TIDBITS:
UNCOMMON COMMON INTEREST WORK PRODUCT DOCTRINE, SECOND CHANCE SUMMARY JUDGMENT MOTIONS, UNPUBLISHED ORPHANS, AND WAITING FOR INTERLOCUTORY'S END

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I. Common Interest Doctrine

A. Federal

In some lawsuits there are multiple defendants who have a common interest in the way to defend the case, and defense counsel understandably desire to share information with each other that is supportive of, and in furtherance of, a group-type defense strategy. Some of the information can be of a nature that would be protected under the attorney-client privilege or work product doctrine if such information were not being shared with other attorneys. Of course, ordinarily, the attorney-client privilege and work-product protection are waived when an attorney shares information and documents with someone

who is not their client or co-counsel who represent the same client. Fortunately, state and federal courts recognize what can be deemed a joint defense attorney-client privilege and work product protection. This protection is known by various terms in addition to the joint defense privilege, such as the common interest privilege, the common interest doctrine, and the common defense rule. It seems that most courts which have addressed the issue have used the term "common interest," and most view it as an exception to waiver of the attorney-client privilege and work product protection.

The Fourth Circuit Court of Appeals has recognized for over 25 years the common interest protection, both as an extension or part of the attorney-client privilege and work product doctrine. In *In re Grand Jury Subpoenas*, 902 F.2d 244 (4th Cir. 1990), a company and its wholly owned subsidiary had engaged in joint efforts in prosecuting a claim against the United States Army for equitable adjustment of a contract and in defending the Army's counterclaim. An issue arose as to whether the subsidiary had waived the attorney-client privilege or work product protection to various documents. The Court observed:

> The concept of a joint defense privilege first arose in the context of criminal co-defendants whose attorneys shared information in the course of devising a joint strategy for their clients' defense.[1] *An exception to the general rule that disclosure to a third party of privileged information thereby waives the privilege, a joint defense privilege cannot be waived without the consent of all parties who share the privilege.*
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> Because "'[t]he need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common

[1] Citing a case that is over 100 years old, *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 822 (1871).

> interest about a legal matter,' *courts have extended the joint defense privilege to civil co-defendants*[2], companies that had been individually summoned before a grand jury who shared information before any indictment was returned; *potential co-parties to prospective litigation*; plaintiffs who were pursuing separate actions in different states; and civil defendants who were sued in separate actions. Thus, . . . the joint defense privilege is "more properly identified as the 'common interest rule.'" Finally, as an exception to waiver, the joint defense or common interest rule presupposes the existence of an otherwise valid privilege, and *the rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine*.
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> . . . Although the government notes, as did the district court, that Movant [company] and [its] Subsidiary were not criminal co-defendants, and that Subsidiary was not named as a party in either the civil claim against the Army or in the Army's counter-claim, we have discovered no case in which the existence of a joint defense or common interest privilege turned on such distinctions. Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: *persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims*.

In re Grand Jury Subpoenas, 902 F.2d at 248-49 (citations omitted; emphasis added).

The Fourth Circuit has cited *In re Grand Jury Subpoenas* on several subsequent occasions in considering the common interest doctrine, and in describing some additional aspects of the doctrine. *See*, *e.g.*, *Hanwha Azdel, Inc. v. C & D Zodiac, Inc.*, 617 F. Appx. 227, 243 (4th Cir. 2015) (unpublished) ("'The joint defense privilege, an extension of the attorney-client privilege, protects communications between parties who share a common interest in litigation.' . . . The proponent of the privilege has the burden to establish that

[2] Citing *Western Fuels Ass'n, Inc. v. Burlington Northern R.R. Co.*, 102 F.R.D. 201 (D. Wyo. 1984). Because the North Carolina Court of Appeals later also cited *Western Fuels Ass'n* case, the Wyoming District Court's comments can be found below at footnote 10.

the parties had 'some common interest about a legal matter.' Importantly, 'it is unnecessary that there be actual litigation in progress for this privilege to apply.' . . . *[W]e have never held that in order to assert the common legal interest privilege, the party asserting the privilege must put forward evidence establishing the details of a joint legal strategy.* Moreover, such a holding would undermine the logic of our prior cases holding that the privilege applies even to actions which are not 'ongoing.'") (emphasis added); *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 341 (4th Cir. 2005) ("The joint defense privilege, an extension of the attorney-client privilege, protects communications between parties who share a common interest in litigation. The purpose of the privilege is to allow persons with a common interest to 'communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.' *For the privilege to apply, the proponent must establish that the parties had 'some common interest about a legal matter.*'") (citations omitted; emphasis added).

Another case that cited *In re Grand Jury Subpoenas* involved whether Exemption 5 of the Freedom of Information Act ("FOIA") applied.[3] In *American Management Services, LLC v. Dep't of the Army*, 703 F.3d 724 (4th Cir. 2013), the Court acknowledged that "'in some circumstances a document prepared outside the Government may nevertheless qualify as an 'intraagency' memorandum under Exemption 5.' One such circumstance . . . is where the common interest doctrine applies." *Id.* at 732 (citations omitted). The Court went on to state:

[3] Exemption 5 excludes from the FOIA disclosure requirement "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5).

> "The common interest doctrine permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims." We "carefully scrutinize[ ]" a government agency's assertion of a common interest. Therefore, *for the common interest doctrine to apply in the context of Exemption 5*, "an agency must show that it had agreed to help another party prevail on its legal claims at the time of the communications at issue because doing so was in the public interest." *The common interest doctrine does not require a written agreement, nor does it require that both parties to the communications at issue be co-parties in litigation. However, there must be an agreement or a meeting of the minds. "[M]ere 'indicia' of joint strategy as of a particular point in time are insufficient to demonstrate that a common interest agreement has been formed."*

American Management Services, 703 F.3d at 732-33 (citations omitted; emphasis added).

A question still lingers as to whether an agreement of the attorneys is necessary in a defense group situation, when it is obvious that the group of defendants have the same legal interest in litigating against the plaintiff. Although the Fourth Circuit's *American Management Service* does note that "there must be an agreement or a meeting of the minds," 703 F.3d at 733,[4] that comment appears to have been influenced by FOIA Exemption 5, *see id.* ("for the common interest doctrine to apply in the context of Exemption 5"), and other common interest cases have not expressly referred to the need for a specific agreement. *See*, *e.g.*, *In re Jemsek Clinic, P.A.*, No. 06-31766, 2013 WL 3994663, at *11 (Bankr. W.D.N.C. Aug. 2, 2013) (unpublished) ("To be protected under the common interest privilege, . . . [a party] must 'demonstrate that the communicating parties shared an identical legal interest, the communication was made in the course of

[4] *Hunton & Williams v. U.S. Dep't of Justice*, 590 F.3d 272 (4th Cir. 2010), was cited in support of the agreement requirement, but *Hunton & Williams* also was considering the applicability of the FOIA Exemption 5, and no case or authority was cited for the requirement.

and in furtherance of the joint legal effort, and the privilege had not been waived.'" The Court found that the privilege applied, even though there was no mention in the opinion of an agreement between the companies involved to treat the documents at issue as privileged.); *United States v. Duke Energy Corp.*, No. 1:00CV1262, 2012 WL 1565228 (M.D.N.C. Apr. 30, 2012) (unpublished) (quoted at length below; no mention of the need for an agreement); *Mainstreet Collection, Inc. v. Kirkland's, Inc.*, 270 F.R.D. 238 (E.D.N.C. 2010) (quoted at length below; no mention of the need for an agreement). Even *In re Grand Jury Subpoenas*, 902 F.2d 244 (4th Cir. 1990), did not mentioned an agreement as a prerequisite for the common interest doctrine.

Although the Court in *Hanwha Azdel, Inc. v. C & D Zodiac, Inc.*, 617 F. Appx. 227 (4th Cir. 2015) (unpublished), did not list an agreement as a requirement for the application of the common interest privilege, it did refer to two companies having "entered into a common interest agreement." *Id.* at 243 n.9. However, it does not appear there was an actual agreement, but rather one of those two companies had received a letter from a third company outlining claims against it, with such claims implicating the second company, and the Court concluded that the first and second companies had entered into a common interest agreement, and "[t]hus, there can be no doubt that a common legal interest existed between the two entities." *Id.* (It seems strange that a letter from a third company could create an agreement between two other companies.)

Although the Fourth Circuit has not appeared to require a "meeting of the minds" for the common interest privilege to apply outside the context of determining the applicability of the FOIA Exemption 5, some District Courts have. *See*, *e.g.*, *Atlantis*

Consultants Ltd. Corp. v. Terradyne Armored Vehicles, Inc., No. 1:15-CV-439-CMH-MSN, 2015 WL 9239808, at *4 (E.D. Va. Dec. 16, 2015) (unpublished); *Dillon v. BMO Harris Bank, N.A.*, No. 1:13CV897, 2015 WL 6619972, at *2 (M.D.N.C. Oct. 30, 2015) (unpublished); *In re Infinity Bus. Grp., Inc.*, 530 B.R. 316, 322–23 (Bankr. D.S.C. 2015); *Maxtena, Inc. v. Marks*, No. 11-0945, 2013 WL 1316386, at *6 (D. Md. March 26, 2013) (unpublished); *United States v. Duke Energy Corp.*, No. 1:00CV1262, 2012 WL 1565228, at *14 (M.D.N.C. Apr. 30, 2012) (unpublished). However, except for the *Maxtena* case, the Courts in these cases did not actually address an issue whether there was evidence of any agreement or "meeting of the minds."

The Court of Appeals in *Hunton & Williams* noted that "a common interest agreement can be inferred where two parties are clearly collaborating in advance of litigation," 590 F.3d at 284, and hence the Fourth Circuit would likely find that it is possible to infer a common interest agreement where the parties are "clearly collaborating" *during* litigation. Nevertheless, even though there is uncertainty as to the circumstances when there is a need for an agreement, the wisest and safest course is for defense counsel to clearly agree among themselves in a multiple defendant case that they will be exchanging information, engaging in joint strategy, and sharing their mental impressions, conclusions, opinions, legal theories, and other work product information and documents as a group with a common interest (such as defeating the plaintiff's claims). Such an agreement should be in writing, or at least some "writing" that memorializes the agreement and understanding (such as email). Additionally, any such

writing should expressly state that the parties and counsel do not intend to waive any attorney-client privilege and work product protection.[5]

There have been several decisions by U.S. District Courts in North Carolina regarding the common interest doctrine. Of particular interest is *United States v. Duke Energy Corp.*, No. 1:00CV1262, 2012 WL 1565228 (M.D.N.C. Apr. 30, 2012) (unpublished), because of the extensive discussion by the Court regarding the "joint defense or common interest rule." Because of its relevance, the Court's discussion is set forth at length:

> The Fourth Circuit recognizes an exception to waiver of attorney-client privilege in the joint defense rule, now "more properly identified as the 'common interest rule.'" Although not a privilege in and of itself, the rule applies to material covered by attorney-client privilege and work product protection. According to the Fourth Circuit,
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> > Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims.

[5] Because there is some doubt regarding the "meeting of the minds" requirement, another reason why defense counsel should "err on the side of caution" is because of what the Court observed in the common interest case of *United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996): "[T]he attorney-client privilege interferes with 'the truthseeking mission of the legal process,' because it 'is in derogation of the public's right to every man's evidence.' Thus, the privilege 'is not favored by federal courts' and 'is to be strictly confined within the narrowest possible limits consistent with the logic of its principle.'" *Id.* at 1389 (citations omitted). *See also United States v. Duke Energy Corp.*, No. 1:00CV1262, 2012 WL 1565228, at *16 (M.D.N.C. Apr. 30, 2012) (unpublished) ("the Fourth Circuit has not clarified the exact parameters of the common interest rule and has in fact emphasized that claims of privilege should be strictly construed").

Despite the Fourth Circuit's elaboration on and even expansion of the rule, litigation remains a central component. The Fourth Circuit referred to "ongoing or contemplated" actions, "defendants or plaintiffs," "litigation or potential litigation," and a "common interest in litigation." As a district court for the Eastern District of Virginia observed,

> In every case cited by the Fourth Circuit to support its broad reading of the privilege . . ., both parties claiming the common interest privilege were involved in some type of litigation. It is true that the prospect for litigation could be so remote that it involved 'potential co-parties to prospective litigation,' but the prospect of litigation still had to be there.[6]

In *United States v. Aramony*, the Fourth Circuit explained, "To be entitled to the protection of this [joint defense] privilege the parties must first share a common interest about a legal matter. But it is unnecessary that there be actual litigation in progress for this privilege to apply." The Fourth Circuit in *Aramony* held that the joint defense rule did not protect a defendant's communications with his employer's attorneys because he and his employer "clearly did not share a common interest about a legal matter" despite the defendant's claims that he and his employer shared a common strategy, which included investigating and preparing defenses to accusations against the defendant, "with respect to the press inquiries and any potential litigation to which the press reports could give rise." . . .

The Fourth Circuit, while acknowledging that "it is unnecessary that there be actual litigation in progress for this privilege to apply," has not clarified how attenuated the prospect of litigation can be for the common interest rule to still apply. The cases where the Fourth Circuit has recognized a common interest privilege, however, have all involved existing or at least pending litigation. . . .

The Fourth Circuit most recently addressed the subject of the common interest rule in *Hunton & Williams v. United States Dep't of Justice*, 590 F.3d 272 (4th Cir. 2010), within the context of a suit under the

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[6] Quoting *Federal Election Comm'n v. Christian Coalition*, 178 F.R.D. 61, 73 (E.D. Va 1998) (citations omitted), *aff'd in part and modified in part*, 178 F.R.D. 456 (E.D. Va. 1998).

Freedom of Information Act ("FOIA").[7] The Fourth Circuit explained, "The common interest doctrine requires a meeting of the minds, but it does not require that the agreement be reduced to writing or that litigation actually have commenced." The court distinguished between an agreement to undertake a joint legal strategy and an "agreement to exchange information in order to make an assessment." According to the Fourth Circuit,

> First, although a common interest agreement can be inferred where two parties are clearly collaborating in advance of litigation, mere "indicia" of joint strategy as of a particular point in time are insufficient to demonstrate that a common interest agreement has been formed. Second, it is not clear that the particular "indicia" identified by the district court [that the parties "agreed to exchange declarations, other proposed pleadings, and their views on issues relating to the effect of any injunction"] pointed to an actual common interest agreement, as opposed to a mere confidentiality agreement.

Furthermore, the fact that the parties later concluded that they shared each other's interest failed to shield "communications between the two before that decision was made."

. . . According to the Fourth Circuit [in *Hunton & Williams*], the fact that two or more parties may have different motivations for pursuing their common interest is irrelevant in determining whether the common interest rule applies. The court explained that

> the agreement between RIM and DOJ . . . makes it clear that RIM and DOJ had committed to working together to achieve that goal. . . . It does not matter that RIM was motivated by the commercial benefit that would accrue to it if it succeeded in opposing the BlackBerry injunction while the government was motivated by concern for the public interest. What matters is that there was a unity of interest in preserving a non-disruptive pattern of governmental BlackBerry use, and RIM and DOJ could rely on one another's advice, secure in

[7] A footnote at this point of the opinion reads: "While the Fourth Circuit elaborated on the proper use of the rule, it also referred to the 'judicial skepticism that FOIA demands,' making it unclear whether the same level of scrutiny would be applied to contexts outside of the FOIA." *Duke Energy*, at *14 n.27.

> the knowledge that privileged communications would remain just that.
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> "A fair interpretation of a common interest agreement, however, must leave room for the parties to debate the means by which they will secure their common end."

Duke Energy, at *13-15 (citations omitted).

A second District Court case that contains a good discussion of the common interest doctrine is *Mainstreet Collection, Inc. v. Kirkland's, Inc.*, 270 F.R.D. 238 (E.D.N.C. 2010). Although the Court did not rule on specific common interest objections to disclosing documents, it did provide the parties some guidance:

> The "common interest rule," also known as a "joint defense privilege," is an exception to the general rule that disclosure to a third party of privileged information thereby waives the privilege. The Fourth Circuit has recognized that "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims" without waiving privileged attorney-client communications or protected work product.
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> The common interest doctrine has its origins in the criminal law, where multiple defendants, each having separate counsel, share information to effect a united defense. The doctrine has, however, been extended to civil matters, and now includes "potential co-parties to prospective litigation." "[A]s an exception to waiver, the joint defense or common interest rule presupposes the existence of an otherwise valid privilege, and the rule applies not only to communications subject to the attorney-client privilege, but also to communications protected by the work-product doctrine." To be protected under the common interest privilege, "shared or jointly created information," or communication between the parties, "must first satisfy the traditional requisites for the attorney-client or work product privilege." "Additionally, the proponent of the privilege must at least demonstrate that (1) the communicating parties shared an identical legal interest, (2) the communication was made in the course of and in furtherance of the joint legal effort, and (3) the privilege had not been waived."

> . . . [I]n order to claim the protection of the common interest doctrine, Defendants must first demonstrate that the communications at issue are in fact privileged. Moreover, Defendants must show that the alleged privileged communication was made in the course and furtherance of a joint legal effort between parties with an identical legal interest, and that the privilege has not been waived.

Mainstreet Collection, 270 F.R.D. at 242-43.

B. North Carolina

Before this year, North Carolina appellate courts had not expressly addressed the existence of the common interest privilege and common interest work product in the context of multiple defense attorneys with different clients. However, there were earlier pronouncements and rulings in earlier cases that portended an eventual recognition of such protection, including, most importantly, *Raymond v. N.C. Police Benevolent Ass'n, Inc.*, 365 N.C. 94, 721 S.E.2d 923 (2011). In that case, the Court had to decide if a professional membership association, one of its members, and an attorney hired by the association to represent that member established between them an attorney-client relationship. This certainly wasn't a multiple attorney/multiple parties situation, and the Court spoke of the tripartite nature of the relationship. However, in discussing whether there was an attorney-client privilege under the facts of the case, the Court stated:

> Traditionally, the attorney-client relationship is found between an attorney and a single client the attorney represents. This Court, however, has also recognized a multiparty attorney-client relationship in which an attorney represents two or more clients.[8]

[8] Citing *Dobias v. White*, 240 N.C. 680, 684-85, 83 S.E.2d 785, 788 (1954) (indicating that an attorney-client relationship can exist between more than two individuals when "two or more persons employ the same attorney to act for them in some business transaction").

> The most common scenario involving a tripartite attorney-client relationship occurs when an insurance company employs counsel to defend its insured against a claim. In the insurance context, courts find that the attorney defending the insured and receiving payment from the insurance company represents both the insured and the insurer, providing joint representation to both clients. Under these circumstances, notwithstanding that usually only the insured has been sued, a tripartite attorney-client relationship exists because the interests of both the insured and the insurer in prevailing against the plaintiff's claim are closely aligned.
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> The 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.[9] The tripartite attorney-client relationship has been recognized by various courts.[10]

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[9] Citing *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 387 (M.D.N.C. 2003), which recognized a joint defense/common interest exception to waiving the attorney-client privilege and work product protection.

[10] The Court referred to the following examples: "*In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (stating that a 'need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter' (quoting *United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir. 1989) . . .); *W. Fuels Ass'n v. Burlington N. R.R. Co.*, 102 F.R.D. 201, 203 (D. Wyo. 1984) (explaining that the joint defense attorney-client privilege 'enables counsel for clients facing a common litigation opponent to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving either privilege') . . . ." *Raymond*, 365 N.C. at 99, 721 S.E.2d at 927.

The *Western Fuels Ass'n* case involved multiple railroads with their own counsel that had acted in a joint defense with respect to a series of quiet title actions. The District Court provided a good explanation of the principles involved:

> The joint defense privilege enables counsel for clients facing a common litigation opponent to exchange privileged communications and attorney work product in order to adequately prepare a defense without waiving either privilege. However, a party to joint defense communications may waive the attorney-client privilege by disclosing such confidential information to persons outside the scope of the joint defense relationship. Furthermore, a party to joint defense communications may waive the work product privilege by disclosing such privileged information to third parties

Raymond, 365 N.C. at 98-99, 721 S.E.2d at 926-27 (citations omitted).

The North Carolina Business Court acknowledged the common interest attorney-client privilege in *Morris v. Scenera Research, LLC*, No. 09 CVS 19678, 2011 WL 3808544 (N.C. Bus. Ct. Aug. 26, 2011) (unpublished), where the defendant claimed communications between the corporate defendant's General Counsel and the father of the co-defendant CEO of the corporate defendant were protected from disclosure in discovery by the common interest privilege. Although the Court delayed deciding if the privilege applied to the facts of the case, it did recognize the existence of the privilege:

> The common-interest or joint-defense privilege extends the protection of the attorney-client privilege to communications between parties who share a common litigation interest. "For the privilege to apply, the proponent must establish that the parties had some common interest about a legal matter." The Fourth Circuit has recognized the joint-defense/common-interest doctrine where the facts showed an actual agreement to prosecute claims.[11] "A party requesting that the court apply this rule must demonstrate that (1) the communicating parties shared an

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> in such a manner as is inconsistent with the purpose of maintaining the secrecy of such information from current or potential adversaries. But, disclosure of work product to friendly litigants in related cases or to others with friendly interests is not beyond the scope of such privilege and will not constitute a waiver of the same. Furthermore, waiver of privileges relating to information shared in joint defense communications by one party to such communications will not constitute a waiver by any other party to such communications. This limitation is necessary to assure joint defense efforts are not inhibited or even precluded by the fear that a party to joint defense communications may subsequently unilaterally waive the privileges of all participants, either purposefully in an effort to exonerate himself, or inadvertantly [sic].

Western Fuels Ass'n, 102 F.R.D. at 203 (citations omitted).

[11] Citing *In re Grand Subpoena Under Seal*, 415 F.3d 333 (4th Cir. 2005).

> identical legal interest, (2) the communication was made in the course of and in furtherance of the joint legal effort, and (3) the privilege had not been waived."[12] Generally, the privilege has been adopted to facilitate communications between separate groups of counsel representing separate clients having similar interests and actually cooperating in the pursuit of those interests. One leading treatise states that a party relying on the common-interest doctrine must demonstrate that the specific communications at issue were designed to facilitate the common legal interest, and that proving a common business or commercial interest will not suffice.[13]

Morris, at *7 (citations omitted).

Fortunately for defense counsel in North Carolina, less than four months ago the North Carolina Court of Appeals decided *Friday Investments, LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, ___ N.C. App. ___, 788 S.E.2d 170 (2016). Although that case did not involve multiple defense attorneys representing different clients, the discussion by the Court clearly supports the existence of a defense joint attorney-client privilege and work product doctrine. The Court began its opinion be observing that "[t]his appeal requires us to consider the common interest doctrine, which extends the attorney-client privilege to communications between and among multiple parties sharing a common legal interest." *Id.* at 172.

In *Friday Investments*, the plaintiff sued the defendant for back rent and other charges under a lease. In a separate asset purchase agreement, another company agreed to indemnify the defendant in actions arising from any lease, and that indemnifying company defended the defendant in the lawsuit brought by the plaintiff although that

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[12] Quoting *Neighbors Law Firm, P.C. v. Highland Capital Mgmt., L.P.*, No. 5:09-CV-353-F, 2011 WL 761480 at *3 (E.D.N.C. Feb. 24, 2011) (unpublished).

[13] Citing 6 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.49 (3d ed. 2011).

indemnitor was not a named party in the lawsuit. The plaintiff sought in discovery documents exchanged between the defendants and the non-party indemnitor, but the defendants contended that such documents were subject to attorney-client privilege. This set the stage for the Court of Appeals to discus the common interest doctrine. Because of the importance and precedential effect of the case, a lengthy quote from the opinion is set forth.

> Although attorney-client arrangements between two or more clients have been recognized by North Carolina courts for more than half a century,[14] there is a dearth of controlling appellate precedent explaining the precise nature of these arrangements and the extension of privilege invoked in disputes with third parties. Accordingly, our discussion of the issue presented in this case is best addressed by reference to not only the limited controlling authority from our state appellate courts, but also non-binding, persuasive decisions by other courts.
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> Arrangements between two or more parties to obtain legal counsel for a shared legal purpose are known as "tripartite" attorney-client relationships.[15] A tripartite relationship most commonly exists "when an insurance company employs counsel to defend its insured against a claim." A tripartite relationship may also exist between an individual and a "trade association or lobbying group that represents a special interest if there is specific, ongoing litigation."
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> The linchpin in any analysis of a tripartite attorney-client relationship is the finding of a common legal interest between the attorney, client, and third party. "[T]he parties must first share a common interest about a legal matter."[16] North Carolina courts have yet to formulate a bright line rule or articulate criteria for determining whether a common

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[14] Just as in *Raymond*, the Court cited *Dobias v. White*, 240 N.C. 680, 684–85, 83 S.E.2d 785, 788 (1954).

[15] Citing *Raymond v. N.C. Police Benevolent Ass'n*, 365 N.C. 94, 721 S.E.2d 923 (2011), mentioned above.

[16] Quoting *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996).

legal interest exists to extend the attorney-client privilege between multiple parties. Instead, our courts have engaged in specific analysis of the facts in each case involving this issue.[17]

All fifty states and federal courts have recognized the extension of the attorney-client privilege to certain tripartite relationships under various monikers including, inter alia, the "joint defense privilege," the "common interest privilege," the "common interest doctrine," and the "common defense rule."[18] To extend the attorney-client privilege between or among them, parties must (1) share a common interest; (2) agree to exchange information for the purpose of facilitating legal representation of the parties; and (3) the information must otherwise be confidential. Although prudent counsel would always put a representation agreement in writing, there is no requirement that the agreement be in writing. Despite being labeled a "privilege" by some courts, the common interest doctrine does not recognize an independent privilege, but is "an exception to the general rule that the attorney-client privilege is waived upon disclosure of privileged information [to] a third party." Extension of the attorney-client privilege to these relationships "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." The extension of privilege applies in disputes between third parties and one or more members of the tripartite arrangement, but not in disputes inter sese [between themselves].

While not binding, decisions by several federal courts and the North Carolina Business Court provide some clarity as to what constitutes a common legal interest, distinguishing it in particular from a common business interest. "For the privilege to apply, the proponent must establish

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[17] The Court referred to two examples, *Raymond*, 365 N.C. at 100, 721 S.E.2d at 927 (common legal interest based on mission of benevolent organization), and *Nationwide Mutual Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 602-03, 617 S.E.2d 40, 45-46 (2005) (common legal interest based on contract between insured and insurer).

[18] The Court cited as examples four cases: *Aramony*, 88 F.3d at 1392; *United States v. Schwimmer*, 892 F.2d 237, 243-46 (2d Cir. 1989); United States v. McPartlin, 595 F.2d 1321, 1336-37 (7th Cir. 1979); and Ferko v. NASCAR, 219 F.R.D. 396, 401-03 (E.D. Tex. 2003). It also cited the law review article of Craig S. Lerner, Conspirators' Privilege and Innocents' Refuge: A New Approach to Joint Defense Agreements, 77 NOTRE DAME L. REV. 1449, 1491 (2002).

> that the parties had some common interest about a *legal* matter."[19] In that vein, the North Carolina Business Court has held that the common interest doctrine applies to "communications between separate groups of counsel representing separate clients having similar interests and actually cooperating in the pursuit of those interests."[20] The Business Court distinguishes such legal interests from "business interest[s] that may be impacted by litigation involving one of the parties."[21]

Friday Investments, 788 S.E.2d at 176-79 (citations omitted).

After setting forth the above legal principles, the Court of Appeals observed that "[n]either this Court nor the North Carolina Supreme Court has extended the common interest doctrine to relationships formed primarily for purposes other than indemnification or coordination in anticipated litigation," *id.* at 178, and "we are aware of no precedent indicating that federal courts within the Fourth Circuit have extended the common interest doctrine to a case 'where the sharing was not done by agreement relating to some shared actual or imminent, specific litigation.'" *Id.* (quoting *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 388 (M.D.N.C. 2003)). The Court also cited three other cases, and included two parenthetical explanations: "*In re Grand Jury*

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[19] The Court quoted *In re Grand Jury Subpoena Under Seal*, 415 F.3d 333, 341 (4th Cir. 2005), adding the emphasis on "legal."

[20] The Court was referring to the case mentioned above, *Morris v. Scenera Research, LLC*, 2011 NCBC 33, 2011 WL 3808544, at *7 (N.C. Bus. Ct. Aug. 26, 2011) (unpublished).

[21] The Court's supporting cites were *SCR-Tech LLC v. Evonik Energy Serv. LLC*, 2013 NCBC 42, 2013 WL 4134602, at *6 (N.C. Bus. Ct. Aug. 13, 2013) ("A party seeking to rely on the common interest doctrine must demonstrate that the specific communications at issue were designed to facilitate a common legal interest; a business or commercial interest will not suffice."), and *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995) ("[T]he common interest doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation.").

Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990) (parent company and its subsidiary had agreement to jointly prosecute contract claims against U.S. Army)[,] *Schwimmer*, 892 F.2d at 243 . . .[, and] *McPartlin*, 595 F.2d at 1337 ("The privilege protects pooling of information for any defense purpose common to the participating defendants.")." *Id.*

The Court of Appeals concluded that the defendants and the non-party indemnitor "shared a common business interest as opposed to the common legal interest necessary to support a tripartite attorney-client relationship[, and that] . . . the trial court did not abuse its discretion in compelling Defendants to produce the documents." *Id.* at 179.

With the Court in *Friday Investments* citing and quoting key cases recognizing the common interest privilege, such cases can provide guidance as to how North Carolina courts should apply the common interest attorney-client privilege and work product doctrine. Although *Friday Investments* did not actually involve the application of the work product doctrine, it is clear from the description of the common interest doctrine by the Court, and the cases it cited in its opinion, that the common interest doctrine includes protection for work product in North Carolina.

Two and a half months ago the North Carolina Court of Appeals reiterated the existence of the "joint defense privilege" in *Sessions v. Sloane*, No. COA 15-1095, 2016 WL 3893080 (N.C. App. July 19, 2016) (unpublished). The defendants had sought to prevent the disclosure of some documents they felt were protected under the joint defense attorney-client privilege and work product doctrine. Although the Court concluded that the defendants did not present sufficient evidence to justify reversing the lower court's

decision to compel the production of documents, it did acknowledge the joint defense privilege, quoting and citing the *Friday Investments* case:

> The joint defense privilege, also known as the common interest doctrine, takes the attorney-client privilege and extends it to other parties that '(1) share a common interest; (2) agree to exchange information for the purpose of facilitating legal representation of the parties; and (3) the information must otherwise be confidential.' . . . Thus, the joint defense privilege is not actually a separate privilege, but is instead an exception to the general rule that the attorney-client privilege is waived when the client discloses privileged information to a third party. . . . It is generally recognized when parties communicate to form a joint legal strategy.

Sessions, at *9.

II. A Second Summary Judgment Motion

A. North Carolina

There is a general understanding that in North Carolina state courts, one judge cannot overrule, reverse, or rule differently from another judge who has already ruled on the same issue in the same case. This principle is often applied in the context of summary judgment motions, where, in essence, a party has only one chance at having a court rule on a motion for summary judgment, and that party cannot usually make a second attempt at the same summary judgment motion. This section of the Seminar paper will liberally quote form pertinent cases, and will include some related principles and rulings related to the topic.

Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972), is often the case cited for the proposition that one judge cannot rule differently from a judge who decided the same issue earlier, but that opinion also had a wide-ranging discussion and recitation of various principles:

> The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.
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> An order denying a motion to amend pleadings in an interlocutory order, that is, '(o)ne given in the progress of a cause upon some plea, proceeding, or default which is only intermediate and does not finally determine or complete the suit.' The doctrine of Res judicata does not apply to decisions upon ordinary motions incidental to the progress of the trial with the same strictness as to a judgment. It is frequently said that the doctrine does not apply unless the order involves 'a substantial right.' Accordingly, the rule is that a judge has the power to modify an interlocutory order made by another whenever there is a showing of changed conditions which warrant such action. Interlocutory orders are subject to change 'at any time to meet the justice and equity of the case upon sufficient grounds shown for the same.['] For example, when a judge denies a motion for a change of venue upon the basis of his findings of crucial facts, his order denying the motion is conclusive of the right to remove on the facts found. However, because of events intervening thereafter the ends of justice might then require removal of the action.
>
> When a judge rules upon a motion to strike an averment from a pleading on the ground that it is irrelevant, improper or prejudicial he rules as a matter of law, whether he allows or disallows the motion. No discretion is involved and his ruling finally determines the rights of the parties unless it is reversed upon appeal.
>
> Likewise, when one judge allows a motion to amend a pleading in his discretion and the amendment is made in accordance with the authority granted, a second judge may not strike it on the ground that the first erred in allowing it. He is 'under the necessity of observing the terms of the judgment allowing the (party) to amend.[']

Calloway, 281 N.C. at 501-03, 189 S.E.2d at 488-89 (citations omitted). The Court commented that the rule that one judge may not overrule or modify the decision of another judge was engendered by "considerations of orderly procedure, courtesy and comity." *Id.* at 504, 189 S.E.2d at 490.

A comprehensive summary of the basic principles related to, and examples of the applicability of, the general prohibition of a second judge ruling differently from a first judge in the case can be found in *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 272 S.E.2d 374 (1980):

> Ordinarily, one superior court judge may not overrule the judgment of another superior court judge previously made in the same case on the same legal issue. This rule does not apply to interlocutory orders given in the progress of the cause. An order is merely interlocutory if it does not determine the issue but directs some further proceeding preliminary to a final decree. The doctrine of res judicata does not apply to interlocutory orders if they do not involve a substantial right. Therefore, a judge does have the power to modify an interlocutory order when there is a showing of changed conditions which warrant such action.
>
> > For example, when a judge denies a motion for a change of venue upon the basis of his findings of crucial facts, his order denying the motion is conclusive of the right to remove on the facts found. However, because of events intervening thereafter the ends of justice might then require removal of the action.
>
> However, when the judge rules as a matter of law, not acting in his discretion, the ruling finally determines the rights of the parties unless reversed upon appellate review. For example, a ruling on a motion to strike an averment from a pleading on the ground that it is irrelevant, improper or prejudicial, is a ruling as a matter of law.
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> In the granting or denial of a motion for summary judgment, the court is ruling as a matter of law, and is not exercising its discretion. In determining a motion for summary judgment, the court must decide as a matter of law whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. Such a ruling is determinative as to the issue presented. The aggrieved party has its remedy; if the summary judgment is denied, the moving party may ask for appellate review by way of certiorari, and may preserve its rights for later appellate review by noting proper objection and exception in the record. If summary judgment is allowed, the aggrieved party may have appellate review as a matter of right. The aggrieved party may not seek relief by identical motion before another superior court judge.

Defendant contends that the materials presented to the court on the second motion for summary judgment were different from those at the hearing on the first motion for summary judgment, and therefore, it was appropriate for [the second judge] . . . to determine the motion. We do not agree. It is true that additional evidence was offered at the hearing on the second motion[, including 14 depositions and seven affidavits of witnesses]. . . .

Nevertheless, the legal issue raised by the second motion was identical to the legal issue on the first motion. The ruling by [the first judge] determined the issue as to punitive damages with respect to the motion for summary judgment. Defendants cannot thereafter relitigate the issue by way of [a second] motion for summary judgment. If defendants' contention is permitted to prevail, an unending series of motions for summary judgment could ensue so long as the moving party presented some additional evidence at the hearing on each successive motion. This would defeat the very purpose of summary judgment procedure, to determine in an expeditious manner whether a genuine issue of material fact exists and whether the movant is entitled to judgment on the issue presented as a matter of law.

It must be remembered that defendants asked for the hearing before [the first judge] upon their motion. If they needed additional evidence, they should not have requested the hearing, or should have requested a continuance of the hearing.

This is not to say that there can never be more than one motion for summary judgment in a lawsuit. Where a second motion presents legal issues that are different from those raised in the prior motion, such motion would be appropriate. For example, plaintiff sues agent and principal in an automobile negligence case. Principal files motion for summary judgment, contending solely that there was no agency relationship. The denial of this motion would not bar principal from thereafter filing motion for summary judgment on the question of negligence.

Defendants rely upon Fleming v. Mann, 23 N.C. App. 418, 209 S.E.2d 366 (1974); Alltop v. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885, cert. denied, 279 N.C. 348, 182 S.E.2d 580 (1971); Miller v. Miller, 34 N.C. App. 209, 237 S.E.2d 552 (1977); State v. Turner, 34 N.C. App. 78, 237 S.E.2d 318 (1977), and several federal cases. In Fleming defendants moved to dismiss pursuant to Rule 12(b) (6). The motion was denied. Thereafter, plaintiff amended the complaint and the defendant Chace

> moved to dismiss the amended complaint under Rule 12(b)(6). This Court held the trial court had authority to determine the motion as it did not present the same legal question resolved by the first motion. There was also a difference in the parties involved. In Alltop this Court properly held that the denial of a motion to dismiss under Rule 12(b)(6) does not preclude the subsequent determination of a motion for summary judgment. Again, different legal issues are presented by the motions. Miller presented the question whether a judge who rules on a motion for summary judgment may thereafter strike the order, rehear the motion for summary judgment, and allow the motion. Such procedure does not involve one judge overruling another, and is proper under Rule 60. In Turner, the Court approved the action of a second judge in allowing the state's motion to continue a case after another judge had previously ordered the case to be tried or dismissed at a certain term of court. The order setting the case for trial was a pretrial order dealing with procedural matters of the case and not the merits. It did not determine any of the issues involved in the case and was interlocutory in nature. The doctrine that one superior court judge has no authority to overrule another does not apply to such orders. Greene v. Laboratories, Inc., supra.
>
> Defendants cite several federal court decisions, none from the Fourth Circuit. We have carefully examined these cases and do not find them persuasive. . . . . The federal courts are not troubled by the problems attendant to North Carolina's "salutary principle" of rotation of judges. . . .
>
> The conservation of judicial manpower and the prompt disposition of cases are strong arguments against allowing repeated hearings on the same legal issues. The same considerations require that alleged errors of one judge be corrected by appellate review and not by resort to relitigation of the same issue before a different trial judge. North Carolina has long observed this rule. We perceive no sound reason to depart from this rule.

Carr, 49 N.C. App. at 632-36, 272 S.E.2d at 376-78 (most citations omitted). *See also Cail v. Cerwin*, 185 N.C. App. 176, 181, 648 S.E.2d 510, 514 (2007) ("[A]lthough '[t]here may be more than one motion for summary judgment in a lawsuit, . . . the second motion will be appropriate only if it presents legal issues that are different from those raised in the earlier motion.").

These principles cannot be avoided by stipulation, as the attorneys attempted in *Huffaker v. Holley*, 111 N.C. App. 914, 433 S.E.2d 474 (1993). There, the first judge had denied both the plaintiff's motion for partial summary judgment and the defendants' motions for summary judgment. As recounted in *Huffaker*, ""[t]he parties brought the same matter, with no new or additional issues, before Judge Hobgood[, a different judge]. Under these circumstances, we are compelled to find that Judge Hobgood had no authority to rule on these motions. It is irrelevant that plaintiff and defendants 'stipulated and agreed' that Judge Hobgood could rehear the motions; their consent cannot bestow authority the judge does not otherwise have." Id. at 916, 433 S.E.2d at 476.

Usually, it is fairly easy to know if separate issues are the subject of first and second summary judgment motions. See, e.g., *Connor v. Harless*, 176 N.C. App. 402, 626 S.E.2d 755 (2006) (defendant's second summary judgment motion that concerned whether there was mutual assent between the parties to an agreement was properly considered by second judge when defendant's first summary judgment motion ruled on by a different judge revolved around whether the agreement complied with the Statute of Frauds).

Hastings v. Seegars Fence Co., 128 N.C. App. 166, 493 S.E.2d 782 (1997), is an example where Defendant was hoping that its second summary judgment could be considered by a second judge when it argued a "different" defense than the one that was the subject of the first summary judgment motion, and new information was provided. However, the Court of Appeals took a close look at the two motions, and concluded the basic issue that was decided by both judges was the same:

> In the present case, defendant argues that its second motion was based upon the defense contained in G.S. § 99B–3, which had not been before the court at the time of the previous hearing. We do not agree, notwithstanding the recitation in Judge Duke's order that "G.S. 99B–3 has not been the subject of a previous motion. . . ."
>
> Although the materials before Judge Duke at the hearing on defendant's second motion included depositions which had not been before Judge Ragan when he denied defendant's first motion for summary judgment, the legal issues raised by the pleadings remained the same. Defendant's amended answer, which had been filed prior to the initial summary judgment motion and had not since been further amended, alleged the minor plaintiff's contributory negligence "by engaging in horseplay on the fence and cantilevered gate. . . ." This pleading was sufficient to raise the defense provided by G.S. § 99B–3, upon which defendant based its second motion, that the minor plaintiff "used the fence in a manner other than as it was originally designed, tested, or intended by the manufacturer to be used, i.e. she played on the fence and used it as a toy." The depositions offered at the hearing on the second motion disclosed, as had been disclosed in the pleadings and in the materials considered by Judge Ragan in ruling on defendant's first motion for summary judgment, that the minor plaintiff had been injured while playing on the gate. Thus, the issue of the manner in which the minor plaintiff used the fence and gate was before Judge Ragan at the hearing of defendant's first motion for summary judgment and his denial of summary judgment was conclusive upon the issue, precluding Judge Duke from thereafter granting summary judgment on that same issue.

Hastings, 128 N.C. App. at 168-69, 493 S.E.2d at 784 (citations omitted).

Another example of a second and different type of motion still could not be decided by a second judge is the case of *Robinson v. Duke University Health Systems, Inc.*, 229 N.C. App. 215, 747 S.E.2d 321 (2013):

> In granting summary judgment in favor of defendants in the present case, Judge Hudson ruled contrary to Judge Hobgood's prior ruling on the same legal issue to dismiss: whether plaintiffs' complaint properly complied with the pertinent provisions of Rule 9(j). Judge Hudson was without authority to reconsider Judge Hobgood's determination on that issue. Although Judge Hudson stated in his supplemental order/advisory opinion that he was "not reviewing or attempting to overrule the findings

> and/or order entered by Judge [Hobgood] on July 1, [,]" citing the different standards for consideration of a Rule 12(b)(6) motion and a Rule 56 motion, Judge Hudson did precisely the opposite. While we recognize that "[t]he trial court's standards for a Rule 12(b)(6) motion to dismiss and a motion for summary judgment are different and present separate legal questions[,]" one trial court judge is nonetheless powerless to make a contrary ruling on an issue of law already resolved by a prior trial court judge's ruling, despite the denomination of the order as one denying a motion to dismiss or granting summary judgment.
>
> In comparing the two orders side by side in the present case, as well as defendants' arguments on the issue in both instances, it is clear that Judge Hudson granted summary judgment in favor of defendants in light of his conclusion that the doctrine of res ipsa loquitur was not applicable to the facts alleged and evidence presented by plaintiffs and therefore plaintiffs' complaint failed to comply with the pertinent provisions of Rule 9(j) – the opposite conclusion reached by Judge Hobgood in his prior order denying defendants' motion to dismiss on the same legal issue. Accordingly, we must vacate Judge Hudson's order granting summary judgment in favor of defendants on the legal question of plaintiffs' compliance with the pertinent provisions of Rule 9(j).

Robinson, 229 N.C. App. at 222-23, 747 S.E.2d at 327-28 (citations omitted).

The defendant in *Cail v. Cerwin*, 185 N.C. App. 176, 648 S.E.2d 510 (2007), had filed a motion for summary judgment as to all claims, but the lower court ruled that an issue of agency existed due to the disputed facts before it, and denied the motion. One year later, the plaintiffs filed a summary judgment motion, presenting additional evidence on the agency issue. A different judge *granted* the plaintiffs' motion, which the Court of Appeals ruled was improper, explaining:

> Although additional evidence was before the court – particularly with respect to the alleged agency relationship . . . – the legal issues were the same as those at issue in [the earlier summary judgment motion of] defendant. . . . As this Court has explained, "[t]he presentation of a new legal issue is distinguishable from the presentation of additional evidence," and only when the legal issues differ between the first motion for summary judgment and a subsequent motion may a trial court hear and rule on the

> subsequent motion. Before Judge Cashwell, the key legal issues [in the plaintiffs' summary judgment motion] once again were agency . . . . Judge Cashwell's order overrules Judge Titus' order in several respects, and as Judge Cashwell had no jurisdiction to overrule Judge Titus on the same legal issues, Judge Cashwell's order must be vacated to the extent that it contradicts Judge Titus' earlier order.

Cail, 185 N.C. App. at 183-84, 648 S.E.2d at 515-16 (citations omitted).

Because of the principle that a second summary judgment should not be considered by a second judge even when new evidence is presented, defense counsel need to consider the timing of any summary judgment motion they wish to make. That was a lesson learned in *Whitley's Electric Service, Inc. v. Walston*, 105 N.C. App. 609, 414 S.E.2d 47 (1992). In that case, Defendants had filed a summary judgment motion that was denied, and then after taking an important deposition that provided more relevant evidence, filed a second summary judgment motion on the same issue. Based upon the new information, the second judge found that no genuine issue of material fact existed and hence granted the motion. The Court of Appeals held that it was improper for that second judge to hear and rule on the second summary judgment motion, reiterating the general rule:

> [O]rdinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action. The reason for this is that
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> > if the rule were otherwise, the normal reviewing function of appellate courts would be usurped, and, in some instances, the orderly trial process could be converted into a chaotic, protracted affair as one party attempted to shop around for a more favorable ruling from another superior court judge.
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> . . . Judge Brown's order granting defendants' motion for summary judgment was subsequent to Judge Butterfield's denial of defendants'

> earlier motion for summary judgment on the identical issue. Even though it is interlocutory in terms of appealability, a ruling on a motion for summary judgment involves an issue of law, not discretion. Where a judge rules as a matter of law, the rights of the parties are finally determined, subject only to reversal on appeal. Thus, where one judge denies a motion for summary judgment, another judge may not reconsider the issue and grant summary judgment on the same issue.
>
> *Defendants argue that if Judge Brown's order is vacated, the parties will be forced to have a jury trial even though Judge Brown has now found that no genuine issue of material fact exists. While this contention may be true, it is also irrelevant.* It was defendants who initially moved for summary judgment . . . . Judge Butterfield denied the motion on the basis of the materials presented to him by both parties. It was incumbent upon both parties at the time of the hearing on the motion to present to the court the evidence which would support either the granting or denial of the motion. . . . Generally, motions for summary judgment should not be decided until all parties are prepared to present their contentions on all the issues raised and determinable under Rule 56. Piecemeal litigation of motions for summary judgment is to be avoided. Since it was defendants who filed for summary judgment . . ., it was their burden to present evidence which would support the granting of their motion. If discovery was necessary to accomplish this task then discovery should have been carried out before the summary judgment motion was filed.

Whitley's Electric Service, 105 N.C. App. at 610-12, 414 S.E.2d at 47-48 (citations omitted; emphasis added).

The recently decided case of *Daughtridge v. North Carolina Zoological Society, Inc.*, ___ N.C. App. ___, 785 S.E.2d 729 (2016), involved disputes regarding titles to property. The defendant filed a summary judgment motion, but a judge felt that the motion should be denied because of factual disputes. After further discovery was conducted, and shortly before the trial was to begin, the trial judge conducted a lengthy pretrial hearing "to determine whether or not the case needs to be decided . . . by a jury or whether [there] are questions of law that will be decided by the judge." *Id.* at 730. That

judge concluded that based upon the evidence presented to him at the hearing, the defendant should prevail, and he entered an order quieting title in favor of the defendant as a matter of law. The Court of Appeals held that the first judge's decision denying summary judgment and concluding that the defendant should not prevail as a matter of law precluded the trial judge at the pretrial hearing from quieting title in favor of defendant as a matter of law. The Court explained:

> It is well established that "[o]ne superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order." "In the granting or denial of a motion for summary judgment, the court is ruling as a matter of law, and is not exercising its discretion." Because a denial of a motion for summary judgment is not discretionary, "[t]he aggrieved party may not seek relief by identical motion before another superior court judge." Furthermore, "one trial judge 'may not reconsider and grant a motion for summary judgment previously denied by another judge.'"
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> Defendant attempts to circumvent these established rules by labeling [the trial judge's] . . . judgment a "directed verdict." Defendant cites to *Clinton v. Wake Cnty. Bd. of Educ.*, 108 N.C. App. 616, 621, 424 S.E.2d 691, 694 (1993), for the proposition that "a pretrial order denying summary judgment has no effect on a later order granting or denying a directed verdict on the same issue or issues." In *Clinton*, "[a]ll motions for summary judgment were denied . . . and the case proceeded to trial. . . ." The plaintiff in *Clinton* presented his evidence at trial before a jury and then the trial court directed a verdict in favor of the defendant.
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> *Clinton* has no relevance to the case before us. Here, [the trial judge] . . . did not grant a directed verdict during trial following the presentation of evidence. Instead, he conducted a pre-trial hearing to determine whether there were genuine issues of fact appropriate for a jury trial or if the case could be decided as a matter of law. Whether labeled as such or not, . . . [the trial judge] purported to grant summary judgment to defendant.

Daughtridge, 785 S.E.2d at 731 (most citations omitted).

Iverson v. TM One, Inc., 92 N.C. App. 161, 374 S.E.2d 160 (1988), is in accord, and was cited in *Daughtridge*. When the *Iverson* case came on for trial, the trial judge held a pretrial hearing to determine if there was any issue of fact for the jury to consider, and he concluded there was no disputed issue of fact for the jury to consider and dismissed the case. However, another judge had earlier denied the defendant's summary judgment motion. The Court of Appeals reminded the parties that "one trial judge 'may not reconsider and grant a motion for summary judgment previously denied by another judge.'" *Id.* at 164, 374 S.E.2d at 163. The Court observed that:

> As the same legal issue was presented to both trial judges, it is immaterial that the second judge . . . may have had before him evidence not available to [the first] Judge. While the defendant did not label its motion to [the second] Judge . . . as one for summary judgment, that nonetheless was the essence of the request. TM One contended in the face of plaintiffs' request for a jury trial that "there were no facts to be found by the jury." [The second] Judge . . . found there was "no disputed issue of fact for the jury to consider or for the Court to resolve." The procedure utilized by [that] Judge . . ., while not labeled a hearing on summary judgment, was exactly that. . . . Therefore, [the second] Judge['s] . . . judgment dismissing the complaint had the effect of overruling [the first] Judge['s] . . . denial of defendant's motion for summary judgment and must be vacated.

Id. at 164-65, 374 S.E.2d at 163. (citations omitted).

The basic rule against a second summary judgment motion on the same issue does not apply when the judge who ruled on the first summary judgment motion is the judge who is considering the second summary judgment motion. In *Diggs v. Forsyth Memorial Hospital, Inc.*, No. No. COA09-890, 2010 WL 2816252, 205 N.C. App. 467, 698 S.E.2d 200 (2010) (unpublished), Defendant had filed a motion for summary judgment, but it was denied. Later, that Defendant filed a motion for the same judge who ruled on the

summary judgment motion to reconsider his original ruling. (One could reasonably view such second motion as a second summary judgment motion, since the judge was being requested to grant summary judgment despite that judge having earlier denied it.) Although Plaintiff argued that allowing Defendant to have a second chance at its summary judgment motion was contrary to the established law about second summary judgment motions, the Court of Appeals disagreed. The Court quoted from, and followed, the earlier case of *Miller v. Miller*, 34 N.C. App. 209, 237 S.E.2d 552 (1977):

> In *Miller*, the respondent made a motion for summary judgment where the petitioner sought a partition order for two tracts of land . . . . Superior Court [Judge] . . . Graham . . . initially denied the motion, but subsequently struck the original order and granted respondent's motion for summary judgment. . . . Our Court affirmed the trial court's order holding that "[a]n order denying summary judgment is not res judicata and a judge is clearly within his rights in vacating such denial." "*Miller* presented the question whether a judge who rules on a motion for summary judgment may thereafter strike the order, rehear the motion for summary judgment, and allow the motion. Such procedure does not involve one judge overruling another, and is proper under Rule 60."

Diggs, at *3 (citations omitted).

Adkins v. Stanly County Board of Education, 203 N.C. App. 642, 692 S.E.2d 470 (2010), involved the denial of Defendant's Rule 12(b)(6) motion and the subsequent granting of that Defendant's Rule 56 summary judgment motion. Usually, one could assume that there is nothing wrong with a second judge ruling on the subsequent motion:

> . . . "[W]hile one superior court judge may not overrule another, [a motion for summary judgment and a motion to dismiss pursuant to Rule 12(b)(6)] do not present the same [legal] question." The trial court's standards for a Rule 12(b)(6) motion to dismiss and a motion for summary judgment are different and present separate legal questions. . . .

Id. at 647, 692 S.E.2d at 473 (citation omitted). See also *Wake County v. Hotels.com, L.P.*, 235 N.C. App. 633, 649-51, 762 S.E.2d 477, 487-88 (2014) (holding that it was proper for a second judge to rule on the defendant's summary judgment motion even though another judge had earlier ruled on that defendant's Rule 12(b)(6) motion).

However, the *Adkins* case is an example that sometimes there is an overlap in deciding a Rule 12(b)(6) motion and a summary judgment motion:

> [C]omparing the two orders at issue before us in light of the legal context established by Judge Spainhour [the first judge] and applied by Judge Beale [the second judge], we determine that Defendants' motion for summary judgment brought before Judge Beale an issue already resolved by Judge Spainhour. Judge Beale was presented the opportunity to rule on the very same legal question as Judge Spainhour: whether Plaintiff's 2000 complaint touched on a matter of public concern.
>
> . . . .
>
> [A direct comparison] reveals that Judge Beale's order is not merely the application of the different standard required by a motion for summary judgment; rather, Judge Beale's order operates to overrule Judge Spainhour's application and conclusion of law in Judge Spainhour's ruling on Defendants' . . . Rule 12(b)(6) motion. Judge Spainhour's order centers on his conclusion that "the 2000 [complaint] raised an issue of public concern, the disclosure to the media of statutorily protected information concerning Plaintiff by an elected Board member who is also a Defendant in this matter." Addressing this line of reasoning, Judge Beale wrote: "This [c]ourt does not believe that this is the law under the First Amendment jurisprudence." Thus, Judge Beale's order was not merely an order granting summary judgment applying a different standard of review as would be appropriate . . .; rather, Judge Beale's order overruled Judge Spainhour's ruling. . . . Judge Beale was without authority to "modify, overrule, or change" Judge Spainhour's conclusion that Plaintiff's 2000 complaint addressed a matter of public concern. . . .
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> . . . Judge Beale's order begins with his assertion that the very conclusion made by Judge Spainhour "is not the law under the First Amendment Jurisprudence." Judge Beale then reaches a determination contrary to Judge Spainhour, namely, whether the 2000 complaint touched on a matter of public concern. Then, Judge Beale determined that, based on his

> determination that the 2000 complaint did not touch on a matter of public concern, Plaintiff's federal claim and her state claim must fail. Judge Beale then granted Defendants' motion for summary judgment as to all of Plaintiff's claims. It is clear that Judge Beale's order granted summary judgment in favor of Defendants as to both Plaintiff's federal and state claims because of his conclusion regarding the 2000 complaint. We must vacate Judge Beale's order . . . .

Adkins, 203 N.C. App. at 647, 650-52, 692 S.E.2d at 474, 475-76 (citations omitted).

The Court in *Steele v. Bowden*, 238 N.C. App. 566, 768 S.E.2d 47 (2014), touched upon res judicata and collateral estoppel:

> As an initial matter, Defendant contends that the trial court lacked the authority to grant summary judgment with respect to Plaintiff's claims on the grounds that those claims had previously been argued and adjudicated before a different trial judge in violation of the principle of collateral estoppel and the rule that one judge cannot overrule another judge of equal authority. In support of this contention, Defendant notes that Judge Long denied Plaintiff's [earlier] motion for judgment on the pleadings with respect to Plaintiff's substantive claims . . . . Defendant's contention lacks merit.
>
> > "[A] claim cannot be barred by res judicata or collateral estoppel unless it was litigated to final judgment in a prior action." In view of the fact that Judge Long's order denying Plaintiff's motion for judgment on the pleadings was neither entered in a separate action or constituted a final judgment, that order does not have collateral estoppel effect.

Steele, 238 N.C. App. at 572, 768 S.E.2d at 54 (citations omitted).

Fox v. Johnson, ___ N.C. App. ___, 777 S.E.2d 314 (2015), *pet. for discr. rev. denied*, 368 N.C. 679, 781 S.E.2d 480 (2016), involved the denial of Defendant's Rule 12(b)(6) motion and the subsequent granting of that Defendant's Rule 12(c) motion. Although the Court of Appeals acknowledged that ordinarily, one Superior Court judge may not correct another judge's errors of law nor may that second judge modify, overrule, or change the judgment of another judge previously made in the same case, it

also pointed out the exception when three conditions are met: "(1) the subsequent order 'was rendered at a different stage of the proceeding, [(2)] the materials considered by [the second judge] were not the same, and [(3)] the [first] motion . . . did not present the same question as that raised by the later motion. . . .'" *Fox*, 777 S.E.2d at 322 (quoting *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987)). The Court then proceeded to explain why it was proper for the second judge to rule on the Rule 12(c) motion:

> Defendants argue that all three . . . conditions are satisfied here.
>
> First, Defendants point out that a motion pursuant to Rule 12(c) may be made only after the pleadings are closed, while a Rule 12(b)(6) motion must be made before the pleadings are closed. Plaintiffs counter that, because "[b]oth a motion for judgment on the pleadings and a motion to dismiss for failure to state a claim upon which relief should be granted when a complaint fails to allege facts sufficient to state a cause of action or pleads facts which deny the right to any relief[,]" there is no "functional" difference between the stage of the proceedings when each motion is decided. We must reject Plaintiffs' contention:
>
> > As we have recognized, a complaint is subject to dismissal under Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim. On the other hand, a motion for judgment on the pleadings pursuant to Rule 12(c) should only be granted when the movant clearly establishes that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. Neither rule employs the same standard. It is plainly evident . . . because a plaintiff has survived a 12(b)(6) motion, and thus has alleged a claim for which relief may be granted, his survival in the action is not the equivalent of the court determining that conflicting issues of fact exist and no party is entitled to judgment as a matter of law under Rule 12(c).

> Regarding the second and third . . . conditions, . . . different materials and questions were considered by the trial court in ruling on the respective Rule 12(b)(6) and Rule 12(c) motions. In ruling on Defendants' Rule 12(b)(6) motion, the trial court considered only Plaintiffs' complaint and the arguments of the parties, while the later Rule 12(c) ruling was based upon the trial court's consideration of additional materials: Defendants' answer, the federal complaint, and the federal court's decision. Further, . . . this Court dismissed Defendants' [earlier] interlocutory appeal precisely because it was not persuaded by Defendants' argument that the trial court's denial of their Rule 12(b)(6) motion "necessarily rejected their argument that Plaintiffs' malicious prosecution claims were barred by collateral estoppel." In contrast, the trial court's Rule 12(c) order explicitly ruled on Defendants' collateral estoppel argument. In sum, the Rule 12(c) order appealed from here is not an improper "overruling" by a second superior court judge of an earlier superior court judge's Rule 12(b)(6) order.

Fox, 777 S.E.2d at 321-22 (citations omitted).

In the vein of two different types of motions filed at different times, *Edwards v. Northwestern Bank*, 53 N.C. App. 492, 281 S.E.2d 86 (1981), noted that an "'earlier denial of a motion for summary judgment should not, in any way, be considered a barrier to later consideration of a motion for directed verdict.'" *Id.* at 495, 281 S.E.2d at 88 (citation omitted). *Accord*, *Wooten v. Warren*, 117 N.C. App. 350, 352, 451 S.E.2d 342, 344 (1994). However, even though the Court in *Lockett v. Sister-2-Sister Solutions, Inc.*, 209 N.C. App. 60, 704 S.E.2d 299 (2011), acknowledged what would seem to be a definitive principle in *Edwards* ("should not, in any way, be considered a barrier"), it narrowed when the principle could actually apply:

> Defendant points us to the case of Edwards . . . ("'[T]he earlier denial of a motion for summary judgment should not, in any way, be considered a barrier to later consideration of a motion for directed verdict.'") . . . . However, that quotation from *Edwards*, in context, merely emphasizes that motions for summary judgment and directed verdict differ as to the legal standards applied and the burdens placed upon the parties. It does not

> support the contention that one trial court's conclusion of law, based upon the same findings of fact, can be overruled by a second trial court.

Lockett, 209 N.C. App. at 68 n.1 , 704 S.E.2d at 304 n.1.

In *Lockett*, a judge had ruled earlier in the case on a summary judgment motion that a contract at issue was legally enforceable, but the trial judge after a trial entered a directed verdict against the defendant when he ruled that the contract was unenforceable, a ruling that the trial judge "was not free to make." *Id.* at 68 , 704 S.E.2d at 304. The plaintiff contended that the trial court had the benefit of hearing actual evidence in the case, and hence, could reconsider the conclusion of law reached by the first court. The Court of Appeals said that:

> [t]his argument fails. First, [Plaintiff's] . . . purported new evidence is "witness testimony regarding the enforceability of the parties' employment agreement." Both . . . courts, however, made their conclusions based upon the law and the face of the contract, and witness testimony as to an individual's intentions or understanding of the contract's enforceability affects neither the law nor the face of the contract. Furthermore, even if the first . . . court had erred in making its legal conclusion that the contract is enforceable, our case law clearly provides that "one Superior Court judge may not correct another's errors of law[.]"

Id. at 69, 704 S.E.2d at 305 (citation omitted).

There is another exception to the general rule that a judge cannot overrule the decision of another judge in the same case, and that is when the issue is subject matter jurisdiction. As noted in *Transcontinental Gas Pipe Line Corp. v. Calco Enterprises*, 132 N.C. App. 237, 511 S.E.2d 671 (1999):

> Respondent-appellant NCEC first contends that the trial court committed reversible error when it granted Transco's motion for summary judgment after a previous motion to dismiss had been denied by another judge. We disagree. NCEC argues that the earlier motion to dismiss was in fact a

> motion for summary judgment because the trial judge considered matters beyond those in the pleadings. The trial judge's order, in fact, recites that the case file and briefs of counsel had been reviewed. "Where matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment . . . ."
>
> However, in this case, Transco's original motion to dismiss alleged that NCEC had no standing to contest the clerk's judgment. Standing is treated differently than most other issues because it is an aspect of subject matter jurisdiction. In determining the issue of subject matter jurisdiction on a motion to dismiss, the court is not restricted to the face of the pleadings in making its determination. Furthermore, the question of subject matter jurisdiction may be raised at any time, even on appeal. "If a court finds at any stage of the proceedings that it lacks jurisdiction over the subject matter of a case, it must dismiss the case. . . ." Accordingly, the original ruling did not preclude Transco from raising the jurisdictional issue before the second judge, who properly considered Transco's motion.

Transcontinental Gas, 132 N.C. App. at 240-41, 511 S.E.2d at 674-75 (citations omitted).

B. Federal

Federal courts do not have the same general limitation followed by North Carolina state courts regarding one judge not overruling another judge in the same case. Usually, when a situation exits where a judge reconsiders his or her earlier ruling or a second judge is confronted with a motion on an issue decided earlier in the case, the principle of "law of the case" is invoked. *American Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505 (4th Cir. 2003), provides a good recitation of the law recognized in the Fourth Circuit (and in most federal circuits). The Court of Appeals viewed an initial motion for declaratory judgment as actually being a motion for partial summary judgment that the District Court granted in favor of the plaintiff. The appellate court stated:

> [A]n order of partial summary judgment is interlocutory in nature. . . . Motions for reconsideration of interlocutory orders are not subject to the

> strict standards applicable to motions for reconsideration of a final judgment. . . . This is because a district court retains the power to reconsider and modify its interlocutory judgments, including partial summary judgments, at any time prior to final judgment when such is warranted. *See Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469 (4th Cir. 1991) ("An interlocutory order is subject to reconsideration at any time prior to the entry of a final judgment."); cf. Fed.R.Civ.P. 54(b) (providing that interlocutory orders that resolve fewer than all claims are "subject to revision at any time before the entry of [final] judgment"). Said power is committed to the discretion of the district court, see *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 12, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (noting that "every order short of a final decree is subject to reopening at the discretion of the district judge"), and doctrines such as law of the case, which is what the district court apparently relied on in this case, have evolved as a means of guiding that discretion, *see Sejman v. Warner–Lambert Co., Inc.*, 845 F.2d 66, 69 (4th Cir. 1988) (noting that earlier decisions of a court become law of the case and must be followed unless "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." (internal quotation marks omitted)).
>
> Law of the case is just that however, it does not and cannot limit the power of a court to reconsider an earlier ruling. The ultimate responsibility of the federal courts, at all levels, is to reach the correct judgment under law. Though that obligation may be tempered at times by concerns of finality and judicial economy, nowhere is it greater and more unflagging than in the context of subject matter jurisdiction issues, which call into question the very legitimacy of a court's adjudicatory authority. These questions are of such overriding import that the Supreme Court has, in other contexts, carved out special exceptions for them to the general rules of procedure. So, for example, a party can challenge subject matter jurisdiction for the first time on appeal even though, in most contexts, issues not raised below are considered waived. . . . Thus, the Supreme Court itself has decided that the value of correctness in the subject matter jurisdiction context overrides at least some of the procedural bars in place to protect the values of finality and judicial economy. . . . Law of the case, which is itself a malleable doctrine meant to balance the interests of correctness and finality, can likewise be calibrated to reflect the increased priority placed on subject matter jurisdictional issues generally . . . .

American Canoe, 326 F.3d at 514-16.

In *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287 (4th Cir. 1982), the appellant argued that a second District Judge could not "overrule" earlier rulings by another District Judge. Although the Court of Appeals decided it did not need to address the matter to resolve the appeal, it did volunteer that:

> it bears observing that whether rulings by one district judge become binding as "law of the case" upon subsequent district judges is not a matter of rigid legal rule, but more a matter of proper judicial administration which can vary with the circumstances. It may sometimes be proper for a district judge to treat earlier rulings as binding, sometimes not. . . . Our decisions in *Prack v. Weissinger*, 276 F.2d 446 (4th Cir. 1960), and *United States v. Whiting*, 311 F.2d 191 (4th Cir. 1962), . . . are not to the contrary. In each case, this court affirmed as proper a district judge's application of an earlier ruling by another judge as "binding" upon him on the facts of the case. But we have not held that the "law of the case" doctrine is so related to the very power of the second judge that we must in review affirm even a legally erroneous ruling because it was compelled as "law of the case.". . . That, of course, reveals the true nature of the doctrine as not being jurisdictional.

Hill, 696 F.2d at 290 n.3.

The U.S. District Court for the Middle District of North Carolina has voiced its approach to when a District Judge can reconsider an earlier ruling:

> Even though "a district court retains the power to reconsider and modify its interlocutory judgments, including partial summary judgments, at any time prior to final judgment when such is warranted[,]" "[t]he law of the case doctrine 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case[.]'"[22] This doctrine "is designed to serve the goals of

[22] Quoting *TFWS, Inc. v. Franchot*, 572 F.3d 186, 191 (4th Cir. 2009) (which had quoted *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) (which had quoted *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 108 S. Ct. 2166, 100 L. Ed. 2d 811, 815-16 (1988)). Although the Supreme Court did state that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case," it also stated later in its opinion that "the law-of-the-case doctrine 'merely expresses the practice of courts generally to refuse to reopen what has

> finality and predictability in the trial court[,] ... [but] is neither absolute nor inflexible; it is a rule of discretion rather than a jurisdictional requirement." Nevertheless, the rule will apply "unless: (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice."[23]

United States v. Duke Energy Corp., No. 1:00CV1262, 2014 WL 4659479, at *3 (M.D.N.C. Sept. 17, 2014) (unpublished).

In another Middle District case, *LeGrande v. Aluminum Co. of America*, No. 1:05CV00376, 2007 WL 1452969 (M.D.N.C. May 17, 2007) (unpublished), Defendant had filed a motion to dismiss or, in the alternative, for summary judgment about two months after Plaintiff filed his amended Complaint. That motion was denied for insufficiency of evidence to support the alleged statute of limitations violation. About two weeks later Defendant filed a motion for reconsideration or, in the alternative, for summary judgment, which was denied. Discovery proceeded over the next six months, and Defendant filed a motion for summary judgment, reasserting its statute of limitations defense. The Court had no problem with considering the issue again:

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been decided, not a limit to their power.' A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" *Christianson*, 486 U.S. at 817, 108 S. Ct. at 2178.

[23] Again quoting the Fourth Circuit's *TFWS* case. Interestingly, the quote from the Fourth Circuit case is prefaced with "once the decision of an appellate court establishes the law of the case," *TFWS,* 572 F.3d at 191, but the Middle District Court decided to follow the principle for the District Court level. *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999), which the *TFWS* quoted and cited for support for this proposition, also limited its discussion to appellate decisions as establishing the law of the case.

> [Defendant] has presented new evidence learned through discovery in support of its claim that this action was not timely filed within the applicable statute of limitations period. [Plaintiff] . . . argues that, based on the previous denial of . . . [the statute of limitations defense], that the law of the case doctrine precludes summary judgment. "Under the law of the case doctrine, 'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" . . . "[T]he doctrine [to adhere to earlier decisions of law in a case] is a rule of discretion, not a jurisdictional requirement." Denials of summary judgment are interlocutory, not final, orders. As such, they "remain open to trial court reconsideration, and do not constitute the law of the case." *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42 (1st Cir. 1994); *see also Plotkin v. Lehman*, No. 98-1638, 1999 WL 259669, at *1 (4th Cir. Apr. 30, 1999) (adopting *Perez-Ruiz*). Accordingly, . . . [Defendant's] statute of limitations claim will be reconsidered in light of the additional evidence submitted in support of the instant Motion for Summary Judgment.

LeGrande, at *2 (most citations omitted).

Perez-Ruiz, quoted with approval by the Middle District Court, involved two plaintiffs who had initially filed separate § 1983 actions. A District Judge had denied a motion to dismiss based on a statute of limitations defense, then the two cases were consolidated, and another District Judge granted a motion to dismiss on the statute of limitations. As explained in *Perez-Ruiz*:

> Appellants first challenge the dismissal order on the ground that the earlier district court ruling denying the motion to dismiss in the Lopez action became the "law of the case" in the consolidated action. Appellants misapprehend the "law of the case" doctrine. Interlocutory orders, including denials of motions to dismiss, remain open to trial court reconsideration, and do not constitute the law of the case. Second, although the law of the case doctrine implements an important judicial policy against reconsidering settled matters, it "is neither an absolute bar to reconsideration nor a limitation on a federal court's power."

Perez-Ruiz, 25 F.3d at 42 (citations omitted).

In *Plotkin v. Lehman*, No. 98-1638, 1999 WL 259669, 178 F.3d 1285 (4th Cir. 1999) (unpublished), the case referenced in the Middle District's *LeGrande* case, the District of Columbia District Court had denied Defendants' motion to dismiss and then transferred the case to the Eastern District of Virginia. That latter court subsequently granted the motion to dismiss. Plaintiff asserted that the law of the case doctrine barred the second court from ruling on Defendants' motion to dismiss. The Court of Appeals stated:

> [Plaintiff's] claim is misplaced. "Interlocutory orders, including denials of motions to dismiss, remain open to trial court reconsideration, and do not constitute the law of the case." The fact that a different district court may have made the initial ruling is of no consequence. Therefore, the district court did not err in ruling on the motion.

Plotkin, at *1 (citations omitted).

The Court in *Crain v. Butler*, 419 F. Supp. 2d 785 (E.D.N.C. 2005), also displayed a willingness to reconsider interlocutory rulings:

> Plaintiffs argue that this court's March 26, 2004, order denying summary judgment implicitly resolved this issue. The court disagrees. In any event, even if the order did address the issue, nothing prevents this court from reconsidering the issue. Denials of summary judgment are interlocutory, not final, orders. Before a final order is entered, "a district court retains the power to reconsider and modify its interlocutory judgments." Further, just because a predecessor United States District Judge entered the order does not preclude this court from revisiting it. "[W]hether rulings by one district judge become binding as 'law of the case' upon subsequent district judges is not a matter of rigid legal rule, but more a matter of proper judicial administration which can vary with the circumstances. It may sometimes be proper for a district judge to treat earlier rulings as binding, sometimes not." Law of the case doctrine has evolved to serve as a guide in exercising discretion rather than a staunch limit on the court's power, and the doctrine cannot be used to escape the duty of rendering legally correct decisions.

Crain, 419 F. Supp. 2d at 788 n.1 (citations omitted). *See also United States v. Shaw*, No. 5:07-HC-2214-FL, 2011 WL 4101498, at *1 (E.D.N.C. Aug. 23, 2011) (unpublished) ("The court retains the discretion to revisit the issue of transfer notwithstanding its having previously been litigated before another judge in this case. '[W]hether rulings by one district judge become binding as 'law of the case' upon subsequent district judges is not a matter of rigid legal rule, but more a matter of proper judicial administration which can vary with the circumstances.'").

As would be expected, an excellent summary and overview of the concept of law of the case and the power of a second judge to rule on an issue previously decided in the same case appears in Wright, Miller, et al.'s FEDERAL PRACTICE & PROCEDURE:

> All too often, however, a trial court could not operate justly if it lacked power to reconsider its own rulings as an action progresses toward judgment. Far too many things can go wrong, particularly with rulings made while the facts are still undeveloped or with decisions made under the pressures of time and docket.
>
> Civil Rule 54(b) confirms the trial court's necessary authority to correct itself. It provides that until the court expressly directs entry of final judgment, an order that resolves fewer than all of the claims among all of the parties "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." And so the Supreme Court has said that "every order short of a final decree is subject to reopening at the discretion of the district judge." These and like statements reflect the power to revise. . . .
>
> The trial-court power to reconsider may be affected by reassignment of a case from one trial judge to another. In some ways the reassignment might seem to encourage reconsideration. A second judge who believes that an earlier order was wrong may encounter great difficulty in resolving other matters affected by the order, and may find awkwardness even in addressing matters that seem to be independent of the wrong order. But reassignment also may discourage reconsideration. There is a natural tendency to respect a colleague's work, and to avoid the likely waste effort

of reconsideration. Frequent reconsideration, moreover, might tempt litigants to "shop" rulings from one judge to another, and could encourage the view that the quality of justice depends on the identity of the judge. . . .

At least three major factors influence a trial court's decision whether to reconsider an earlier ruling. A ruling made early in the proceedings may rest on poorly developed facts that have been better developed by continuing proceedings. In these circumstances, the forward progress of the case encourages reconsideration. A ruling made early in the proceedings, however, may have shaped later proceedings in ways that can be undone only at the cost of delay and duplicating expense. In these circumstances, the forward progress of the case discourages reconsideration. In all circumstances, an earlier ruling may come to seem wrong. Self-correction is manifestly important if the alternative is the greater delay and expense that would result from persisting in the error and eventual appellate reversal. Even if reversal is not likely, the trial court will prefer to reach a just result.

As might be expected, few regular patterns emerge from the reported decisions that balance these often competing forces. It is likely that the most important parts of actual practice go unreported and unremarked as trial courts regularly reconsider earlier rulings, or refuse to reconsider earlier rulings, according to the seeming sense of the situation. . . .

Courts have recognized the general proposition that the decision whether to reconsider an earlier ruling is properly affected by the stage the proceeding has reached. Stability becomes increasingly important as the proceeding nears final disposition, supporting refusal to reopen issues that could cause further delay or confusion. Reopening has been contemplated or permitted even after lengthy and complex proceedings, supported by the desire for a proper outcome. . . .

The pretrial rulings that may be reconsidered in continuing pretrial proceedings span the full range of pretrial activity. Some pretrial rulings are avowedly preliminary, designed to maintain order while gathering information and resources for reconsideration. An order granting or denying a preliminary injunction, for example, rests on tentative findings that are subject to reconsideration, either at trial or during later stages of pretrial proceedings. Rulings on the sufficiency or amendment of pleadings are easily modified or retracted, in keeping with the generally subordinate role played by pleading in modern practice. Denial of a motion to dismiss may be followed by an order granting dismissal, or – in the very nature of the difference between a ruling on the pleadings and an examination of the

record – an order granting summary judgment. Summary judgment orders provide innumerable further examples. It is proper to refuse to reconsider a summary judgment ruling. But denial of summary judgment often is reconsidered and followed by an order granting summary judgment, or by inconsistent action at trial. Denial can easily be followed by judgment as a matter of law or dismissal after trial, in part because there is some measure of discretion to deny summary judgment even though failure at trial to improve on the summary-judgment record would require judgment as a matter of law. An order granting summary judgment likewise may be reconsidered, to be followed by dismissal without judgment, or grant of summary judgment to the party who initially lost. A summary judgment also may be vacated at trial, although it is important to protect the reliance interests of a party who may be unprepared to litigate issues that had seemed to be resolved. Pursuing events still further, denial of judgment as a matter of law at trial may be followed by an order granting summary judgment before further trial proceedings are launched.

. . . Trial rulings also are subject to reconsideration during and after trial. This authority is so well accepted, and so routinely exercised, that courts seldom pause to comment on the practice. The primary constraint arises from the need to protect reliance against the unfair surprise that might result from changing direction without adequate opportunity to respond. Rulings on the admissibility of evidence, whether made before trial or at trial, provide frequent illustrations of the need to reconsider as trial progresses or at a subsequent trial of the same action. Findings of fact, whether or not labeled as tentative, can be amended; indeed, that is what Civil Rule 52(b) is for. Appraisals of the sufficiency of the evidence can be changed. Even a denial of leave to advance new claims at trial may be reconsidered at the end of trial. . . .

The basic themes that apply to same-judge reconsideration carry forward to situations in which one trial-court judge is asked to reconsider a ruling by another trial-court judge. Despite the desire to avoid an approach that would reward a disappointed party's efforts to replace one judge with another, a successor judge must be free to attempt the best possible disposition of the case. As one court remarked, it would hardly do to reverse a correct ruling by the second judge on the simplistic ground that it departed from the "law of the case" established by an earlier ruling. . . .

The concern that a second judge must have power to manage continuing litigation and to reach the right result has not persuaded all courts that a second judge should treat a predecessor's rulings as the judge's own. The desire to deter judge-shopping and more general notions

of comity suggest some measure of added respect. There are advantages as well in the ability to rely on earlier rulings, and protecting against the costs and delay incurred in relitigating matters already resolved. . . .

Cases that squarely address the authority of a second judge to reconsider and reverse a ruling made by a predecessor in the same case cover the full spectrum of trial-court activity. Pretrial orders are illustrated by common categories of rulings. Denial of a motion to dismiss, for example, may be followed by an order of a different judge granting dismissal. Dismissal, on the other hand, may be followed by reinstatement at the hands of another judge. Denial of class-action certification may be followed by certification.

Not surprisingly, summary-judgment rulings provide hosts of examples of pretrial rulings reconsidered. The general principle that denial of summary judgment may be reconsidered by a later judge is exemplified by many cases in which denial is followed by grant. So too, another ruling that seems inconsistent with summary judgment may be followed by summary judgment. Denial of summary judgment also may be followed by judgment as a matter of law at trial. An order granting summary judgment, on the other hand, may be reopened to deny summary judgment. . . .

A brief reminder on vocabulary may be in order. Courts differ on the question whether to apply the "law-of-the-case" label to the policies that regulate reconsideration of earlier rulings as an action proceeds through a trial court. The most important concern is that a trial court, acting through one judge or successive judges, have power to achieve the best disposition possible. A judge convinced that an earlier ruling was wrong has, must have, authority to reconsider and rectify the error. Reconsideration, however, is not provided indiscriminately whenever some party might wish it. Judges must protect themselves and the other parties against the delays and burdens that could be imposed by yielding to simple disappointment or a deliberate desire to inflict delay and burden. Effective trial-court management also demands that parties be able to rely on the rulings that progressively direct proceedings toward trial.

18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, ET AL., FED. PRAC. & PROC. § 4478.1 (2d ed. 2016).

III. Unpublished Opinions

A. North Carolina

Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure provides as follows:

> An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g).[24] When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

Although this Rule seems rather clear, the North Carolina Court of Appeals has occasionally commented about the use of unpublished opinions. For example, the panel that decided *State ex rel. Moore County Board of Education v. Pelletier*, 168 N.C. App.

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[24] Rule 28(g) provides:

> Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument.
>
> Before the Court of Appeals, the party shall file an original and three copies of the memorandum; in the Supreme Court, the party shall file an original and fourteen copies of the memorandum.

218, 606 S.E.2d 907 (2005), expressed its opinion that citing an unpublished opinion should be significantly limited:

> [W]e deem it appropriate to address the surety's citation of [*Nixon*,] an unpublished opinion in its brief to this Court. . . . Citation to unpublished authority is expressly disfavored by our appellate rules but permitted if a party, in pertinent part, "believes . . . there is no published opinion that would serve as well" as the unpublished opinion. N.C.R. App. 30(e)(3) (2004). Neither of the principles [of law] propounded by the surety justify citation to the *Nixon* opinion in this matter, and we reiterate that citation to unpublished opinions is intended solely in those instances where the persuasive value of a case is *manifestly superior* to any published opinion.

Pelletier, 168 N.C. App. at 222, 606 S.E.2d at 909 (emphasis added). *See also Inland Harbor Homeowners Ass'n, Inc. v. St. Josephs Marina, LLC*, 219 N.C. App. 348, 352, 724 S.E.2d 92, 96 (2012) (expressing the same sentiments, quoting *Pelletier*, noting that Plaintiff's argument [on one of the issues on appeal] "does not justify reliance on an unpublished opinion").

Even though there are limited circumstances when an unpublished decision of the N.C. Court of Appeals should be cited, such decisions can be helpful to the Court. For example, in *Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014), the Court did not even refer to Rule 30(e) when it saw no problem with using an unpublished opinion as "persuasive authority":

> In making its equitable distribution, the trial court . . . also cited [the North Carolina Court of Appeals case of] *Wirth II* to support the distribution of the diminution in value . . . . Although *Wirth II* is an unpublished opinion, an unpublished opinion may be used as persuasive authority at the appellate level if the case is properly submitted and discussed and there is no published case on point. We see no reason why this principle should not apply in the trial courts and agree that *Wirth II* supports the trial court's decision.

Zurosky, 236 N.C. App. at 233-34, 763 S.E.2d at 764 (citations omitted). *See also Funderburk v. JPMorgan Chase Bank, N.A.*, ___ N.C. App. ___, 775 S.E.2d 1, 6 (2015) (noting that seven unpublished opinions cited to the Court, "[a]lthough unpublished [and] . . . not binding, . . . [are] instructive in the present case"); *CaroMont Health, Inc. v. N.C. Dep't of Health & Human Services*, 231 N.C. App. 1, 9, 751 S.E.2d 244, 250 (2013) ("We recognize that an unpublished decision of a prior panel of this Court cannot bind a subsequent panel, . . ., and that Rule 30(e)(3) . . . permits the citation to unpublished opinions in a party's brief on appeal only when that party "believes . . . there is no published opinion that would serve as well as the unpublished opinion." . . . As we find both [unpublished cases cited by the parties] . . . particularly relevant to consideration of the present case and both cases were properly submitted and discussed by the parties, we find the reasoning of those cases persuasive and adopt it here."); *State v. Pritchard*, 186 N.C. App. 128, 129, 649 S.E.2d 917, 918-19 (2007) ("Our Court previously decided the precise issue presented in the present case in [an unpublished opinion] . . . . Although we are not bound by a prior unpublished decision, . . . we find the reasoning of [the unpublished opinion] . . . instructive.").

Although the Court does allow the citation of unpublished cases pursuant to Rule 30(e)(3), it does want that Rule to be followed with respect to procedure. *Cary Creek Ltd. Partnership v. Town of Cary*, 203 N.C. App. 99, 690 S.E.2d 549 (2010), admonishes those who desire to cite unpublished decisions to follow proper procedures:

> Cary Creek's brief relies largely on our unpublished opinion . . . . However, Cary Creek fails to note that [the opinion] . . . was unpublished in its brief to this Court and did not serve this Court with a copy of the opinion as

> required. N.C.R. App. P. 30(e)(3). Where a party cites an unpublished opinion but fails to comply with the requirement that it "serve [ ] a copy thereof on all other parties in the case and on the court," we may decline to consider the unpublished case. . . . Moreover, "[a]n unpublished decision of the North Carolina Court of Appeals is not controlling legal authority."

Cary Creek, 203 N.C. App. at 105-06, 690 S.E.2d at 554. (After the admonishment, the Court observed that Cary Creek's reliance on the unpublished case "is misplaced.")

Although many attorneys may believe that there is no good justification for distinguishing between published and unpublished decisions, the current rule at least allowing the citation of an unpublished opinion under certain circumstances is better than what had been an earlier rule, as evinced in *Long v. Harris*, 137 N.C. App. 461, 528 S.E.2d 633 (2000):

> [W]e are compelled to address a violation by defendant of the Rules. In his appellate brief, defendant cited as authority, and quoted extensively from, an unpublished opinion of this Court filed in 1998.
>
> > A decision without a published opinion is authority only in the case in which such decision is rendered and *should not be cited in any other case in any court for any purpose*, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.
>
> N.C.R. App. 30(e)(3) (emphasis added). An unpublished opinion "establishe[s] no precedent and is not binding authority" . . . .
>
> Compliance with the Rules is mandatory and violation thereof subjects a party to sanctions. . . . Notwithstanding, we have elected in our discretion pursuant to N.C.R. App. P. 2 to review defendant's contentions herein, but without consideration of the unpublished decision cited in his appellate brief. . . . Nonetheless, we "remind counsel of the [explicit] provisions of [N.C.R. App. P.] 30(e)," . . . prohibiting citation of unpublished opinions and use thereof as precedent.

Long, 137 N.C. App. at 470-71, 528 S.E.2d at 638-39 (emphasis in original). *See also State v. Taylor*, 141 N.C. App. 321, 330, 541 S.E.2d 199, 205 (2000) ("This Court declines to consider unpublished opinions cited by a party. . . . Hence, we remind counsel of our North Carolina Appellate Rules, specifically N.C.R. App. P. 30(e), which prohibit the citation of unpublished opinions and use thereof as precedent.").[25]

B. Federal – Fourth Circuit

Rule 32.1 of the Federal Rules of Appellate Procedure states:

> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
>
> > (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
> >
> > (ii) issued on or after January 1, 2007.
>
> (b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

This rule became effective on December 1, 2006. The Advisory Committee Notes explain the rule:

> Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated by a federal court as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Committee Note will refer to these dispositions collectively as "unpublished" opinions.

[25] An excellent article that reviews different state courts' rules regarding the citation and use of unpublished opinions, and the reasons supporting and opposing such citation and use, is Lauren S. Wood, *Out of Cite, Out of Mind: Navigating the Labyrinth That Is State Appellate Courts' Unpublished Opinion Practices*, 45 U. BALT. L. REV. 561 (2016).

Rule 32.1 is extremely limited. It does not require any court to issue an unpublished opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that determination. It says nothing about what effect a court must give to one of its unpublished opinions or to the unpublished opinions of another court. Rule 32.1 addresses only the citation of federal judicial dispositions that have been designated as "unpublished" or "non-precedential" -- whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed unpublished opinions to be cited in some circumstances, such as to support a contention of issue preclusion or claim preclusion. But the circuits have differed dramatically with respect to the restrictions that they have placed on the citation of unpublished opinions for their persuasive value. Some circuits have freely permitted such citation, others have discouraged it but permitted it in limited circumstances, and still others have forbidden it altogether.

Rule 32.1(a) is intended to replace these inconsistent standards with one uniform rule. Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an unpublished opinion of a federal court for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court may not place any restriction on the citation of such opinions. For example, a court may not instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue.

Rule 32.1(a) applies only to unpublished opinions issued on or after January 1, 2007. The citation of unpublished opinions issued before January 1, 2007, will continue to be governed by the local rules of the circuits.

Subdivision (b). Under Rule 32.1(b), a party who cites an opinion of a federal court must provide a copy of that opinion to the court of appeals and to the other parties, unless that opinion is available in a publicly accessible electronic database -- such as a commercial database maintained by a legal research service or a database maintained by a court. A party who is required under Rule 32.1(b) to provide a copy of an opinion must file and serve the copy with the brief or other paper in which the opinion is cited. Rule 32.1(b) applies to all unpublished opinions, regardless of when they were issued.

As a result of this federal appellate rule, the Fourth Circuit established the following Local Rule 32.1:

> Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.
>
> If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) are met.

Interestingly, this Local Rule seems to be inconsistent with the observation in the Advisory Committee Notes that "a court may not instruct parties that the citation of unpublished opinions is discouraged, nor may a court forbid parties to cite unpublished opinions when a published opinion addresses the same issue." Allowing an unpublished opinion to be cited if there is "no published opinion that would serve as well" seems very close to "forbid[ding] parties to cite unpublished opinions when a published opinion addresses the same issue." Fourth Circuit Local Rule 32.1. However, apparently the Fourth Circuit Court of Appeals has not addressed this head on.[26]

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[26] As to why an opinion is published by The Fourth Circuit Court of Appeals:

> Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication:
>
> i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or
> ii. It involves a legal issue of continuing public interest; or
> iii. It criticizes existing law; or
> iv. It contains a historical review of a legal rule that is not duplicative; or

The Fourth Circuit Court of Appeals does not need to consider any of its unpublished opinions, even though post-2006 unpublished opinions can be cited by the parties. *See*, *e.g.*, *In re Naranjo*, 768 F.3d 332, 345 (4th Cir. 2014) (At argument, counsel for some of the plaintiffs invoked a case that they argued was supportive of their position, "but that opinion is unpublished and of no precedential weight."). However, it is not uncommon for the appellate court to seek to distinguish cited unpublished opinions. *See*, *e.g.*, *Great-West Life & Annuity Insurance Co. v. Information Systems & Networks Corp.*, 523 F.3d 266, 272 (4th Cir. 2008) (noting that a case cited was "an unpublished opinion

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> v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit.
>
> The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the Court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgments only if the opinion has been in circulation for ten days and an inquiry to the non-acknowledging judge's chambers has confirmed that the opinion was received.

Fourth Circuit Local Rule 36(a). *See also* Fourth Circuit Local Rule 36(b) ("Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. Published and unpublished opinions are sent to the trial court or agency in which the case originated, to counsel for all parties in the case, and to litigants in the case not represented by counsel. Published and unpublished opinions are also posted on the Court's Web site each day and distributed in electronic form to subscribers to the Court's daily opinion lists. Published and unpublished opinions issued since January 1, 1996 are available free of charge at www.ca4.uscourts.gov. Counsel may move for publication of an unpublished opinion, citing reasons. If such motion is granted, the unpublished opinion will be published without change in result.").

[is] . . . not binding precedent in our circuit," but still proceeded to distinguish the case, concluding that it "is materially inapposite to the case at hand").

Just as with North Carolina appellate court practice in earlier years (before the availability of unpublished opinions became greater), the Fourth Circuit prior to 2007 was more restrictive as to the citation and use of Fourth Circuit unpublished opinions. *See*, *e.g.*, *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996) ("Under our own internal rules, unpublished opinions are not precedential; indeed, "[i]n the absence of unusual circumstances," we are bound as a court "not [to] cite an unpublished disposition in any of [our] published opinions or unpublished dispositions." Local Rule 36(c)."); *Hupman v. Cook*, 640 F.2d 497, 501 n.7 (4th Cir. 1981) (Unpublished opinions "do not constitute binding precedents. . . . Only in unusual circumstances will the court cite an unpublished opinion. Rules of the United States Court of Appeals for the Fourth Circuit, 18(d)(i). Citation by counsel is disfavored. Id. 18(d)(i). An unpublished opinion may be cited for what precedential value it may have. Id. 18(d)(iii).").

The Fourth Circuit has not yet addressed whether it is unconstitutional to follow the rule that unpublished opinions are not precedent. The Court in *Anastasoff v. United States*, 223 F.3d 898 (8th Cir. 2000), had an interesting and extensive discussion about "precedent," and concluded that unpublished opinions *do* constitute precedent, ruling that the Eighth Circuit's Local Rule declaring unpublished opinions as having no precedent to be unconstitutional. *Id.* at 899. However, that decision was vacated by the Eighth Circuit en banc because the case became moot. *Anastasoff v. United States*, 235 F.3d 1054 (8th Cir. 2000). No other federal appellate court that has expressly considered the issue has

subsequently agreed with the earlier Eighth Circuit panel's ruling regarding unpublished opinions. To the contrary, several have disagreed. *See*, *e.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001) ("Unlike the *Anastasoff* court, we are unable to find within Article III of the Constitution a requirement that all case dispositions and orders issued by appellate courts be binding authority. On the contrary, we believe that an inherent aspect of our function as Article III judges is managing precedent to develop a coherent body of circuit law to govern litigation in our court and the other courts of this circuit. We agree with *Anastasoff* that we – and all courts – must follow the law. But we do not think that this means we must also make binding law every time we issue a merits decision.").

C. Federal – U.S. District Courts in North Carolina

M.D.N.C. Local Rule 7.2(c) and (d) provide:

> (b) Citation of Published Decisions. Unpublished decisions may be cited only if the unpublished decision is furnished to the Court and to opposing parties or their counsel when the brief is filed. Unpublished decisions should be cited as follows: *Wise v. Richardson*, No. C-70-191-S (M.D.N.C., Aug. 11, 1971).
>
> (d) Citation of Decisions Not Appearing in Certain Published Reports. Decisions published only in reports other than the West Federal Reporter System, Westlaw, LEXIS, the official North Carolina reports and the official United States Supreme Court reports (e.g., C.C.H. Reports, Labor Reports, U.S.P.Q., reported decisions of other states or other specialized reporting services) may be cited only if the decision is furnished to the Court and to opposing parties or their counsel when the brief is filed.

Local Rule 7.2(d) is a little confusing, since if the term "published" means the court rendering the decision has not identified it as being "unpublished" (or words to that effect), almost all if not all, of the cases will appear in the West Federal Reporter System, Westlaw, and LEXIS. In any event, if a case is "unpublished" or does not appear in the

West Federal Reporter System, Westlaw, LEXIS, the official North Carolina reports, or the official United States Supreme Court reports, then a copy of such case must be provided to the Court and to opposing parties or their counsel when the brief that cites the case is filed.

The Middle District Court has stated that "[u]npublished opinions are not favored in this Court and are not binding precedent." *Salami v. N.C. Agricultural & Technical State University*, 394 F. Supp. 2d 696, 715-16 (M.D.N.C. 2005).

E.D.N.C. Local Rule 7.2(d) provides:

> Unpublished decisions may be cited only if the unpublished decision is furnished to the court and to opposing parties or their counsel when the memorandum is filed. The unpublished decision of a United States District Court may be considered by this court. The unpublished decision of a United States Circuit Court of Appeals will be given due consideration and weight but will not bind this court. Such unpublished decisions should be cited as follows: United States v. John Doe, 5:94-CV-50-F (E.D.N.C. Jan. 7, 1994) (unpublished) and United States v. Norman, No. 74-2398 (4th Cir. June 27, 1975) (unpublished).

In one case, an Eastern District Judge expressly stated that it did not consider an unpublished decision from the Northern District of New York because the party that cited it "had fail[ed] to supply a copy of the decision to plaintiff's counsel or to the court." *United States v. One 1985 Mercedes Benz Automobile*, 716 F. Supp. 211, 212 (E.D.N.C. 1989). However, as would be expected, the Eastern District Court will consider an unpublished opinion if properly provided to the Court. *See*, *e.g.*, *Blue v. United Way of Cumberland County*, 41 F. Supp. 3d 470, 472-73 (E.D.N.C. 2014) (Defendant "argues that the court should not consider [the Fourth Circuit's] *Daniels* [case] because it is unpublished. It is true that *Daniels* is not binding precedent in this circuit and that the

Fourth Circuit 'disfavors' citation to unpublished opinions. However, the court considers *Daniels* persuasive authority given the similarity of the facts alleged in *Daniels* and this case and the strength of the *Daniels* reasoning.").

The United States District Court for the Western District of North Carolina does not appear to have any local rule addressing unpublished opinions.

IV. Appealing What Had Been an Interlocutory Order

The basics of the law regarding the appealability of an interlocutory order is explained well in *Hamilton v. Mortgage Information Services, Inc.*, 212 N.C. App. 73, 711 S.E.2d 185 (2011):

> An order is either "interlocutory or the final determination of the rights of the parties." "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." . . . As a general proposition, only final judgments, as opposed to interlocutory orders, may be appealed to the appellate courts. Appeals from interlocutory orders are only available in "exceptional cases." Interlocutory orders are, however, subject to appellate review:
>
> > "if (1) the order is final as to some claims or parties, and the trial court certifies pursuant to . . . [N.C.R. Civ. P.] 54(b) that there is no just reason to delay the appeal, or (2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed."
>
> The appealing party bears the burden of demonstrating that the order from which he or she seeks to appeal is appealable despite its interlocutory nature. If a party attempts to appeal from an interlocutory order without showing that the order in question is immediately appealable, we are required to dismiss that party's appeal on jurisdictional grounds. . . .
>
> [If an] order . . . was not certified for immediate review pursuant to . . . Rule 54(b), Plaintiff is only entitled to interlocutory review of the trial court's order in the event that it "'deprives the appellant of a substantial right.'" In order to determine whether a particular interlocutory order is

> appealable pursuant to . . . §§ 1–277(a) and 7A–27[27]. . . , we utilize a two-part test, with the first inquiry being whether a substantial right is affected by the challenged order and the second being whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal. As a result, the extent to which Plaintiff is entitled to appeal the trial court's order hinges upon whether she has established that "delay of the appeal will jeopardize a substantial right" and "caus[e] an injury that might be averted if the appeal were allowed."
>
> The extent to which an interlocutory order affects a substantial right must be determined on a case-by-case basis. In making this determination, we take a "restrict[ive] view of the 'substantial right' exception to the general rule prohibiting immediate appeals from interlocutory orders." As we previously mentioned, the appellant must demonstrate the applicability of the substantial right exception to the particular case before the appellate court.

Hamilton, 212 N.C. App. at 76-79, 711 S.E.2d at 188-90 (citations omitted).

An order that initially was interlocutory can be appealed as of right when that order ceases to be interlocutory, and events can occur that result in such a change of status. A typical example is when a motion for partial summary judgment is granted, as occurred in *White v. Northwest Property Group-Hendersonville No. 1, LLC*, 225 N.C. App. 810, 739 S.E.2d 572 (2013):

> A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal. . . . Ordinarily, an appeal from an order granting summary judgment to fewer than all. . . claim[s] is premature and subject to dismissal. However, since the [defendant] here voluntarily dismissed the claim which survived summary judgment, any rationale for dismissing the

[27] N.C. Gen. Stat. § 1-277 provides that "[a]n appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding . . . ." *See also* § 7A-27(b)(3)a ("appeal lies of right directly to the Court of Appeals . . . [f]rom any interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . [a]ffects a substantial right.").

> appeal fails. [Defendant's] voluntary dismissal of this remaining claim does not make the appeal premature but rather has the effect of making the trial court's grant of partial summary judgment a final order.

White, 225 N.C. App. at 813, 739 S.E.2d at 575.

Other cases have had similar situations, but before referring to them, a cautionary tale that is *Hill v. West*, 177 N.C. App. 132, 627 S.E.2d 662 (2006), should be mentioned. It is not surprising that an attorney who has had a partial summary judgment entered against their client on their main claim would want to seek to obtain appellate relief sooner than later, and hence they would voluntarily dismiss weaker claims in order to cause the order for partial summary judgment to cease to be interlocutory. However, the Court in *Hill* thought that the attorneys went too far. The lower court had dismissed some of the defendants pursuant to Rule 12(b)(6), and other defendants pursuant to a summary judgment motion, leaving one defendant with claims still against her. Plaintiffs appealed the summary judgment order, but the Court of Appeals dismissed the appeal because it was interlocutory. Thereafter, Plaintiffs had a lower court judge sign a Consent Order dismissing without prejudice the remaining claims against who had been the last remaining defendant, and then appealed the summary judgment order again.

The Court of Appeals was unhappy with what they viewed as improper manipulation of the rules:

> [W]e believe that by entering into the consent order as to Teresa Henson West, counsel are manipulating the Rules of Civil Procedure in an attempt to appeal the 2003 summary judgment that otherwise would not be appealable.
>
> Rule 54(a) . . . provides that "[a] judgment is either interlocutory or the final determination of the rights of the parties." Subsection (b) allows

appeal if the specific action of the trial court from which appeal is taken is final. The Rules of Civil Procedure permit a plaintiff to take one voluntary dismissal on an action "by filing a notice of dismissal at any time before the plaintiff rests his case, or [ ] by filing a stipulation of dismissal signed by all parties [.]"

. . . After this Court dismissed the [the first] interlocutory appeal, the trial court signed and entered the consent order in which the parties agreed to the voluntary dismissal without prejudice of all claims against [the remaining defendant] . . . . Two weeks after the voluntary dismissal, plaintiffs noticed appeal, again seeking this Court's review of the 2003 summary judgment.

In our view, the consent order of 19 April 2005 is not a "final" judgment as contemplated by Rule 54, as it is not a "final determination of the rights of the parties" because plaintiffs' rights as to Teresa Henson West have not been determined. Rather, plaintiffs' rights as to Teresa Henson West are "in limbo" as plaintiffs still have the opportunity to refile their action against her. This is apparently an attempt to obtain appellate review of the 2003 summary judgment by taking a dismissal without prejudice as to Teresa Henson West. The only perceived purpose of the consent order is to appeal an order that is in fact, not final.

The consent order filed herein provides, in part:

> This Court specifically orders, with the consent of all parties, that if this case is remanded for trial, all claims against Teresa Henson West may be reinstated as the Plaintiffs deem necessary and that the prior dismissals without prejudice will not be pled as a bar to said claims.

This language reveals the order is not a "final" order as to Teresa Henson West within the meaning of . . . Rule 54. . . . [I]t is our belief that in enacting . . . Rule 54, the General Assembly never contemplated or intended that parties would be allowed an appeal under the circumstances in the case *sub judice.* If we were to entertain an appeal under these circumstances, an appeal would be possible from every interlocutory ruling which disposes of one or more claims as to one or more parties by taking a dismissal without prejudice as to the other parties and claims and later refiling the action. This was never intended by the General Assembly and will not be permitted.

> Counsel in the case at bar are violating the spirit of our Rules and are attempting to do indirectly what they cannot do directly. This appeal is dismissed . . . .

Hill, 177 N.C. App. at 135-36, 627 S.E.2d at 664 (citations omitted).

Although it is understandable as to why the Court reacted so negatively to the blatant strategy of Plaintiff's counsel, it is surprising that the Court was willing to state that as long as a voluntarily dismissed claim could be refiled, it did not lead to the case being "final," even if there were no other claims remaining.[[28]] Subsequent cases have narrowly construed and applied Hill, leaving it primarily to the unusual facts of that case. For example, in the case of *White v. Northwest Property Group-Hendersonville No. 1, LLC*, 225 N.C. App. 810, 739 S.E.2d 572 (2013), quoted above as an example involving a partial summary judgment, the defendant voluntarily dismissed without prejudice its counterclaims (the only claims remaining after the entry of summary judgment against the plaintiff), thus resulting in the plaintiff being able to appeal the partial summary judgment. However, the *White* Court saw nothing improper in such voluntary dismissal:

> Moreover, there are no apparent violations of our Rules of Appellate Procedure, nor is there reason to think that the parties are attempting to misuse the Rules of Civil Procedure. *Cf. Hill ex rel. Hill v. West*, 177

[28] Two weeks after *Hill* was decided, another panel of the Court of Appeals was confronted in *Noblot v. Timmons*, 177 N.C. App. 258, 628 S.E.2d 413 (2006), with the situation where several defendants successfully obtained summary judgment in their favor, leaving two defendants in the case. The plaintiffs appealed the summary judgment order, but the Court of Appeals dismissed the appeal as being interlocutory. Six days after the dismissal of the appeal, the plaintiffs filed a voluntary dismissal without prejudice of their claims against the remaining defendants, and then filed a second notice of appeal. The Court of Appeals proceeded to hear the appeal of the summary judgment order, and did not even comment on the plaintiffs' decision to voluntarily dismiss the remaining defendants in order to render as final what had been an interlocutory summary judgment order.

> N.C.App. 132, 135-36, 627 S.E.2d 662, 664 (2006) (dismissing an appeal from partial summary judgment as interlocutory despite voluntary dismissal of other pending claims where . . . it was apparent that counsel were "manipulating the Rules of Civil Procedure."). Therefore, the order granting defendant's motion for partial summary judgment is final and properly before us.

White, 225 N.C. App. at 813-14, 739 S.E.2d at 575.

Anther example is *Tuck v. Turoci*, No. COA06-1571, 2008 WL 304719, 188 N.C. App. 634, 656 S.E.2d 15 (2008) (unpublished), where summary judgment was granted in favor of all but two defendants. In a little less than a month after the entry of summary judgment, the plaintiff filed a notice of appeal from the summary judgment orders. About one month later, the plaintiff voluntarily dismissed the two remaining defendants without prejudice, and re-filed her notice of appeal from the summary judgment orders. It seems rather obvious that the voluntary dismissals were taken in order that the plaintiff could appeal the summary judgment orders in favor of most of the defendants. The defendants argued on appeal that the plaintiff's appeal was interlocutory and should be dismissed, "since Plaintiff voluntarily dismissed the employees without prejudice, Plaintiff's claims against the employees are 'outstanding' as Plaintiff 'still has the opportunity to refile her action against them.'" *Id.* at *4. However, the Court of Appeals saw nothing wrong in the plaintiff having voluntarily dismissed the two remaining defendants. After recounting what occurred in the *Hill* case, the Court explained:

> The circumstances of *Hill II* are readily distinguishable from the case at bar, and we conclude that *Hill II* does not control the resolution of this case. The rights of the voluntarily dismissed Defendants in this case are not "in limbo[,]" . . ., as were the rights of the dismissed defendant in *Hill II*. Until Plaintiff commences a new action against the employees, if she ever does, there is nothing left for the trial court to determine or resolve. . . . In this

> case, *the parties did not create an artificial mechanism* which Plaintiff can invoke to circumvent the Rules of Civil Procedure and reinstate her claims against the employees. We discern no violation of the spirit of our Rules by Plaintiff in the case at bar. We conclude that the summary judgment orders became final judgments within the meaning of Rule 54 when [the two remaining defendant] . . . were voluntarily dismissed without prejudice from the action. This appeal, therefore, is not interlocutory . . . .

Tuck, 2008 WL 304719, at *5 (emphasis added). The "artificial mechanism" referred to by the Court apparently was the Consent Order that the parties in *Hill* obtained that provided that "if this case is remanded for trial, all claims against [the defendant who had been the remaining defendant before she was voluntarily dismissed] . . . may be reinstated as the Plaintiffs deem necessary . . . ."

In *Goodman v. Holmes & McLaurin*, 192 N.C. App. 467, 665 S.E.2d 526 (2008), the lower court had dismissed some of the plaintiff's claims as a result of the defendants' Rule 12(b)(6) motions. The plaintiff thereafter voluntarily dismissed all of the claims which survived the dismissal orders. The Court of Appeals declined to dismiss the appeal:

> [As a result of the voluntary dismissal of the remaining claims,] . . . plaintiff's claims were no longer interlocutory, and any rationale for dismissing the appeal as interlocutory fails.
>
> Defendant's rely on *Hill* . . . for the proposition that the voluntary dismissal without prejudice of the surviving claims of a partial summary judgment is not a "final determination of the rights of the parties," and cannot be used to render a partial summary judgment appealable.
>
> The plaintiffs in Hill appealed the trial court's order of partial summary judgment twice. On the first appeal, this Court concluded that the appeal was interlocutory because plaintiffs' claims against certain defendants remained pending. This Court dismissed plaintiffs' appeal, and admonished plaintiffs for violating Rule 28(b)(4) of the Rules of Appellate

> Procedure for failing to include in their appellate brief a statement of the grounds for appellate review. . . .
>
> Following the dismissal of their appeal, plaintiffs voluntarily dismissed their remaining claims without prejudice and again appealed. On the second appeal, this Court concluded that the merits of plaintiffs' appeal would not be reached because plaintiffs again failed to include a statement of the grounds for appellate review. The *Hill* Court went on to state that the partial summary judgment was interlocutory because plaintiffs remained at liberty to re-file their voluntarily dismissed claims.
>
> Plaintiff argues, and we agree, that *Hill* is not controlling. *Hill* is factually distinguishable from the instant case. Unlike the plaintiffs in *Hill*, plaintiff in the instant case followed the Rules of Appellate Procedure. . . . We hold the trial court's order is not interlocutory and plaintiff's appeal is properly before this Court.

Goodman, 192 N.C. App. at 471-72, 665 S.E.2d at 530.

Duval v. OM Hospitality, LLC, 186 N.C. App. 390, 651 S.E.2d 261 (2007), distinguished *Hill* in such a way where a good argument can be made that *Hill* does not apply if a plaintiff merely dismisses a remaining claim or defendant pursuant to Rule 41 so that what had been an interlocutory order ceases to be interlocutory. The lower court in *Duval* had granted summary judgment as to all but one defendant, and the plaintiff thereafter entered into a stipulation of dismissal without prejudice as to the remaining defendant. The Court of Appeals had to deal with Hill before proceeding to consider the merits of the plaintiff's appeal:

> This Court has recognized [in *Hill*] that a voluntary dismissal without prejudice as to one defendant may render an order of summary judgment as to other defendants interlocutory. . . . However, this case may be distinguished from *Hill* . . . .
>
> Hill was the second appeal to this court, after the first appeal had been dismissed as interlocutory because there was one defendant remaining in the case while orders of dismissal or summary judgment had been

> entered in favor of the other defendants. After this Court dismissed the appeal, the parties entered into a consent order, dismissing the remaining defendant, Teresa West, ("West") from the case, without prejudice. The consent order specifically provided "that if this case is remanded for trial, all claims against [West] *may be reinstated as the Plaintiffs deem necessary and that the prior dismissals without prejudice will not be pled as a bar to said claims*."
>
> The *Hill* plaintiffs then filed notice of appeal again, both from the order of summary judgment and dismissal which they had previously appealed and from the consent order which dismissed West without prejudice. The *Hill* court stated that based upon the entry of the consent order for voluntary dismissal, they believed that "counsel [were] manipulating the Rules of Civil Procedure in an attempt to appeal the 2003 summary judgment that otherwise would not be appealable." We also note that as of 4 April 2006, the date of filing of *Hill*, plaintiffs would still have been able to renew the claim against West, as the time for plaintiffs to refile under North Carolina Rule of Civil Procedure 41(a)(2) had not yet expired. The language of the consent order could arguably have even permitted plaintiffs to reinstate their claims against West after a year had expired, beyond the time permitted by Rule 41.
>
> In the present case, the stipulation of voluntary dismissal as to defendant Days Inn was filed on 19 January 2006. Time has expired for plaintiff to refile this claim against [the remaining] defendant . . . pursuant to North Carolina Rule of Civil Procedure 41(a)(1). The stipulation of dismissal did not contain any additional language purporting to give plaintiff any time beyond that permitted by Rule 41(a)(1) to pursue her claim against [the remaining defendant] . . . . The procedural posture of this case does not cause us to believe that counsel are "manipulating the Rules of Civil Procedure in an attempt to appeal" an order that should not be appealable. We therefore conclude that *Hill* is inapposite and does not compel us to dismiss this appeal as interlocutory.

Duval, 186 N.C. App. at 393-94, 651 S.E.2d at 263-64 (citations omitted; emphasis in original).

Curl v. American Multimedia, Inc., 187 N.C. App. 649, 654 S.E.2d 76 (2007), evinced a not so subtle disapproval of *Hill*'s treatment of voluntary dismissals that seek to render an interlocutory final. In *Curl*, after the trial court entered an order of partial

summary judgment, leaving Plaintiffs' claims for property damage still pending, Plaintiffs dismissed their remaining claims against Defendants pursuant to Rule 41. The Court of Appeals proceeded to quote and cite earlier cases decided by other panels of the Court of Appeals that allowed appeals of orders that had been interlocutory but which were later deemed final as a result of voluntary dismissals of remaining claims and/or parties. *See Curl*, 187 N.C. App. at 652-53, 654 S.E.2d at 79 (quoting and/or citing *Brown v. Woodrun Ass'n*, 157 N.C. App. 121, 577 S.E.2d 708 (2003); *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 555 S.E.2d 634 (2001); *Rouse v. Pitt County Memorial Hospital*, 343 N.C. 186, 470 S.E.2d 44 (1996); *Whitford v. Gaskill*, 119 N.C. App. 790, 460 S.E.2d 346 (1995); *Berkeley Federal Savings Bank v. Terra Del Sol, Inc.*, 119 N.C. App. 249, 457 S.E.2d 736 (1995)).

The Court then dealt with *Hill*:

> Defendants, however, ask us to dismiss Plaintiffs' appeal as interlocutory, based on the holding in a recent case, Hill v. West . . . . In *Hill*, following dismissal of plaintiffs' appeal from partial summary judgment as interlocutory, appellants took a voluntary dismissal without prejudice of their remaining claims against defendants. Plaintiffs then filed a second appeal, which this Court dismissed. Defendants herein argue that *Hill* compels dismissal in the instant case. *We note, however, that Hill did not attempt to distinguish its holding from the significant body of case law holding contra.* Moreover, the Court in *Hill* stated several reasons for the dismissal, including plaintiffs' repeated failure to comply with the North Carolina Rules of Appellate Procedure, and the Court's perception that the appellants were "manipulating the Rules of Civil Procedure in an attempt to appeal the 2003 summary judgment that otherwise would not be appealable." . . . Inasmuch as the holding in *Hill* was apparently based in part on the appellants' "manipulative" behavior and failure to follow the Rules of Appellate Procedure, we conclude that *Hill's* holding *is restricted to the facts of that case*. Defendants' motion is denied.

Curl, 187 N.C. App. at 654, 654 S.E.2d at 79-80 (emphasis added).

The Court in *Hernandez v. Coldwell Banker Sea Coast Realty*, 223 N.C. App. 245, 735 S.E.2d 605 (2012), decided six years after *Hill*, did not even mention *Hill* when confronted with an appeal of a partial summary judgment following the voluntary dismissal by the plaintiff of her remaining claim, but rather quoted from and followed the *Combs* case decided five years before *Hill* (and quoted in *Curl* mentioned in the above two paragraphs):

> "Ordinarily, an appeal from an order granting summary judgment to fewer than all of a plaintiff's claim is premature and subject to dismissal." *Combs & Assocs. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001) . . . . However, "[p]laintiff's voluntary dismissal of [the] remaining claim does not make the appeal premature but rather has the effect of making the trial court's grant of partial summary judgment a final order." *Id.* . . . As plaintiff voluntarily dismissed her remaining claims against the other defendants, the trial court's grant of partial summary judgment became a final order and is properly before us.

Hernandez, 223 N.C. App. at 248-49, 735 S.E.2d at 608. *See also Sawyer v. Estate of Sawyer*, No. COA15-1142, 2016 WL 3887187, at *2 (N.C. App. July 19, 2016) (unpublished) ("[W]here a partial summary judgment is granted against a plaintiff and plaintiff voluntarily dismisses his or her remaining claims in order to obtain immediate review of the partial summary judgment order[,] . . . the voluntary dismissal of remaining claims renders the partial summary judgment a final order from which plaintiff may seek immediate appeal.") (citing *Combs*; *Hill* is not mentioned); *Tong v. Dunn*, 231 N.C. App. 491, 497-98, 752 S.E.2d 669, 674 (2013) ("This Court has . . . repeatedly limited *Hill* to the specific, unusual facts present in that case.").[29]

[29] If a plaintiff wants to take advantage of the procedure of dismissing remaining claims or defendants so that a partial summary judgment order can be appealed, they need to be

Before this section of the Seminar paper concludes, reference will be made to an unpublished opinion that was issued earlier this year by the North Carolina Court of Appeals. Although that opinion is not binding (as explained in Section III of this paper regarding unpublished opinions), it should give attorneys pause regarding appeal procedure. *Majerske v. Majerske*, No. COA15–839, 2016 WL 1566167, 785 S.E.2d 782 (N.C. App. April 19, 2016) (unpublished), involved orders for child custody, child support, and alimony. The trial court had entered an order modifying alimony in July 2013, but other matters had not yet been finalized, and hence the alimony order was interlocutory. Although Plaintiff wanted to appeal the alimony order, Plaintiff's counsel knew such appeal would be premature and would be dismissed due to it being interlocutory. The trial court eventually entered two orders on the last day of 2014 "resolv[ing] all pending matters in this action," *id.* at *1, though neither dealt with the alimony or the alimony order. As a result of all matters having been "resolved," it seems obvious that Plaintiff's attorney viewed the 2013 alimony order now as a final order which could be appealed, and so the alimony order was appealed.

Considering the procedural history, probably many (if not most) attorneys would feel justified in appealing only the alimony order, since that was the only order with

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sure they do not voluntarily dismiss all of their claims. The plaintiff in *Lloyd v. Carnation Co.*, 61 N.C. App. 381, 301 S.E.2d 414 (1983), was in for a surprise when he gave "notice of voluntary dismissal without prejudice of *his claims* against Carnation Company" more than one year after the lower court granted partial summary judgment in the defendant's favor. *Id.* at 383, 301 S.E.2d at 416 (emphasis in original). The Court of Appeals held that "when plaintiff took a voluntary dismissal without prejudice as to his claims against Carnation Company, he destroyed his right to appeal the [partial] . . . summary judgment. There was nothing left on which to appeal after the voluntary dismissal." *Id.* at 383-84, 301 S.E.2d at 416.

which Plaintiff disagreed. And as was noted above, it is well recognized by the North Carolina Court of Appeals that an interlocutory order becomes final once there are no other claims against any parties still remaining. No doubt Plaintiff's attorney thought she was following the proper course. Had an appeal been attempted in 2013 when the alimony order was entered, the Court of Appeals would have dismissed it as premature and interlocutory.

However, in a rather surprising move, the Court of Appeals concluded that Plaintiff had to appeal from a final judgment, that the 2013 alimony order was not to be viewed as a final judgment, and therefore she was required to appeal from the 2014 orders "resolv[ing] all pending matters in this action," *id.* at *2, even though Plaintiff was not contesting that order. In addition to the 2014 orders, Plaintiff was to appeal from the 2013 alimony order, which she was contesting, and which she did appeal. The Court's reasoning was as follows:

> "An interlocutory order is one made during the pendency of an action, *which does not dispose of the case*, but leaves it for further action by the trial court in order to settle and determine the entire controversy." Conversely, a "final judgment is one which *disposes of the cause* as to all the parties, leaving nothing to be judicially determined between them in the trial court." In the present case, final judgment was rendered when the December 2014 orders were entered. Although Plaintiff filed a notice of appeal within thirty days after entry of the December 2014 orders, she appeals only "from the Order on Defendant's Motion to Modify Alimony entered on 15 July 2013" and, therefore, has not vested this Court with jurisdiction to her hear appeal.
>
> As a general rule, an "appeal lies of right directly to the Court of Appeals . . . [f]rom any *final judgment* of a district court in a civil action." N.C. Gen. Stat. § 7A–27(b)(2) (2015) (emphasis added). When appealing from a final judgment, however, an appellant must reference that judgment in its notice of appeal because an appellate court ordinarily "obtains

> jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken." . . .
>
> By contrast, there generally "is no right of immediate appeal from interlocutory orders or judgments[.]" With some exceptions not relevant to the present case, "[a]n interlocutory decree . . . is reviewable *only on appropriate exception* upon an appeal from the final judgment in the cause." "The rule forbidding interlocutory appeals is designed to promote judicial economy by eliminating the unnecessary delay and expense of repeated fragmentary appeals and by preserving the entire case for determination in a *single* appeal from a final judgment." Our caselaw is clear that an otherwise unappealable interlocutory order does not become a "final judgement" merely because a case is fully resolved, but instead may be challenged only in connection with "an appeal from *the* final judgment in the cause."; *but cf. Combs & Associates, Inc. v. Kennedy*, 147 N.C. App. 362, 367, 555 S.E.2d 634, 638 (2001) (holding that a party's "voluntary dismissal of [its] remaining claim [after entry of partial summary judgment] . . . has the effect of making the trial court's grant of partial summary judgment a final order.").

Majerske, at *2 (emphasis in original).

Although the Court did refer to the *Combs* opinion, it did so with a "cf," which according to The Bluebook, is used when "[t]he proposition supported by the authority is different from the main proposition but sufficiently analogous to lend support."

The *Majerske* is interesting not only because of its ruling, but the Court brought up and addressed the issue on its own. Plaintiff-appellant's appellate brief did not address the issue (it simply asserted that the alimony order was "a final judgment"), and the defendant-appellant was *pro se* and did not file a brief. Because the opinion was issued pursuant to Rule 30(e) of the North Carolina Rules of Appellate Procedure (i.e., unpublished), other panels are not bound to follow it, and it will be interesting to see how another panel will rule on the issue when (and if) the parties on a future appeal will be

able to specifically address the issue.[30] In the meantime, attorneys need to be aware of *Majerske* and its approach to orders that had been interlocutory but then later become final due to all other claims and matters having been resolved.

[30] Although this paper will not attempt to present arguments to counter what the Court held in *Majerske,* the incongruity of needing to appeal an order to which the appellant has no objection comes to mind. For a party to properly appeal an order, they must be aggrieved. *See*, *e.g.*, *Hoisington v. ZT-Winston-Salem Associates*, 133 N.C. App. 485, 496, 516 S.E.2d 176, 184 (1999) (third-party defendant attempted to appeal even though the trial court had dismissed all claims against it; Court of Appeals held that such defendant was not a "party aggrieved," and "[o]nly a 'party aggrieved' may appeal from a trial court's order . . . [, and a] 'party aggrieved' is one whose rights have been directly and injuriously affected by the judgment entered") in the superior court"); *Boone v. Boone*, 27 N.C. App. 153, 154, 218 S.E.2d 221, 223 (1975) ("It is well settled in this jurisdiction that only the party aggrieved may appeal to the appellate court. . . . Where a party is not aggrieved by the judicial order entered, his appeal will be dismissed."); N.C. GEN. STAT. § 1-271 ("Any party aggrieved may appeal"). Query the interplay between N.C. GEN. STAT. § 1-271 and § 1-278 ("Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.").