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I. LIABILITY

A. Negligence

In Cranes Creek, LLC v. Neal Smith Engineering, Inc., ___ N.C. App. ___, 896 S.E.2d 273 (2023), the court of appeals addressed whether a motion for summary judgment should be granted on claims for negligence and negligent misrepresentation where the defendant is sued in its professional capacity and expert testimony did not identify instances of breach of a specific professional standard of conduct.

A corporation sought to purchase a new residential subdivision. Id. at ___, 896 S.E.2d at 275. The corporation asked an engineering company to share "waterflow" test results for the subdivision and confirm whether the waterflow was "sufficient for fire suppression." Id. The engineering company replied that the waterflow requirements were met. Id. After completing the purchase of the subdivision, the corporation discovered that the waterflow was not sufficient, requiring that additional water supply and pipes would need to be installed to remedy the deficiency. Id.

The corporation filed a complaint against the engineering company alleging negligent misrepresentation, negligence, breach of contract, and breach of implied warranties. Id. The engineering company filed a motion for summary judgment, after which the corporation filed an amended complaint asserting only negligent misrepresentation and negligence. Id. The trial court granted the engineering company's motion for summary judgment, dismissing the initial complaint and amended complaint. Id. The corporation appealed, arguing there were genuine issues of material fact barring summary judgment. Id.

The court of appeals stated that the corporation's negligence and negligent misrepresentation claims were specifically for professional negligence because the corporation

alleged negligent performance by the engineering company in its professional capacity. Id. Thus, the corporation was required to show the following: (1) the nature of the engineering company's profession; (2) the engineering company's duty to conform to a specific standard of care; and (3) that a breach of that duty proximately caused injury to the corporation. Id.

In the context of professional negligence, the applicable standard of care must be established through expert testimony, unless the negligence was so gross that common knowledge is sufficient to determine whether the standard was met. Id. at ___, 896 S.E.2d at 276. Appellate courts will affirm a trial court's grant of summary judgment if the expert testimony does not show a breach of the relevant standard of care occurred. Id.

In this case, the corporation offered testimony from three experts. Id. None of these experts, however, was able to testify whether the engineering company had breached the standard of care; one expert, in particular, stated that the information he had was insufficient to make that determination. Id.

Because none of the experts could show a specific breach of the standard of care, there were no genuine issues of material fact before the trial court, and thus the trial court did not err in granting summary judgment for the engineering company. Id. Accordingly, the court of appeals affirmed the trial court. Id.

(1) Contributory

In Moseley v. Hendricks, ___ N.C. App. ___, 897 S.E.2d 680, appeal docketed (Mar. 11, 2024), a divided court of appeals addressed whether there were genuine issues of material fact regarding an injury suffered by a golfer where it was unclear how the golf cart in which he was sitting found itself in the path of another golfer's ball, and whether the city in which the golf course

was located was negligent in failing to extend the driving range's fence, positioning the driving range tees, and in overserving alcohol.

A group of friends met at a golf course. Id. at ___, 897 S.E.2d. at 682. During a game of golf—where all the friends joined in drinking one of the friends' moonshine—one golfer drank more than the others, consuming "an additional five to ten beers." Id. Toward the end of the game, the golfer struggled to stay upright while teeing up his ball. Id.

After the game, some of the friends headed to the golf course's driving range in two golf carts. Id. After they parked, the golfer who had the most to drink remained seated in one golf cart while the others walked toward the driving range. Id. at ___, 897 S.E.2d at 683. According to the golfer who remained in the cart, he was texting his wife at this time. Id. at ___, 897 S.E.2d at 683 n.4. The friend who had brought the moonshine proceeded to hit the ball first. Id. at ___, 897 S.E.2d at 683. Before hitting the ball, the friend followed the standard procedure he had learned in high school: ensure that no one is in the target line, keep your head down, and shoot. Id. After hitting the ball, the friend heard a sound, looked up, and saw that the golfer who remained in the cart had been struck in the eye with the ball. Id. Both the friend and another golfer testified that neither the injured golfer nor the golf cart had been in the way when the friend initially went to hit the ball. Id. Furthermore, there was not enough time between hitting the ball and the sound of the ball striking the golfer who was hit for the friend to yell, "Fore!" Id. at ___, 897 S.E.2d at 684.

The injured golfer brought suit against the friend, alleging that the ball caused blindness to his left eye. Id. He filed an amended complaint to include the city in which the golf course was located as a defendant. Id. The friend filed a motion for summary judgment, which the trial court granted on the basis of the injured golfer's contributory negligence and the doctrine of last clear

chance. Id. The trial court also granted summary judgment for the city on issues of sovereign immunity and negligence. Id. The injured golfer appealed. Id.

On appeal, the injured golfer argued that the trial court erred in granting summary judgment as to contributory negligence. Id. A majority of the court of appeals disagreed, in an opinion authored by Judge Thompson. Id. A defendant who asserts the defense of contributory negligence must show: (1) lack of due care on plaintiff's part and (2) "'a proximate connection between the plaintiff's negligence and the injury.'" Id. (quoting Proffitt v. Gosnell, 257 N.C. App. 148, 152, 809 S.E.2d 200, 204 (2017)). Additionally, contributory negligence is measured by an objective standard of behavior. Id. Accordingly, "'a person who possesses the capacity to understand and avoid a known danger and fails to take advantage of that opportunity, and is injured as a result, is chargeable with contributory negligence.'" Id. (quoting Proffitt, 257 N.C. App. at 152–53, 809 S.E.2d at 204).

The majority concluded the injured golfer failed to exercise reasonable care for his own safety, and there was a proximate connection between his failure to do so and his injury. Id. at ___, 897 S.E.2d at 685. The injured golfer had testified that he was familiar with the rules of golf, as well as the inherent dangers therein. Id. Thus, when he entered the driving range, "his lack of situational awareness—due at least in part to his intoxication and the distraction from his cell phone—constituted . . . failure to exercise ordinary care." Id. Although the injured golfer testified that he had not even been aware at the time that he had entered the driving range area, he would have known had he exercised reasonable care. Id. The question as to how the golf cart moved to the driving range area, exposing the injured golfer to errant golf balls, was of no moment. Id.

Next, the majority addressed the last clear chance doctrine, which requires a plaintiff to show that: (1) the plaintiff put himself "into a position of helpless peril" by his own negligence;

(2) the defendant discovered, or should have discovered, the plaintiff's situation; (3) the defendant had the "time and ability" to avoid the plaintiff's injury; (4) the defendant negligently failed to save the plaintiff from injury; and (5) the plaintiff was injured as a result. Id. (quoting Trantham v. Est. of Sorrells By & Through Sorrells, 121 N.C. App. 611, 613, 468 S.E.2d 401, 402 (1996)). Additionally, this doctrine is of last clear chance, not of possible chance; thus, the chance must have been such to allow a reasonably prudent person to act effectively. Id.

The court of appeals concluded that the doctrine did not apply in this instance because the friend did not discover, nor should have discovered, that the golfer who remained in the cart had moved into his target line when the friend hit the ball. Id. "[I]f the [golf] cart had moved forward onto the driving range while [the friend] was looking down and addressing his ball, [the friend] would not have known of [the golfer]'s precarious position until after he hit the ball." Id. A reasonably prudent person in the friend's position would not have been able to act effectively to avoid the golfer's injury. Id. at ___, 897 S.E.2d at 686. Furthermore, although "golfers have a duty to 'give adequate and timely notice to persons who appear to be unaware of their intentions to hit the ball'" and of their proximity to the ball's target line," this does not mean that golfers must ensure others' safety or exercise a duty of care to people who are located somewhere one would not reasonably anticipate them to be located. Id. (quoting McWilliams v. Parham, 273 N.C. 592, 597, 160 S.E.2d 692, 695 (1968)).

Next, addressing the claim of punitive damages, the majority stated that a plaintiff must show the presence of an "'aggravating factor of fraud, malice, or willful or wanton conduct.'" Id. (quoting Jones v. J. Kim Hatcher Ins. Agencies Inc., 290 N.C. App. 316, 335, 893 S.E.2d 1, 14 (2023)). Per its previous analysis, the court of appeals concluded that none of the friend's conduct rose to this level. Id.

As to the claims against the city, the court of appeals concluded that whether the city could benefit from sovereign immunity was immaterial due to the fact that there was no genuine dispute of material fact as to the injured golfer's contributory negligence. Id.

Accordingly, a majority of the court of appeals affirmed the trial court. Id.

Judge Thompson dissented by separate opinion. Id. at ___, 897 S.E.2d at 686–90. According to Judge Thompson, there remained genuine issues of material fact that made summary judgment inappropriate as to both the friend and the city. Id. at ___, 897 S.E.2d at 686. Particularly, there was a genuine issue of material regarding how the golf cart in which the injured golfer was seated found itself in the path of the friend's golf ball; this issue impacted the analysis as to the defense of contributory negligence. Id. For example, both the friend and another golfer testified that the golf cart moved from where it was parked onto the driving range itself. Id. at ___, 897 S.E.2d at 687. Even the injured golfer testified that the golf cart was in a different position than when it had been parked, although he did not know how that occurred. Id. at ___, 897 S.E.2d at 688. Furthermore, the majority suggested various ways in which the injured golfer could have prevented his injury, and by doing so "usurp[ed] the role of the factfinder in the trial court. Such 'mere speculation or conjecture' is insufficient to sustain summary judgment[.]" Id. (quoting Blackmon v. Tri-Arc Food Sys., Inc., 246 N.C. App. 38, 42, 782 S.E.2d 741, 744 (2016)).

As to the city, Judge Thompson stated that governmental immunity was not available as a complete defense to the claim that it had been negligent in not fully extending between the driving range and the parking lot, placing the driving range tees, and overserving alcohol to the friend group. Id. at ___, 897 S.E.2d at 689. Immunity only applies where the entity acted in furtherance of its governmental functions, not when it engages in a proprietary function. Id. Here, the city's actions "do not appear to have conclusively been held to be governmental functions," because the

record was not sufficiently developed and neither party had advanced case law addressing issues such as fencing, tee placement, or overserving alcohol on a golf course. Id. at ___, 897 S.E.2d at 690.

Accordingly, Judge Thompson would have reversed the trial court and remanded for further proceedings. Id.

B. Contract

In Smith Debnam Narron Drake Saintsing & Myers, LLP v. Muntjan, ___ N.C. App. ___, 897 S.E.2d 673, writ of cert. allowed, ___ N.C. ___, 896 S.E.2d 626 (2024), the court of appeals addressed the issue of whether a law firm had a valid claim of breach of contract or quantum meruit against a father of a business owner whom the law firm believed had promised to pay for the business owner's legal fees.

A business owner and his father met with a law firm partner to discuss services that the law firm would provide the business owner. Id. at ___, 897 S.E.2d at 675. The parties disagree as to whether fees were discussed during this meeting; the partner avers that the father promised to pay for the law firm's services, whereas the father denies doing so. Id. About a month after this initial meeting, the law firm mailed and emailed the business owner an engagement letter. Id. Neither the business owner nor the father, however, ever received the letter. Id.

The business owner was eventually sued by former clients. Id. Despite not receiving a returned, signed copy of the engagement letter, the law firm began performing legal services for the business owner and billed him accordingly. Id. The payments on the business owner's balance were made via the father's credit card. Id. Both the business owner and the father testified that the father did not make these payments himself; rather, the father allowed the business owner "to use his credit card as a loan." Id.

Sometime later, the law firm emailed the business owner about past due portions of his balance. Id. The law firm followed up with another email a few weeks later. Id. The business owner responded, asking that the law firm copy the father on future emails. Id.

The law firm and the father corresponded via email, where the father:

- Expressed that "it 'was important to us to always pay our valued partners quickly for their services'";
- Shared the complaint against the business owner and "asked how 'we can best work together in this regard'";
- "[Q]uestioned whether a payment was missing from an invoice"; and
- "[A]sked if discovery could be limited in order to keep costs down."

Id. In each of these emails, the father signed off with his first or full name. Id.

Months later, the law firm tried to collect the business owner's past-due bills by suing the father. Id. After a bench trial, the trial court eventually entered a judgment of $13,528.06 against the father, concluding that the father had breached his "original promise," which constituted a valid unwritten contract, to the law firm. Id.

On the father's appeal, the court of appeals addressed whether the trial court erred in concluding that the father was liable to the law firm and whether the law firm could recover for breach of contract or quantum meruit. Id. at ___, 897 S.E.2d at 678. The majority of the court of appeals, in an opinion written by Judge Carpenter, concluded that, to the extent the parties formed a contract, it was unenforceable under the statute of frauds. Id.

The statute of frauds requires some contracts to be in writing. Id. Specifically, section 22-1 of the North Carolina General Statutes provides that:

> No action shall be brought . . . to charge any defendant upon a special promise to answer the debt, default or miscarriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party charged therewith or some other person thereunto by him lawfully authorized.

Id. at ___, 897 S.E.2d at 676 (alteration in original) (quoting N.C. Gen. Stat. § 22-1). "In other words, an enforceable contract to pay another's debt"—also known as a "guaranty"—"must be in writing and be signed by the party charged." Id.

Next, the majority opinion addressed whether the father had made a "collateral promise" to the law firm, which constitutes a guaranty, or an "original promise," which does not. See id. Courts will find an original promise when credit is extended "'directly and exclusively to the promisor'"; in these cases, the promise does not fall within the statute of frauds. Id. (quoting Burlington Indus., Inc. v. Foil, 284 N.C. 740, 754, 202 S.E.2d 591, 601 (1974)). When credit is extended to anyone other than the promisor, the promise is collateral and thus within the statute of frauds. Id. Here, because the father had promised that he, in addition to the business owner, would be responsible for the business owner's legal fees, the father had made a collateral promise—a guaranty. Id. Thus, the trial court erred when it concluded that the father had made an "original promise" to the law firm that did not need to be in writing to be enforceable. Id.

Guaranties may still avoid the statute of frauds. Id. When the main purpose of the guaranty is to benefit the guarantor, then it does not fall within the statute of frauds. Id. The court of appeals called this the "main-purpose rule." See id. A parent-child relationship, by itself, is insufficient to meet the main-purpose rule exception. Id. Here, the father promised to pay the business owner's debt; because there was no other evidence indicating that the main purpose of the guaranty was to benefit the father, the main-purpose rule did not apply. Id. Accordingly, the statute of frauds still controlled in this case. Id.

Next, the court determined whether any correspondence between the father and the law firm constituted a signed memorandum. Id. A written memorandum may be informal so long as it is "'sufficiently definite to show the essential elements of a valid contract.'" Id. (quoting Smith

v. Joyce, 214 N.C. 602, 604, 200 S.E. 431, 433 (1939)). A written correspondence that "'sufficiently refer[s] to some writing in which the terms are set out and which itself contains all the requisites of a valid contract or memorandum under the statute'" may also satisfy the statute of frauds. Id. at ___, 897 S.E.2d at 677 (alteration in original) (quoting Winders v. Hill, 144 N.C. 614, 618–19, 57 S.E. 456, 457 (1907)). (Here, the majority opinion inserts a footnote disagreeing with the dissent's position, infra, that Winders was wanting in precedential value due to its age and previously uncited status. The majority opinion stated that, "[t]o the contrary, . . . a case's precedential value increases with the passage of time." Id. at n.1.) The court also observed that "'separate writings may be considered together to satisfy the statute of frauds requirement.'" Id. (quoting Crocker v. Delta Grp., Inc., 125 N.C. App. 583, 586, 481 S.E.2d 694, 696 (1997)).

The court noted that all the emails the father sent to the law firm ended with his name, thus satisfying the signature requirement for the statute of frauds. Id. The issue then became "whether the substance of [the father]'s emails contains 'the essential elements of a valid contract.'" Id. (quoting Smith, 214 N.C. at 604, 200 S.E. at 433). Because these emails, by themselves, did not discuss the price of the law firm's services, they lacked an essential element and thus did not constitute a contract. Id.

The emails could still satisfy the statute of frauds if they referred to another memorandum that, in turn, included all the essential elements of a contract. Id. at ___, 897 S.E.2d at 678. The father's emails referred to the law firm's invoices, which provided the price of the firm's services. Id. However, due to the nature of the promise—a guaranty—the invoices needed to show the father's promise to pay, which they did not. Id. Furthermore, the language contained in the emails was "passive" and "vague." Id.

The court concluded that these emails, "[t]aken as a whole," implied that the father agreed to pay the business owner's bills; in fact, the trial court had concluded that the father had "verbally promised to do so." Id. However, the emails were not sufficiently definite to include the essential elements of a contract. Id. Thus, because the guaranty was not memorialized and signed by the father, it was not enforceable against him. Id.

The court then addressed whether the law firm could recover for quantum meruit; in other words, it addressed whether there was an "equitable principle" warranting recovery in lieu of a contract. Id. Quantum meruit requires a plaintiff to show: "'(1) services were rendered to defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously.'" Id. (quoting Env't. Landscape Design Specialist v. Shields, 75 N.C. App. 304, 306, 330 S.E.2d 627, 628 (1985)). There must also be a benefit passed from the plaintiff to the defendant. Id. Here, the benefit of the law firm's legal services passed only to the business owner, not his father. Id. Thus, the law firm could not recover for quantum meruit. Id.

Accordingly, because the trial court's decision was "not supported by contract theory or quantum meruit," the court of appeals reversed. Id.

Judge Arrowood dissented by separate opinion. Id. at ___, 897 S.E.2d at 679-80. The dissenting judge stated that the statute of frauds "'was designed to guard against fraudulent claims supported by perjured testimony,'" not to allow defendants to "'evade an obligation.'" Id. at ___, 897 S.E.2d at 679 (quoting House v. Stokes, 66 N.C. App. 636, 641, 311 S.E.2d 671, 675 (1984)). Here, the only element left to be determined as to whether these communications satisfied the statute of frauds was the father's promise to pay. Id. One of the father's emails stated that "'it is important to us to always pay our valued partners quickly for their services rendered so rest assured your invoice will be turned around immediately and a check sent upon receipt.'" Id. (emphasis in

original). The emails also directed the law firm to send "'any and all [future] invoices' . . . directly to [the father]'s personal email address." Id. (brackets in original). To Judge Arrowood, "this sufficiently shows in writing [the father]'s promise to pay." Id.

In Hoaglin v. Duke University Health System, Inc., ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 2002554 (2024), the court of appeals considered whether a trial court properly granted a hospital's motion for summary judgment against a resident doctor's claims for breach of an employment agreement.

A resident brought an action against his former employer, a hospital. Id. at *1. The resident claimed that the hospital breached his employment agreement and violated the ADA, among other claims, when he was terminated. Id. at *1. After hiring the resident, the hospital began to receive grievances about him for "unprofessional behavior[,]" among other complaints. Id. Despite these grievances, the hospital gave the resident positive performance reviews. Id. at *2. Around this time, the resident sought, and was granted by the hospital, an accommodation for his depression, so that he would not be "scheduled for more than 5 days in a row." Id. When the hospital found out that the resident was working for Uber and renting out his house through AirBnB against the terms of the employment agreement, the hospital terminated the resident. Id. After the trial court granted summary judgment dismissing the claims for, among other things, breach of contract, the resident appealed. Id.

On appeal, the court of appeals held that the trial court erred in granting summary judgment on the resident's claim for breach of contract. Id. at *3. Beginning with the scope of the employment agreement, the court found that the hospital's Corrective Action and Hearing Procedures (the "Procedures") were incorporated into the employment agreement. Id. at *3. The court acknowledged that "the law of North Carolina is clear that unilaterally promulgated

employment manuals or policies do not become part of the employment contract unless expressly included in it." Id. at *3. However, in this case, the employment agreement "expressly included" the Procedures when it stated, "corrective action may be taken . . . as set forth in the [Procedures.]" Id. Since the Procedures were incorporated into the employment agreement, and there were genuine issues of material fact as to whether the hospital followed the Procedures in terminating the resident, summary judgment was inappropriate. Id. at *4.

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

C. Medical Malpractice

In Cottle v. Mankin, ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 2279851 (2024), the court of appeals considered whether a claim against a medical practice for negligent retention is a claim for medical malpractice such that the four-year statue of repose barred the claim.

A doctor performed two surgeries on a teenage girl, the last of which was performed on November 23, 2012. Id. at *1. The teenage girl and her parents filed suit more than four years after the second surgery against the medical practice with which the doctor was associated alleging, as relevant here, a claim for negligent retention. Id. The trial court granted summary judgment for the medical practice, finding that the four-year statue of repose that applies to claims for medical malpractice barred the claims. Id. The teenage girl and her parents appealed. Id.

The court of appeals reversed in relevant part. The court first observed that under section 90-21.11 of the North Carolina General Statutes only a "health care provider" can be liable for "medical malpractice." Id. at *4. And "[t]he only non-human entities incorporated within the definition of 'health care provider' are '[a] hospital, a [duly licensed] nursing home and [a duly licensed] adult care home.'" Id. (alterations in original).

Because the language of section 90–21.11 does not include a medical practice and there was no evidence that the medical practice was a hospital, a nursing home or an adult care home, the claim against the medical practice could not be a claim for medical malpractice. Id. Because the claim was not one for medical malpractice, the four-year statute of repose did not apply. Id.

II. PRETRIAL PROCEDURE

A. Statute of Limitation

In Morris v. Rodeberg, 385 N.C. 405, 895 S.E.2d 328 (2023), the supreme court addressed whether subsection 1-17(c) of the North Carolina General Statutes—which was enacted relatively recently—imposed a three-year limitations period against a medical patient whose medical malpractice cause of action accrued when he was 13 years old, thus making the action time-barred before the patient could reach the age of majority.

A patient underwent multiple surgeries at the age of 13 after an initial appendectomy failed to remove his entire appendix. Id. at 407, 895 S.E.2d at 329–30. Over five years later, the patient filed a medical malpractice action against the doctor who performed the first appendectomy and the hospital. Id. at 407, 895 S.E.2d at 330.

The doctor and the hospital moved to dismiss the complaint as time-barred pursuant to subsections 1-15(c) and 1-17(c) of the North Carolina General Statutes; specifically, they argued that these subsections required plaintiffs between the ages of 10 and 18 to assert a medical malpractice claim within three years. Id. In opposition to the motion to dismiss, the patient argued that subsection 1-17(c) did not apply to his action; rather, he contended that subsection 1-17(b), allowing minor plaintiffs for any professional malpractice action to reach the age of 19 before filing, controlled in his case. Id. The trial court entered an order denying the motion to dismiss.

Id. The doctor and the hospital appealed and filed a petition for writ of certiorari. Id. The court of appeals allowed the petition for certiorari. Id.

A divided court of appeals reversed the trial court's order denying the motion to dismiss. Id. The majority opinion concluded that, although subsection 1-15(c) provides a three-year statute of limitations for most medical malpractice claims, subsection 1-17(c) controlled when the cause of action accrued when the plaintiff was a minor. Id. The majority opinion interpreted subsection 1-17(c) as adopting the same three-year limitations period as subsection 1-15(c) for a plaintiff in a medical malpractice action whose cause of action accrues when the minor plaintiff is between the ages of 10 and 18; for minors under the age of 10, subsection 1-17(c)(1) applies. Id. Thus, because the patient had filed suit more than three years after the cause of action accrued at the age of 13, his action was time-barred. Id.

The dissenting opinion stated that, when a minor plaintiff does not satisfy any of the exceptions laid out in subsections 1-17(c)(1) through (c)(3) (namely, being: under the age of 10, adjudicated abused or neglected, or in the legal custody of some entity other than the child's parents, id. at 412, 895 S.E.2d at 333), subsection 1-17(b) must apply. Id. at 408, 895 S.E.2d at 330–31. According to the dissenting opinion, because the patient had until his 19th birthday to file suit, his action was timely. Id. at 409, 895 S.E.2d at 331.

The patient appealed to the supreme court. Id. The supreme court concluded that sections 1-15 and 1-17 must be read together to resolve whether the patient's medical malpractice action was time-barred. Id. The supreme court stated that subsection 1-15(c) provided a three-year limitations period for plaintiffs in medical malpractice actions. Id. Section 1-17, however—unlike subsection 1-15(c)—takes into account scenarios in which the plaintiff to a civil action is "under

a disability," which, per subsection 1-17(a), includes being a minor. Id. at 410, 895 S.E.2d at 332. The supreme court then addressed the various subsections to 1-17. See id.

Where subsection 1-17(a) "focuses on general torts," subsection 1-17(b) specifically addresses professional negligence claims; furthermore, the tolling provision contained in 1-17(b) applies "to the exclusion of subsection (a) and except as provided in subsection (c)." Id. "Inasmuch as medical malpractice is a subcategory of professional malpractice, subsection 1-17(b) would supply the controlling statute of limitations for the medical malpractice claims of minors if the statute ended there." Id. Indeed, this was the case until 2011. Id. at 412, 895 S.E.2d at 333.

But in 2011, as the supreme court noted, the General Assembly added subsection 1-17(c), which, as the supreme court had previously acknowledged in a footnote prior to the subsection's taking effect, "'further narrow[s] the time period for a minor to pursue a medical malpractice claim.'" Id. (alteration in original) (quoting King v. Albemarle Hosp. Auth., 370 N.C. 467, 471 n.2, 809 S.E.2d 847, 850 n.2 (2018)). Notably, "subsection 1-17(c) unambiguously declared that its tolling provision—not those in subsections 1-17(a) and 1-17(b)—applies to the medical malpractice claims of minors." Id. (emphasis added). Subsection 1-17(c) further provides that the medical malpractice claims of minors must be filed within the limitations set by subsection 1-15(c), unless any exception listed in subsections 1-17(c)(1) through (c)(3) applies. Id.

In the case sub judice, the parties did not dispute that none of the exceptions of subsections 1-17(c)(1) through (c)(3) applied, and the supreme court agreed. Id. Accordingly, subsection 1-17(c) required the patient to file his lawsuit within the three-year time frame set out in subsection 1-15(c). Id. As he had failed to do so, the claim was time-barred. Id. Further, this reading did not yield "absurd" results, contrary to the patient's contentions, because the General Assembly "may have reasonably decided that young children should have more time to bring their claims"

than older children. Id. at 414, 895 S.E.2d at 334. In any case, the supreme court was required to defer to the legislature. Id.

Thus, the supreme court affirmed the court of appeals. Id. at 416, 895 S.E.2d at 335.

In Davis v. Hayes Hofler, P.A., No. COA 22-1028, 2024 WL 16125 (Jan. 2, 2024), an unpublished decision, the court of appeals addressed how courts should identify a law firm's last act giving rise to a malpractice action for the purpose of calculating when the statute of limitations accrues.

A law firm filed a lawsuit on February 8, 2017, with respect to a matter involving a woman's trust. Id. at *1. The law firm was retained by a woman's daughter-in-law and grandson, and the complaint alleged that the daughter-in-law was suing the woman's daughter on the woman's behalf, even though the woman was alive and had not been declared incompetent. Id. In February and March 2017, the woman and daughter filed motions to dismiss pursuant to Rule 12(b)(6). Id. The law firm, acting on behalf of the daughter-in-law and grandson, moved to continue or stay proceedings for the purpose of gathering additional information as to the woman's incapacity. Id. In late March 2017, the woman petitioned the trial court to be removed from the matter as a represented plaintiff and to instead intervene as a defendant. Id. On March 28, 2017, the trial court granted the woman's petition, denied the law firm's motion to continue or stay, and—relevant to the malpractice action that followed—granted the woman's and daughter's motions to dismiss. Id.

In April 2017, the law firm moved pursuant to Rule 60 to petition to adjudicate the woman incompetent and appoint a guardian. Id. The trial court denied the motion in May 2017, and the law firm appealed the denial over three weeks later. Id. The woman and daughter moved to dismiss the appeal as untimely. Id.

On November 7, 2017, the law firm filed a second Rule 60 motion with the trial court as well as a motion for extension of time with the court of appeals to respond to the motion to dismiss the appeal. Id. The court of appeals granted the law firm's request, giving it until November 30 to respond. Id. On November 17, the law firm filed an additional motion for extension of time, seeking until the trial court's ruling on the pending Rule 60 motion to respond. Id. The court of appeals denied this request. Id.

In the meantime, the woman relocated to Georgia, where her daughter petitioned to have her declared incompetent. Id. In December 2017, the law firm petitioned a North Carolina trial court to have the woman declared incompetent and her grandson appointed as guardian. Id. Due to the pending Georgia proceeding, in July 2018, the North Carolina court "dismissed the petition with prejudice and relinquished jurisdiction." Id. A Georgia court eventually declared the woman incompetent and appointed her daughter as guardian. Id. At this juncture, the daughter-in-law and grandson incurred legal expenses while litigating the Georgia matter, which, they claimed, was a result of the law firm's failure to seek an adjudication of incompetence while the woman was still living in North Carolina. Id.

In August 2018, the court of appeals granted the woman's and daughter's motion to dismiss the appeal. Id. at *2. On May 24, 2019, the law firm moved to stay or continue the hearing on its Rule 60 motion for the purpose of gathering additional evidence. Id. In June 2019, the trial court denied both the Rule 60 motion and the motion to stay or continue. Id.

The woman and daughter then filed a motion for attorneys' fees against the daughter-in-law and grandson, seeking over $160,000. Id. On this basis, the daughter-in-law and grandson sued the law firm on February 8, 2021, for legal malpractice. Id.

The law firm moved to dismiss its now former clients' malpractice complaint, arguing the action was time-barred by the three-year statute of limitations. Id. During a hearing on its motion to dismiss, the law firm argued that it did not owe a continuing duty to its former clients because such a duty is applicable only to medical malpractice actions. Id. The law firm also argued that, in any case, because "the statute of limitations runs upon the date of the attorney's last act giving rise to the negligence," its last act had been either the filing of the initial complaint on behalf of the clients on February 8, 2017, or when the trial court dismissed the complaint on March 28, 2017. Id. In response, the former clients argued that the law firm's last act was actually the filing of the motion to stay or continue the Rule 60 hearing, which occurred on May 24, 2019, and thus was within the statute of limitations. Id. The trial court dismissed the clients' complaint, and the clients appealed. Id.

The court of appeals stated that section 1-15(c) of the North Carolina General Statutes applies to legal malpractice claims, establishing a three-year statute of limitations and a four-year statute of repose. Id. at *3. Continuing legal representation following the negligent act does not extend the statute of limitations; thus, a complaint accrues at the time of the negligent act giving rise to a cause of action. Id.

On appeal, the law firm argued that its last act was the trial court's dismissal of the complaint, which occurred on March 28, 2017; thus, the clients' malpractice action, filed February 8, 2021, fell outside of the limitations period. Id. Again, the clients argued that neither the filing of the complaint nor the trial court's dismissal thereof constituted the last act; rather, the last act "'from which [the law firm's] negligence stems'" was its filing of the motion to stay or continue the hearing on its second Rule 60 on May 24, 2019. Id.

The court of appeals agreed with the clients. Id. The basis for the court's conclusion was that the law firm had taken "several remedial steps" on the clients' behalf after filing the initial complaint (February 8, 2017) and after the initial complaint was dismissed (March 28, 2017). Id. Because the law firm had continued to seek relief for its clients, neither of these dates marked the law firm's last act for the statute of limitations purposes. Id. Indeed, to identify a last act, courts will "'look at factors such as the contractual relationship between the parties, when the contracted-for services were complete, and when the alleged mistake could no longer be remedied.'" Id. (quoting Carle v. Wyrick, Robbins, Yates & Ponton LLP, 225 N.C. App. 656, 661, 738 S.E.2d 766, 771 (2013)). Here, the court of appeals determined that "[n]one of those factors are present" on either the date of the initial complaint's filing or the date of its dismissal. Id.

Accordingly, the court of appeals concluded that neither the filing nor the dismissal constituted the law firm's last act. Id. at *4. At the earliest, the court of appeals surmised that the law firm's last act could have been in July 2018, when the North Carolina trial court "ceded jurisdiction" to the Georgia court. Id.

Thus, because the clients' malpractice action was timely, the court of appeals reversed and remanded the trial court's dismissal. Id.

In Warren v. Snowshoe LTC Group, LLC, ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 1172421 (2024), the court of appeals considered whether a trial court erred by denying plaintiffs' motion for an extension of time under Rule 6(b) to refile their complaint after the expiration of the one-year period provided by Rule 41(a)(1) for lawsuits that were voluntarily dismissed without prejudice.

A decedent's estate filed a wrongful death action, with ancillary claims, against healthcare providers. Id. at *2. Less than two years later, the decedent's estate voluntarily dismissed the

action without prejudice on September 16, 2019. Id. Then, over a year after the dismissal, on October 21, 2020, the decedent's estate refiled the action, while simultaneously filing a motion for extension of time pursuant to Rule 6(b). Id. In the motion for extension of time, the decedent's estate requested that the one-year time period to refile a previous suit under Rule 41(a)(1) be retroactively extended to permit the refiling of the complaint in this case. Id. The decedent's estate claimed the delay was the result of excusable neglect under Rule 6(b). Id. In response, the two healthcare providers filed motions to dismiss. Id. After making findings of fact and conclusions of law, the trial court found that the complaint was untimely and held that it must be dismissed as a matter of law. Id. The decedent's estate appealed. Id.

The court of appeals found that the trial court did not err by declining to extend the one-year timeframe for refiling the complaint found in Rule 41(a) and dismissed the appeal. Id. *4. The court of appeals acknowledged that Rule 6(b) grants trial courts broad discretion to extend deadlines found in the Rules of Civil Procedure based on excusable neglect. Id. at *3. However, the court of appeals also found that even if it construed Rule 6(b) as providing authority to extend the one-year savings provision provided by Rule 41(a), Rule 6(b) cannot be applied to extend an otherwise expired statute of limitations. Id. Since the statute of limitations had run on the decedent's estate's claims, the court of appeals held that the complaint was time barred. Id. at *4.

Quoting Locklear v. Scotland Memorial Hospital, Inc., the court of appeals reiterated "that trial courts do not have discretion pursuant to Rule 6(b) to prevent a discontinuance of an action under Rule 4(e) when there is neither endorsement of the original summons nor issuance of alias or pluries summons within ninety days after issuance of the last preceding summons." 119 N.C. App. 245, 247–48, 457 S.E.2d 764, 766 (1995).

For these reasons, the court of appeals dismissed the appeal. Id.

In Warren v. Cielo Ventures, Inc., ___ N.C. App. ___, ___ S.E.2d. ___, 2024 WL 2002828, motion for en banc rehearing filed (May 21, 2024), the court of appeals considered whether a one-year limitation of liability clause in a contract applied to claims made under North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA").

Two homeowners discovered that their water heater was leaking and notified their homeowners' insurance of the incident. Id. at *1. On July 10, 2017, a home restoration company conducted a preliminary inspection of the house and informed the homeowners that the water leak resulted in extensive damage to the house, requiring the home restoration company to begin work immediately. Id. The homeowners entered into an agreement with the home restoration company, authorizing the company to begin work on the house. Id. Among other terms, the contract contained a clause stating:

> NO ACTION, REGARDLESS OF FORM, RELATING TO THE SUBJECT MATTER OF THIS CONTRACT MAY BE BROUGHT MORE THAN ONE (1) YEAR AFTER THE CLAIMING PARTY KNEW OR SHOULD HAVE KNOWN OF THE CAUSE OF ACTION.

Id.

Because of the extent of the necessary repairs, the homeowners stayed in a hotel. Id. Ten days after the initial inspection, the homeowners visited the house and observed that the home restoration company had not completed any noticeable amount of work on the house at all. Id. Because the water leak from the water heater had not been abated, the extensive water damage allowed mold to proliferate throughout the house. Id. The homeowners contacted another company to help with the water damage, but after a failed attempt, the damage was found to be irreparable, and the house was later demolished. Id. The homeowners' insurance compensated the homeowners for the loss. Id.

The homeowners filed a claim under North Carolina's UDTPA against the home restoration company. Id. The home restoration company later filed a motion for summary judgment, asserting that the homeowner's UDTPA claim was time-barred under the contract. Id. The trial court granted the motion for summary judgment at the end of a hearing on that motion, acknowledging that the contract reduced the time frame for the statute of limitations. Id. The homeowners timely appealed the trial court's order. Id.

Among other things, the court of appeals considered whether parties can contractually agree to a shorter time limit for asserting claims under the UDTPA, such that the contractually shortened one-year limitation clause barred the claim. Id. at *2.

The court of appeals first considered whether allowing one-year limitation clauses against UDTPA claims violates public policy by circumventing the North Carolina General Assembly's stated purpose in enacting the UDTPA. Id. at *3. The court of appeals reviewed the legislative history and acknowledged that UDTPA claims are considered distinct from other claims with respect to statutes of limitations. Id. Moreover, the legislative purpose of the UDTPA is:

> [t]o provide civil legal means to maintain ethical standards of dealings between persons engaged in business and . . . the consuming public within this State, to the end that good faith and dealings between buyers and sellers at all levels of commerce be had in this State.

Id. at *4 (quoting N.C. S.B. 515 (1969), amended by N.C. H.B. 1050 (1977)).

Consequently, courts must look at whether the allegedly unfair action violates public policy and how the action affects consumers when adjudicating UDTPA claims. Id. Here, the court of appeals held that public policy weighs against permitting contractual agreements to shorten the statute of limitations for UDTPA claims and decided against construing the generalized one-year clause of limitation contained in the contract as a bar to the homeowners' UDTPA claim. Id.

For these reasons, the court of appeals found that the trial court erred, vacated the trial court's order granting summary judgment, and remanded for further proceedings. Id.

In Taylor v. Bank of America, N.A., ___ N.C. ___, 898 S.E.2d 740 (2024), the supreme court considered whether the statute of limitations barred a group of borrowers' claims for fraud against a mortgage loan servicer.

A group of mortgage loan borrowers, who elected to participate in a federal mortgage relief program called the Home Affordable Modification Program (HAMP), brought an action against a loan servicer for fraud, among other claims. Id. at ___, 898 S.E.2d at 743. The borrowers alleged that the loan servicer engaged in a fraudulent scheme to intentionally prevent eligible applicants from receiving permanent HAMP modifications to their mortgages that ultimately resulted in foreclosures on their homes. Id. The trial court granted the loan servicer's motion to dismiss on the grounds that the complaint was barred by the applicable statutes of limitations. Id. at ___, 898 S.E.2d at 744. After the court of appeals reversed and remanded the trial court's dismissal in a divided opinion, the loan servicer appealed to the supreme court. Id.

On appeal, Justice Newby, writing for the majority, found that the complaint was barred by the applicable statutes of limitations. Id. at 746, ___ N.C. at ___. The court found that, generally, a statute of limitations begins to run from the moment a plaintiff is injured, but when a claim for fraud is brought, the injury may not be readily discoverable, and the discovery rule can toll the statute of limitations. Id. at 745, ___ N.C. at ___. The court stated that the discovery rule tolls the statute of limitations only until a reasonable person should have discovered the fraud under the circumstances in the exercise of reasonable prudence, regardless of when the fraud was actually discovered. Id. at 746, ___ N.C. at ___. According to the majority, "the complaint makes clear that the statute of limitations [ ] began to run—at the very latest—by the date they lost their

homes," because, by that time, each borrower knew, or reasonably should have known, that the loan servicer wrongfully delayed and denied the borrowers' HAMP applications which resulted in the borrowers losing their homes. Id. Additionally, the court found that if the borrowers investigated the matter further, they could have easily discovered nationwide litigation against the same loan servicer for similar claims, including a consent judgment entered therein. Id.

Justice Riggs wrote a dissenting opinion. The dissent would not have found that the complaint, on its face, reveals that the statute of limitations barred the claims of fraud. Id. at 747, ___ N.C. at ___. From the dissent's perspective, the majority's opinion "disregard[ed] portions of the complaint and g[ave] the news coverage of problems with the HAMP program more legal significance than the allegations and record support." Id. Referring to prior caselaw, the dissent emphasized that, "the foreclosure process itself does not represent an act constituting fraud nor do the facts surrounding a foreclosure give rise to an inference of fraud." Id. Ultimately, the dissent found that, "[t]he notions of fundamental fairness underpinning the discovery rule" were at odds with a finding that the borrowers should have known about their claims when they lost their homes, particularly when the loan servicer's alleged deceptive actions delayed or interfered with the borrowers' discovery of its conduct. Id. at 749, ___ N.C. at ___.

B. Rule 4(j1)

In Builder's Mutual Insurance Co. v. Neibel, ___ N.C. App. ___, 899 S.E.2d 560 (2024), the court of appeals considered whether service by publication was sufficient where the notice was published in the county in North Carolina where personal service was attempted without success but not the county in which the plaintiff filed suit.

In 2010, an insurance company filed a complaint (the "2010 Complaint") seeking to collect unpaid insurance premiums from a contractor. Id. at ___, 899 S.E.2d at 562. The insurance

company attempted to serve the 2010 Complaint and summons via certified mail to Sugar Grove, North Carolina, because the contractor listed this address in his insurance application, and at an address in Paragon, Indiana, because the contractor listed this address in his filing with the North Carolina Licensing Board for General Contractors. Id. The insurance company also attempted to serve an address in Vilas, North Carolina, included in a Certificate of Assumed Name for the contractor. Id. All three attempts were unsuccessful and the summonses were returned. Id. The insurance company later attempted service on the contractor through the Watauga County Sheriff at the addresses in Vilas and Sugar Grove but to no avail. Id. Finally, the insurance company published a notice in a local Watauga newspaper because the contractor's last known address was in Watauga County. Id. Following the publication of the notice, the insurance company moved for summary judgment and obtained a monetary judgment against the contractor in 2011 (the "2011 Judgment"). Id.

The insurance company filed a complaint in Wake County in 2021 alleging that the 2011 Judgment remained unsatisfied and requested entry of a renewed judgment. Id. at ___, 899 S.E.2d at 563. The contractor filed an answer asserting that the 2011 Judgment was void for lack of personal jurisdiction, insufficient process, and insufficient service of process. Id. The insurance company eventually filed a motion for summary judgment, and the trial court granted the motion in favor of the insurance company and against the contractor for the full amount owed for the 2011 Judgment. Id. The contractor timely filed a notice of appeal. Id.

On appeal, the contractor asserted that the 2011 Judgment was void because of two defects in the insurance company's service of process by publication. Id. The contractor first contended that the insurance company failed to exercise due diligence in attempting to locate the contractor before resorting to service of publication. Id. at ___, 899 S.E.2d at 564. He argued that the

insurance company should have attempted service at a post office box in Watauga County and that the insurance company should have made repeated attempts at service at the Paragon, Indiana address that was on file with the North Carolina Licensing Board for General Contractors. Id. The court of appeals, in a majority opinion authored by Judge Hampson, held that the contractor failed to identify any facts in the record that would have indicated that its suggestions would have been fruitful. Id. Ultimately, the court of appeals concluded that the insurance company exercised due diligence in making multiple attempts to serve the contractor with the 2010 Complaint. Id. at ___, 899 S.E.2d at 565.

Second, the contractor contended that the notice of service by publication of the 2010 Complaint in Watauga County did not meet the requirements of Rule 4(j1) of the North Carolina Rules of Civil Procedure. Id. The contractor argued that the insurance company either reasonably believed that the contractor was located in Watauga County or Indiana and should have served him by publication in both locations, or, in the alternative, the insurance company had no reliable information about the contractor's whereabouts and should have served the contractor in Wake County where the lawsuit was pending. Id. In response to this argument, the court of appeals acknowledged Rule 4(j1) states, in pertinent part:

> a notice of service of process by publication . . . in a newspaper . . . circulated in the area where the party to be served is believed by the serving party to be located, or if there is no reliable information concerning the location of the party then in a newspaper circulated in the county where the action is pending.

Id. (quoting N.C. Gen. Stat. § 1A-1, Rule 4(j1) (2023)). Here, the court of appeals found that the contractor effectively conceded that service by publication in Watauga County was not improper. Id. There were sufficient reasons for the insurance company to believe that the contractor would be located in Watauga County because all of the insurance company's dealings with the contractor

occurred in Watauga County, the contractor's last known residence was in Watauga County, and the records held by the insurance company reflected that the contractor only conducted business in Watauga County. Id. The court of appeals also concluded that the insurance company had no reason to believe that the contractor was located in Indiana. Id. at ___, 899 S.E.2d at 566. The insurance company's efforts at service at the Paragon, Indiana address were unsuccessful, and the record provided no indication of any other reason to believe the contractor was located there. Id.

Finally, the court of appeals disagreed with the contractor that the insurance company should have served the contractor in Wake County where the action was pending. Id. Even though the insurance company was not able to effectuate service in Watauga County, which was the county where the contractor was last known to reside, it did not follow that the contractor was no longer located in that county. Id. It also did not follow that the insurance company could not reasonably believe that the contractor would be located in Watauga County. Id. Moreover, the evidence suggested that there was no likelihood that the contractor would have received notice in Wake County. Id. The court noted that it was apparent that service by publication in Wake County was "least reasonably calculated" to notify the contractor of the 2010 Complaint and provide him with an opportunity to defend against the lawsuit. Id. The test under Rule 4(j1) asks whether the insurance company, in 2010 when it filed the complaint, "reasonably believed [that the contractor] was located in Watauga County based on what reliable information it had at the time." Id. at ___, 899 S.E.2d at 567. The court of appeals concluded that the answer to this question was yes and concluded that the contractor failed to establish that the insurance company was required to publish the notice of the 2010 Complaint in Wake County where the action was pending. Id.

Ultimately, the court of appeals held that the contractor failed to show that the insurance company failed to exercise due diligence in attempting personal service or that service by

publication in Watauga County was insufficient. Id. Consequently, the trial court had jurisdiction over the contractor to enter the 2011 Judgment, and the trial court did not err in granting summary judgment to the insurance company renewing the 2011 Judgment. Id.

Judge Gore dissented, disagreeing with the majority's holding that Rule 4(j1) did not require the insurance company to serve the contractor by publication in Wake County, the county where the action was pending. Id. at ___, 899 S.E.2d at 567–69. Specifically, Judge Gore noted that the evidence obtained through attempts to serve the contractor during the lawsuit contradicted the conclusion that the insurance company reasonably believed that the contractor was located in Watauga County. Id. at ___, 899 S.E.2d at 567. Judge Gore conceded that the actual likelihood that the contractor would have received the notice through publication in Wake County was nearly zero since the contractor was, in fact, located in Indiana at the time of the lawsuit. Id. at ___, 899 S.E.2d at 568. However, the insurance company's failed initial efforts to affect service via certified mail and personal service through the Sherriff to both Vilas, North Carolina, and Sugar Grove, North Carolina, "raise[d] suspicion as to [the insurance company's] reliable information and reasonable belief of [the contractor]'s location." Id. Judge Gore would have concluded that the requirement of service by publication in the location in which the action is pending should have been considered necessary where the evidence showed that the insurance company lacked reliable information of the contractor's location. Id. at ___, 899 S.E.2d at 569.

C. Rule 9(j)

In Robinson v. Halifax Regional Medical Center, ___ N.C. App. ___, 899 S.E.2d 11 (2024), the court of appeals addressed whether the trial court properly dismissed a patient's medical malpractice claims pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure,

where the trial court determined that the designated medical expert would not be reasonably expected to testify pursuant to Rule 702(b) of the North Carolina Rules of Evidence.

The matter arose from allegations of medical malpractice lodged by the daughter and the estate of a deceased patient against a hospital and two doctors. See id. at ___, 899 S.E.2d at 14, Pursuant to Rule 9(j), the daughter and the estate were required to provide a provision in the complaint certifying that "the medical care and all medical records in this case [had] been reviewed by an expert witness who [was] reasonably expected to qualify as such and who [was] willing to testify as to the standard of care." Id. Originally, the trial court dismissed the action for lack of compliance with Rule 9(j). Id. at ___, 899 S.E.2d at 13. On appeal, the court of appeals reversed the trial court in part, concluding that the trial court had "jumped the gun" because the complaint had, on its face, satisfied the preliminary pleading requirements. Id. (quoting Robinson v. Halifax Reg'l Med. Ctr., 271 N.C. App. 61, 66, 843 S.E.2d 265, 265 (2020)). In this prior opinion, the court of appeals included "a caveat," explaining that future discovery could still reveal that the daughter and the estate should not have reasonably believed that their expert would have qualified under Rule 702. Id. at ___, 899 S.E.2d at 13-14.

Upon remand, the parties engaged in discovery, and the daughter and the estate identified one expert witness, a physician purportedly "specializing in internal medicine and practicing as a hospitalist." See id. The physician was scheduled to be deposed; however, two days before the deposition, counsel for the daughter and the estate announced that the physician would be unavailable because he required payment of a deposit for the deposition at least seven days in advance. Id. Thus, the deposition was cancelled. Id. This was the first time that counsel for the hospital and doctors learned of the physician's payment requirements. Id. Eventually, the deadline

for deposing the physician as set forth in the scheduling order passed. Id. The hospital and doctors filed a motion to strike the witness as well as a motion to dismiss and for summary judgment. Id.

The trial court granted the motion to dismiss and for summary judgment "upon the basis of noncompliance with Rule 9(j)." Id. Specifically, the trial court found that the physician would not be able to qualify as an excerpt witness pursuant to Rule 702 because the daughter and the estate failed to show, among other things, that the physician "specializ[ed] in internal medicine and practic[ed] as a hospitalist" during a specific period of time. Id. at ___, 899 S.E.2d at 15. Thus, there was nothing before the trial court showing that the physician was or could be familiar with the relevant standard of care. Id. The trial court also found that the physician was "unwilling to testify as to the standard of care opinions in this action[] due to [his] failure to attend his deposition." Id. Further, the trial court found that the daughter and the estate failed to make the physician available for deposition before the scheduling order due date and failed to move for an amended scheduling order to remedy that failure. Id.

The daughter and the estate appealed. Id. The court of appeals stated that "Rule 9(j) serves as a gatekeeper . . . to prevent frivolous malpractice claims by requiring expert review before filing of the action." Id. at ___, 899 S.E.2d at 13 (alteration and emphasis in original) (quoting Moore v. Proper, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012)). "Whether an expert will ultimately qualify to testify is controlled by Rule 702." Id. (quoting Moore, 366 N.C. at 31, 726 S.E.2d at 817). Accordingly, "the preliminary, gatekeeping question of whether a proffered expert witness is 'reasonably expected to qualify as an expert witness under Rule 702' is a different inquiry from whether the expert will actually qualify under Rule 702." Id. (quoting Moore, 366 N.C. at 31, 726 S.E.2d at 817).

Rule 702(b), in turn, provides a three-part test to determine whether someone may qualify as an expert witness:

> (1) whether, during the year immediately preceding the incident, the proffered expert was in the same health profession as the party against whom or on whose behalf the testimony is offered; (2) whether the expert was engaged in active clinical practice during that time period; and (3) whether the majority of the expert's professional time was devoted to that active clinical practice.

Id. at ___, 899 S.E.2d at 17 (quoting Moore, 336 N.C. at 33, 725 S.E.2d at 818). Here, despite the plaintiff's argument that the trial court misapplied Rule 702, the court of appeals concluded to the contrary—the trial court's findings addressed the three-part test and thus supported excluding and striking the physician as an expert witness. Id.

Accordingly, the court of appeals affirmed the trial court. Id.

D. Rule 12(b)(3)

In Clapper v. Press Ganey Associates, LLC, 291 N.C. App. 136, 894 S.E.2d 778 (2023), the court of appeals considered whether a forum selection clause that specified the parties' disputes arising from a contract must be litigated in another state's court was enforceable in North Carolina.

A consultant entered into an employment agreement with a healthcare company. Id. at 137, 894 S.E.2d at 779. The employment agreement contained a section stating that any disputes or controversies arising out of the employment agreement would be brought in Delaware and that the parties submitted to the exclusive jurisdiction of federal and state courts in Delaware. Id. A holding company sought to amend its limited partnership agreement to admit additional limited partners, which would include the consultant. Id. The amended limited partnership agreement incorporated the consultant's employment agreement and also contained a jury trial waiver and provisions specifying choice of law and venue and requiring submission to the jurisdiction of Delaware courts. Id. at 138, 894 S.E.2d at 780. The consultant signed the amended limited

partnership agreement on July 23, 2019, while he purportedly resided in North Carolina. Id. Other limited partners also signed the amended limited partnership agreement. Id. The holding company's general partner signed the amended limited partnership agreement on July 25, 2021, while in Delaware. Id.

Sometime thereafter, the healthcare company decided to terminate the consultant's employment. Id. The holding company decided to exercise a call right to stock owned by the consultant pursuant to terms in both the employment agreement and the amended limited partnership agreement. Id. at 139, 894 S.E.2d at 780. This decision caused the consultant to file a lawsuit against the healthcare company and the holding company alleging breach of contract, breach of the covenant of good faith and fair dealing, fraud, and violation of the North Carolina Wage and Hour Act. Id., 894 S.E.2d at 780-81. The healthcare company and the holding company moved to dismiss the consultant's claims pursuant to, among other things, Rule 12(b)(3), asserting that the consultant brought his claims in an improper venue. Id. The trial court denied the Rule 12(b)(3) motion. Id. at 139-40, 894 S.E.2d at 781. The healthcare company and the holding company filed a timely notice of appeal seeking review. Id.

On appeal, the court of appeals considered whether the trial court improperly denied the healthcare company's and holding company's 12(b)(3) motion to dismiss for improper venue. Id. at 140-41, 894 S.E.2d at 781.

The court of appeals held that the trial court erred by denying the healthcare company's and holding company's Rule 12(b)(3) motion to dismiss. Id. at 141, 894 S.E.2d at 781. The court acknowledged that the enforceability of forum selection clauses has varied in North Carolina law with respect to forum selection clauses that require disputes between parties to be litigated in other state courts. Id. at 141, 894 S.E.2d at 782 (citing Cable Tel Servs., Inc. v. Overland Contr'g., Inc.,

154 N.C. App. 639, 642, 574 S.E.2d 31, 33 (2002)). The court of appeals outlined the relevant standard from Perkins v. CCH Computax, Inc.:

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

Id. at 142, 894 S.E.2d at 782 (citing Perkins v. CCH Computax, Inc., 333 N.C. 140, 144, 4232 S.E.2d 780, 783 (1992) (internal citations omitted)). The North Carolina legislature has also enacted legislation on forum selection clauses, stating the following:

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

Id. (quoting N.C. Gen. Stat. § 22B-3). Furthermore, the court of appeals in prior cases has reconciled the Perkins standard with the subsequent enactment of section 22B-3 of the North Carolina General Statutes by acknowledging that where a party seeks to avoid enforcement of a forum selection clause entered into outside of North Carolina, the party must demonstrate at least one of two things: (1) that the clause was the product of fraud or unequal bargaining power or (2) that enforcement of the clause would be unfair or unreasonable. Id. (citing Parsons v. Oasis Legal Fin., LLC, 214 N.C. App. 125, 135, 715 S.E.2d 240, 246 (2011)). Thus, in order to determine whether the Perkins standard or section 22B-3 applies to a forum selection clause, the court must first look at where the parties entered into the contract. Id. (citing Szymczyk v. Signs Now Corp., 168 N.C. App. 182, 187, 606 S.E.2d 728, 733 (2005)). A contract takes place where "'the last act

was done by either of the parties essential to a meeting of minds.'" Id. at 143, 894 S.E.2d at 783 (quoting Bundy v. Commercial Credit Co., 200 N.C. 511, 515, 157 S.E. 860, 862 (1931)).

Here, the court of appeals found the last act occurred in Delaware. Id. As noted above, the consultant signed the amended limited partnership agreement on July 23, 2019, while residing in North Carolina, but the holding company's general partner did not sign the agreement until July 25, 2021, while located in Delaware. Id. This amended limited partnership agreement contained the provisions identifying Delaware as its designated forum for choice of law, venue, and jurisdiction. Id. Consequently, the court of appeals held that the trial court should have granted the healthcare company's and the holding company's rule 12(b)(3) motion to dismiss for improper venue. Id. at 144, 894 S.E.2d at 783.

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

E. Rule 12(b)(6)

In Turpin v. Charlotte Latin School, Inc., ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 1392290 (2024), appeal filed (May 7, 2024), the court of appeals considered whether a trial court properly dismissed a breach of contract claim for failing to state a claim under Rule 12(b)(6).

Parents of private school students brought an action against the school, its administrators, and members of the school's board. Id. at *1. The parents alleged that the school breached enrollment contracts when it terminated the contracts after the parents raised concerns about changes in the school's culture and curriculum. Id. at *3-4. The parents asserted claims for, among other things, breach of contract. Id. at *4. The trial court granted the school's motion to dismiss the contract claim pursuant to Rule 12(b)(6). Id. The parents appealed. Id.

On appeal, Judge Thompson, writing for the majority, found that the parents failed to state a claim for breach of the enrollment contracts, affirming the trial court's dismissal. Id. at *5-6. The majority maintained that the plain language of the enrollment contracts gave the school a right to discontinue enrollment if it concluded, in its discretion, that the actions of a parent/guardian made a positive, collaborative working relationship impossible or seriously interfered with the school's mission. Id. at *6. According to the majority, the contracts' plain and unambiguous language gave the school discretion to terminate the enrollment contracts, and neither the parents nor the court could substitute their judgment for the school's. Id. While the majority acknowledged the liberal pleading standard on a Rule 12(b)(6) review, it held that "[t]he plain language of the contract necessarily defeated plaintiffs' claim for breach of contract." Id. at *7.

Judge Arrowood wrote a concurring opinion, emphasizing that North Carolina "recognizes that, unless contrary to public policy or prohibited by statute, freedom of contract is a fundamental constitutional right." Id. at *15 (quoting Hlasnick v. Federated Mut. Ins. Co., 353 N.C. 240, 243, 539 S.E.2d 274 (2000)). Like the majority, Judge Arrowood found that "this is a case of basic contract interpretation." Id. Since the "contracts—in plain and simple language—expressly reserved the school the right to discontinue enrollment" under certain conditions, then "the trial court was correct in dismissing plaintiffs' claim for breach of contract." Id.

Judge Flood wrote a dissenting opinion. She would have found that dismissal of the breach of contract claim was premature under Rule 12(b)(6). Quoting Norton v. Scotland Memorial Hospital, Inc., Judge Flood stated that, "[a] complaint should not be dismissed under Rule 12(b)(6) unless it affirmatively appears that [the] plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." Id. at *16 (quoting 250 N.C. App. 392, 399, 793 S.E.2d 703, 709 (2016)). Upon reviewing the complaint, Judge Flood found that the parents

sufficiently alleged the elements of a breach of contract: (1) the existence of a contract; (2) the particular provisions breached; (3) the facts constituting breach; and (4) the amount of damages resulting from such breach. Id. at *17. While recognizing that the parents did not address the disenrollment provision discussed by the majority in their complaint, Judge Flood found that, when viewed in the light most favorable to the parents, the complaint contained sufficient allegations of specific contractual guarantees that were breached by the school on a Rule 12(b)(6) review. Id.

For the reasons stated above, the majority of the court of appeals affirmed the trial court's dismissal of the parents' breach of contract claim.

F. Amendments to Judgments

In Carcano v. JBSS, LLC, ___ N.C. App. ___, 896 S.E.2d 261 (2023), the court of appeals considered whether a realty group filed its complaint within the statute of limitations when it was disputed whether and when the trial court entered an amended judgment.

A realty group obtained an initial judgment holding a man and a woman jointly and severally liable to the realty group in the amount of $95,000.00 for breach of contract on October 12, 2010. Id. at ___. 896 S.E.2d at 263. The initial judgment, however, erroneously identified the realty group in the caption. Id. at ___. 896 S.E.2d at 263-64. The trial court later amended the initial judgment in order to correct the erroneous caption to correctly identify the realty group on May 23, 2012. Id. at ___. 896 S.E.2d at 264.

On April 7, 2022, the realty group filed a complaint seeking a judgment renewing the prior judgment for an additional term of ten years because the judgment had not been fully paid. Id. The man and woman filed an answer asserting that the realty group's claim was barred by the ten-year statute of limitations. Id. The trial court entered an order denying the realty group's motion for summary judgment and granting the man and woman's motion for summary judgment. Id.

Among other things, the trial court found that the judge who entered the amended judgment lacked any jurisdiction or authority to enter the amended judgment. Id. The realty group appealed. Id.

The court of appeals considered whether the judgment was properly amended under Rule 59(e) or Rule 60(b) of the North Carolina Rules of Civil Procedure. Id. at ___, 896 S.E.2d at 266. Under Rule 59(e), "a party's motion to alter or amend a judgment 'shall be served no later than [ten] days after the entry of the judgment.'" Id. (quoting N.C. R. Civ. P. 59(e)). Under Rule 60(b), "a trial court may correct a party's name that was erroneously designated in the court's judgment or order, but this corrective action may be taken only upon a party's motion, to be brought 'not more than one year after the judgment, order, or proceeding was entered or taken.'" Id. (quoting N.C. R. Civ. P. 60(b)).

Here, the court of appeals found that neither rule applied. Id. at ___. 896 S.E.2d at 266. The initial judgment was entered on October 12, 2010, and the amended judgment was entered approximately two years later on May 23, 2012. Id. The record below did not contain any evidence that the realty group filed a motion to amend the initial judgment within ten days after its entry or within a year after its entry. Id.

Absent a proper motion, the court of appeals determined that a trial court could issue nunc pro tunc a corrective judgment or order. Id. However, for an amended judgment to be nunc pro tunc, the prior judgment must not have been entered due to accident, mistake, or neglect of the clerk. Id. at ___. 896 S.E.2d at 267. (citing Whitworth v. Whitworth, 222 N.C. App. 771, 778-79, 731 S.E.2d 707, 713 (2012). Here, nothing in the record indicated that the initial judgment was not entered. Id.

The court of appeals also discussed that even if the trial court did enter the amended judgment nunc pro tunc, such an entry would be disadvantageous to the realty group's broader

argument regarding the statute of limitations. Id. "[W]hen appropriately entered, a nunc pro tunc judgment is entered 'to the date when it was decreed or signed.'" Id. (citing Whitworth, 222 N.C. App. at 778-79, 731 S.E.2d at 713). Thus, if the amended judgment here had been entered nunc pro tunc, it would have been dated on the date of the initial judgment, which was October 12, 2010. Id. Accordingly, the court of appeals held that the ten-year statute of limitations ran from the date of entry of the judgment filed on October 12, 2010. Id. As a result, the trial court did not err in stating that it lacked jurisdiction or authority to enter the amended judgment. Id.

For these and other reasons, the court of appeals found no error.

G. Rule 60(b)(1)

In T.H. v. SHL Health Two, Inc., ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 1626260 (2024), the court of appeals considered whether a trial court abused its discretion when it denied a motion for relief under Rule 60(b)(1) where the movant had filed a notice of dismissal with prejudice even though the movant intended to proceed with the litigation.

A woman and others filed a complaint against a massage spa. Id. at *1. A few months into the litigation, the trial court severed the suit and ordered the woman to file a second amended complaint based on the same exact factual allegations and the same exact causes of action. Id. The woman mistakenly filed a new complaint under a new case number, when she should have filed it under the original case number as instructed by the trial court. Id. The woman proceeded with refiling her complaint under the original case number. Id. The woman's attorney then contacted the massage spa's attorney who consented to a voluntary dismissal of the claims mistakenly filed under the new case number. Id. The woman filed a notice of dismissal styled "Notice of Voluntary Dismissal with Prejudice" in the new case. Id.

A month later, the massage spa filed a motion to dismiss the newest complaint in the original case because of the woman's dismissal with prejudice of the mistakenly filed complaint in the new case. Id. The woman filed a Rule 60(b) motion seeking relief from her dismissal with prejudice along with an affidavit from her attorney that said in part, "[a]t no time did I express any opinion or legal reasoning that these incorrectly filed matters must have been dismissed with prejudice." Id. The message spa's counsel also filed an affidavit "averring that [the woman's] counsel believed he had 'no choice' but to dismiss with prejudice. . . [and] asserted that [the woman's] counsel explained his legal reasoning for filing dismissals with prejudice, as opposed to without prejudice." Id. The trial court found that the woman's counsel made untruthful statements to the court and accepted as true the message spa's counsel's affidavit. Id. The trial court denied the woman's Rule 60(b) motion, and the woman filed a notice of appeal. Id.

On appeal, the court of appeals considered whether the trial court abused its discretion by denying the woman relief under Rule 60(b). Id. at *2. The court of appeals acknowledged that under Rule 60(b)(1), a trial court "may relieve a party or his legal representative from a final judgment" if the judgment stems from "[m]istake, inadvertence, surprise, or excusable neglect." Id. (citing N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2023)). Relief under Rule 60(b)(1) depends on the intention of the party seeking relief. Id. The relevant intention, however, is not the intended outcome of the action; the relevant intention is the intended action. Id. at *3 (citing Couch v. Private Diagnostic Clinic, 133 N.C. App. 93, 103–04, 515 S.E.2d 30, 38, aff'd without precedential value, 351 N.C. 92, 520 S.E.2d 785 (1999) (per curiam)). Therefore, a misunderstanding of legal consequences is immaterial. Id. (citing Couch, 133 N.C. App. at 103, 515 S.E.2d at 38).

Here, the woman argued that the trial court abused its discretion by analyzing her counsel's procedural intent, which was to dismiss with prejudice, as opposed to her ultimate intent to

continue her litigation. Id. at *4. The woman and her attorney did not intend to end the litigation, which is the same as saying they did not intend for res judicata to apply. Id. In effect, they misunderstood the legal consequences of dismissing with prejudice, which is immaterial to the question of whether the woman deliberately intended to dismiss with prejudice. Id. The court of appeals held that the trial court correctly applied the law. Id. The trial court found that the voluntary dismissal with prejudice was an "intentional, deliberate, volitional, and willful decision" of the woman's attorney at the time. Id. Thus, the trial court did not abuse its discretion by denying the woman's motion for relief under Rule 60(b)(1). Id. at *5.

For these and other reasons, the court of appeals affirmed the trial court's order. Id. at *6.

H. Rule 63

In Dan King Plumbing Heating & Air, LLC v. Harrison, ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 1391165 (2024), the court of appeals considered whether the trial court was authorized to order a new trial where the original trial judge discussed her interpretation of the direction on remand from the court of appeals at a hearing but did not enter an order prior to the expiration of her term.

A homeowner hired a plumbing company to install an HVAC system in his home. Id. at *1. Litigation ensued with each asserting claims against the other. The case proceeded to trial and, among other things, the jury returned "findings of fact" concerning the unfair and deceptive trade practices claims. Id.

After trial, the judge held a hearing to determine, among other things, whether the jury's findings of fact about the plumbing company constituted unfair and deceptive trade practices claims as a matter of law. Id. The trial judge ultimately found that the jury's findings did not

amount to unfair or deceptive trade practices. Id. As relevant here, the homeowner appealed the trial judge's written judgment. Id.

The court of appeals held that the trial judge erred in her determination that the unfair and deceptive trade practices claim failed as a matter of law and remanded for further fact-finding on the issue. Id. at *2.

Some time after the case was remanded, the plumbing company filed a motion to amend the judgment to conform to the appellate opinion because the trial court had not taken any further action. Id. The trial judge held a hearing on the motion. Id. at *3. During the hearing, the trial judge discussed her interpretation of the ruling of the court of appeals, stating that "the only thing I need to redo on the unfair and deceptive [sic] is rewrite the facts that needed to be there in the first go-round." Id. However, the trial judge did not prepare or file a written order on the plumbing company's motion to amend the judgment before leaving the bench. Id. The matter was later assigned to a new judge who held a new hearing on the plumbing company's motion. Id. The new judge ultimately denied the plumbing company's motion and ordered a new trial. Id. at *4. The plumbing company appealed this decision. Id.

On appeal, the plumbing company first argued that the trial judge left an order waiting to be signed and should have been recalled and commissioned to complete her work on the case. Id. In response to this argument, the court of appeals pointed to section 7A-53 of the North Carolina General Statutes:

> No retired judge of the district or superior court may become an emergency judge except upon the judge's written application to the Governor certifying the judge's desire and ability to serve as an emergency judge. If the Governor is satisfied that the applicant qualifies under G.S. 7A-52(a) to become an emergency judge and the applicant is physically and mentally able to perform the official duties of an emergency judge, the Governor shall issue to the

> applicant a commission as an emergency judge of the court from which the applicant retired.

Id. Here, the court of appeals observed that the plumbing company did not provide any argument or evidence that section 7A-52(a) would have applied to the trial judge. Id. at *5. Moreover, the plumbing company did not assert that the Governor should or would have appointed the trial judge as an emergency judge. Id.

Second, the plumbing company argued that the trial court should have tasked the chief judge of the district court with handling the issues on remand pursuant to Rule 63 of the North Carolina Rules of Civil Procedure. Id. at *4. The court of appeals acknowledged that Rule 63 provides:

> If by reason of . . . expiration of term, . . . a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed: . . . (2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts. If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

Id. at *4 (citing N.C. R. Civ. P. 63).

The court of appeals recognized that "[a] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. An announcement of judgment in open court constitutes the rendition of judgment, not its entry." Id. at *5 (quoting West v. Marko, 130 N.C. App. 751, 755, 504 S.E.2d 571, 573–74 (1998) (internal quotations omitted)). "An oral ruling announced in open court is not enforceable until it is entered." Id. (quoting In re Thompson, 232 N.C. App. 244, 227 754 S.E.2d 168, 171 (2014)).

Here, there was no evidence that the trial judge entered an order or that she drafted an order and left it for the chief district court judge to sign after her term ended. Id. She held a hearing on the plumbing company's motion which requested that she act pursuant to the opinion from the court of appeals. Id. During that hearing, the trial judge stated how she would rule on the motion, but she did not enter an order. Id. The court of appeals held that the new judge was entitled to exercise his discretion and hold a new hearing on the unresolved motion and enter a ruling on the matter. Id. at *5.

For these reasons, the court of appeals affirmed the trial court's order denying the plumbing company's motion to amend the judgment and ordering a new trial. Id. at *7.

I. Intervention

In Causey v. Southland National Insurance Corporation, ___ N.C. App. ___, 899 S.E.2d 17 (2024), the court of appeals considered whether an insurance company had standing to intervene against a liquidation petition where the applicable North Carolina statute only provides for the directors of an insurer to take such actions that are reasonably necessary to defend against a liquidation petition.

An insurance company consented to being placed under administrative supervision after the commissioner of insurance expressed concern that the insurance company would be financially unable to meet outstanding obligations to its policyholders. Id. at ___, 899 S.E.2d at 19. The insurance company was owned by a holding company. Id. During the administrative supervision period, the commissioner determined that the insurance company lacked sufficient liquidity and filed a petition to liquidate the insurance company. Id. In response, the holding company filed a motion to intervene on the petition for liquidation, to which the commissioner filed a response, asserting that the holding company lacked standing under section 58-30-95 of the North Carolina

General Statutes. Id. The trial court conducted a hearing on the petition and ultimately granted the insurance company's motion to intervene, stating that it believed the holding company had the right to contest the petition. Id.

About a year later, the commissioner filed another petition to liquidate two other insurance companies owned by the holding company, asserting that they were insolvent pursuant to section 58 of the North Carolina General Statutes. Id. at ___, 899 S.E.2d at 20. The holding company again filed a motion to intervene in the matter. Id. At a hearing on this motion, the holding company provided conflicting accounts of whether there were directors available to defend against the liquidation petition. Id. The holding company's counsel first stated that the directors were effectively disbanded when the liquidation petition was filed. Id. Later, counsel for the holding company conceded that there actually were directors for both the other two insurance companies and that they would be available to defend against the petition. Id. During this hearing, the trial court also questioned counsel for the holding company about whether the Rules of Civil Procedure governed this liquidation petition, or if the applicable North Carolina statute recognizes that only directors who owe a fiduciary duty can challenge a liquidation petition. Id. Ultimately, the trial court concluded that the statute only authorized directors to defend against an order of liquidation and that the holding company did not have standing. Id. at ___, 899 S.E.2d at 21. Following the hearing, the trial court entered an order providing that the liquidation proceed. Id. The holding company timely filed a notice of appeal. Id. at ___, 899 S.E.2d at 22.

On appeal, the commissioner asserted that the holding company lacked standing to intervene in the liquidation petition for the second and third insurance company liquidation petitions because section 58-30-95 expressly states that the trial court shall grant the directors of an insurance company the ability to take such action as are reasonably necessary to defend against

a liquidation petition. Id. The holding company asserted that it should be allowed to intervene because the trial court allowed it to intervene in the first insurance company liquidation petition. Id. Ultimately, the court of appeals agreed with the commissioner. Id. at ___, 899 S.E.2d at 24.

The court of appeals first acknowledged that Rule 1 of the North Carolina Rules of Civil Procedure applies "in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute." Id. at ___, 899 S.E.2d at 22. (quoting N.C. Gen Stat. § 1A-1, Rule 1 (2023)). However, the supreme court has instructed that "when 'the legislature has prescribed specialized procedures to govern a particular proceeding,' the Rules of Civil Procedure 'do not apply.'" Id. (quoting In re Ernst & Young, LLP, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009)). Furthermore, the court of appeals, in a subsequent decision, explained that "[a]lthough our North Carolina Rules of Civil Procedure typically apply in all actions and proceedings of a civil nature[,] the Rules do not apply when a differing procedure is prescribed by statute." Id. at ___, 899 S.E.2d at 23 (quoting In re Simmons, ___ N.C. App. ___, ___, 893 S.E.2d 271, 273 (2023)). In that same case, the court of appeals held that the North Carolina Rules of Civil Procedure do not apply to foreclosure proceedings because the rules "were not 'specifically engrafted into the [foreclosure] statute.'" Id. (quoting In re Simmons, ___ N.C. App at ___, 893 S.E.2d at 274). Thus, when a statute describes a proceeding of a civil nature with its own specialized procedure, the rules laid out in that statute "supplant[] the Rules of Civil Procedure." Id. (quoting In re Ernst & Young, 363 N.C. at 620, 684 S.E.2d at 156).

Here, the court of appeals first acknowledged that language of section 58-30-95 was unambiguous. Id. The statute empowers directors of an insurance company to opt into taking any necessary actions to defend against a liquidation petition. Id. The court of appeals also noted that the statute does not direct directors to file a civil complaint in order to do so. Id. Thus, the court

of appeals concluded that the statute is a civil proceeding with its own specialized procedure. Id. Consequently, the statute supplants the Rules of Civil Procedure, granting only directors the power to take necessary actions to defend against liquidation petitions. Id. The court of appeals acknowledged that holding otherwise would contravene the legislature's intent in enacting section 58-30-95 by allowing any interested party the opportunity to participate in liquidation proceedings under Rule 24(a) or Rule 24(b) of the North Carolina Rules of Civil Procedure. Id. In conclusion, the court of appeals held that because the holding company is not a director of any of the insurance companies, it did not have standing to intervene, and should not have been allowed to intervene in the liquidation proceeding. Id. at ___, 899 S.E.2d at 24.

The court of appeals modified the trial court orders to clarify that the holding company is not a proper party to the action and affirmed. Id. at ___, 899 S.E.2d at 24-25.

J. Immunity

In Land v. Whitley, ___ N.C. App. ___, 898 S.E.2d 17 (2024), the court of appeals addressed whether a statute enacted during the COVID-19 pandemic, which was designed to limit liability from suit for medical professionals during the pandemic, could protect a doctor and various medical facilities from claims arising out of a medical procedure performed in 2020.

In May 2020, during the height of the COVID-19 pandemic, the North Carolina General Assembly passed "The Emergency or Disaster Treatment Protection Act." Id. at ___, 898 S.E.2d at 20. The Act provided medical professionals limited immunity from ordinary negligence claims if the medical services rendered were provided during the pandemic, were impacted by the pandemic, and were provided in good faith. Id. (citing N.C. Gen. Stat. § 90-21.133(a)). The Act expressly excluded gross negligence and willful or intentional conduct from immunity. Id. (citing N.C. Gen. Stat. § 90-21.133(b)).

In June 2020, a doctor performed a hysterectomy on a patient. Id. at ___, 898 S.E.2d at 20-21. The patient claimed that, among other things, the doctor could have chosen, but did not choose, a laparoscopic procedure that would have allowed better visualization of the target area while the patient was suffering from health complications. Id. at ___, 898 S.E.2d at 21. At a post-operative follow-up visit, the patient reported experiencing abdominal pain; however, the doctor did not include this information in the patient's medical records. Id. Days later, the patient presented to the emergency department with severe abdominal pain; she was subsequently diagnosed with sepsis, stage four kidney failure, and an abdominal infection. Id. A new surgeon operated on the patient and discovered infected tissue inside the body leftover from the hysterectomy. Id.

In February 2022, the patient and her husband commenced an action against the doctor and affiliated medical facilities, alleging claims arising from the patient's hysterectomy and follow-up care. Id. at ___, 898 S.E.2d at 21-22 The doctor and medical facilities moved to dismiss the complaint on various grounds including immunity under the Act. Id. at ___, 898 S.E.2d at 22. The trial court denied these motions, and the doctor and medical facilities appealed. Id.

On appeal, the doctor and medical facilities argued that the trial court erred in denying their Rule 12(b)(6) motion because of the immunity conferred to them by the Act. Id. Specifically, the doctor and medical facilities argued that "the Act's three statutory requirements for immunity from civil liability 'existed on the face of [the patient's and her husband's] complaint and other materials properly before the trial court.'" Id. at ___, 898 S.E.2d at 23.

The court of appeals disagreed. Id. Per subsection (b), the Act expressly provides exceptions to its limitations on liability, namely for acts of "gross negligence, reckless misconduct, or intentional infliction of harm." Id. (quoting N.C. Gen. Sat. § 90-21.133(b)). Indeed,

subsection (b) makes it apparent that the Act was neither designed nor intended "to give a health care provider blanket immunity from every claim of civil liability arising during the COVID-19 pandemic." Id. at *6. Thus, a healthcare provider must show that the requirements under subsection (a) are met and that the actions alleged do not constitute "gross negligence, reckless misconduct, or intentional infliction of harm." Id. This reading of the Act "is consistent with the general principle of statutory immunity, which[,] as an affirmative defense, is available to a defendant only if he satisfies all of the requirements or elements defined" therein. Id.

Here, the first element was satisfied, as the patient and her husband conceded that the doctor and medical facilities provided their health care services during the pandemic. Id. at ___, 898 S.E.2d at 25. As to the second element, although the doctor and medical facilities provided affidavits containing detailed information as to how the COVID-19 pandemic affected their services, they "fail[ed] to establish a causal link between the impact of COVID-19 and [the patient]'s care or treatment." Id. Furthermore, although the doctor's affidavit explained why he opted for the open hysterectomy procedure rather than the laparoscopic alternative, the affidavit did not provide "any COVID-19 related explanation" for that choice or for the presence of remnants of the patient's uterus inside her abdomen. Id. The affidavits also failed to provide a connection between the pandemic and the patient's post-operative care. Id. The doctor and medical facilities also failed to meet the third element of subsection (a) of the Act. Id. Specifically, they did not state that they provided these healthcare services to the patient in good faith. Id.

The patient and her husband further contended that the doctor's and medical facilities' conduct fell within the statutory exception carved out by subsection (b) of the Act. Id. In opposition, the doctor and medical facilities argued that the complaint contained "conclusory allegations," but the court of appeals disagreed. Id. Rather, the patient and her husband needed

only to provide "sufficient facts to support the allegations of gross negligence," which they had. Id. at ___, 898 S.E.2d at 26. In fact, the patient and her husband described the doctor's services in detail, "list[ing] several ways in which that care breached [his] duty of care as a medical professional." Id.

Accordingly, because the patient's and husband's complaint was not barred by subsection (a) of the Act, the court of appeals affirmed the trial court's denial of the doctor's and medical facilities' motion to dismiss. Id. at ___, 898 S.E.2d at 27.

In Happel v. Guilford County Board of Education, ___ N.C. App. ___, 899 S.E.2d 387 (2024), appeal filed (Apr. 5, 2024), the court of appeals considered whether 42 U.S.C. § 247d-6d ("the PREP Act") applied to provide immunity to a county board of education and a medical services provider.

A county school district notified a high school student athlete, his mother, and stepfather, that the student athlete may have been exposed to COVID-19 by other student athletes on his team. Id. at ___, 899 S.E.2d at 389. The county school district recommended the student athlete be tested to know whether he had contracted COVID -19, regardless of his vaccination status. Id. The student athlete went to a testing facility managed by a medical services provider and located in a high school within the county school district. Id. The student athlete filled out a form he believed to be related to the COVID-19 test. Id. at ___, 899 S.E.2d at 390. A clinic worker attempted to call the student athlete's mother to obtain consent to administer a COVID-19 vaccine to the student athlete but was unsuccessful. Id. The clinic worker did not attempt to contact the student athlete's stepfather. Id. After failing to make contact, another clinic worker instructed the original clinic worker to administer the vaccine. Id. The student athlete expressed that he did not want a vaccine and was only expecting a test, but a clinic worker administered the vaccine anyway. Id.

The student athlete's mother, both individually and on behalf of the student athlete, filed a lawsuit, naming the county board of education and the medical services provider as defendants. Id. The complaint alleged three causes of action: battery, violations of the mother's constitutional liberty and parental rights and of the student athlete's bodily autonomy rights under articles 1, 13, and 19 of the North Carolina Constitution and violations of their federal constitutional rights. Id. Both the county board of education and the medical services provider filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). Id. The trial court held a hearing and later dismissed the complaint as to both defendants. Id. The mother filed a timely notice of appeal. Id.

On appeal, the student athlete and mother asserted that the trial court erred in finding that the PREP Act, codified at 42 U.S.C. § 247d-6d, applied in this case and provided immunity to the county board of education and the medical services provider. Id. The court of appeals disagreed with this argument and affirmed the trial court's order. Id.

The court of appeals first acknowledged that section 90-21.5(a1) of the North Carolina General Statutes requires that "a health care provider shall obtain written consent from a parent or legal guardian prior to administering any vaccine that has been granted emergency use authorization and is not yet fully approved by the United States Food and Drug Administration to an individual under 18 years of age." Id. Next, the court of appeals analyzed the Prep Act. Id. The PREP Act provides that the Secretary of Health and Human Services ("Secretary") may make a declaration recommending the manufacture, testing, development, administration, or use of one or more covered countermeasures when they determine that a disease or other condition or other threat to health constitutes a public health emergency. Id. (citing 42 U.S.C. § 247d-6d(b)(1). Additionally, the Secretary may declare that the aforementioned activities can be covered by

liability immunity provided in Subsection (a) of the same act. Id. The terms of the liability immunity state, in pertinent part, that:

> a covered person shall be immune from suit and liability under Federal and State law with respect to all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration under subsection (b) has been issued with respect to such countermeasure.

Id. (quoting 42 U.S.C. § 247d-6d(a)(1)). The PREP Act defines the term "loss" to include a broad array of things, such as:

> "any type of loss, including . . . (i) death; (ii) physical, mental, or emotional injury, illness, disability, or condition; (iii) fear of physical, mental, or emotional injury, illness, disability, or condition, including any need for medical monitoring; and (iv) loss of or damage to property, including business interruption loss."

Id. (quoting 42 U.S.C. § 247d-6d(a)(2)(A)). As far as the scope of the liability, the PREP Act explains that:

> immunity . . . applies to any claim for loss that has a causal relationship with the administration to or use by an individual of a covered countermeasure, including a causal relationship with the design, development, clinical testing or investigation, manufacture, labeling, distribution, formulation, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing, or use of such countermeasure.

Id. at ___, 899 S.E.2d at 391 (quoting 42 U.S.C. § 247d-6d(a)(2)(B)). The only exception to the immunity from suit and liability of covered persons in the PREP Act are made for "exclusive Federal cause[s] of action against a covered person for death or serious physical injury proximately caused by willful misconduct." Id. (quoting 42 U.S.C. § 247d-6d(d)(1)). Finally, the PREP Act defines covered countermeasure to include "a drug, biological product, or device that is authorized for emergency use." Id. (citing 42 U.S.C. § 247d-6d(i)(1)).

Here, the court of appeals conducted an analysis to determine whether the defendants were considered covered persons, whether the vaccine was considered a covered countermeasure, whether the immunity provision in the PREP Act covered the potential liability at issue in this case, and whether the PREP Act preempted section 90-21.5(a1) of the North Carolina General Statutes. Id. at ___, 899 S.E.2d at 390-393.

The court of appeals first noted that the Secretary had issued a declaration pursuant to the PREP Act in response to the COVID-19 pandemic. Id. at ___, 899 S.E.2d at 391. This declaration recommended the use of covered countermeasures which included "any antiviral, any other drug, any biologic, any diagnostic, any other device, or any vaccine, used to treat, diagnose, cure, prevent, or mitigate Covid-19." Id. (quoting Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 Fed. Reg. 15198-01, 15,202). The trial court took judicial notice that the declaration was in place for the Pfizer COVID-19 vaccine at the time when the student athlete was vaccinated. Id. at ___, 899 S.E.2d at 392. The student athlete and his mother did not dispute that the vaccine was considered a covered countermeasure. Id. The court of appeals held that the medical services provider was a covered person under the definition provided in the PREP Act. Id. The court of appeals also held that the county board of education was a covered person because the Secretary's declaration defined covered person to include a "state or local government . . . [that] provides a facility to administer or use a Covered Countermeasure." Id. (quoting Declaration, 85 Fed. Reg. at 15,199).

Finally, the court of appeals held that the scope of immunity outlined in the PREP Act covered the potential liability at issue in the case, primarily because the immunity in the PREP Act is "extremely broad." Id. Specifically, the plain language of the PREP Act included claims of battery and violations of state constitutional rights within its scope of immunity. Id. Those types

of claims squarely covered the claims at issue in the present case and none of the exceptions noted above applied. Id. Additionally, the PREP Act contained a broad provision preempting state law. Id. at ___, 899 S.E.2d at 393(citing 42 U.S.C. § 247d-6d(b)(8)).

In closing, the court of appeals emphasized that courts are not in the position to "question the wisdom or policy of the statute under consideration, but should enforce it as it is written unless [the court] conclude[s] that there is an unmistakable conflict with the organic law." Id. at ___, 899 S.E.2d at 394 (quoting Faison v. Bd. of Comm'rs of Duplin Cnty., 171 N.C. 411, 415, 88 S.E. 761, 763 (1916)).

For these reasons, the court of appeals affirmed the trial court's order dismissing the claims.

(1) Sovereign

In Williams v. Charlotte-Mecklenburg Schools Board of Education, ___ N.C. App. ___, 898 S.E.2d 366 (2024), the court of appeals considered whether a bus driver's alleged negligence was considered an emergency-management activity covered by the North Carolina Emergency Management Act and whether such emergency-management activity was immune from suit under the North Carolina Tort Claims Act.

The Governor of North Carolina issued two consecutive executive orders in response to the COVID-19 pandemic. Id. at ___, 898 S.E.2d at 367. The first executive order declared a state of emergency and the second executive order closed North Carolina schools and ordered the North Carolina Department of Public Instruction to take steps to ensure that it could address and serve the health, nutrition, safety, educational needs, and wellbeing of students during the time that schools would be closed. Id. During the school-closure period, a bus driver for the school board drove a school bus he used to deliver meals to students attending schools remotely and collided with a parked car. Id.

The car owner filed a property-damage claim in the North Carolina Industrial Commission under North Carolina's Tort Claims Act. Id. at ___, 898 S.E.2d at 368. In a motion for summary judgment, the school board asserted immunity under the North Carolina Emergency Management Act because the bus driver was performing an emergency-management activity during the incident, despite conflicting immunity provisions in the Tort Claims Act. Id. Thus, the school board argued that the Emergency Management Act controls in this action. Id. A deputy commissioner denied the school board's motion for summary judgment because the commissioner found that there was a waiver of sovereign immunity. Id. The full Commission denied the school board's request for a full-panel review even though the full Commission agreed that the Emergency Management Act conflicts with the Tort Claims Act concerning waiver of sovereign immunity for the claims pertaining to the bus driver. Id. The school board timely filed an appeal to the court of appeals. Id. The court of appeals issued an initial decision affirming the Commissions' denial of summary judgment, however, the school board filed a petition for rehearing. Id. The court of appeals granted the school board's petition for rehearing. Id.

On appeal, the court of appeals held that the North Carolina Industrial Commission erred in finding a waiver of sovereign immunity. Id. at ___, 898 S.E.2d at 369. Specifically, the court of appeals held that the Tort Claims Act waived sovereign immunity, but the Emergency Maintenance Act created a caveat concerning emergency-management activity. Id.

The court of appeals acknowledged that state government entities are generally immune from suit absent waiver of sovereign immunity. Id. (citing Meyer v. Walls, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997)). Further, "statutes waiving [sovereign] immunity . . . must be strictly construed." Id. (quoting Guthrie v. N.C. State Ports Auth., 307 N.C. 522, 537–38, 299 S.E.2d 618, 627 (1983)). The Tort Claims Act "provides a limited waiver of immunity and authorizes recovery

against the State for negligent acts of its officers, employees, involuntary servants or agents." Id. (quoting White v. Trew, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013)). Notably, prior case law has held that although the Tort Claims Act applies to school buses, activity buses are not incorporated into the waiver of immunity contemplated by the Tort Claims Act. Id. (citing Irving v. Charlotte-Mecklenburg Bd. of Educ., 368 N.C. 609, 610–11, 781 S.E.2d 282, 283–84 (2016)). On the other hand, the Emergency Maintenance Act provides that "neither the State nor any political subdivision thereof . . . shall be liable for the death of or injury to persons, or for damage to property as a result of any emergency-management activity." Id. (quoting N.C. Gen. Stat. § 166A-19.60(a) (2021)). The statute defines emergency management to include "those measures taken by the populace and governments at federal, State, and local levels to minimize the adverse effects of any type of emergency, which includes the never-ending preparedness cycle of planning, prevention, mitigation, warning, movement, shelter, emergency assistance, and recovery." Id. (quoting N.C. Gen. Stat. § 166A-19.3(8)). Additionally, the statute provides that school buses may be used for emergency management purposes. Id. (citing N.C. Gen. Stat. § 115C-242(6)).

Here, the bus driver was employed by the state of North Carolina during a state of emergency and drove a public-school bus to deliver food to students during the COVID-19 pandemic. Id. Using school buses to deliver meals to remote students during the pandemic constitutes emergency management because it minimized the adverse effects of the emergency. Id. at ___, 898 S.E.2d at 370 (citing N.C. Gen. Stat. § 166A-19.3(8)). Thus, the court of appeals held that the board of education was immune from suits stemming from the bus driver's alleged negligence while it engaged in emergency-management activity. Id.

For these reasons, the court of appeals reversed the North Carolina Industrial Commission's denial of summary judgment. Id.

(2) Governmental

In Bates v. Charlotte-Mecklenburg Historic Landmarks Commission, ___ N.C. App. ___, 897 S.E.2d 1 (2024), the court of appeals considered whether governmental immunity was a defense to a claim for breach of the covenant of good faith and fair dealing.

A buyer attempted to purchase a property from a historic landmarks commission, an entity created by a city-county government partnership for the purpose of identifying and preserving historic properties. Id. at ___, 897 S.E.2d at 4. The buyer entered contracts to purchase the property in 2016 and again in 2019 but the buyer was not able to obtain ownership of the property. Id. at ___, 897 S.E.2d at 4-5. Consequently, the buyer filed a complaint in superior court naming the historic landmark commission itself as well as the commission's director, consulting director, and board chairman as defendants. Id. at ___, 897 S.E.2d at 5.

The complaint alleged claims including breach of the covenant of good faith and fair dealing and breach of contract. Id. The defendants filed a motion for summary judgment on the breach of contract claim and a motion to dismiss all claims pursuant to Rules 12(b)(1), (2), and (6). Id. The trial court denied the motion to dismiss in relevant part with respect to the claims for breach of the covenant of good faith and fair dealing and breach of contract. Id. The defendants filed their notice of appeal. Id.

On appeal, the historic landmarks commission along with the director, consulting director, and the board chairman in their individual capacities asserted that the trial court erred in denying their motion to dismiss the claim for breach of the covenant of good faith and fair dealing because the complaint failed to allege that defendants waived their governmental immunity. Id. at ___, 897 S.E.2d at 6-7. The complaint did not allege a waiver of governmental immunity and the buyer acknowledged this in its appellate brief. Id. at ___, 897 S.E.2d at 7. However, the buyer asserted

that governmental immunity was not a defense to the breach of the covenant of good faith and fair dealing claim because the cause of action arose from a contract. Id.

The court of appeals first acknowledged that every contract contains an implied covenant of good faith and fair dealing that guarantees neither party will do anything that injures the right of the other to receive the benefits of the agreement. Id. (citing Bicycle Transit Authority v. Bell, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985)). North Carolina appellate courts typically treat a claim of breach of implied covenant of good faith and fair dealing in a similar manner to a breach of contract claim, particularly where the underlying factual allegations supporting both causes of actions are the same. Id. The court of appeals further acknowledged:

> A plaintiff may rely on the implied covenant [of good faith and fair dealing] when there is a gap in the contract and a defendant behaves in an unexpected manner, thereby frustrating the fruits of the bargain that the asserting party reasonably expected. Stated another way, breach of the implied covenant is a claim available to a plaintiff who could not have contracted around a defendant's allegedly arbitrary or unreasonable behavior.

Id. at ___, 897 S.E.2d at 8 (citing Value Health Sols., Inc. v. Pharm. Rsch. Assocs., 385 N.C. 250, 268, 891 S.E.2d 100, 115 (2023)). In applying this reasoning, the court of appeals held that sovereign immunity is waived when a government entity enters a valid contract and that this rule includes a waiver of immunity against a breach of the implied covenant term as it would for any of the other explicit terms of the contract. Id.

For these, the court of appeals affirmed in relevant part. Id. at ___, 897 S.E.2d at 11.

(3) Public Official

In Petrillo v. Barnes-Jones, 291 N.C. App. 62, 894 S.E.2d 772 (2023), the court of appeals considered whether a high school principal properly asserted public official immunity as an absolute defense to a negligence claim.

A trainee for a summer camp program filed a complaint against a principal after severely injuring herself on the premises of the principal's high school. Id. at 63, 894 S.E.2d at 774. The trainee alleged that the uneven and raised concrete on a pathway between two buildings at the school campus caused her to fall to the ground and severely injure herself. Id. The trainee alleged that she was suing the principal solely in her individual capacity for negligence while the principal was acting in the course and scope of her employment. Id. The trainee further alleged that the principal "operated, managed, maintained, and supervised the property and premises of the high school." Id., 894 S.E.2d at 778. The trainee also cited the principal's duty to "exercise ordinary and reasonable care in the maintenance of the property and premises of [the high school,]" and claimed her injuries were "proximately caused by the careless, negligent[,] and unlawful conduct" of the principal. Id.

The principal filed an initial motion to dismiss that the trial court denied because the trainee sued the principal in her individual capacity. The principal filed a second motion to dismiss where she contended that the suit should be dismissed pursuant to the doctrine of public official immunity. Id. at 64, 894 S.E.2d at 775. The trial court denied the second motion to dismiss. Id. The principal filed a notice of appeal shortly thereafter. Id.

On appeal, the court of appeals considered its jurisdiction over the interlocutory appeal and, subsequently, whether the trial court erred in denying the principal's motion to dismiss based on the doctrine of public official immunity. Id. at 64-66, 894 S.E.2d at 775-76.

First, the court of appeals held that it maintained appellate jurisdiction to review the principal's appeal. Id. Although the principal's appeal was interlocutory, her appeal involved a substantial right. "Orders denying dispositive motions based on the defenses of governmental and public official's immunity affect a substantial right and are immediately appealable." Id. at 64,

894 S.E.2d at 775 (quoting Thompson v. Town of Dallas, 142 N.C. App. 651, 653, 543 S.E.2d 901, 903 (2001)).

Second, the court of appeals held that the trial court erred in denying the principal's motions to dismiss because the principal was entitled to assert public official immunity as an absolute defense. Id. at 65, 894 S.E.2d at 775-76. The court first clarified the distinction between governmental immunity and public official immunity:

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

Id. at 67, 894 S.E.2d at 776-77 (citing Fullwood v. Barnes, 250 N.C. App. 31, 38, 792 S.E.2d 545, 550 (2016)) (emphasis in original). The court of appeals then acknowledged how public official immunity works as a defense:

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

Id. (quoting Smith v. State, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)) (emphasis in original). Moreover, the question of whether a public official may assert public official immunity turns on the capacity in which the public official is being sued. Id. (citing Patrick v. N. Carolina Dep't of Health and Hum. Servs., 192 N.C. App. 713, 716, 666 S.E.2d 171, 173 (2008)).

Here, the trainee's complaint specifically alleged in her negligence claim that she was suing the principal solely in her individual capacity as a public employee of the board of education for the local city-county municipality. Id. at 68, 894 S.E.2d at 777. However, the principal's

employment as a high school principal qualified her as a public official, and the trainee's complaint failed to allege that the principal acted with malice. Id. Thus, the court of appeals found that the principal may assert public official immunity as an absolute defense to the trainee's negligence claim. Id. at 68, 894 S.E.2d at 778.

For these reasons, the court of appeals reversed the trial court's order denying the principal's motion to dismiss and remanded for entry of an order granting the principal's motion to dismiss. Id. at 69, 894 S.E.2d at 778.

(4) Immunity Under N.C. Gen. Stat. § 122C-210.1

In Kirkman v. Rowan Regional Medical Center, Inc., 291 N.C. App. 178, 894 S.E.2d 784 (2023), petition for discretionary review filed (Dec. 5, 2023), the court of appeals considered whether a plaintiff in a malpractice case must allege gross negligence by a regional hospital and emergency room doctor in order to overcome the immunity from liability established by the legislature in section 122C-210.1 of the North Carolina General Statutes.

A nursing student was attending clinical instruction at a regional hospital when he engaged in an unprovoked outburst. Id. at 180, 894 S.E.2d at 785. During this outburst, the nursing student accused the nursing instructor of being the devil, pulled out a cross he wore around his neck, and touched the instructor's face and arm with the cross. Id. The nursing instructor later reported that the nursing student began speaking some sort of unintelligible language and that his eyes were dilated as he prevented her from leaving the room. Id. Fearing for her and the other students' safety, the nursing instructor immediately filed an Affidavit and Petition for Involuntary Commitment for the nursing student. Id. Later that day, a county magistrate issued a custody order for the involuntary commitment of the nursing student on the basis that the nursing student was likely mentally ill and in need of treatment. Id. at 180, 894 S.E.2d at 786. The nursing student

and the nursing instructor went to the emergency room of the regional hospital. Id. There, the nursing student was admitted and examined by an emergency room doctor. Id.

The nursing student remained calm and compliant throughout the majority of his emergency room stay. Id. After an examination, the emergency room doctor medically cleared the nursing student for a psychiatric evaluation. Id. A licensed professional counselor conducted a telehealth behavioral health assessment of the nursing student, which was typical for mental health assessments conducted at that regional hospital. Id. at 181, 894 S.E.2d at 786. The nursing student's wife was also present in the room while the assessment took place. Id. The counselor's assessment involved a number of questions, one of which was whether the nursing student had any firearms in the home. Id. He answered in the negative even though he had access to a number of hunting rifles, shotguns, and handguns in his home. Id. The nursing student's wife also knew this and did not amend or correct the nursing student's response to the question about having any firearms in the home. Id.

After her evaluation of the nursing student, the counselor determined that there was no indication that the nursing student was a current threat to himself or anyone else and concluded that the student suffered from anxiety. Id. The counselor reported these findings to the emergency room doctor. Id. The emergency room doctor then diagnosed the nursing student with behavioral outburst and determined that he was not mentally ill or a danger to himself. Id. The emergency room doctor made this determination based on her own observations of the nursing student, the results of the medical examination, and the counselor's telehealth behavioral health assessment. Id. After staying at the regional hospital for less than twenty-four hours, the nursing student was discharged by the emergency room doctor. Id. Two days later, the nursing student died from a self-inflicted gunshot wound. Id.

The wife filed a complaint against the regional hospital, the emergency room doctor, the counselor, and other entities. Id. at 182, 894 S.E.2d at 786. She alleged that during the nursing student's hospital stay in the regional hospital's emergency room department, each defendant was negligent and deviated from the applicable standard of care, thereby causing the injuries and subsequent death of the nursing student. Id., 894 S.E.2d at 787. The wife later voluntarily dismissed all defendants except for the regional hospital and the emergency room doctor. Id. The regional hospital and emergency room doctor then filed a motion for summary judgment. Id.

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

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

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

> No facility or any of its officials, staff, or employees, or any physician or other individual who is responsible for the custody, examination, management, supervision, treatment, or release of a client and who follows accepted professional judgment, practice, and standards is civilly liable, personally or otherwise, for actions arising from these responsibilities or for the actions of the client. This immunity is in addition to any other legal immunity from liability to which these facilities or individuals may be entitled and applies to action performed in connection with, or arising out of, the admission or commitment of any individual pursuant to this Article.

Id. at 183, 894 S.E.2d at 787-88 (citing N.C. Gen. Stat. § 122C-210.1). Among other things, the wife asserted that section 122C-210.1 did not apply to medical malpractice actions. Id. at 184, 894 S.E.2d at 788. In support of her argument, the wife referred to Alt v. Parker, which stated that "a defendant is entitled to immunity under section 122C-210.1 if the challenged act or omission was a professionally acceptable choice." Id. (quoting Alt v. Parker, 112 N.C. App. 766, 442 S.E.2d 507 (1994)). Id. The court of appeals inferred that the wife invoked Alt to argue that section 122C-210.1 "only provides immunity for claims other than medical malpractice or where a claim for medical malpractice would already fail based upon a plaintiff's failure to establish negligence under the standard of care [pursuant to North Carolina's general medical malpractice statute]." Id. The court of appeals disagreed with this argument and determined that Ali did not create any relationship between section 122C-210.1 and North Carolina's general medical malpractice statute. Id. at *4.

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

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

Id. at 185, 894 S.E.2d at 789 (quoting Boryla-Lett v. Psychiatric Sols. of N.C., Inc., 200 N.C. App. 529, 533, 685 S.E.2d 14, 18 (2009)). Moreover, the decision in Boryla-Lett relied significantly on a negligence case where the court of appeals also held that "under North Carolina law, '[c]laims based on ordinary negligence do not overcome . . . statutory immunity' pursuant to Section 122C-210.1; a plaintiff must allege gross or intentional negligence." Id. (quoting Snyder v. Learning Servs. Corp., 187 N.C. App. 480, 484, 653 S.E.2d 548, 551 (2007)).

Thus, the court of appeals found that the rule controlling this issue states that the qualified immunity from liability pursuant to section 122C-210.1 can only be overcome by an allegation that a covered defendant committed gross negligence. Id. at 186, 894 S.E.2d at 789. Here, the nursing student's wife failed to include an allegation of gross negligence in her complaint. Id. Consequently, the court of appeals held that the trial court did not err in granting summary judgment in favor of the regional hospital and the emergency room doctor. Id.

K. Summary Judgment

In JDG Environmental, LLC v. BJ & Associates, Inc., 291 N.C. App. 45, 894 S.E.2d 253 (2023), appeal filed (Nov. 15, 2023), appeal dismissed (Apr. 12, 2024), the court of appeals considered whether the superior court prematurely granted summary judgment because a subcontractor maintained an opportunity to obtain a certificate of authority until the beginning of trial.

A construction company hired an Oklahoma based subcontractor for a project that involved repairing the damage incurred to a residential community after a hurricane. Id. at 47, 894 S.E.2d at 254. A dispute arose between the construction company and the subcontractor regarding payment and the subcontractor initiated this case, alleging claims for breach of contract and unjust enrichment. Id.

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

court entered judgment on the motions for summary judgment, the subcontractor obtained a certificate of authority. Id.

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

On appeal, the court of appeals considered whether the superior court prematurely granted the construction company's summary judgment motion. Id. The court of appeals began the analysis by reconciling the statutory interpretation of section 57D-7-02(a) of the North Carolina General Statutes with the procedural nature of a motion for summary judgment. Id. at 48, 894 S.E.2d at 254-55. Under North Carolina law,

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

Id. at 48, 894 S.E.2d at 255 (quoting N.C. Gen. Stat. § 57D-7-02(a)). This obligation is statutory and the court of appeals interpreted the statute according to its common and ordinary meaning. Id. (citing Pratt v. Bishop, 257 N.C. 486, 504, 126 S.E.2d 597, 610 (1962)). In North Carolina, a judge who hears a summary judgment motion may not be the judge who presides over the trial. Id. at 49-50, 894 S.E.2d at 255-56. It follows that the reference to a "trial judge" in section 57D-7-02(a) refers to the judge presiding over the trial and not the judge hearing a summary judgment motion. Id. at 50, 894 S.E.2d at 256 "[P]rior to trial" means any time before the trial commences or when a jury is empaneled. Id. at 49, 894 S.E.2d at 255. Moreover, granting summary judgment

has the same effect as winning at trial for the party that moves for summary judgment. Id. (citing Kessing v. Nat'l Mortg. Corp., 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971)).

Therefore, the plain language of section 57D-7-02 requires that the issue of whether a non-moving party obtained a certificate of authority be brought up with the judge presiding over trial and that doing so in a summary judgment proceeding would be improper. Id. at 50, 894 S.E.2d at 256 (citing Harold Lang Jewelers, Inc. v. Johnson, 156 N.C. App. 187, 188, 576 S.E.2d 360, 361 (2003)). Holding otherwise allows the superior court to prematurely assume before trial that the non-moving party would not satisfy section 57D-7-02. Id. at 51, 894 S.E.2d at 256 (citing Leasecomm Corp. v. Renaissance Auto Care, Inc., 122 N.C. App. 119, 122, 468 S.E.2d 562, 564 (1996)). The court of appeals further explained that even though the court in Leasecomm did not directly address the issue in this present case, its holding was based on the premise that a court that grants summary judgment to a moving party that lacks a certificate of authority prematurely assumes that the party will not gain a certificate before trial. Id. (citing Leasecomm, 122 N.C. App. at 122, 468 S.E.2d at 564). "[I]t follows that if a lower court grants summary judgment because the non-moving party lacks a certificate of authority, the court also prematurely assumes the non-moving party will not gain one before trial." Id. at 51, 894 S.E.2d at 256-57 (citing Leasecomm, 122 N.C. App. at 122, 468 S.E.2d at 564) (emphasis in original).

Here, the subcontractor was in fact a foreign LLC transacting business in North Carolina and was required to obtain a certificate of authority prior to trial. Id. at 48, 894 S.E.2d at 256. The superior court granted the construction company's motion for summary judgment on the basis of its lack of a certificate of authority, which ended the litigation. Id. Despite the adverse ruling, the subcontractor obtained a certificate of authority before a jury was empaneled for this case. Id. at 50, 894 S.E.2d at 256. Under North Carolina law, the subcontractor was entitled to obtain a

certificate any time before the trial court empaneled a jury, which included time after the summary judgment stage. Id.

For these reasons, the court of appeals vacated the trial court's order and remanded the case to the lower court. Id. at 52, 894 S.E.2d at 257.

Judge Murphy dissented from the majority opinion, stating that he would reverse the order of the trial court, but disagreed with the majority's interpretation of section 57D-7-02(a). Id. at 52-61, 894 S.E.2d at 257-263. He contended that the majority's interpretation of section 57D-7-02(a) was "impossible to reconcile with the plain text of the whole statute[. . .]." Id. at 52, 894 S.E.2d at 257. By the majority's interpretation of the statute, a foreign LLC is statutorily entitled to obtain a certificate of authority within a certain period prior to when the jury is empaneled. Id. However, the same statute requires that an issue pertaining to the status of a certificate of authority must be raised by motion and determined by the trial judge prior to trial, effectively prohibiting a trial judge from rendering a judgment on this issue once a jury is empaneled. Id. Thus, the majority's interpretation makes it "impermissible for the trial court to ever rule on a motion concerning a business plaintiff's lack of certification." Id. (emphasis in original).

Judge Murphy also asserted that prior case law has permitted trial courts to enter summary judgment against an uncertified business plaintiff prior to trial in order to reconcile the "absurdity" of this reading of the statute. Id. However, he noted that the majority's attempt to "harmonize" Harold Lang and Leasecomm with its holding here "misses the forest for the trees, passing over core procedures and applications of law that contradict its interpretation of N.C. Gen. Stat. § 57D-7-02 in favor of magnifying minutiae." Id. at 56, 894 S.E.2d at 259.

Finally, Judge Murphy took issue with the distinction the majority made regarding a trial court deciding a summary judgment motion and a judge that presides over trial as a trial judge. Id.

at 57-59, 894 S.E.2d at 260-62. His reading of case law indicated that "trial court" and "trial judge" were generally synonymous unless the authority made it contextually clear that the title of judge refers to the particular official presiding over the court. Id. at 58-59, 894 S.E.2d at 261-62. Moreover, his view was that North Carolina has rejected the majority's understanding of the term "trial judge." Id.

Based on this reasoning, Judge Murphy agreed with the majority that the trial court's order should be reversed but on other grounds; those grounds being that the record did not support a determination that that the subcontractor was transacting business in North Carolina. Id. at 61, 894 S.E.2d at 263. He would have remanded for further findings of fact regarding whether the subcontractor was transacting business in North Carolina. Id. "In the event the trial court found Plaintiff had conducted sufficient activities in North Carolina to require certification, dismissal at this point in the proceedings would be proper. However, if the trial court's factfinding revealed no further instances in which Plaintiff had conducted business activities in North Carolina, Plaintiff would not be required to obtain a certificate of authority." Id.

In D.V. Shah Corp. v. Vroombrands, LLC, 385 N.C. 402, 895 S.E.2d 345 (2023), the supreme court considered whether a trial court errs when it declines to exercise its discretion to hear oral testimony at a summary judgment hearing where the court mistakenly believes that the North Carolina Rules of Civil Procedure bar the consideration of such testimony.

A plaintiff sued a defendant for breach of a commercial lease, and after about six months, the plaintiff moved for summary judgment. Id. at 403, 895 S.E.2d at 345. Plaintiff's summary judgment motion was calendared and heard shortly thereafter. Id. During the hearing, the defendant sought to introduce live testimony in opposition to plaintiff's motion and in support of

his counterclaim. Id. However, the trial court interrupted the defendant and stated, "I can't accept that in the context of a summary judgment hearing." Id. at 403, 892 S.E.2d at 346.

After the hearing, the trial court granted summary judgment for plaintiff on all claims, and defendant appealed to the court of appeals. Id. In a divided decision, the court of appeals vacated the trial court's summary judgment order and remanded the case. Id. Plaintiff appealed to the supreme court based on the dissent. Id. at 404, 892 S.E.2d at 346.

The supreme court held that the trial court's decision should be vacated because the trial court failed to exercise its discretion under the mistaken belief that no such discretion exists. Id. The supreme court acknowledged that "[w]here . . . the court is clothed with discretion, but rules as a matter of law, without the exercise of discretion, the offended party is entitled to have the proposition reconsidered and passed upon as a discretionary matter." Id. at 404, 895 S.E.2d at 346 (citing Capps v. Lynch, 253 N.C. 18, 22, 116 S.E.2d 137 (1960)). The supreme court added, "This is no less true when the discretion is afforded by our Rules of Civil Procedure." Id.

The supreme court identified Rule 43(e) of the North Carolina Rules of Civil Procedure as the operative rule here. Id. Under Rule 43(e), "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." Id. (quoting N.C. Gen. Stat. § 1A-1, Rule 43(e)). The supreme court thus concluded that Rule 43(e) allowed for the introduction of the defendant's live oral testimony at the summary judgment hearing in the trial court's discretion. Id.

The supreme court modified and affirmed the court of appeals' decision to vacate the trial court's summary judgment order and remanded the case. Id. at 405, 892 S.E.2d at 347.

L. Motion to Recuse

In Hudson v. Hudson, ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 1172010 (2024), the court of appeals considered whether a trial judge lacked the authority to enter an order following her recusal based upon perceived bias against one party.

A mother brought a post-divorce action against the father of their three children, seeking permanent child support and alimony. Id. at *1. In September 2021, the trial judge heard the mother's claims for permanent child support and alimony, and in November 2021, she emailed counsel a general summary of her ruling, directing the father's counsel to draft the order. Id. Before the Child Support and Alimony Order was issued, the trial judge entered an Order of Recusal. Id. The Order of Recusal stated that the trial judge recused herself from all future hearings "not based on any parts of the Judicial Code of Conduct" but because the father said "the court was biased toward defendant/mother and/or prejudiced against plaintiff/father" and recusal was appropriate "[b]ased on the perception articulated and the years long history of these parties appearing before this judge, and believing that in order to promote justice all parties must feel heard." Id.

After entering the Order of Recusal, the trial judge entered the Child Support and Alimony Order. Id. The mother appealed, contending that the "trial judge erred by continuing to preside over this matter following her recusal" and the "trial judge lacked authority to enter orders following her recusal without following the requisite procedures to continue presiding over [the] matter." Id.

The court of appeals vacated the Child Support and Alimony Order and remanded the case for a new hearing on the issue. Id. at *3-4. The court of appeals found that because the Order of Recusal was based upon perceived bias, the trial judge had no authority to enter any subsequent

orders. Id. at *3. In doing so, the court of appeals rejected the father's argument that the Order of Recusal was a partial recusal. Id. at *2-3. Looking to the language of the Order of Recusal, the court of appeals found that it did not limit its application to any particular issue or claim, nor to any newly filed motions or issues arising after its entry, and because of the stated reason for the recusal order, i.e., perceived bias, the purpose of the order would not be served by a limited or partial recusal. Id. at *2. The court of appeals further found that while the Order of Recusal was limited to "future hearings," the Child Support and Alimony Order was not effective until it was written, signed, and filed. Id. at *2 (citing McKinney v. Duncan, 256 N.C. App. 717, 719-20, 808 S.E.2d 509, 511-12 (2017)).

Additionally, the court of appeals found that Rule 63 of the North Carolina Rules of Civil Procedure, concerning judges that retire, was inapplicable because the trial judge recused herself based on perceived bias. Id. at *3. Consequently, the court of appeals held that the substitute judge would not have the discretion to enter the same Child Support and Alimony Order and instead must conduct a new hearing and enter a new order on the issue. Id. (citing Lange v. Lange, 357 N.C. 645, 648, 588 S.E.2d 877, 879-80 (2003)).

For these reasons, the court of appeals vacated the trial court's order and remanded the matter for a new hearing and entry of a new order.

III. TRIAL

A. Jury Selection – Batson Challenge

In State v. Wilson, 291 N.C. App. 279, 895 S.E.2d 581, temp. stay allowed, 893 S.E.2d 535 (Nov. 14, 2023), the court of appeals addressed whether the trial court made inadequate Batson findings in light of State v. Hobbs, 374 N.C. 345, 841 S.E.2d 492 (2020).

At the outset of a defendant's trial, the State exercised two peremptory challenges to excuse two black prospective jurors; by then, the State had already removed another prospective juror for cause. Id. at 281, 895 S.E.2d at 585. The defendant raised a Batson objection. Id. The trial court asked the State to explain its choices, and the State responded that it exercised the peremptory challenges because one prospective juror personally knew a witness and the other was "not paying attention." Id. at 282, 895 S.E.2d at 585. The trial court concluded that there had not been a "prima facie case for a Batson challenge." Id. The defendant was eventually found guilty on all charges. Id. The defendant appealed. Id. On appeal, the defendant argued that the trial court made inadequate Batson findings in light of the supreme court's opinion in State v. Hobbs, 374 N.C. 345, 841 S.E.2d 492 (2020). Id. at 290, 895 S.E.2d at 590.

In a majority opinion written by Judge Murphy, the court of appeals reversed and remanded for a new Batson hearing in light of the failure to conduct the analysis required under Hobbs. Id. at 296, 895 S.E.2d at 594.

Under Batson, trial courts must engage in a three-step process: first, the defendant must make a prima facie showing that the State exercised a race-based peremptory challenge; if the first step is successful, then, second, the State must offer a facially valid, race-neutral explanation of its peremptory challenge; lastly, the trial court must decide whether the defendant has proved purposeful discrimination. Id. at 290, 895 S.E.2d at 590.

In Hobbs, the supreme court concluded that a trial court must consider "on the record factors weighing for and against findings of discrimination in order to sufficiently respond to a Batson challenge." Id. at 290, 895 S.E.2d at 591 (citing Hobbs, 374 N.C. at 360, 841 S.E.2d at 503). In Hobbs, the trial court had skipped to the second step in Batson "without ruling on the defendant's prima facie case." Id. (citing Hobbs, 374 N.C. at 360, 841 S.E.2d at 503). This year,

the supreme court further elaborated on that notion in State v. Campbell, 384 N.C. 126, 884 S.E.2d 674 (2023), explaining the circumstances under which a trial court's analysis of the first Batson step becomes moot. Id. at 291, 895 S.E.2d at 591.

In Campbell, "the trial court sought, purportedly during the first step of Batson, race-neutral reasons from the State for its peremptory challenges." Id. (citing Campbell, 384 N.C. at 127, 884 S.E.2d at 677). The trial court ruled on the Batson objection and the State cautioned the trial court that "offering race-neutral reasons at that stage in the proceedings 'could be viewed as a stipulation that there was a prima facie showing.'" Id. (quoting Campbell, 384 N.C. at 128, 884 S.E.2d at 678). Nevertheless, "the trial court 'ordered the State to proceed as to stating a racially-neutral basis for the exercise of the peremptory challenges.'" Id. (quoting Campbell, 384 N.C. at 128, 884 S.E.2d at 678). After hearing the State's race-neutral reasons, the trial court stated that it still found that the defendant had not made a prima facie showing of purposeful discrimination. Id. (quoting Campbell, 384 N.C. at 130, 884 S.E.2d at 679).

Conversely, in the case at bar, the trial court immediately sought the State's input upon hearing the defendant's argument under the first Batson step, without concluding whether he had made a prima facie case. Id. at 293, 895 S.E.2d at 592. When the trial court did make a ruling as to the defendant's prima facie showing, it did so after hearing the State's race-neutral reasons; in other words, the trial court did so at the third Batson stage. Id. Under Hobbs, when the State provides race-neutral reasons for its peremptory challenges (Batson step two) and the trial court rules on them (step three), "'the question of whether a defendant initially established a prima facie case of discrimination becomes moot.'" Id. at 294, 895 S.E.2d at 593 (quoting Hobbs, 374 N.C. at 355, 841 S.E.2d at 500). Likewise, here, the question of whether the defendant had established a prima facie case of discrimination had become moot. See id.

"As the trial court issued its ruling after soliciting input from the State, it was required, pursuant to Hobbs, to engage in a full analysis of [the defendant]'s arguments that the State employed its peremptory strikes in a racially discriminatory manner." Id. (citing Hobbs, 374 N.C. at 355–56, 841 S.E.2d at 500–01). The court of appeals concluded that the trial court's findings of fact were inadequate under Hobbs. Id. at 295, 895 S.E.2d at 594. Specifically, the trial court failed to explain "how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges." Id. It also failed to provide a "comparative analysis" between the stricken jurors, who were black, and other jurors who were not stricken but were similarly situated. Id. In fact, many of the defendant's arguments "went completely unaddressed." Id.

Ordinarily, on a defendant's appeal from a Batson challenge, the court of appeals will "conduct a comparable analysis to that of the trial court in order to determine whether the ruling at issue was clearly erroneous." Id. at 296, 895 S.E.2d at 594. However, here, the defendant did not seek review of the trial court's analysis; he only argued that the trial court failed to conduct a comparative analysis as a whole. Id. Thus, the court of appeals was limited to reversing and remanding to the trial court for further proceedings and did so. Id.

Judge Dillon concurred separately to state that the trial court did not err in determining that there had been no prima facie showing of discrimination during jury selection. Id. at 297, 895 S.E.2d at 595. However, due to current jurisprudence, the trial court was required to conduct a full Batson inquiry. Id.

Judge Stading also wrote separately to dissent in relevant part. Id. He specifically dissented from the majority's conclusion that the trial court erred under Hobbs. Id. In his view, the trial court was not required to engage in a full Batson analysis because it determined that the defendant failed to make his prima facie showing at Batson step one. Id. The fact that the

challenge would not have survived step three did not render step one moot. Id. at 298, 895 S.E.2d at 595. According to Judge Stading, it was not the trial court that moved to Batson step two, but the State; when the defendant raised a Batson challenge, the trial court invited the State to respond, but the State "prematurely sought to address the second prong of the Batson inquiry." Id. at 299, 895 S.E.2d at 596. Thus, Judge Stading dissented from the majority's conclusion that the trial court's first Batson step was moot. Id. at 300, 895 S.E.2d at 596.

B. Witnesses

In Gabbidon Builders, LLC v. North Carolina Licensing Board for General Contractors, ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 2002553 (2024), the court of appeals considered whether the North Carolina Licensing Board for General Contractors (the "Board") erred when it allowed virtual testimony from witnesses who were subpoenaed to appear and testify before the Board.

A construction company and its qualifying agent were accused of, among other things, "gross negligence, incompetency and/or misconduct in the practice of general contracting" by the Board. Id. at *1. After noticing two hearings, the Board subpoenaed several witnesses to "appear and testify[.]" Id. Before the hearings, the Board notified the construction company and qualifying agent that five subpoenaed witnesses would be testifying virtually. Id. The construction company and qualifying agent objected and moved to exclude the virtual testimony. Id. After hearing argument on the motions, the Board denied both motions and proceeded with the virtual testimony. Id. Not long after, the Board revoked the construction company's licenses and the qualifying agent's ability to act on behalf of a licensed contractor. Id. After a superior court affirmed the Board's decision, the construction company appealed arguing the Board violated the

Administrative Procedure Act, among other rules, and deprived it of due process by allowing subpoenaed witnesses to appear virtually. Id. at *2.

On appeal, the court of appeals affirmed the superior court's decision finding no error in the Board's decision to allow virtual testimony. Id. at *4. The court of appeals found that while the Board's regulations provide procedures for the issuance of "subpoenas for the attendance and testimony of witnesses[,]" "there are no procedures for virtual testimony[.]" Id. at *3. Specifically, "the Board's regulations and Rule 45 neither provide for nor prohibit witnesses from testifying virtually." Id. (emphasis omitted); see also 21 N.C. Admin. Code 12A.0827(a) (2023). In rejecting the construction company's and qualifying agent's arguments that the Board improperly allowed witnesses to circumvent lawfully issued subpoenas, the court of appeals stated that, "[t]here is no provision in [Rule 45], North Carolina statute, or case law, that allows a party to challenge the validity of, or compliance with, a subpoena for witnesses that were not subpoenaed for the complaining party's case-in-chief." Id. at *4. The court found that "it is beyond dispute that [the construction company and qualifying agent] had sufficient notice and opportunity to be heard at the hearing before the Board." Id.

For these reasons, the court of appeals affirmed the superior court and the Board. Id. at *5.

C. Evidence

(1) Lay Opinion

In State v. Aguilar, ___ N.C. App. ___, 898 S.E.2d 914 (2024), the court of appeals addressed whether the trial court erred in admitting, against the State's objections, the testimony of a detective as to the credibility of a complainant's report of assault.

The family of a minor waitress called the police after she told them that an adult waiter forcefully touched and kissed her at a restaurant where they both worked. Id. at ___, 898 S.E.2d

at 916. The minor stated that the incident had occurred in a storage closet, and that, when she exited, she encountered two other coworkers. Id. According to the minor, she told her coworkers that waiter had only come into the storage closet to say "hi" to her. Id. A detective interviewed the minor, her mother, and her cousin. Id.

At trial, during direct examination of the detective, counsel for the State asked whether "[a]t any point in [the] investigation" the detective had "question[ed] the validity" of the minor's story. Id. The detective replied she had not. Id. Counsel for the waiter objected, and the trial court asked the State to rephrase its question. Id. The State asked for the trial court to clarify, "and each side was heard." Id. Counsel for the waiter "specifically raised the issue of the [d]etective offering opinion testimony," arguing that the detective was invading the province of the jury in determining whether the minor was telling the truth. Id. The trial court allowed the State to re-ask its question, overruled the objection, and allowed the detective to answer. Id.

The State continued with its line of questioning, asking why the detective did not question the minor's credibility. Id. at ___, 898 S.E.2d at 916-17. The detective answered that the minor had come forward with the accusation immediately after the fact and had told her story consistently between her police report and her interview with the detective. Id. at ___, 898 S.E.2d at 917. Counsel for the State then asked the detective whether the minor's report that she encountered two other witnesses after the fact gave her reason to feel differently about the minor's credibility. Id. The detective replied, "No." Id. At this point, counsel for the waiter renewed the objection, which the trial court overruled. Id. The jury eventually returned guilty verdicts against the waiter for sexual battery, assault on a female, and false imprisonment. Id. The waiter appealed. Id.

The court of appeals reviewed the trial court's ruling on the admissibility of the detective's lay opinion for abuse of discretion. Id. at ___, 898 S.E.2d at 918. Pursuant to Rule 701 of the

North Carolina Rules of Evidence, if a witness is not testifying as an expert, the witness's opinions and inferences must be "'rationally based on the perception of the witness'" and "'helpful to a clear understanding of [the witness] testimony or the determination of a fact in issue.'" Id. (quoting N.C. Gen. Stat. § 8C-1, Rule 701).

However, "'admission of opinion testimony intended to bolster or vouch for the credibility of another witness violates . . . Rule 701.'" Id. (quoting State v. Harris, 236 N.C. App. 388, 403, 763 S.E.2d 302, 313 (2014)). Where the verdict relies entirely on comparing the credibility of the complainant versus the accused, it is fundamental error for the trial court to admit testimony vouching for the complainant's credibility. Id. Rather, it is only for the jury to determine the truthfulness of a witness's story, because the jury acts as the "'lie detector of the courtroom.'" Id. (alterations in original) (quoting State v. Caballero, 383 N.C. 464, 475, 880 S.E.2d 661, 669 (2022)).

On this basis, the court of appeals concluded that "the challenged portion of [the detective's] testimony was inadmissible" at trial. Id. While detectives are allowed to testify as to the reasoning for their decision-making, the detective's testimony at issue here consisted of an evaluation of the minor's credibility. Id. at ___, 898 S.E.2d at 919. Accordingly, the court of appeals vacated the judgment and remanded for a new trial. Id. at ___, 898 S.E.2d at 921.

(2) Lay Witness Repressed Memories

In State v. Heyne, ___ N.C. App. ___, ___ S.E.2d. ___, 2024 WL 2002564 (2024), the court of appeals considered whether a witness may present lay witness testimony of repressed memories without expert testimony to explain the phenomenon of memory repression.

A young woman contacted law enforcement officials to report that a man had sexually assaulted her fourteen years earlier during a sleepover at the man's house. Id. at *1. The man

was indicted and tried. During trial, the woman testified about the sexual assault. Id. at *2. At the end of trial, a jury found the man guilty of first-degree rape, and the trial court sentenced him to 192-240 months in prison. Id. at *2.

On appeal, the man asserted that the trial court plainly erred by admitting lay witness testimony of repressed memories without expert support. Id. The court of appeals acknowledged that "unless qualified as an expert or supported by admissible expert testimony, a witness 'may not testify that the memories were repressed or recovered.'" Id. (quoting Barrett v. Hyldburg, 127 N.C. App. 95, 101 487 S.E.2d 803, 806 (1997)). However, not all testimony based on repressed memory must be excluded without accompanying expert testimony. Id. at *3 (citing State v. King, 366 N.C. 68, 78, 733 S.E.2d 535, 542 (2012)). "If a witness is tendered to present lay evidence of sexual abuse, expert testimony is not an automatic prerequisite to admission of such evidence, so long as the lay evidence does not otherwise violate the statutes of North Carolina or the Rules of Evidence." Id. (quoting King, 366 N.C. at 78, 733 S.E.2d at 541–42). Ultimately, "a witness may testify as to their recollection of an incident, and 'to the effect that, for some time period, he or she did not recall, had no memory of, or had forgotten the incident,' without expert support." Id. (quoting King, 366 N.C. at 78, 733 S.E.2d at 542). "However, unless qualified as an expert or supported by admissible expert testimony, a witness 'may not testify that the memories were repressed or recovered.'" Id. (citing King, 366 N.C. at 78, 733 S.E.2d at 542).

Here, the girl testified as to her recollection of the night she spent at the man's house for a sleepover and her reasons for not immediately reporting the incident. Id. She was asked why she had not said anything about the assault for so long, and she explained that there were several reasons, but ultimately, she said she did not have the ability to verbally explain what happened to her in that moment. Id. At no point during her testimony did the girl state that she had repressed

memories or that she had recovered repressed memories. Id. Instead, the girl testified as to her recollection of the incident, and that she had always remembered parts of the sexual assault. Id. The court of appeals held that this type of testimony does not require support through expert testimony. Id.

For these and other reasons, the court of appeals held that there was no plain error in relevant part. Id. at *7.

(3) Character

In State v. Pickens, 385 N.C. 351, 893 S.E.2d 194 (2023), the supreme court considered whether evidence of a teacher's alleged sexual assault of another student was properly admitted at trial pursuant to Rule 404(b) of the North Carolina Rules of Evidence.

A former chorus teacher was convicted of first-degree rape and first-degree statutory sexual offense with a child who was a recent middle school student. Id. at 352, 893 S.E.2d at 196. While the trial involved the teacher's assaults on the student, testimony of a former middle school student's assault by the same teacher was presented before the jury. Id. Before the trial, the teacher filed a motion in limine to exclude the former middle school student's testimony pursuant to Rule 404(b) of the North Carolina Rules of Evidence. Id. at 352-53, 893 S.E.2d at 196. The district court denied the motion and the jury found the teacher guilty of all charges. Id. at 353, 893 S.E.2d at 196. The teacher entered a notice of appeal. Id.

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

The supreme court acknowledged that evidence of a defendant's character "is not admissible to prove he acted in conformity therewith," and noted that "[e]vidence of other crimes, wrongs, or acts . . . may, however, be admissible [to prove] motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." Id. at 356, 893 S.E.2d at 198 (quoting N.C. Gen. Stat. § 8C-1, Rule 404(a)-(b)). The supreme court also noted that in order "[t]o be admissible, prior bad acts do not need to 'rise to the level of the unique and bizarre' and instead will be considered sufficiently similar and admissible 'if there are some unusual facts present in both crimes that would indicate that the same person committed them.'" Id. (quoting State v. Beckelheimer, 366 N.C. 127, 131, 726 S.E.2d 156 (2012)).

The prosecution contended that the former middle school student's testimony was properly offered to prove the teacher's intent, motive, plan, and design to assault middle school students from schools where he worked as a teacher. Id. at 357, 893 S.E.2d at 199. In support of this argument, the prosecution noted several similarities between the testimony of both the assault of the former middle student and the assault of the recent middle school student by the teacher. Id. at 357-58, 893 S.E.2d at 199. The supreme court agreed with the prosecution and explained that a Rule 404(b) analysis of testimony evidence offered to show intent, motive, plan, and design in this case should "focus[ ] on the similarities and not the differences between the bad acts offered and the acts of the defendant." Id. at 359, 893 S.E.2d at 200 (citing Beckelheimer, 366 N.C. at 131-32, 726 S.E.2d 156).

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

In other words, the former middle school student's testimony was admitted to show the teacher's intent, motive, plan, and design to assault middle school students. Id. at 360, 893 S.E.2d at 200. The supreme court listed several unique facts common to both victims that included:

> (1) the [students] were middle-school-aged children attending schools where [the teacher] taught; (2) [the teacher] used his position as a middle school teacher to gain access to both victims; (3) [the teacher] exerted control over both victims during the assaults despite their protests, tears and resistance; (4) [the teacher] engaged in vaginal intercourse or tried to engage in vaginal intercourse with both victims; (5) [the teacher] committed the offenses during school hours or during school-related activities; (6) [the teacher] only removed his pants and underwear halfway during both assaults; and (7) [the teacher] threatened the [students] after the assaults were completed.

Id.

For these reasons, the supreme court affirmed the court of appeals' holding that the Rule 404(b) evidence of the teacher's assault on the recent middle school student was properly admitted. Id. at 364, 893 S.E.2d at 203.

D. Appeals

In State v. Lindsay, ___ N.C. App. ___, 899 S.E.2d 25 (2024), the court of appeals considered whether a trial court can commit plain error in a criminal bench trial.

A male family friend of a young girl was found guilty of second degree forcible sexual offense, sexual battery, and assault on a female after waiving his right to jury trial and proceeding before a bench trial. Id. at ___, 899 S.E.2d at 27. Ultimately, the trial judge found the male family friend guilty and sentenced the defendant to a minimum of 100 months and a maximum of 180 months in the North Carolina Department of Adult Corrections. Id. at ___, 899 S.E.2d at 30. The male family friend gave notice of appeal in open court. Id.

On appeal, the male family friend argued that the trial court committed plain error when it admitted an officer's testimony regarding out-of-court statements as well as statements from a recorded interview. Id. Specifically, the male family friend asserted that the out-of-court statements at issue were inadmissible hearsay evidence because none of the statements corroborated in-court testimony and the hearsay exception for excited utterances was inapplicable to the recorded statements. Id. Ultimately, the court of appeals disagreed with the male family friend's argument. Id.

The court of appeals, in a majority opinion authored by Judge Arrowood, established that "[w]hen an issue is not preserved by objection at trial, appellate courts review the issue for plain error." Id. (citing State v. Caballero, 383 N.C. 464, 473, 880 S.E.2d 661 (2022)). However, appellate courts presume that trial courts ignore inadmissible evidence unless a defendant can show otherwise. Id. at ___, 899 S.E.2d at 31 (citing State v. Jones, 260 N.C. App. 104, 109, 816 S.E.2d 921 (2018)). In other words:

> [Appellate courts] give the trial court the benefit of the doubt that it adhered to basic rules and procedure when sitting without a jury. Therefore, "no prejudice exists simply by virtue of the fact that such evidence was made known to [the trial judge] absent a showing by the defendant of facts tending to rebut this presumption."

Id. (citing Jones, 248 N.C. App. at 424, 789 S.E.2d 651 (2016)).

The court of appeals noted that North Carolina statutes only recently began allowing criminal defendants to waive their right to a jury trial in certain cases and request a bench trial. Id. at ___, 899 S.E.2d at 32 (citing N.C. Const. art. I, § 24). Since the recent change, bench trials in criminal cases were a "relatively new occurrence and rarely used." Id. Consequently, there is no precedent in North Carolina case law that determines whether a plain error analysis is on point given the "longstanding authority that a judge is presumed to have ignored any incompetent

evidence." Id. The court of appeals then concluded that it was not possible for one to establish plain error in a bench trial despite the male family friend asserting that such an error occurred. Id.

Judge Murphy dissented in part and concurred in the result, disagreeing with the majority opinion's "sweeping expression" that it was not possible to establish plain error in a bench trial. Id. at ___, 899 S.E.2d at 33. Judge Murphy stated that he would conclude, from his interpretation of case law, that the presumption that the trial court ignores incompetent evidence and improper arguments is merely a presumption that may be rebutted. Id. (citing In re M.L.B., 377 N.C. 335, 338, 857 S.E.2d 101 (2021)). Notwithstanding that conclusion, Judge Murphy added that preservation, or the lack thereof, increases the appellant's burden to show a "higher degree of resulting prejudice." Id. His assessment of the majority's reasoning asserted that the majority risks turning the plain error standard of review in criminal bench trials into an irrebuttable presumption that would introduce unnecessary confusion. Id.

(1) Interlocutory

In Mecklenburg Roofing, Inc. v. Antall, ___ N.C. App. ___, 895 S.E.2d 877 (2023), the court of appeals addressed whether citations to general caselaw stating that appellate courts will review an interlocutory appeal where a substantial right has been affected by the order below—without additional context, argument, or a showing that the appellant will prevail on the merits or suffer irreparable injury—is sufficient to invoke interlocutory jurisdiction.

A roofing company hired an employee who was eventually promoted to the role of estimator. Id. at ___, 895 S.E.2d at 878. As part of this promotion, the roofing company and the estimator entered an employment agreement. Id. The agreement contained a non-compete clause stating that, should his employment terminate, the estimator was barred from engaging in other roofing work for a period of two years within a one-hundred-mile radius from the roofing

company's office. Id. Sometime later, the estimator left the roofing company and started a new position within ten miles of the roofing company. Id.

The roofing company filed an action against the estimator and his new employer and moved for a preliminary injunction to enforce the non-complete. Id. Following a hearing, the trial court denied the motion, and the roofing company appealed. Id. at ___, 895 S.E.2d at 879.

In its statement of the grounds for appellate review, the roofing company acknowledged that the order from which it appealed was interlocutory and stated that the court of appeals could nevertheless exercise jurisdiction because the order affected a substantial right. Id. The roofing company quoted precedent for the general assertion that appellate courts have in the past reviewed appeals from interlocutory orders where a substantial right is at stake; it did not, however, add context to these assertions or otherwise identify its substantial right. Id. at ___, 895 S.E.2d at 880.

The court of appeals stated that prior appellate decisions "consistently reiterated that mere citation to precedent is generally insufficient to invoke . . . interlocutory jurisdiction." Id. The roofing company's unsupported contention that the court of appeals could exercise jurisdiction was "wholly insufficient." Id. Rather, the roofing company "improperly and disproportionately relie[d] upon vague, conclusory statements and prior cases," without arguing that it would prevail on the merits or showing that it would suffer irreparable injury if the order were not remedied prior to an appeal from final judgment. Id. ___, 895 S.E.2d at 881.

Furthermore, the facts belied the roofing company's likelihood of prevailing on the merits or of suffering irreparable injury. Id. On appeal, the roofing company made "only general and hypothetical allegations" as to the trade secrets and information the estimator "might disclose," whereas the estimator's defense counsel had previously argued that there were no trade secrets at issue. Id. Additionally, the roofing company argued that it was in "constant[], aggressive[],

and . . . direct" competition with the new employer; however, the estimator's affidavit provided that he never witnessed this competition, and the new employer's affidavit averred that it had only competed with the roofing company once, on a bid that did not involve the estimator. Id.

The court of appeals could not review the appeal because the statement of grounds for appellate review was insufficient to invoke interlocutory jurisdiction. Id. Accordingly, it dismissed the interlocutory appeal for lack of jurisdiction. Id. at ___, 895 S.E.2d at 882.

E. Arbitration

In Earnhardt Plumbing, LLC v. Thomas Builders, Inc., 291 N.C. App. 1, 893 S.E.2d 564 (2023), the court of appeals addressed whether the trial court properly concluded, without making findings of fact in support thereof, that the Federal Arbitration Act did not preempt North Carolina law in determining whether a forum-selection clause in an arbitration agreement was enforceable.

A North Carolina plumber entered a contract with two property owners, a North Carolina company, and its affiliated Tennessee corporation. Id. at 2, 893 S.E.2d at 566. Under the contract, the plumber agreed to install plumbing and gas line systems for a hotel located in Fayetteville that was owned by the property owners. Id. The contract contained an arbitration agreement providing that arbitration "'shall be held at the discretion of the Contractor either at the Contractor's principle [sic] place of business or where the Project is located.'" Id.

The plumber eventually commenced an action against the property owners for breach of contract, alleging failure to pay in full for services rendered. Id. at 3, 893 S.E.2d at 566. The property owners filed a pre-answer motion to dismiss or alternatively to stay the proceedings pending mediation and/or arbitration. Id. At a hearing on the motion, the parties focused their arguments on where, not whether, the matter should be arbitrated; specifically, the arguments

centered around whether, per the contract, the property owners could compel arbitration to take place in Tennessee. Id.

The trial court denied the property owners' motion to dismiss and granted their alternative motion to stay. Id. Although the trial court concluded that the contract contained a valid agreement to arbitrate, it also concluded that the property owners were barred by North Carolina law from forcing the arbitration to occur in Tennessee. Id. at 3, 893 S.E.2d at 567. Specifically, the trial court held that the property owners were barred by section 22B-3 of the North Carolina General Statutes, which provides that "'any provision in a contract entered into in North Carolina that requires . . . the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable.'" Id. (alteration in original) (quoting N.C. Gen. Stat. § 22B-3). Additionally, the trial court concluded that the Federal Arbitration Act ("FAA") did not preempt section 22B-3. Id. The trial court thus ordered arbitration to occur in North Carolina. Id. The property owners appealed. Id.

Generally, orders denying arbitration and orders addressing the validity of forum-selection clauses, albeit interlocutory, are immediately appealable because they involve a substantial right that may be lost if the appeal is delayed. Id. The property owners argued that a substantial right was at stake here because the trial court, although granting arbitration, "deprive[d] them of their contractual right to select the forum for arbitration." Id. at 4, 893 S.E.2d at 567. The court of appeals agreed. Id.

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

The court of appeals stated that, when a contract involves interstate commerce, "'the FAA preempts North Carolina's statute and public policy regarding forum selection.'" Id. at 5, 893 S.E.2d at 568 (quoting Goldstein v. Am. Steel Span, Inc., 181 N.C. App. 534, 538, 640 S.E.2d 740, 743 (2007)). Furthermore, whether a contract involves interstate commerce is a question of fact, which is strictly within the province of trial courts, not appellate courts, to determine. Id.

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

Thus, the court of appeals vacated and remanded the trial court's order. Id. at 6, 893 S.E.2d at 568.

In Canteen v. Charlotte Metro Credit Union, ___ N.C. ___, ___ S.E.2d ___, 2024 WL 2338525 (2024), the supreme court considered whether the unilateral modification of a contract to include an arbitration provision could be enforceable.

A consumer opened a checking account with a credit union in 2014. Id. at *1. The member agreement provided the agreement was subject to North Carolina law and contained a forum selection clause. Id. at *5. The member agreement also included a provision that allowed the credit union—upon notice to the consumer as required by law—to change the terms of the agreement pursuant to the law of the state where the credit union's main office was located. Id. at *1. In 2021, the credit union amended its member agreement to require arbitration and to waive the right to file class actions. Id. The credit union provided the consumer with notice. Id.

Later that year, the consumer filed a class action complaint against the credit union. Id. at *2. The credit union filed a motion to stay the action and compel arbitration, which the trial court denied, concluding the member agreement did not allow a unilateral amendment and that, even if it did, such an amendment would violate the duty of good faith and fair dealing. Id. The court of appeals reversed and remanded the case to the trial court in a divided opinion. Id.

The consumer appealed to the supreme court. In a majority opinion written by Justice Berger, the supreme court affirmed the court of appeals, taking the "opportunity" to "address[] the boundaries of a party's ability to include a change-of-terms provision and then unilaterally amend a contract pursuant to that provision." Id. at *3. The court held that when parties mutually agree to a unilateral chance-of-terms provisions, that provision must be enforced and the "traditional modification analysis which requires mutual assent and consideration does not apply." Id. However, the party implementing the change must still comply with the implied covenant of good faith and fair dealing. Id.

To fall within the implied covenant of good faith and fair dealing, the changes must "reasonably relate to subjects discussed and reasonably anticipated in the original agreement." Id. at *5. Because the agreement at issue contained a "governing law" provision that North Carolina law applied and provided a forum selection clause, the agreement "clearly contemplated the forum and method for dispute resolution between the parties." Id. Because the arbitration provision at issue "simply changed the forum in which the parties could raise certain disputes, . . . it was within the same universe of terms as the Governing Law provision." Id. Accordingly, the arbitration provision did not violate the implied covenant of good faith and fair dealing. Id.

The supreme court further addressed the consumer's argument that permitting the amendment rendered the member agreement illusory. Because "the implied covenant of good faith

and fair dealing requires that any modifications made pursuant to a change-of-terms provision fall within the universe of terms included in the original agreement," "[t]his requirement serves as a sufficient 'limitation on a promisor's freedom of choice' and as such remedies any purported issues of illusoriness which may arise from a change-of-terms clause." Id. at *6.

Justice Riggs dissented, beginning by stating that she would have held that the credit union's actions violate North Carolina contract law:

> These unilaterally adopted provisions are illusory—nothing precludes CMCU under the majority's opinion from one-sidedly restoring CMCU's rights to bring its claims in court. CMCU's arbitration amendment also violated the implied covenant of good faith and fair dealing, which precludes parties from single-handedly "recaptur[ing] opportunities forgone upon contracting." Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369, 373 (1980). Finally, the majority's holding is at odds with the realities of consumer contracts and the effects of arbitration on the constitutional right to trial by jury, both generally and in this particular case.

Id. at *7.

And concluding by stating:

> "[I]mplicit in every contract is the obligation of each party to act in good faith." Great Am. Ins. Co. v. C.G. Tate Constr. Co., 303 N.C. 387, 399, 279 S.E.2d 769 (1981). The majority's holding in this case functionally erases that obligation in the context of unilateral retroactive amendments to consumer contracts, thereby disrupting the leveling effect of our law on parties that have dramatically different negotiating power. So now, as long as the original consumer contract touched on the subject of the amendment, the amending party has free rein to make whatever changes it wishes—including relieving itself of any duty to arbitrate while leaving that restriction on the other party.

Id. at *11.

IV. INSURANCE

A. UIM

In Ennis v. Haswell, ___ N.C. App. ___, 897 S.E.2d 15 (2024), the court of appeals considered whether an auto insurance company was required to advance the amount of the liability settlement offer in order to preserve its subrogation claim against the proceeds of any recovery from the tortfeasor under section 20-279.21(b)(4) of the North Carolina General Statutes.

A vehicle passenger was severely injured while riding in a car operated by the driver and owned by the driver's parents. Id. at ___, 897 S.E.2d at 16. The driver and vehicle owners were insured by an auto insurance policy with limits of $300,000 per person and $300,000 per accident. Id. The auto insurance policy provided underinsured motorist coverage for passengers in an insured vehicle in the amount of $300,000 per person and $300,000 per accident, which covered the injured vehicle passenger in the present case. Id. At the time of the accident, the vehicle passenger was also insured under a separate auto insurance policy issued by a different auto insurance company. Id. The vehicle passenger's own auto insurance policy provided underinsured motorist coverage for the vehicle passenger with a limit of $100,000 per person. Id.

Prior to filing suit, the vehicle passenger's counsel sent a letter to the driver's and vehicle owners' auto insurance company demanding that the driver's and vehicle owners' auto insurance company tender its policy limit within 30 days. Id. The driver's and vehicle owners' auto insurance company did not respond to this demand. Id. at ___, 897 S.E.2d at 17. The vehicle passenger then filed suit against the driver and vehicle owners in superior court. Id. The vehicle passenger's counsel notified the vehicle passenger's auto insurance company of three things. Id. First, that the driver's and vehicle owner's auto insurance company had not responded to the time-limited demand. Id. Second, that the vehicle passenger had filed suit against the driver and the

vehicle owners. Id. Third, that the vehicle passenger's auto insurance company had the right to participate in the litigation as an unnamed party. Id.

Later, the vehicle passenger's auto insurance company offered to pay the vehicle passenger $100,000 pursuant to its underinsured motorist coverage. Id. The vehicle passenger accepted this offer and the trial court approved the settlement of the vehicle passenger's claim against their auto insurance company. Id. Under the terms of the settlement, the vehicle passenger's auto insurance company reserved any and all rights it may have had to recover its payments from the tortfeasor and acknowledged that the driver and the vehicle owners assert that these rights have been waived. Id. The vehicle passenger, the driver, and the vehicle owners participated in a court-ordered mediation, which produced an agreement to settle for an amount greater than $300,000. Id. That same day, the vehicle passenger's counsel notified the vehicle passenger's auto insurance company via email of the settlement agreement and suggested that the auto insurance company elect to advance to secure its subrogation rights. Id. However, the vehicle passenger's auto insurance company declined to advance the amount of the settlement agreement. Id. The vehicle passenger's auto insurance company later filed a motion to intervene in the action and a motion to enforce its subrogation right, pursuant to section 20-279.21(b)(4) of the North Carolina General Statutes. Id. After a hearing on the motions, the trial court granted the motion to intervene and denied the motion to enforce the subrogation right. Id. The vehicle passenger's auto insurance company timely filed a notice of appeal. Id.

On appeal, the vehicle passenger's auto insurance company asserted that it became subrogated against the proceeds of any recovery to the extent of its $100,000 payment under the underinsured motorist policy limit and was therefore entitled to reimbursement of that payment from any money that the vehicle passenger recovered from the driver or the vehicle owners or their

auto insurance company pursuant to § 20-279.21(b)(4). Id. The vehicle passenger contended that the plain text of section 20-279.21(b)(4) is clear that if an auto insurance company offering underinsured motorist coverage intends to preserve its subrogation rights against a tortfeasor, it must advance a payment to the insured person in the amount of the tentative settlement with a liability insurer within 30 days of the date it received notice of the offer. Id. If an auto insurance company fails to do so, it loses all subrogation rights. Id. Ultimately, the court of appeals agreed with the vehicle passenger. Id.

Here, the court of appeals determined that the question presented was purely a question of law. Id. Section 20-279.21(b)(4) of the North Carolina General Statutes states, in pertinent part, that:

> No insurer shall exercise any right of subrogation . . . where the insurer has been provided with written notice before a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of that notice.

Id. at ___, 897 S.E.2d at 19.

The court of appeals was not persuaded by the vehicle passenger's auto insurance company's argument that this section of the statute creates two kinds of subrogation rights, differentiated by whether the underinsured motorist coverage insurer pays a claim before the insured exhausts the tortfeasor's liability insurance coverage or after the exhaustion of coverage. Id. Instead, the court of appeals held that there was no ambiguity in the plain text of the statute. Id. The court of appeals also acknowledged that because it is "an error-correcting body, not a policy making or law-making one," the public policy concerns advanced by the vehicle passenger's auto insurance company could not be considered in this appeal. Id. (quoting Shearin v. Brown, 276 N.C. App. 8, 14, 854 S.E.2d 443, 448 (2021))

For these reasons, the court of appeals affirmed the trial court's order denying the motion to enforce the vehicle passenger's auto insurance company's right of subrogation. Id. at ___, 897 S.E.2d at 20.

V. WORKERS' COMPENSATION

In Lassiter v. Robeson Cnty. Sheriff's Dep't, ___ N.C. App. ___, 896 S.E.2d 280 (2023), petition for discretionary review filed, (Mar. 4, 2024), temp. stay allowed, ___ N.C. ___, 897 S.E.2d 672 (Mar. 11, 2024), the court of appeals considered whether an off-duty law enforcement officer was jointly employed by a Sheriff's office and a construction company when he was injured while directing traffic under a contract with the construction company.

A construction company contracted with the North Carolina Department of Transportation ("NCDOT") to perform bridge preservation work along I-95. Id. at ___, 896 S.E.2d at 283. Under the contract, NCDOT required the construction company to provide law enforcement officers, with blue lights activated, to direct traffic in accordance with a traffic control plan. Id. In compliance with the agreement, the construction company engaged a captain of a Sheriff's office and a chief of police to obtain law enforcement officers to execute the traffic control work. Id. The captain contacted a law enforcement officer who was off duty at the time and agreed to do the traffic control work. Id. The officer reported to his position in an unmarked patrol car and began performing his duties. Id. At around midnight, the captain directed the officer to switch positions with him and after doing so, the officer was struck by a vehicle and sustained significant injuries that required him to be airlifted to a hospital. Id.

The officer sought workers' compensation and filed the requisite form notice of accident to employer, listing both the Sheriff's office and the construction company. Id. After both the

Sheriff's office and the construction company denied the existence of employment, the officer filed a request for hearing with the North Carolina Industrial Commission. Id. After the hearing, a Deputy Commissioner entered an opinion and award, concluding that the officer was employed by the Sheriff's office but that there was no employment relationship between the officer and the construction company. Id. The Sheriff's office appealed to the Full Commission and the Full Commission affirmed the Deputy Commissioner's conclusions. Id. The Sheriff's office timely filed a notice of appeal to the court of appeals. Id. at ___, 896 S.E.2d at 284.

On appeal, the court of appeals first addressed whether the law enforcement officer was acting as an independent contractor at the time of his injury. Id. The court acknowledged that "[i]n order to recover under [North Carolina's] Workers' Compensation Act, 'the claimant must be, in fact and in law, an employee of the party from whom compensation is claimed[,]' and must have been in an employer-employee relationship with that party at the time of their injury." Id. (quoting Fagundes v. Ammons Dev. Grp., Inc., 261 N.C. App. 138, 150, 820 S.E.2d 350, 359 (2018)). North Carolina case law has not yet directly addressed whether, at a time of injury, a law enforcement officer was engaged in an independent occupation or business, however, the court of appeals found State v. Gaines instructive. Id. at *3 (citing State v. Gaines, 332 N.C. 461, 466, 421 S.E.2d 569, 571 (1992)). In State v. Gaines, the supreme court held that:

> the duty of a law enforcement officer, regardless of whether he is off duty performing a secondary employment, is to act as a peace officer, whose primary duty is to "enforce the law and insure the safety of the public at large." Further[more], the Supreme Court held the officer was hired on the basis of his official status as a police officer with the advantages such a status would bring to his secondary employment—to deter crime and enforce a system of law in an area it was needed. The Court noted that while his unformed presence alone was a symbol of the rule of law, he also served to benefit Red Roof Inn as "his ultimate or primary purpose was to keep the peace at all times without regard to his 'off-duty' or 'off-shift' status."

Id. at ___, 896 S.E.2d at 285 (citing Gaines at 475, 421 S.E.2d at 576).

Here, the court of appeals held that the officer did not classify as an independent contractor at the time of his injury. Id. at ___, 896 S.E.2d at 286. The law enforcement officer was acting as a law enforcement officer for a number of reasons. Id. First, he was conducting traffic duty, which is considered an official duty of law enforcement officers. Id. Second, the officer neither acted solely on behalf of a private entity nor was he engaging in some private business of his own. Id. Third, the contracted services benefited the construction company while also protecting the safety of the community. Id.

The evidence presented at the hearing also indicated that the officer was hired on the basis of his official status as a police officer, which was required by the contract between the construction company and NCDOT. Id. This contract established who maintained significant control over the officer's ability to do his work. Id. The court of appeals' analysis under Gaines established that the officer was under the control of both the Sheriff's office and the construction company and that he did not have the independent use of his skill, knowledge, or training. Id. Furthermore, the officer was not able to select his own time or hire his own assistants and was paid hourly instead of a fixed price or lump sum. Id. The officer was also subject to discharge by the Sheriff's office if he failed to follow instructions. For these reasons, the court held that the Full Commission did not err in its conclusion that the officer was not an independent contractor. Id.

The court of appeals then considered whether the officer was employed by the Sheriff's office, the construction company, or both. Id. The court first acknowledged that because a person can be considered an employee of two different employers at the time of an injury. Id. at ___, 896 S.E.2d at 287 (citing Leggette v. McCotter, Inc., 265 N.C. 617, 625, 144 S.E.2d 849, 855 (1965)). Thus, in order to prove simultaneous employment, the court of appeals instructed claimants to use

two doctrines: the joint employment doctrine and the lent employee doctrine. Id. (citing Whicker v. Compass Group USA, Inc., 246 N.C. App. 791, 797, 784 S.E.2d 564, 569 (2016)). The doctrines require the following analysis:

> Under the joint employment doctrine, Plaintiff must prove he was, at the time of his injury, "a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously perform[ing] services for both employers, and [ ] the service for each employer is the same as, or is closely related to, that for the other."

Id. (quoting McGuine v. Nat'l Copier Logistics, LLC, 270 N.C. App. 694, 700-01, 841 S.E.2d 333, 338 (2020) (citations and internal quotation marks omitted).

The court of appeals acknowledged that it was already established that there was an employment contract that existed between the Sheriff's office and the officer. Id. The court of appeals further held that there was an implied contract between the construction company and the officer. Id. at ___, 896 S.E.2d at 288. An employment contract may be "express or implied, oral or written[.]" Id. at ___, 896 S.E.2d at 287 (quoting N.C. Gen. Stat. § 97-2(2)). Here, the record evidence reflected that even though the construction company was not responsible for training the officer, it did exercise "some supervisory authority and control" over the officer and directly paid him for his services. Id. The construction company was also in control of exactly how many officers were working at the time. Id.

The court of appeals then moved on to the second step of the analysis and held that the officer was under the simultaneous control of both the Sheriff's office and the construction company. Id. at ___, 896 S.E.2d at 288. In conducting this analysis, the court of appeals distinguished the present case from Whicker, where a cleaning company contracted with a hospital to provide cleaning services to the hospital's facilities. Id. (citing Whicker, 246 N.C. App. at 792, 784 S.E.2d at 566). There, the court stated that the employee, a cleaning service worker, must

show the work she performed at the time of her injury was of the same nature as the work performed by the company that hired her through a cleaning service. Id. (citing Whicker, 246 N.C. App. at 800, 784 S.E.2d at 570). Here, the court of appeals clarified that "the doctrine required . . . the service for each employer to be the same or closely related to that for the other." Id. at ___, 896 S.E.2d at 289 (citing Whicker at 797, 784 S.E.2d at 569). The officer, at the time of his injury, performed traffic duty for the construction company that was similar in kind and nature to the services he performed for the Sheriff's office. Id.

For these reasons, the court of appeals affirmed in part and reversed in part the Full Commission's opinion and award affirming the Deputy Commissioner's conclusions. Id.

In Alderete v. Sunbelt Furniture Xpress, Inc., ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 2279832 (2024), the court of appeals considered whether the Industrial Commission has exclusive jurisdiction over an employee's claim for damages arising out of a sexual assault that occurred during the course of employment.

An employee was hired to load and unload trucks. Id. at *1. The employer assigned an inmate who was part of a work release program to train the employee. Id. The inmate sexually assaulted the employee. Id. The employee filed suit against the employer alleging negligent supervision. Id. The trial court dismissed the claim for lack of subject matter jurisdiction, finding that the Industrial Commission had exclusive jurisdiction over the matter. Id. at *2. The employee appealed. Id. at *1.

The court of appeals affirmed. Id. at *2. After determining that the employer was subject to the provisions of the Worker's Compensation Act, the court of appeals next considered whether the cause of action arises out of and in the course of employment by applying the applicability test. Id. at *3. Under the applicability test, the court first determines whether the injury—i.e., the sexual

assault—was caused by an accident. Id. Because the sexual assault was "unexpected and without design," from the employee's perspective, the assault was an accident under the Worker's Compensation Act. Id. at *4. The court of appeals next considered whether the assault arose out of and in the course and scope of employment. Id. The court found it was uncontested that the assault occurred in the course of employment. Id. at *5. The court then looked at whether the injury arose out of the employment. Id. Because the employee was hired exclusively to load and unload trucks, the court found the assault was not related to the performance of the services required of the employee. Id. The court distinguished an earlier case finding that a sexual assault arose out of employment where a cocktail waitress who had been instructed to offer any assistance that she could to customers was sexually assaulted by a customer when she stopped to assist the customer who appeared to have a broken-down vehicle. Id. at *4. Because the sexual assault was not related to the performance of the services required of the employee—i.e., was not related to loading and unloading trucks—the sexual assault did not arise out of the employment. Id. at *5.

Because the injury did not arise out of the employee's employment under the applicability test, the Industrial Commission did not have jurisdiction over the complaint. For that reason, the trial court did not err in denying the employer's motion to dismiss for lack of subject matter jurisdiction.