staffing agency appealed.

The staffing agency argued that the court of appeals erroneously applied a de novo standard of review to the industrial commission's findings. Id. at ¶ 16. "The difference between a question of law, on the one hand, and a question of fact, on the other is well-established, although often difficult to determine." Id. at ¶ 25. The supreme court reviewed a history of analogous cases to determine whether the industrial commission's determination that the fifth method was "fair and just" was a question of fact or of law. Id. at ¶¶ 17–28. The supreme court found in reviewing these cases that "all of them focus upon the extent to which particular 'fairness and justness' determinations reflect a proper understanding of the relevant statutory language." Id. at ¶ 27.

Here, while a finding of "fair and just" may be a factual finding, it becomes a legal question when such a determination rests upon a misapplication of the law. Id. at ¶ 28. Here, the industrial commission based its finding on what the employee had earned, rather than what he "would be earning" but for the injury. Id. Even so, the supreme court held that the court of appeals overstepped its review in "ma[king] its own factual determinations . . . rather than simply reviewing the Commission's decision." Id. The "most appropriate disposition" would be to remand the matter to the commission for entry of an order containing facts and conclusions based upon a "correct understanding of the applicable law." Id.

Justice Barringer authored a dissent which Chief Justice Newby joined. According to the dissent whether a calculated weekly wage is fair and just is a question of fact. Id. at

¶ 30 (Barringer, J., dissenting). "This Court's precedent has never indicated otherwise." Id. Accordingly, de novo review was not warranted. Id. at ¶ 43. Further, as the industrial commission based its finding that the fifth method was applicable on competent evidence, no action was required by the appellate courts. Id. at ¶ 51. "Perhaps different factual inferences could be drawn from the evidence. However, that is not the role of the appellate courts." Id. at ¶ 52. Therefore, the dissent would affirm the industrial commission's opinion and award. Id. at ¶¶ 52–53.

In Mahone v. Home Fix Custom Remodeling, ___ N.C. App. ___, 870 S.E.2d 259, 2022-NCCOA-93, the court of appeals considered whether an employee in a workers' compensation case was required to present expert testimony to a reasonable degree of medical certainty that his traumatic brain injury was caused by a workplace accident.

The employee worked as a sales representative for a home remodeling company. Id. at ¶ 2. During a sales call, the employee fell more than twenty feet after the floor of the attic where he was working collapsed. Id. After the fall, the employee was diagnosed with traumatic brain injury. Id. at ¶ 11. The employee filed a workers' compensation claim. Id. at ¶ 7. The industrial commission reviewed the employee's claim and issued an opinion and award, which found, among other things, "that '[a]lthough the medical records in this case indicate that [the employee] was diagnosed with a mild [traumatic brain injury] following the 24 July 2018 incident, the Full Commission finds [the employee] presented no expert medical opinion evidence causally linking the 24 July 2018 incident with [the employee's] traumatic brain injury." Id. at ¶ 16.

In particular, the industrial commission found that although the employee's doctor "wrote a letter to the Commission indicating that the [traumatic brain injury] was related to

the 24 July 2018 incident, [the doctor] did not offer an opinion to a reasonable degree of medical certainty and was not deposed by the parties." Id. As a result, the industrial commission determined that the employee was not entitled to compensation for his traumatic brain injury. Id.

The employee appealed the industrial commission's decision to the court of appeals, arguing that the commission applied the incorrect legal standard in evaluating whether the employee's traumatic brain injury was compensable. The court of appeals held that the industrial commission erred in denying the employee compensation for his traumatic brain injury.

To start, the court of appeals explained that it "has repeatedly held that a doctor is not required to testify to a reasonable degree of medical certainty" in a workers' compensation case. Id. at ¶ 31 (quoting Erickson v. Siegler, 195 N.C. App. 513, 524, 672 S.E.2d 772, 780 (2009)). "All that is required is that it is 'likely' that the workplace accident caused plaintiff's injury. Id. (quoting Erickson, 195 N.C. App. at 524, 672 S.E.2d at 780). The court of appeals determined that, based on the industrial commission's findings, it appeared that the commission had "required [the employee] to present expert testimony, either at a hearing or deposition, to a reasonable degree of medical certainty, that his [traumatic brain injury] was causally related to the accident." Id. at ¶ 34. This, however, was not the correct standard to apply. Id. Instead, the employee "was required to present expert opinion evidence, not necessarily in the form of testimony, that it was likely that the accident caused [his] injury." Id.

Here, the employee's doctor offered documentary evidence, in the form of a letter, that sufficiently linked the employee's workplace accident to his traumatic brain injury, and

the doctor's letter was not "was not speculative or guesswork." Id. Thus, it did not matter that the doctor was not deposed or that he did not testify at the hearing on the employee's claim. Id. His letter provided sufficient evidence to satisfy the employee's burden of proving causation by a preponderance of the evidence. Id.

For these reasons, the court of appeals reversed the industrial commission's opinion and award on the compensability of the employee's traumatic brain injury and remanded to the commission to make findings and conclusions applying the correct standard.

In Forte v. Goodyear Tire & Rubber Company, ___ N.C. App. ___, ___ S.E.2d ___, 2022-NCCOA-281, the court of appeals considered whether the industrial commission was required to (1) expressly state that it found good grounds to reconsider the evidence and alter a workers' compensation award issued by the deputy industrial commissioner and (2) expressly state what it determined those good grounds to be.

An employee of a tire company alleged that he injured himself while at work. Id. at ¶¶ 6–9. Several months after the alleged injury, the employee reported the injury to the tire company and later filed a workers' compensation claim, which the company contested. Id. at ¶ 10. The deputy industrial commissioner issued an opinion and award concluding that the employee had sustained a compensable workplace injury by accident. Id. at ¶ 11. The tire company filed an appeal with the industrial commission. Id. at ¶ 12. The industrial commission issued an opinion and award determining that the employee had not sustained a compensable workplace injury by accident. Id. The employee appealed the industrial commission's decision to the court of appeals.

The court of appeals affirmed the industrial commission's opinion and award.

The employee argued that the industrial commission's opinion and award was subject to reversal because the commission did not expressly state that it found any good grounds to reconsider the evidence and alter the deputy industrial commissioner's award and because it did not expressly state what it determined those good grounds to be. Id. at ¶¶ 3, 13. The court of appeals disagreed. Id. at ¶ 4, 15.

Under section 97-85(a) of the North Carolina General Statutes, the industrial commission "may reconsider the evidence before the deputy commissioner, receive further evidence, and amend the deputy commissioner's award 'if good ground be shown' to do so." Id. at ¶ 14. "Whether this 'good ground' standard is satisfied 'is a matter within the sound discretion of the full Commission, and the full Commission's determination in that regard will not be reviewed on appeal absent a showing of manifest abuse of that discretion.'" Id. (quoting Crump v. Indep. Nissan, 112 N.C. App. 587, 589, 436 S.E.2d 589, 592 (1993)).

The court of appeals explained that North Carolina appellate courts "have never addressed whether the Full Commission must make an express finding that good grounds exist, or expressly state the reasoning for that determination." Id. at ¶ 15. Given this lack of controlling law, the court of appeals borrowed a rule from its case law: that "when a trial court has discretion to act upon a showing of good cause and makes no express findings, [the reviewing court will] presume the trial judge found the necessary 'good cause' and examine whether the record supports that finding." Id.

Here, the industrial commission stated that it had entered its opinion and award pursuant to section 97-85, and nothing in the record showed that the commission misunderstood the law when evaluating its authority to reconsider the deputy industrial

commissioner's findings. Id. at ¶ 16. Accordingly, the court of appeals presumed that the industrial commission found the necessary good grounds to reconsider the evidence and alter the deputy industrial commissioner's award. Id. The court of appeals also concluded that the industrial commission's decision was not a product of manifest abuse of the commission's discretion based on the commission's findings and conclusions, including the commission's finding that the employee's testimony was not credible. Id. at ¶¶ 17, 24.

For these reasons, the court of appeals affirmed the industrial commission's conclusion that the employee had not sustained a compensable workplace injury by accident.

VI. ETHICS

A. Disqualification

In Rosenthal Furs, Inc. v. Fine, ___ N.C. App. ___, 2022-NCCOA-208, the court of appeals considered whether a trial court erred in disqualifying an attorney from representing his firm or himself, pro se, in a legal malpractice action.

A business filed a complaint alleging legal malpractice, constructive fraud, and negligent misrepresentation against an attorney and his firm. Id. at ¶ 2. The business's claims arose out of the attorney's and firm's prior representation of the business in a commercial lease dispute. Id. The attorney filed a notice of limited appearance on behalf of his firm, and a motion to dismiss on behalf of the firm and himself. Id. at ¶ 3.

The business filed a motion to disqualify the attorney as counsel for himself or his firm under Rule 1.9 and 3.7 of the North Carolina Rules of Professional Conduct. Id. at ¶

4. The business argued the attorney was "a material and necessary witness in the litigation as [the attorney's] conduct, advice, filings, decisions, statements, acts, and omissions are the subject of th[e] legal malpractice suit." Id. Further, the business argued the attorney's representation of the firm and himself was materially adverse to the interests of the business, and the attorney had not requested or received the business's consent. Id.

At the hearing, the attorney acknowledged that based on an ethics opinion from the North Carolina State Bar "it's up to the trial court to decide" whether Rule 3.7 precluded his ability to represent himself or the firm in the malpractice action. Id. at ¶ 5. The trial court granted the business's motion and disqualified the attorney. Id. at ¶ 6. After the trial court denied a motion for reconsideration, the attorney appealed. Id. at ¶ 7.

The court of appeals began its analysis by observing as interlocutory the order granting the motion to disqualify. Id. at ¶ 8. However, "[t]he North Carolina Supreme Court has previously held that orders disqualifying counsel affect a substantial right and are immediately appealable." Id. (citing Goldston v. Am. Motors Corp., 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990)). The court of appeals identified two issues: Whether the trial court erred in disqualifying the attorney from representing his firm, and whether the trial court erred in disqualifying the attorney from representing himself. Id. at ¶ 9.

The court of appeals first considered whether the attorney could represent his firm. The court of appeals recognized that it had previously held a trial court held the power to disqualify an attorney under Rule 3.7 when the attorney was likely to be a necessary witness. Id. at ¶ 13 (citing Harris & Hilton, P.A. v. Rassette, 252 N.C. App. 280, 284 798 S.E.2d 154, 157 (2017)).

Acknowledging this principle, the attorney and firm instead argued that the trial court prematurely disqualified the attorney because Rule 3.7 states that "a lawyer shall not advocate at a trial." Id. at ¶ 14 (quoting N.C. R. Pro. Conduct 3.7). However, the court of appeals looked to a 2020 Ethics Committee opinion offering that while the Rule 3.7 disqualification does not automatically extend to pretrial matters, a court has discretion to disqualify an attorney "if the pretrial activities involve evidence that, if admitted at trial, would reveal the lawyer's dual role." Id. (quoting 2020 Formal Ethics Opinion No. 2, N.C. State Bar). Accordingly, the court of appeals held the trial court acted within its discretion in disqualifying the attorney from representing his firm. Id. at ¶ 15.

As to the issue of whether the attorney could represent himself, the attorney argued that North Carolina law provides any litigant the right to represent himself, and that all pro se litigants carry a "dual role" as counsel and witness. Id. at ¶ 16. The court of appeals further recognized that another Ethics Committee opinion provided that an attorney may represent himself at trial with no inherent prohibition within Rule 3.7. Id. at ¶ 17 (citing 2011 Formal Ethics Opinion No. 3, N.C. State Bar). "Thus, as a general rule, a lawyer-litigant has a right to appear pro se and Rule 3.7 does not automatically operate to disqualify a lawyer-litigant from appearing pro se even when the lawyer-litigant is likely to be a necessary witness." Id.

However, although Rule 3.7 does not serve as an automatic bar, "the question remains whether circumstances may arise permitting a court to disqualify a lawyer from appearing pro se in a particular case." Id. at ¶ 19 (emphasis added). While the trial court relied in part on Rule 3.7 as basis for disqualifying the attorney from representing himself, this was not the sole basis for disqualification. Id. at ¶ 22.

The court of appeals noted that the trial court's findings "reflect concern" about the attorney's ability to operate and advocate objectively in the "tripartite role of litigant, lawyer, and key witness." Id. "Given the litany of concerns reflected in the trial court's Order, we cannot conclude the trial court's exercise of its inherent authority to control proceedings—including control of the lawyers appearing before it—was arbitrary or unsupported by reason." ¶ 24.

Therefore, the court of appeals affirmed and held that the trial court did not abuse its discretion in disqualifying the attorney from representing himself or his firm. ¶ Id.