Law Between the Lines

Thomas L. Fowler
ARTICLE

LAW BETWEEN THE LINES

THOMAS L. FOWLER

"[T]his Court has implicitly held that production of the revocatory writing itself is not the only method to prove its existence and validity."2

INTRODUCTION

Sometimes appellate judges say too much. Appellate opinions often contain statements or conclusions that sound like pronouncements of law but actually address matters that are unnecessary to the

1. Associate Counsel, North Carolina Administrative Office of the Courts, Raleigh, North Carolina. B.A., 1975, University of North Carolina at Chapel Hill; J.D., 1980, University of North Carolina at Chapel Hill. The opinions expressed in this article are solely those of the author and do not represent any position or policy of the Administrative Office of the Courts.

2. The North Carolina Supreme Court acknowledging an implicit holding in In re Will of McCauley, 336 N.C. 91, 95, 565 S.E.2d 88, 91 (2002). For other cases in which the Court specifies sub silentio holdings, see Polaroid Corp. v. Offerman, 349 N.C. 290, 307, 507 S.E.2d 284, 296 (1998) ("Therefore, the court implicitly held that income received 'in lieu of' prospective profits - income that would normally be characterized as business income - is considered business income for corporate income-tax purposes."); Davidson & Jones, Inc. v. N.C. Dept. of Admin., 315 N.C. 144, 151, 337 S.E.2d 463, 467 (1985) (reversing an implicit holding of the Court of Appeals); Holloway v. Wachovia Bank & Trust Co., 339 N.C. 338, 346, 452 S.E.2d 233, 237 (1994). The Court of Appeals also acknowledged implicit holdings, see Roussel v. Starling, 128 N.C. App. 439, 448, 495 S.E.2d 725, 731 (1998) ("Furthermore, we have implicitly held otherwise in Alt, where the existence of the common law tort of false imprisonment foreclosed a direct constitutional claim against the State."); State v. Nixon, 119 N.C. App. 571, 573, 459 S.E.2d 49, 50 (1995).
resolution of the specific issue before the court. Such statements are not the court’s holding but are mere dicta. Dicta is not precedential and therefore is not binding on lower courts. It is only the holding that constitutes binding precedent. To some extent the rationale, explanation and analysis that underlie the holding are also precedential.


4. “It is clear that any statements, explanations, rationales or observations that are not directly related, or necessary, to the outcome of the particular dispute that was before the appellate court, no matter how scholarly, insightful or wise, do not constitute binding precedent, as the court arguably lacks jurisdiction to pronounce any rule on such ‘hypothetical’ issues.” Thomas L. Fowler, Of Moons, Thongs, Holdings and Dicta: State v. Fly and the Rule of Law, 22 CAMPBELL L. REV. 253, 298 (2000).

5. As stated in Moose v. Bd. of Comm’rs, 172 N.C. 419, 433, 90 S.E. 441, 448-49 (1916),

The doctrine of stare decisis contemplates only such points as are actually involved and determined in a case, and not what is said by the Court or judge outside of the record or on points not necessarily involved therein. Such expressions, being obiter dicta, do not become precedents. It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision.

6. Some commentators propose that the holding in a case consists only of the facts of the case and the outcome. According to this analysis, explanation, reasoning, justification or rationale, even if directly related or necessary to the result, may well be worth considering, applying, and following - that is, it may be powerful and convincing dicta, but it is dicta nonetheless and not binding precedent. See Arthur L. Goodhart, Determining the Ratio Decidendi of a Case, 40 YALE L. J. 161, 162 (1930) (“The reason which the judge gives for his decision is never the binding part of the precedent.”); Ruggero J. Aldisert, Precedent: What it is and What it isn’t; When Do We Kiss it and When Do We Kill it?, 17 PEPPERDINE L. REV. 605, 607 (1990) (“[A] case is important only for what it decides: for ‘the what,’ not for ‘the why,’ and not for ‘the how.’ Strictly speaking, the later court is not bound by the statement of reasons, or dicti, set forth in the rationale.”) But see Michael C. Dorf, Dicta and Article III, 142 U. PA. L. REV. 1997, 1998-99 (1994) (“I defend a view of the holding/dictum distinction that attributes special significance to the rationales of prior cases, rather than just their facts and outcomes . . . . [A] too narrow view of holdings often serves as a means by which judges evade precedents that cannot fairly be distinguished.”) (emphasis added).
On the other hand, sometimes appellate judges say too little. Even the best appellate judges do not always completely explain their reasoning or say everything they mean. Sometimes statements are necessary in the resolution of the specific issue before the court, while other times they never explicitly state a conclusion that appears both obvious in the context of the opinion and necessary to the decision. Therefore, the question is whether appellate judges must always say everything they hold. Can there be unstated but implicit holdings — that should be discerned and followed by the lower courts, i.e., that are binding on the lower courts?

The evidence suggests that implied or sub silentio holdings do exist. They can make law and even overturn express precedent. One commentator explains that "appellate courts may implicitly overrule prior decisional law . . . simply by establishing a later contrary precedent without taking note of its impact on earlier decisions. Normally, the later decision is considered authoritative and as having implicitly rejected the earlier one." This point is, however, open for debate. A jurisdiction's highest court may jealously reject the notion that lower courts can decide for themselves what the highest court did not actu-

7. An implicit holding is a conclusion that is logically necessary but is not explicitly stated, or that is explicitly stated but is not explicitly labeled as the holding in the case. An implicit overruling may occur when rationales are followed or decisions are reached which conflict with established precedent but such conflict is not expressly acknowledged in the opinion. If an implied "conclusion" in an opinion is not determined to be a "holding" then it is not binding on the lower court, but, like express dicta, can be followed if convincing and if no binding precedent is on point.


9. "The notion of sub silentio reversal . . . is commonplace in the law." James Bopp, Jr., Richard E. Coleson, Barry A. Bostrom, Does the United States Supreme Court Have a Constitutional Duty To Expressly Reconsider and Overrule Roe v. Wade?, 1 SETON HALL CONST. L. J. 55, 75 (1990) (noting that while the Supreme Court sometimes expressly overrules a prior decision, in a great many instances the overruling must be deduced from the principles of related cases.) Raoul Berger, A Study of Youthful Omniscience: Gerald Lynch on Judicial Review, 36 Ark. L. Rev. 215 (1982) ("In the history of the Court many a decision has been overruled sub silentio. . . ."); see also Lisa J. Allegrucci & Paul E. Kunz, The Future of Roe v. Wade in the Supreme Court: Devolution of the Right of Abortion and Resurgence of State Control, 7 St. John's J. Legal Comment. 295, 327 (1991) ("Although sub silentio overruling is a common practice in our system of jurisprudence, it often clouds the law and undermines the legitimacy of both the new decision and the precedent. Stability is better achieved when the Court directly reviews the weaknesses of the prior case law and completely, rather than partially, overrules it.")

ally say but really meant. For instance, the U.S. Supreme Court stated, "[I]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Yet despite this explicit language, one federal judge noted, "[T]here are persuasive authorities cited in support of the right (arguably, the duty) of a lower court to decline to apply Supreme Court precedent when the Court in later decisions has itself de facto overruled that precedent, although not expressly."11

This article takes the position that the law can be found between the lines of appellate opinions. Several North Carolina cases admit to sub silentio overrulings,13 and one court of appeals case explicitly found error when a trial court did not find that a case had been overruled sub silentio.14 Additionally, North Carolina appellate courts regularly avoid explicitly detailing the impact an opinion has on the precedential value of an earlier case, and instead invite the lower

13. In re Will of McCauley, 356 N.C. 91, 95, 565 S.E.2d 88, 91 (2002) ("Thus, this Court has implicitly held that production of the revocatory writing itself is not the only method to prove its existence and validity."); State v. Lynch, 334 N.C. 402, 410, 432 S.E.2d 349, 352-53 (1993) ("Here, however, we are forced to acknowledge that in Gibson we overruled, sub silentio, our recent precedent established in Garner."); Rowan County Bd. of Educ. v. U.S. Gypsum Co., 332 N.C. 1, 8, 418 S.E.2d 648, 653 (1992) ("Our review of the case law persuades us that the second line of cases overrules, sub silentio, the earlier line."); White v. White, 312 N.C. 770, 778, 324 S.E.2d 829, 834 (1985) ("Once the trial court orders a distribution, it has held sub silentio that such distribution is fair and equitable. A specific statement that the distribution ordered is equitable is not required."); Teachy v. Coble Dairies, Inc., 306 N.C. 324, 326, 293 S.E.2d 182, 183 (1982) ("This decision was based on the conclusion that the denial of a motion to dismiss under Rule 12 (b)(1) for lack of subject matter jurisdiction is not immediately appealable and the sub silentio determination that sovereign immunity is a matter of subject matter jurisdiction."); City of Winston-Salem v. Yarbrough, 117 N.C. App. 340, 346, 451 S.E.2d 358, 363 (1994) ("Thus, the Court decided, sub silentio, that holding property for anticipated development is a present use."); Reidy v. Macauley, 57 N.C. App. 184, 187, 290 S.E.2d 746, 748 (1982) ("We believe Chipley has been overruled sub silentio by Vogel and its progeny.").
courts to make that determination for themselves. For example in Meyer v. Walls the Supreme Court stated, "[T]o the extent that any cases are inconsistent with this holding, they are overruled." This language appears to explicitly direct the lower courts to apply the sub silentio rule in proper cases. It must also be noted that the Supreme Court does not consistently restrict the lower court review to the narrow "holding" of the opinion, but instead occasionally extends the review to the broader categories of "our decision here," "this opinion," "the analysis herein," or "the language of this case." The clear implication of such language is that the precedential value of a decision can extend beyond the holding to the rationale, explanation, and analysis that underlie the holding.

In sum, sometimes judges don’t say what they really mean. It is therefore arguable that lower courts have the duty to discern implied, de facto holdings in appellate opinions, and to evaluate the effect and significance of this law between the lines. These are not easy tasks. What follows are examples of possible de facto holdings that arose in the language (and between the lines) of several appellate opinions. Some proved to be, and some proved not to be, implied holdings, and others are left with no definitive categorization. The test for determining the existence of an implied, de facto holding is still evolving. Despite this lack of guidance, the lower courts should not ignore or avoid the possibility and legitimacy of such sub silentio holdings.

15. E.g., McMillian v. N.C. Farm Bureau Mut. Ins. Co., 347 N.C. 560, 565, 495 S.E.2d 352, 355 (1998) ("Further, to the extent that Ohio Casualty and its progeny are inconsistent with our holding herein, they are hereby overruled."); State v. Barnes, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997) ("To the extent that Blankenship, Reese, and their progeny are inconsistent with this opinion, they are hereby overruled.")

16. Meyer v. Walls, 347 N.C. 97, 107, 489 S.E.2d 880, 886 (1997). See also State v. Hinnant, 351 N.C. 277, 287, 523 S.E.2d 663, 669 (2000) ("To the extent that cases such as State v. Jones (citations omitted) . . . are inconsistent with our holding, they are overruled.").

17. Id. (emphasis added). The question remains whether the court needed to explicitly state this or whether this is always the intent and impact of an appellate opinion even if there is no express direction.


22. Interestingly appellate opinions that dismiss a statement of rationale in an earlier opinion as dictum do so only in dictum - the explanation is always unnecessary to the holding. See Michael C. Dorf, Dicta and Article III, 142 U. Pa. L. Rev. 1997, 2067 (1994).
The Meaning Of A Denial Of Discretionary Review: The Drug Tax And Double Jeopardy Cases

In State v. Ballenger,23 the defendant was charged with felonious possession of marijuana. Pursuant to title 105, section 113.105 of the N.C. General Statute, the North Carolina Controlled Substance Tax,24 the North Carolina Department of Revenue issued a controlled substance tax assessment against defendant.25 The defendant paid the tax assessment of $3,837.24, including interest and penalty, and then moved to dismiss the criminal charges for possession of the controlled substance.26 The defendant alleged his criminal prosecution violated the prohibition against successive punishments for the same offense contained in the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.27 The trial court granted defendant's motion, expressly basing its order upon the decision of the United States Supreme Court in Montana Department of Revenue v. Kurth Ranch.28 In the Kurth case, the Court subjected Montana's statute imposing a tax on the possession and storage of dangerous drugs to the double jeopardy analysis.29 Kurth Ranch held that Montana's assessment of the tax on the possession of illegal drugs in a separate proceeding, after the State imposed a criminal penalty arising from the same conduct, amounted to a second punishment within the contemplation of the Double Jeopardy Clause.30 The trial court in Ballenger

24. The North Carolina Controlled Substance Tax levies a tax on controlled substances and counterfeit controlled substances possessed by dealers. The tax is due within forty-eight hours after the drug dealer possesses the substance upon which the tax has not been previously paid. The tax obligation is not contingent upon the dealer's arrest which, in the normal course of events, would result in the confiscation and destruction of the substance. As unlikely as this may be, the dealer can satisfy his tax obligation by paying the tax upon acquisition of the substance and by then permanently affixing thereto stamps issued by the Secretary of Revenue to indicate payment. N.C. GEN. STAT. § 105-113.5 (2001).
26. Id.
27. Id.
29. Id.
30. Id. at 784. The Court's analysis centered upon whether the Montana tax had punitive characteristics. The Court noted, "that neither a high rate of taxation nor an obvious deterrent purpose automatically marks this tax a of punishment," although those attributes were "consistent with a punitive character." The Court found the Montana tax to be "remarkably high" when it was eight times the drug's market value. Moreover, the Court found the Montana legislature clearly intended the tax to deter people from possessing marijuana.
agreed that because he had paid the tax, prosecution of the defendant on the drug possession charges would subject him to double jeopardy. On appeal, however, the Court of Appeals upheld North Carolina's drug tax as "a legitimate and remedial effort to recover revenue from those persons who would otherwise escape taxation when engaging in the highly profitable, but illicit and sometimes deadly activity of possessing, delivering, selling or manufacturing large quantities of controlled drugs." Ballenger was affirmed per curiam by the N.C. Supreme Court in 1997.

In 1998, however, the United States Court of Appeals for the Fourth Circuit expressly held, in Lynn v. West, that the North Carolina Controlled Substance Tax was a criminal penalty rather than a revenue tax. Defendants across the state argued that Lynn was now the controlling law. Despite this contrary ruling by the federal court, most lower North Carolina courts continued to follow Ballenger, noting that North Carolina state courts are not bound by Fourth Circuit decisions, but are constrained to follow the decisions of the Supreme Court of North Carolina until the U.S. Supreme Court directs otherwise. In the fall of 1998, the U.S. Supreme Court denied the state's

32. Id. at 184, 472 S.E.2d 575.
34. Lynn v. West, 134 F.3d 582 (4th Cir. 1998), cert. denied, 525 U.S. 813.
35. E.g., State v. Adams, 132 N.C. App. 819, 513 S.E.2d 588 (1999) (although defendant proffered a Fourth Circuit decision as sustaining the trial court's action, federal appellate decisions are not binding upon either the appellate or trial courts of North Carolina with the exception of decisions of the United States Supreme Court); State v. Dawkins, 113 N.C. App. 557, 514 S.E.2d 318 (1998) (an unpublished opinion of the N.C. Court of Appeals filed on 1 December 1998).
36. State v. McDowell, 310 N.C. 61, 74, 310 S.E.2d 301, 314 (1984). A state court should exercise and apply its own independent judgment, treating decisions of the United States Supreme Court as binding and according to decisions of lower federal courts such persuasiveness as these decisions might reasonably command. See also Lockhard v. Fretwell, 506 U.S. 364, 376 (1993), where Justice Thomas in a concurrence stated,
petition for certiorari in *Lynn v. West*, thus leaving in effect the federal Court of Appeals' ruling that North Carolina's drug tax did implicate the double jeopardy clause. Some would argue this was a clear message that the U.S. Supreme Court (the court that can overrule the North Carolina Supreme Court) had upheld *Lynn v. West* and overruled, by implication, *State v. Ballenger*. But this was not the case. In such situations, the law is clear that a denial of discretionary review never establishes an implied holding or overruling.

It is settled law that denial of certiorari imparts no implication or inference concerning the U.S. Supreme Court's view of the merits of the underlying case. In *Maryland v. Baltimore Radio Show*, Justice Frankfurter stated:

> The sole significance of such denial of a petition for writ of certiorari . . . [i]s that fewer than four members of the Court deemed it desirable to review a decision of the lower court as a matter 'of sound judicial discretion'. . . . A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different justices to the same result. . . . Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review.

Although possibly a way to predict future rulings, the U.S. Supreme Court's denial of certiorari was not a *sub silentio* affirmance of *Lynn v. West* and thus did not effect the relationship between *Lynn* and *Ballenger*.

(2) *The Significance Of Logically Necessary But Not Explicitly Stated Legal Conclusions: Legislatively Created Circuit Courts vs. Constitutionally Created Superior Courts*

In the late 19th century, the North Carolina legislature created new courts called "circuit" courts and specified that such courts had concurrent and equal jurisdiction and authority with the existing superior courts. Over the years, appeals from judgments of these circuit courts were taken directly to the North Carolina Supreme Court...
and the court regularly resolved the matters so appealed. Because subject matter jurisdiction is always a proper consideration of the courts, even if the parties themselves have not raised the matter, the North Carolina Supreme Court's resolving of these cases could have been viewed as a *de facto* confirmation that these circuit courts properly functioned as the equals of superior courts. But in 1898, in *Rhyne v. Lipscombe*, the N.C. Supreme Court held that the legislature's attempt to create circuit courts with the same jurisdiction as superior courts was unconstitutional and void. Thus, there could be no direct appeal from these circuit courts to the Supreme Court. Justice Walter Clark noted, "[w]hile appeals have been often brought to this court direct from criminal inferior courts [i.e., the circuit courts], the right to do so has never been adjudged by this Court." Thus despite the logical inference from the earlier cases that the court approved of the equivalence of the legislatively created circuit courts and the constitutionally created superior courts, the Court denied that this was a *de facto* holding because the precise issue had never been properly raised or appealed in any of the previous cases.

38. Bailey v. Gooding, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980). ("It is well established in this jurisdiction that if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appeal has not been raised by the parties themselves.") See also Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity to Be Heard*, 39 SAN DIEGO L. REV. 1253, (2002) (observing that it is accepted for appellate courts to resolve cases on jurisdictional grounds even if the parties did not raise the issue). An interesting question is whether it would ever be proper to determine that such a *sua sponte* ruling was implied.


40. Id. at 656, 29 S.E. 57 at 58-59.

41. See e.g. Barnes v. Teer, 219 N.C. 823, 824, 15 S.E.2d 379, 380 (1941) ("In originally upholding the judgment, this question was inadvertently answered *sub silentio* in the affirmative. The authorities are to the contrary."); Anonymous, 2 N.C. 171, 120-21, (1795) ("Whatever may have been the practice, I cannot say, not having attended to it in this particular - Sometimes a practice may prevail for a length of time, upon the strength of a precedent passing *sub silentio*, which, when it comes to be examined, may be found very erroneous."); Scott v. Battle, 85 N.C. 184, 189, 2 S.E. 70 (1881) ("On looking to the case, the fact that the plaintiff was a married woman seems not to have been observed by the court, at least there is no mention made of that circumstance in the opinion. So far as we can see, the point passed *sub silentio*, as if it had been the case of an ordinary vendor, resting under no disability, seeking to avoid his parol agreement; and regarding the decision to be inconsistent alike with precedent and principle, we do not feel at liberty to follow it.").
Interpreting Supreme Court Actions (i.e., More Legal Conclusions That Are Logically Necessary But Not Explicitly Stated): Civil Rule 9(j) and Medical Malpractice Actions

North Carolina Civil Rule 9(j) provided special rules of pleading in medical malpractice cases, but the North Carolina Court of Appeals held it was unconstitutional and therefore void in Anderson v. Assimos.\(^{42}\) In a subsequent case, Best v. Wayne Memorial Hosp., Inc.,\(^{43}\) the Court of Appeals stated that the holding in Anderson was binding and controlling regarding the status of Rule 9(j). In December 2001, in Sharpe v. Worland,\(^ {44}\) the court also stated that, pursuant to Anderson, Rule 9(j) was void and so required reversal of the trial court's dismissal "on the basis of Rule 9(j)."\(^ {45}\) Sharpe acknowledged that Anderson was on appeal to the N.C. Supreme Court. Best and Sharpe appeared to establish that during the pendency of the Anderson appeal, the status of the law was that, pursuant to Anderson, Rule 9(j) was void and therefore could not serve as the legal basis for dismissal of a lawsuit. The N.C. Supreme Court, however, appeared to disagree.

In an opinion filed in February of 2002, Thigpen v. Ngo,\(^ {46}\) the N.C. Supreme Court upheld the dismissal of the case based on a violation of Rule 9(j). The N.C. Supreme Court's result seemed inconsistent with the Court of Appeals' cases that repeatedly held Rule 9(j) was void. The Thigpen opinion reasoned:

The trial court dismissed plaintiff's complaint with prejudice because it did not comply with Rule 9(j) and was therefore filed outside the statute of limitations. . . . Rule 9(j) clearly provides that '[a]ny complaint alleging medical malpractice . . . shall be dismissed' if it does not comply with the certification mandate. . . . Failure to include the certification necessarily leads to dismissal. . . . In light of the specific, unambiguous, and plain language of Rule 9(j); the legislative intent of the statute; and the record and facts in this particular case, we hold the trial court correctly dismissed plaintiff's complaint.\(^ {47}\)

45. Id. at 783, 557 S.E.2d at 111. "Recently in Anderson v. Assimos, 146 N.C. App. 339, 553 S.E.2d 63 (2001), a different panel of this Court held that the pre-filing certification of Rule 9(j) of the North Carolina Rules of Civil Procedure was unconstitutional and void. Thus, we must reverse the trial court's dismissal of this matter on the basis of Rule 9(j)."
47. Id. at 200, S.E.2d at 164.
After *Thigpen*, was it still improper for a trial judge to consider a motion to dismiss a medical malpractice action based on a failure to comply with Rule 9(j) as the Court of Appeals cases clearly held? Or did the Supreme Court, in *Thigpen*, implicitly reverse *Sharpe* and *Anderson* in a sub silentio overruling? *Thigpen* neither mentioned the Court of Appeals cases nor discussed the constitutionality of Rule 9(j), the status of the *Anderson* decision pending appeal to the Supreme Court, nor the effect on other cases resolved after *Anderson* but prior to the Supreme Court's decision. Yet in light of the trio of Court of Appeals cases, the Supreme Court justices could not have been unaware of the holding in *Anderson* v. Assimos. *Thigpen*'s upholding the dismissal on Rule 9(j) grounds seemed to be a clear rejection of the Court of Appeals conclusion that Rule 9(j) was void and therefore not a proper basis for dismissal. But *Thigpen* did not take this position explicitly and it can be argued that *Thigpen* did no more than suggest the likelihood that the Supreme Court was disposed to overrule *Anderson*—although it did remain theoretically possible that this aspect of *Thigpen* was simply an inadvertence. Maybe it carried no significance at all, but maybe it did.

On 22 November 2002, the Supreme Court vacated the Court of Appeals opinion in *Anderson* v. Assimos that had held Civil Rule 9(j) unconstitutional. The court noted that this constitutional issue had not been raised at the trial, and constitutional issues not raised at trial will generally not be considered on appeal. Further the court stated that plaintiff's complaint asserted *res ipsa loquitur* as the sole basis for the negligence claim, and because *res ipsa* claims are based on facts that permit an inference of defendant's negligence, the certification requirements of Rule 9(j) were not implicated. Thus, the Court of

48. *Id.*

49. See e.g. Barnes v. Teer, 219 N.C. 823, 824, 15 S.E.2d 379, 381 (1941) ("In originally upholding the judgment, this question was inadvertently answered sub silentio in the affirmative. The authorities are to the contrary."); Scott v. Battle, 85 N.C. 184, 189, 2 S.E. 70, 75 (1881).


51. *Id.* at 416, 572 S.E.2d at 102. The Court noted that in exceptional circumstances, the Supreme Court may exercise its supervisory power to consider constitutional questions not properly raised in the trial court, but that in this case, resolution of the constitutional issue was not necessary because it was not "definitely drawn into focus by plaintiff's pleadings."

52. *Id.* at 417, 572 S.E.2d at 102. "The certification requirements of Rule 9(j) apply only to medical malpractice cases where the plaintiff seeks to prove that the defendant's conduct breached the requisite standard of care—not to *res ipso loquitur* claims."
Appeals erred in addressing the constitutionality of Rule 9(j) under these circumstances, and the decision of the Court of Appeals was vacated "to the extent it concluded that Rule 9(j)" violated the state and federal constitutions.\footnote{Anderson, 356 N.C. 415, 572 S.E.2d 101.}

The question remains, after the Supreme Court's decision in \textit{Thigpen} but before the court's decision in \textit{Anderson}, would a trial court have committed error by following the Court of Appeals decisions and dismissing a medical malpractice action based on a Rule 9(j) violation?\footnote{The question of the constitutionality of Rule 9(j) also remains. Although one could argue that the Supreme Court's resolution of the \textit{Anderson} case suggests that the court favors constitutionality, \textit{Anderson} could not be construed as holding this impliedly or \textit{sub silentio}.}

\section*{(4) Are Rationales Holdings—and Therefore Binding on the Lower Courts? Part I: The Status of the Alienation of Affection Tort}

In 1984, in \textit{Cannon v. Miller},\footnote{71 N.C. App. 460, 322 S.E.2d 780 (1984).} after an extensive review of the historical and theoretical bases of the torts of alienation of affection and criminal conversation, the Court of Appeals abolished both torts because "the very theory of recovery underlying both actions is without basis in contemporary society."\footnote{Id. at 492, 322 S.E.2d at 801.} The court appeared to conclude, not that the North Carolina Supreme Court would probably abolish these torts itself at some point in the future, but that the Supreme Court already had done so, by implication in other cases. "[T]here is no continuing legal basis for the retention of these tort actions today."\footnote{Id. at 497, 322 S.E.2d at 804.} The Supreme Court, however, rejected this application of the \textit{sub silentio} doctrine. In a sharp rebuke to the Court of Appeals, the Supreme Court reversed, stating that the panel of judges of the Court of Appeals to which this case was assigned acted "under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court."\footnote{Cannon v. Miller, 313 N.C. 324, 327 S.E.2d 888 (1985).} As noted above, it seems clear that in \textit{Cannon} the Court of Appeals was not claiming the author-
ity to overrule the Supreme Court, but the authority to determine that the Supreme Court had already overruled its own precedent by disavowing the underlying rationale. The Supreme Court's opinion in Cannon does not expressly deny this authority to the lower courts—although one could argue it implies this denial.

(5) Are Rationales Holdings – And Therefore Binding on the Lower Courts? Part II: Roe v. Wade and the Later Cases

Sometimes appellate judges may be communicating with each other when they proclaim rationales that are inconsistent with existing and well-known precedent while refusing to expressly address the impact on established precedent. One often cited example is Roe v. Wade and the subsequent U.S. Supreme Court cases that addressed the efforts by various states to regulate abortion. In 1991, in Planned Parenthood v. Casey the Third Circuit concluded that the strict scrutiny review, applied by the Supreme Court in the early abortion cases, had given way to Justice O'Connor's undue burden test. The Third Circuit determined that even without the express direction from the Supreme Court, it was the duty of the lower courts to follow the new rationale rather than the one apparently adopted in Roe. The Court of Appeals noted that as

60. For a fascinating in-depth exploration of the roles played by the various Supreme Court justices in the decades of debate over Roe v. Wade, see Edward Lazarus, CLOSED CHAMBERS 329-424 (1999) (Lazarus served as a law clerk to Justice Blackmun from 1988-89).
61. 947 F.2d 682 (3rd Cir. 1991).
62. Id.

The majority in Roe concluded that abortion was a fundamental right and, therefore, applied strict scrutiny review, the standard of review generally applied in fundamental rights cases. The dissenters in Roe contended that abortion was not a fundamental right and... Therefore, they urged that the Court apply the deferential rational basis test traditionally used to review social and economic legislation. Justice O'Connor has referred to the right to abortion as a "limited" fundamental right and adopted a middle ground between these two positions. She uses the strict scrutiny standard if the regulation at issue causes an "undue burden" on a woman's abortion decision and the rational basis standard if it does not. Id. at 688 (citations and footnote omitted).
63. Id. at 697.

It would be anomalous if the results reached under a constitutional standard remained binding after the standard or test was repudiated. If the standard is replaced, decisions reached under the old standard are not binding. We thus conclude that a change in the legal test or standard governing a particular
a lower court, we are bound by both the Supreme Court's choice of legal standard or test and by the result it reaches under that standard or test. As Justice Kennedy has stated, courts are bound to adhere not only to results of cases, but also to their explications of the governing rules of law.' Our system of precedent or stare decisis is thus based on adherence to both the reasoning and result of a case, and not simply to the result alone. . . .when a majority of the Justices announce in the course of deciding a case that they are substituting a new standard or result for that used in a prior case, the substitution is effected, and the lower courts are thereafter bound to follow the new standard or result. 64

The Third Circuit concluded that only by applying Justice O'Connor's rationale in her concurring opinions, rather than following Roe itself, would the lower courts decide abortion regulation cases in a way consistent with the way the Supreme Court decided them in the later abortion cases. 65

Several commentators agreed that Roe could not stand in light of the explanations and rationales utilized by the Supreme Court in later cases. 66 But the Supreme Court itself was too divided to resolve the matter in Planned Parenthood v. Casey. 67 Despite a four justice dissent arguing that a reexamination of the "fundamental right" Roe accorded to a woman's decision to abort a fetus was warranted by the "confusing and uncertain state of this Court's post-Roe decisional law," the Court did not revisit the Roe holding. 68 But neither did the Court rebuke the Third Circuit for its willingness to consider whether recent rationales employed by the Supreme Court could impliedly overrule precedents that relied on inconsistent rationales. 69

area is a change binding on lower courts that makes results reached under a repudiated legal standard no longer binding.

Id. (footnotes omitted).

64. Id. at 691-92.


68. See id. at 833. For a complete discussion of Casey see Lazarus, supra, note 60, at 459-86.

69. Edward Lazarus, law clerk to Justice Blackmun, quotes a memo circulated by Justice Scalia prior to the Court's decision in Webster, meant to sway Justice
(6) Are Lower Courts Judges or Ciphers? Ring v. Arizona

In 2001, the Arizona Supreme Court faced something of a quandary. At issue before the court was the constitutionality of Arizona's capital sentencing scheme. Arizona's procedure required the sentencing judge, without a jury, to determine whether or not aggravating factors existed that would elevate the punishment from life in prison to death. Without this judicial determination the convicted capital defendant would only receive life imprisonment. In 1990, the U.S. Supreme Court expressly upheld this aspect of Arizona's capital sentencing scheme in the case of Walton v. Arizona. But subsequent U.S. Supreme Court cases raised significant questions about Walton's continuing validity.

In Apprendi v. New Jersey, decided in 2000, the U.S. Supreme Court addressed a New Jersey hate crime statute which allowed the judge to determine the existence of certain facts, based on a preponderance of the evidence, which would increase the maximum sentence for certain felonies from ten to twenty years. The Supreme Court determined that the statute violated due process, and held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt, other than the fact of prior conviction. Unless there was some reason to apply a different due process standard to capital offenses, the rationale and holding of Apprendi appeared to invalidate Arizona's capital sentencing scheme. The Apprendi majority expressly mentioned Walton and dismissed any conflict.

The Apprendi majority was, however, clearly in error regarding its consistency with Walton. This obvious fact was spelled out by Justice O'Connor's dissent, joined by Chief Justice Rehnquist, Justices Kennedy and Breyer. In her Apprendi dissent, Justice O'Connor stated:

The distinction of Walton offered by the Court today is baffling, to say the least. The key to that distinction is the Court's claim that, in Arizona, the jury makes all of the findings necessary to expose the

O'Connor's tenuous legal position. "Of the four courses we might have chosen today—to reaffirm Roe, to overrule it explicitly, to overrule it sub silentio, or to avoid the question—the last, the one we have chosen, is the least responsible." Lazarus, supra note 60, at 415.

70. 536 U.S. 584 (2002).
71. Id.
72. Id.
74. 530 U.S. 466 (2000).
75. Id.
76. Id. at 496.
defendant to a death sentence. . . . [T]hat claim is demonstrably untrue. A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. . . . If the Court does not intend to overrule Walton, one would be hard pressed to tell from the opinion it issues today.77

The issue before the Arizona Supreme Court in 2001 was the question raised by Justice O'Connor in her dissent: did Apprendi overrule Walton sub silentio? The Arizona Supreme Court was conflicted. The Court noted dryly that although the Apprendi majority "refused to expressly overrule Walton," the case raised "some question about the continued viability of Walton."78 The Court also noted that Justice O'Connor correctly asserted that the Apprendi majority had mischaracterized the Arizona capital sentencing procedure.79 Nevertheless, the Apprendi majority's obvious mistake in interpreting the Arizona statute, and despite the manifest and material conflict between the Apprendi rationale and holding and that of Walton, the Arizona Supreme Court declined to find that Walton had been effectively overruled. The Court stated:

We recognize that the United States Supreme Court has explicitly refrained from overruling Walton. Although Defendant argues that Walton cannot stand after Apprendi, we are bound by the Supremacy Clause in such matters. Thus, we must conclude that Walton is still the controlling authority and that the Arizona death-penalty scheme has not been held unconstitutional under either Apprendi or Jones.80

In the 2002 case, Ring v. Arizona,81 the U.S. Supreme Court acknowledged that Walton was irreconcilable with Apprendi, and that "[c]apital defendants, no less than non-capital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."82 The Ring majority makes clear that it found no reasonable argument that Walton could survive the reasoning of Apprendi.83 In his concurrence, Justice

77. Id. at 538.
78. State v. Ring, 25 P.3d 1139, 1150 (Ariz. 2001). In addition to Apprendi, the opinion also cites the important case of Jones v. United States, 526 U.S. 227 (1999).
79. Id. at 1151.
80. Id. at 1151.
81. 536 U.S. 584 (2002).
82. Id. at 2432.
83. Id. at 2440.
Kennedy states that *Apprendi* is "now the law," and that "no principled reading of *Apprendi* would allow *Walton v. Arizona* . . . to stand."\(^8^4\)

The U.S. Supreme Court seemed to state that *Apprendi* was the law and that there was no reasonable argument that *Walton* could survive the holding in *Apprendi*. Yet the Supreme Court did not admit that *Apprendi* had indeed overruled *Walton sub silentio*. Instead, Ring commended the Arizona Supreme Court for its refusal to exercise its own authority to analyze and interpret the opinions of the U.S. Supreme Court, even when the impact on *Walton* was so obvious and indisputable. The Court in *Ring* stated, "[a]lthough it agreed with the *Apprendi* dissent's reading of Arizona law, the Arizona court understood that it was bound by the Supremacy Clause to apply *Walton*, which this Court had not overruled."\(^8^5\)

It would have been more interesting if the Arizona Supreme Court had explicitly ruled that *Apprendi* overruled *Walton sub silentio*. The U.S. Supreme Court may or may not have found this to be error, even though the Court essentially reached the same conclusion. It would also be interesting to know if the U.S. Supreme Court would have emphasized the fact, as the Arizona Supreme Court did, that the *Apprendi* majority explicitly (and mistakenly) refused to overrule *Walton*, or whether the lower court's conclusion that *Walton* had been overruled would have been permissible if *Apprendi* had not mentioned *Walton*.

(7) The Art of Discerning the Binding Part of an Opinion, A Cautionary Tale: Civil Rule 68, Offers of Judgment and Poole v. Miller

North Carolina Rule of Civil Procedure 68 provides:

(a) Offer of judgment. - At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after

\(^8^4\) Id. at 2445.

\(^8^5\) Id. at 2436.
the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.86

The language of Rule 68(a) is virtually identical to Federal Rule of Civil Procedure 68.87 Rule 68 was intended to encourage settlement of civil actions prior to trial.88 The Rule allows a defendant to make a formal settlement offer, or offer of judgment, early in the litigation. The plaintiff ignores or declines the offer of judgment at its peril because the Rule provides for the shifting of responsibility for litigation costs if the judgment finally obtained is less favorable than the offer of judgment that was not accepted.89 For example, if the offer of judgment was for $5,000, and the judgment finally obtained was $1,000, then plaintiff cannot recover for its litigation costs incurred after the date of the offer of judgment. In addition, the plaintiff becomes liable for defendant's litigation costs incurred after the date of the offer of judgment. This cost shifting becomes particularly important when a statute allows the trial court to award attorneys fees to plaintiff as a part of the court costs.90 Rule 68 was thus intended to

The purpose of Rule 68 is to significantly increase the incentives for settlement by attaching financial penalties (through a cost-shifting mechanism) to the rejection of a settlement offer that was eventually proved (by the verdict) to have been reasonable. That is, if a plaintiff turns down a settlement offer and then fails to receive a greater award at trial, the plaintiff's role in prolonging the litigation results in two negative consequences: the plaintiff is precluded from recovering his own costs and is also liable for the defendant's costs from the time the settlement offer was made.
90. See Marek v. Chesny, 473 U.S. 1 (1985), where the U.S. Supreme Court found that the term "costs" in Rule 68 included all costs properly awardable in an action, and that if Rule 68 was found to apply, the rule shifted those costs which included attorney fees (when attorney fees were awardable as costs). For examples of fee shifting statutes see N.C. GEN. STAT. § 6-21.1 (2002):
In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars ($10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant
place a significant burden on the plaintiff to terminate the litigation when the defendant submits a reasonable offer of judgment.\(^9^1\) Upon receipt of such offer, the plaintiff must promptly and objectively evaluate its chances at trial relative to the offer, in light of the attorney fees and other costs that may be shifted, if Rule 68 applies. Rule 68 was intended to be an effective tool to unclog the civil court calendars.\(^9^2\) But, in North Carolina, it isn’t.

Taken as a whole,\(^9^3\) it is obvious that Rule 68 intends for the amount of the offer of judgment to be compared with the amount of obtaining a judgment for damages in the suit, with attorney’s fee to be taxed as a part of the court costs.

See also N.C. GEN. STAT. § 75-16.1 (2002):

In any suit instituted by a person who alleges that the defendant violated N.C. Gen. Stat. § 75-1.1 (2002), the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party, upon a finding by the presiding judge that: (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

\(^9^1\) In Marek v. Chesny, 473 U.S. 1 (1985), the Supreme Court acknowledged the argument that subjecting plaintiffs—who might otherwise be entitled to attorney fees—to the settlement provision of Rule 68 might significantly deter them from bringing suit, i.e., because plaintiffs “who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney’s fees for services performed after the offer is rejected.”

\(^9^2\) There have been several proposals to modify federal Rule 68 to make it more effective. See discussions in William W. Schwarzer, Fee-Shifting Offers of Judgment— an Approach to Reducing Cost of Litigation, 76 JUDICATURE 147 (1992); Richard Mincer, Rule 68 Offer of Judgment: Sharpen the Sword for Swift Settlement, 25 U. MEM. L. REV. 1401 (1995); Russell C. Fagg, Montana Offer of Judgment Rule: Let’s Provide Bonafide Settlement Incentives, 60 MONT. L. REV. 39 (1999). Some of the issues addressed by these proposals are expanding Rule 68 to be an option available for both plaintiff and defendant (presently only defendants can make offers of judgment), expanding the Rule 68 definition of costs to affirmatively include attorney fees (when attorney fees are not included as costs, the remaining costs may, in many cases, amount to a relatively small amount and therefore provide minimal incentive to settle even if such costs are shifted), and clarifying the predictability of the application of Rule 68.

\(^9^3\) This article will not go into a detailed examination of the statutory interpretation performed in Poole v. Miller. But it will be noted that the term “judgment” has not always been used to mean “final judgment” and therefore is arguably ambiguous—which would justify the Court in considering the statute “as a whole” and looking to the intent and function of Rule 68—which the Court clearly did not do. It’s also clear that our appellate courts have allowed appeal of “final judgments” even when those final judgments left pending plaintiffs’ claims for
the jury verdict to determine if the latter is "more favorable" than the offer. The offer of judgment must always include plaintiff's costs incurred up to the date of the offer of judgment, and that amount will, of course, be included in any final judgment if the matter goes to trial. In most cases, plaintiff's costs incurred up to the date of the offer of judgment will be a wash and do not need to be calculated prior to comparing the offer of judgment amount to the jury verdict in order to determine which is more favorable for purposes of applying Rule 68's cost shifting provisions. It should be clear that Rule 68's effectiveness would be defeated if the amount of the offer of judgment was attorneys fees, raising questions about whether a "judgment finally obtained" must include such post-trial matters. See Gibbons v. Cole, 132 N.C. App. 777, 782, 513 S.E.2d 834, 837 (1999)(trial court could not consider motion for attorneys fees while matter was on appeal). See generally Michael D. Green, From Here To Attorney's Fees: Certainty, Efficiency, And Fairness In The Journey To The Appellate Courts, 69 CORNELL L. REV. 207 (1984), which addresses whether a trial court decision that resolves all issues in a case other than attorney's fees issues should be immediately appealable.


At the time an offer is made, the plaintiff knows the amount of damages caused by the defendant's challenged conduct and may easily ascertain any costs then accrued. The plaintiff is capable of making a reasonable determination of whether to accept defendant's settlement offer 'by simply adding these two figures and comparing the sum to the amount offered.' . . Using an amount including both pre-offer and post-offer costs for comparison with the offer of judgment defeats the rule's purpose since post offer costs are frequently greater than costs accrued at the time of defendant's offer of judgment. The purpose of the underlying cost-shifting provision of Rule 68 is to penalize plaintiffs 'who continue to litigate after a reasonable offer of judgment, but fail to secure a better result.' . . . Litigious plaintiffs might easily defeat the purpose of the rule by pressing an issue to trial on purpose to incur additional costs and increase the amount of their 'judgment finally obtained.' It would be anomalous to allow the plaintiff to benefit from additional costs of pressing the issue to trial . . .

95. A defendant who makes an offer of judgment has three options: 1) to specify the amount of the judgment and the amount of costs, 2) to specify the amount of the judgment and leave the amount of costs open to be determined by the court, or 3) to make a lump sum offer which expressly includes both the amount of the judgment and the amount of costs. Aikens v. Ludlum, 113 N.C. App. 823, 825, 440 S.E.2d 319, 321 (1994).

96. The exception would be when the offer of judgment is a lump sum offer which expressly includes the amount of costs in the stated lump sum. See option three as listed in footnote 7, supra. For these lump sum offers of judgment the "costs then accrued" must be determined and subtracted from the lump sum offered before it can be determined what part of the offer was compensatory (and so comparable to the jury verdict). An illustrative case is Marryshow v. Flynn, 986 F.2d 689 (4th Cir. 1993).
compared, not with the jury verdict standing alone, but instead with
the jury verdict plus all attorneys' fees and costs awarded by the court,
including the attorneys' fees and costs incurred after the offer of judg-
ment.97 Thus, in the example above, where the plaintiff declined the
offer of judgment for $5,000, proceeded to trial where the jury
awarded $1,000, and the judge, pursuant to N.C. Gen. Stat. § 6-21.1
awarded plaintiff $4,600 in attorneys fees and other costs ($4,100 of
which was incurred after the date of the offer of judgment), if the attor-
neys fees and costs incurred after the offer of judgment were included
in the "more favorable" calculation, then Rule 68 would not apply. If
this approach was correct, the burden on the plaintiff to seriously con-
sider a reasonable settlement offer would be substantially
diminished.98

a. Should the offer of judgment be compared to the jury verdict or to
the final judgment including all costs awarded by the trial court?

In Purdy v. Brown,99 plaintiff sought $300,000 in damages. Defen-
dant filed an offer of judgment for $5,001, with all costs accrued
except attorneys' fees.100 It was refused. The jury's award to plaintiff
was only $3,500. After determining that the defendant's offer of judg-
ment was technically valid, the Supreme Court concluded that
defendant is entitled to the protections afforded him under Rule 68
when the plaintiff's recovery is not more favorable than the offer.
Defendant's offer here was for $5,001, but plaintiff only received

97. See id.

Rule 68 requires that a comparison be made between an offer of judgment
that includes 'costs then accrued' and the 'judgment finally obtained.' . . . To
make a proper comparison between the offer of judgment and the judgment
obtained when determining, for Rule 68 purposes, which is the more
favorable, like 'judgments' must be evaluated. Because the offer includes
costs then accrued, to determine whether the judgment obtained is "more
favorable," as the rule requires, the judgment must be defined on the same
basis - verdict plus costs incurred as of the time of the offer of judgment. The
post-offer costs - the very costs at issue by virtue of the rule's application - should
not, however, also be included in the comparison and thereby become the vehicle
to defeat the rule's purpose.

Id. at 692 (emphasis added).

98. "Including costs and attorney fees incurred after an offer of judgment in
calculating 'the judgment finally obtained' discourages the settlement of cases."
Bumgarner, supra note 94, at 262.


100. Id.
$3,500 from the jury. The Rule provides that in this situation, plaintiff must bear the costs incurred after the offer of judgment was made.\textsuperscript{101}

The Court proceeded to note that the trial court also ordered defendant to pay $1,200 in attorney's fees and $325 in expert witness fees, but that the trial court lacked authority for such awards because both expert witness fees and most of the attorneys fees "were incurred after the offer of judgment was made."\textsuperscript{102}

\textit{Purdy} thus expressly stated that the $5001 offer of judgment was to be compared to the jury verdict of $3,500 in order to determine whether or not Rule 68 applied.\textsuperscript{103} Based on this comparison the court reasoned that costs incurred by plaintiff after the offer for judgment were not awardable.\textsuperscript{104} Because \textit{Purdy} vacated the trial court's order awarding such costs, the determination that the offer of judgment should be compared to the jury verdict would appear to be a logically necessary part of one of the holdings in \textit{Purdy}. Had \textit{Purdy} held, then, that the offer of judgment should be compared to the jury verdict ($3,500) rather than the total judgment finally entered by the trial judge ($3,500 + 1,525 = $5,025)? Arguably, it had.

Twelve years later, however, that question was raised in \textit{Poole v. Miller}.\textsuperscript{105} In \textit{Poole}, plaintiff sought $300,000 in damages and defendant tendered an offer of judgment for $6,000 together with costs accrued.\textsuperscript{106} As of the date of the offer, $420.03 had been incurred in prejudgment interest as well as $401.40 in costs, so that the offer of judgment equaled $6,821.43.\textsuperscript{107} The offer was declined and the matter proceeded to trial.\textsuperscript{108} The jury returned a verdict of $5,721.73.\textsuperscript{109} The plaintiff moved for, and was granted, costs for its expert witnesses and attorneys fees pursuant to N.C. Gen. Stat.\textsuperscript{\$}6-21.1.\textsuperscript{110} For the most part, these costs and attorneys fees were incurred \textit{after} the date

\begin{itemize}
  \item \textsuperscript{101} \textit{Id}.
  \item \textsuperscript{102} "The trial judge did not have the authority to award $1,200 in attorney's fees because that amount undoubtedly included fees incurred after the time of the offer."
  \item \textsuperscript{103} \textit{Id.} at 98, 296 S.E.2d at 163.
  \item \textsuperscript{104} \textit{Id}.
  \item \textsuperscript{106} \textit{Id}.
  \item \textsuperscript{107} \textit{Id}.
  \item \textsuperscript{108} \textit{Id}.
  \item \textsuperscript{109} \textit{Id}.
  \item \textsuperscript{110} \textit{Id}.
\end{itemize}
of the offer of judgment.\textsuperscript{111} Thus, the final judgment entered by the trial court included post-offer costs, and totaled $9,058.21.\textsuperscript{112} The trial judge compared this figure to the offer of judgment and determined that it was more favorable than the offer.\textsuperscript{113} Defendant appealed, arguing that under \textit{Purdy} the jury verdict of $5,721.73 was less favorable than the offer of judgment of $6,000 and therefore Rule 68's cost shifting clause applied, meaning plaintiff was not entitled to any post-offer costs.\textsuperscript{114} The Court of Appeals concluded, expressly relying on \textit{Purdy} as the controlling precedent.\textsuperscript{115} The Court of Appeals stated, "[t]his case is controlled by \textit{Purdy v. Brown}," and that "[u]nder \textit{Purdy v. Brown}, final judgment is the jury verdict; it does not include costs such as expert witness fees, attorney's fees, and interest incurred after the offer of judgment."\textsuperscript{116} However, plaintiffs appealed to the North Carolina Supreme Court.\textsuperscript{117}

Surprisingly the North Carolina Supreme Court reversed the Court of Appeals and held that Rule 68 required that the offer of judgment be compared to the "judgment finally obtained."\textsuperscript{118} The "judgment finally obtained" did not mean the jury verdict, but instead meant the final judgment rendered by the trial court which would include post-offer costs awarded by the trial court. The \textit{Poole} court expressly stated that it "determined that 'judgment finally obtained' for purposes of Rule 68 is the final judgment entered by the court."\textsuperscript{119} But even more surprisingly, the \textit{Poole} Court stated that the Court of Appeals' decision "inappropriately relied upon this Court's decision in \textit{Purdy v. Brown}."\textsuperscript{120} The Supreme Court stated this was because "\textit{Purdy} did not specifically address the issue currently presented: whether 'judgment finally obtained' pursuant to Rule 68 is equivalent to the jury's verdict."\textsuperscript{121} This statement is surprising because \textit{Purdy}

\begin{itemize}
\item \textsuperscript{111} \textit{Id}.
\item \textsuperscript{112} \textit{Id}.
\item \textsuperscript{113} \textit{Id}.
\item \textsuperscript{114} \textit{Id}.
\item \textsuperscript{115} \textit{Id}.
\item \textsuperscript{117} 342 N.C. 349, 464 S.E.2d 409 (1995).
\item \textsuperscript{118} \textit{Id}.
\item \textsuperscript{119} \textsuperscript{id} at 354, 464 S.E.2d at 412. In reaching its conclusion, \textit{Poole} did not apply the canon of statutory construction that to "determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." Brown v. Flowe, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998) (emphasis added).
\item \textsuperscript{120} \textit{Id}.
\item \textsuperscript{121} \textit{Id}.
\end{itemize}
did appear to specifically address this issue, and Purdy’s order to vacate the trial court’s award of post-offer costs was by necessity based on the conclusion that the offer of judgment was more favorable than the jury verdict. It would not have been more favorable than the final judgment entered by the trial court in Purdy.

The issue arose again in 1999 in Roberts v. Swain. In this case, a civil rights action, defendants made a lump sum offer of judgment for $50,000, which plaintiff declined. At trial, plaintiff was awarded $18,100 in damages. To determine the “judgment finally obtained” for purposes of Rule 68, the trial court added plaintiff’s attorney fees (under 42 U.S.C. § 1988) incurred before the offer of judgment ($21,810), his costs before the offer ($757.10) to his attorney’s fees incurred after the offer ($36,945), and his costs after the offer ($9,722.59), for a total of $87,334.69. Since that sum for the “judgment finally obtained” exceeded the offer of judgment of $50,000, the trial court awarded plaintiff all costs including the attorney’s fees awarded. The defendants appealed arguing that the trial court abused its discretion in calculating the “judgment finally obtained” under Rule 68 by including costs incurred after the offer of judgment. The Court of Appeals agreed with the appellants, stating that they disagreed with the trial court’s application of Poole to the case. In the holding, the court explained that the “judgment finally obtained” did not equal the jury verdict. “[T]he Supreme Court in Poole merely held that “judgment finally obtained” is calculated by using the jury verdict along with costs.” The court in the Poole case “did not direct the trial court to include costs incurred after the offer of judgment in that calculation.” The court stated what it believed to be a novel issue as: “[s]hould costs incurred after the offer of judgment be included in calculating the “judgment finally obtained” under Rule 68.” The court’s answer was a resounding no.

123. Id.
124. Id.
125. Id.
126. Id.
127. Id.
128. Id.
129. Id.
130. Id.
131. Id. at 617, 521 S.E.2d at 496.

Since the trial court in the instant case included all costs and attorney’s fees incurred before and after the offer of judgment in calculating the “judgment
The plaintiff petitioned for discretionary review by the Supreme Court, which granted the petition. In its opinion, the Supreme Court reversed the Court of Appeals, stating clearly that costs incurred after the offer of judgment, but prior to the entry of judgment should be included in calculating the "judgment finally obtained." But the Supreme Court also addressed the basis for the Court of Appeals decision, i.e., the extremely narrow reading of the Supreme Court's holding in Poole:

The Court of Appeals reasoned that its holding was not inconsistent with this Court's holding in Poole because this Court narrowly held in Poole that the "judgment finally obtained" was not equal to the jury verdict. We note, however, that in Poole this Court broadly defined the "judgment finally obtained" as "the jury's verdict as modified by any applicable adjustments," . . . and did not limit such adjustments to pre-offer costs. Furthermore, . . . this Court in Poole approved the calculations performed by the trial court where the trial court had included post-offer costs in calculating the "judgment finally obtained."133

b. The Poole result is unfortunate but more troubling are the contradicting applications by our appellate courts of the holding/dictum distinction

The rule that accomplishes the purposes of Rule 68 is the rule applied in Purdy v. Brown,134 which also follows the holding of the U.S.

finally obtained”, the court’s calculation was erroneous. Instead, the trial court should have added the jury verdict to the costs and attorney’s fees incurred before the offer of judgment to make its determination of the “judgment finally obtained”. Using that formula, the correct calculation of the “judgment finally obtained” in the instant case would be the pre-offer of judgment costs of $757.10 plus the pre-offer of judgment attorney’s fees of $21,810 plus the jury verdict of $18,100 for a total of $40,667.10, which is less favorable than the $50,000 offer of judgment.

133. Id. at 250, 538 S.E.2d at 568 (emphasis added). The Supreme Court also noted that “[i]n light of the precedent of Poole, it was unnecessary for the Court of Appeals to look to federal case law for guidance,” which the Court of Appeals had done in citing Marryshow v. Flynn, 986 F.2d 689 (4th Cir. 1993). The Court clarified that “the meaning of Rule 68 of the North Carolina Rules of Civil Procedure is the same for all cases brought in North Carolina courts. As such, we hold that costs incurred after the offer of judgment but prior to the entry of judgment should be included in calculating the “judgment finally obtained,” even where attorney’s fees are awarded under a federal statute.” Roberts v. Swain, 353 N.C. 246, 250-51, 538 S.E.2d 566, 568 (2000).
Supreme Court in *Marek v. Chesny.*\(^{135}\) This rule is most clearly stated as follows: the determination of whether or not Rule 68 applies is made before any determination that plaintiff should receive post-offer costs or attorney fees and if Rule 68 is found to apply then plaintiff cannot receive post-offer costs or attorney fees. The problem with the *Poole v. Miller\(^{136}\)* decision is that it requires the trial court to address the applicability of Rule 68 only after it determines whether or not plaintiff should receive post-offer costs or attorneys fees. But depending on these costs determinations, the trial court may be compelled to find that Rule 68 does apply and therefore the court has no authority to award post-offer costs and fees to the plaintiff. This would then necessitate a modification of the final judgment awarding such costs and fees. Thus, the "judgment finally obtained" as envisioned by *Poole* that must be compared to the offer of judgment, is really a forecast of a judgment that might be finally obtained—undermining *Poole's* statutory interpretation analysis.\(^{137}\)

But more troubling is the inconsistent application of the holding/dictum distinction. *Purdy* held that once Rule 68 was determined to be applicable, the trial court's statutory discretionary authority to award post-offer costs and attorneys fees was eliminated. Because the trial court actually awarded post-offer costs and attorneys fees and the Supreme Court expressly reversed this aspect of the trial court's judgment, the Supreme Court's holding in this regard does not appear to be dictum as *Poole* apparently concluded. In *Poole* the Court of Appeals held that under *Purdy,* the offer of judgment should be compared with the jury verdict. But the Supreme Court rejected this interpretation and stated that *Purdy* "did not specifically address the issue currently presented." But it did. Further, in *Poole,* the Court of Appeals was arguably correct in its evaluation of the *Purdy* precedent. In any event,

137. This uncertain approach is compounded if the trial court is required to consider the offer of judgment in its discretionary determination of what post-offer attorney fees the court is inclined to award. *See* Blackmon v. Bumgarner, 135 N.C. App. 125, 130, 519 S.E.2d 335, 338 (1999), where the Court of Appeals noted that "in exercising its discretion [in awarding attorney fees], the trial court should consider all the circumstances of the case, which include offers of settlement made by the opposing party, and the timing of those offers." The Court then noted that in this case the offers of judgment "were more than four times the amount recovered by the plaintiff at trial," so that the trial court did not abuse its discretion in denying plaintiff's motion for an award of attorney fees. Is this a legitimate backdoor approach to accomplishing the true purpose of Rule 68 despite the roadblock created by *Poole* and *Roberts*?
the Purdy opinion also "approved the calculations" underlying its conclusion, and according to the Supreme Court in Roberts, this should have made the Purdy conclusion precedential.

Nevertheless, in Roberts, the Court of Appeals rejected Poole on a similar basis, stating that Poole "did not specifically address the issue of whether the costs incurred after the offer of judgment are included in calculating the 'judgment finally obtained.'" But Poole did expressly acknowledge and approve the trial court's final judgment which did include the "costs accrued after the offer of judgment." The holding in Poole was thus fairly clear and was obviously not dictum.

These cases leave us with no understanding of the analysis that either of our appellate courts will apply to distinguish between an opinion's holding and its dictum. Additionally, the statement in Roberts that the Court had "approved the calculations" and by doing so had established a precedent, is a confirmation of the propriety of searching for implied or de facto holdings—yet this approach was expressly denied in Poole's rejection of the contrary but clear implicit holding in Purdy. 138

(8) The North Carolina Test for Determining the Binding Effect of a Sub Silentio Ruling (i.e., Lower Courts Are Not Mere Ciphers): Riley v. DeBaer

In Riley v. DeBaer,139 Superior Court judge, Howard E. Manning, Jr., granted defendants' motion for summary judgment basing his ruling solely on the negligent infliction of emotional distress [NIED] standard announced in a 1997 Court of Appeals case, Lorbacher v. Housing Authority of City of Raleigh.140 Lorbacher was clear and applicable precedent that compelled Judge Manning's decision so long as it had not

138. Maybe the final word for these cases should belong to Justice Sarah Parker who correctly dissented in Poole on the grounds that the judgment finally obtained should not include post-offer costs. Justice Parker concurred, however, in Roberts, stating: [the result reached by the majority is consistent with this Court's decision in Poole v. Miller ... I dissented from the decision of the majority in Poole, and I continue to believe that the reasoning of my dissent in that case was correct.... However, the doctrine of stare decisis, which impels courts to abide by established binding precedent except in the most extraordinary circumstance, requires that I now accept Poole as authoritative and concur in the decision of the majority in the present case. Roberts, 353 N.C. at 251, 538 S.E.2d at 569. Alone among the justices, Justice Parker appears to be correct on both her interpretation of Rule 68 and her evaluation of what constitutes precedent.

been overruled—and, without a doubt, the Supreme Court had never explicitly overruled *Lorbacher*. However, the Court of Appeals held that the North Carolina Supreme Court overruled *Lorbacher sub silentio* in a 1998 case, and therefore reversed Judge Manning's grant of summary judgment for the defendants.

"By mere implication, a subsequent decision cannot be held to overrule a prior case, unless the principle is directly involved and the inference is clear and impelling." *Lorbacher* announced the standard for a negligent infliction of emotional distress (NIED) claim as requiring the plaintiff to show, inter alia, that the defendant negligently engaged in conduct that was extreme and outrageous. In the later Supreme Court case, *McAllister v. Ha*, the court stated that when a plaintiff asserts a claim of NIED, "[a]lthough an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice." In *Riley v. DeBaer* the Court of Appeals stated that

[a]lthough the *McAllister* Court did not directly state that its decision overruled the holding in *Lorbacher*, the same principle is directly involved in both cases and the inference in *McAllister* is clear and compelling—an allegation of ordinary negligence will suffice as the first prong in a claim of NIED.

Thus, the trial court erred by failing to recognize and follow the Supreme Court's implicit, sub silentio overruling of the explicit precedent established by *Lorbacher*.

**Conclusion**

The U.S. Supreme Court has stated, "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." One commentator has criticized this position, noting that

[t]he net result of the Court's approach . . . is that in deciding if it is bound by a precedent of the Court, lower courts must ignore the reasoning of that decision and subsequent doctrinal developments

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which might bring the validity of that reasoning into question, focusing instead on the narrow holding of the case, and whether it has been expressly overruled. . . . What does it mean for a court of law to announce that the reasons it gives for its decisions do not matter; all that matters is the decision itself, the raw exercise of power? After all, one can argue that deciding in a reasoned manner and explaining the reasons for one's decision is the essence of judging, as distinguished from other forms of state power.¹⁴⁶

Maybe these positions can be reconciled. It is clear that the lower courts must proceed cautiously in deciding that a higher court has made a sub silentio determination—and extra cautiously if that determination involves overruling an express precedent. This does not mean, however, that a clear and applicable precedent must always be followed until explicitly overruled by the Supreme Court.¹⁴⁷ Language in an appellate opinion that merely raises doubts as to a precedent's continuing viability should suffice only to predict the future decisions of the court—but not to justify a sub silentio overruling. On the other hand, if the language's conflict with the existing precedent is clear and compelling, then the lower court must be authorized to declare the de facto overruling. Rationales and reasons in appellate opinions matter.¹⁴⁸ Lower courts are not mere ciphers or functionaries limited to following only the express direction of the highest court. Although Justice Holmes claimed the law is simply a prediction of how judges would rule,¹⁴⁹ when express, applicable precedent exists, lower courts should not engage in predicting how the supreme court will rule on the matter in the future.¹⁵⁰ But although the lower courts must proceed cautiously in deciding that a later inconsistent supreme court opinion has overruled express precedent sub silentio, there is law to be found between the lines of appellate opinions, and the lower courts must search for it even if reasonable legal scholars, attorneys, and judges can't agree as to exactly what that law is.

¹⁴⁷. See supra notes 6, 7, 8.