CIVIL LAW UPDATE
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2024 Appellate Training: New & Emerging Legal Issues

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A. Negligence

In Cranes Creek, LLC v. Neal Smith Engineering, Inc., 291 N.C. App. 532, 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 does not identify instances of breach of a specific professional standard of conduct.

A corporation sought to purchase a new residential subdivision. Id. at 533, 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 "and dismiss[ed] [the corporation's] 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 534, 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. at 536-37, 896 S.E.2d at 276-77.

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. at 537, 896 S.E.2d at 277. Accordingly, the court of appeals affirmed the trial court. Id.

In Long v. Fowler, ___ N.C. App. ___, 906 S.E.2d 41, appeal filed (Sept. 11, 2024), the court of appeals addressed the extent to which an injury must be foreseeable in negligence actions to preclude entry of summary judgment in defendants' favor. Id. at ___, 906 S.E.2d at 48-49.

An OSHA-certified pipefitter who worked for an industrial equipment contractor was assigned to work on a construction project at North Carolina State University (the "University"). Id. at ___, 906 S.E.2d at 44. Part of the project involved moving a large, mobile chiller. Id. Several

warning labels were attached to the exterior of the chiller. Id. One of the labels directed workers to put five gallons of antifreeze into the chiller when shutting it down for the winter, as it was not possible to completely drain all water from the chiller. Id.

On December 19, 2016, a University supervisor issued a work order instructing employees to drain and secure the chiller for relocation. Id. Defendants, who were University employees, drained the chiller and secured the chiller by attaching metal caps and flanges over the inlet and outlet pipes. Id. at ___, 906 S.E.2d at 44-45.

In early January 2017, temperatures in Raleigh dropped below freezing, causing water in the chiller's pipes to freeze and expand. Id. at ___, 906 S.E.2d at 45. The expanding water burst the pipes allowing high-pressure refrigerant to escape and causing the chiller to become pressurized. Id.

On January 20, 2017, the OSHA-certified pipefitter who worked for the equipment contractor was assigned to remove the caps and flanges from the chiller. Id. Prior to beginning work, he checked the chiller's pressure gauges, all of which read zero. Id. While removing the flanges, a cap flew off and struck him in the face and head. Id. He was transported to a hospital and passed away five days later from his injuries. Id.

The administrator of his estate filed a wrongful death lawsuit against the University employees alleging they were negligent in failing to use antifreeze when shutting down the chiller. Id. Following discovery, the trial court granted the defendants' motion for summary judgment. Id.

On appeal, the plaintiff argued there were genuine issues of material fact both as to whether defendants proximately caused the decedent's death and whether the decedent was contributorily negligent. Id. In a majority opinion authored by Judge Griffin, first addressing the issue of proximate cause, the court of appeals noted that "[f]oreseeability of injury is an essential element

of proximate cause." Id. at ___, 906 S.E.2d at 46. However, defendants are not required to foresee events which are "merely possible," but rather only those events which are reasonably foreseeable. Id.

The plaintiff argued that because the chiller's manual warned of system pressure from failing to use antifreeze, and the accident resulted from system pressure, the University employees were negligent by failing to read the manual and failing to use antifreeze when shutting down the chiller. Id. at ___, 906 S.E.2d at 47. The court of appeals disagreed, reasoning that because the manual only warned of potential damage to the chiller itself and not of injury to persons resulting from system pressure, the injury was not reasonably foreseeable. Id. In support of this conclusion, the court of appeals also noted that the decedent's employer and coworkers, as well as even plaintiff's expert, testified that an accident of this nature was completely unexpected. Id.

The court of appeals next addressed the issue of contributory negligence. Even assuming that there were genuine issues of material fact as to proximate cause, the court of appeals concluded that decedent's contributory negligence was sufficient to warrant summary judgment in defendants' favor. Id. Unlike the University employee defendants, the decedent should have reasonably foreseen the danger presented by the chiller's potential pressurization because of his extensive safety training and his employer's safety procedures. Id. at ___, 906 S.E.2d at 49. For example, his training included instructions to stand to the side of a cap when removing it from a pipe. Id. Thus, the decedent "not only possessed the capacity to understand possibility of an unforeseeable danger, but also the training on how to avoid potential unforeseen circumstances that could present danger." Id. For these reasons, the court of appeals concluded that as a matter of law, the decedent failed to conform his conduct to that of a reasonably prudent person in the same circumstances. Id.

In a dissenting opinion, Judge Hampson concluded that there were genuine issues of material fact precluding entry of summary judgment. Id. at ___, 906 S.E.2d at 52. On the issue of proximate cause, Judge Hampson noted that the manual warned that installing and starting the equipment could be hazardous due to system pressures and instructed all persons working on the chiller to observe the precautions in the literature and on tags, stickers, and labels attached to the equipment. Id. at ___, 906 S.E.2d at 53. Judge Hampson observed that even though the manual did not address the exact means by which the system became pressurized in this case, the test of proximate cause is only whether a risk of some injury is reasonably foreseeable, not necessarily the precise form in which the injury occurs. Id. Thus, Judge Hampson concluded that the warnings in the manual created a genuine issue of material fact as to whether the University employees should have foreseen the risk of injury resulting from pressurization of the chiller. Id.

On the issue of contributory negligence, Judge Hampson noted that the plaintiff produced evidence showing that the decedent looked at the pressure gauges, which read zero and indicated that the chiller was not pressurized. Id. at ___, 906 S.E.2d at 56. Additionally, there was evidence that the decedent checked for noise, smell, and other indicators of pressure before completely loosening the nut and removing the cap. Id. In Judge Hampson's view, this evidence was sufficient for a jury to conclude that the decedent could not reasonably have anticipated the chiller was improperly drained and had become pressurized. Id. at ___, 906 S.E.2d at 57.

(1) Negligent Entrustment

In Chappell v. Webb, ___ N.C. App. ___, 905 S.E.2d 346 (2024), the court of appeals considered whether a $40 million jury verdict award in compensatory and punitive damages in a motor-vehicle accident case was excessive and whether the evidence supported a claim for negligent entrustment. Id. at ___, 905 S.E.2d at 351.

The case arose from a motor-vehicle accident where an intoxicated driver, driving her friend's car, crossed the center line of a highway and struck another vehicle head-on. Id. The driver of the second vehicle died later that night. Id. The administrator of the deceased's estate brought a wrongful death action alleging that the intoxicated driver was negligent in driving the vehicle and the owner was negligent in entrusting the intoxicated driver with her vehicle. Id.

The jury returned a verdict awarding the deceased's estate $40 million in total damages. Id. The intoxicated driver and vehicle owner were found joint and severally liable for $15 million in compensatory damages, the intoxicated driver was found liable for $5 million in punitive damages, and the vehicle owner was found liable for $20 million in punitive damages. Id. The trial court entered judgment consistent with the verdicts and denied the defendants' post-trial motions, including the owner's motion for judgment notwithstanding the verdict. Id.

The court of appeals affirmed. Id. at ___, 905 S.E.2d at 357. The court of appeals first addressed whether the plaintiff presented sufficient evidence to prove negligent entrustment. Id. at ___, 905 S.E.2d at 351. To prove negligent entrustment, the plaintiff must show that (1) defendant car owner entrusted her car to another and (2) the car owner knew or reasonably should have known the other person was in a condition where she was likely to cause injury to others in her driving. Id. The defendant vehicle owner argued that the plaintiff in a negligent entrustment action must show that the owner voluntarily delivered possession of her car to the driver, rather than simply consenting to allow the driver to drive the owner's vehicle. Id. at ___, 905 S.E.2d at 352. The defendant relied upon North Carolina Pattern Jury Instruction 102.68 which contains the "voluntarily gave possession" requirement. Id. However, jury instructions do not have the force of law, and North Carolina jurisprudence "does not suggest that there is a heightened burden

beyond that the owner consented, either expressed or implied, to allowing one she knew or should have known to be incompetent/reckless to drive her car." Id.

The court of appeals held that the issue of negligent entrustment was properly submitted to the jury. Id. In her answer to plaintiff's complaint, the owner admitted that the intoxicated driver drove her vehicle with her express knowledge, express consent, and express authorization. Id. Additionally, evidence of vehicle ownership is prima facie evidence that the driver was driving the vehicle with the owner's consent and knowledge. Id. (citing N.C. Gen. Stat. § 20-71.1(a)). Furthermore, the evidence showed that the intoxicated driver was in the backseat of the vehicle, but at some point prior to the accident she became the driver while the owner moved to the backseat. Id. For these reasons, the trial court did not err in denying the vehicle owner's motion for judgment notwithstanding the verdict. Id.

The court of appeals next addressed the defendants' arguments concerning the amount of damages. Id. at ___, 905 S.E.2d at 353. The court of appeals noted that the $40 million total verdict appears to be the "largest drunk driving verdict in North Carolina history." Id. Regarding compensatory damages, the defendants asked the court of appeals to apply a "damages norm test" to determine if the verdict was excessive when compared to the evidence presented and the typical damages awarded in similar cases. Id.

The court of appeals declined to adopt the damages norm test, noting that the North Carolina supreme court has previously disapproved implementing a similar test. Id. at ___, 905 S.E.2d at 354. Here, although the plaintiff did not produce evidence of the deceased's future income or her medical and funeral expenses, there was evidence concerning the pain and suffering she suffered during the last hour of her life and there was evidence of her family's loss, particularly the loss suffered by her two children. Id. Even though some people "and perhaps even some

judges" might find a compensatory damages award of $15 million excessive "based on a death involving less than an hour of suffering and where no 'economic damages' evidence was introduced," the court of appeals could not say that the trial court abused its discretion in refusing to set aside the award. Id.

The court of appeals next addressed the $25 million total punitive damages award. Id. at ___, 905 S.E.2d at 355. The defendant vehicle owner argued that the issue of punitive damages based on her negligent entrustment should not have been presented to the jury because the evidence presented at trial did not prove by clear and convincing evidence that she knew the driver was drunk when she allowed the driver to drive her vehicle. Id. The court of appeals disagreed, noting that the trooper observed open beer cans both outside and inside the vehicle and smelled a strong odor of alcohol even before entering the vehicle. Id. Additionally, there was evidence that five years prior to the accident, the driver was pulled over and cited for drunk driving while driving the owner's vehicle and while the owner was a passenger. Id. For these reasons, the court of appeals upheld the jury's damages awards. Id. at ___, 905 S.E.2d at 356.

(2) Contributory

In Moseley v. Hendricks, 292 N.C. App. 258, 897 S.E.2d 680, appeal docketed (Mar. 11, 2024), the 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 260, 897 S.E.2d. at 682. During a game of golf, while all the friends partook in drinking one of the friends' moonshine one golfer drank the

most, consuming "an additional five to ten beers." Id. Indeed, 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. at 261, 897 S.E.2d at 682. Once 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 261, 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 262, 897 S.E.2d at 683 n.4. The friend who had brought the moonshine went to hit the ball first. Id. 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 golfer who was hit 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., 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. at 263, 897 S.E.2d at 684. 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 Arrowood. 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 court of appeals concluded that the injured golfer failed to exercise reasonable care for his own safety, and that there was a proximate connection between his failure to do so and his injury. Id. at 264, 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 was not 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 court of appeals 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 that would allow a reasonably prudent person to act effectively. Id.

The court of appeals concluded that the doctrine does 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. "Specifically, if 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 266, 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 being exposed to danger. 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 court of appeals 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 267-73, 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 267, 897 S.E.2d at 686. Particularly, there was a genuine issue of material fact 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 268, 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 269, 897 S.E.2d at 688. Furthermore, the opinion 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 270-71, 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 273, 897 S.E.2d at 690.

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

In Cullen v. Logan Developers, Inc., 386 N.C. 373, 904 S.E.2d 730 (2024), the supreme court considered whether a woman who fell through a hole in her attic was contributorily negligent and whether a builder was grossly negligent for cutting out the hole.

A wife and her husband hired a company to build their home. Id. at 732. As part of the construction, the builder installed an air handler in the home's attic. Id. To reach the air handler, a person had to walk on a plywood floor running across rows of trusses that were surrounded by insulation. Id. After examining the attic, a building inspector told the builder that the existing access point to the attic was too far from the air handler to meet North Carolina's Building Code, so the builder installed a second opening in the attic's plywood flooring above the master bathroom. Id. at 732-33. This change upset the homeowners. Id. at 733. To assuage the homeowners' concerns over the appearance of the opening in the bathroom, the builder covered the opening in the master bathroom's ceiling with a sheet of drywall but left open the hole above in the attic's plywood flooring. Id. This left some insulation between the hole in the plywood flooring and the bathroom ceiling. Id.

After the home was built, the wife went into the attic to take pictures of its interior. Id. While in the attic, the wife stepped backwards and fell through the hole in the plywood floor above the master bathroom's ceiling. Id. The wife suffered a concussion and broke her thumb and her right foot's heel. Id. The wife brought an action against the builder for negligence and gross negligence based on the "dangerous condition of the attic floor." Id. During her deposition, the wife testified that she knew it was unsafe to step on any part of the attic not covered by plywood flooring, that she did not look before she stepped backwards into the hole, and that nothing prevented her from seeing the hole if she had looked. Id. The builder moved for summary

judgment and the trial court granted the motion finding the wife was contributorily negligent and could not support a claim for gross negligence based on the facts. Id.

On appeal, the court of appeals vacated the trial court's summary judgment order. Id. The court of appeals held that "the evidence viewed in the light most favorable to [the wife] creates a genuine issue of material fact as to whether [the wife] knew the scuttle hole area in the attic remained unsafe such that she was negligent in failing to look out for her safety while walking." Id. (cleaned up). The court of appeals likewise held that dismissing the gross negligence claim was premature because the forecasted evidence may have shown that the builder knew that concealing the appearance of the hole from the master bathroom ceiling violated the building code and created a concealed hazard. Id. The builder appealed to the supreme court.

The supreme court held that the wife could not prevail on either claim for negligence or gross negligence. Id. at 738. The supreme court stated that "[t]he law expects individuals to take reasonable steps to protect themselves from open and obvious risks." Id. at 732. "For this reason, plaintiffs ordinarily cannot recover damages from defendants who created such risks if the plaintiffs could have avoided harm through due regard for their own safety." Id. In the wife's case, the supreme court found that "the hole presented an open and obvious risk" and that the wife "failed to exercise reasonable care under the circumstances," necessitating the dismissal of the negligence claim. Id. And even assuming the placement of the hole violated North Carolina's Building Code, the builder did not display the level of conscious disregard for the wife's safety necessary to prove gross negligence. Id.

For these reasons, the supreme court reversed the court of appeals and reinstated the trial court's summary judgment order. Id. at 738.

B. Medical Malpractice

In Cottle v. Mankin, ___ N.C. App. ___, 901 S.E.2d 682 (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 ___, 901 S.E.2d at 683. 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 ___, 901 S.E.2d at 686. 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. at ___, 901 S.E.2d at 686-87.

C. Contract

In Smith Debnam Narron Drake Saintsing & Myers, LLP v. Muntjan, 292 N.C. App. 141, 897 S.E.2d 673, writ of cert. allowed, 896 N.C. 626, 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 who 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 142, 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. at 143, 897 S.E.2d at 675. 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 147, 897 S.E.2d at 678. The court of appeals, in a majority 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 144, 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 court of appeals addressed whether the father had made a "collateral promise," 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 of appeals 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 146, 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 of appeals also provided 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 of appeals 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 147, 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 opinion 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 opinion 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 149-51, 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 149, 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.

As mentioned above, the dissent also took issue with the fact that the majority opinion cited Winders v. Hill, 144 N.C. 614, 57 S.E. 456 (1907), "a 116-year old case that—until this filing—has not been mentioned for sixty-nine years." Id. Additionally, the dissenting judge believed that the majority opinion attempted to forge a new rule from Winders "that written 'implications' cannot support satisfying the statute of frauds," a proposition that neither the Winders opinion itself nor sections 22-1 through 22-5 of the North Carolina General Statutes stated. Id. at 151, 897 S.E.2d at 680.

In Hoaglin v. Duke University Health System, Inc., ___ N.C. App. ___, 901 S.E.2d 378 (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 ___, 901 S.E.2d at 383. The resident claimed among other things that the hospital breached his employment agreement and violated the ADA when he was terminated. Id. 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. 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 learned 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. at ___, 901 S.E.2d at 384.

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 ___, 901 S.E.2d at 385. 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. 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. 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 ___, 901 S.E.2d at 383.

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

In Canteen v. Charlotte Metro Credit Union, 386 N.C. 18, 900 S.E.2d 890 (2024), the supreme court considered whether a credit union could add an arbitration provision to a longstanding membership agreement through a notice of change-of-terms provision.

Plaintiff Pamela Phillips (the "Member") joined the Charlotte Metro Credit Union (the "Credit Union") in 2014, signing the Credit Union's Membership Agreement. Id. at 19-20, 900 S.E.2d at 892. The Membership Agreement included a Notice of Amendments Provision, allowing the Credit Union to change the terms of the Membership Agreement "except as prohibited by applicable law." In 2021, the Credit Union amended the Membership Agreement to include an arbitration provision and class-action waiver. Id., 900 S.E.2d at 893.

Pursuant to the Notice of Amendments Provision, the Credit Union emailed the Member (who agreed to receive account notifications by email) three times in early 2021 with a notice of

the amendment and providing her an opportunity to opt out. Id. at 20, 900 S.E.2d at 893. The Member did not opt out. Id.

Later in 2021, the Member filed a putative class action against the Credit Union in Mecklenburg County Superior Court, alleging that the Credit Union improperly collected overdraft fees on accounts that were not overdrawn. Id. at 21, 900 S.E.2d at 893. The Credit Union responded with a motion to stay proceedings and compel arbitration. Id. The trial court denied the motion, ruling that the arbitration provision was unenforceable. Id. In a divided decision, the court of appeals reversed the trial court, holding that the arbitration provision was a valid change to the original Membership Agreement. Id. at 21-22, 900 S.E.2d at 893-94.

The supreme court, with Justice Berger writing for the majority, affirmed the court of appeals, holding that the arbitration clause was a binding and enforceable agreement between the Credit Union and the Member. Id. at 28, 900 S.E.2d at 898.

The supreme court began by analyzing the Notice of Amendments provision. Id. at 22, 900 S.E.2d at 894. This provision allowed the Credit Union to change the terms of the Membership Agreement unilaterally. Where parties agree to a unilateral change-of terms provision, that provision must be enforced as written. Id. However, a change-of-terms provision does not "grant a party free rein to alter a valid agreement;" the change must still comply with the covenant of good faith and fair dealing. Id. at 23, 900 S.E.2d at 894-95.

The supreme court held that "modifications made pursuant to change-of-terms provisions comply with the covenant of good faith and fair dealing if the changes reasonably relate to subjects discussed and reasonably anticipated in the original agreement." Id. at 26, 900 S.E.2d at 896. Thus, the question in this case was whether the Credit Union's original Membership Agreement contained terms relating to dispute resolution "such that a reasonable person could have anticipated

the inclusion of an arbitration clause." Id. The supreme court determined that arbitration was within the universe of terms of the original Membership Agreement because the original Membership Agreement had a governing law provision that "contemplated the forum and method for dispute resolution between the parties." Id., 900 S.E.2d at 897. The amendment adding the arbitration clause "simply changed the forum in which the parties could raise certain disputes." Id.

The supreme court next addressed the Member's argument that "permitting the unilateral Arbitration Amendment pursuant to the Notice of Amendments provision would render the contract illusory." Id. A contract is illusory when a party retains an unlimited right to determine the nature and extent of its performance. Id. Here, the Notice of Amendments provision contained the limiting language of "[e]xcept as prohibited by applicable law." Id. Thus, the Credit Union was prohibited from making unilateral modifications, for example, that violated the implied covenant of good faith and fair dealing. Id. This requirement, to comply with the covenant of good faith and fair dealing, served as a sufficient limitation on the Credit Union's ability to unilaterally modify the Membership Agreement such that the Membership Agreement was not illusory. Id.

For all these reasons, the supreme court held that the Arbitration Agreement was a binding and enforceable agreement between the Member and Credit Union. Id. at 28, 900 S.E.2d at 898.

In dissent, Justice Riggs wrote that the majority's opinion "hurts consumers, unfairly favors sophisticated corporations, and abandons the scrutinous approach generally taken to agreements of adhesion like form consumer contracts." Id. at 29, 900 S.E.2d at 898. Justice Riggs contended that the "unilaterally adopted provisions" were illusory, because the "unilateral" amendments clause was "unrestricted," and that the Credit Union's arbitration amendment violated the implied covenant of good faith and fair dealing, because the Credit Union sought to impose a retroactive

arbitration clause. Id. For those reasons, Justice Riggs contended that the arbitration agreement was void. Id. at 37, 900 S.E.2d at 903-04.

D. Unfair & Deceptive Practices

In Myers v. Broome-Edwards, ___ N.C. App. ___, 903 S.E.2d 381 (2024), the court of appeals considered whether executing a self-help eviction constitutes a violation of the Unfair and Deceptive Trade Practices Act ("UDTPA") under Chapter 75 of the North Carolina General Statutes. Id. at ___, 903 S.E.2d at 383.

In 2020, property owners filed complaints for summary ejectment against plaintiff tenant. Each of those complaints was dismissed. Id. The property owners then locked the tenant out of the home and placed the tenant's belongings on the curb. Id.

The tenant sued the property owners alleging, among other claims, that the property owners breached the implied covenant of quiet enjoyment, wrongfully evicted the tenant, and violated the UDTPA. Id. Following a bench trial in district court, the trial court entered an order concluding that the property owners engaged in self-help tactics in violation of section 42-25.9 of the North Carolina General Statutes and that the property owners' actions were done in commerce and in violation of the UDTPA. Id. at ___, 903 S.E.2d at 384.

On appeal, the property owners contended that the trial court erred "by failing to review all the facts associated with the claim of unfair and deceptive practices." Id. In analyzing the competency of the evidence, the court of appeals began by reciting the legal principles of a UDTPA claim in the landlord-tenant context. Id. Under North Carolina law, it is "well-established" that a landlord's eviction of a tenant without resort to judicial process constitutes an unfair or deceptive practice within the meaning of the UDTPA. Id. Furthermore, violations of public policy may also

constitute unfair and deceptive practices. Id. North Carolina law recognizes that self-help evictions violate public policy. Id.

Here, the trial court's order contained several findings of fact that the court of appeals concluded were supported by competent evidence, and the findings of fact supported the trial court's conclusions of law. Id. at ___, 903 S.E.2d at 385. These findings included that the property owners changed the locks on the property, removed the tenant's belonging from the premises and placed them outside of the property on the curb, and that the property owners denied the tenant re-entry to the premises, despite a temporary restraining order requiring them to do so. Id. Therefore, the court of appeals affirmed the trial court's order concluding that the property owners violated the UPDA, thereby entitling the tenant trebled damages. Id. at ___, 903 S.E.2d at 387.

E. Fraud

In Hale v. Macleod, ___ N.C. App. ___, 904 S.E.2d 142, pet. disc. review filed (July 23, 2024), the court of appeals considered whether a trial court properly dismissed an investor's action against a company's CEO for fraud, breach of contract, and unfair and deceptive trade practices, among other claims.

An investor filed an action against a hemp and cannabidiol ("CBD") company, its manager, and CEO. Id. at ___, 904 S.E.2d at 146. The investor alleged that, among other things, the CEO committed fraud and engaged in unfair and deceptive trade practices by failing to disclose information and making false representations about the company and the hemp and CBD industry during negotiations of the investor's $250,000 investment in the company. Id. at ___, 904 S.E.2d at 146-49. After the investor amended his complaint, the company, its manager, and its CEO all filed motions to dismiss. Id. at ___, 904 S.E.2d at 149. The trial court granted the CEO's motion

to dismiss. Shortly thereafter, the investor voluntarily dismissed the company and its manager from the suit and appealed the trial court's order granting the CEO's motion to dismiss. Id.

The court of appeals found that the investor failed to state claims for fraud and unfair and deceptive trade practices. Id. at ___, 904 S.E.2d at 160. The court held that the investor's allegations amounted to unfulfilled promises, statements about potential future business prospects, and a failure to disclose information, none of which supports a claim for fraud. Id. at ___, 904 S.E.2d at 151. The court also held that the investor did not satisfy Rule 9's particularity requirement when he failed to allege who specifically concealed information and what information the CEO failed to provide to him. Id. Since North Carolina law requires "claims of fraud to be based on particularly alleged existing facts, not merely on future prospects or unfulfilled promises," the court held that the investor failed to state a claim for fraud. Id.

Likewise, the court of appeals affirmed the dismissal of the investor's unfair and deceptive trade practice claim because the allegations were not "in or affecting commerce" as the statute requires. Id. at ___, 904 S.E.2d at 155. Quoting Nobel v. Foxmoor Group, 380 N.C. 116, 120, 868 S.E.2d 30, 34 (2022), the court stated that, "actions solely connected to a company's capital fundraising are not 'in or affecting commerce,' even under a reasonably broad interpretation of the legislative intent underlying these terms." Id. Accordingly, the investor's $250,000 investment in the company was not the regular purchase or sale of goods and thereby fell outside the scope and reach of an unfair and deceptive trade practice claim. Id.

In contrast, the court held that the trial court improperly dismissed the investor's breach of contract claim against the CEO. Id. at ___, 904 S.E.2d at 161. The court found sufficient allegations that the CEO failed to uphold the personal guaranty of the $250,000 investment in the company. Id.

For these reasons, the court of appeals affirmed in part and reversed in part the trial court's dismissal of the investor's amended complaint. Id. at ___, 904 S.E.2d at 160-61.

In Anhui Omi Vinyl Co. v. USA Opel Flooring, Inc., ___ N.C. App. ___, 905 S.E.2d 339, pet. for disc. review filed (Sept. 10, 2024), the court of appeals considered whether the trial court properly held that a debtor's transfer of a building to a related entity was voidable as a fraudulent transfer.

After falling on hard times in 2017, a debtor company directed its employees to create a related entity to engage in the same business as the debtor. Id. at ___, 905 S.E.2d at 340. Soon after, a creditor sued the debtor to recover just over a million dollars owed. Id. at ___, 905 S.E.2d at 341. During the suit, however, the debtor sold and transferred a building—its only asset—to a related entity. Id. After counsel for the debtor withdrew from the suit, and no other counsel appeared for the debtor, the court entered judgment for just over a million against the debtor. Id. However, because the debtor had no assets, the creditor was unable to collect on its judgment against the debtor. Id.

As a result, the creditor brought the above-titled action against the related entity, seeking to hold it liable for the judgment against the debtor. Id. The creditor advanced two theories to recover: the related entity was a "mere continuation" of the debtor under the doctrine of successor liability, and the transfer of assets from the debtor was a fraudulent transfer under the Uniform Voidable Transactions Act ("UVTA"). Id. After a bench trial, the trial court entered an order that held that the related entity was a "mere continuation" of the debtor and that the transfer of the building to the related entity was fraudulent under the UVTA. Id. The related entity appealed. Id.

On appeal, the court of appeals held that the trial court's order was supported by competent evidence and that its conclusions of law were proper in light of those findings. Id. at ___, 905

S.E.2d at 345-46. In explaining the UVTA's function and purpose, the court of appeals stated that it "renders voidable as to a creditor any transfer made or obligation incurred when that transfer—in this case, the conveyance of the subject property—is consummated by a debtor with the intent to defraud any creditor of the debtor." Id. at ___, 905 S.E.2d at 343 (quoting Cherry Cmty. Org. v. Sellars, 381 N.C. 239, 251–52, 871 S.E.2d 706, 717 (2022) (cleaned up)). To assess intent to defraud, the court of appeals examined the non-exclusive list of factors in the UVTA, which follow "the traditional badges of fraud[.]" Id.

With those factors in mind, the court of appeals found that while the trial court did not specifically discuss the factors enumerated in the UVTA, the unchallenged findings of fact "clearly implicate[d] several of those factors." Id. at ___, 905 S.E.2d at 344. Specifically, the trial court's findings of fact indicated that: (1) the transfer was to an insider, (2) the building was transferred after the debtor was sued by the creditor, (3) the transfer was concealed, (4) the transfer was substantially all the assets of debtor, and (5) the debtor became insolvent shortly after the transfer. Id. at ___, 905 S.E.2d at 345. Since the above findings of fact were uncontested by the related entity, the court of appeals held that a presumption of fraudulent intent arose, shifting the burden to the related entity to show it was a good faith transferee under the UVTA. Id. Analyzing the good faith defense found in the UVTA, the court of appeals held that the related entity needed to show: (1) that it took the building in good faith, and (2) for a reasonably equivalent value. Id. Despite this burden, the related entity's good faith defense arguments were not supported by the uncontested findings of fact. Id. Thus, the court of appeals refused to overturn the trial court's order based on this defense. Id.

Since the court of appeals concluded that the transfer was voidable under the UVTA, it did not address whether the related entity was a mere continuance of the debtor. Id. at ___, 905 S.E.2d

at 346. In closing, the court of appeals dismissed the related entity's argument that the county's secured liens on the building precluded the creditor from obtaining judgment against transferee.

For these reasons, the court of appeals affirmed the trial court. Id.

In Lail v. Tuck, ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 4487548 (2024), the court of appeals considered whether grossly inadequate consideration is an independent cause of action separate from fraud that can result in recission of a deed.

The plaintiff fell behind on ad valorem taxes on her house and Catawba County began threatening the plaintiff with foreclosure. Id. at *1. In 2019, the plaintiff became re-acquainted with the defendant with whom she had worked and had a romantic relationship thirty years prior. Id. According to the plaintiff, she offered to sign her house to the defendant if the defendant would pay the back and all future ad valorem taxes on the house and grant the plaintiff a life estate to allow her to continue living there. Id.

The defendant hired an attorney to draft a deed. Id. The plaintiff testified that she asked to meet with the attorney but was told by the attorney's staff that he was unable to meet with her. Id. The plaintiff also testified that the defendant told her that if she brought anyone to the closing or told anybody, the deal was off. Id. The plaintiff was illiterate and signed the deed without reading it or having it read to her. Id. A secretary at the attorney's office refused to read it to her. Id.

The deed did not grant the plaintiff a life estate but rather granted the defendant a fee simple absolute estate. Id. at *2. The defendant contended that he did not know the plaintiff was illiterate until she began stating that she retained a life estate. Id. The defendant told the plaintiff that he owned the property and that she needed to vacate. Id.

The plaintiff brought suit challenging the transfer of the property and included claims for fraud and for recission and cancellation of the deed. Id. The trial court dismissed the plaintiff's claims for constructive fraud, trespass, and unfair and deceptive trade practices. Id. The evidence at trial showed that the tax value of the property was $112,000 and that the defendant's total ad valorem payments were $2,327.89. Id. The jury found for the defendant on fraud but deadlocked on whether the defendant paid grossly inadequate consideration under the circumstances. Id. A second jury found that the defendant's consideration was grossly inadequate under the circumstances and the trial court cancelled the deed. Id.

On appeal, the defendant argued that the trial court erred by submitting the issue of grossly inadequate consideration to the jury as an issue separate from fraud. Id. A majority of the court of appeals, in an opinion authored by Judge Tyson, disagreed. Id. at *6.

If the inadequacy of consideration is so gross that practically nothing was paid, the issue of inadequacy of consideration may be submitted to the jury without other evidence. Id. at *3. Here, there was ample evidence of grossly inadequate consideration. Id. at *4. The evidence showed that the parties had a prior and current relationship, that the plaintiff was illiterate, that the defendant gave secretive instructions, that the plaintiff contended she retained a life estate, and that the defendant's attorney failed to make himself available for questions. Id.

The court of appeals also rejected the defendant's arguments that the law on unconscionability does not allow the issue of grossly inadequate consideration to be submitted to the jury as an independent issue. Id. at *5. The plaintiff's evidence supported both the procedural and substantive prongs of unconscionability of the defendant's and his attorney's conduct surrounding the transaction and execution of the deed. Id. The court of appeals therefore affirmed. Id. at *6.

In a dissenting opinion, Judge Dillon contended that the trial court should have entered judgment for the defendant prior to the second trial based on the first jury's verdict that the defendant did not commit fraud. Id. at *7. In Judge Dillon's view, a finding of grossly inadequate consideration does not mandate that the transaction be set aside where there was otherwise no finding that the transaction was fraudulent. Id. A court does not look at the adequacy of consideration unless there is fraud. Id. The trial court had no authority to declare the deed void where no jury found that the defendant obtained the deed by fraud. Id. at *8.

F. Constitutional Claims

In Askew v. City of Kinston, ___ N.C. App. ___, 906 S.E.2d 500 (2024), the court of appeals, on remand, once again considered whether a trial court properly granted summary judgment dismissing plaintiffs' direct state constitutional claims.

Two African-American property owners filed direct constitutional claims alleging that a city violated their rights to substantive due process and equal protection by condemning and marking for demolition three properties in North Carolina. Id. at ___, 906 S.E.2d at 502. The trial court granted the city's motion for summary judgment for failure to exhaust administrative remedies. Id. The property owners appealed. Id. at ___, 906 S.E.2d at 505. The court of appeals held that the trial court lacked subject-matter jurisdiction over the matter because the property owners did not exhaust all administrative remedies. Id.

The property owners appealed to the supreme court. Id. The supreme court held that the court of appeals analysis was incorrect for two reasons: (1) it conflated the property owners' distinct constitutional claims for due process and equal protection violations, and (2) it required exhaustion of all administrative remedies for subject-matter jurisdiction over the claims. Id. The supreme court clarified that the issue of administrative exhaustion goes to an element of the claims

regarding the existence of an adequate remedy, rather than the court's jurisdiction. Id. Accordingly, the supreme court remanded the case back to the court of appeals. Id.

On remand, the court of appeals held that the administrative process provided an adequate remedy for each of the property owners' constitutional claims, which was not fully exercised by the property owners, and thus affirmed the dismissal of the claims. Id. In contrast to its prior decision, the court of appeals analyzed each constitutional claim individually. Id. at ___, 906 S.E.2d at 506-07. Reviewing the administrative process available for both constitutional claims, the court found that the property owners had a right to appeal the condemnation decisions from the city council, and if that was unsuccessful, they had a right to petition the superior court for a writ of certiorari. Id. Nevertheless, of the three properties at issue, only one condemnation decision by the city council was appealed. Id. And even though that appeal was dismissed, the record did not reveal a petition to the superior court. Id. Consequently, the court concluded that the property owners could not establish an essential element of their claims because the administrative process provided an adequate remedy, and they did not completely exhaust this adequate remedy. Id. at ___, 906 S.E.2d at 507.

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

In Kinsley v. Ace Speedway Racing, Ltd., 386 N.C. 418, 904 S.E.2d 720 (2024), the supreme court considered whether a racetrack sufficiently alleged violations of state constitutional rights against a state agency.

At the outset of the COVID-19 pandemic, the Governor of North Carolina issued an executive order limiting attendance at outdoor venues to twenty-five people. Id. at 420, 904 S.E.2d at 724. In response, a racetrack owner vocally and publicly opposed the restrictions and kept the

racetrack open in violation of the order. Id. This led to a series of events where the Governor allegedly pressured local officials, including a county sheriff, to enforce the order against the racetrack, culminating in the North Carolina Department of Health and Human Services ("DHHS") issuing an abatement order to shut down the racetrack as an "imminent hazard" to public health. Id. at 421, 904 S.E.2d at 724-25. Allegedly, the racetrack was singled out while other businesses violated the emergency order and were not subject to similar enforcement. Id. at 421, 904 S.E.2d at 724.

The trial court initially issued a preliminary injunction against the racetrack, prohibiting it from holding events until it complied with the abatement order. Id. at 422, 904 S.E.2d at 725. In return, the racetrack and its operators counterclaimed, alleging state constitutional violations of the right to earn a living and selective enforcement of the law. Id. The trial court denied DHHS's motion to dismiss these counterclaims, and DHHS appealed. Id. The court of appeals affirmed the trial court's decision that the racetrack owner sufficiently alleged state constitutional violations, and DHHS appealed to the supreme court. Id.

The supreme court affirmed the trial court, holding that the racetrack sufficiently alleged colorable claims under the state constitution. Id. at 420, 904 S.E.2d at 724. In doing so, the court rejected DHHS's arguments about governmental immunity, holding that a properly alleged state constitutional claim will "pierce the State's sovereign immunity at the outset[.]" Id. at 423, 904 S.E.2d at 725-26.

The court outlined three requirements needed to sufficiently allege a state constitutional claim: (1) the complaint must allege a state actor violated a person's constitutional right, (2) the complaint must contain facts sufficient to support the alleged violation of a right protected by the constitution, and (3) no adequate state remedy exists to address the violation. Id. Because DHHS

did not dispute the first and third elements, the supreme court focused on the second element. Id. Looking to the racetrack's allegations, and treating them as true, the supreme court found that the counterclaim alleged "Governor Cooper took a series of 'unusual steps' to single out and shut down the [racetrack]—first by pressuring the local sheriff to arrest [the racetrack owner] and, when the sheriff refused, ordering public health officials to shut down the [racetrack] as a health hazard." Id. at 420, 904 S.E.2d at 724. "The claims also allege that Governor Cooper took these actions not because there was an actual health hazard at the racetrack, but to punish [the racetrack owner] for speaking out, and that health officials did not take similar actions against other large outdoor venues whose owners did not openly criticize the Governor." Id. Together, these allegations sufficiently alleged a violation of the right to engage in any legitimate business, occupation, or trade, and the right to equal protection under the law.

For these reasons, the supreme court affirmed the court of appeals and the trial court's denial of DHHS's motion to dismiss. Id. at 430, 904 S.E.2d at 730.

G. Joint and Several

In Millsaps v. Hager, ___ N.C. App. ___, 906 S.E.2d 835 (2024), the court of appeals considered whether a trial court erred in concluding that liability was joint and several as to all defendants in its order enforcing a settlement agreement between the parties.

A minority shareholder of a closely-held company and her predecessor in interest filed a lawsuit against the majority shareholder, his wife, and his separate trucking company. Id. at ___, 906 S.E.2d at 837. The closely-held company was originally named as a defendant, but at the request of a receiver, switched from a defendant to a plaintiff. Id. The plaintiffs alleged that the majority shareholder directed corporate payments of $800 per week to his co-defendant wife for

no valuable services provided to the company or its shareholders. Id. The plaintiffs also alleged that the majority shareholder improperly diverted corporate funds to his trucking company. Id.

When the case was called for trial, the parties reported that they had reached a settlement. Id. The defendants' counsel reported that his three clients (the majority shareholder, his wife, and his trucking company) agreed to enter into a consent judgment for the total sum of $385,000, with allocation among the defendants to be resolved by counsel for defendants and counsel for plaintiffs. Id. A few months later, the plaintiffs filed a motion to enforce the settlement agreement, reporting that the defendants refused to sign the consent judgment because the defendants could not agree on whether the settlement amount was to be assessed jointly and severally. Id.

Among other arguments, plaintiffs asked the trial court to enter judgment in the amount of $385,000 against defendants, jointly and severally. Id. at ___, 906 S.E.2d at 838. The trial court granted the plaintiffs' motion to enforce the settlement agreement and concluded that the defendants' liability was joint and several. Id.

On appeal, the defendants first argued that there was no meeting of the minds regarding a material term of the settlement agreement, the material term being the amount of the consent judgment as to each defendant. Id. The court of appeals noted that the issue of lack of mutual assent in a contract is not reviewable when raised for the first time on appeal. Id. Here, defense counsel represented to the trial court that defendants agreed to a settlement and defense counsel never argued or asked the trial court to rule that there was not a valid contract. Id. As this issue was raised for the first time on appeal, the court of appeals concluded that it was not preserved for consideration and dismissed the argument. Id. at ___, 906 S.E.2d at 839.

The defendants' second argument on appeal was that the trial court erred in finding liability to be joint and several as to all defendants. Id. Defendants argued that the plaintiffs never made

a claim for joint and several liability. Id. The court of appeals disagreed, noting that Rule 8 of the North Carolina Rules of Civil Procedure requires only that a pleading contain a short and plain statement of the claim to give the court and the parties notice of the transactions or occurrences intended to be proved to show that the pleader is entitled to relief. Id. There is no requirement to state a claim for joint and several liability in the complaint. Id.

The court of appeals also noted that the defendants were fully aware of the liability they faced. Id. For example, the receiver submitted an affidavit noting that both the majority shareholder and his co-defendant wife owed money to the company and took salaries in a disproportionate ratio compared to their respective ownerships in the company. Id. at ___, 906 S.E.2d at 839-40. Because the litigation materials put the defendants on notice of a potential claim for joint and several liability, it was the defendants' duty through discovery or motions practice to dispose of the possibility of joint and several liability if they believed it to be in error. Id. at ___, 906 S.E.2d at 840. The court of appeals therefore affirmed the trial court's order on the plaintiffs' motion to enforce the settlement agreement. 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 reached 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., 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.

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

In Davis v. Hayes Hofler, P.A., 292 N.C. App. 110, 895 S.E.2d 629, 2024 WL 16125 (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 grandmother's trust. Id. at *1. The law firm was retained by the grandmother's daughter-in-law and grandson, and the complaint purported that the daughter-in-law was suing the grandmother's daughter on the grandmother's behalf, even though the grandmother was alive and had not been

declared incompetent. Id. In February and March 2017, the grandmother and daughter filed motions to dismiss pursuant to Rule 12(b)(6). Id. The law firm, acting on behalf of its clients, moved to continue or stay proceedings for the purpose of gathering additional information as to the grandmother's incapacity. Id. In late March 2017, the grandmother 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 grandmother's petition, denied the law firm's motion to continue or stay, and—relevant to the malpractice action that followed—granted the grandmother's and daughter's motions to dismiss. Id.

In April 2017, the law firm moved pursuant to Rule 60 to petition to adjudicate the grandmother 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 grandmother 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 grandmother 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 grandmother 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 grandmother 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 grandmother was still living in North Carolina. Id.

In August 2018, the court of appeals granted the grandmother'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 grandmother 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 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 motion 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, 293 N.C. App. 174, 900 S.E.2d 135 (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 175, 900 S.E.2d at 136. 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. at 179-80, 900 S.E.2d at 139. 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 178, 900 S.E.2d at 138. 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.

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. ___, 901 S.E.2d. 437, temp. stay allowed 903 S.E.2d 349 (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 ___, 901 S.E.2d at 439. 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 ___, 901 S.E.2d at 440.

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 ___, 901 S.E.2d at 440-41. 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 ___, 901 S.E.2d at 442 (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., 385 N.C. 783, 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 784, 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 786, 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, Chief Justice Newby, writing for the majority, found that the complaint was barred by the applicable statutes of limitations. Id. at 789-90, 898 S.E.2d at 746. 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 788, 898 S.E.2d at 745. The court stated that the discovery rule tolls the statute of limitations only until a reasonable person should have discovered the fraud in the exercise of reasonable prudence, regardless of when the fraud was actually discovered. Id. at 789, 898 S.E.2d at 746. According to the court, "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 791, 898 S.E.2d at 747. 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 794, 898 S.E.2d at 749.

In Epcon Homestead, LLC v. Town of Chapel Hill, ___ N.C. App. ___, 905 S.E.2d 83, pet. disc. review filed (Aug. 20, 2024), the court of appeals considered whether statutes of limitation begin to run when a cause of action accrues or when a claim accrues. Id. at ___, 905 S.E.2d at 86.

The plaintiff purchased a piece of land, and as required by the town's land use management ordinance, applied for a special use permit to develop the property into residential units. Id. The plaintiff opted to pay a fee (the "Fee") rather than dedicate a percentage of the property to affordable housing as required by the town's ordinance. Id. Plaintiff filed a complaint against the town, seeking a declaration that the ordinance and fee are unconstitutional and seeking a refund of the Fee. Id. The trial court dismissed the plaintiff's complaint under Rule 12(b)(6) because the plaintiff filed its complaint outside the applicable statute of limitations. Id.

The court of appeals affirmed the trial court. Id. at ___, 905 S.E.2d at 93. A statute of limitations begins to run on the "accrual date," or the date when the injured party can sue. Id. at ___, 905 S.E.2d at 87. However, the North Carolina supreme court has used "competing language concerning what accrues;" it has said both that a statute of limitations begins to run when a cause of action accrues and when a claim accrues. Id.

Although "seemingly synonymous," claims and causes of action are distinct. Id. A claim is "a pattern of allegations that may, or may not, support a cause of action." Id. A cause of action is a legal theory that is the vehicle for pursuing a claim. Id. Although a claim and its corresponding

causes of action will typically accrue at the same time, there are cases where the injury necessary to support a cause of action occurred later in time than the beginning of the claim's aggregate injury. Id. This was such a case.

Here, all of the plaintiff's legal theories were supported by one claim: that the plaintiff was injured by an application of the ordinance, and the ordinance is unlawful. Id. at ___, 905 S.E.2d at 88. Thus, plaintiff's claim began to accrue when it purchased the property (on December 31, 2015). Id. However, the injury supporting some of the plaintiff's causes of action was more precise. Two of plaintiff's causes of action sought repayment of the Fee, and plaintiff did not make its first fee payment until July 5, 2017. Id. Thus, these two causes of action did not begin to accrue until July 5, 2017. Id.

To evaluate whether plaintiff's complaint was time barred, the court of appeals had to evaluate when the applicable statutes of limitation began to run in this case, namely, when the claim accrued or when the cause of action accrued? Id. Plaintiff argued that the three-year statute of limitations in section 1-52(2) of the North Carolina General Statutes (governing liability created by statute) applied. Id. at ___, 905 S.E.2d at 89. The town argued that a one-year statute of limitations in section 160A-364.1(b) (governing an action challenging a zoning or development ordinance) applied. Id. Because both of these statutes refer to an "action" accruing, the court of appeals determined that both proposed statutes of limitation begin to run when the applicable cause of action accrues. Id.

The court of appeals then had to "parse through each of Plaintiff's causes of action and discern accrual dates for each, rather than discerning one accrual date for the underlying claim." Id. Plaintiff's causes of action seeking a declaration that the ordinance is unlawful accrued on December 31, 2015, when the plaintiff began purchasing the property. Id. at ___, 905 S.E.2d at

92. Plaintiff filed its complaint on October 24, 2019. Id. Thus, regardless of whether a one-year or three-year statute of limitations applied, plaintiff's causes of action seeking a declaration were time barred. Id.

The court of appeals next addressed plaintiff's causes of action seeking repayment of the Fee. Id. These causes of action accrued on July 5, 2017, when plaintiff made its first Fee payment. Id. The court of appeals determined that a one-year statute of limitations applied, because section 160A-364.1(b) dealt "more directly and specifically" with plaintiff's repayment causes of action than did section 1-52(2). Id. at ___, 905 S.E.2d at 93. Therefore, plaintiff's repayment causes of action were also time barred. Id.

Having concluded that plaintiff's causes of action were time barred, the court of appeals affirmed the trial court's dismissal. Id. In a footnote, the court of appeals stated that its "accrual conclusion," in other words, that the statutes of limitation begin to accrue when the cause of action, rather than the claim, accrues, "is limited to the statutes of limitation found in subsections 1-52(2) and 160A-364.1(b)." Id. at ___, 905 S.E.2d at 89, n. 4.

B. Venue

In Reynolds v. Burks, ___ N.C. App. ___, 906 S.E.2d 508 (2024), the court of appeals considered when venue must be transferred to where the cause arose on the grounds that the action is against a "public officer" or "person especially appointed to execute his duties" under section 1-77 of the North Carolina General Statutes.

A resident of Pender County filed a complaint in Pender County Superior Court alleging medical negligence on the part of two doctors for treatment the patient received while admitted at the University of North Carolina Medical Center in Chapel Hill, North Carolina. Id. at ___, 906 S.E.2d at 509. In their answers to the complaint, the doctors denied that they were employed by

UNC and objected and moved to strike the allegations that they were acting "as an employee, agent and/or apparent agent of the School of Medicine of the University of North Carolina." Id. at ___, 906 S.E.2d at 510.

In their answers, the doctors also moved to change venue to Orange County Superior Court on the basis that Orange County is the county in which the care occurred and where UNC Hospital and the School of Medicine are located. Id. The doctors based this argument on section 1-77 of the North Carolina General Statues, which provides that a case "must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial" where the action is "against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office." Id. Alternatively, the doctors moved for a change of venue under section 1-83 based on convenience of the witnesses. Id.

The trial court denied the motions to change venue. Id. at ___, 906 S.E.2d at 511. In its order, the trial court noted that it made no findings that the doctors are not covered under section 1-77, "but based upon what was presented to the Court, the motions to change venue pursuant to N.C. Gen. Stat. §§ 1-77 and 1-83 are both denied." Id. The doctors appealed the order denying their motions to change venue. Id.

The court of appeals began its analysis by discussing its jurisdiction. Id. An interlocutory order denying a motion to change venue under section 1-77 is immediately appealable. Id. at ___, 906 S.E.2d at 512. Having determined that the doctors had a right to an immediate appeal, the court of appeals proceeded to address whether the trial court erred in denying the motions to change venue. Id.

Change of venue is governed by section 1-83. Id. Section 1-83 in part provides that the court "may change the place of trial . . . [w]hen the county designated for that purpose is not the

proper one." Although section 1-83 uses the word "may," a trial court has "no discretion in ordering a change of venue if demand is properly made and it appears that the action has been brought in the wrong county." Id. (cleaned up).

The doctors contended that they were employees of UNC Hospitals, and thus covered by section 1-77, and that the action arose from the medical care they provided in Orange County. Id. However, the doctors did not present any evidence or affidavits to support their position. Id. at ___, 906 S.E.2d at 513. The doctors did not present anything to the trial court to establish that they were either "public officers" or "persons especially appointed." Id.

In fact, they either denied or objected and moved to strike the patient's allegations that they were employees or agents of UNC Hospitals and School of Medicine. Id. There was nothing on the record before the trial court that would have permitted the trial court to make findings concerning the relationship between the doctors and UNC Hospitals or School of Medicine, let alone determine that the doctors constituted "public officials" or "persons especially appointed" under section 1-77. Id.

Therefore, venue was not improper in Pender County where the patient resides, and the trial court did not err in denying the doctors' motions to change venue. Id.

C. Service of Process

In Builder's Mutual Insurance Co. v. Neibel, 293 N.C. App. 1, 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 3, 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. None of the three attempts succeeded, 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. at 3-4, 899 S.E.2d at 562. 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., 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. at 4, 899 S.E.2d at 563. 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 5, 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 6, 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. at 8, 899 S.E.2d at 565 (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 9, 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 10-11, 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 12, 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., 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., 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 14, 899 S.E.2d at 569.

D. Notice of Motion

In Carcano v. JBSS, LLC, 291 N.C. App. 522, 896 S.E.2d 261 (2023), the court of appeals considered whether a realty group sufficiently pled and filed their complaint within the statute of

limitations when it was disputed whether and when the trial court entered an amended judgment nunc pro tunc.

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 523, 896 S.E.2d at 263. The initial judgment, however, erroneously identified the realty group in the caption. Id., 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., 896 S.E.2d at 264. The amended judgment also stated that the man and woman were jointly and severally liable to the realty group in the amount of $95,000.00. Id., 896 S.E.2d at 263.

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. at 524, 896 S.E.2d at 264. The man and woman filed an answer asserting that the realty group's claim was barred by a ten-year statute of limitations. Id. The realty group filed a motion for summary judgment and the trial court entered an order denying the motion. Id. Among other things, the trial court found that the judge who entered the amended judgment ten years ago lacked any jurisdiction or authority to enter the amended judgment. Id. The realty group timely appealed. Id.

On appeal, the court of appeals first considered whether the realty group sufficiently pled and filed their complaint within the statute of limitations. Id. at 526, 896 S.E.2d at 265. The realty group asserted that the date the initial judgment was amended, May 23, 2012, was the date of entry for the purposes of the ten-year statute of limitations, making its complaint timely. Id. In support of this assertion, the realty group asserted that the trial court had authority and jurisdiction to enter

the amended judgment nunc pro tunc. Id. The court of appeals found this argument determinative of the statute of limitations analysis. Id. at 528, 896 S.E.2d at 266.

The court of appeals acknowledged that Rule 59(e) and Rule 60(b) of the North Carolina Rules of Civil Procedure governed this issue. Id. 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)). Absent a proper motion under the Rules of Civil Procedure, a trial court may issue nunc pro tunc a corrective judgment or order. Id.

Here, the court of appeals held that the trial court did not have jurisdiction to enter the amended judgment under Rule 59(e). Id.. 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. Id.

Because the trial court had no jurisdiction under the North Carolina Rules of Civil Procedure to enter the Amended Judgment, the court of appeals determined that the only means by which the trial court may have had jurisdiction or authority to enter the amended judgment was by entering it nunc pro tunc. Id. However, it is established that 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 529, 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 noted 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 to the date of the initial judgment, which was October 12, 2010. Id. Regardless, the court of appeals held that the ten-year statute of limitations ran from the date of entry of the final initial judgment which was filed on October 12, 2010. Id. As a result, the trial court did not err in its order stating that it lacked jurisdiction or authority to enter the amended judgment. Id.

For these and other reasons, the court of appeals affirmed in part, reversed in part, and remanded.

E. Rule 9(j)

In Robinson v. Halifax Regional Medical Center, 292 N.C. App. 587, 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 591, 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 588, 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 589, 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 592, 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 588, 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 595, 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.

F. Rule 12

In Turpin v. Charlotte Latin School, Inc., 293 N.C. App. 330, 900 S.E.2d 352, 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 333-34, 900 S.E.2d at 357. 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 334, 900 S.E.2d at 358. The parents asserted claims for, among other things, breach of contract. Id. 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 339, 900 S.E.2d at 361. The court 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 340, 900 S.E.2d at 361. According to the court, 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 court 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.

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 355, 900 S.E.2d at 370 (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 357, 900 S.E.2d at 372 (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. 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 court of appeals affirmed the trial court's dismissal of the parents' breach of contract claim.

G. Intervention

In Causey v. Southland National Insurance Corporation, 292 N.C. App. 551, 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 553, 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 555, 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 556, 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 557, 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 562, 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 558, 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., 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 the 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 560, 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 562, 899 S.E.2d at 24-25.

H. Rule 60(b)(1)

In T.H. v. SHL Health Two, Inc., ___ N.C. App. ___, 900 S.E.2d 719 (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 ___, 900 S.E.2d at 720. 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. at ___, 900 S.E.2d at 721. 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. 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. at ___, 900 S.E.2d at 722 (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. (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 ___, 900 S.E.2d at 723. 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 ___, 900 S.E.2d at 724.

For these and other reasons, the court of appeals affirmed the trial court's order. Id. at ___, 900 S.E.2d at 725.

I. Rule 63

In Dan King Plumbing Heating & Air, LLC v. Harrison, 293 N.C. App. 222, 900 S.E.2d 683 (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 223, 900 S.E.2d at 684. 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. at 224, 901 S.E.2d at 685.

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 225, 901 S.E.2d at 685.

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. at 226, 901 S.E.2d at 686. The trial judge held a hearing on the motion. Id. 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 228, 901 S.E.2d at 687. 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 229, 901 S.E.2d at 687-88. 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. 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. (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., 901 S.E.2d at 688 (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.

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 232, 901 S.E.2d at 689.

J. Immunity

In Land v. Whitley, 292 N.C. App. 244, 898 S.E.2d 17, review allowed, 900 S.E.2d 662 (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 246, 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 247, 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., 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 249, 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., 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 251, 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 253-54, 898 S.E.2d at 24. 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 254, 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 256, 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 258, 898 S.E.2d at 27.

In Happel v. Guilford County Board of Education, 292 N.C. App. 563, 899 S.E.2d 387 appeal dismissed, ___ N.C. ___, 900 S.E.2d 668 (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 564, 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., 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. at 564-65, 899 S.E.2d at 390. 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. at 565, 899 S.E.2d at 390. 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. at 566, 899 S.E.2d at 390 (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 566, 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 565-70, 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 567, 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. at 567-68, 899 S.E.2d at 391 (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 568, 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 570, 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 571, 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, 292 N.C. App. 542, 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 543, 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 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 544, 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 546, 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 547, 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.

In K.H. ex rel. Claggett v. Dixon, ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 4351614, appeal filed (Nov. 5, 2024), the court of appeals considered whether, to survive a motion to dismiss, a student who asserted tort and a constitutional claim against a teacher and school board sufficiently alleged waiver of sovereign immunity and facts to support the constitutional claim. Id. at *2-7.

A middle school student attempted to enter a classroom to retrieve her bookbag. Id. at *1. A student alleged that a teacher tried to physically prevent the student from entering the classroom and the situation escalated. Id. The student further alleged that the teacher slammed the student into the door and repeatedly slammed the student's head into the ground. Id. Following the incident, the student was suspended for ten days and relocated to a different school. Id.

Through her guardian ad litem grandmother, the student filed a complaint against the teacher and school board. Id. The student alleged several causes of action including tort claims and violations of the North Carolina Constitution article I, section 15 and article IX, section 2. Id. The defendants moved to dismiss the complaint pursuant to North Carolina Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6). Id.

The trial court granted the motion and dismissed each of the plaintiff's claims with prejudice. Id. at *2. The trial court concluded that the plaintiff's complaint failed to demonstrate a waiver of sovereign immunity, and as to plaintiff's constitutional claim, the complaint failed to allege facts giving rise to the type of claims contemplated in Deminski v. State Board of Education. Id. (referencing Deminski v. State Bd. of Educ., 377 N.C. 406, 858 S.E.2d 788 (2021)).

The majority of the court of appeals, in an opinion authored by Judge Thompson, affirmed the trial court's order granting the motion to dismiss. Id. at *7. The opinion began by discussing

sovereign immunity and the student's argument that a school board trust is a de facto insurance policy. Id. at *2.

Under the doctrine of sovereign immunity, a state may not be sued in its own courts or elsewhere unless it has consented by statute to be sued or has otherwise waived its immunity. Id. at *3. Sovereign immunity is not merely a defense, but rather it is a bar to actions that requires the plaintiff to establish a waiver of immunity. Id. The complaint does not need to include precise language that the State has waived immunity, but the complaint does need to provide a reasonable forecast of waiver. Id. If a plaintiff fails to allege waiver, the complaint fails to state a cause of action. Id.

Under section 115C-42 of the North Carolina General Statutes, a local board of education is authorized to waive its immunity from lability by securing liability insurance. Id. at *3. However, a school board can only waive its immunity when it procures insurance through a company licensed and authorized to issue insurance in North Carolina or a qualified insurer as determined by the Department of Insurance. Id. Here, the student's only contention in the complaint regarding sovereign immunity was that the school board failed to provide a safe learning environment in violation of the North Carolina Constitution, which precludes the school board and its agents from governmental immunity. Id. This contention fell short of establishing that the defendants waived sovereign immunity and the trial court did not err in dismissing the student's tort claims pursuant to Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. Id. at *4.

The opinion then addressed whether the student sufficiently alleged a violation of the North Carolina Constitution. Id. Sovereign immunity does not bar suits by North Carolina citizens who seek to remedy violations of their rights guaranteed under the North Carolina Constitution. Id. A three-part test governs whether a plaintiff has sufficiently alleged a state constitutional claim: first,

a state actor must have violated an individual's constitutional rights; second, the claim must be colorable, meaning that the claim presents facts sufficient to support an alleged violation of a constitutionally protected rights; and third, there must be no adequate state remedy. Id.

The student satisfied the first prong of the three-part test, alleging that the school board failed to provide a safe learning environment free of harassment and intimidation as required by article I section 15 and article IX, section 2 of the North Carolina Constitution. Id. at *5. However, the student failed the second prong, failing to allege a colorable constitutional claim. Id. at *7.

In Deminski, the supreme court of North Carolina held that article I, section 15 and article IX, section 2 of the North Carolina Constitution "work in tandem . . . to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." Id. at *5 (quoting Deminski, 377 N.C. at 412, 858 S.E.2d at 793). The court determined that the instant case was distinguishable from Deminski. Id. Deminski concerned students who alleged they were repeatedly subjected to bullying and sexual harassment over a period of several months. Id. In contrast, in the instant case, the student's complaint lacked any allegation that suggested repeated or ongoing issues with the teacher and instead the complaint was predicated on a single attack. Id. at *6. Thus, the student's allegations did not give rise to the type of claims contemplated in Deminski and the trial court properly dismissed the constitutional claim pursuant to Rule 12(b)(6). Id.

Judge Murphy wrote a separate opinion concurring in part and dissenting in part. Id. at *7. Judge Murphy concurred with the majority's holding that the plaintiff failed to allege waiver of sovereign immunity but dissented from the majority's holding that the trial court did not err in dismissing the student's constitutional claim. Id. In Judge Murphy's view, the student sufficiently alleged a colorable claim that the school board violated her right to receive a sound basic education

as protected by the North Carolina Constitution. Id. at *11. The student's allegations, taken as true, alleged that the school board was deliberately indifferent to a hostile environment it created when it placed an individual with no teaching license in a position of authority to supervise children, failed to adequately staff that school, and failed to take action when the teacher's concerning behaviors first arose. Id. at *10. Judge Murphy contended that the majority failed to take these allegations into account when concluding that this case is distinguishable from Deminski. See id. at *8.

(2) Governmental

In Bates v. Charlotte-Mecklenburg Historic Landmarks Commission, 292 N.C. App. 1, 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 3, 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 4, 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 a board chairman as defendants. Id. at 4, 897 S.E.2d at 5. The buyer sued the people individually and in their official capacities. Id.

The complaint alleged, among others, a claim for breach of the covenant of good faith and fair dealing. Id. As relevant here, the defendants filed a motion to dismiss pursuant to Rules 12(b)(1), (2), and (6). Id. After a hearing, the trial court denied the motion to dismiss with respect

to the claim for breach of the covenant of good faith and fair dealing. Id. All 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 all defendants waived their governmental immunity. Id. at 6, 897 S.E.2d at 6-7. The complaint did not allege a waiver of governmental immunity, which the buyer acknowledged in its appellate brief. Id. at 7, 897 S.E.2d at 7. But 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 underling 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 9, 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 and other reasons, the court of appeals affirmed in relevant part. Id. at 14, 897 S.E.2d at 11.

In Flomeh-Mawutor v. City of Winston-Salem, ___ N.C. App. ___, 906 S.E.2d 1 (2024), the court of appeals considered whether the trial court properly dismissed an action by borrowers against a city based on a claim of governmental immunity.

Borrowers filed an action against the city of Winston-Salem for claims of negligent misrepresentation, negligent hiring and retention, and breach of contract. Id. at ___, 906 S.E.2d at 4. The borrowers alleged that in the summer of 2019, they applied for a $100,000 loan through the city's small business loan program. Id. at ___, 906 S.E.2d at 3. After applying, the borrowers alleged that they received verbal confirmation from the city that the loan request was approved, and they would receive a written letter of approval the following week. Id. After months of waiting and repeated promises that the loan would close soon, the city sent the borrowers a letter on February 17, 2020 (the "Letter"), stating that the loan was "conditionally approved" and laid out its preliminary terms. Id. The loan closed in early July 2020 and the funds were disbursed in mid-August 2020. Id. Despite the ultimate payment, the borrowers alleged that they lost significant business opportunities and goodwill from the delay. Id. at ___, 906 S.E.2d at 3-4.

In response, the city moved for summary judgment claiming it was entitled to governmental immunity and/or sovereign immunity as to all claims brought by the borrowers. Id. at ___, 906 S.E.2d at 4. The trial court granted the city's motion for summary judgment dismissing

all the borrowers' claims based on governmental immunity. Shortly thereafter, the borrowers appealed.

On appeal, the court of appeals held that the borrowers' claims were all barred by the doctrine of governmental immunity. Id. at ___, 906 S.E.2d at 7-8. Beginning with the tort claims, the court held that "[u]nder the doctrine of governmental immunity, a county or municipal corporation is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity[,]" and, conversely, when "a county or municipality is engaged in a proprietary function, governmental immunity does not apply." Id. at ___, 906 S.E.2d at 6 (quoting Meinck v. City of Gastonia, 371 N.C. 497, 502, 819 S.E.2d 353, 357 (2018)). The court analyzed whether the city's actions were proprietary using a three-step test adopted by our supreme court. Id.

First, the court considered whether, and to what degree, the legislature decided loaning money to small businesses for neighborhood revitalization and development was proprietary or governmental in nature. Id. at ___, 906 S.E.2d at 7. Citing section 160A-456 of the North Carolina General Statutes, which declared the expenditure of funds for community development was governmental in nature, the court held that step one was in favor of the city but not dispositive since the statute did not specifically address the particular circumstances of this case. Id. Moving to step two of the analysis, the court considered whether "the activity is one in which only a governmental agency could engage or provide," and thus perforce governmental in nature. Id. The court held that step two was dependent on whether the activity was defined broadly or narrowly, e.g., loaning money versus dispersing governmental grants for community development. Id. Without a clear answer to step two, the court moved to the third step, considering non-dispositive factors, including whether the city's actions were "traditionally a service provided by

a governmental entity, whether a substantial fee is charged for the service provided, and whether that fee does more than simply cover the operating costs of the service provider." Id. Finding the third step in favor of the city, the court considered the fact that the loan program was controlled by the federal government and could only be administered by a governmental entity particularly persuasive. Id.

Thus, the court concluded that the city's actions were governmental in nature, and since the borrowers failed to allege the city waived its governmental immunity, dismissal of the tort claims was proper. Id. at ___, 906 S.E.2d at 8.

In addressing the breach of contract claim, the court stated that a city waives its governmental immunity "when it enters into a valid contract, to the extent of that contract." Id. Looking to the complaint, the court found that it did not specifically identify what correspondence from the city formed the basis of the breach of contract claim. Id. Guided by the borrowers' statements in discovery claiming the Letter was the contract, the court analyzed whether the Letter was a valid contract. Id. The court found that the signatory of the Letter did not have the authority to bind the city, and this information was publicly available. Id. As a result, the court concluded that the Letter was not a binding a contract and consequently, the city did not waive its immunity. Id.

For these reasons, the court of appeals affirmed the trial court's dismissal of the borrowers' claims. Id. at ___, 906 S.E.2d at 9.

K. Summary Judgment

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 reversibly errs when it declines to exercise its

discretion to hear oral testimony at a summary judgment hearing where it mistakenly asserts that the North Carolina Rules of Civil Procedure prohibit the receipt of such testimony.

A plaintiff sued a defendant for breach of a commercial lease and after about six months into pretrial litigation, 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., 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. The court of appeals vacated the trial court's summary judgment order and remanded the case. Id.

On appeal, the supreme court held that the trial court's decision should be vacated because it 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 also added that the same is true when the discretion is afforded by the North Carolina 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.

For this reason, 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, 293 N.C. App. 87. 900 S.E.2d 131 (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 88, 900 S.E.2d at 132. 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 92, 900 S.E.2d at 134. 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 90, 900 S.E.2d at 134. In doing so, the court of appeals rejected the father's argument that the Order of Recusal was a partial recusal. Id. 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. 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 89, 900 S.E.2d at 133 (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. 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.

M. Voluntary Dismissal

In Cowperthwait v. Salem Baptist Church, Inc., ___ N.C. ___, 906 S.E.2d 454, 455 (2024), the supreme court considered whether the court of appeals properly affirmed in part, and reversed in part, a trial court's order that vacated plaintiffs' voluntary dismissal and dismissed the case with prejudice for failure to prosecute.

A summer camper filed a complaint against a church that hosted the summer camp alleging personal injuries sustained nine years prior to filing the complaint. Id. at ___, 906 S.E.2d at 456. Two weeks before filing the lawsuit, the camper's counsel had assured the church's liability insurance carrier that he would produce copies of the camper's medical records but failed to do so. Id. To no avail, the church reached out multiple times to obtain the camper's medical records after the lawsuit was filed. Id. Months later, the church filed its answer and served interrogatories and formal requests for production of documents. Id. at ___, 906 S.E.2d at 456-57. However, the camper failed to respond to the interrogatories and discovery requests by the deadline. Id. at ___, 906 S.E.2d at 457. Despite further requests for the medical records and assurances from the camper, the church had still not received any responses to discovery months later and proceeded to file a motion to dismiss the case for failure to prosecute or, in the alternative, to compel discovery responses. Id.

After a hearing on the motion, where the trial judge orally granted the church's motion to dismiss, the camper filed a voluntary dismissal. Id. The trial court subsequently entered a written order dismissing the camper's action, with prejudice, for failure to prosecute. Id. In its order, the trial court made findings of fact and conclusions of law and held that the camper's year-long delay in prosecuting the action, in an already old case, prejudiced the church. Id. The camper timely appealed. Id.

On appeal, in a divided opinion, the court of appeals affirmed the trial court's decision to vacate the camper's voluntary dismissal. Id. at ___, 906 S.E.2d at 457. The court of appeals held that the camper could not use the voluntary dismissal to escape the consequences of the trial court's decision after it was made. Id. However, the court of appeals also held that the trial court abused its discretion in dismissing the matter with prejudice. Id. The court reasoned that the trial court did not make sufficient findings of fact to justify the severe sanction of dismissal and improperly considered the time during which the statute of limitations was tolled in concluding the delay prejudiced the church. Id. Thus, the court of appeals concluded that the trial court abused its discretion in dismissing the action. Id.

Then-Chief Judge Stroud dissented in part, concluding that the plain language of the order reflected that the order was premised solely on the additional one-year delay caused by the camper's failure to obtain and provide the necessary records and not the tolling of the statute of limitations. Id. Chief Judge Stroud concluded that the order contained sufficient findings to support its decision to dismiss the action, and therefore the trial court did not abuse its discretion. Id. Consequently, Chief Judge Stroud would have affirmed the trial court's order. Id. at ___, 906 S.E.2d at 458. The church filed a timely notice of appeal based on Chief Judge Stroud's dissent. Id.

On appeal to the supreme court, the supreme court issued a per curiam opinion reversing the decision of the court of appeals "[f]or the reasons stated in the dissenting opinion of Chief Judge Stroud." Id. at ___, 906 S.E.2d at 455.

Justice Barringer concurred in part and dissented in part. Id. Justice Barringer concurred with "the majority that the decision of the Court of Appeals should be reversed when applying the applicable standard of review—abuse of discretion." Id. However, Justice Barringer wrote a

separate "dissent to clarify that the relevant time period to be considered is the 'period of time between the filing of the complaint and the ruling on [d]efendant's . . . motion." Id. (quoting Cowperthwait v. Salem Baptist Church, Inc., 290 N.C. App. 262, 271, 892 S.E.2d 621, 628 (2023) (alterations in original) (Stroud, C.J., concurring in result only in part, dissenting in part). In doing so, Justice Barringer noted concern with the trial court's consideration of how old the case was by virtue of the tolling of the statute of limitations in its determination that the additional year-long delay in prosecuting the action prejudiced the church. Id. at ___, 906 S.E.2d at 456.

Justice Earls dissented from the majority with Justice Riggs joining. Id. Justice Earls would modify and affirm the decision of the court of appeals. Id. Justice Earls agreed that the applicable standard of review of the trial court's decision to dismiss the action was abuse of discretion. Id. However, Justice Earls found that the trial court improperly applied the legal standard in assessing whether the camper "acted in a manner which deliberately or unreasonably delayed the matter" and whether the church was prejudiced by the delay under the Wilder test. Id. at ___, 906 S.E.2d at 459-60. Regarding the delay, Justice Earls found that for most of the action there were no discovery deadlines, and the only delay amounted to about one month. Id. at ___, 906 S.E.2d at 460. Further, Justice Earls found that the record was devoid of any factual findings to show the delay prejudiced the church. Id. at ___, 906 S.E.2d at 461. "Because a trial court's error of law also constitutes an abuse of discretion, and because questions of law are reviewed de novo, [she] would [have] h[e]ld that the trial court's order here was an abuse of discretion." Id. at ___, 906 S.E.2d at 456.

II. TRIAL

A. Jury

(1) Selection

In State v. Reber, ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 4351480 (2024), the court of appeals considered whether a criminal defendant was entitled to a new trial where the trial court allowed four disqualified jurors to serve on the defendant's trial. Id. at *2.

Just prior to the defendant's trial, the Ashe County Superior Court conducted a different jury trial of a misdemeanor stalking case. Id. at *5. Following that trial of the misdemeanor stalking case, the judge informed the jurors that they were summoned for the week and were to stay for the State's next case. Id. Six of the jurors from the misdemeanor stalking case were selected to participate in voir dire for the defendant's case. Id. Defense counsel did not raise any objection and none of the jurors were challenged for cause. Id. Four of the six jurors were empaneled for the defendant's trial. Id. The jury found the defendant guilty of the charges. Id. at *2.

On appeal, the defense argued that the trial court erred in allowing the four jurors to serve on his trial and that this error warranted automatic reversal of the jury verdict. Id. at *6.

Section 9-3 of the North Carolina General Statutes governs qualifications of prospective jurors. Id. Section 9-3 in part provides that a prospective juror must not have already served as a juror in the preceding two years. Id. A person who is not qualified under section 9-3 is subject to challenge for cause. Id.

Although defense counsel did not raise any objections at trial or challenge any of the jurors for cause, the defense argued on appeal that the error is automatically preserved when a trial court acts contrary to a statutory mandate. Id. However, section 9-3 specifically provides that a person

not qualified not serve as a juror is subject to challenge for cause. Id. Thus, the defendant's sole recourse under the statute was to challenge the disqualified jurors for cause. Id. Having failed to do so at trial, the defendant did not preserve this issue for appellate review. Id.

But even if the error was preserved and the trial court did violate section 9-3, a defendant must prove more than a statutory violation to receive a new trial. Id. Defendants claiming error in the jury selection process must show prejudice before they can receive a new trial. Id. To establish prejudice in the jury selection process, a defendant must have exhausted all peremptory challenges. Id. Here, the defendant did not claim to have exhausted all challenges and therefore could not establish prejudice in the jury selection process. Id. The court of appeals held that the defendant received a fair trial free from error. Id. at *7.

(2) Instructions

In State v. Plotz, ___ N.C. ___, 906 S.E.2d 57, pet. disc. review filed (Sept. 24, 2024), the court of appeals considered whether a trial court improperly instructed the jury regarding a misdemeanor stalking charge and whether the defendant invited any error committed by agreeing to the jury instructions given.

In 2021, a man was charged with and convicted of Misdemeanor Stalking following a bench trial in district court. Id. at ___, 906 S.E.2d at 62. The man appealed his conviction to superior court, where he was tried de novo. Id. After a jury trial in superior court, the man was again found guilty of Misdemeanor Stalking. Id. The man then appealed to the court of appeals claiming, "the trial court erred by failing to instruct the jury as to the specific course of conduct alleged in the Misdemeanor Statement of Charges, allowing the jury to find him guilty of Misdemeanor Stalking upon a theory of conduct not alleged in the charging instrument." Id.

On appeal, the court of appeals considered whether, as a threshold matter, the man invited the purported error in the jury instructions. Id. at ___, 906 S.E.2d at 63. Because the man did not object to the jury instructions, the court reviewed the record under a plain error standard. Id. The court stated that if the man invited the error, he waived his right to all appellate review, even if it was plain error. Id. (quoting State v. Barber, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001)).

After evaluating the man's level of participation in crafting the jury instructions, the court held that he did not invite any asserted error. Id. at ___, 906 S.E.2d at 71. The record showed that counsel for the state and the man worked through the pattern jury instructions "line by line," and counsel for the man and the state consented to the trial court's ultimate choices of construction; however, the issue regarding the man's course of conduct in the charging document never came up during the charge conference. Id. at ___, 906 S.E.2d at 66. "In cases where the defendant participates in crafting the instructions and specifically consents to the instruction as given, he may not argue on appeal that the language or form of the instruction that was given was in error." Id. If, on the other hand, "a provision is excluded from the instruction and the appealing party did not affirmatively consent to its exclusion but only consented to the instructions as given," no invited error has occurred even when there is ample opportunity to object. Id.

Ultimately, the court held that, "[t]he trial court did not plainly err." Id. at ___, 906 S.E.2d at 68. For these reasons, and others, the court of appeals affirmed the trial court. Id.

(3) Contempt

In State v. Hahn, ___ N.C. App. ___, 906 S.E.2d 329 (2024), the court of appeals considered whether a prospective juror was properly held in direct criminal contempt when he declined to wear a mask in the jury assembly room. Id. at ___, 906 S.E.2d at 331.

In October 2022, a prospective juror reported for jury duty at the Harnett County Courthouse and was directed to the jury assembly room. Id. A courthouse employee asked the prospective juror to wear a mask, which he declined to do. Id. The trial court was informed that the prospective juror would not wear a mask and ordered the juror to be taken to a courtroom. Id.

In the courtroom, the judge told the prospective juror that it was a requirement to wear a mask while in the courtroom. Id. The prospective juror responded that "with all due respect, I will not be wearing a mask, sir." Id. The judge warned the prospective juror that failure to wear a mask would be contempt of court. Id. The prospective juror then responded, "yes sir." The judge found the prospective juror in direct criminal contempt and summarily imposed a twenty-four-hour jail sentence. Id.

On appeal, the prospective juror defendant argued that the trial court's findings of fact did not support its conclusions of law that his actions amounted to an act of contempt. Id. at ___, 906 S.E.2d at 332. In a decision authored by Judge Stading, the court of appeals agreed and held that the defendant's refusal to wear a mask was not an act of contempt. Id. The defendant's actions did not interrupt the trial court's proceedings and did not impair respect of the court's authority. Id. The defendant was always respectful to the judge, responding "yes, sir" or "no sir" to the judge's questions. Id. Thus, the trial court's finding that the defendant engaged in a contemptuous manner was not supported by competent evidence. Id.

The court of appeals also noted that the authority underlying the local emergency order at issue (requiring masks to be worn in certain areas of the courthouse) had been revoked. Id. at ___, 906 S.E.2d at 334. The local emergency order was based on emergency directives issued by the Chief Justice of the North Carolina Supreme Court, but those directives were revoked in June 2021. Id.

Finally, the court of appeals noted that the trial court's contempt order did not contain any findings that the defendant's conduct amounted to willful interference with the orderly functioning of a court session. Id. at ___, 906 S.E.2d at 335. To be found guilty of criminal contempt, an individual must act willfully or with gross negligence. Id. Here, the defendant could not have known that his discussion with a courthouse employee in the jury assembly room might directly interrupt the trial court's proceedings or business. Id. The defendant had not yet been called to the courtroom to serve as a potential juror; rather, he was preemptively summoned before the judge to address "perceived future noncompliance in [the] courtroom." Id.

Judge Griffin authored a concurring opinion concluding that the trial court's findings failed to support a conclusion that the defendant was likely to interrupt or interfere with matters before the court. Id. The defendant was not involved in any proceedings before the court when he was first admonished for not wearing a mask. Id. Judge Griffin also noted that the defendant alleged that the judge was not wearing a mask during the proceedings. Id. at ___, 906 S.E.2d at 336. Furthermore, the record lacked any evidence that the defendant took affirmative steps to impede court proceedings. Id. Rather, the judge stopped the proceedings to address the defendant's actions that took place, not in the courtroom, but in the jury assembly room. Id. In Judge Griffin's view, "the facts presented here reflect an offense to sensibilities, not an 'obstruction to the administration of justice.'" Id. (quoting In re Little, 404 U.S. 553, 555 (1972)).

B. Evidence

(1) Hearsay

In State v. Hollis, ___ N.C. App. ___, 905 S.E.2d. 265 (2024), the court of appeals considered whether hearsay evidence presented under the business records exception may be

authenticated by affidavits made under penalty of perjury but not sworn before a notary or other official authorized to administer oaths.

At the criminal trial of the defendant for embezzlement of company funds, the state proffered the defendant's bank records. Id. at ___, 905 S.E.2d at 267. The bank records were accompanied by documents seeking to authenticate the bank records. Id. The documents indicated that they were signed under penalty of perjury but were not notarized or otherwise confirmed by oath or affirmation. Id. The trial court admitted the bank records into evidence. Id.

The court of appeals affirmed the trial court, holding that the bank records were properly admitted because the authentication documents were made under penalty of perjury and communicated that the records were made in the course of a regularly conducted business activity, made at or near the time of the activity by a person with knowledge of it, and it was the regular practice of the business to make such records. Id. at ___, 905 S.E.2d at 271.

One exception to the general rule against hearsay is the business records exception, under which records of a regularly conducted business activity are admissible regardless of whether or not the declarant is available as a witness. Id. at ___, 905 S.E.2d at 268 (citing N.C. Gen. Stat. § 8C-1, Rule 803(6)). In lieu of live testimony, the proponent of the business records may submit an affidavit of the custodian of the records in question confirming that the records are true and accurate copies of records made by persons having knowledge of the information during the course of a regularly conducted business activity at or the near the time of the events recorded. Id.

The court of appeals noted that the "traditional definition of an affidavit requires that it be sworn to and subscribed before a notary public." Id. at ___, 905 S.E.2d at 269. However, the notary requirement is not universal in all circumstances in all jurisdictions, and "there are signs of a trend away from that requirement, particularly when statements are made under penalty of

perjury." Id. For example, in federal proceedings, declarations made under penalty of perjury are admissible in lieu of a sworn affidavit subscribed before a notary. Id. (citing 28 U.S.C. § 1746).

The purpose of authentication "is to show that 'the matter in question is what its proponent claims.'" Id. at ___, 905 S.E.2d at 270 (quoting N.C. Gen. Stat. § 8C-1, Rule 901). Here, the affidavits at issue acknowledged that they were made under penalty of perjury. Id. The court of appeals stated that explicit acknowledgment of the penalty of perjury "evinces a similar level of credibility" to an oath before a notary. Id.

Because the business records authentication affidavits were made under penalty of perjury and otherwise complied with the business records hearsay exception requirements, the court of appeals held that the trial court did not err in admitting the bank records. Id.

(2) Lay Opinion

In State v. Aguilar, 292 N.C. App. 596, 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 597, 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. at 598, 898 S.E.2d at 916. 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 598, 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., 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 600-01, 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. at 601, 898 S.E.2d at 918 (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 602, 898 S.E.2d at 919. Accordingly, the court of appeals vacated the judgment and remanded for a new trial. Id. at 606, 898 S.E.2d at 921.

In State v. Hunt, ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 4487682, appeal filed (Nov. 8, 2024), the court of appeals considered whether a lay witness is permitted to testify about the cause of an automobile accident and the defendant's intent at the time of the accident when that witness did not observe the accident. Id. at *2.

The defendant and the victim were neighbors and had a long history of animosity. Id. at *1. One day, the defendant was on his way home from work and got into an automobile collision with the victim who was riding a 4-wheeler. Id. An eyewitness testified that the defendant increased speed and crossed the double-yellow line when approaching the victim, implying that the defendant intentionally collided with the victim. Id. at *4. The defendant was indicted for injury to personal property and assault with a deadly weapon with intent to kill. Id. at *2.

At trial, a law enforcement officer who responded to the scene of the accident testified for the State, although the State did not proffer the officer as an expert witness. Id. The officer

testified that, in his opinion, the defendant intentionally caused the accident. Id. The jury found the defendant guilty of injury to personal property and assault with a deadly weapon inflicting serious injury, but without intent to kill. Id. On appeal, the defendant argued that the trial court committed plain error by allowing a lay witness to give an expert opinion about how the accident happened and whether the defendant intentionally hit the victim. Id.

In a majority opinion authored by Judge Thompson, the court of appeals agreed with the defendant and held that the trial court erred in allowing the officer to testify about the cause of the accident and the defendant's intent. Id. The court of appeals applied a plain error standard of review as defense counsel did not object to the testimony at trial. Id.

A law enforcement officer who does not witness an automobile accident, but who later observes the scene, is permitted to testify about physical facts observed at the scene, including the position of the vehicles and the condition of the vehicles. Id. But when the officer does not personally observe the accident, a jury is just as qualified as the officer to makes inferences from those physical facts. Id. Accident reconstruction and accident analysis requires expert analysis and therefore falls under Rule 702 of the Rules of Evidence. Id.

Here, because the State did not proffer the officer as an expert witness in accident reconstruction, the trial court erred in allowing the officer to testify about the cause of the accident and the defendant's intent. Id. at *3. This error constituted plain error warranting reversal of the defendant's conviction because the key dispute was whether the defendant intended to hit the victim with his vehicle, and the officer's testimony had a probable impact on the jury's verdict. Id.

In a dissenting opinion, Judge Stading contended that admission of the officer's testimony did not amount to plain error. Id. In Judge Stading's view, even if the officer's testimony should

not have been admitted, the record contained sufficient other evidence to support the jury's verdict. Id. at *4. An eyewitness testified that the defendant crossed a double yellow line, increased speed when approaching the victim, and did not try to check on whether the victim was okay following the collision. Id. Additionally, other evidence showed a lack of brake marks on the road. Id. Judge Stading contended that the defendant failed to show that the error of admitting the officer's testimony had a probable impact on the jury's verdict. Id.

C. Witnesses

In Gabbidon Builders, LLC v. North Carolina Licensing Board for General Contractors, ___ N.C. App. ___, 901 S.E.2d 640 (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 ___, 901 S.E.2d at 641. After noticing two hearings, the Board subpoenaed several witnesses to "appear and testify[.]" Id. at ___, 901 S.E.2d at 642. 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.

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 ___, 901 S.E.2d at 644. 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 ___, 901 S.E.2d at 643. 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 ___, 901 S.E.2d at 644. 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. 5.

D. Appeals

In State v. Lindsay, 292 N.C. App. 641, 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 642, 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 649, 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 649, 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 651, 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 653, 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.

In Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC, 386 N.C. 359, 905 S.E.2d. 14 (2024), the supreme court addressed whether an issue raised in a dissent at the court of appeals, but not addressed by the parties, can form the basis for review at the supreme court.

A business that owned a truck left the truck on property that it lost in a foreclosure sale. Id. at 360, 905 S.E.2d at 15. The purchaser of the foreclosed property hired a towing company to tow the truck away from the property. Id. The towing company later petitioned to sell the truck to satisfy a lien for unpaid towing and storage expenses. Id. The business that owned the truck opposed the sale and challenged the amount of the purported lien. Id.

The trial court held a hearing on the contested issues. Id. The business that owned the truck presented testimony that it repeatedly attempted to pick up the truck, but the towing company refused to release the truck arguing that the business failed to provide sufficient proof that it was

authorized to take the truck. Id. The business also argued that the towing company improperly used the truck rather than simply storing it, and that the towing company performed unnecessary maintenance and cosmetic alterations. Id. at 360-61, 905 S.E.2d at 15. The trial court entered an order and judgment reducing the lien amount due to unnecessary maintenance and cosmetic alterations, as well as a reduction to account for the towing company driving the truck when the truck should have been stored. Id. at 361, 905 S.E.2d at 15.

On appeal, the business argued the trial court did not reduce the lien by a sufficient amount based on the evidence. Id. at 361, 905 S.E.2d at 16. In a divided opinion, the court of appeals affirmed the trial court's order and judgment. Id. The majority held that the evidence supported the trial court's findings and conclusions concerning the appropriate amount of the lien. Id. The dissent argued that the towing company unlawfully converted the truck for personal use and the case should be remanded to reduce the lien based on the truck's loss in fair market value as a result of the conversion. Id.

The towing company filed a notice of appeal to the supreme court based on the dissent. Id. Although the North Carolina General Assembly has since repealed the portion of section 7A-30 of the North Carolina General Statutes that conferred a right to appeal to the supreme court based on a dissent at the court of appeals, this appeal was filed and docketed before the effective date of that legislation. Id. at 361 n.1, 905 S.E.2d at 16 n.1.

In a majority opinion authored by Justice Dietz, the supreme court analyzed whether it had jurisdiction to address the dissent's argument that the towing company unlawfully converted the truck for personal use. Id. at 362, 905 S.E.2d at 16. Under Rule 16(b) of the North Carolina Rules of Appellate Procedure, the supreme court may review those issues "specifically set out in the dissenting opinion as the basis for that dissent." Id. The supreme court has emphasized that its

review in these circumstances is limited to those issues for which the dissent provides "'reasoning.'" Id. (quoting Cryan v. Nat'l Council of YMCAs, 384 N.C. 569, 575, 887 S.E.2d 828 (2023)). Here, the dissent provided "extensive reasoning" for its position that the towing company's unauthorized use of the truck while it should have been stored was a form of unlawful conversion. Id. Therefore, the supreme court had jurisdiction over this issue. Id.

However, possessing jurisdiction does not automatically mean that the issue is one the supreme court can properly address. Id. It is "well-settled" that appellate courts cannot address arguments not raised or argued by the appellant. Id. Here, the business that owned the truck "never raised a conversion argument, never argued that [the towing company]'s unauthorized use had reduced the value of the truck, and never presented any evidence as to the value of the truck." Id. at 363, 905 S.E.2d at 17. The dissent's approach would effectively require the trial court to start over from the beginning and conduct another hearing to receive evidence on the change in the truck's fair market value and then enter an entirely different order. Id. at 364, 905 S.E.2d at 17. Therefore, the supreme court concluded that the conversion theory raised in the dissent was not properly an issue it could address, and it affirmed the court of appeals' decision. Id. at 364, 905 S.E.2d at 18.

Justice Earls authored a dissent. In her view, the majority took a "hyper-technical and unjustifiably narrow approach" to determining whether the business that owned the truck made the necessary legal arguments regarding conversion. Id. at 365, 905 S.E.2d at 18. The business did raise the issue of conversion at the trial court, it just did not use that "specific terminology." Id. The majority elevated "form over substance" and "effectively determin[ed]" that because the business framed its argument using plain English rather than legal terminology, the dissent was not permitted to address the business's argument using its legal name: conversion. Id. at 370, 905

S.E.2d at 22. The supreme court "should reach the merits of the dissent so long as it addresses the substance of a party's claims.

(1) Interlocutory

In Mecklenburg Roofing, Inc. v. Antall, 291 N.C. App. 351, 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 351, 895 S.E.2d at 878. As part of this promotion, the roofing company and the estimator entered an employment agreement. Id. at 352, 895 S.E.2d at 878. 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. 353, 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 stating a 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 354, 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. at 356, 895 S.E.2d at 880-81.

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 held that it could not review the appeal specifically 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 359, 895 S.E.2d at 882.

IV. WORKERS' COMPENSATION

In Lassiter v. Robeson County Sheriff's Department, 291 N.C. App. 579, 896 S.E.2d 280 (2023), writ allowed, ___ N.C. ___, 904 S.E.2d 529 (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 581, 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., 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. at 582, 896 S.E.2d at 284. 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 584, 896 S.E.2d at 285 (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 584, 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., 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 a person can be considered an employee of two different employers at the time of an injury. Id. at 586, 896 S.E.2d at 286-87 (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)).

> 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 588, 896 S.E.2d at 288. An employment contract may be "express or implied, oral or written[.]" Id. at 587, 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 588, 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 589,

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. ___, 901 S.E.2d 865 (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 ___, 901 S.E.2d at 867. The employer assigned an inmate who was part of a work release program to train the employee. Id. at ___, 901 S.E.2d at 868. The inmate sexually assaulted the employee. Id. The employee filed suit against the employer alleging negligent supervision. Id. The trial court denied the employer's motion to dismiss for lack of subject matter jurisdiction, finding that the Industrial Commission did not have exclusive jurisdiction over the matter. Id. The employer appealed. Id. at *1.

The court of appeals affirmed. Id. 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 ___, 901 S.E.2d at 870. 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. 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 ___, 901 S.E.2d at 871. 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 ___, 901 S.E.2d at 870-71. 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 ___, 901 S.E.2d at 871.

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. Id.

In Taylor v. Southland Industries, Inc., ___ N.C. App. ___, ___ S.E.2d ___, 2024 WL 4351616 (2024), the court of appeals considered whether the Industrial Commission erred in its calculation of a worker's average weekly wage and compensation rate. Id. at *2.

Section 97-2(5) of the North Carolina General Statutes sets forth five distinct methods for calculating an injured employee's average weekly wages in workers compensation matters. Id. The Industrial Commission applied the third method ("Method 3"), which provides for calculating average weekly wages by dividing the total earnings on the job by the number of weeks or portion of weeks the employee worked. Id. at *3. The employer appealed, arguing that the Commission erred in applying Method 3. Id. at *2.

The court of appeals disagreed with the employer and affirmed the Commission's calculation of the worker's average weekly wages. Id. at *5. The five methods of calculating average weekly wages set forth in section 97-2(5) are ranked in order of preference, and each subsequent method should be applied only if the previous method is inappropriate. Id. at *3. The Commission determined that Methods 1 and 2 had no application to the worker given that he had not been employed for fifty-two weeks prior to the injury. Id.

The employer argued that use of Method 3 was not fair and just to both parties because the general contractor for the project on which the worker worked terminated all of the employer's work and none of its workers were employed for fifty-two weeks. Id. The employer argued that the Commission should have employed Method 5, which allows the Commission to resort to other methods of computing average weekly wages when, "for exceptional reasons," the other methods would be unfair. Id.

The court of appeals concluded that contrary to the employer's arguments about the prospects of the worker's future employment, the Commission made several unchallenged findings of fact showing that the worker would have been able to continue working for the employer if he was not injured. Id. at *5. The Commission properly found that Method 3 was the method of calculation which most nearly approximated the amount of wages the worker would be earning in the employment in which he was working at the time of the injury and the Commission's conclusion to use Method 3 was therefore affirmed. Id.

V. INSURANCE

A. UIM

In Ennis v. Haswell, 292 N.C. App. 112, 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 113, 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 114, 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 section 20-279.21(b)(4). Id. at 115, 897 S.E.2d at 17. 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) 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 117, 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 119, 897 S.E.2d at 20.