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I. Liability

A. Negligence

(1) Contributory Negligence

In Holmes v. Sheppard, __ N.C. App. __, 805 S.E.2d 371 (2017), the court of appeals considered under what circumstances the failure to read a document before signing it constitutes contributory negligence.

An owner of real-estate holdings purchased several insurance policies for his properties through an insurance agent. Id. at __, 805 S.E.2d at 373. The owner filed a claim under one of the policies for theft loss involving an office building, and the insurance company refused to pay the claim because of a vacancy exclusion in the policy. Id. The owner continued to use the agent to purchase policies from the insurance company but told the agent that he did not want to have the vacancy problem again. Id. at __, 805 S.E.2d at 373–74.

The owner also had a policy with the insurance company on a newly constructed home. Id. at __, 805 S.E.2d at 373. When construction of the new home was completed, the insurance company canceled the policy on the new home because the house was vacant. Id. The agent advised the owner that the owner would have to obtain insurance on the new home through the North Carolina Joint Underwriters Association. Id. The owner took out a policy with the association but admits that he never read the policy. Id. at __, 805 S.E.2d at 374. Later, the new home sustained water damage, and the owner filed a claim under the new policy. Id. The association denied the owner's claim because the policy excluded claims for water loss to

dwellings that had been vacant for more than sixty consecutive days before the loss. Id. The owner sued the agent and the insurance company. Id. The trial court granted the agent and insurance company's motion for summary judgment on the owner's negligence claim on the ground that the owner was contributorily negligent by failing to read the policy that he purchased through the association. Id. at __, 805 S.E.2d at 375.

The court of appeals reversed. Id. at __, 805 S.E.2d at 376. The court explained that generally, when "a person of mature years of sound mind who can read or write signs or accepts a deed or formal contract affecting his pecuniary interest," the person has a duty to read the document, "and knowledge of the contents will be imputed to him in case he has negligently failed to" read it. Id. at __, 805 S.E.2d at 375 (quoting Elam v. Smithdeal Realty & Ins. Co., 182 N.C. 599, 603, 109 S.E. 632, 634 (1921)). But that duty "is subject to the qualification that nothing has been said or done to mislead him or to put a man of reasonable business prudence off his guard." Id. (quoting Elam, 182 N.C. at 603, 109 S.E. at 634). In that case, "the cause should be submitted to the jury on the question whether the failure to hold an adequate policy is due to plaintiff's own negligence in not reading his policy and taking out [a policy] sufficient to protect him." Id. (quoting Elam, 182 N.C. at 603–04, 109 S.E. at 634).

Here, the court of appeals noted that whether the owner read the policy was not at issue—the owner admitted that he did not read the policy, and he further admitted that he could have done so, which he said would have caused him to do something about the lack of a vacancy exclusion in the policy. Id. at __, 805 S.E.2d at 376. The owner argued that the negligence claim nonetheless

should have been submitted to the jury on the question whether his failure to read the policy was contributorily negligent, because the agent made representations about the coverage that misled the owner or put him off his guard. Id. The court of appeals concluded that there were facts in the record for a jury to determine that the agent misled the owner or put him off his guard. Id. Accordingly, the court of appeals held that the policy did not necessitate, as a matter of law, that summary judgment be granted on the owner's negligence claim. Id.

The supreme court denied the agent and insurance company's petition for discretionary review. Holmes v. Sheppard, __ N.C. __, 811 S.E.2d 589 (2018).

In Proffitt v. Gosnell, __ N.C. App. __, 809 S.E.2d 200 (2017), the court of appeals considered whether a person with a low IQ is held to a less-stringent standard of care and discussed when the doctrine of last clear chance applies to avoid a contributory-negligence defense.

A son sued a driver for injuries that he suffered as a result of the driver's alleged negligence. Id. at __, 809 S.E.2d at 203. The son was driving a truck at night when his father, a passenger in the vehicle, saw that a fallen tree was obstructing both lanes of traffic on a road near their home. Id. at __, 809 S.E.2d at 202. The father turned on the truck's hazard lights and called his wife to get a chainsaw so that he could cut the tree and remove it from the road. Id. The father instructed his son "to get across the tree and try to wave traffic down" and "slow [cars] down" while they waited on the wife to bring the chainsaw. Id. The son decided to climb the tree, and shortly after that, the son and father heard a vehicle approaching. Id. at __, 809 S.E.2d at 203. The son waved his arms in an attempt to get the driver's attention. Id. The father testified that his son "'never got

down' from the tree; had been 'goofing off' while standing on the tree; and was 'just being a teenager'" because the son thought the driver was going to stop. Id. The driver alleged that he did not realize there was a tree in the road or see the son until the driver collided with the fallen tree. Id. On impact, a branch struck the son in the back of the head and propelled him through the air and into the road, resulting in severe injuries to the son. Id. The driver moved for summary judgment based on contributory negligence, and the trial court granted the driver's motion. Id. The son appealed. Id.

The court of appeals affirmed. Id. at __, 809 S.E.2d at 213. The court noted that while it has cautioned that summary judgment "is rarely an appropriate remedy in cases of negligence or contributory negligence," summary judgment is appropriate on a negligence claim when the plaintiff's forecast of evidence fails to show that the defendant was negligent or establishes that the plaintiff was contributorily negligent as a matter of law. Id. at __, 809 S.E.2d at 204 (quoting Blackmon v. Tri-Arc Food Sys., Inc., __ N.C. App. __, 782 S.E.2d 741, 744 (2016)).

The court first addressed the son's argument that the ordinary standard of care did not apply because the son's IQ "falls into the category of mild mental retardation." Id. The son argued that the jury must determine whether he "acted with the degree of care he [was] able to perceive based on his diminished [mental] capacity." Id. at __, 809 S.E.2d at 205 (alterations in original). The court held that the record disclosed insufficient evidence that the son lacked the capacity to "understand and avoid a clear danger." Id. The court rejected the son's reliance on Stacy v. Jedco Construction, Inc., 119 N.C. App. 115, 457 S.E.2d 875 (1995), which the son cited for the

"proposition that any evidence of an injured party's 'diminished mental capacity' necessarily precludes summary judgment based on the affirmative defense of contributory negligence." Proffitt, __ N.C. App. at __, 809 S.E.2d at 205. In Stacy, the court considered "whether an adult whose mental capacity has been impaired or diminished due to advanced age, disease, or senility is capable of contributory negligence." Id. (quoting Stacy, 119 N.C. App. at 120, 457 S.E.2d at 878–79). That case involved a plaintiff who suffered from "senile dementia, with progressively worse short term memory loss." Id. (quoting Stacy, 119 N.C. App. at 117, 457 S.E.2d at 877). Here, the court noted that the son "appear[ed] to argue that, under Stacy, he is generally subject to a less stringent standard of care because his low IQ constitutes a 'diminished mental capacity not amounting to insanity.'" Id. The court did not find the son's "low IQ factually analogous to senility." Id.

The court further distinguished the procedural posture of Stacy, which involved the denial of a plaintiff's motion for directed verdict, not the allowance of a defendant's motion for summary judgment. Id. At the summary-judgment hearing, the only evidence presented in support of the son's argument was a statement that the son "had an IQ of around 65." Id. at __, 809 S.E.2d at 206. The court of appeals concluded that this was not enough: "Just as we have observed that '[m]erely showing that a child is bright, smart, or industrious is not enough to rebut the presumption'" that children between the ages of seven and fourteen are incapable of being negligent, "merely showing that a plaintiff has a low IQ or other intellectual disability is insufficient to establish that he should not be held to the objective reasonable person standard for

purposes of contributory negligence." Id. (quoting Frank v. Funkhouser, 169 N.C. App. 108, 115, 609 S.E.2d 788, 794 (2005)). Accordingly, the court of appeals held that the son "failed to forecast sufficient evidence tending to show that, as a result of the specific 'diminished mental capacity' alleged—[the son's] low IQ—he could not be expected to exercise ordinary care in the circumstances that led to his injuries." Id.

Next, the court of appeals addressed the son's argument that, even if he was contributorily negligent, there were genuine issues of material fact as to whether the driver had the last clear chance to avoid the accident. Id. at __, 809 S.E.2d at 212. An injured pedestrian who has been guilty of contributory negligence and invokes the doctrine of last clear chance against the driver of a motor vehicle must establish four elements:

> (1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

Id. (quoting VanCamp v. Burgner, 328 N.C. 495, 498, 402 S.E.2d 375, 376–77 (1991)). "The issue of last clear chance '[m]ust be submitted to the jury if the evidence, when viewed in the light most favorable to the plaintiff, will support a reasonable inference of each essential element of the

doctrine.'" Id. (alteration in original) (quoting Scheffer v. Dalton, 243 N.C. App. 548, 559, 777 S.E.2d 534, 542 (2015)). The last-clear-chance doctrine is inapplicable, however, "where the injured party is at all times in control of the danger and simply chooses to take the risk." Id. Here, the court of appeals concluded that the doctrine was inapplicable because the son's own evidence, including evidence that he presented to show that the driver had "ample time and distance" to avoid striking the tree, suggested that the son's presence in the tree was not a position from which he was "powerless to extricate himself." Id. at __, 809 S.E.2d at 213 (quoting Nealy v. Green, 139 N.C. App. 500, 505, 534 S.E.2d 240, 244 (2000)).

In Davis v. Hulsing Enterprises, LLC, __ N.C. __, 810 S.E.2d 203 (2018), the supreme court considered whether a plaintiff's contributory negligence bars a claim for dram-shop liability.

A man and woman had dinner and drinks in the bar of a hotel where they were staying to celebrate their wedding anniversary. Id. at __, 810 S.E.2d at 204. Over the course of four-and-a-half hours, the couple ate dinner and ordered twenty-four alcoholic beverages. Id. The woman consumed at least ten of those drinks and became visibly intoxicated to the point that a hotel employee had to transport the woman to her room in a wheelchair. Id. The employee helped the woman to her hotel room and onto her bed. Id. The next morning, the man found the woman lying on the floor deceased. Id. The woman's cause of death was alcohol poisoning. Id. The man sued the hotel for wrongful death, alleging causes of action for (1) common-law dram-shop liability, (2) negligent aid, rescue, or assistance, and (3) punitive damages. Id. The hotel's answer included an affirmative defense for contributory negligence. Id. The trial court dismissed the claims for dram-

shop liability and punitive damages. Id. On appeal, the man contested only the dismissal of his claim for common-law dram-shop liability. Id.

The court of appeals reversed the trial court, holding that the man stated a valid negligence per se dram-shop claim under N.C. Gen. Stat. § 18B-305(a). See Davis v. Hulsing Enters., LLC, __ N.C. App. __, 783 S.E.2d 765, 768 (2016). Judge Dillon wrote a dissenting opinion. Id. at __, 783 S.E.2d at 774 (Dillon, J., dissenting). He reasoned that although the man alleged facts sufficient to support a claim for negligence per se, the man also alleged facts demonstrating that the woman "acted negligently in proximately causing her own death." Id. The hotel appealed based on the dissenting opinion. Davis, __ N.C. at __, 810 S.E.2d at 205. The supreme court allowed discretionary review to also address the hotel's proposed issue of whether North Carolina recognizes a first-party claim for dram-shop liability. Id. On appeal, the hotel argued that the factual allegations in the man's complaint established the woman's contributory negligence. Id.

The supreme court reversed. Id. at __, 810 S.E.2d at 206. The court first noted that Sorrells v. M.Y.B. Hospitality Ventures of Asheville, 332 N.C. 645, 423 S.E.2d 72 (1992), which involved a claim brought by the administrator of the estate of a person who was killed while driving in a highly intoxicated state, was "both instructive and controlling in this case." Davis, __ N.C. at __, 810 S.E.2d at 205. It further noted that North Carolina's wrongful-death statute, N.C. Gen. Stat. § 28A-18-2, provides for survivorship only for claims that could have been brought by the woman herself had she lived. Id. at __, 810 S.E.2d at 206. Because the claim was brought by the man in

his capacity as the administrator of his wife's estate, the claim was subject to the affirmative defense of contributory negligence. Id.

The man argued that because his wife's death was proximately caused by the hotel's gross negligence, only gross contributory negligence on the part of the woman would bar recovery. Id. The supreme court explained that "a plaintiff's ordinary contributory negligence is not a bar to recovery when a 'defendant's gross negligence, or willful or wanton conduct, is a proximate cause of the plaintiff's injuries.'" Id. (quoting Yancey v. Lea, 354 N.C. 48, 51, 550 S.E.2d 155, 157 (2001)). Like in Sorrells, the court concluded that the actions of the hotel and the woman rose "to the same level of negligence, thereby barring [the man's] common law dram shop claim." Id. The court acknowledged that while "[t]he events leading up to the [woman's] death are undeniably tragic," in North Carolina, "contributory negligence precludes recovery for a plaintiff when, as here, the complaint alleges facts that demonstrate the plaintiff's decedent exhibited the same level of negligence as the defendant." Id. Accordingly, the supreme court reversed the court of appeals' reversal of the trial court's order dismissing the man's common-law dram-shop claim. Id. Because it concluded that the man's complaint established the woman's contributory negligence, the court concluded that the hotel's petition for discretionary review as to the additional claim of first-party dram-shop liability was improvidently allowed. Id.

Justice Hudson wrote a dissenting opinion, which Justices Beasley and Morgan joined. Id. (Hudson, J., dissenting). Justice Hudson disagreed with the majority's application of Sorrells and concluded that the complaint sufficiently alleged gross negligence by the hotel. Id. Moreover,

Justice Hudson found no allegations in the complaint that supported gross contributory negligence on the part of the woman. Id. She argued that the allegations asserted gross negligence and willful and wanton conduct by the hotel that evidenced a reckless disregard for the safety of others. Id. at __, 810 S.E.2d at 207. "Taking these allegations as true," Justice Hudson concluded that the majority "improperly applied inferences of ordinary contributory negligence to bar [the man's] claims for gross negligence and willful and wanton conduct as a matter of law." Id. In Justice Hudson's view, it was for the jury to decide whether the facts as alleged were shown by evidence to constitute "a conscious, or even a reckless, 'disregard for the safety of others.'" Id. (quoting Yancey, 354 N.C. at 53, 550 S.E.2d at 158). In conclusion, Justice Hudson noted that she is "unaware of any decision from this Court holding that drinking to the point of intoxication in a safe location, absent accompanying allegations of impaired driving or other conduct, constitutes gross negligence as a matter of law." Id. at __, 810 S.E.2d at 208.

(2) Doctrine of Sudden Emergency

In Goins v. Time Warner Cable Southeast, LLC, __ N.C. App. __, 812 S.E.2d 723 (2018), the court of appeals considered whether a trial court commits prejudicial error by instructing the jury on the doctrine of sudden emergency for allegedly negligent conduct that occurs after the emergency arises.

A storm caused a cable company's utility line to fall from its poles into the roadway. Id. at __, 812 S.E.2d at 725. The cable company was notified of the fallen line that same day. Id. The next morning, a man was cycling and was severely injured when his tire hit the utility line,

which was still lying in the road. Id. Later that day, a woman cyclist was severely injured when she collided with another cyclist who had struck the utility line. Id. At trial, the jury found that the cable company was negligent and that neither the man nor the woman was contributorily negligent. Id. On appeal, the cable company argued that the trial court erred by instructing the jury on the sudden-emergency doctrine. Id.

The court of appeals vacated the trial court's judgment and remanded the case for a new trial. Id. The court of appeals explained that the sudden-emergency doctrine excuses the acts of a party that would normally constitute negligence "where the party so acted in response to a sudden emergency" that the party did not cause. Id. at __, 812 S.E.2d at 726 (citing Rogers v. Carter, 266 N.C. 564, 568, 146 S.E.2d 806, 810 (1966)). The doctrine applies only to allegedly negligent conduct that occurs after the emergency arises. Id. (citing Carrington v. Emory, 179 N.C. App. 827, 830, 528 S.E.2d 532, 534 (2006)). Moreover, a sudden-emergency instruction is improper to excuse otherwise negligent behavior that contributed to the emergency. Id.

The court of appeals concluded that the trial court erred by instructing the jury on the doctrine of sudden emergency as a theory by which the jury could excuse the man and woman's behavior of traveling too fast or failing to keep a proper lookout because the instruction was not supported by evidence. Id. at __, 812 S.E.2d at 728. The court rejected the man and woman's argument that the instruction was proper because "the emergency situation was created by the very negligence of" the cable company—"namely a dangerous hazard left in the roadway." Id. at __, 812 S.E.2d at 727. The court noted that this argument misconstrues the sudden-emergency

doctrine because, "assuming the jury determined that [the man and woman] failed to keep a proper lookout," the cable company's "failure to remove the wire did not cause [the man and woman's] failure to keep a proper lookout or failure to travel at a safe speed." Id. The court provided the following example of an instance where the sudden-emergency doctrine would apply:

> The doctrine of sudden emergency would apply if, for instance, the [man and woman] were keeping a proper lookout and then, suddenly, an outside agency, such as a car turning into their lane of traffic, caused them to swerve into the wire. In such a case, their action of swerving in a direction without first determining if there was an obstacle in that direction might be excused since their action of swerving was in response to a sudden emergency, i.e., the car turning into their lane of traffic.

Id.

The court said that it was further "persuaded, if not compelled," by the supreme court's holding in Rogers v. Carter to conclude that the trial court's instruction on the sudden-emergency doctrine "constituted prejudicial error likely to mislead the jury." Id. at __, 812 S.E.2d at 728. While it is possible that the jury determined that the man and woman were not contributorily negligent because they kept a proper lookout, it is also possible that the jury determined that the man and woman failed to keep a proper lookout or followed too closely, "but improperly determined that [they] were otherwise not contributorily negligent because they were confronted with the 'sudden emergency' of a wire in their path." Id. Because of the "reasonable possibility that the latter occurred," the court of appeals concluded that the trial court's jury instruction on the sudden-emergency doctrine was prejudicial error. Id.

The man and woman have filed a petition for discretionary review. That petition is currently pending.

B. Contract

(1) Ratification

In IO Moonwalkers, Inc. v. Banc of America Merchant Services, LLC, __ N.C. App. __, __ S.E.2d __, 2018 WL 1597441 (2018), the court of appeals considered the doctrine of ratification in the context of an electronically signed contract.

A dispute arose between a company and a company that provides credit-card processing services concerning chargebacks for fraudulent purchases. Id. at *1. The company argued that it never electronically signed the contract with the processing company and should not be bound by the terms of that contract. Id. The company asserted that a salesperson for the processing company likely signed the contract on the company's behalf without permission. Id.

At summary judgment, the processing company produced records showing the exact date and time that someone using the company's e-mail viewed the proposed contract, electronically signed it, and later viewed the final, fully executed version. Id. The company did not dispute the accuracy of those records or the fact that it viewed the proposed contract, but insisted that the contract was not signed by anyone at the company who was authorized to sign. Id. The trial court held that even if the company did not sign the contract, the company ratified the contract through its actions. Id.

The court of appeals affirmed. Id. at *5. The court introduced the matter as "one of a growing number of contract cases requiring the courts to fit decades-old (sometimes centuries-old) contract principles to the realities of the digital age." Id. at *1. It explained that, "[i]n contract law, ratification is a legal doctrine that binds a principal to certain unauthorized acts of an agent, such as executing a contract." Id. at *3. "[T]o establish the act of a principal as a ratification of the unauthorized transactions of an agent, the party claiming ratification must prove" the following: "(1) that at the time of the act relied upon, the principal had full knowledge of all material facts relative to the unauthorized transaction, and (2) that the principal had signified his assent or his intent to ratify by word or by conduct which was inconsistent with an intent not to ratify." Id. (quoting Carolina Equip. & Parts Co. v. Anders, 265 N.C. 393, 400–01, 144 S.E.2d 252, 258 (1965)).

The court explained that if the contract at issue were a more traditional contract negotiation in which the parties mailed proposed contracts back and forth, a sworn affidavit stating that the company never reviewed or signed the contract might be sufficient to create a genuine issue of material fact with respect to the knowledge element of ratification. Id. But this case is different, the court explained, because the processing company presented evidence from its electronic document application that it sent the contract to the company e-mail address. Id. The processing company also submitted evidence that someone with access to that e-mail viewed the e-mail and accompanying contract, electronically signed it, and later viewed the final contract. Id. "Simply put, the electronic trail created by [the electronic document application] provide[d] information

that would not have been available before the digital age—the ability to remotely monitor when other parties to a contract actually view it." Id. While the company disputed many of the facts alleged by the processing company, it did not dispute the accuracy of the records from the electronic document application. Id.

The court of appeals also concluded that the trial court properly determined that the company signified its intent to ratify the contract through its conduct. Id. at *4. Even accepting as true the company's claim that an employee of the processing company improperly signed the contract without authorization, the undisputed evidence showed that the company both received and reviewed the proposed contracts and the final contracts signed by the parties. Id.

Judge Dillon wrote a concurring opinion based on the jurisdictional grounds for the appeal. Id. at *5 (Dillon, J., concurring).

The company has filed a petition for discretionary review. That petition remains pending.

C. Constitutional Claims

In Taylor v. Wake County, __ N.C. App. __, 811 S.E.2d 648 (2018), the court of appeals considered the scope of Corum claims and whether the adequacy of a remedy depends on a plaintiff's ability to recover for a particular injury or to recover from a particular defendant.

A woman obtained a domestic-violence protective order against her estranged husband after the husband threatened to kill the woman and their minor children. Id. at __, 811 S.E.2d at 650. A caseworker from the county division of social services (DSS) was assigned to the case. Id. A few months later, the husband went to the woman's residence and shot and killed the

woman's parents and shot the woman in front of their children. Id. at __, 811 S.E.2d at 651. The woman filed a complaint against DSS in superior court and filed a complaint under the Tort Claims Act against the North Carolina Department of Health and Human Services (DHHS) in the North Carolina Industrial Commission. Id. DSS moved to dismiss and for summary judgment. Id. The court granted DSS's motions and concluded that (1) the woman's tort claims were barred by the doctrine of governmental immunity and DSS did not waive that immunity, and (2) with respect to the woman's constitutional claim, the woman had an adequate remedy under state law before the Industrial Commission. Id.

On appeal, the woman argued that the trial court erred when it concluded that she had an adequate remedy under state law by bringing a claim against DHHS in the Industrial Commission, thereby precluding her from asserting a direct constitutional claim against DHHS under Corum. Id. Specifically, the woman argued that her claim against DHHS was not an adequate remedy because that claim did not provide a remedy against DSS. Id. The woman further argued that, even if she were to recover in the Industrial Commission, that forum's damages are capped at $1 million per person injured. Id.

The court of appeals affirmed. Id. A Corum claim allows a plaintiff to recover compensation for a violation of a state constitutional right for which there is either no common law or statutory remedy, or when the common law or statutory remedy that would be available is inaccessible to the plaintiff. Id. at __, 811 S.E.2d at 652. A Corum claim is available to a plaintiff who can establish that (1) her state constitutional rights have been violated, and (2) she lacks any

sort of "adequate state remedy." Id. (quoting Corum v. Univ. of N.C., 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992)). The court of appeals explained that the supreme court's definition of "adequacy" is twofold: "(1) that the remedy addresses the alleged constitutional injury, and (2) that the remedy provides the plaintiff an opportunity to 'enter the courthouse doors.'" Id. at __, 811 S.E.2d at 654 (quoting Craig v. New Hanover Cty. Bd. of Educ., 363 N.C. 334, 339–40, 678 S.E.2d 351, 429 (2009)). It further explained that the General Assembly explicitly granted authority to the Industrial Commission to function as a court for claims within its jurisdiction: "The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies of the State." Id. (emphasis omitted) (quoting N.C. Gen. Stat. § 143-291(a) (2017)). The court concluded that the woman's "assertion that she has been denied access to the 'courthouse doors' is unavailing in light of such an unequivocal designation." Id.

The court of appeals examined multiple court of appeals and supreme court opinions to conclude that adequacy of a state-law remedy depends on the injury alleged by the plaintiff, not the party from whom the plaintiff seeks recovery. Id. at __, 811 S.E.2d at 856. "While the law generally allows plaintiffs to select the defendant(s) from whom they wish to obtain relief, such is not the case when doing so requires the extraordinary exercise of the judiciary's constitutional power necessary to permit a Corum claim." Id. Moreover, "[t]he adequacy of a state remedy requires only the opportunity to be heard, and if successful[,] to recover for the injuries alleged in

the direct constitutional claim." Id. The court was therefore "compelled" to hold that the woman had an adequate remedy under state law for the alleged violations of her constitutional rights. Id. Because the woman could not establish that her claims in the Industrial Commission were impossible, she could not assert her direct constitutional claims under Corum against DSS. Id. at __, 811 S.E.2d at 857.

The woman has filed a petition for discretionary review. That petition remains pending.

In Tully v. City of Wilmington, __ N.C. __, 810 S.E.2d 208 (2018), the supreme court considered whether a public employee states a claim against his employer under the North Carolina Constitution when the employer violates its own policy by refusing to consider the employee's appeal on the validity of an examination required for a promotion.

A police officer sought a promotion to the rank of sergeant in the police department. Id. at __, 810 S.E.2d at 211. The officer took a written examination, as required by the department's policy manual, but he did not receive a passing score. Id. On the exam, the officer had based his answers on the prevailing law at the time. Id. When he reviewed the exam and his answers, the officer discovered that the official answers were based on outdated law. Id. The officer filed a grievance regarding this discrepancy through the city's internal grievance process. Id. The city responded that "the test answers were not a grievable item." Id.

The officer filed a complaint in the trial court alleging two claims under the North Carolina Constitution. Id. at __, 810 S.E.2d at 211–12. The officer's first claim argued that the city violated article I, section 19 of the Constitution, which states that "[n]o person shall be . . . deprived of his

life, liberty, or property, but by the law of the land." Id. at __, 810 S.E.2d at 212 (quoting N.C. Const. art. I, § 19). His second claim argued that the city violated his rights under article I, section 1 of the Constitution, which states that "[w]e hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." Id. (quoting N.C. Const. art. I, § 1). The trial court dismissed the officer's claims with prejudice. Id.

The court of appeals reversed the trial court in a divided opinion. See Tully v. City of Wilmington, __ N.C. App. __, 790 S.E.2d 854 (2016). The court of appeals acknowledged that the case presented an issue of first impression under North Carolina law and concluded that "it is inherently arbitrary for a government entity to establish and promulgate policies and procedures and then not only utterly fail to follow them, but further to claim that an employee subject to those policies and procedures is not entitled to challenge that failure." Id. at __, 790 S.E.2d at 860 (emphasis omitted). The majority also concluded that "'irrational and arbitrary' government actions violate the 'fruits of their own labor' clause." Id. at __, 790 S.E.2d at 858.

Judge Bryant wrote a dissenting opinion in which she relied on the distinction between the government acting in its capacity as a regulator and an employer. Id. at __, 790 S.E.2d at 861 (Bryant, J., dissenting). Judge Bryant explained that because the city acted as an employer rather than a sovereign, "and is vested with the power to manage its own internal operations, [the officer's] pleadings—although asserting what appears to be an unfair result in a standard process—do not state a viable constitutional claim." Id. Judge Bryant "strongly urge[d] the Supreme Court

to take a close look at this issue to see whether it is one that, as currently pled, is subject to redress under our N.C. Constitution." Id. at __, 790 S.E.2d at 863.

The supreme court affirmed in part and reversed in part. Tully, __ N.C. at __, 810 S.E.2d at 217. The court first addressed the officer's argument under article I, section 1's "fruits of their own labor" clause. Id. at __, 810 S.E.2d at 213. The court acknowledged that application of that constitutional provision in this context was an issue of first impression, and concluded that the officer successfully stated a claim under article I, section 1. Id. (citing Corum v. Univ. of N.C., 330 N.C. 761, 782–83, 413 S.E.2d 276, 389–90 (1992)). The court was persuaded that article I, section 1 "applies when a governmental entity acts in an arbitrary and capricious manner toward one of its employees by failing to abide by promotional procedures that the employer itself put in place." Id. at __, 810 S.E.2d at 215. In reaching its decision, the court noted that "other courts have recognized the impropriety of government agencies ignoring their own regulations, albeit in other contexts." Id. (first citing United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954); then citing United States v. Heffner, 420 F.2d 809, 811–12 (4th Cir. 1969); and then citing Farlow v. N.C. State Bd. of Chiropractic Exam'rs, 76 N.C. App. 202, 208, 332 S.E.2d 696, 700 (1985)).

Here, the supreme court explained, the officer adequately stated a claim because he alleged that the city arbitrarily and capriciously denied him the ability to appeal an aspect of the promotional process despite the policy manual's statement that "[c]andidates may appeal any portion of the selection process." Id. (alteration in original). These allegations were adequate to

implicate the officer's right under article I, section 1 "to pursue his chosen profession free from actions by his governmental employer that, by their very nature, are unreasonable." Id.

The court was careful to note, however, that this right is not without limitation. Id. at __, 810 S.E.2d at 216. Based on the supreme court's "distillation of the admittedly sparse authority in this area of the law," the court held that "to state a direct constitutional claim grounded in this unique right under the North Carolina Constitution, a public employee must show that no other state law remedy is available and plead facts establishing three elements":

(1) that "a clear, established rule or policy existed regarding the employment promotional process that furthered a legitimate governmental interest";

(2) that "the employer violated that policy"; and

(3) that "the plaintiff was injured as a result of that violation."

Id. If a public employee alleges these three elements, "he has adequately stated a claim that his employer unconstitutionally burdened his right to the enjoyment of the fruits of his labor." Id. The court declined to opine on the ultimate viability of the officer's claim or the remedy to which the officer would be entitled if he ultimately succeeds in proving his claim. Id.

Next, the court addressed whether the court of appeals erred in allowing the officer's claim under article I, section 19 to proceed. Id. The court noted that it is "aware of no authority recognizing a property interest in a promotion," and that the officer conceded in his brief that no such property interest exists. Id. at __, 810 S.E.2d at 217. Accordingly, the court concluded that the trial court correctly dismissed the officer's article I, section 19 claim. Id.

D. Negligent Infliction of Emotional Distress

In Riddle v. Buncombe County Board of Education, __ N.C. App. __, 805 S.E.2d 757 (2017), the court of appeals considered whether it was reasonably foreseeable that a student would suffer severe emotional distress as a proximate result of the negligent acts that led to another student's death.

A high-school student sustained fatal injuries during football practice when he was struck by a motorized vehicle driven by another student. Id. at __, 805 S.E.2d at 759. Members of the football team regularly used the vehicle to move items during and after practice, even though the football players were minors who had received no training on how to operate the vehicle. Id. On the day of the accident, a football coach had instructed a student to use the vehicle to transport large coolers across the football field. Id. Another student and member of the football team who witnessed the accident sued the school for negligent infliction of emotional distress arising out of concern for himself and for his deceased friend and teammate. Id. at __, 805 S.E.2d at 760. Specifically, the student alleged that the school committed negligent acts that proximately and foreseeably caused the student to suffer severe emotional distress. Id. at __, 805 S.E.2d at 759. The school moved to dismiss, and the trial court granted the motion to dismiss. Id. at __, 805 S.E.2d at 759–60.

The court of appeals affirmed. Id. at __, 805 S.E.2d at 762. The court of appeals noted that the dispositive issue in the case was foreseeability. Id. at __, 805 S.E.2d at 761. The court explained that in cases arising from concern for another's welfare—"bystander claims"—factors

that bear on foreseeability include "the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." Id. (quoting Johnson v. Ruark Obstetrics & Gynecology Assocs., P.A., 327 N.C. 283, 305, 395 S.E.2d 85, 98 (1990)).

First, the court held that the student's claim arising from concern for himself failed as a matter of law because "allegations of 'temporary fright' are insufficient to satisfy the element of severe emotional distress." Id. (quoting Ruark, 327 N.C. at 304, 395 S.E.2d at 97). Next, the court turned to the student's claim arising out of concern for his teammate. Id. The court of appeals acknowledged that the case appeared to be a case of first impression under North Carolina's bystander jurisprudence, because all prior cases have involved close familial relationships. Id. The court noted that, although the student cited no case from any jurisdiction that recognized a bystander claim similar to the claim alleged in this case, "'the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned' is but one factor to consider in determining foreseeability." Id. (quoting Ruark, 327 N.C. at 305, 395 S.E.2d at 98).

The court concluded that the student's allegations were insufficient to establish that his emotional distress was reasonably foreseeable. Id. at __, 805 S.E.2d at 762. The court acknowledged that the student's physical presence and observation of his teammate's accident favored foreseeability but noted that "no factor is determinative in all cases." Id. Specifically, the court concluded that the student's allegations about his relationship with the deceased teammate failed to support the foreseeability of his injury. Id. The complaint did not allege that the student

and his teammate shared an unusually close relationship, or that his friendship with the teammate made the student particularly susceptible to severe emotional distress. Id. Accordingly, the court of appeals held that the student's complaint failed to state a claim for negligent infliction of emotional distress arising from concern for himself or his teammate. Id.

E. Alienation of Affection

In Rodriguez v. Lemus, __ N.C. App. __, 810 S.E.2d 1 (2018), the court of appeals considered whether evidence of post-separation conduct may be used to corroborate evidence of pre-separation conduct to support claims for alienation of affection and criminal conversation.

A woman sued a family friend for alienation of affection and criminal conversation under N.C. Gen. Stat. § 52-13. Id. at __, 810 S.E.2d at 2. The woman discovered that her then-husband was having an affair with her friend. Id. The woman and husband separated. Id. The woman and husband discussed reconciliation, but the husband refused. Id. Several months before the woman and husband's divorce was finalized, the husband began living with the friend. Id. at __, 810 S.E.2d at 2–3. The trial court concluded that the friend had maliciously and wrongfully injured the woman and husband's marriage and had committed criminal conversation with the husband. Id. at __, 810 S.E.2d at 3. The friend appealed. Id.

On appeal, the friend challenged the trial court's finding that she had engaged in sexual conduct with the husband prior to the date of the woman and husband's separation. Id. The friend argued that there was no competent evidence of pre-separation activity that gave rise to "more than mere conjecture of sexual conduct." Id.

The court of appeals affirmed. Id. at __, 810 S.E.2d at 6. Claims of alienation of affection and criminal conversation that arise after the effective date of separation cannot be sustained without evidence of pre-separation acts that satisfy the elements of those torts. Id. at __, 810 S.E.2d at 3. "What is less clear," the court of appeals explained, "is whether evidence of post-separation acts is admissible to support an inference of pre-separation acts constituting alienation of affection or criminal conversation." Id. at __, 810 S.E.2d at 4. The court noted that because criminal conversation is adultery, prior decisions addressing the evidence necessary to prove adultery are instructive with respect to criminal conversation and with respect to the element of malice in an alienation-of-affection case (which can be satisfied by criminal conversation). Id. at __, 810 S.E.2d at 4–5.

The court looked to In re Estate of Trogdon, 330 N.C. 143, 409 S.E.2d 897 (1991), where the supreme court held that adultery barred a surviving spouse from receiving a year's allowance from a decedent's estate. Rodriguez, __ N.C. App. at __, 810 S.E.2d at 4. The court of appeals noted that in Trogdon, the supreme court "observed a principle that transcends generations: 'Adultery is nearly always proved by circumstantial evidence . . . as misconduct of this sort is usually clandestine and secret.'" Id. (quoting Trogdon, 330 N.C. at 148, 409 S.E.2d at 900). Thus, the court of appeals explained, while the wife could prove criminal conversation by circumstantial evidence, that circumstantial evidence "must rise to more than 'mere speculation,'" such as through a showing of "opportunity and inclination." Id. (quoting Coachman v. Gould, 122 N.C. App. 443, 447, 470 S.E.2d 560, 563 (1996)).

The court of appeals also noted that intentional acts other than sexual intercourse can satisfy the malice element for alienation of affection. Id. For example, in Pharr v. Beck, 147 N.C. App. 268, 554 S.E.2d 851, 854 (2001), the court of appeals held that malice was shown by evidence of pre-separation conduct by the defendant, such as meeting regularly with the plaintiff's spouse knowing that he was married and holding the spouse's hand in public. Rodriguez, __ N.C. App. at __, 810 S.E.2d at 4 (citing Pharr, 147 N.C. App. at 274, 554 S.E.2d at 855). The court also held that evidence of post-separation sexual intercourse between the defendant and the plaintiff's spouse "corroborate[d] the pre-separation relationship between [the] parties." Id. at __, 810 S.E.2d at 4–5 (quoting Pharr, 147 N.C. App. at 274, 554 S.E.2d at 855).

Based on this precedent, the court of appeals held that "evidence of post-separation conduct may be used to corroborate evidence of pre-separation conduct and can support claims for alienation of affection and criminal conversation, so long as the evidence of pre-separation conduct is sufficient to give rise to more than mere conjecture." Id. at __, 810 S.E.2d at 5. The court noted that it is "mindful of the factually specific nature of claims for alienation of affection, criminal conversation, and adultery" and of the supreme court's observation that "these cases often rest solely on circumstantial evidence." Id. Applying this holding, the court concluded that evidence of post-separation conduct between the friend and the husband corroborated evidence of their pre-separation conduct. Id.

The friend has filed a petition for discretionary review and a petition for writ of certiorari in the supreme court. Those petitions are currently pending.

F. Unfair and Deceptive Trade Practices

In Bickley v. Fordin, __ N.C. App. __, 811 S.E.2d 671 (2018), the court of appeals considered whether a claim for unfair or deceptive trade practices under N.C. Gen. Stat. § 75-1.1 was barred by the internal-business-disputes exemption.

A shareholder purchased a 10% interest in a software company for $50,000 and, shortly after that, was sentenced to two years in prison for drug charges. Id. at __, 811 S.E.2d at 673. When the shareholder was released from prison, the founder of the software company expressed concern to the shareholder that the shareholder's involvement in the software company would harm the company. Id. The founder offered to repurchase the shareholder's interest for a $50,000 promissory note. Id. The founder told that the shareholder that if he refused to accept the offer, the founder would bankrupt the software company. Id. The shareholder accepted the offer and resold his interest to the company. Id. The founder subsequently assigned the software that the company was developing to another company. Id. The other shareholders of the software company received minority shares in the new company. Id. Later, the founder sold the new company for $14 million. Id. After the sale of the new company, the shareholder sued the founder, the software company, and the new company for damages based on the founder's actions in convincing the shareholder to resell his interest in the software company. Id. The complaint included a claim under N.C. Gen. Stat. § 75-1.1 for unfair or deceptive trade practices. Id.

The trial court granted the defendants' motion for a directed verdict on the shareholder's section 75-1.1 claim but determined that the shareholder was entitled to $50,000 on the promissory

note as a matter of law. Id. The jury awarded the shareholder $505,000 for his fraud, constructive fraud, and fiduciary-duty claims. Id. The shareholder appealed the trial court's denial of his section 75-1.1 claim. Id.

The court of appeals affirmed. Id. The court held that the shareholder's claim did not fall within the scope of section 75-1.1 because "the repurchase of an interest in a closely held company from a shareholder does not fall within the scope of" section 75-1.1. Id. The court reasoned that section 75-1.1 targets "unfair and deceptive interactions between market participants." Id. at __, 811 S.E.2d at 674 (quoting White v. Thompson, 364 N.C. 47, 52, 691 S.E.2d 676, 679 (2010)). For that reason, section 75-1.1 does not "intrude into the internal operations of a single market participant." Id. (quoting White, 364 N.C. at 52, 691 S.E.2d at 679). The court of appeals concluded that the dispute was more appropriately classified as internal conduct between two owners of a single business—the software company. Id. Accordingly, the shareholder's section 75-1.1 claim was barred by the internal-business-disputes exemption. Id.

As an alternate basis for its decision, the court noted that the shareholder's resale of his interest in the software company was "analogous to a securities transaction." Id. The supreme court has held that transactions involving the issuance, redemption, and transfer of securities are exempt from the scope of section 75-1.1 because those activities "merely work[ ] a change in ownership of the security itself" and are not "business activities" under the act that are "in or affecting commerce." Id. (quoting HAJMM Co. v. House of Raeford Farms, Inc., 328 N.C. 578, 594, 403 S.E.2d 483, 493 (1991)). The court did not expressly decide whether the shareholder's

10% interest in the software company was technically a "security" but noted that the supreme court's reasoning in HAJMM supports a conclusion that the shareholder's section 75-1.1 claim was barred by section 75-1.1's securities exemption. Id.

G. Misappropriation of Trade Secrets

In Krawiec v. Manly, __ N.C. __, 811 S.E.2d 542 (2018), the supreme court considered the pleading standard for a trade-secret-misappropriation claim.

A dance company entered into contracts with two dancers. Id. at __, 811 S.E.2d at 546. Under the contracts, the dancers procured work visas in exchange for their express promise to work exclusively for the dance company as dance instructors and performers. Id. The dancers also agreed not to work for any other dance company that offered dance instruction or competed against the dance company for one year after either the expiration or termination of their employment with the dance company. Id.

During the contract term, the dancers violated their employment agreements by working as dance instructors for a competing dance company. Id. According to the dance company, the dancers also shared confidential information with the competing company and lured away the dance company's customers, causing the dance company to lose significant revenue. Id. The dance company sued the dancers and the competing company, and the dancers and competing company moved to dismiss under Rule 12(b)(6). Id. The business court granted the motion in part and denied it in part. Id.

The supreme court affirmed. Id.

On the trade-secret-misappropriation claim, the supreme court held that the dance company failed to identify the alleged trade secrets with sufficient particularity and failed to allege specific acts of misappropriation that the competing company and the dancers engaged in. Id. at __, 811 S.E.2d at 547. The supreme court noted that it had not previously considered the requirements for pleading a claim for trade-secret misappropriation, but that the court of appeals' decisions are persuasive on this topic and mirror the notice-pleading standard used in North Carolina. Id. The court of appeals has stated that, to plead a claim for trade-secret misappropriation, "a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur." Id. at __, 811 S.E.2d at 547–48 (first quoting Washburn v. Yadkin Valley Bank & Tr. Co., 190 N.C. App. 315, 326, 660 S.E.2d 577, 585 (2008); then citing Savor, Inc. v. FMR Corp., 812 A.2d 894, 897 (Del. 2002); and then citing SmithKline Beecham Pharm. Co. v. Merck & Co., 766 A.2d 442, 447 (Del. 2000)). The supreme court concluded that as long as the information meets the two requirements for a trade secret in N.C. Gen. Stat. § 66-152(3), "information regarding customer lists, pricing formulas and bidding formulas can qualify as a trade secret." Id. at __, 811 S.E.2d at 548 (quoting Area Landscaping, LLC v. Glaxo-Wellcome, Inc., 160 N.C. App. 520, 525, 586 S.E.2d 507, 511 (2003)). The court was "persuaded by the fact that other jurisdictions have reached the same conclusion." Id. (citing multiple cases from other states).

The court explained that, in this case, the dance company described its trade secrets only as its "original ideas and concepts for dance productions, marketing strategies and tactics, as well

as student, client and customer lists and their contract information." Id. at __, 811 S.E.2d at 549. The dance company provided no further detail about these ideas, concepts, strategies, and tactics to put the competing company and dancers on notice of "the precise information allegedly misappropriated." Id. Likewise, the complaint, on its face, did not show that the dance company's customer lists qualified as a protected trade secret, because the complaint did not allege that the lists contained information that was not readily accessible to the dancers or competing company. Id.

The court pointed out that if the dance company had provided additional descriptors to put the dancers and competing company on notice as to which "original ideas and concepts for dance productions" and "marketing strategies and tactics" were allegedly misappropriated, then the claim before the court would be a different one with the potential for a different outcome. Id. Likewise, the only allegation of secrecy in the complaint was that the dance company "shared this information" with the dancers and the competing company in confidence. Id. An expectation of confidentiality, however, is not enough to establish that the information was the "subject of efforts that [were] reasonable under the circumstances to maintain its secrecy." Id. (alteration in original) (quoting N.C. Gen. Stat. § 66-152(3)(b) (2017)). The complaint was "devoid of any allegation of a method, plan, or other act by which [the dance company] attempted to maintain the secrecy of the alleged trade secrets. Id. Accordingly, the dance company failed to state a claim for trade-secret misappropriation. Id.

The supreme court also affirmed the business court's dismissal of the dance company's claims for tortious interference with contract, unfair and deceptive trade practices, civil conspiracy, and unjust enrichment. Id. at __, 811 S.E.2d at 546–52.

On the claim for tortious interference with contract, the supreme court held that the dance company failed to allege that the competing company knew of the exclusive employment agreement between the dance company and the dancers. Id. at __, 811 S.E.2d at 546. The entirety of the relevant allegations in the dance company's complaint was that the competing company and the dancers "all had knowledge and/or should have had knowledge of the existing contracts pursuant to the [visas]" between the dance company and the dancers. Id. The fact that the competing company allegedly knew of the contracts "pursuant to" the visas, however, did not satisfy the dance company's Rule 12(b)(6) burden, because the complaint did not allege that the visas themselves constituted or referred to an exclusivity agreement. Id.

The supreme court held that the business court properly dismissed the dance company's claim for unfair and deceptive trade practices in violation of N.C. Gen. Stat. § 75-1.1. Id. at __, 811 S.E.2d at 550. This claim was based on the dance company's claims for misappropriation of trade secrets and tortious interference with contract. Id. Since those claims failed, and because the dance company did not make "further allegations of specific unfair or deceptive acts," the section 75-1.1 claim likewise failed. Id.

The court also affirmed dismissal of the dance company's claim for civil conspiracy. Id. The dance company's underlying claim for misappropriation of trade secrets failed, and the

allegations that the dancers "unlawfully left [the dance company] to work for [the competing company] and that all defendants unlawfully solicited [the dance company's] customers" lacked sufficient detail to survive a Rule 12(b)(6) motion. Id. at __, 811 S.E.2d at 551.

Finally, the court affirmed dismissal of the dance company's claim for unjust enrichment against the competing company, but it reached this conclusion on different grounds than the business court. Id. The business court held that the dance company (1) could not seek an equitable remedy against the competing company while seeking the same damages through their breach-of-contract claim against the dancers, and (2) failed to plead that the competing company took any action to solicit or induce the dance company to incur expenses necessary to maintain a claim for unjust enrichment. Id. The supreme court instead focused on the dance company's allegation that the competing company received the benefit of the dance company's procurement of the dancers' work visas, because it was able to employ the dancers without paying for their visas. Id. at __, 811 S.E.2d at 552. The supreme court said that this allegation was contradicted by the immigration forms attached to the complaint, which showed that the petition for approval for a nonimmigrant worker visa applies only to the employment outlined in the petition. Id. Thus, if the competing company employed the dancers without filing new petitions, no benefit was conferred on the competing company. Id.

Justice Beasley dissented "to specifically highlight the problematic and muddled standards for North Carolina plaintiffs seeking to properly plead a claim for misappropriation of trade secrets." Id. (Beasley, J., dissenting). She believed that the dance company's description of its

trade secrets as "original ideas and concepts for dance productions, marketing strategies and tactics, as well as student, client and customer lists and their contact information" was sufficient to put the dancers and the competing company on notice of the trade secrets that they allegedly misappropriated and sufficient to survive North Carolina's liberal pleading standards. Id. at __, 811 S.E.2d at 553. She said that the majority's "reasoning and reliance on various authority" conflated the standards for Rule 12(b)(6), motions for preliminary injunction, and motions for summary judgment, as well as other jurisdictions' standards for discovery. Id. Notably, she said, the majority relied on cases that were in various procedural postures, and in doing so, "validate[d] a heightened pleading standard for a claim in which public disclosure of confidential information is a real concern for [the dance company]." Id.

Justice Beasley emphasized that "[t]he sufficiency of a claim for misappropriation of trade secrets is a matter of first impression for [the supreme court]." Id. She said that the pleading requirements for the claim are set out in N.C. Gen. Stat. § 66-155, and noted that there is no statutory heightened pleading standard for the claim under Rule 9. Id. Ultimately, she concluded that while there is no support under North Carolina law for the premise that "original ideas and concepts for dance productions" are trade secrets, "there is no authority that they are decidedly not, and similar information has been valued and protected when former employees accept similar employment from competitors." Id. at __, 811 S.E.2d at 555 (citing Amdar, Inc. v. Satterwhite, 37 N.C. App, 410, 413, 416, 246 S.E.2d 165, 166, 168 (1978)). She further noted that the court in this case "had an opportunity to correct the faulty logic that for over a decade has resulted in the

substitution of a preliminary injunction standard for our general pleading standard governing this particular claim" but instead chose to "validate[ ] a heightened pleading standard for a misappropriation of trade secrets claim with no discussion as to why it believes it is necessary to do so." Id. at __, 811 S.E.2d at 556.

II. PRETRIAL PROCEDURE

A. Personal Jurisdiction

In Bradley v. Bradley, __ N.C. App. __, 806 S.E.2d 58 (2017), the court of appeals considered what constitutes sufficient minimum contacts with the state for purposes of personal jurisdiction for a person who has no permanent home.

A husband and wife were married in North Carolina and, during the course of their four-year marriage, lived at various times in England, Australia, New Jersey, and New York. Id. at __, 806 S.E.2d at 60. During the couple's marriage, the husband engaged in various acts to maintain his ties with North Carolina. Id. When the couple separated, the wife filed a complaint in North Carolina seeking child custody, child support, post-separation support, alimony, and attorney's fees. Id. at __, 806 S.E.2d at 61. At that time, the wife was living in North Carolina, and the husband was living in London. Id. The husband moved to dismiss for lack of personal jurisdiction under Rule 12(b)(2) of the North Carolina Rules of Civil Procedure. Id. The trial court denied the husband's motion and concluded that the court had personal jurisdiction over the husband. Id.

The court of appeals affirmed. Id. at __, 806 S.E.2d at 74. To determine whether North Carolina courts have personal jurisdiction over the husband, the court of appeals analyzed whether

the husband had sufficient contacts with the state to satisfy due process standards. Id. at __, 806 S.E.2d at 63. The court compared the case to its decision in Sherlock v. Sherlock, 143 N.C. App. 300, 304, 545 S.E.2d 757, 761 (2001). Bradley, __ N.C. App. at __, 806 S.E.2d at 68. In Sherlock, a couple was married in North Carolina but never actually lived in the state. Sherlock, 143 N.C. App. at 304, 545 S.E.2d at 759. The couple lived in multiple countries during their marriage, but when they separated, the wife sued in North Carolina. Id. The court held that the husband had sufficient minimum contacts with North Carolina, despite the fact that the husband was "seldom physically present within the state." Id. at 306, 806 S.E.2d at 762. The court of appeals concluded that, like in Sherlock, the couple in Bradley lacked a permanent residence during their marriage, differentiating the case from the "ordinary divorce case." Bradley, __ N.C. App. at __, 806 S.E.2d at 73 (quoting Sherlock, 143 N.C. App. at 306, 545 S.E.2d at 762). Because of the couple's "frequent moves from one foreign country to another, and their failure to establish a permanent home anywhere in the United States or abroad," the court had to evaluate the couple's situation on its own merits. Id. (quoting Sherlock, 143 N.C. App. at 306, 545 S.E.2d at 762).

In considering the factors relevant to the personal-jurisdiction analysis, the court of appeals first looked to the fact that the couple married in North Carolina and participated in two ceremonies in the state. Id. While a "marriage by itself cannot support a . . . court's exercise of [personal] jurisdiction over a spouse," the court noted that the wedding ceremonies could be considered in conjunction with the husband's other contacts with North Carolina. Id. (quoting Kulko v. Superior Court of Cal., 436 U.S. 84, 93 (1978)). The court also noted that a baby shower was held for the

couple in North Carolina. Id. Second, the court of appeals found significant that the husband not only consented to storing some of his personal property—including the couple's marital property—in North Carolina but also (1) personally made several of the necessary arrangements for the storage, and (2) continued to pay rental fees for the property storage for the twenty-three-month period preceding the trial-court hearing. Id. In other words, the husband affirmatively chose to store his property in North Carolina instead of in another state. Id. Third, the husband chose to have some of his mail directed to his in-laws' North Carolina mailing address. Id.

Finally, the court explained that while the purpose of the due process analysis is to protect the defendant's due process rights, North Carolina case law requires the court to take into account as secondary factors the interest of the forum state and the convenience of the parties. Id. (citing Butler v. Butler, 152 N.C. App. 74, 82, 566 S.E.2d 707, 712 (2002) ("North Carolina has an important interest in the resolution of plaintiff's claims . . . since plaintiff and the parties' daughter currently reside in the State.")). While the convenience of the forum alone cannot confer personal jurisdiction over a non-resident defendant, the court could not "ignore the fact that North Carolina [was] clearly the most convenient forum for this action." Id. at __, 806 S.E.2d at 73–74. Moreover, while the court agreed that the contacts of the husband in Sherlock were more extensive than the husband's contacts with North Carolina in Bradley, it rejected the notion that Sherlock set a "floor" for purposes of establishing minimum contacts in this context. Id. at __, 806 S.E.2d at 74. To the contrary, the Sherlock court found that the contacts in that case far exceeded the minimum contacts required for personal jurisdiction. Id. (quoting Sherlock, 143 N.C. App. at 306,

545 S.E.2d at 762). Accordingly, the court concluded that the husband had sufficient minimum contacts with North Carolina to ensure that the exercise of jurisdiction over him would not offend "traditional notions of fair play and substantial justice." Id. (quoting Sherlock, 143 N.C. App. at 302, 545 S.E.2d at 760).

B. Venue

In Stokes v. Stokes, __ N.C. App. __, 811 S.E.2d 693 (2018), the court of appeals considered whether an order on a motion to change venue for the convenience of the witnesses under N.C. Gen. Stat. § 1-83 is immediately appealable, and whether a motion to change venue based on section 1-83 filed contemporaneously with an answer is prematurely filed.

A husband and wife separated while the couple was living in Pitt County with their two minor children. Id. at __, 811 S.E.2d at 695. A few months later, the wife and minor children relocated to Union County, while the husband stayed in Pitt County. Id. The wife filed a complaint for child custody, child support, and equitable distribution in Union County. Id. The husband then filed a custody action in Pitt County, and a motion in Union County for emergency ex parte custody and a motion to dismiss for improper venue or, in the alternative, a motion to change venue in the Union County case to Pitt County. Id. The trial court in Union County held a hearing on the husband's motion to change venue and ruled that venue was proper in both Pitt and Union Counties, but ordered that venue be changed to Pitt County. Id. The wife appealed. Id.

On appeal, the wife argued that venue was proper in Union County and, to the extent that the order was an attempt to change venue for the convenience of the witnesses, the trial court abused its discretion in changing venue to Pitt County. Id.

The court of appeals dismissed the appeal. Id. at __, 811 S.E.2d at 699. Motions to change "venue because the county designated is not proper affect a substantial right and are immediately appealable." Id. at __, 811 S.E.2d at 696 (quoting Heustess v. Bladenboro Emergency Servs., Inc., __ N.C. App. __, 791 S.E.2d 669, 671 (2016)). That rule, however, applies to grants or denials of a motion asserting a statutory right to venue. Id. (quoting Snow v. Yates, 99 N.C. App. 317, 319, 392 S.E.2d 767, 768 (1990)). On the other hand, "an order denying [or granting] a motion for change of venue . . . based upon the convenience of witnesses and the ends of justice, is an interlocutory order and [is] not immediately appealable." Id. (first alteration in original) (quoting Kennon v. Kennon, 72 N.C. App. 161, 164, 323 S.E.2d 741, 743 (1984)).

The husband's motion was based on N.C. Gen. Stat. § 1-83(1) and (2). Id. The court of appeals pointed out that "unlike motions for change of venue based upon allegations of improper venue, which must be made a part of the answer or filed as separate motions prior to answering, motions for change of venue made pursuant to [section] 1-83(2) are properly made only after an answer has been filed." Id. (quoting Godley Constr. Co. v. McDaniel, 40 N.C. App. 605, 607, 253 S.E.2d 359, 360 (1979)). The trial court appeared to base its ruling on the convenience of the witnesses under section 1-83(2). Id. at __, 811 S.E.2d at 697; N.C. Gen. Stat. § 1-83(2) ("The court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice

would be promoted by the change."). The court of appeals concluded that because the trial court's order granting the husband's motion to change venue was based on the convenience of the witnesses under section 1-83(2), the order was not immediately appealable. Stokes, __ N.C. App. at __, 811 S.E.2d at 697.

Next, the court of appeals turned to the question whether a motion to change venue based on the convenience of the witnesses filed contemporaneously with an answer is prematurely filed. Id. The court noted that case law makes clear that a defendant's motion for change of venue based on section 1-83(2) is premature if filed before the answer, but that the law "is less clear [on] what result issues when a motion for change of venue is filed at the same time as an answer, or is deemed to also amount to [an] answer." Id. at __, 811 S.E.2d at 698. The court held that a motion to change venue based on the convenience of the witnesses filed contemporaneously with an answer is not "prematurely filed." Id.

Judge Murphy dissented in a separate opinion. Id. at __. 811 S.E.2d at 699 (Murphy, J., dissenting). Judge Murphy agreed with the majority's holding that the trial court based its order on section 1-83(2). Id. He dissented from the majority's holding that the husband's motion to change venue was a responsive pleading equating to an answer. Id. Rather, he believed that the trial court's ruling on the motion to change venue was premature because the husband had not yet filed an answer or responsive pleading. Id.

C. Statute of Limitations

In Ragsdale v. Whitley, __ N.C. App. __, 809 S.E.2d 368 (2018), the court of appeals considered whether an adjudication of incompetency is required for the tolling of a statute of limitations.

On May 20, 2015, a patient filed a complaint for medical malpractice against a doctor. Id. at __, 809 S.E.2d at 369. The patient voluntarily dismissed the complaint under Rule 41 on November 12, 2015. Id. On December 7, 2015, a guardian ad litem was appointed for the patient. Id. On December 31, 2015, the trial court issued an order finding that the patient was incapable of conducting his own affairs and was entitled to have a guardian ad litem appointed. Id. Also on December 31, 2015, the guardian ad litem refiled the complaint against the doctor. Id.

The guardian ad litem alleged that the claim was filed within the applicable statute of limitations because the last act giving rise to the cause of action accrued on February 12, 2012. Id. The patient was treated by the doctor beginning in February 2011, shortly before he was diagnosed with having a large pituitary adenoma. Id. The guardian ad litem alleged that the doctor, a neurosurgeon, when evaluating the need for the patient's brain surgery, and while treating the patient after surgery, failed to assess the nature of the adenoma by failing to order a blood test to determine if the pituitary adenoma could be treated medically instead of surgically. Id. The patient's surgery on March 6, 2011, caused substantial swelling to the patient's brain, "proximately causing a severe stroke and 'severe, permanent, and debilitating neurological damage in addition to the severe, permanent, and debilitating neurological damage previously caused by the extensive and invasive brain surgery performed by [the doctor].'" Id. According to the guardian ad litem,

the patient's surgery was unnecessary and inappropriate because the patient had a prolactinoma, which should have been treated medically rather than surgically. Id. The patient began receiving medical services from a different doctor in February 2012, who performed a blood test and concluded that the patient's "tumor was a prolactinoma which was medically treatable." Id. at __, 809 S.E.2d at 370.

The trial court granted summary judgment in favor of the doctor. Id. The trial court found that the patient's initial complaint was filed within the applicable statute of limitations because the patient was a minor until January 19, 2014, and the three-year statute of limitations began to run on that date. Id. The court further found that the patient alleged for the first time in his re-filed complaint on December 31, 2015, that he was under a disability. Id. The guardian ad litem appealed. Id.

The court of appeals reversed. Id. at __, 809 S.E.2d at 373. On appeal, the guardian ad litem argued that the trial court erred by determining that an adjudication of incompetency under chapter 35A of the General Statutes was necessary to toll the statute of limitations, and that a genuine issue of material fact existed as to whether the patient had been incompetent since his eighteenth birthday on January 19, 2014, until the date that the guardian ad litem was appointed on December 7, 2015. Id. at __, 809 S.E.2d at 370–71.

N.C. Gen. Stat. § 1-17(a) provides that a "person entitled to commence an action who is under disability at the time the cause of action accrued may bring his or her action within the time limited in this Subchapter, after the disability is removed." Id. at __, 809 S.E.2d at 371 (quoting

N.C. Gen. Stat. § 1-17(a) (2017)). For purposes of section 1-17(a), a person is "under a disability" if the person is incompetent as defined in sections 35A-1101(7) (incompetent adult) or (8) (incompetent child over 17.5 years old). Id. The court of appeals rejected the trial court's conclusion that the patient must have been adjudicated incompetent under chapter 35A for the statute of limitations to be tolled. Id. The court found the language of section 1-17(a) to be clear, and concluded that if a person meets the statutory definition of an "incompetent adult" under section 35A-1101(7), the applicable statute of limitations is tolled until the disability is removed. Id. The court of appeals noted that its holding in Fox v. Health Force, Inc., 143 N.C. App. 501, 547 S.E.2d 83 (2001), which "stands for the proposition that an adjudication of incompetency is not required for the tolling of the statute of limitations," was persuasive on this issue. Ragsdale, __ N.C. App. at __, 809 S.E.2d at 372.

Next, the court considered whether there was a genuine issue of material fact as to whether the patient had been an incompetent adult since his eighteenth birthday until the date that his guardian ad litem was appointed. Id. The court of appeals concluded that there was evidence from which a fact finder could determine that the patient was competent when the statute of limitations expired but that, viewing all evidence in the light most favorable to the patient, the guardian ad litem forecast sufficient evidence to create a genuine issue of material fact as to whether the patient was incompetent at the time the statute of limitations expired, thus tolling the statute. Id. at __, 809 S.E.2d at 373. Accordingly, there was a genuine issue of material fact, and the trial court erred by granting summary judgment in favor of the doctor. Id.

The doctor and his employer have filed a petition for discretionary review in the supreme court. That petition is currently pending.

In King v. Albemarle Hospital Authority, __ N.C. __, 809 S.E.2d 847 (2018), the supreme court considered whether the appointment of a guardian ad litem on behalf of a minor removes the disability of minority and starts the running of the statute of limitations.

A minor was born on February 4, 2005. Id. at __, 809 S.E.2d at 848. Soon after she was born, the hospital discovered that the minor had sustained a brain injury during delivery. Id. Almost three years later, on January 10, 2008, the trial court, upon motion, appointed a guardian ad litem for the purpose of bringing a lawsuit on the minor's behalf against the hospital. Id. On October 31, 2008, the guardian ad litem voluntarily dismissed the action under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. Id. On January 30, 2015—over six years later—the trial court granted a motion to appoint the same guardian ad litem to represent the minor for the purpose of bringing a lawsuit on her behalf. Id. The same day, the minor, by and through her guardian ad litem, filed an action for medical negligence. Id. The trial court dismissed the minor's claim as time-barred on July 27, 2015, based on the three-year statute of limitations for medical-malpractice claims. Id. On appeal, the minor argued that the plain language of N.C. Gen. Stat. § 1-17(b) tolled the statute-of-limitations period until February 4, 2024, when the minor turns nineteen. Id.

The court of appeals reversed. See King v. Albemarle Hosp. Auth., No. COA15-1190, 2016 WL 4608188 (N.C. Ct. App. Sept. 6, 2016). The court of appeals determined that despite

having a court-appointed guardian ad litem, the minor's minority status constituted a disability that triggered the tolling provision of section 1-17(b). Id. at *4. Under the court of appeals' interpretation of section 1-17(b), the guardian ad litem's appointment did not remove the minor's disability of minority, thus allowing the minor the same nineteen-year statute of limitations as a plaintiff without a court-appointed guardian ad litem. King, __ N.C. at __, 809 S.E.2d at 848 (discussing King, 2016 WL 4608188, at *3); see also id. at __, 809 S.E.2d at 850 n.2 (noting that effective October 1, 2011, the General Assembly amended the relevant statute to reduce the minor's age from nineteen to ten years for medical-malpractice claims). The supreme court allowed the hospital's petition for discretionary review. Id. at __, 809 S.E.2d at 849.

The supreme court reversed. Id. at __, 809 S.E.2d at 851. The court explained that, "[a]ssuming a person is 'under a disability at the time the cause of action accrue[s],' [section 1-17(a)] requires the person to bring the cause of action within the time specified 'after the disability is removed.'" Id. at __, 809 S.E.2d at 849 (first two alterations in original) (quoting N.C. Gen. Stat. § 1-17(a) (2017)). "The disability of minority can be removed by the appointment of a [guardian ad litem] or by the passage of time, whichever occurs first." Id. Removal of the disability by reaching the majority age or by the appointment of a guardian ad litem triggers the running of the statute of limitations. Id. at __, 809 S.E.2d at 850. The court noted that "[t]his statutory interpretation comports with [the court's] long-standing jurisprudence" that "[w]hen the trial court appoints a [guardian ad litem] for the purpose of pursuing a minor plaintiff's legal claim, it removes the minor's disability and begins the running of the statute of limitations." Id. In other

words, "the failure of the guardian to sue in apt time is the failure of the ward, entailing the same legal consequence with respect to the bar of the statute." Id. (quoting Johnson v. Pilot Life Ins. Co., 217 N.C. 139, 144, 7 S.E.2d 475, 477–78 (1940)).

Moreover, the court explained, "once the statute of limitations begins to run, it is not thereafter tolled." Id. at __, 809 S.E.2d at 851 (citing Rowland v. Beauchamp, 253 N.C. 231, 234–35, 116 S.E.2d at 720, 723 (1960)). Thus, the court's appointment of a guardian ad litem requires the guardian ad litem to comply with the standard three-year statute of limitations for medical-malpractice claims. Id. Accordingly, the supreme court reversed the court of appeals' decision and instructed the court of appeals to reinstate the trial court's order dismissing the minor's claim as time-barred. Id.

Justice Beasley wrote a dissenting opinion, which Justices Hudson and Morgan joined. Id. (Beasley, J., dissenting). Justice Beasley argued that the majority engaged in "judicial interpretation of a clear and unambiguous statute," section 1-17(b), "to reach a result that is contrary to its plain language." Id. Justice Beasley would hold that the minor's claim was timely under the plain language of section 1-17(b). Id. Specifically, Justice Beasley argued that "[t]he statute's language could not be more clear" that section 1-17(b) "allows a minor plaintiff injured by the professional negligence of another to bring a claim at any time 'before the minor attains the full age of 19 years.'" Id. at __, 809 S.E.2d at 851–52. She noted that there is no provision in section 1-17(b) that allows for a different result if the minor is appointed a guardian ad litem or files suit but takes a voluntary dismissal under Rule 41(a)(1). Id. at __, 809 S.E.2d at 852.

Accordingly, Justice Beasley disagreed with the majority's conclusion that removal of the disability of minority by appointment of a guardian ad litem triggers the running of the statute of limitations—a conclusion that Justice Beasley noted was reached "without citation to authority." Id.

D. Statute of Repose

In Head v. Gould Killian CPA Group, P.A., __ N.C. App. __, __ S.E.2d __, 2018 WL 2171051 (2018), the supreme court considered the statute of repose for a professional-negligence claim in the context of summary judgment.

A taxpayer hired an accounting firm to prepare her tax returns for years 2005 through 2010. Id. at *1. The taxpayer's federal and state tax returns for years 2006 through 2009 were never filed. Id. The taxpayer sued the accounting firm for professional negligence and fraudulent concealment, alleging that the firm failed to properly prepare and file the delinquent tax returns and intentionally deceived her about the status of the returns. Id. at *2. The trial court granted summary judgment in favor of the accounting firm on the fraudulent-concealment claim for tax years 2006 through 2009, and on the professional-negligence claim for tax years 2006 and 2007 based on the statute of repose. Id. at *3.

A divided court-of-appeals panel affirmed in part and reversed in part the trial court's summary-judgment order. Id. (citing Head v. Gould Killian CPA Grp., P.A., __ N.C. App. __, 795 S.E.2d 142, 150–51 (2016)). The majority reversed the trial court on the statute of repose, concluding that whether the accounting firm was responsible for filing the tax returns and whether

and when it did so "determined when the statute of repose began to run, and thus constituted genuine issues of material fact." Id. (quoting Head, __ N.C. App. at __, 795 S.E.2d at 148). The court affirmed the trial court's dismissal of the fraudulent-concealment claim because the taxpayer failed to show that the firm had an ongoing relationship with her and a corresponding duty to honestly disclose information. Id. (citing Head, __ N.C. App. at __, 795 S.E.2d at 150). The dissent rejected the majority's statute-of-repose analysis and concluded that the last act or omission regarding the 2006 and 2007 tax returns occurred in December 2008 when the firm hand-delivered the taxpayer her prepared returns from 2007. Id. (citing Head, __ N.C. App. at __, 795 S.E.2d at 151 (Enochs, J., concurring in part and dissenting in part)). Thus, the four-year statute of repose barred the taxpayer's claim. Id. The accounting firm appealed based on the dissenting opinion, and the taxpayer filed a petition for discretionary review on the fraudulent-concealment claim, which the supreme court allowed. Id.

The supreme court affirmed in part and reversed in part the decision of the court of appeals. Id. at *7. Specifically, the court held that genuine issues of material fact regarding both the fraudulent-concealment claim and the scope and timing of the accounting firm's duties to the taxpayer made summary judgment improper on either claim. Id. at *1.

The evidence raised genuine issues of material fact on the fraudulent-concealment claim based on theories of actual and constructive fraud. Id. at *5. Therefore, the supreme court reversed the court of appeals on this issue. Id.

On the professional-negligence claim, the court noted that the statute of repose began to run at "the last act of the defendant giving rise to the cause of action." Id. at *6 (quoting N.C. Gen. Stat. § 1-15(c) (2017)). The supreme court concluded that the taxpayer presented substantial evidence that raised a genuine issue of material fact regarding the scope of the parties' contractual relationship and the timing of the corresponding "last act." Id. Viewed in the light most favorable to the taxpayer, the parties' agreement included both preparing and filing the taxpayer's returns and negotiations with the IRS. Id. Because there was a genuine issue of material fact concerning when the statute of repose began to run, the court affirmed the court of appeals' holding that the professional-negligence claim survived summary judgment. Id.

Justice Beasley concurred in part and dissented in part. Id. at *7 (Beasley, J., dissenting). Justice Beasley agreed with the majority that there were genuine issues of material fact regarding (1) when the taxpayer's professional-negligence claim accrued under the statute of repose and (2) the taxpayer's fraudulent-concealment claim under a theory of actual fraud. Id. She would have held that the taxpayer's failure to plead a constructive-fraud theory to support the fraudulent-concealment claim procedurally barred the taxpayer from asserting a constructive-fraud theory on remand. Id.

E. Standing

In Willowmere Community Ass'n v. City of Charlotte, __ N.C. __, 809 S.E.2d 558 (2018), the supreme court considered whether a corporate entity must affirmatively demonstrate

compliance with its bylaws and internal governance procedures before it may invoke the jurisdiction of the General Court of Justice.

Two community associations filed petitions challenging the validity of a zoning ordinance enacted by the city. Id. at __, 809 S.E.2d at 559. The trial court granted summary judgment for the city on the ground that the associations lacked standing to file suit because they failed to comply with various provisions of their corporate bylaws when their respective boards of directors initiated the litigation. Id. at __, 809 S.E.2d at 560. The trial court concluded that one of the associations lacked standing because its board of directors agreed in an e-mail to initiate the lawsuit, and e-mail was not an expressly authorized substitute for the board's written consent to take action without a formal meeting under the association's bylaws. Id. The court concluded that the other association's decision to commence litigation was defective under its bylaws because the association failed to, among other things, hold a formal meeting with a quorum of its directors present. Id. The court of appeals affirmed the trial court's summary-judgment ruling. See Willowmere Cmty. Ass'n v. City of Charlotte, __ N.C. App. __, 792 S.E.2d 805, 812–13 (2016).

The supreme court allowed the associations' petition for discretionary review and reversed the court of appeals. Willowmere Cmty. Ass'n, __ N.C. at __, 809 S.E.2d at 560. The court explained that "[l]egal entities other than natural persons may have standing." Id. at __, 809 S.E.2d at 561 (quoting River Birch Assocs. v. City of Raleigh, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990)). For an association to have standing, the "association or one of its members must suffer some immediate or threatened injury." Id. (quoting River Birch, 326 N.C. at 129, 338 S.E.2d at

555). "[A]n association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." Id. (alteration in original) (quoting River Birch, 326 N.C. at 129, 338 S.E.2d at 555).

The supreme court observed that the court of appeals' decision and the city's arguments were not based on the associations' failure to meet the elements of associational standing; rather, they relied on cases that dealt with an association's capacity to enforce restrictive covenants. Id. at __, 809 S.E.2d at 561–62.

The supreme court further noted that no appellate court in this state has ever held—until the court of appeals in this case—"(1) that a defendant who is a stranger to the plaintiff association may assert that the plaintiff's failure to abide by its own bylaws necessitates dismissal of the plaintiff's complaint for lack of standing," or "(2) that a corporate defendant must affirmatively demonstrate compliance with its bylaws and internal governance procedures in order to have standing." Id. at __, 809 S.E.2d at 563 (emphasis omitted). The court explained that "[n]othing in our jurisprudence on standing requires a corporate litigant to affirmatively plead or prove its compliance with corporation bylaws and internal rules relating to its decision to bring suit." Id. Because "standing is a 'necessary prerequisite to a court's proper exercise of subject matter jurisdiction'" that "can be challenged 'at any stage of the proceedings, even after judgment,' adopting such a rule would subject countless judgments across North Carolina to attack for want of subject matter jurisdiction." Id. at __, 809 S.E.2d at 563–64 (first quoting Crouse v. Mineo, 149

N.C. App. 232, 236, 658 S.E.2d 33, 36 (2008); then quoting In re T.R.P., 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006)).

The supreme court "decline[d] to permit a defendant who is a stranger to an association to invoke the association's own internal governance procedures as an absolute defense to subject matter jurisdiction in a suit filed by the association against that defendant." Id. at __, 809 S.E.2d at 564. If one of the associations' members disagreed with the associations' decision to file a lawsuit, the proper vehicle to challenge the associations' failure to comply with the bylaws is a suit against the association brought by the aggrieved member or, in certain circumstances, a derivative action. Id. The court noted that this holding comports with the reasoning of other jurisdictions that have considered this issue. Id. (citing multiple cases from other states).

For these reasons, the court concluded that despite the associations' failure to strictly comply with their bylaws and internal governance procedures, the associations "possess a 'sufficient stake in an otherwise justiciable controversy' to confer jurisdiction on the trial court to adjudicate this legal dispute." Id. at __, 809 S.E.2d at 565 (quoting Willowmere Cmty. Ass'n, __ N.C. App. at __, 792 S.E.2d at 813).

F. Service of Process

In Watauga County v. Beal, __ N.C. App. __, 806 S.E.2d 338 (2017), the court of appeals considered whether the county exercised the due diligence necessary to justify the use of service of process by publication under Rule 4(j1) of the North Carolina Rules of Civil Procedure when

the county was unable to effect service of process on a property owner by personal delivery or mail.

A property owner became delinquent on her tax obligations, and the county initiated collections for the taxes owed. Id. at __, 806 S.E.2d at 339. The county made several unsuccessful attempts to find a valid address for the owner. Id. Eventually, the county filed a complaint to collect the delinquent taxes from the owner and to initiate foreclosure proceedings to satisfy the tax lien, along with a notice of service by publication. Id. The county also attempted service by certified mail to the owner's address of record, but the mail was returned as undeliverable. Id. Default judgment was entered against the property owner, and the property was sold. Id.

The owner filed a motion to set aside the entry of default, default judgment, foreclosure sale, and commissioner's deed. Id. at __, 806 S.E.2d at 340. She claimed that the county's service by publication was effectuated before a diligent effort was made to locate and serve the owner personally. Id. The trial court denied the owner's motion to set aside. Id.

The court of appeals affirmed. Id. at __, 806 S.E.2d at 343. Under North Carolina Civil Procedure Rules 4(j1) and 4(k), and section 1-75.8 of the North Carolina General Statutes, if after due diligence, a plaintiff in a foreclosure action is unable to serve the defendant by personal delivery, registered mail, certified mail, or designated delivery service, the defendant may be serve by publication in the county where the action is pending. N.C. Gen. Stat. §§ 1A-1, Rules 4(j1), (k), 1-75.8 (2017). The court analyzed what constitutes "due diligence" under Rule 4(j1). Id. at __, 806 S.E.2d at 340–41.

The court of appeals explained that there is "no 'restrictive mandatory checklist for what constitutes due diligence' for purposes of service of process by publication; '[r]ather, a case by case analysis is more appropriate.'" Id. (alteration in original) (quoting Jones v. Wallis, 211 N.C. App. 353, 358, 712 S.E.2d 180, 184 (2011)). The court noted that while "the 'due diligence' test of Rule 4(j1) requires a party to use all reasonably available resources to accomplish service," it does not require a plaintiff "to jump through every hoop later suggested by a defendant in order to meet" the due-diligence requirement. Id. at __, 806 S.E.2d at 342 (first quoting Barclays Am./Mortg. Corp. v. BECA Enters., 116 N.C. App. 100, 103, 446 S.E.2d 883, 886 (1994); then quoting Jones, 211 N.C. App. at 359, 712 S.E.2d at 185). This is especially "true when there is no indication in the record that any of the steps suggested by a defendant would have been fruitful." Id. (quoting Jones, 211 N.C. App. at 359, 712 S.E.2d at 185). After all, the court noted, a party is not required to "explore every possible means of ascertaining the location of a defendant." Id. (quoting Jones, 211 N.C. App. at 359, 712 S.E.2d at 185).

The court held that, because the "unique facts" of the case showed that the county "was aware based on extensive prior experience with [the owner] that it could not effect service of process on [the owner] by personal delivery or by registered or certified mail, [the county's] actions satisfied the 'due diligence' requirement necessary to justify the use of service of process by publication." Id. at __, 806 S.E.2d at 339. The record and the trial court's findings of fact made clear that, for years, the county had been unable to reach the owner at the address that she provided

to the county tax administrator. Id. at __, 806 S.E.2d at 342. Accordingly, the court agreed that service by any means other than publication would not have been fruitful. Id.

G. Class Action

In Chambers v. Moses H. Cone Memorial Hospital, __ N.C. App. __, __ S.E.2d __, 2018 WL 1801629 (2018), the court of appeals considered whether a class action can proceed when the named plaintiff's claim becomes moot.

A patient signed a consent form before receiving treatment for an emergency procedure at a hospital. Id. at *1. The form stated "I understand that I am financially responsible for, guarantee and agree to pay in full, in accordance with the regular rates and terms of [the hospital] at the time of patient's treatment, for all services provided to me by [the hospital]." Id. The hospital billed the patient $14,578.14 for services rendered and materials provided during his stay at the hospital. Id. When the bill went uncollected, the hospital sued the patient in district court. Id.

The patient filed a class-action complaint against the hospital alleging that the hospital charged inflated prices for emergency-care services provided to uninsured patients. Id. He later filed an amended class-action complaint seeking only a declaratory judgment that the hospital's consent form entitled the hospital to no more than the reasonable value of the treatment or services provided. Id. The hospital dismissed its counterclaims against the patient in connection with the amended class-action complaint as well as the district-court action, and moved to dismiss the amended complaint under Rule 12(b)(1). Id. The business court dismissed the amended complaint on mootness grounds, concluding that "[t]here was no longer a controversy between the parties,

and the case did not fit within an exception that allowed a moot claim to proceed." Id. at *2. The patient appealed, arguing that the business court erred by concluding that the hospital's dismissal of its counterclaims defeated the patient's right to continue prosecuting the putative class action. Id.

The court of appeals affirmed. Id. Because the hospital dismissed with prejudice all counterclaims against the patient as well as the district-court action, the patient no longer had an individual claim against the hospital and was not subject to suit by the hospital for recovery of the outstanding balance owed for emergency medical services. Id. at *3. Because the patient's bill was permanently waived or written off, he was no longer a member of the proposed class that he sought to represent. Id.

The patient argued that at least three exceptions to the mootness doctrine precluded dismissal of his action: (1) "cases in which termination of a class representative's claim does not moot the claims of the unnamed members of the class," (2) "a defendant's voluntary cessation of a challenged practice does not deprive . . . a court of its power to determine the legality of the practice," and (3) "the court has a 'duty' to address an otherwise moot case when the 'question involved is a matter of public interest.'" Id. (quoting Thomas v. N.C. Dep't of Human Res., 124 N.C. App. 698, 705, 478 S.E.2d 816, 820 (1996), aff'd, 346 N.C. 268, 485 S.E.2d 295 (1997)).

The court disagreed. Id. The court explained that the patient did not raise a challenge that is temporary in nature or likely to be resolved before the claim could be heard. Id. Moreover, the proposed class had only one proposed representative—the patient—and that patient lacked a

genuine personal interest in the outcome of the case. Id. at *4. For these reasons, the court of appeals affirmed. Id.

The patient has filed a petition for discretionary review. That petition is currently pending.

H. Immunity

In Ballard v. Shelley, __ N.C. App. __, 811 S.E.2d 603 (2018), the court of appeals discussed the circumstances in which a county waives its governmental immunity by purchasing excess liability insurance.

Homeowners asserted tort claims against the county in connection with a fence on the homeowners' property that was not in compliance with county code requirements. Id. at __, 811 S.E.2d at 605. The county moved to dismiss on governmental-immunity grounds. Id. The trial court granted the county's motion to dismiss and found that the county had not waived its immunity by purchasing excess liability insurance. Id. The homeowners appealed. Id.

The court of appeals affirmed on the issue of governmental immunity. Id. at __, 811 S.E.2d at 607. The court first addressed its jurisdiction over the appeal. Id. at __, 811 S.E.2d at 605. It explained that when a state entity moves to dismiss tort claims based on immunity and the trial court denies the motion, "that denial unquestionably affects a substantial right." Id. But the same is not true when the trial court grants a motion to dismiss tort claims on governmental-immunity grounds, because "the losing party is in the same position as any other litigant whose claim was dismissed for lack of jurisdiction or for failure to state a claim." Id. The court nonetheless allowed the homeowners' appeal to proceed in light of conflicting case law on this issue, since "one panel

of [the court of appeals] cannot overrule another." Id. at __, 811 S.E.2d at 606 (citing In re Civil Penalty, 324 N.C. 373, 384, 379 S.E.2d 30, 36 (1989)).

On the merits of the homeowners' appeal, the court explained that a county may waive its immunity by purchasing liability insurance that covers a particular risk. Id. (citing N.C. Gen. Stat. § 153A-435(a) (2017)). That waiver, however, applies only "to the extent of insurance coverage." Id. (quoting N.C. Gen. Stat. § 153A-435(a)). The court noted that it has previously discussed how the waiver rule applies to an insurance policy that provides excess liability coverage above the municipality's own self-insured retention. Id. Those cases, the court explained, "have held that excess policies do not waive immunity when they are not triggered until the municipality first pays the entire amount of the self-insured retention." Id. The court concluded that the county's excess policy did not waive its immunity with respect to the homeowners' tort claims. Id. at __, 811 S.E.2d at 606–07. The policy language stated that the county's obligation to pay is not triggered until a judgment is entered against the county or the county agrees to pay the claim (with the insurer's approval). Id. at __, 811 S.E.2d at 607. The homeowners did not show that either of those triggering events had occurred. Id.

I. Rule 9(j) Experts

In Bluitt v. Wake Forest University Baptist Medical Center, __ N.C. App. __, __ S.E.2d __, 2018 WL 1801311 (2018), the court of appeals considered the circumstances in which a res ipsa loquitur claim is appropriate in a medical-malpractice action.

A patient filed a complaint for medical negligence against a hospital based on the theory of res ipsa loquitur. Id. at *1. The complaint alleged that the patient underwent a cardiac ablation to correct her irregular heartbeat. Id. When the patient awoke after surgery, she immediately "experienced horrific and excruciating pain in her lower back." Id. Before her procedure, she had no back pain or injury, and she claimed no personal knowledge as to how, why, or when she sustained a lower-back injury. Id. Later, the injury on the patient's back was diagnosed as a third-degree burn, which required the patient to undergo a skin graft. Id. The patient alleged that the hospital's negligence was the proximate cause of her injury, but did not allege that her medical care had been reviewed by an expert before she filed the complaint. Id.

The hospital moved to dismiss for failure to comply with Rule 9(j). Id. The hospital filed a supporting brief and four affidavits from cardiac electrophysiologists to support its argument that the motion to dismiss should be granted because (1) the patient's complaint failed to establish negligence under a res ipsa loquitur theory, (2) North Carolina rarely applies res ipsa loquitur to medical-malpractice claims, (3) the patient's alleged injury was an inherent risk of the procedure that she underwent, and (4) even if the burns were not an inherent risk of the procedure, the average juror would require expert testimony to determine whether the hospital's conduct fell below the applicable standard of care. Id. The trial court granted the hospital's motion to dismiss based on the patient's failure to comply with Rule 9(j). Id.

On appeal, the patient argued that the trial court erred by converting her motion to dismiss into a motion for summary judgment by considering the hospital's expert affidavits, and by

impermissibly applying Rule 9(j)(1) and (2)'s certification requirements to her Rule 9(j)(3) claim. Id.

The court of appeals affirmed. Id. In medical-malpractice cases, a complaint must meet the heightened standard of Rule 9(j) to survive a motion to dismiss. Id. at *2. Res ipsa loquitur "applies when (1) direct proof of the cause of an injury is unavailable, (2) defendant controlled the instrumentality involved in the accident, and (3) 'the injury is of a type that does not ordinarily occur in the absence of some negligent act or omission.'" Id. (quoting Grigg v. Lester, 102 N.C. App. 332, 333, 401 S.E.2d 657, 657–58 (1991)). A plaintiff who alleges res ipsa loquitur "must show that the injury resulted from the defendant's negligent act, and also 'must be able to show—without the assistance of expert testimony—that the injury was of a type not typically occurring in [the] absence of some negligence by defendant.'" Id. (quoting McGuire v. Riedle, 190 N.C. App. 785, 787, 661 S.E.2d 754, 758 (2008)).

The court first noted that a trial court can consider affidavits in the context of its Rule 9(j) ruling without converting a motion to dismiss into a motion for summary judgment. Id.

The court also rejected the patient's argument that the trial court allowed the hospital to use Rule 9(j)(1) and (2) certification requirements to obtain a dismissal. Id. at *3. The court noted that it has "consistently found that 'res ipsa loquitur is inappropriate in the usual medical malpractice case where the question of injury and the facts in evidence are peculiarly in the province of expert opinion.'" Id. (quoting Robinson v. Duke Univ. Health Sys., Inc., 229 N.C.

App. 215, 225, 747 S.E.2d 321, 329 (2013)). Thus, the court has applied the doctrine of res ipsa loquitur "in a somewhat restrictive manner":

> [T]he majority of medical treatment involves inherent risks which even adherence to the appropriate standard of care cannot eliminate. This, coupled with the scientific and technical nature of medical treatment, renders the average juror unfit to determine whether [a] plaintiff's injury would rarely occur in the absence of negligence. Unless the jury is able to make such a determination[, a] plaintiff clearly is not entitled to the inference of negligence [that res ipsa loquitur] affords.

Id. (second and third alterations in original) (quoting Robinson, 229 N.C. App. at 225–26, 747 S.E.2d at 329–30). The court explained that, in accordance with this principle, the court of appeals "will affirm the dismissal of medical negligence complaints based on" res ipsa loquitur "where both the standard of care and its breach must be established by expert testimony." Id.

Here, the hospital supported its position with four affidavits from specialists in the field who explained the procedures involved in a cardiac ablation, noted that burns to the back are an unforeseeable, inherent risk of the procedure, and that burns during the procedure can occur without negligence on the part of the physician performing the procedure. Id. The court agreed that the facts alleged in the complaint necessarily defeated a res ipsa loquitur claim. Id. at *4. The procedures involved in a cardiac ablation are outside of the common knowledge, experience, and sense of a layperson. Id. Thus, "without expert testimony, a layperson would lack a basis upon which to make a determination as to whether plaintiff's back injury was an injury that would not normally occur in the absence of negligence, or was an inherent risk of a cardiac ablation." Id. When a plaintiff claiming medical negligence cannot show that the injury was of a type not

typically occurring in the absence of some negligence by a defendant without the use of expert testimony, res ipsa loquitur claims are inappropriate. Id. Accordingly, dismissal under Rule 9(j) was proper. Id.

The patient has filed a petition for discretionary review. That petition remains pending.

In Ingram v. Henderson County Hospital Corp., __ N.C. App. __, __ S.E.2d __, 2018 WL 2011527 (2018), the court of appeals considered the circumstances in which a complaint that facially complies with Rule 9(j) warrants dismissal based on facts revealed during discovery that show noncompliance with Rule 9(j).

A hospital moved to dismiss a patient's claim regarding nursing care because the patient's expert witness on this issue testified in her deposition that she did not believe that the nursing care fell below the applicable standard of care. Id. at *13. The trial court dismissed the patient's claims against the hospital to the extent that the complaint asserted a negligence claim based on the theory that the hospital's nursing staff failed to comply with the applicable standard of care. Id.

The court of appeals affirmed. Id. at *17. The court rejected the patient's argument that her complaint complied with Rule 9(j) because she reasonably expected her expert to testify regarding nursing care. Id. at *14. The court noted that the trial court's findings of fact quoted the expert's deposition testimony stating "that she had not believed nor would she testify that the nursing care provided by [the hospital] fell below the standard of care." Id. The court explained that it is "well established that even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not

supported by the facts, then dismissal is likewise appropriate." Id. (quoting Ford v. McCain, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008)).

The court also rejected the patient's argument that even if her expert was unwilling to testify, three other experts were all willing to testify that the nursing care fell below the standard, and that the patient brought these experts' willingness to testify to the trial court's attention before the court dismissed the action. Id. at *15. The court of appeals concluded that the patient failed to identify those three experts as experts who would offer opinions regarding nursing care in response to discovery. Id.

Accordingly, the court of appeals concluded that the trial court's findings of fact supported its conclusion of law that the patient's claim for medical negligence did not comply with Rule 9(j).

J. Failure to State a Claim

In ABC Services, LLC v. Wheatly Boys, LLC, __ N.C. App. __, __ S.E.2d __, 2018 WL 2207327 (2018), the court of appeals considered the trial court's authority to hear a motion that has not been properly noticed under the local court rules.

A car-wash company alleged that a company's employee damaged its car-wash facility when the employee dumped a large quantity of diesel fuel into a drain at the facility. Id. at *1. The car-wash company filed a complaint against the employee's employer to recover cleanup costs. Id. The employer filed an answer that contained a Rule 12(b)(6) motion to dismiss. Id. Later in the case, before trial, the parties stipulated in a pretrial order that the only pending motions in the case were motions in limine. Id. Two years later, the trial court heard the motions in limine

and empaneled a jury. Id. The next day, before trial began, the trial court heard and granted the employer's 12(b)(6) motion to dismiss. Id. The car-wash company appealed. Id.

The court of appeals affirmed in part and reversed and remanded in part. Id. at *5. The court explained that "[g]enerally, a trial court is free to consider a motion to dismiss at any time before trial begins." Id. at *1 (citing N.C. Gen. Stat. § 1A-1, Rule 12(h)(2) (2017)). "However, motions practice must adhere to the particular rules of the reviewing jurisdiction." Id. (citing Forman & Zuckerman, P.A. v. Schupak, 38 N.C. App. 17, 20, 247 S.E.2d 266, 269 (1978)). In North Carolina District 3B where the matter was brought, the local rules require that dispositive motions be noticed to all parties at least fifteen days before trial. Id. at *2. Because a trial court has discretion to modify or avoid a jurisdiction's local rules, the court of appeals reviewed the trial court's decision to disregard the local rules under an abuse-of-discretion standard. Id.

The court of appeals concluded that the trial court did not abuse its discretion in considering the employer's Rule 12(b)(6) motion because the car-wash company had notice of the pending motion. Id. (citing Harold Lang Jewelers, Inc. v. Johnson, 156 N.C. App. 187, 576 S.E.2d 360 (2003)). The employer placed the car-wash company on notice of the motion to dismiss when it filed its answer two years prior. Id. The court noted that "[t]he local rules serve to ensure that all parties are on notice of trial proceedings and that nothing new is raised at trial for the first time." Id.

As to the sufficiency of the pleadings, the court agreed with the trial court's dismissal of the car-wash company's claim for littering under N.C. Gen. Stat. § 14-399 because the car-wash

drain was "a litter receptacle of some sort." Id. at *3. The court held, however, that the complaint properly stated claims for trespass and negligence, and thus, it reversed the trial court on those issues. Id. at *4–5.

K. Sanctions

In GEA, Inc. v. Luxury Auctions Marketing, Inc., __ N.C. App. __, __ S.E.2d __, 2018 WL 2207528 (2018), the court of appeals considered whether the trial court erred in striking a party's defenses and entering default as a sanction for the party's failure to comply with a discovery order.

A man entered into an agreement with the owner of residential auction companies to purchase one of the owner's companies through a stock purchase. Id. at *1. The owner retained ownership of one company. Id. Conflict arose between the parties shortly after the purchase, which resulted in litigation. Id. Most of the information and supporting proof for the owner's claims was stored on company and individual computers that the man took with him after the stock purchase. Id. at *2. Accordingly, the owner's company served the man's company with a request to inspect the computers and equipment. Id.

During the man's deposition, his counsel informed the owner that the man had destroyed the computers after the litigation commenced. Id. The man testified that "the majority of the computers, if not all," had been discarded. Id. The man also testified that although he knew that the owner sought return of the computers as part of the claims in the case, the man's company "had the right to do with [the computers] as [it] pleased." Id. (emphasis omitted). The owner's company

filed a motion to compel inspection of the computers. Id. The man's company responded that even though the man discarded the computers, he had "made copies of the files of the discarded computers, and those files [were] available for inspection on the hard drives in [the man's] possession." Id.

The trial court ordered the man's company to make the computer servers and any available hardware and equipment for the computers available for inspection, including the man's personal laptop. Id. at *3. The man's company produced a server but did not produce the backups or the personal laptop, and the server could not be inspected without certain login credentials. Id. When the owner's company asked for the login credentials, the man said that he did not know them and that his company's IT employee could not remember them. Id. As a result, the owner's company was unable to access the server. Id. Despite this, the man's company repeatedly requested that the owner return the inaccessible server. Id.

The owner's company filed a motion to show cause to avoid contempt. Id. The trial court orally granted the motion and gave the man's company ten days to produce the server's password, the laptop, and any other computers or backups in its possession. Id. The trial court ordered that the company be sanctioned if it failed to produce these items. Id. When the man's company failed to produce or provide a password within ten days, the trial court reduced its order to writing. Id. The order denied the company's motion for reconsideration and for in camera review of the man's personal laptop, found the company to be in violation of the court's order on the motion to compel, and affirmed sanctions against the company. Id. The order also stated that if

the man's company did not comply with the production requirements by noon of that day, the sanction for noncompliance would be to strike the company's defenses in the case and enter judgment by default in the owner's company's favor on all its claims. Id. The man's company appealed. Id. at *4.

The court of appeals affirmed. Id. at *9. The court first rejected the man's company's argument that the trial court erred by failing to make findings of fact and conclusions of law that it considered lesser sanctions than the striking of defenses and entry of default judgment. Id. at *5. A trial court must consider lesser sanctions before it chooses to strike a party's defenses or counterclaims. Id. (quoting Clawser v. Campbell, 184 N.C. App. 526, 531, 646 S.E.2d 779, 783 (2007)). But the trial court is not required to make formal findings of fact and conclusions of law stating that it considered lesser sanctions "in order to sustain an order's validity in every instance." Id. An order for sanctions will be affirmed if the court of appeals can infer "'from the record that the trial court considered all available sanctions' and 'the sanctions imposed were appropriate in light of the party's actions.'" Id. (quoting In re Pedestrian Walkway Failure, 173 N.C. App. 237, 251, 618 S.E.2d 819, 828 (2005)).

The court of appeals concluded that it could infer from the record that the trial court considered lesser sanctions and that the sanctions imposed were appropriate. Id. at *6. It noted that the trial court even gave the man's company the opportunity to avoid sanctions altogether by complying with the terms of the order on the motion to compel within ten days. Id.

The court also rejected the man's company's argument that the trial court erred when it found the company in violation of the motion-to-compel order. Id. The court's review of the record showed that the order mandated production of the man's personal laptop, and the man failed to produce the laptop. Id. The court further concluded that man's company failed to make the server "available for inspection" because it failed to provide the server's login credentials. Id. at *7.

Finally, the court was not persuaded by the man's company's argument that the trial court abused its discretion by imposing sanctions without regard to the company's inability to provide the server's login credentials or to the man's privacy interests in his personal laptop. Id.

As to the server, the trial court made clear that it did not find credible the man's assertion that neither he nor his company's agents knew the server's login credentials. Id. It was "the province of the trial court" to determine the credibility of the company's contentions on this matter, and the court did not abuse its discretion by ordering that the company be sanctioned if it failed to provide the credentials. Id.

As to the man's personal laptop and the argument that the trial court should have conducted an in camera review of the laptop, the court of appeals reiterated that the rules of discovery allow parties to "obtain discovery concerning any unprivileged matter as long as it is relevant to the pending action and is reasonably calculated to lead to the discovery of admissible evidence." Id. at *8. Whether to conduct an in camera review is within the trial court's discretion. Id. Thus, while the man's personal laptop might have contained "needless" personal information, the court

of appeals found sufficient evidence in the record to suggest that the laptop also contained information relating to the claims in the case that would lead to the discovery of admissible evidence. Id. The court expressed concern about the man's attitude and overall contempt for the discovery process and concluded that the trial court did not abuse its discretion when it ordered that the man's company be sanctioned unless the man produced his personal laptop for inspection. Id. at *9.

For these reasons, the court concluded that the trial court did not err in striking the man's company's counterclaim defenses and entering default against the company. Id.

L. Rule 41

In Market America, Inc. v. Lee, __ N.C. App. __, 809 S.E.2d 32 (2017), the court of appeals considered whether a plaintiff is permitted to voluntarily dismiss its claims under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure after the trial court has announced its ruling against the plaintiff on the defendant's dispositive motion but before the court has memorialized its ruling in a written order.

A company sued its former employee for breach of a noncompete agreement. Id. at __, 809 S.E.2d at 35. The former employee filed an answer along with a motion to dismiss under Rule 12(b)(6) and a motion for judgment on the pleadings under Rule 12(c). Id. At the close of the hearing on the former employee's motions, the trial court announced its ruling from the bench that it would grant the former employee's motions and directed counsel to draft a written order. Id. A few hours later, the company filed a notice of voluntary dismissal without prejudice under Rule

41(a)(1). Id. The former employee moved to vacate the notice of voluntary dismissal on the ground that the dismissal was ineffective because it was not taken in good faith. Id. The trial court entered a written order granting the former employee's motion to vacate the voluntary dismissal and dismissing the company's claims against the former employee with prejudice. Id.

The court of appeals affirmed the trial court's ruling on the former employee's motion to vacate the voluntary dismissal and reversed the portion of the order dismissing the company's claims under Rule 12. Id. at __, 809 S.E.2d at 42.

The court first analyzed whether the company's voluntary dismissal was proper. Id. at __, 809 S.E.2d at 36. Under Rule 41(a)(1), a plaintiff may file a notice of voluntary dismissal "at any time before the plaintiff rests his case." Id. (quoting N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (2017)). "The only limitations are that the dismissal not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial." Id. at __, 809 S.E.2d at 37 (emphasis omitted) (quoting Brisson v. Santoriello, 351 N.C. 589, 597, 528 S.E.2d 568, 573 (2000)).

The court noted that the company's only challenge to the trial court's ruling was that the voluntary dismissal was taken in bad faith. Id. The company's argument was that "no published opinion exists in which North Carolina's appellate courts have invalidated an attempted voluntary dismissal based on the bad faith exception under these circumstances." Id. The company asserted that the scope of the bad-faith exception is restricted exclusively to the "unique fact pattern" in

Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986)—the case in which the supreme court first recognized the bad-faith exception. Mkt. Am., Inc., __ N.C. App. at __, 809 S.E.2d at 37.

In Estrada, the plaintiff filed a bare-bones complaint one day before the statute of limitations was set to expire and filed a notice of voluntary dismissal two minutes later, with no effort to ever serve the summons and complaint on the defendant. Id. Over eleven months later, the plaintiff filed a new complaint arising out of the same events, but provided more detail. Id. at __, 809 S.E.2d at 38. The defendant moved to dismiss the second complaint as time-barred, and the plaintiff argued that the complaint was timely because Rule 41 had granted him an additional one-year period from the date of the dismissal to refile his complaint. Id. The trial court dismissed the second complaint as untimely, and the supreme court agreed. Id. The supreme court observed that the plaintiff made a "candid admission" that the "lawsuit was filed with the sole intention of dismissing it in order to avoid the lapse of the statute of limitations" and held that such an admission was "tantamount to a concession that his only purpose in certifying the complaint was to extend the deadline by which he must draft and file a sufficient complaint." Id. (quoting Estrada, 316 N.C. at 325, 341 S.E.2d at 543).

While acknowledging that unpublished opinions of the court of appeals lack precedential authority, the court found Eubank v. Van-Riel, No. COA11-1088, 2012 WL 2308310 (N.C. Ct. App. June 19, 2012), instructive in this case. Mkt. Am., Inc., __ N.C. App. at __, 809 S.E.2d at 38. In Eubank, the trial court addressed how the bad-faith exception applies in the "precise circumstances at issue in the present case," explaining that the timing of a notice of voluntary

dismissal after a bench ruling but before the ruling is memorialized in a written order "permits no conclusion other than that [the plaintiff] was attempting to prevent the trial court from dismissing his complaint." Id. (quoting Eubank, 2012 WL 2308310, at *12).

The court of appeals concluded that while "[t]aking a voluntary dismissal based on concerns about the potential for a future adverse ruling" is permissible, "[d]ismissing an action after such a ruling has actually been announced by the court is not." Id. Once the trial court has announced its ruling against the plaintiff on the defendant's dispositive motion, "Rule 41 does not permit the proceeding to devolve into a footrace between counsel to see whether a notice of voluntary dismissal can be filed before the court's ruling is memorialized in a written order and filed with the clerk of court." Id. "To hold otherwise would 'make a mockery of' the court's ruling." Id. (quoting Maurice v. Hatterasman Motel Corp., 38 N.C. App. 588, 592, 248 S.E.2d 430, 433 (1978)).

The court of appeals reversed the portion of the trial court's granting the former employee's motions under Rule 12. Id. at __, 809 S.E.2d at 42. The court explained that while "our appellate courts have made clear that non-compete agreements are unenforceable where the time and territorial restrictions contained therein are overbroad," the trial court cannot make that determination at the pleadings stage in cases where evidence is needed to show the reasonableness of the restrictions contained therein." Id. at __, 809 S.E.2d at 41. The court concluded that the enforceability of the noncompete agreement here could not be decided on the pleadings. Id. at __, 809 S.E.2d at 42.

M. Summary Judgment

In Badin Shores Resort Owners Ass'n v. Handy Sanitary District, __ N.C. App. __, 811 S.E.2d 198 (2018), the court of appeals considered whether a party waives its right to ten days' notice for a summary-judgment hearing by attending and participating in the hearing.

An HOA sued a utility that provides water and sewer services to the HOA over the terms of a contract between the parties. Id. at __, 811 S.E.2d at 201. On January 3, 2017, the HOA moved for summary judgment on its declaratory-judgment claim, and on January 10, 2017, the utility moved for summary judgment in its favor on all of the HOA's claims. Id. at __, 811 S.E.2d at 203–04. On January 17, 2017, the court held a hearing on the summary-judgment motions and on earlier-filed motions to dismiss. Id. at __, 811 S.E.2d at 204. The trial court granted summary judgment for the utility and dismissed the HOA's complaint. Id. The HOA appealed. Id.

On appeal, the HOA argued that, as to certain of its claims, the utility's motion for summary judgment was not properly before the trial court. Id.

The court of appeals affirmed. Id. at __, 811 S.E.2d at 206. The court noted that the HOA was correct that Rule 56(c) provides that a motion for summary judgment "shall be served at least 10 days before the time fixed for hearing," and that here, the utility's motion was served only seven days before the hearing. Id. at __, 811 S.E.2d at 204 (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017)). The court of appeals nonetheless concluded that the HOA was not entitled to relief on this basis. Id. at __, 811 S.E.2d at 205. The court explained that "[i]t is well-established that "[a] party who is entitled to notice of a motion may waive notice," and that "[a] party ordinarily does

this by attending the hearing on the motion and participating in it." Id. (quoting Collins v. N.C. State Highway Comm'n & Pub. Works Comm'n, 237 N.C. 277, 283, 74 S.E.2d 709, 714–15 (1953)). Here, the HOA "attended the hearing and participated in it, without requesting a continuance, objecting, or arguing that [it] needed more time to prepare." Id. Accordingly, the court held that the HOA waived any objection to the timeliness of service of the utility's motion for summary judgment. Id. at __, 811 S.E.2d at 206.

The court further noted that to obtain relief, an appellant must not only show error but "must also show that the error was material and prejudice, amounting to denial of a substantial right that will likely affect the outcome of the action." Id. at __, 811 S.E.2d at 205 (quoting Bogovich v. Embassy Club of Sedgefield, Inc., 211 N.C. App. 1, 14, 712 S.E.2d 257, 266 (2011)). Here, the HOA did not request a continuance, object, or ask for more time to prepare, nor did the HOA argue that it was prejudiced by the hearing being held seven days after service rather than ten days. Id.

In Sullivan v. Pugh, __ N.C. App. __, __ S.E.2d __, 2018 WL 1597433 (2018), the court of appeals considered whether a grant of summary judgment deprives a litigant of his constitutional right to a trial by jury.

A man and a company engaged in litigation over which party owned timbered property that sustained fire damage. Id. at *1. The trial court granted summary judgment in the company's favor. Id. The man appealed, arguing that his constitutional right to a trial by jury was denied when the court granted the company's motion for summary judgment. Id. at *2. Specifically, the

man argued that "although Rule 56 'is a commendable attempt by the judiciary to extend its power in order to reduce its docket and render the courts more efficient,' it is nevertheless 'blatantly unconstitutional,' treasonous, and should not be tolerated." Id. To support his argument, the man relied on article I, section 25 of the North Carolina Constitution, which states that "[i]n all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." Id. (quoting N.C. Const. art. I, § 25).

The court of appeals affirmed. Id. at *4. The court explained that the constitutional right to trial by jury is not absolute, but "is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury." Id. at *2 (quoting Bank v. Burnette, 297 N.C. 524, 537, 256 S.E.2d 388, 396 (1979)). Thus, "[t]he right to a jury trial accrues only when there is a genuine issue of fact to be decided at trial." Id. (quoting State ex rel. Albright v. Arellano, 165 N.C. App. 609, 618, 599 S.E.2d 415, 421 (2004)). If "'the trial court determines that only questions of law, not fact, are at issue,' a trial is not necessary and is to be eliminated, along with the attendant opportunity for the nonmoving party to present its facts to the jury." Id. (quoting Loy v. Lorm Corp., 52 N.C. App. 428, 437, 278 S.E.2d 897, 903 (1981)). The court of appeals determined that the trial court did not err in granting summary judgment for the company because no genuine issues of material fact existed. Id. at *4.

III. TRIAL

A. Evidence

(1) Attorney-Client Privilege

In Friday Investments, LLC v. Bally Total Fitness of the Mid-Atlantic, Inc., 370 N.C. 235, 805 S.E.2d 664 (2017), the supreme court considered whether a contractual duty to defend and indemnify gives rise to an attorney-client relationship.

A commercial landlord sued its former tenants for payment of back rent and other charges under a lease agreement for a large health-club space that the former tenants had assigned to a successor tenant. Id. at 236, 805 S.E.2d at 666. The former tenants sought indemnification from the successor tenant under an asset purchase agreement, which transferred any obligations arising under the leases of fitness clubs sold. Id. The indemnification clause in the asset purchase agreement stated that the successor tenant would "defend, indemnify, and hold [the former tenants] . . . harmless of, from and against any Losses incurred . . . on account of or relating to . . . any Assumed Liabilities, including those arising from or under the Real Property Leases after the Closing." Id.

During discovery, the landlord's counsel requested that the former tenants' counsel produce copies of "post-suit correspondence and documents exchanged between" the former tenants and the successor tenant. Id. at 236, 805 S.E.2d at 667. The former tenants refused, and the landlord moved to compel production of the documents. Id. at 237, 805 S.E.2d at 667. The former tenants objected on the basis of attorney-client privilege and moved for a protective order.

Id. After conducting an in camera inspection, the trial court denied the motion for a protective order, and the former tenants appealed. Id.

The court of appeals affirmed. Id.; see Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc., __ N.C. App. __, 788 S.E.2d 170 (2016). The court of appeals held that there was no tripartite attorney-client relationship between the former tenants and the successor tenant because "an indemnification provision in an asset purchase agreement, standing alone, is insufficient to create a common legal interest between a civil indemnitee and a third-party indemnitor." Friday Invs., LLC, 370 N.C. at 237, 805 S.E.2d at 667 (quoting Friday Invs., LLC, __ N.C. App. at __, 788 S.E.2d at 172).

The supreme court modified and affirmed the decision of the court of appeals. Id. at 242, 805 S.E.2d at 670. The court first explained that while, "[h]istorically, an attorney-client relationship arises between an attorney and a single client the attorney represents," the supreme court "has also recognized a multiparty attorney-client relationship in which an attorney represents two or more clients." Id. at 238, 805 S.E.2d at 667 (first quoting In re Investigation of Miller, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003); then citing Dobias v. White, 240 N.C. 680, 685, 83 S.E.2d 785, 788 (1954) (indicating that an attorney-client relationship can exist when "two or more persons employ the same attorney to act for them in some business transaction")). The court explained that "[t]he rationale for recognizing this tripartite attorney-client relationship is that individuals with a common interest in the litigation should be able to freely communicate with their attorney, and with each other, to more effectively defend or prosecute their claims." Id. at

238, 805 S.E.2d at 668 (quoting Raymond v. N.C. Police Benevolent Ass'n, 365 N.C. 94, 99, 721 S.E.2d 923, 926 (2011)).

On those same lines, the court explained, "[a] contractual duty to defend and indemnify creates a common interest and tripartite relationship between the insurer, the insured, and the defense attorney." Id. at 239, 805 S.E.2d at 668 (quoting Raymond, 365 N.C. at 98–99, 721 S.E.2d at 926). Like the common interest that exists "between the insurer and the insured, an indemnification agreement creates a common interest between the indemnitor and the indemnitee in that the indemnitor contractually shares in the indemnitee's legal well-being because the agreement subjects the indemnitor to the 'damages assessed and loss resulting from an adverse judgment.'" Id. (quoting Queen City Coach Co. v. Lumberton Coach Co., 229 N.C. 534, 536, 50 S.E.2d 288, 289 (1948)). Further, "[t]he fact that indemnification relates to a business purpose does not sever but strengthens that common interest." Id. Accordingly, the supreme court explained, an indemnification agreement gives rise to an attorney-client relationship "because the interests of both the indemnitor and indemnitee in prevailing against the plaintiff's claim are contractually aligned, notwithstanding that usually only the indemnitee has been sued." Id.

The supreme court further explained, however, that the mere existence of an attorney-client relationship does not automatically trigger the attorney-client privilege. Id. at 240, 805 S.E.2d at 669 (citing Dobias, 240 N.C. at 684, 83 S.E.2d at 788). For the attorney-client privilege to apply, the communication must satisfy the five-factor test articulated in State v. Murvin, 304 N.C. 523, 284 S.E.2d 289 (1981):

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

Friday Invs., LLC, 370 N.C. at 240, 805 S.E.2d at 669 (quoting Murvin, 304 N.C. at 531, 83 S.E.2d at 294). The supreme court noted that "[t]he trial court is best suited to determine, through a fact-sensitive inquiry, whether the attorney-client privilege applies to a specific communication." Id. (emphasis omitted) (quoting Raymond, 365 N.C. at 100, 721 S.E.2d at 927).

Here, the supreme court concluded that although a tripartite attorney-client relationship existed, the "bare record" did not show that the trial court abused its discretion or misapplied the law in determining that the post-litigation communications between the former tenants and the successor tenant were not privileged and compelling disclosure of those communications. Id. at 241, 805 S.E.2d at 669–70.

(2) Expert

In State v. Thomas, __ N.C. App. __, __ S.E.2d __, 2018 WL 1801308 (2018), the court of appeals considered whether the trial court abused its discretion by excluding expert testimony that would not provide insight to the trier of fact beyond the conclusions that jurors could readily draw from their ordinary experience.

A defendant was convicted of voluntary manslaughter following a jury trial. Id. at *2. On appeal, the defendant argued that the trial court erred in excluding the expert testimony of a

forensic psychologist about the "fight or flight" response as it related to the defendant's voluntary-manslaughter defense. Id. Specifically, the defendant contended that the trial court incorrectly ruled that this evidence was not relevant or reliable and would not assist the jury, and that the trial court's exclusion of the expert testimony violated his constitutional rights. Id.

The court of appeals found no error on this issue, but vacated and remanded a separate portion of the trial court's order. Id. at *1. The court explained that "[t]he trial judge is afforded wide latitude when making a determination about the admissibility of expert testimony." Id. at *3 (quoting State v. Bullard, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984)). A trial court's decision on the admission of expert testimony will be reversed only for an abuse of discretion. Id. In State v. McGrady, 368 N.C. 880, 787 S.E.2d 1 (2016), the supreme court adopted the Daubert standard and stated that "a trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." Thomas, 2018 WL 1801308, at *3 (quoting McGrady, 368 N.C. at 893, 787 S.E.2d at 11). "The standard of review remains the same whether the trial court has admitted or excluded the testimony—even where the exclusion of expert testimony results in summary judgment and thereby becomes 'outcome determinative.'" Id. (quoting McGrady, 368 N.C. at 893, 787 S.E.2d at 11). Moreover, "even if expert scientific testimony might be reliable in the abstract, to satisfy Rule 702(a)'s relevancy requirement, the trial court must assess 'whether that reasoning or methodology properly can be applied to the facts in issue.'" Id. (quoting State v. Babich, __ N.C. App. __, 797 S.E.2d 359, 362 (2017)). "This ensures that 'expert testimony proffered in the case

is sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute.'" Id. (quoting Babich, __ N.C. App. at __, 797 S.E.2d at 362). This is known as the "fit" test. Id. (citing Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 591 (1993)).

The court of appeals concluded that the trial court did not abuse its discretion when it excluded the expert's proffered testimony on the "fight or flight" response. Id. at *6. The court distinguished this case from McGrady, which also excluded expert testimony on the fight-or-flight response. Id. The testimony in McGrady, however, was excluded largely because the expert "lacked medical or scientific training." Id. (quoting McGrady, 368 N.C. at 896, 787 S.E.2d at 13). The court explained that while the forensic psychologist in this case held several degrees, including a PhD in psychology, those degrees are not medical or scientific degrees. Id. On that basis, the trial court determined that her testimony "was not based on scientific, technical, or other specialized knowledge that would assist the . . . jury . . . to better understand the evidence or to determine a fact in issue." Id. at *7. In other words, the psychologist's testimony as an expert witness did not "provide insight beyond the conclusions that jurors can readily draw from their own ordinary experiences in their own lives." Id. (emphasis omitted).

The court of appeals said that the trial court "acted well within its discretion to make this determination." Id. The psychologist's testimony was not proffered for her to explain, for example, "a highly technical and scientific issue in simpler terms for the jury," but "to cast a sheen of technical and scientific methodology onto a concept of which a lay person (and jury member) would probably already be aware." Id.

The defendant has filed a petition for discretionary review. That petition is currently pending.

In State v. Shore, __ N.C. App. __, __ S.E.2d __, 2018 WL 1597716 (2018), the court of appeals considered the requirements for admitting expert testimony under Rule 702(a).

A defendant appealed from judgments entered on his convictions for statutory sexual offense and statutory rape on the ground that the trial court erred by permitting the state to introduce unreliable expert testimony in violation of Rule 702 of the North Carolina Rules of Evidence. Id. at *3. Specifically, the defendant argued that the trial court abused its discretion by allowing the expert to testify that it is not uncommon for children to delay in disclosing sexual abuse and by allowing the expert to provide possible reasons for delayed disclosures. Id. The defendant asserted that this testimony was unreliable because it was not "based upon sufficient facts or data" and was not "the product of reliable principles and methods." Id. Although the defendant conceded that the court had previously allowed analogous expert testimony, he nonetheless urged the court to examine the issue in light of the 2011 amendment to Rule 702 and the specific facts of this case. Id.

The court of appeals found no error. Id. at *13. The court first provided an overview of North Carolina's adoption of Daubert. Id. at *4 (citing State v. McGrady, 368 N.C. 880, 884, 787 S.E.2d 1, 5 (2016)). "By adopting virtually the same language from the federal rule into the North Carolina rule, the General Assembly thus adopted the meaning of the federal rule as well." Id. (quoting McGrady, 368 N.C. at 888, 787 S.E.2d at 7–8). The court noted that although North

Carolina's Rule 702 was amended, the supreme court in McGrady reasoned that "previous cases are still good law if they do not conflict with the Daubert standard." Id. (quoting McGrady, 368 N.C. at 888, 787 S.E.2d at 8). While the amendment "did not change the basic structure of the [Rule 702(a)] inquiry," it "did change the level of rigor that our courts must use to scrutinize expert testimony before admitting it." Id. (quoting McGrady, 368 N.C. at 892, 787 S.E.2d at 10). To determine the proper application of Rule 702(a), the court must look to the text of the rule, the Daubert line of cases, and to the court's existing precedents that do not conflict with the rule's amended text or with Daubert. Id.

The amended rule requires expert testimony to meet Daubert's three-pronged reliability test. Id. Under that test, (1) testimony must be based on sufficient facts or data, (2) testimony must be the product of reliable principles and methods, and (3) the witness must have applied the principles and methods reliably to the facts of the case. Id. (quoting McGrady, 363 N.C. at 890, 787 S.E.2d at 9). Here, the defendant challenged the reliability of the expert's delayed-disclosure testimony under prongs one and two of the reliability test. Id.

The defendant argued that the testimony failed the first prong because the expert did not conduct her own research and instead relied on studies conducted by others. Id. at *7. The court rejected this argument as directly conflicting with the meaning of Rule 702, the Daubert line of cases, and the court's existing precedent. Id. The court acknowledged the advisory committee notes to the federal rule, which state that the first prong of the reliability test "calls for a quantitative rather than qualitative analysis" and "requires that expert testimony be based on sufficient

underlying 'facts or data.'" Id. (quoting Fed. R. Evid. 702 advisory committee's note to 2000 amendment). It further noted, however, that "[t]he Daubert line of cases also stands for the proposition that 'no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experienced." Id. (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 156 (1999)). The court also noted the similarities between this case and State v. Carpenter, in which the supreme court held that a proper foundation was established for expert testimony on delayed disclosures where the expert testified that her testimony was grounded in multiple hours of training, over a decade of forensic-interviewing experience consisting of over 1,200 forensic interviews, and a review of over twenty articles on delayed disclosures. Id. at *8 (discussing State v. Carpenter, 147 N.C. App. 386, 394, 556 S.E.2d 316, 321–22 (2001)). Thus, the court concluded that the expert's disclosure was based on facts or data sufficient to satisfy the first prong of Rule 702(a). Id.

As to the second prong, the defendant argued that the research the expert relied on was flawed in multiple ways, including her assumption that participants were honest and her failure to implement methods or protocols to screen out the dishonest participants. Id. From reviewing the record, the court concluded that "these concerns were addressed throughout the examination and cross-examination of [the expert]." Id. Accordingly, the testimony also satisfied the second prong of Rule 702(a). Id. at *9.

B. Judicial Recusal

In Shearin v. Reid, __ N.C. App. __, 812 S.E.2d 381 (2018), the court of appeals discussed the standards for evaluating a motion for judicial recusal based on allegations of bias and impartiality under the North Carolina Code of Judicial Conduct.

A mother brought an action against a father for a declaratory judgment that the father lost his right to intestate succession in the estate of his deceased daughter. Id. at __, 812 S.E.2d at 383. On the first day of trial in the action, the mother filed a motion to recuse the trial judge on the grounds that the judge had "expressed prejudice against [the mother] and her counsel" and "has previously expressed . . . an opinion as to the merits of the case, casting doubt on her ability to be impartial." Id. at __, 812 S.E.2d at 384. The mother further alleged that the father's counsel "may have played a significant role in [the judge's] campaign[,] which reasonably questions [the judge's] impartiality." Id. The trial court denied the mother's motion to recuse. Id. The trial proceeded, and the jury reached a verdict in the father's favor. Id. The mother filed a renewed motion to recuse the judge. Id. In addition to the grounds stated in her first recusal motion, the renewed motion alleged that "the Judge and her mother celebrate[ ] the Christmas holiday at defense counsel's home on a regular basis" and that "the Judge and defense counsel's wife belong to the same social club and sorority." Id. (alteration in original). The trial court denied the mother's renewed motion to recuse, and the mother appealed. Id.

The court of appeals affirmed. Id. at __, 812 S.E.2d at 386. Canon 3C of the North Carolina Code of Judicial Conduct provides that "[o]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned,

including but not limited to instances where . . . [t]he judge has a personal bias or prejudice concerning a party." Id. at __, 812 S.E.2d at 385 (quoting N.C. Code of Judicial Conduct canon 3C(1)(a)). The court noted that "evidence of a strained professional relationship between a trial judge and an attorney does not—without more—require recusal." Id. at __, 812 S.E.2d at 386 (citing Harrington v. Wall, 212 N.C. App. 25, 28, 710 S.E.2d 364, 367 (2011)).

The court concluded that the mother presented no evidence of actual bias or an inability of the trial judge to be impartial. Id. The mother's allegations that the judge "displayed hostility toward her attorney during trial and that [the father's] attorney served as chairman of a political action committee that worked to elect [the judge]" was not enough to show impartiality. Id. Likewise, the mother failed to show evidence of bias based on opposing counsel's assistance with the judge's campaign. Id. The court also found no merit to allegations in the mother's renewed recusal motion about the judge attending Christmas parties at the defense counsel's home and belonging to the same social clubs as defense counsel. Id. Accordingly, the court concluded that the trial court did not err in denying the recusal motions. Id.

C. Civil Contempt

In Adams Creek Associates v. Davis, __ N.C. App. __, 810 S.E.2d 6 (2018), the court of appeals considered whether the trial court is required to make findings about an individual's inability to comply with a civil-contempt order if those findings would be futile.

Two brothers have been imprisoned for civil contempt since March 2011 for failing to comply with court orders. Id. at __, 810 S.E.2d at 8. In its 2011 contempt order, the trial court

gave the brothers the opportunity to purge their contempt by (1) removing their structures and equipment from other property owners' property and (2) attesting in writing to never again trespass on the property. Id. In 2016, the brothers moved for custodial release on the grounds that they were financially unable to comply with the contempt order and that their incarceration "has become punitive and violates due process." Id. At the hearing on the brothers' motions, the brothers testified that even if they were able to financially comply with the property-removal purge condition, they would not do so, and they again refused to comply with the attestation purge condition. Id. In light of the brothers' refusal to comply with the purge conditions, the trial court refused to make findings of fact on their financial condition, and concluded that continued incarceration has not become punitive because the brothers "wield the power to purge their contempt but have recalcitrantly refused." Id. at __, 810 S.E.2d at 9. The brothers appealed based on the trial court's (1) failure to consider their financial inability to comply with the contempt order, (2) failure to consider whether the purpose of the incarceration could still be served by the brothers' continued incarceration, and (3) improper conclusion that the brothers' incarceration has not become a punitive criminal contempt. Id.

The court of appeals affirmed. Id. The court held that the trial court "did not err in refusing to make futile findings on [the brothers'] alleged inability to comply with the prior order due to [their] outright refusals to purge their contempt." Id. Moreover, because "the character of relief ordered by the contempt order was incarceration until compliance, and [the brothers] were afforded

the opportunity to avoid imprisonment by performing affirmative acts," the court held that the trial court properly concluded that the brothers' continued incarceration had not become punitive. Id.

Judge Stroud dissented in a separate opinion. Id. at __, 810 S.E.2d at 14 (Stroud, J., dissenting). Judge Stroud believed that the trial court and the majority opinion conflated two separate requirements of N.C. Gen. Stat. §§ 5A-22 and 5A-21(a). Id.

Judge Stroud explained that the brothers sought release under section 5A-22(a), which provides that

> [a] person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. Upon finding compliance with the specifications, the sheriff or other officer having custody may release the person without a further order from the court.

Id. (quoting N.C. Gen. Stat. § 5A-22(a) (2017)). Section 5A-21(a) outlines four factors for when a civil contempt is "continuing." Id. at __, 810 S.E.2d at 15. The brothers' dispute related to two of those factors, which Judge Stroud explained are separate and independent requirements that the trial court must address: (1) "[t]he noncompliance by the person to whom the order is directed is willful," and (2) "[t]he person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order." Id. (quoting N.C. Gen. Stat. § 5A-21(a)(2a), (3)). Judge Stroud took issue with the trial court's refusal to consider the brothers' evidence of their inability to comply with the order. Id.

Judge Stroud analogized the brothers as being in the position of the Black Knight in the movie Monty Python and the Holy Grail:

> The Black Knight insists that "None shall pass" through the path in the forest which he guards; the defendants insist the same as to the land they claim. King Arthur—who had the legal authority as king to order the Black Knight to let him pass—seeks to pass through the forest, but the Black Knight refuses to comply with his order. King Arthur and the Black Knight then engage in a sword fight. Even after King Arthur has cut off both of the Black Knight's arms and legs, he still insists that he will continue to fight and that no one may pass—although he cannot do anything. King Arthur simply says, "We'll call it a draw," and continues on his way, leaving the Black Knight with no one to listen to his protests.

Id. at __, 810 S.E.2d at 16. Judge Stroud said that here, the trial court and the property owners "should follow King Arthur's wise lead and leave [the brothers] behind." Id. She also noted that "the penalty for trespassing is not life imprisonment." Id. at __, 810 S.E.2d at 17.

D. Attorneys' Fees

In Tigani v. Tigani, __ N.C. App. __, 805 S.E.2d 546 (2017), the court of appeals considered whether the trial court erred in finding a husband in civil contempt of court for failing to abide by an order directing him to pay attorney's fees to opposing counsel.

A husband and wife separated, and litigation involving the couple's separation agreement went to trial. Id. at __, 805 S.E.2d at 548. Following trial, the trial court ordered the husband to pay the wife's attorney $20,096.68 in attorney's fees. Id. The husband failed to pay, and the attorney filed a motion for civil contempt. Id. Following a hearing, the trial court entered an order

finding the husband in contempt of court and ordered that the husband be incarcerated until he paid the full amount of attorney's fees. Id. The husband appealed. Id.

The court of appeals reversed. The court explained that under section 5A-21(b) of the North Carolina General Statutes, "[a] person who is found in civil contempt may be imprisoned as long as the civil contempt continues." Id. at __, 805 S.E.2d at 549 (quoting N.C. Gen. Stat. § 5A-21(b)). The court further explained, however, that "a defendant in a civil contempt action should not be fined or incarcerated for failing to comply with a court order without demonstration by the trial court that the defendant is presently capable of complying." Id. (quoting McBride v. McBride, 334 N.C. 124, 130, 431 S.E.2d 14, 18 (1993)).

The court of appeals first noted that the nature of the contempt motion was not entirely clear. Id. at __, 805 S.E.2d at 550. Specifically, the motion was captioned "Motion for Contempt" but asked the trial court for an order directing the husband "to appear and show cause" why he should not be held in contempt, and the notice of hearing indicated that the matter for hearing was a "SHOW CAUSE." Id. The court explained that, "[b]ased on the language of the motion and the notice of hearing," the husband might have believed that the hearing on the contempt motion could have resulted in nothing more than the issuance of a show-cause order. Id. Because the husband did not argue on appeal that he lacked noticed that he might be held in contempt, however, the court of appeals did not further address this issue. Id.

The court of appeals then turned to the husband's contention that the trial court's finding that his "failure to comply with the [attorney's fees order was] willful and deliberate and he ha[d]

the means and ability to comply with the Order as evidenced by his bank statements" was not supported by any record evidence. Id. at __, 805 S.E.2d at 550–51. The court noted that no witness testimony or exhibits were introduced into evidence at the hearing on the contempt motion, and thus, there was no competent evidence on the issue of the husband's financial circumstances or his ability to pay the attorney's fees. Id. at __, 805 S.E.2d at 551. Accordingly, the court of appeals concluded that the trial court erred by finding the husband in civil contempt of court for failing to abide by the terms of the order directing him to pay attorney's fees, and ordered that the contempt order be reversed and remanded. Id. at __, 805 S.E.2d at 552.

E. Punitive Damages

In Haarhuis v. Cheek, __ N.C. App. __, 805 S.E.2d 720 (2017), the court of appeals considered whether questioning the jury during voir dire was improper and violated the defendant's right to a bifurcated trial where the questioning involved issues relevant only to the plaintiff's punitive-damages claim.

A husband brought a wrongful-death claim against a driver whose negligent driving injured and ultimately killed the husband's wife. Id. at __, 805 S.E.2d at 723. The trial of the matter was bifurcated into two phases: the first phase addressed compensatory damages, and the second phase addressed punitive damages. Id. During the compensatory-damages phase, the husband presented evidence concerning his actual damages. Id. The jury awarded the husband $4.25 million in compensatory damages. Id. During the punitive-damages phase of the trial, the husband presented evidence that, among other things, the driver had consumed alcohol in the hours leading up to the

accident and had a blood-alcohol content that was above the legal limit after the accident occurred. Id. The jury awarded the husband $45,000 in punitive damages. Id.

The driver moved for a new trial. Id. at __, 805 S.E.2d at 724. The trial court denied the driver's motion for a new trial, and the driver appealed. Id. On appeal, the driver argued that the husband's questioning of the jury during voir dire about the jurors' general attitudes on alcohol and drunk-driving was improper because those questions were relevant only to the punitive-damages phase of the trial—not the compensatory-damages phase. Id.

The court of appeals first recognized an inherent tension in section 1D-30 of the North Carolina General Statutes, which gives a defendant the right to a bifurcated trial on issues of liability for compensatory damages and punitive damages. Id.; see N.C. Gen. Stat. § 1D-30 (2017). Section 1D-30 prohibits a plaintiff from introducing evidence "relating solely to punitive damages" during the compensatory-damages phase, but at the same time requires the same panel of jurors that tries the compensatory-damages phase to try the issues relating to punitive damages. N.C. Gen. Stat. § 1D-30; Haarhuis, __ N.C. App. at __, 805 S.E.2d at 728.

The court of appeals explained that "a defendant's right to bifurcation must be weighed against a plaintiff's right to an impartial jury, which includes a plaintiff's right to question potential jurors during voir dire about issues that they may be asked to consider." Id. at __, 805 S.E.2d at 725 (stylistic emphasis omitted). Thus, the court of appeals explained, the husband "had the right to question potential jurors regarding their general attitudes about alcohol and drunk driving in order to determine 'whether a basis for challenge for cause exist[ed]' and to allow both parties to

'intelligently exercise [their] peremptory challenges.'" Id. (alterations in original) (quoting State v. Gregory, 340 N.C. 365, 388, 459 S.E.2d 638, 651 (1995)).

Accordingly, the court of appeals affirmed the trial court's denial of the driver's motion for a new trial and concluded that the husband's questioning, "which was general in nature and did not expressly state that [the driver] had been intoxicated, was appropriate." Id.

The driver has filed a petition for discretionary review and a notice of appeal based on a constitutional question. The petition and appeal remain pending.

F. Rule 50

In Martin v. Pope, __ N.C. App. __, 811 S.E.2d 191 (2018), the court of appeals considered whether a defendant waives his ability to assert a JNOV motion by failing to move for a directed verdict at the close of all evidence.

Buyers sued a seller for concealing environmental contamination on property that he sold to the buyers. Id. at __, 811 S.E.2d at 194. At trial, the jury returned a verdict in favor of the buyers. Id. The trial court later denied the seller's motion for JNOV. Id. On appeal, the seller argued that the trial court should have granted his JNOV motion and set aside the verdict as a matter of law because the buyers' claims were barred by the statute of limitations and because there was insufficient evidence to support their claims. Id.

The court of appeals affirmed. Id. at __, 811 S.E.2d at 195. The court explained that it could not address the seller's arguments on appeal because the seller waived those arguments by failing to move for a directed verdict at the close of all evidence. Id. at __, 811 S.E.2d at 194–95

(citing N.C. Gen. Stat. § 1A-1, Rule 50 (2017)). The court explained, moreover, that a litigant must move for a directed verdict at the close of all evidence, not merely at the close of the plaintiff's evidence, because "once defendants have presented their own case, the evidence in the trial record has changed." Id. at __, 811 S.E.2d at 195. The seller conceded that although he moved for a directed verdict at the close of the buyers' case, he did not renew his motion at the close of all the evidence. Id. The court acknowledged that this outcome may be "harsh" but explained that it is important for "our courts to apply procedural rules uniformly to all litigants who appear before them." Id. Thus, the court held that while "justice is best served when this Court reaches the merits of the underlying issues raised on appeal," the court is "obligated to enforce this well-settled procedural rule and hold that [the seller's] JNOV arguments are waived." Id.

G. Rule 55

In Swan Beach Corolla, L.L.C. v. County of Currituck, __ N.C. App. __, 805 S.E.2d 743 (2017), the court of appeals considered whether the trial court's failure to apply the proper standard in considering a motion to set aside an entry of default, and its denial of that motion, amounted to an abuse of discretion.

A group of property owners sued the county for refusing to allow the owners to develop their land. Id. at __, 805 S.E.2d at 745. The county moved to dismiss all claims but did not file an answer. Id. The trial court granted the county's motion to dismiss, and the owners appealed. Id. The court of appeals affirmed the trial court's dismissal of one claim, and reversed and

remanded the case to the trial court for further proceedings on two claims. Id. Following the issuance of the mandate from the court of appeals' decision, the parties communicated regarding settlement negotiations and other matters. Id. During negotiations, on the thirtieth day after issuance of the mandate, the owners moved for entry of default based on the county's failure to answer the complaint. Id. The county filed a motion to set aside the entry of default and submitted a proposed answer to the court. Id. The county asserted that there is no clearly established rule under the North Carolina Rules of Civil Procedure or the North Carolina Rules of Appellate Procedure that addresses the time in which a responsive pleading must be filed after an appellate-court ruling, and further that the time period in which it could file a responsive pleading never commenced because the complaint was revived by the court of appeals' decision under N.C. Gen. Stat. § 1-298, which requires the trial court to enter an order effectuating the modification of its prior order following a decision by the court of appeals. Id. The trial court ultimately denied the county's motion to set aside the entry of default and entered a default judgment of more than $39.1 million against the county. Id. at __, 805 S.E.2d at 746.

The court of appeals reversed. Id. The court held that the trial court abused its discretion by failing to apply the proper standard in considering the county's motion to set aside the entry of default, and that even if the trial court had applied the proper standard, denial of the county's motion to set aside the entry of default would amount to an abuse of discretion. Id.

The court of appeals first discussed the proper standard that courts should apply when considering a motion to set aside an entry of default. Id. at __, 805 S.E.2d at 746–47. The court

noted that the decision whether to set aside an entry of default for good cause under Rule 55(d) is "within the sound discretion of the trial court." Id. at __, 805 S.E.2d at 746 (quoting Auto. Equip. Distribs., Inc. v. Petroleum Equip. & Serv., Inc., 87 N.C. App. 606, 608, 361 S.E.2d 895, 896 (1987)). To determine whether a party has made a showing of good cause to set aside an entry of default, courts consider three factors: (1) whether the moving party was diligent in pursuing the matter, (2) whether the non-moving party suffered any harm because of the delay, and (3) whether the non-moving party would suffer a "grave injustice" if he or she cannot defend the lawsuit. Id. at __, 805 S.E.2d at 746–47 (quoting Luke v. Omega Consulting Grp., 194 N.C. App. 745, 748, 670 S.E.2d 604, 607 (2009)).

Next, the court of appeals explained how a trial court can abuse its discretion when ruling on a motion to set aside an entry of default, even if the court applies the proper standard. Id. at __, 805 S.E.2d at 747. The court stressed that, unlike the standard for setting aside a default judgment under Rule 60(b), which generally involves a showing of excusable neglect and a meritorious defense, only good cause must be shown to set aside an entry of default. Id. The court looked to the Supreme Court of North Carolina's decision in Peebles v. Moore, 302 N.C. 351, 275 S.E.2d 833 (1981), in which the supreme court held that courts should adhere "to the principle that a default should not be entered, even though technical default is clear, if justice may be served otherwise." Swan Beach Corolla, __ N.C. App. at __, 805 S.E.2d at 747 (quoting Peebles, 302 N.C. at 356, 275 S.E.2d at 836). This reasoning is in line with "the strong public policy that '[t]he law generally disfavors default and any doubt should be resolved in favor of setting aside an entry

of default so that the case may be decided on its merits.'" Id. (alteration in original) (quoting Auto. Equip. Distribs., 302 N.C. App. at 504–05, 269 S.E.2d at 698).

The court of appeals concluded that the trial court identified no reason for its denial of the county's motion to set aside other than uncertainty as to whether the deadline for the county to file its answer had expired and a desire for clarity from the court of appeals on that issue. Id. at __, 805 S.E.2d at 748. The court found that (1) there had been extensive discovery and litigation before the trial court and the court of appeals, (2) the county's reliance on section 1-298 was not unreasonable or dilatory, (3) the county would suffer a grave injustice if it is unable to defend its claims. Id. The court also noted that "default judgments should be reserved for instance in which 'one party refuse[s] or fails to attend to his or her legal business.'" Id. (quoting Beard v. Pembaur, 68 N.C. App. 52, 58, 313 S.E.2d 853, 856 (1984)). Additionally, the court was persuaded that, because of the size of the judgment and the nature of the claims—vested-rights and equal-protection claims—the county would suffer a grave injustice if it were denied the ability to defend against those claims. Id. at __, 805 S.E.2d at 749.

Judge Berger, in a dissenting opinion, disagreed with the majority opinion for two reasons: (1) it would be more prudent to remand the matter to the trial court for additional findings, and (2) the majority opinion sanctioned "what is essentially a 'mistake of law' defense" by the county. Id. Judge Berger stressed long-standing precedent that "failure to understand the law is not good cause to set aside entry of default," and argued that the county "unjustifiably relied" on section 1-

298 to its detriment. Id. (citing Lewis v. Hope, 224 N.C. App. 322, 324-25, 736 S.E.2d 214, 216-17 (2012)).

The supreme court affirmed the court of appeals in a per curiam opinion. Swan Beach Corolla, L.L.C. v. Cty. of Currituck, __ N.C. __, __ S.E.2d __, 2018 WL 2171027 (2018).

H. Appeals

(1) Violation of the Rules

In McKinney v. Duncan, __ N.C. App. __, 808 S.E.2d 509 (2017), the court of appeals considered its jurisdiction to review an order that had been rendered orally and signed by the trial court but never filed with the clerk of court.

A man and his mother filed a complaint in domestic violence court after a new neighbor moved in across the street and "engaged in threatening and upsetting behavior," including shouting at the mother and making "pig noises" in her direction, displaying a banner that disparaged the condition of the man and his mother's yard, sending letters to the mother that frightened her, displaying a gun and pointing it at the man and his mother's house, and stalking and harassing the man as he walked home from his job. Id. at __, 808 S.E.2d at 510–11. During a hearing on the claims, the neighbor testified that he was a sixty-two-year-old disabled veteran and grandfather, and that he had not committed the acts that the man and his mother alleged. Id. at __, 808 S.E.2d at 511. The court entered no-contact orders barring the neighbor from having any contact with the man and his mother. Id. Later, the man and his mother filed several show-cause motions relating to the neighbor's alleged violations of the no-contact orders, and the parties eventually reached an

agreement and presented consent judgments to the court that specified ways in which the parties could respect each other's privacy and provided that the judgments were enforceable by contempt proceedings. Id.

The man and his mother subsequently filed additional show-cause motions for the neighbor's alleged violations of the no-contact orders and consent judgments. Id. The court held a hearing, orally rendered judgment at the end of the hearing, and signed orders finding the neighbor in contempt of the no-contact orders and consent judgments. Id. The orders stated that the neighbor was to be incarcerated until he was no longer in contempt, and that the neighbor could purge himself of contempt by committing no further violations and obtaining a psychological exam. Id. The orders were signed by the court but were never filed with the clerk of court. Id. The neighbor appealed. Id.

The court of appeals dismissed the neighbor's appeal for lack of subject-matter jurisdiction because the record did not establish that the contempt orders were ever entered. Id. at __, 808 S.E.2d at 512. The court explained that under Rule 58 of the North Carolina Rules of Civil Procedure, a "judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." Id. at __, 808 S.E.2d at 511 (quoting N.C. Gen. Stat. § 1A-1, Rule 58 (2017)). A judgment that has been orally rendered is not enforceable until entry. Id. at __, 808 S.E.2d at 512. (quoting Watson v. Price, 211 N.C. App. 369, 370, 712 S.E.2d 154, 155 (2011)). Here, the court of appeals explained that although the trial court had signed the orders after orally rendering judgment, the orders could not be enforced or appealed because they did not "bear a file stamp or

other indication that they were ever filed with the clerk of court." Id. Thus, the court of appeals concluded that the orders from which the neighbor was attempting to appeal were never entered, and the court of appeals therefore lacked subject-matter jurisdiction to review the contents of the orders. Id.

I. Arbitration

In Thompson v. Speller, __ N.C. App. __, 808 S.E.2d 608 (2017), the court of appeals considered the trial court's authority to award interest and costs in a judgment confirming an arbitration award.

An insured driver was involved in a motor-vehicle collision. Id. at __, 808 S.E.2d at 610. Following the accident, the insured's UIM carrier settled with the at-fault driver's liability-insurance carrier. Id. Because the UIM carrier and the insured were unable to settle on the amount of total damages that the insured was entitled to recover, the insured demanded arbitration pursuant to his insurance policy. Id.

A three-member arbitration panel heard the case and rendered a unanimous arbitration award of $110,000. Id. The award specifically provided that "[t]he arbitrators did not consider interest or costs in the determination of th[e] award." Id. The insured filed a motion with the trial court for an order confirming the $110,000 arbitration award and for interest and costs. Id. The trial court confirmed the arbitration award and entered judgment for the insured for $110,000 plus pre-award interest, post-award/pre-judgment interest, and costs. Id. The UIM carrier appealed,

arguing that the trial court exceeded its authority when it awarded interest and costs in its judgment confirming the arbitration award. Id.

The court of appeals affirmed the trial court's grant of post-award/pre-judgment interest but reversed the trial court's grant of costs and pre-award interest. Id. at __, 808 S.E.2d at 611. The court explained that "our courts have very limited authority to modify an arbitration award under our Revised Uniform Arbitration Act." Id. at __, 808 S.E.2d at 610 (first citing Nucor Corp. v. Gen. Bearing Corp., 333 N.C. 148, 155, 423 S.E.2d 747, 751 (1992); then citing Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 236, 321 S.E.2d 872, 880 (1984)). Specifically, "a trial court may modify an arbitration award only where the arbitrators make (1) a mathematical error, (2) an error relating to form, or (3) an error resulting from arbitrators' exceeding their authority." Id. (first citing Cyclone Roofing Co., 312 N.C. at 236, 321 S.E.2d at 880; then citing N.C. Gen. Stat. § 1-569.24 (2017)). The court concluded that none of these factors applied here. Id.

First, the court addressed pre-award interest and costs. Id. at __, 808 S.E.2d at 611. The court explained that the decision "[w]hether to include pre-award interest as part of compensatory damages is a matter within the authority of the arbitrators—not the trial court—to decide." Id. Typically, unless there is a mathematical error, a form error, or an exercise of excess authority by the arbitrators, the trial court is obligated to confirm the award as written. Id. Additionally, "[a] trial court may grant pre-award interest only if the arbitrators expressly defer the issue of interest to the trial court's discretion as part of their award." Id. (emphasis omitted). Here, the

arbitrators did not expressly defer the issue of pre-award interest to the discretion of the trial court—they simply did not consider pre-award interest in determining the award. Id.

The court of appeals concluded that the trial court also lacked the authority to grant costs to the insured. Id. While "N.C. Gen. Stat. § 1-569.25 does allow the trial court to include 'reasonable costs' in its judgment, these costs are limited to 'reasonable costs of the motion [to confirm the award]' filed by the party after the arbitration award is entered." Id. at __, 808 S.E.2d at 611–12 (alteration in original) (quoting N.C. Gen. Stat. § 1-569.25(b) (2017)). Here, the trial court granted costs related to the filing of the original action, the cost of the court reporter for depositions, an expert-witness fee, and subpoena-service fees. Id. at __, 808 S.E.2d at 612. Accordingly, the court of appeals concluded that "the trial court's grant of pre-award interest and costs constituted an impermissible modification of the arbitration award." Id. at __, 808 S.E.2d at 610.

Next, the court of appeals addressed the trial court's grant of post-award/pre-judgment interest. Id. The court noted that neither party cited a North Carolina case that directly addresses the trial court's power to grant interest that accrues after the arbitration award but before the trial court enters judgment confirming the award. Id. Relying on the general rule as stated in the "seminal treatise on commercial arbitration" that a trial court has the discretion to grant interest that accrues after the date of the award, the court of appeals concluded that "the trial court should be allowed to compensate the insured for the 'time value' of the award between the time the award is made and the time the award is paid." Id. (citing 2 Martin Domke et al., Domke on Commercial

Arbitration § 35:6 (3d ed. 2012)). Accordingly, the court concluded that the trial's grant of post-award/pre-judgment interest was appropriate. Id. at __, 808 S.E.2d at 611–12.

(1) Waiver

In iPayment, Inc. v. Grainger, __ N.C. App. __, 808 S.E.2d 796 (2018), the court of appeals considered the standard of review that applies to a trial court's denial of a motion to compel arbitration on the basis that a party waived its contractual right.

A dispute arose over an asset-purchase agreement executed between two companies that process bankcard payments for retail merchants. Id. at __, 808 S.E.2d at 798. The asset-purchase agreement included an arbitration clause and a choice-of-law provision. Id. The arbitration provision provided that any dispute or claim arising from the agreement would be resolved by binding arbitration. Id. The choice-of-law provision provided that New York law would govern the agreement. Id. The plaintiff company also executed a split-funding agreement with a finance company owned and operated by the officers of the defendant company, which included a similar mandatory-arbitration clause and choice-of-law provision. Id. The plaintiff company brought an arbitration in New York against the defendant company and its officers, alleging that they made misrepresentations to the plaintiff company and breached the asset-purchase agreement. Id. at __, 808 S.E.2d at 799. The plaintiff company obtained an arbitration award of $2,350,264.74 against the defendant company and its officers. Id.

The plaintiff company filed a motion to confirm the arbitration award in federal court in New York. Id. While that motion was pending, the plaintiff company filed a complaint in North

Carolina state court against the defendant company, the finance company, and the officers, alleging that, immediately after the arbitration award was entered, the defendant company's officers entered into a scheme to fraudulently transfer their assets to a third-party company to avoid paying the arbitration award. Id. The plaintiff company pursued discovery in that case. Id. The finance company filed counterclaims related to the split-funding agreement, and the plaintiff company commenced discovery targeting the allegations in those counterclaims. Id. at __, 808 S.E.2d at 800. The plaintiff company moved to dismiss the counterclaims arising from the split-funding agreement or, in the alternative, to stay the litigation and compel arbitration of the counterclaims based on the mandatory-arbitration provision in the agreement. The finance company argued that the plaintiff company waived its right to compel arbitration by participating in the litigation and pursuing discovery. Id. The trial court agreed and denied the motion to compel, finding that the plaintiff company's conduct "was clearly inconsistent with the arbitration provision" in the split-funding agreement and "manifests [the plaintiff company's] election to submit to the jurisdiction of this forum." Id. The plaintiff company appealed. Id.

The court of appeals reversed. Id. at __, 808 S.E.2d at 804. The court first noted that it had jurisdiction over the appeal of the trial court's interlocutory order because an order denying a motion to compel arbitration affects a substantial right. Id. at __, 808 S.E.2d at 800. As to the plaintiff company's right to compel arbitration, the court concluded that the trial court erred in finding that counterclaims asserted by the finance company invoked the split-funding agreement, and concluded that the finance company failed to present competent evidence that the plaintiff

company acted inconsistently with its right to compel arbitration or that the finance company was prejudiced by the plaintiff company's actions before invoking its right to compel. Id. at __, 808 S.E.2d at 804.

The court first clarified the standard of review that applies to a trial court's denial of a motion to compel arbitration on the basis that a party waived its contractual right. Id. at __, 808 S.E.2d at 801. The seminal decision on this point is Cyclone Roofing Co. v. David M. LaFave Co., 312 N.C. 224, 321 S.E.2d 872 (1984). iPayment, Inc., __ N.C. App. at __, 808 S.E.2d at 801. That case explains that arbitration is a contractual right that may be waived, but creates some confusion about whether this question is a question of fact or law. Id. Cyclone Roofing states that "[w]aiver of a contractual right to arbitration is a question of fact," which conflicts with the supreme court's statement in Servomation Corp. v. Hickory Construction Co., 316 N.C. 543, 342 S.E.2d 853 (1986) that the determination whether a party has waived its right requires the application of "rules of law." iPayment, Inc., __ N.C. App. at __, 808 S.E.2d at 801-02 (first quoting Cyclone Roofing Co., 312 N.C. at 229, 321 S.E.2d at 876; then quoting Servomation Corp., 316 N.C. at 545, 342 S.E.2d at 854).

The court of appeals interpreted Cyclone Roofing's reference to waiver as a question of fact to apply to the question whether a party has in fact in engaged in a particular action, and concluded that Servomation Corp.'s holding means that "the question of whether those actions, once found as fact by the trial court, amount to waiver of the right to arbitrate as a dispute is a question of law subject to de novo review." Id. at __, 808 S.E.2d at 802.

Accordingly, the court of appeals reviewed whether the trial court's findings of fact were supported by competent evidence. Id. The court concluded that, based on the pleadings, the plaintiff company's initial claims in the North Carolina state-court action were not related to the split-funding agreement. Id. at __, 808 S.E.2d at 801. Therefore, the court of appeals considered only the litigation and discovery pursued by the plaintiff company following, "and directly related to," the counterclaims. Id. at __, 808 S.E.2d at 804. "Keeping in mind the strong public policy favoring arbitration," the court of appeals held that the trial court's conclusion that the plaintiff company acted inconsistent with its right to compel arbitration was unsupported by the court's findings of fact. Id.

The court of appeals also held that the plaintiff company's limited participation in the litigation did not prejudice the finance company by allowing the plaintiff company to take advantage of discovery not permitted under the rules of arbitration. Id.

IV. INSURANCE

A. UM

In Powell v. Kent, __ N.C. App. __, 810 S.E.2d 241 (2018), the court of appeals considered whether service of process must be accomplished on an uninsured-motorist (UM) carrier before the statute-of-limitations period expires.

A man brought claims for personal injury and negligence against a couple and for uninsured-motorist coverage against the insurer that had a policy covering the man's vehicle. Id. at __, 810 S.E.2d at 242. In North Carolina, the statute of limitations for UM claims requires that

UM carriers be served with the summons and complaint no later than three years after the date of injury. Id. at __, 810 S.E.2d at 243. The insurer argued that because the accident occurred on February 8, 2006, and the insurer was not served until more than six weeks after the statute of limitations expired, the insurer was entitled to summary judgment. Id. The trial court entered summary judgment for the insurer. Id.

The court of appeals affirmed. Id. at __, 810 S.E.2d at 245. On appeal, the man argued that he was not required to obtain service on the UM insurer within three years of the date of injury to be within the statute-of-limitations period, that N.C. Gen. Stat. § 20-279.21(b)(3) does not require a civil summons to be issued against a UM insurer, and that he timely served the insurer under section 20-279.21(b)(3). Id. at __, 810 S.E.2d at 243.

Section 20-279.21(b)(3) provides that, for a UM carrier to be bound by a judgment against an uninsured motorist, the insurer must be "served with copy of summons, complaint or other process in the action against the uninsured motorist by registered or certified mail, return receipt requested, or in any manner provided by law." Id. at __, 810 S.E.2d at 244 (quoting N.C. Gen. Stat. § 20-279.21(b)(3)(a) (2017)). The court of appeals noted that while the statute does not specify a time limitation for service of the UM carrier, the court of appeals is bound by its decisions holding that "the three-year tort statute of limitations, which begins running on the date of the accident, also applies to the uninsured motorist carrier." Id. (quoting Thomas v. Washington, 136 N.C. App. 750, 754–55, 525 S.E.2d 839, 842–43 (2000)). The court of appeals observed that Thomas and a more recent case, Davis v. Urquiza, 233 N.C. App. 462, 757 S.E.2d 327 (2014),

"appear to be inconsistent with other applications of the statute of limitations which hold that cases are timely when filed within the statute of limitations." Powell, __ N.C. App. at __, 810 S.E.2d at 244–45. The court went on to note that it was "unable to discern any requirement in N.C. Gen. Stat. § 20-279.21(b)(3)(a) that specifically requires in an uninsured motorist action that service of process also be accomplished before the date the statute of limitations expires." Id. at __, 810 S.E.2d at 245. Thus, while the court was bound by its decisions in Thomas and Davis, it concluded by urging the supreme court or the legislature to revisit the issue: "Given this inconsistent application of the statutes of limitations for similarly situated litigants, this situation appears ripe for determination or clarification by our Supreme Court or the Legislature." Id.

The man has filed a petition for discretionary review in the supreme court. That petition remains pending.

B. UIM

In Nationwide Property & Casualty Insurance Co. v. Smith, __ N.C. App. __, 808 S.E.2d 172 (2017), the court of appeals considered whether an underinsured-motorist (UIM) carrier can seek contribution from other tortfeasors for injuries to the carrier's insured.

A husband and wife purchased a personal automobile UIM policy from an insurance company. Id. at __, 808 S.E.2d at 173. One day when the husband was walking by the side of the road, he was struck by a drunk driver. Id. The husband and wife sued the driver and the insurance company. Id. The insurance company filed a third-party complaint against a couple for allegedly negligently serving the driver alcohol and allowing her to drive. Id. The insurance company

sought contribution from the couple for a portion of their alleged common liability for the husband's injuries. Id. The husband and wife then negotiated a settlement with the insurance company for $850,000. Id. Thus, the only remaining issue in the case was the insurance company's third-party complaint against the couple who had allegedly served the driver alcohol before the accident. Id. at __, 808 S.E.2d at 174. The couple moved to dismiss the insurance company's contribution claim, and the trial court granted the motion to dismiss. Id.

On appeal, the insurance company argued that the trial court improperly granted the couple's motion to dismiss, contending that the insurance company had a cause of action to seek contribution for the couple's role in causing the husband's injuries. Id. The couple argued that the insurance company had no right to assert a claim for contribution because a contribution claim is available only among joint tortfeasors, and the insurance company, as the husband's insurer, was not a tortfeasor. Id.

The court of appeals affirmed. Id. at __, 808 S.E.2d at 175. The court explained that the right of a plaintiff's UIM carrier to bring claims does not extend to a right to seek contribution against other tortfeasors who may have contributed to the accident. Id. at __, 808 S.E.2d at 174 (citing Johnson v. Hudson, 122 N.C. App. 188, 468 S.E.2d 64 (1996)). Further, section 1B-1(b) of the North Carolina General Statutes provides that "[t]he right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability." Id. (quoting N.C. Gen. Stat. § 1B-1(b)). Accordingly, the court of appeals concluded that the insurance

company, as the UIM carrier, had no right to assert a claim against the couple for contribution because its insureds—the husband and wife—never had a right to assert that claim.

In Hairston v. Harward, __ N.C. App. __, 808 S.E.2d 286 (2017), the court of appeals considered whether UIM coverage should be credited against payments made on a tort judgment when subrogation has been waived.

The insured sued a driver for injuries sustained in a car crash. Id. at __, 808 S.E.2d at 288. A jury awarded the insured $263,000 for injuries caused by the driver's negligence. Id. The driver moved for credits and setoffs against the tort judgment for the money that the insured received through his UIM carrier. Id. The trial court entered an order reducing the judgment to $230,000 after finding that "[t]he parties agree that [the driver] is entitled to setoffs or credits totaling $33,000." Id. The parties disagreed over whether the driver was entitled to a credit for payment that the insured received from his UIM carrier following the jury verdict. Id. The UIM carrier and the insured had entered into a settlement agreement under which the UIM carrier agreed to pay the insured $145,000 in UIM coverage and waived its right to subrogation. Id. The trial court held a hearing and concluded that the driver was entitled to a credit for the $145,000 payment made by the insured's UIM carrier and the $97,000 paid directly to the insured by the driver's liability-insurance carrier. Id. The insured appealed. Id.

The court of appeals affirmed. Id. at __, 808 S.E.2d at 293. On appeal, the insured relied on the collateral-source rule to argue that UIM benefits are a collateral source, so the driver could not reduce his tort liability for those benefits received from the insured's UIM carrier. Id. at __,

808 S.E.2d at 290. The insured emphasized that the "purpose of the collateral-source rule is to exclude evidence of payments made to the plaintiff by sources other than the defendant when this evidence is offered for the purpose of diminishing the defendant tortfeasor's liability to the injured plaintiff." Id. (emphasis omitted) (quoting Wilson v. Burch Farms, Inc., 176 N.C. App. 629, 638, 627 S.E.2d 249, 257 (2006)). The court of appeals disagreed, explaining that the collateral-source rule was not relevant, since there was no question regarding evidence presented at trial. Id. at __, 808 S.E.2d at 291. Rather, the court explained, the issue before the court was the proper sources of payment of the jury verdict and the allocation of liability among the driver, the UIM carrier, and the driver's liability insurer. Id.

The court of appeals distinguished the case from its decision in Wood v. Nunnery, 222 N.C. App. 303, 730 S.E.2d 222 (2012). Hairston, __ N.C. App. at __, 808 S.E.2d at 291. In Wood, the court found that the trial court erred by concluding that payments the plaintiff received by the defendant's insurer and the plaintiff's UIM carrier "constituted satisfaction of the judgment entered against the defendant." Id. (quoting Wood, 222 N.C. App. at 305, 730 S.E.2d at 224). The Wood court concluded that the defendant was entitled only to a credit against the judgment for the amount paid by the defendant's insurer, but not for the amount paid by the plaintiff's UIM carrier. Id. (citing Wood, 222 N.C. App. at 308, 730 S.E.2d at 225–26). In reaching that conclusion, the Wood court noted that the reason that the defendant could not receive a credit for the UIM carrier's payment was because the UIM carrier still had a right to subrogation. Id. (citing Wood, 222 N.C. App. at 307, 730 S.E.2d at 225).

Here, the Wood rationale did not apply because the UIM carrier waived its right to subrogation in the settlement agreement. Id. The court of appeals noted that the issue whether UIM coverage should be credited against payments made on a tort judgment when subrogation and the right of reimbursement have been waived is an issue that the court has not addressed. Id. The court concluded, however, based on Wood and other prior decisions, that the trial court did not err when it allowed the driver to credit the UIM carrier's payment toward the tort judgment. Id. Further, the court noted that case law indicates that "subrogation may be relevant to the payment of a judgment, as opposed to the evidence the jury can consider, because factoring in subrogation at that stage helps prevent a windfall." Id.

Judge Hunter, Jr. dissented in a separate opinion. Id. at __, 808 S.E.2d at 293. He concluded that the trial court erred in crediting the insured's judgment against the driver with payments from the UIM carrier. Id. He also argued that the distinction between this case and Wood was not outcome-determinative because the plaintiff's recovery in Wood, like the insured's recovery in this case, was based on a jury verdict finding the driver's negligence responsible for the plaintiff's injuries. Id.

In Nationwide Affinity Insurance Co. of America v. Le Bei, __ N.C. App. __, __ S.E.2d __, 2018 WL 2207533 (2018), the court of appeals considered whether the trial court improperly allowed defendants to recover UIM coverage through interpolicy stacking.

A driver caused a car crash that killed three passengers in his vehicle and injured two others. Id. at *1. The driver's insurance carrier insured the vehicle through a personal automobile

insurance policy. Id. The policy provided liability coverage with limits of $50,000 per person and $100,000 per accident. Id. The policy also provided UIM coverage with limits of $50,000 per person and $100,000 per accident. Id.

Following the accident, the carrier distributed $26,000 to each of the three deceased passengers under the driver's maximum per-accident limit of liability coverage, and various amounts to the other two passengers and to other persons involved in the accident. Id. The parties disagreed on whether the passengers were entitled to recover under the driver's UIM coverage for the difference between the amounts received under the liability coverage and the per-person limits of UIM coverage. Id. The carrier asked the trial court to declare that UIM coverage under the driver's policy was not triggered for any of the passengers. Id.

The passengers (and the estates of the deceased passengers) answered that they were entitled to UIM coverage under the driver's policy. Id. at *2. Two of the deceased passengers, at the time of the accident, had separate insurance policies with the carrier that provided UIM coverage with limits of $50,000 per person/$100,000 per accident and $100,000 per person/$300,000 per accident. Id. The passengers argued that the UIM coverage under their separate policies should be "stacked" with the UIM coverage under the driver's policy. Id. For those two passengers, the trial court held a hearing and approved settlements of $30,800 and $1,000 of liability-policy funds. Id. The court specifically stated that the settlements "shall not affect any rights of [the passengers] to pursue any [UIM] claims against any party, including [the driver]." Id.

The passengers filed a joint motion for summary judgment requesting that the trial court "declare that they are entitled to UIM coverage under [the driver's] policy, in amounts sufficient to exhaust said UIM coverage." Id. The carrier also moved for summary judgment, contending that the multiple-claimant exception in the Financial Responsibility Act, N.C. Gen. Stat. § 20-279.21(b)(4), precluded the passengers from recovering UIM coverage under the driver's policy. Id. The trial court granted the passengers' motion and denied the carrier's motion. Id. The court ordered that the passengers were entitled to payment under the driver's per-person UIM coverage, subject to any applicable credits. Id.

The court of appeals affirmed. Id. at *6. The court said that its analysis was guided by the "avowed purpose" of the Financial Responsibility Act, which "permits interpolicy stacking of UIM coverage to calculate the 'applicable limits of underinsured motorist coverage for the vehicle involved in the accident.'" Id. at *3 (quoting N.C. Farm Bureau Mut. Ins. Co. v. Bost, 126 N.C. App. 42, 50, 483 S.E.2d 452, 457 (1997)). "After stacking, the parties use the stacked amount to determine if the tortfeasor's vehicle is an underinsured highway vehicle" under section 20-279.21(b)(4). Id.

Noting the parties' disagreement about whether the case was one of first impression, the court concluded that the multiple-claimant exception did not apply. Id. at *6. The court explained that the General Assembly added that exception in an effort to further protect innocent victims of financially irresponsible motorists following Ray v. Atlantic Casualty Insurance Co., 112 N.C. App. 259, 435 S.E.2d 80 (1993). Le Bei, 2018 WL 2207533, at *6. To construe the multiple-

claimant exception "to limit UIM recovery to innocent occupants of a tortfeasor's vehicle, while allowing recovery by innocent occupants of an innocent operator's vehicle, would be 'an interpretation which results in injustice.'" Id. (quoting Nationwide Mut. Ins. Co. v. Chantos, 293 N.C. 431, 440, 238 S.E.2d 597, 603 (1977)). "Keeping in mind" the court's obligation "to liberally construe the [Financial Responsibility] Act," the court declined to apply the multiple-claimant exception "in a way which would reduce compensation to innocent victims and conflict with the avowed purpose of the Act." Id.

Judge Dietz concurred in the majority opinion but wrote separately to emphasize that "where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." Id. (Dietz, J., concurring) (quoting Wilkie v. City of Boiling Spring Lakes, __ N.C. __, 809 S.E.2d 853, 858 (2018)). He noted that the court addressed the General Assembly's "intent and the potential for injustice in this case only because N.C. Gen. Stat. § 20-279.21(b)(4), read in its entirety, is open to more than one reasonable interpretation and is therefore ambiguous." Id.

C. Duty to Defend

In North Carolina Farm Bureau Mutual Insurance Co. v. Phillips, __ N.C. App. __, 805 S.E.2d 362 (2017), the court of appeals considered whether an insurer had a duty to defend or indemnify its insureds in a civil action filed against the insureds relating to the sexual assaults of a minor child. The insureds' insurance policy covered liability for damages resulting from "bodily injury." Id. at __, 805 S.E.2d at 363.

The insureds were charged with various sexual offenses against a minor child. Id. The child's father filed a civil action against the insureds for damages that the father allegedly suffered when he learned that his child was sexually assaulted. Id. The insureds had a liability-insurance policy with the insurer during the times that the sexual assaults occurred that provided coverage for "bodily injury" caused by an "occurrence" not otherwise excluded. Id. The policy excluded "bodily harm . . . that arises out of . . . the actual, alleged or threatened sexual molestation of a person." Id. The insurer sought a declaratory judgment that the policy did not apply to claims in the civil action, and that the insurer had no duty to defend or indemnify the insureds. Id. The trial court entered judgment and ordered that the insurer was obligated to defend and indemnify the insureds. Id. at __, 805 S.E.2d at 364. The insurer appealed. Id.

The court of appeals reversed. Id. at __, 805 S.E.2d at 367. The court first explained that, to determine whether an insurer has a duty to defend, North Carolina courts apply the "comparison test." Id. at __, 805 S.E.2d at 365 (quoting Kubit v. MAG Mut. Ins. Co., 210 N.C. App. 273, 278, 708 S.E.2d 138, 144 (2011)). In applying the comparison test, the court reads "the policies and the complaint side-by-side to determine whether the events as alleged are covered or excluded"; if the insurance policy provides coverage for the facts as alleged, the insurer has a duty to defend. Id. (quoting Kubit, 210 N.C. App. at 278, 708 S.E.2d at 144). The court noted that "the duty to defend exists unless the facts as alleged in the complaint 'are not even arguably covered by the policy.'" Id. (quoting Kubit, 210 N.C. App. at 278, 708 S.E.2d at 144). Applying the comparison test, the court of appeals concluded that the claims in the civil action clearly "ar[o]se out of the

sexual molestation of [the father's child] and [were] not included under the definition of a 'bodily injury' as defined under the policy." Id. at __, 805 S.E.2d at 367. Accordingly, the court of appeals held that the insurer had no duty to defend or indemnify the insureds, and remanded for entry of a declaratory judgment in the insurer's favor. Id.

The supreme court denied the insureds' petition for discretionary review. N.C. Farm Bureau Mut. Ins. Co. v. Phillips, __ N.C. __, 809 S.E.2d 594 (2018).

V. WORKERS' COMPENSATION

In Booth v. Hackney Acquisition Co., __ N.C. App. __, 807 S.E.2d 658 (2017), the court of appeals considered whether the bar-date provision and the statute of repose in the Insurance Guaranty Association Act, as applied to workers' compensation claims involving occupational diseases, are unconstitutional on equal protection and due process grounds.

A welder was diagnosed with lung cancer in 2008 and died in 2009. Id. at __, 807 S.E.2d at 660. A doctor opined that the welder's exposure to welding fumes contributed to the lung cancer. Id. The welder's estate filed a claim for workers' compensation benefits in 2009. Id. The insurance carriers that issued the welder's workers' compensation policy had been declared insolvent in 2003, and a court ordered that all claims against the carriers be filed with the liquidator by 2004. Id. Because the insurance carriers had been declared insolvent, the North Carolina Insurance Guaranty Association assumed the role of the carriers and denied the estate's workers' compensation claim. Id. The association filed a motion to dismiss, arguing that the bar date in section 58-48-35(a)(1) of the North Carolina General Statutes, and the statute of repose in section

58-48-100(a) of the North Carolina General Statutes mandate dismissal of the estate's claim. Id. The deputy commissioner denied the association's motion to dismiss, and the association appealed to the full commission. Id. at __, 807 S.E.2d at 660–61. The commission certified constitutional questions to the court of appeals regarding whether the bar-date provision and statute of repose violate the guarantees of due process and equal protection under the North Carolina and United States Constitutions. Id. at __, 807 S.E.2d at 661.

The court of appeals concluded that the bar-date provision and statute of repose do not violate the North Carolina or United States Constitutions. Id. at __, 807 S.E.2d at 660. The court explained that "[i]ndividuals with latent health conditions are not members of a suspect class, and access to a claim against the [association] does not affect a fundamental right." Id. Further, the bar-date provision and statute of repose are subject to minimum scrutiny because they further legitimate state interests. Id.

The court first considered the constitutionality of the bar-date provision. Id. at __, 807 S.E.2d at 662. The bar-date provision in section 58-48-35(a)(1) states the following:

> In no event shall the Association be obligated to a policyholder or claimant in an amount in excess of the obligation of the insolvent insurer under the policy from which the claim arises. Notwithstanding any other provision of this Article, a covered claim shall not include any claim filed with the Association after the final date set by the court for the filing of claims against the liquidator or receiver of an insolvent insurer.

N.C. Gen. Stat. § 58-48-35(a)(1) (2017). The court of appeals concluded that the provision passes constitutional muster because there are several legitimate state interests furthered by the bar date. Booth, __ N.C. App. at __, 807 S.E.2d at 662.

The court next considered the constitutionality of the statute of repose. Id. at __, 807 S.E.2d at 663. The statute of repose in section 58-48-100(a) provides as follows:

> Notwithstanding any other provision of law, a covered claim with respect to which settlement is not effected with the Association, or suit is not instituted against the insured of an insolvent insurer or the Association, within five years after the date of entry of the order by a court of competent jurisdiction determining the insurer to be insolvent, shall thenceforth be barred forever as a claim against the Association.

N.C. Gen. Stat. § 58-48-100(a) (2017). The court of appeals concluded that the state has a legitimate interest in protecting the integrity of the Guaranty Fund, among other things, and that the statute of repose furthers those interests. Booth, __ N.C. App. at __, 807 S.E.2d at 664.

Accordingly, the court of appeals held that the bar date and statute of repose do not violate the North Carolina or United States Constitutions, and remanded the case to the full commission for further proceedings. Id.

The supreme court denied the estate's petition for discretionary review. Booth v. Hackney Acquisition Co., __ N.C. __, 811 S.E.2d 594 (2018).

In Hawkins v. Wilkes Regional Medical Center, __ N.C. App. __, 808 S.E.2d 505 (2017), the court of appeals considered whether an employee is required to name a specific insurance company as a party to a workers' compensation claim.

An employee was injured on the job in 2007 and received workers' compensation benefits for her injury. Id. at __, 808 S.E.2d at 506. Over the next five years, the employee was compensated for other incidents that exacerbated her 2007 injury. Id. The employee sustained another injury in 2012 that she claimed was causally related to her 2007 accident and injury. Id. She filed a workers' compensation claim against her employer and the employer's insurer from 2007, but not the employer's 2012 insurer. Id. The 2007 insurer argued that it was not liable for the employee's 2012 injury because the injury was a new injury, not related to the 2007 injury. Id. On review, the commission concluded that the employee's claim was barred because she had not brought a timely claim against the 2012 insurer. Id. at __, 808 S.E.2d at 507.

The court of appeals reversed. Id. at __, 808 S.E.2d at 509. The court first noted that neither the commission's opinion and award nor the employer and insurer's brief cited any law to support the proposition that an employee must bring a workers' compensation claim against a specific insurer, nor could the court of appeals "find any such law." Id. at __, 808 S.E.2d at 508. The court explained that section 97-97 of the North Carolina General Statutes "clearly places the responsibility for compensation for work-related injuries on the employer and provides that notice to the employer is notice to the carrier." Id.; see N.C. Gen. Stat. § 97-97. Thus, "[w]hether the 2012 injury was a new injury or an exacerbation of her prior 2007 injury, [the employee's] employer was the same at all times, and her employer was provided prompt notice of each and every incident." Hawkins, __ N.C. App. at __, 808 S.E.2d at 508. The court of appeals also noted that the commission's own standard forms reflect that the employee must notify the employer of a

claim but place the burden of identifying the proper insurer on the employer and the commission. Id. (referring to Form 18 as an example).

Accordingly, because the employee had notified her employer of her injury within the time provided by section 97-97, the court of appeals reversed and remanded to the commission for further proceedings. Id. at __, 808 S.E.2d at 509.

In Easter-Rozzelle v. City of Charlotte, 370 N.C. 286, 807 S.E.2d 122 (2017), the supreme court considered whether an employee who recovers from a third-party tortfeasor for personal injuries is barred from pursuing compensation for that claim under the Workers' Compensation Act.

An employee was injured in the course of his job as a utility technician when he slipped while handling a manhole cover. Id. at 287, 807 S.E.2d at 123. His employer authorized treatment with a doctor, and the employee contacted the doctor's office, which informed him that they would provide an out-of-work note that the employee could pick up at their office. Id. While driving to the doctor's office to get the note, the employee was involved in a car wreck and suffered traumatic brain injury. Id. The employee retained separate lawyers for his personal-injury claim relating to the crash and for his workers' compensation claim. Id. at 288, 807 S.E.2d at 123. There was a third-party settlement in connection with the employee's personal-injury claim, and the employee received funds from that settlement. Id. at 288, 807 S.E.2d at 124. When the workers' compensation attorney learned that the employee had been traveling to the office of his authorized physician to get an out-of-work note when the car wreck occurred, he filed an amended workers'

compensation form to include the head injury that the employee sustained in the car wreck. Id. The parties were unable to settle on the compensability of the head injury, and the employee filed a form with the commission requesting that the claim be assigned for a hearing. Id.

The deputy commissioner entered an opinion and award denying the employee's claim for benefits. Id. The commissioner held that, under Hefner v. Hefner Plumbing Co., 252 N.C. 277, 113 S.E.2d 565 (1960), "when an employee settles and disburses funds from a third-party settlement without preserving the defendant's lien, or applying to a superior court judge to reduce or eliminate the lien, the employee is barred from recovering under the [Workers' Compensation] Act." Easter-Rozzelle, 370 N.C. at 289, 807 S.E.2d at 124. The employee appealed to the full commission, which entered an opinion and award reversing the decision of the deputy commissioner. Id. at 289, 807 S.E.2d at 124–25. The employer appealed. Id. at 292, 807 S.E.2d at 126. The court of appeals reversed the full commission. Id., rev'g Easter-Rozzelle v. City of Charlotte, 244 N.C. App. 198, 780 S.E.2d 244 (2015). The employee filed a petition for certiorari. Id. at 293, 807 S.E.2d at 126.

The supreme court allowed the employee's petition for certiorari and reversed the court of appeals. Id. at 293, 807 S.E.2d at 126–27. The supreme court found that the court of appeals majority correctly noted that Hefner "was not a blanket preclusion of an employee's right to recover from his employer as well as the third party tortfeasor under" N.C. Gen. Stat. § 97-10. Id. at 297, 807 S.E.2d at 129 (quoting Easter-Rozzelle, 244 N.C. App. at 203, 780 S.E.2d at 248). But, the supreme court explained, Hefner applied "an election of remedies that is incompatible

with the current statutory framework." Id. (explaining that the provisions of the Act relating to claims against third-party tortfeasors were substantially amended in 1959, and that Hefner was decided under the previous statute). Thus, the supreme court held that the full commission correctly concluded that Hefner was inapplicable here and that the employee had not waived his right to compensation under the Act. Id.

The court further held that the full commission "correctly determined that once the subrogation lien amount is determined by agreement of the parties or by a superior court judge, defendant is entitled to reimbursement of its lien from the benefits due to plaintiff." Id. at 304, 807 S.E.2d at 133. Accordingly, the supreme court reversed the decision of the court of appeals and remanded the case to that court for further remand to the full commission. Id.

In Neckles v. Harris Teeter, __ N.C. App. __, 812 S.E.2d 178 (2018), the court of appeals considered the standard for determining an employee's loss of wage-earning capacity.

An employee was injured on the job and received payments of temporary total disability. Id. at __, 812 S.E.2d at 179. Two years later, at the employer's request, the employee was assessed by a vocational rehabilitation specialist to assess the employee's "current vocational potential." Id. The specialist determined that it would be difficult to place the employee in the job market based on his work history, limited transferrable skills, age, and lack of computer knowledge. Id. The employer claimed that the employee was no longer disabled and requested a hearing in the Industrial Commission. Id. The employee responded that he remained disabled and requested an order compelling his employer to pay for all related medical expenses. Id. The commission

concluded that the employee was not entitled to temporary total disability benefits because he "failed to meet his burden of showing that it would be futile for him to look for work." Id. The employee appealed to the court of appeals. Id.

The court of appeals reversed the commission's opinion and award and held that the employee had met his burden of proving disability under the "futility method" set forth in Russell v. Lowe's Product Distribution, 108 N.C. App. 762, 425 S.E.2d 454 (1993). See Neckles v. Harris Teeter, No. COA16-569, 2016 WL 7984225, at *5 (N.C. Ct. App. Dec. 30, 2016). In reaching its decision, the court of appeals relied heavily on Wilkes v. City of Greenville, 243 N.C. App. 491, 777 S.E.2d 282 (2015), which was later reversed by the supreme court. See Wilkes v. City of Greenville, 369 N.C. 730, 799 S.E.2d 838 (2017). The employer filed a petition for discretionary review, which the supreme court allowed for the limited purpose of remanding to the court of appeals for reconsideration in light of Wilkes. Neckles, __ N.C. App. at __, 812 S.E.2d at 180.

On reconsideration, the court of appeals reversed the opinion and award of the commission. Id. The court discussed the supreme court's directive in Wilkes that "in determining loss of wage-earning capacity, the Commission must take into account age, education, and prior work experience, as well as other preexisting and coexisting conditions." Id. (quoting Wilkes, 369 N.C. at 745, 799 S.E.2d at 849). "Once the plaintiff meets his burden of establishing disability, the burden shifts to the defendant 'to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.'" Id. (quoting Wilkes, 369 N.C. at 745, 799 S.E.2d at 849). If, however, the plaintiff shows a "total

incapacity for work, taking into account his work-related conditions combined with the other factors noted above, he is not required to also show that a job search would be futile." Id. (quoting Wilkes, 369 N.C. at 746, 799 S.E.2d at 849).

Based on Wilkes, the court of appeals held that the commission failed to make necessary findings regarding the effect of the employee's compensable injury on his ability to earn wages. Id. Accordingly, the court of appeals remanded to the commission "to take additional evidence if necessary and to make specific findings addressing [the employee's] wage-earning capacity, considering [the employee's] compensable injury in the context of all the preexisting and coexisting conditions bearing upon his wage-earning capacity." Id. at __, 812 S.E.2d at 182 (quoting Wilkes, 369 N.C. at 748, 799 S.E.2d at 850).

In Briggs v. Debbie's Staffing, Inc., __ N.C. App. __, 812 S.E.2d 706 (2018), the court of appeals considered whether an employee is required to present expert medical evidence to establish that the conditions of his employment placed him at a greater risk than members of the general public for contracting a disease.

An employee worked as a ceramic technician at a manufacturing facility. Id. at __, 812 S.E.2d at 707. His job duties included working on a Voeller machine, which is a large circular mixing machine with a blade that mixes dry ingredients with water. Id. The dry ingredients mixed in the machine included "alumina silicate, cement (calcium aluminate), cristobalite, quartz, fused silica, fumed silica, and silicon carbide." Id. at __, 812 S.E.2d at 707–08. The employee was terminated for attendance-related issues and later filed a notice of accident alleging that he had

"developed COPD and asthma as a result of working as a Voeller technician." Id. at __, 812 S.E.2d at 708. Two physicians were deposed in connection with proceedings in the Industrial Commission. Id.

The first physician testified that the employee had come to his office and complained of shortness of breath and wheezing. Id. The physician opined that the employee's condition had been caused by exposure to substances at the manufacturing facility. Id. The physician conceded, however, that he was unaware that the employee smoked cigarettes during breaks at work, had been given a respirator mask to use during work hours, had a history of marijuana use, and had been treated for allergies with albuterol. Id. The second physician testified that the employee's asthma likely predated his employment because his medical records showed that he had a reactive airway before he began working at the manufacturing facility. Id. He noted, however, his belief that the employee's asthma was aggravated during his employment at the manufacturing facility. Id.

The deputy commissioner issued an opinion and award concluding that the employee "met his burden and [was] temporarily totally disabled from employment as a result of his occupational disease and [was] entitled to temporary total disability compensation at the rate of $213.27 per week." Id. The full commission reversed and denied the employee's claim for benefits. Id.

The court of appeals affirmed. Id. at __, 812 S.E.2d at 715. Under section 97-53(13), a disease is considered occupational if it is "proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all

ordinary diseases of life to which the general public is equally exposed outside of the employment." Id. at __, 812 S.E.2d at 709 (quoting N.C. Gen. Stat. § 97-53(13) (2017)). In Rutledge v. Tulex Corp./Kings Yarn, the supreme court set forth a three-prong test for determining whether a disease is occupational under section 97-53(13):

> [I]t must be (1) characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; (2) not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there must be a causal connection between the disease and the claimant's employment.

Id. (quoting Rutledge v. Tulex Corp./Kings Yarn, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983)). Only "ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded." Id. (quoting Rutledge, 308 N.C. at 93, 301 S.E.2d at 365).

The court of appeals noted that the commission's conclusion that the employee had satisfied the third prong of the Rutledge test by showing that the conditions at the manufacturing facility aggravated his asthma was not in dispute. Id. at __, 812 S.E.2d at 713. Rather, the issue was whether the employee satisfied the first two prongs of the test. Id. The court concluded that the question whether "an individual can actually contract asthma simply by working in a dusty environment is [not] one that a layperson could answer." Id. at __, 812 S.E.2d at 715. That determination is beyond a layperson's understanding, since "questions as to the root causes of asthma can only be answered by medical experts." Id. Thus, the court of appeals concluded that the employee failed to establish that "[his] employment exposed him to a greater risk of contracting

[asthma] than the public generally." Id. (alterations in original) (quoting Rutledge, 308 N.C. at 93–94, 301 S.E.2d at 365).

The employee has filed a petition for discretionary review. That petition remains pending.

In Davis v. Craven County ABC Board, __ N.C. App. __, __ S.E.2d __, 2018 WL 1801134 (2018), the court of appeals considered an argument that non-FDA-approved drugs should be categorically excluded from medical compensation under the Workers' Compensation Act.

An employee was injured at work and struggled with pain from the injury. Id. at *1. The employee's doctors prescribed a compound cream to treat an employee's medical conditions. Id. The compound cream was not approved by the FDA, but the drugs that were compounded to create the cream each were FDA-approved on their own for treatment of various medical conditions. Id. The employee's workers' compensation providers refused to compensate him for this non-FDA-approved treatment. Id.

The deputy commissioner concluded that the compound cream was reasonably necessary to effect a cure, provide relief, or lessen the employee's disability period. Id. at *2. The full commission affirmed the deputy commissioner and ordered the providers to authorize and pay for the compound cream. Id. The providers appealed. Id.

The court of appeals affirmed. Id. at *3. The court rejected the providers' argument that non-FDA-approved drugs should be categorically excluded from medical compensation under the workers' compensation system. Id. at *2. The text of the Workers' Compensation Act does not limit the types of drugs that might reasonably be required to those that are FDA-approved. Id.

Rather, the statute indicates that whether a particular medical treatment "may reasonably be required to effect a cure or give relief" is a fact question "that must be individual assessed in each case." Id. The court noted that "[i]f requiring workers' compensation providers to compensate injured workers for non-FDA-approved drugs is bad policy, it is for our General Assembly to change that law." Id. Accordingly, the court rejected the providers' argument that non-FDA-approved drugs are categorically excluded from the definition of "medical compensation" under the Act. Id.

In Penegar v. United Parcel Service, __ N.C. App. __, __ S.E.2d __, 2018 WL 2011869 (2018), the court of appeals considered the standards for determining when an employee's last injurious exposure to a hazardous material occurs under the Workers' Compensation Act.

An employer challenged the Industrial Commission's finding that a former employee's last injurious exposure to asbestos occurred during the employee's work for the employer. Id. at *3. Specifically, the employer argued that the employee's estate failed to present evidence that the employee was not exposed to asbestos during his subsequent employment. Id.

The court of appeals affirmed in part and dismissed in part. Id. "In any case where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable." Id. at *6 (quoting N.C. Gen. Stat. § 97-57 (2017)). The supreme court has interpreted "last injuriously exposed" to mean "an exposure which proximately augmented the disease to any

extent, however slight." Id. (quoting Rutledge v. Tultex Corp./Kings Yarn, 308 N.C. 85, 89, 301 S.E.2d 359, 362 (1983)). Thus, to prevail, a plaintiff must show only "(1) that she has a compensable occupational disease and (2) that she was 'last injuriously exposed to the hazards of such disease' in [the] defendant's employment." Id. (alteration in original) (quoting Rutledge, 308 N.C. at 89, 301 S.E.2d at 362).

The court of appeals rejected the employer's argument that, because there was no record evidence regarding the employee's asbestos exposure at his subsequent employment, the commission erred in finding that the employee's "last injurious exposure to the hazards of asbestos occurred during his employment with [the employer]." Id. at *7. The court noted that this argument is premised on the theory that, for the commission to find that the employee's last exposure was at the employer, it must first find—based on specific evidence presented by the employee—that that the employee was not later exposed at his subsequent employers. Id. The court rejected that theory based on "precedent and the legislative purpose of the Workers' Compensation Act." Id.

The court further rejected the employer's assertion that the commission's finding was not supported by the evidence. Id. Rather, the court of appeals explained, the commission found that there was no evidence that the employee was exposed to asbestos during his subsequent employment—not that there was no evidence regarding the employee's exposure during his subsequent employment. Id. The court explained that "[t]his distinction, however minor, is

essential," because the court is bound by the commission's findings when those findings are supported by evidence in the record. Id.

Accordingly, the court held that "in the absence of evidence that an employee was exposed to a hazardous material at subsequent employers, the burden shifts to the employer to produce some evidence of a subsequent exposure." Id. While "[s]hifting the burden of production does not shift the burden of proof," "the record must include some evidence of exposure" at the employee's subsequent employment before the commission can find that an employee was exposed to a hazardous condition at that employment. Id. The court found the reasoning in an unpublished opinion, Richardson v. PCS Phosphate Co., No. COA14-615, 2014 WL 7149777 (N.C. Ct. App. Dec. 16, 2014), persuasive in reaching its holding. Penegar, 2018 WL 2011869, at *8.

Here, the court explained that the employee's estate provided competent evidence that the employee was injuriously exposed to asbestos during his employment with the employer and that his exposure contributed to his development of mesothelioma. Id. at *9. Although there was no affirmative evidence that proved a lack of exposure to asbestos during the employee's subsequent employment, nothing in the evidence about his subsequent employment suggested any inference to the contrary. Id. Without that evidence, it would have been error for the commission to find that the employee was later exposed. Id. Thus, the court concluded that based on the record, and in the absence of evidence establishing a nexus between the employee's subsequent employment

and asbestos exposure, the commission did not err in finding that the employee's last injurious exposure to asbestos was at the employer. Id.

In Brooks v. City of Winston-Salem, __ N.C. App. __, __ S.E.2d __, 2018 WL 2207799 (2018), the court of appeals considered when an employee's injury is deemed to have arisen out of his employment under the Workers' Compensation Act.

An employee bought an e-cigarette at a gas station during his lunch break and smoked it in his vehicle. Id. at *1. The employer maintained a tobacco-free policy, which prohibited smoking cigarettes or e-cigarettes inside the employer's vehicles or on its property. Id. When the employee ignited and inhaled the e-cigarette, he began to cough uncontrollably. Id. He opened the vehicle's door and stepped out for fresh air. Id. The employee passed out and fell to the ground, landing on a cement curb. Id. The fall injured the employee's hip, back, and head. Id. The employee sought workers' compensation benefits for his injuries. Id.

The deputy commissioner of the Industrial Commission issued an opinion and award determining that the employee's "injuries were not the result of an injury by accident arising out of and in the course of employment." Id. at *2. The employee appealed to the full commission. Id. The full commission affirmed the deputy commissioner and denied the employee's claim for benefits. Id. The commission found that the employee's fall was an "unexpected and unforeseen occurrence" caused by idiopathic conditions, including extremely elevated blood pressure and blood sugar, and vasovagal response triggered by uncontrolled coughing. Id. at *4. It also found that "no risk attributable to his employment combined with the idiopathic conditions to cause [the

employee's] accident." Id. Further, the commission found no evidence that the employee's working conditions contributed to his fall and injury, and noted that there was "nothing in the record to suggest that [the employee] would not have fallen because of his idiopathic conditions had he been standing in his back yard or leaving a convenience store." Id. Thus, while the employee's accident occurred "in the course of his employment, it did not arise out of his employment." Id.

The court of appeals affirmed. Id. at *7. The court explained that "an injury is said to arise out of the employment when it occurs in the course of the employment and is a natural and probable consequence or incident of it, so that there is some causal connection between the accident and the performance of some service of the employment." Id. at *4 (quoting Taylor v. Twin City Club, 260 N.C. 435, 438, 132 S.E.2d 865, 868 (1963)). "[W]hen the employee's idiopathic condition is the sole cause of the injury, the injury does not arise out of the employment." Id. (quoting Mills v. City of New Bern, 122 N.C. App. 283, 285, 468 S.E.2d 587, 589 (1996)). On the other hand, "the injury does arise out of the employment if the idiopathic condition of the employee combines with the risks attributable to the employment to cause the injury." Id. (quoting Billings v. Gen. Parts, Inc., 187 N.C. App. 580, 586, 654 S.E.2d 254, 259 (2007)).

The employee argued that this case is similar to cases in which North Carolina courts have upheld an award of workers' compensation benefits to an employee who suffers an injury from an idiopathic condition while operating a vehicle for work-related purposes. Id. The court explained,

however, that where the relationship between a plaintiff and his injury is too attenuated, the injury does not arise out of the employment. Id. at *5.

The court found the supreme court's opinion in Vause v. Vause Farm Equipment Co., 233 N.C. 88, 63 S.E.2d 173 (1951), particularly instructive on this point. Brooks, 2018 WL 2207799, at *5. In Vause, the plaintiff had suffered from epileptic convulsions for many years and could "feel one of these seizures when it was coming on." Id. (quoting Vause, 233 N.C. at 93, 63 S.E.2d at 177). The plaintiff realized that he was about to have a seizure "while driving a pick-up truck in the course of his employment to the home of a customer for the purpose of servicing a tractor." Id. (quoting Vause, 233 N.C. at 89, 63 S.E.2d at 173). The plaintiff pulled the truck over to the side of the road, parked and opened the door, and suffered a seizure that caused him to lose consciousness. Id. (citing Vause, 233 N.C. at 89, 63 S.E.2d at 173). When the plaintiff regained consciousness, he was outside of the truck and had suffered injuries. Id. (citing Vause, 233 N.C. at 89–90, 63 S.E.2d at 173). The supreme court found no causal connection between the operation of the truck and the injury. Id. (citing Vause, 233 N.C. at 98, 63 S.E.2d at 180–81).

The court of appeals explained that "[w]hile admittedly [the employee] would not have been at the gas station but for his job, his fall was not traceable to the conditions of his employment." Id. at *6. Rather, the employee's own actions and his idiopathic condition were the "sole forces" that caused his injuries. Id. Thus, his injury was not compensable under the Workers' Compensation Act. Id. at *7.

VI. LAND USE

A. Adverse Possession

In Parker v. DeSherbinin, __ N.C. App. __, 810 S.E.2d 682 (2018), the court of appeals considered the standards for adverse possession under twenty years of continuous possession and color of title.

A man and a couple own adjoining tracts of land. Id. at __, 810 S.E.2d at 683. When the couple purchased their vacant lot with the intent to build, a surveyor fixed the boundary between the two properties to be approximately five feet south of the line established in a survey completed by another surveyor several years prior, and failed to show any overlaps in the surveyed boundary lines. Id. The survey that the couple obtained showed a chain-link fence installed by the man to the north of the boundary line between the two properties. Id. Prior to their purchase, the real-estate agent informed the couple that a dispute existed over the boundary line of the two properties. Id. The couple nonetheless proceeded to buy the property. Id. The couple applied for a building permit to build a home and attached a copy of the survey to their application. Id. The man complained and shared a copy of his recorded survey showing the boundary-line issue. Id. The couple obtained a permit and continued to build their home on the belief that their survey correctly showed the boundary. Id.

The man filed a complaint for, among other things, adverse possession under color of title and adverse possession under twenty years of continuous possession. Id. The couple sought a declaratory judgment based on the survey that they had obtained. Id. The trial court held a bench trial and found in the favor of the couple. Id. at __, 810 S.E.2d at 686. The man appealed. Id.

The court of appeals reversed the trial court on the adverse-possession claims. Id. at __, 810 S.E.2d at 691.

The court of appeals first addressed the man's argument based on adverse possession under twenty years of continuous possession. Id. at __, 810 S.E.2d at 688. To acquire title to land by adverse possession in North Carolina, "the claimant must show actual, open, hostile, exclusive, and continuous possession of the land claimed for the prescriptive period." Id. (quoting Jones v. Miles, 189 N.C. App. 289, 292, 658 S.E.2d 23, 26 (2008)). "Adverse possession of privately owned property without color of title must be maintained for twenty years" for the claimant to acquire title to the land. Id. (citing N.C. Gen. Stat. § 1-40 (2017)). The court of appeals found that the man's installation of the chain-link fence "and his admitted maintenance of the area around and inside it since he established the fence in 1984 or 1985" showed his actual, open, notorious, exclusive, and hostile use of the property located in the disputed area to support his claim for adverse possession under the requisite twenty-year possession period. Id. The court noted that the couple presented no evidence that they, or anyone else, gave the man permission to erect his chain-link fence in the disputed area. Id. The couple's counsel even conceded at oral argument that the couple's "uncontradicted evidence" established adverse possession to the portion of the dispute area south of the chain-link fence. Id. Thus, the court of appeals held that the trial court erred as a matter of law in finding that the man had not established adverse possession as to the portion of the disputed area south of the chain-link fence. Id.

The man also argued that he was entitled to the entire disputed area—the north and south sides to the chain-link fence—through adverse possession under color of title. Id. at __, 810 S.E.2d at 689. The couple contended that this claim failed because the survey referenced in the man's deed stated an incorrect boundary line. Id. The court of appeals concluded that the trial court made no findings regarding whether the man had shown the on-the-ground boundary lines described in his deed and shown on the survey referenced in his deed. Id. The court reversed and remanded this issue to the trial court to make findings and to determine whether the deed and survey under which the man acquired title sufficiently described the remaining portion of the disputed area. Id. at __, 810 S.E.2d at 690.

The supreme court denied the couple's petition for discretionary review. Parker v. DeSherbinin, __ N.C. __, __ S.E.2d __, 2018 WL 2212925 (2018).

VII. ETHICS

In North Carolina State Bar v. Foster, __ N.C. App. __, 808 S.E.2d 920 (2017), the court of appeals considered whether an attorney's conduct violated Rules 3.5 and 8.4 of the North Carolina Rules of Professional Conduct.

A North Carolina-licensed attorney visited the magistrate's office on behalf of the Occupy Asheville movement to inquire about arrest warrants that had been issued for several members of the movement. Id. at __, 808 S.E.2d at 921. The attorney made comments like "what the hell is going on around here?" and "what the f*** is going on around here?" to the magistrate on duty regarding the warrants. Id. When the attorney continued to use profanity, the magistrate told the

attorney that she was being held in contempt of court. Id. Based on these events, the North Carolina State Bar filed a complaint against the attorney with the Disciplinary Hearing Commission. Id. The commission found that the attorney's conduct violated Rules 3.5(a)(4)(B) and 8.4(d) of the North Carolina Rules of Professional Conduct. Id. The commission imposed a two-year suspension on the attorney's law license but stayed the suspension pending compliance with certain conditions (e.g., that the attorney follow her therapist's recommendations and treatment program). Id. The attorney appealed. Id.

The court of appeals affirmed. Id. at __, 808 S.E.2d at 925. The court analyzed the attorney's conduct under Rules 3.5 and 8.4. Id. at __, 808 S.E.2d at 922–24.

Rule 3.5(a)(4)(B) of the Rules of Professional Conduct provides that "[a] lawyer shall not . . . engage in conduct intended to disrupt a tribunal, including . . . undignified or discourteous conduct that is degrading to a tribunal." Id. at __, 808 S.E.2d at 922 (quoting N.C. R. Prof. Conduct 3.5(a)(4)(B)). The court of appeals held that the commission did not err in concluding that the attorney had disrespected the tribunal under Rule 3.5(a)(4)(B) and rejected the attorney's contention that a magistrate is not a tribunal. Id. at __, 808 S.E.2d at 923.

Rule 8.4(d) of the Rules of Professional Conduct provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice." Id. at __, 808 S.E.2d at 924 (quoting N.C. R. Prof. Conduct 8.4(d)). The court pointed out that the attorney did not deny the conduct itself; rather, the attorney contended that the commission "rendered wholly conclusory findings of fact" that the attorney's conduct "harmed

the administration of justice and interfered with the ability of the magistrates to perform their duties on the night at issue." Id. The court disagreed, noting that under Rule 8.4, "[t]hreats, bullying, harassment, and other conduct serving no substantial purpose other than to intimidate, humiliate, or embarrass anyone associated with the judicial process . . . violate the prohibition on conduct prejudicial to the administration of justice." Id. (quoting N.C. R. Prof. Conduct 8.4 cmt. 5).

Accordingly, the court of appeals concluded that the commission did not err in finding that the attorney disrespected a tribunal in violation of Rule 3.5 and that she exhibited conduct prejudicial to the administration of justice in violation of Rule 8.4. Id. at __, 808 S.E.2d at 925.

In In re Henderson, __ N.C. __, __ S.E.2d __, 2018 WL 2171036 (2018), the supreme court considered whether a judge's failure to issue a ruling for more than two years on a motion for attorney's fees and failure to respond to party and attorney inquiries on the status of the ruling amounted to conduct prejudicial to the administration of justice warranting public reprimand.

The Judicial Standards Commission filed a statement of charges against a judge alleging that the judge engaged in conduct inappropriate to his office when he "(1) failed to issue a ruling for more than two years on a motion for attorney's fees and expenses," "(2) failed to respond or delayed responding to party and attorney inquiries as to the status of the pending ruling," and "(3) failed to respond in a timely manner to numerous communications" from the commission's investigator about the status of the ruling during the commission's investigation. Id. at *1. The commission filed a recommendation of judicial discipline that found, among other things, that the judge admitted to having "no excuses for the delay other than his 'dread' of the case," and that the

judge finally informed the commission that the order had been entered over two years and three months after the final hearing on the motion for attorney's fees. Id. at *2–3. The commission's conclusions of law reflected these findings. Id. at *3.

Based on its findings of fact and conclusions of law, the commission recommended that the supreme court publicly reprimand the judge. Id. at *4. The commission's recommendation was also based on certain "dispositional determinations," including the judge's exemplary "record of service to the judiciary, the profession and the community at large." Id.

The supreme court concluded that the commission's findings and dispositional determinations were supported by clear, cogent, and convincing record evidence, and that the commission's facts supported its conclusions of law. Id. at *5. Accordingly, the court accepted the commission's findings, conclusions, and recommendation, and concluded that the judge should be publicly reprimanded for violations of Canons 1, 2A, and 3B of the North Carolina Code of Judicial Conduct. Id.

In Boyce v. North Carolina State Bar, __ N.C. App. __, __ S.E.2d __, 2018 WL 1597920 (2018), the court of appeals considered whether there was a justiciable legal controversy concerning the scope of the concurrent jurisdiction of the court system over attorney disciplinary proceedings and the ability of complainants to bypass the State Bar process when they believe the State Bar has a conflict of interest.

After fourteen years of litigation, a lawyer (and former candidate for attorney general) and a former attorney general settled a dispute concerning allegedly defamatory statements made in

the attorney general's political advertisements during his campaign in 2000. Id. at *1, *3. As part of the settlement, the attorney general allegedly admitted to making false assertions in the 2000 political advertisements. Id. at *3. The lawyer, acting under Rule 8.3 of the North Carolina Rules of Professional Conduct, reported the attorney general's unethical statements to the State Bar, alleging that the attorney general violated Rules 4.1 and 8.4 of the Rules of Professional Conduct. Id.; see N.C. R. Prof. Conduct 4.1 ("[A] lawyer shall not knowingly make a false statement of material fact to a third person."); N.C. R. Prof. Conduct 8.4 (providing that it is professional misconduct for a lawyer to, among other things, "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation").

When the State Bar declined to take public action, the lawyer filed a declaratory-judgment action in the superior court asking for three declarations:

> (a) That concurrent jurisdiction of several types exists as to resolution of attorney discipline and misconduct matters, and
>
> (b) That Defendant The State Bar, by reason of its apparent Conflict of Interest has no right, jurisdiction or authority by recognition and knowledge of the clear conflict of interest and regarding the party and parties in question to ignore and appropriate Order of Referral, and
>
> (c) That Defendant The State Bar is obligated by law, by the Rules of Professional Conduct as a matter of conscience and good faith to refer Plaintiff's complaints and communications regarding the wrongful conduct of its own acting Counsel, Legal Representative to the Appropriate Forum and Jurisdiction for investigation, findings of fact and recommendations as to discipline, if any, as by law provided and so recognized, for cost.

Boyce, 2018 WL 1597920, at *4. The State Bar moved to dismiss on three grounds: (1) lack of standing, (2) declaratory judgment is a remedy limited to interpreting "written instruments" and therefore, there was no viable controversy, and (3) settlement of the prior lawsuit barred the lawyer's claims. Id. The trial court dismissed the lawyer's case under Rule 12(b)(1) on the grounds that the lawyer had no standing to bring the case and the case presented "no viable case or controversy." Id.

The court of appeals affirmed in part and reversed in part. Id. at *8.

The lawyer's first request for declaratory relief sought "the interpretation of a North Carolina statute regarding the availability of forums, in addition to that of the State Bar, for discipline of an attorney who has admitted that he has been untruthful in litigation." Id. at *5. The court of appeals held that the lawyer had "standing to bring an action seeking interpretation of the statutes on concurrent jurisdiction for a court to discipline attorneys' misconduct." Id. Neither party contested that the lawyer is a member of the State Bar, and the statutes make clear that the trial court, in addition to the State Bar, "had or has jurisdiction under its inherent powers to provide for any relief needed to address professional misconduct arising out of litigation before the courts." Id. at *6 (citing Swenson v. Thibaut, 39 N.C. App. 77, 250 S.E.2d 279 (1978)). The court declined to address whether the attorney general violated the Rules of Professional Conduct, however, since the attorney general was not a party to the action and thus had not had a chance to defend himself against charges of misconduct in a trial court. Id.

The court of appeals rejected the State Bar's argument that the settlement of the lawyer's private claim barred disciplinary action for ethical misconduct. Id. at *7. The court explained that professional misconduct in litigation cannot depend on the outcome of the litigation. Id. Nor can inaction by the State Bar or the courts during litigation bar or moot subsequent discipline for professional misconduct. Id. This is because "[a] lawyer's duty to the truth and his duty to advocate based upon the truth is central to our system of dispute resolution." Id. (citing N.C. R. Prof. Conduct 3.3). "While any client, regardless of his or her status, is entitled to procedural defenses and due process in litigating a claim, no client is entitled to have his attorney present a claim or defense which is untruthful." Id. (quoting N.C. R. Prof. Conduct 8.2).

The court of appeals agreed with the trial court's conclusion that the lawyer lacked standing to bring his second and third requests for declaratory relief. Id. The injury for which the lawyer sought declaratory relief is the State Bar's refusal to pursue disciplinary action against the attorney general, allegedly due to the State Bar's conflict of interest. Id. The court of appeals thus addressed "whether that purported injury is one legally cognizable in court." Id.

The court noted that "[u]nsurprisingly," the lawyer was not the first attorney to take issue "with a state bar's failure to act on a disciplinary grievance" and to then seek relief from the courts. Id. Based on the court's review of the precedent on this issue, the court noted that "every jurisdiction that has ever confronted [the issue] has concluded that a complainant has not alleged an injury sufficient to confer standing." Id. (citing cases from multiple states). The court concluded that the lawyer failed to allege a cognizable injury. Id. at *8. The State Bar's

disciplinary process is intended "to protect the public, the courts, and the legal profession." Id. (quoting N.C. State Bar v. Rogers, 164 N.C. App. 648, 656, 596 S.E.2d 337, 343 (2004)). After reporting the alleged attorney misconduct to the State Bar, however, "the complainant's interest in the case going forward is the same as all other members of the public." Id. Moreover, "[t]he mere fact [that] state investigators have an ethical conflict in the performance of their duties does not confer on members of the public the necessary legal standing to bring the dispute directly to court through the Declaratory Judgment Act." Id.

For these reasons, the court of appeals held that "a complainant in a state bar disciplinary proceeding lacks standing to ask the courts to intervene in an ethics investigation on the ground [that] the investigators are biased or have a conflict of interest." Id.

Judge Dietz wrote a separate concurring opinion, which he introduced with the question, "Who watches the watchman?" Id. (Dietz, J., concurring) (first citing Plato, Republic 376c–d; then citing Juvenal, Satires 6.347–48). Judge Dietz pointed out that "[l]awyers employed by the North Carolina State Bar are the watchmen when it comes to allegations of attorney conflicts of interest." Id. He characterized the lawyer's question as a simple one: "when the lawyers at the State Bar have a conflict of interest, who watches them?" Id.

Judge Dietz emphasized that the lawyer had alleged a credible conflict of interest. Id. at *9. That is, at the time the lawyer submitted his grievance and was waiting for the State Bar to investigate, the then attorney general was representing the State Bar "in perhaps the highest profile legal issue in State Bar history." Id. Judge Dietz said that one does not need to be a lawyer to

recognize that the State Bar "has a potential conflict of interest when it is asked to investigate a lawyer who is actively representing the Bar in high-profile litigation, and who may possess confidential information about the Bar and its handling of past attorney discipline investigations." Id.

In sum, Judge Dietz highlighted that the case presented "a justiciable legal controversy concerning the scope of the concurrent jurisdiction of the court system over attorney disciplinary proceedings and the ability of complainants to bypass the State Bar process when they believe the Bar has a conflict of interest." Id. at *10. Because he agreed that the lawyer had standing to seek declaratory relief on this issue, Judge Dietz concurred in the majority's decision to reverse the trial court's dismissal of the claim for lack of standing and to remand for further proceedings. Id.

A. Disqualification

In Worley v. Moore, 370 N.C. 358, 807 S.E.2d 133 (2017), the supreme court considered whether the business court properly disqualified counsel under Rule 1.9(a) of the North Carolina Rules of Professional Conduct.

A former employee was involved in multiple disputes relating to a company for which he was previously employed, including (1) a patent dispute between the employee and the company, (2) a shareholder-inspection-rights action against the company, and (3) a contract dispute between the company and a third-party company. Id. at 359, 807 S.E.2d at 135. The company's law firm offered to represent the employee, in his capacity as a former employee and shareholder of the company, in the contract action, and the employee agreed. Id. at 360, 807 S.E.2d at 136. Later,

the employee and other former shareholders of the company filed an action against the company's parent company. Id. The parent company retained the company's law firm to represent them in that action. Id. at 361, 807 S.E.2d at 136–37.

The former employee and shareholders moved to disqualify the law firm from the shareholder action based on the law firm's past representation of the former employee in the contract dispute. Id. at 362, 807 S.E.2d at 137. The parent company responded that communications between the former employee and the law firm were not confidential because the engagement letter expressly limited the nature of the law firm's representation of the former employee, and specifically authorized the law firm to use its discretion to disclose "any of the information" learned in its communications with the former employee to the company or "any related entities" and their "employees" during the contract litigation. Id.

The business court recognized that the facts presented a "close case" and applied the "appearance of impropriety" test. Id. The court found that an attorney-client relationship existed between the former employee and the law firm based on the contract action, and that the parent company's position was materially adverse to the former employee's position in the shareholder action. Id. at 363, 807 S.E.2d at 137. Thus, the business court determined that the only unresolved issue was whether the shareholder action was "substantially related to the matter" in which the law firm represented the former employee. Id. Specifically, the business court sought to answer whether "there [was] a reasonable probability that confidences were disclosed in the prior representation which could be used against the former client in the current litigation." Id. In its

analysis, the business court relied on the former employee's declaration, which included the employee's characterizations of the attorney-client relationship. Id. Based on its analysis, the business court granted the motion to disqualify. Id. at 363, 807 S.E.2d at 138.

The supreme court reversed. Id. at 368, 807 S.E.2d at 141. North Carolina Rule of Professional Conduct 1.9(a) provides that

> [a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

Id. at 364, 807 S.E.2d at 138 (quoting N.C. R. Prof. Conduct 1.9(a)). "The movant seeking to disqualify his former counsel must meet a particularly high burden of proof." Id. (quoting Gov't of India v. Cook Indus., 569 F.2d 737, 739 (2d Cir. 1978)). A party who seeks to disqualify opposing counsel must establish that (1) an attorney-client relationship existed between the former client and the opposing counsel in a matter in which confidential information would normally have been shared, (2) "the present action involves a matter that is the same as or substantially related to the subject of the former client's representation, making the confidential information previously shared material to the present action," and (3) "the interests of the opposing counsel's current client are materially adverse to those of the former client." Id. at 364–65, 807 S.E.2d at 138–39. In conducting this analysis, the trial court must consider the "circumstances surrounding each representation to objectively assess what would 'normally' have occurred within the scope of that representation." Id. at 365, 807 S.E.2d at 139 (quoting N.C. R. Prof. Conduct 1.9 cmt. 3). The

supreme court explained that Rule 1.9(a) "balances an attorney's ethical duties of confidentiality and loyalty to a former client with a party's right to its chosen counsel," and "permits disqualification of an attorney representing a new client if there is a substantial risk that the attorney could use the confidential information shared by the client in the former matter against that same client in the current matter." Id. at 359, 807 S.E.2d at 135. "The test does not rely on the subjective assessment provided by the former client or attorney." Id. at 365, 807 S.E.2d at 139.

The court concluded that rather than applying an objective test, the business court disqualified the law firm based on the former employee's "subjective perception of the past representation." Id. at 359, 807 S.E.2d at 135. The court explained that the business court erred by trying to determine whether the former employee "actually shared confidential information" with the law firm that the law firm did not share with the other parties to the common-representation agreement. Id. at 366, 807 S.E.2d at 140. Moreover, the business court "failed to consider the normal implications of simultaneous and ongoing representation" of the former employee by other counsel. Id. The supreme court directed that, on remand, the business court should "objectively consider what confidential factual information 'would normally have been obtained' within the scope of the past representation," and provided guidance on how the court should conduct that analysis. Id. at 366–67, 807 S.E.2d at 140 (quoting N.C. R. Prof. Conduct 1.9 cmt. 3).

The supreme court also explained that the business court mistakenly applied the "now replaced 'appearance of impropriety' test as a consideration in favor of disqualification." Id. at

368, 807 S.E.2d at 140. "Unlike its predecessor, the Model Code of Professional Responsibility, the Rules of Professional Conduct does not recognize 'appearance of impropriety' as a basis for disqualification." Id.

As a result, the supreme court reversed the business court's decision and remanded to the business court to apply the appropriate legal standard. Id. at 368, 807 S.E.2d at 141.