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Murky Water: What Really Is Taxed as Court Costs in North Carolina?*

Admittedly, the current status of our common law breeds much confusion for the bench and bar regarding something seemingly as simple as what constitutes a "cost." Regrettably, our opinion may contribute to the confusion. Barring intervention by our General Assembly or Supreme Court, the law of costs will remain unclear.¹

1. THE PROBLEM

What is taxed as court costs? A question so seemingly simple would rightfully lead one to believe it held an answer just as basic. Black's Law Dictionary defines the term as "[t]he charges or fees taxed by the court, such as filing fees, jury fees, courthouse fees, and reporter fees,"² a definition which does nothing to resolve the uncertainty surrounding the topic, especially in the State of North Carolina. The statutes involved appear straightforward, and the use of common principles of statutory interpretation indicate that the "answer" is clear as well—one which would not only clarify the law but also allow for consistent application in the majority of cases that implicate the issue.³ Unfortunately, case law in North Carolina has only muddled the problem, as the North Carolina Court of Appeals, and various trial courts in the state, have taken two divergent options interpreting various cases dealing with costs, rarely attempting to provide any coherent framework for consistency or clarification. "What constitutes 'costs'?" is a question that is in dire need of conclusive resolution by the supreme court, especially in light of recent case law and legislative amendments to controlling statutes.

There are two conflicting lines of reasoning utilized by the courts in our state. One holds that any "reasonable and necessary" expense may be considered a cost.⁴ The other, the "explicitly delineated" approach, appears to operate almost wholly contrary to the discretion-

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¹ The author would like to thank the Honorable John C. Martin for inspiring him to pursue this Comment.
4. Minton v. Lowe's Food Stores, Inc., 468 S.E.2d 513, 516 (N.C. Ct. App. 1996) ("We must look to the provisos of section 6-20, which vests the trial judge with discretionary authority to allow costs as justice may require.").
laden "reasonable and necessary" view. Under the "explicitly delineated" approach, only those items that are explicitly stated in statutes or recognized by existing common law constitute costs—clearly an approach that heavily curtails the discretion of trial judges.

This Comment, after discussing the applicable statutes, will analyze the aforementioned opposing lines of opinion that have evolved and then delve deeper into what specific costs have ordinarily been encompassed under each approach. The next portion will involve a discussion of the impact of these alternative approaches, including a look at their inherent positives and negatives. This discussion will also illustrate what the future holds in light of recent relevant case law and statutory amendments, and will address why one approach has been utilized over the other in certain circumstances. Finally, this Comment will attempt to reconcile the differing opinions on the topic and will propose a solution that centrally focuses on consistency, helping to end the confusion once and for all.

Until this issue is conclusively settled, the legal community and those involved in civil suits in North Carolina will continue to walk on thin ice, never fully knowing what a particular court will deem "costs" to be in a given action. The reader of this Comment will attain a better understanding not only of the current state of North Carolina law surrounding this issue, but also of why a swift resolution of the court costs issue is so imperative. The reader will also be able to appreciate why the issue of costs has lead some to exclaim, "Where's the aspirin!"

II. THE LAW

Before undertaking a discussion into the competing approaches to defining court costs, it is important first to set forth the law that "controls" the issue at hand, because the law is what has created these divergent approaches. By looking at the relevant statutes, one is able

5. Wade v. Wade, 325 S.E.2d 260, 271 (N.C. Ct. App. 1985) ("While the trial court has broad discretion to allow costs, it may exercise that discretion only within the bounds of its statutory authority." (citations omitted)).
7. Joe Wall, "Assessable Costs" in Civil Actions—Has the Court of Appeals Overruled the Supreme Court and the Legislature?, THE LITIGATOR, Apr. 2002, at 7-8, 10 ("In the absence of guidance from our highest court, the Court of Appeals has gone its own way in deciding 'costs' issues.").
8. Id. at 10.
to attain a better understanding of how the problem of "what constitutes 'costs'?" arose, and also how the two different lines of interpretation gained their authority.

The first statute encountered is section 6-1 of the North Carolina General Statutes, which states that "costs shall be allowed as provided in Chapter 7A and this Chapter."9 Those who follow the "reasonable and necessary" approach generally derive their authority from section 6-20, which states that in those actions where costs are not explicitly stated by the General Statutes, "costs may be allowed in the discretion of the court."10 Courts that have adopted this approach interpret the use of the term "discretion" to include not only the ability to determine whether to assess costs generally, but also specifically which costs are assessable.11 The ability to invoke costs under this method of analysis "as justice may require" is what affords trial judges such expansive discretion, and is therefore a very powerful tool for those faced with a given cost to utilize.12

In 2007, the North Carolina Legislature finally spoke on the issue of costs after many years of silence.13 Effective August 1, 2007, section 6-20 was amended to its current reading.14 While the implications of these changes have not been discussed in depth by a panel of the North Carolina Court of Appeals (as many cases discussed in this Comment were brought before the amendment took place), only time will tell whether the problem is finally solved. One can forecast the impact that the changes in these statutes will have on the costs analysis in North Carolina.15 Yet a deeper look into section 6-20 (and later section 7A-305(d)) is pivotal to understanding of the issue.

10. Minton v. Lowe's Food Stores, Inc., 468 S.E.2d 513, 516 (N.C. Ct. App. 1996) ("While case law has found that deposition costs are allowable under section 6-20, it has in no way precluded the trial court from taxing other costs that may be 'reasonable and necessary'.").
12. Minton, 468 S.E.2d at 516 ("We must look to the provisos of section 6-20, which vests the trial judge with discretionary authority to allow costs as justice may require.").
The old version of section 6-20 read: "In other actions, costs may be allowed or not, in the discretion of the court, unless otherwise provided by law." 16 This text led many courts to consider themselves charged with two functionally distinct types of discretion: first, discretion as whether to tax any costs at all, and second, discretion as to what costs to tax. 17 After the amendment, the statute now reads:

In actions where allowance of costs is not otherwise provided by the General Statutes, costs may be allowed in the discretion of the court. Costs awarded by the court are subject to the limitations on assessable or recoverable costs set forth in [section] 7A-305(d), unless specifically provided for otherwise in the General Statutes. 18

As is evident, the new statute severely curtails the power and basis of courts adhering to the "reasonable and necessary" line of reasoning by expressly limiting their power to assess costs to those situations where the costs are explicitly delineated in the North Carolina General Statutes. 19

Courts which adhere to the "explicitly delineated" line interpret "discretion" to indicate the ability of a trial judge to assess or not assess costs—but not to define them—in a given case. 20 Section 7A-320 purports to delimit recoverable costs, stating that the costs set forth in Article 7 (including section 7A-305(d)) "are complete and exclusive, and in lieu of any other costs and fees." 21 The method of interpretation that the courts utilize in this line of reasoning focuses on the "plain meaning" of section 7A-305(d), which would appear to

17. The court of appeals has explained that it reads section 6-20 as conferring two different kinds of discretion: (1) the discretion to determine whether costs should be awarded where no statute mandates an award of costs in a particular civil action, and (2) the discretion to determine whether an expense may be taxed as a cost notwithstanding the fact that such an expense is not listed in [section] 7A-305(d).
18. N.C. GEN. STAT. § 7A-305(d).
20. Dep't of Transp. v. Charlotte Area Manufactured Hous., Inc., 586 S.E.2d 780, 784 (N.C. Ct. App. 2003) ("The trial court may not, however, assess as costs any expenses which are neither enumerated within Article 28 nor 'provided by law.'").
dictate that only those items clearly listed in subsection (d) or provided by other law may be assessed as costs.\textsuperscript{22}

Before the current version of section 7A-305(d) was implemented, the previous version of the statute read: "The following expenses, when incurred, are also assessable or recoverable, as the case may be."\textsuperscript{23}

Looking at the change from the previous statute to the present one, the "complete and exclusive" language takes on new meaning: it appears that the new language is intended to seriously curtail the discretion that many courts exercised in the past. This conclusion is solidified not only by the exclusion of the modifier "also," but also in the language that follows the clause: those expenses set forth "constitute a limit on the trial court's discretion to tax costs pursuant to \[section\] \textsuperscript{6-20} . . . ."\textsuperscript{24} The present version of section 7A-305(d) delineates eleven "assessable" costs which may be taxed in certain civil actions, providing a laundry list for courts to use.\textsuperscript{25} Subsection (e) states that nothing in subsection (d) "shall affect the liability of the respective parties

\begin{itemize}
  \item \textsuperscript{22} See Caminetti v. United States, 242 U.S. 470, 485 (1917). "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." \textit{Id.} at 485. And if a statute's language is plain and clear, the court further warned that "the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." \textit{Id.}
  \item \textsuperscript{24} N.C. GEN. STAT. \$ 7A-305(d) (2007).
  \item \textsuperscript{25} These assessable costs are:
    \begin{enumerate}
      \item Witness fees, as provided by law.
      \item Jail fees, as provided by law.
      \item Counsel fees, as provided by law.
      \item Expense of service of process by certified mail and by publication.
      \item Costs on appeal to the superior court, or to the appellate division, as the case may be, of the original transcript of testimony, if any, insofar as essential to the appeal.
      \item Fees for personal service and civil process and other sheriff's fees, as provided by law.
      \item Fees of mediators appointed by the court, mediators agreed upon by the parties.
      \item Fees of interpreters, when authorized and approved by the court.
      \item Premiums for surety bonds for prosecution, as authorized by \[section\] \textsuperscript{1-109}.
      \item Reasonable and necessary expenses for stenographic and videographic assistance directly related to the taking of depositions and for the cost of deposition transcripts.
      \item Reasonable and necessary fees of expert witnesses solely for actual time spent providing testimony at trial, deposition, or other proceedings.
    \end{enumerate}
\end{itemize}
Those who adhere to the "explicitly delineated" approach rely on the "complete and exclusive" language of section 7A-305(d) as their basis for taxing costs, construing "costs" as stated in section 6-20 to mean only those delineated in section 7A-305(d).

While one may wonder if this amendment has resolved the issue of costs, questions still remain for those costs which have been allowed in past court cases under the "reasonable and necessary" line of authority: (1) do they constitute common law costs under North Carolina jurisprudence, (2) have those cases been overruled in whole, and (3) is the "reasonable and necessary" approach still viable? A discussion of this statutory change and its implications will fuel this article.

Undoubtedly the statutory changes help answer some of the questions courts in the past have dealt with, but new problems still arise in light of the recent amendments. Most importantly, the question arises as to what courts should do with the old analytical framework as set forth in Lord v. Customized Consulting Specialty, Inc. In that case, the court was confronted with an issue of first impression regarding a third party defendant's ability to recover various costs under Rule 41(d). In dealing with the question before it, the court stated the following three-step process to determine what costs were assessable under the old statute:

First, if the costs are items provided as costs under [section] 7A-305, then the trial court is required to assess these items as costs. Second, for items not costs under [section] 7A-305, it must be determined if they are "common law costs" under the rationale of Charlotte Area. Third, as to "common law costs" we must determine if the trial court abused its discretion in awarding or denying these costs under [section] 6-20.

26. Id. § 7A-305(e).
27. Wade v. Wade, 325 S.E.2d 260, 271 (N.C. Ct. App. 1985) (providing that "[c]osts are awarded only pursuant to statutory authority").
28. Crist v. Crist, 550 S.E.2d 260, 264 (N.C. Ct. App. 2001) (stating that "[a]ssessable costs in civil cases, however, are limited to those items listed in section 7A-305").
29. N.C. GEN. STAT. § 7A-305(e).
30. Id. § 6-20.
32. Id. (referencing Dep't of Transp. v. Charlotte Area Manufactured Hous., Inc., 586 S.E.2d 780, 785 (N.C. Ct. App. 2003)) (discussing copy expenses, telephone charges, expert witness fees, deposition and deposition related fees, and mediator fees).
While this method of analysis arguably is no longer valid in a large number of cases due to the 2007 changes to section 7A-305(d), it is still applicable in all cases before courts that involve claims brought prior to the adoption of the amendments or in those cases which the statute of limitations has not run. The question still remains as to how courts should analyze the problem under the current statutory framework.

Another problem stemming from the divergence of the opinions from various cases before the court of appeals deals with the abuse of discretion standard of review. An abuse of discretion is found in situations where the court's action is "manifestly unsupported by reason"—which is an almost impossible finding given the differing lines of authority in the court costs area. Such a deferential standard of review, once afforded, means that the trial court (especially when considering that the two choices are based on the "law") has the ability to virtually insulate its decision, regardless of which line is chosen. In light of the recent changes in the law, however, this safeguard too may be on the wane.

III. The Choices

As stated, there are two approaches that have been adopted by courts in our state, both of which are arguably based on law and which should inform our resolution of the issue. This section of the discussion will give background information for each option, the cases which have delineated each, what costs "normally" are analyzed under

33. Priest v. Safety-Kleen Sys., Inc., 663 S.E.2d 351, 352 n.1 (N.C. Ct. App. 2008) (recognizing that the previous "three step analysis will likely be defunct" due to the legislative amendments to N.C. GEN. STAT. § 7A-305(d)).
34. Vaden v. Dombrowski, 653 S.E.2d 543, 546 n.3 (N.C. Ct. App. 2007) ("Effective 1 August 2007 the General Assembly addressed the inconsistencies within our case law by providing that [section] 7A-305 is a "complete and exclusive . . . limit on the trial court's discretion to tax costs pursuant to [section] 6-20." (citations omitted)).
37. See, e.g., Minton, 468 S.E.2d at 517 (emphasizing that the judge who ruled on the costs at the trial court was also the judge ruling over the "underlying, substantive action," which put him in an "excellent position to assess the reasonableness and necessity of the depositions taken").
both approaches, and also those costs which could be granted under one of the approaches (if not both). Subsection A discusses the "reasonable and necessary" approach, and is followed by a discussion of the "explicitly delineated" approach in subsection B.

A. The Reasonable and Necessary Approach

The "reasonable and necessary" approach is characterized by its committing the costs question to the almost absolute discretion of the trial judge, as a trial court's decision to tax costs under section 6-20 is reviewed under merely an abuse of discretion standard. Many cases in the past have adhered to and adopted this approach, due in part to the interpretation that some expenses which are not provided for by statute may nevertheless "be considered as part of 'costs' and taxed in the trial court's discretion." 39

A recent court of appeals opinion provides an example of this approach. At issue in Lord v. Customized Consulting Specialty, Inc. were copy, telephone, and deposition-related expenses—costs which were not expressly encompassed by section 7A-305(d). 40 Citing several cases which incorporated the "reasonable and necessary" approach, the court of appeals utilized this relaxed interpretation of section 6-20 to classify these contested expenses as costs. 41

A surprising array of expenses which are not explicitly referenced in any North Carolina statute have been assessed against losing litigants as court costs using the "reasonable and necessary" approach. Examples include deposition costs, 42 trial exhibits and travel expenses for hearings and trial, 43 bond premiums in an ejectment action, 44 expert witness fees for multiple testimony aimed at proving the same facts, 45 charges by expert witnesses for time spent outside of litiga-

38. Lewis, 537 S.E.2d at 507.
41. Id. ("These cost items are not allowed under [section] 7A-305(d). However, Cosentino holds that this cost item may be taxed to a plaintiff who dismisses under Rule 41(a) in the discretion of the trial court.") (discussing Cosentino v. Weeks, 586 S.E.2d 787 (N.C. Ct. App. 2003)).
42. Alsup, 390 S.E.2d 750 (1990).
tion, and even costs of prior appeals. Through these sorts of decisions, the common law of costs has become greatly expanded and complex, creating confusion as to what now constitutes costs in a given action. Meanwhile, of course, all costs actually listed in section 7A-305(d) can be taxed to a party, although the decision to do so remains in the discretion of the trial judge.

As is evident, the use of the “reasonable and necessary” method of interpretation leads to many costs being granted almost solely based upon trial courts’ conviction that they have been endowed with “an abundance of discretion, rather than none,” or simply upon what costs seem fair to assess against a party. Prior to the amendment of section 7A-305(d), these exercises of discretion may not have been so far-fetched, as many courts were under the impression that then-current law gave them discretion to lump together most expenses as costs. The obvious advantage of the “reasonable and necessary” approach is that it is able to adapt fluidly to changes in any area of law affecting costs, whether foreseen or unforeseen (such as new, unenumerated expenses incurred by litigants making use of technological or other innovations, or unintended statutory inadequacies or complications). Countervailing concerns over this approach include its basis in questionable principles of statutory construction and its inconsistent application, as extra-statutory principles of reasonableness and necessity can lead to results based on ad hoc determinations.

48. Dep't of Transp. v. Charlotte Area Manufactured Hous., Inc., 586 S.E.2d 780, 783 (N.C. Ct. App. 2003) (“Since the enumerated costs [for expert witnesses, discovery, subpoena charges, transcript costs, the cost of reproducing documents for use at trial as exhibits, and miscellaneous postage charges] sought by plaintiffs are not expressly provided for by law, it was within the discretion of the trial court whether to award them . . . .”); see also Smith v. Cregan, 632 S.E.2d 206, 210 (N.C. Ct. App. 2006) (“The plain language of section 7A-305(d) makes the items it sets forth ‘assessable or recoverable.’ Accordingly, nothing in section 7A-305 requires a trial court to exercise its discretion under section 6-20 to award the items listed in section 7A-305(d).”).
50. Cf. City of Charlotte v. McNeeley, 190 S.E.2d 179, 185 (N.C. 1972) (negating the notion that courts have power to assess costs “against anyone on mere equitable or moral grounds”).
51. See supra notes 23–24, 31–34 and accompanying text (discussing section 7A-305(d) before the 2007 amendments).
52. Id.
B. The Explicitly Delineated Approach

The "explicitly delineated" approach is one rooted more convincingly in statutory interpretation, as it derives its authority from the plain meaning of the relevant statutes, the principle of expressio unius est exclusio alterius,53 and also the "paramount precedent established by the Supreme Court."54 As the Supreme Court of North Carolina has held, and courts who adopt this method quoted, "[c]osts, in this State, are entirely creatures of legislation, and without this they do not exist."55 In addition to this definitive statement by our state's highest court, Justice Sharp in City of Charlotte v. McNeely also stated, "[s]ince the right to tax costs did not exist at common law and costs are considered penal in their nature, '[statutes] relating to costs are strictly construed.'"56 It therefore appears as if, applying precedent and the principles of statutory interpretation, the law should be clear.57 This, however, has not been the case.

Under the "explicitly delineated" theory, costs should be limited to those which appear in the North Carolina General Statutes, or which constitute costs previously recognized by the common law.58 Common law costs have recently been construed to encompass those costs "established by case law prior to the enactment of [section] 7A-320 in 1983."59 Under this interpretation, the costs listed in section 7A-305(d) constitute mandatory costs, and are required to be assessed if implicated in an action.60 While this seems simple enough in appli-

54. Smith v. Cregan, 632 S.E.2d 206, 211 (N.C. Ct. App. 2006) (stating that Department of Transportation v. Charlotte Area Manufactured Housing, Inc., 586 S.E.2d 780 (N.C. Ct. App. 2003), applied "the paramount precedent established by the Supreme Court" when it refused to "recognize the non-statutory expenses which had been subsequently created by this Court").
55. McNeely, 190 S.E.2d at 185 (quoting Clerk's Office v. Comm'rs of Carteret County, 27 S.E. 1003, 1003 (N.C. 1897)).
56. Id. at 186 (quoting 20 Am. JUR. 2D Costs § 8 (1965)).
57. Charlotte Area Manufactured Hous., 586 S.E.2d at 786 ("We conclude that our duty is to follow the rule established by the Supreme Court in McNeely and this Court's "explicitly delineated" cases, which generally adhere to that rule.").
58. Id. at 784 ("Other cases from this Court have strictly limited the trial court's authority to award costs to those items (1) specifically enumerated in the statutes, or (2) recognized by existing common law.").
60. Priest v. Safety-Kleen Sys., Inc., 663 S.E.2d 351, 353 (N.C. Ct. App. 2008) ("[W]e must determine whether the cost sought is one enumerated in [section] 7A-305(d); if so, the trial court is required to assess the item as costs." (quoting Miller v. Forsyth Mem'l Hosp., Inc., 618 S.E.2d 838, 843 (N.C. Ct. App. 2005))). But see Smith,
cation, some costs present quirky problems, because even though they are explicitly delineated, one must also determine whether they are assessable "as provided by law," which requires an analysis of other costs statutes as well as the common law of costs. This interpretation runs contrary to the understanding of the "reasonable and necessary" approach, which has still been noted as analytically "sound" by those who disagree with its ultimate conclusion, a factor that only helps in furthering the confusion.

Many costs have been denied using this approach, heeding the words of Justice Sharp in McNeely. Examples include taxing of travel expenses, x-ray films and copies made of records, copying, phone calls, postage, and travel not directly stemming from a deposition, appraisal fees by witnesses voluntarily selected by defendants, fees assessed by banks to assemble records and appear to testify pursuant to subpoena, trial exhibit expenses, and attorney, appraisal, and engineering fees. The granting of expert witness fees has also been curtailed under this line of cases, even though "witness fees" are now explicitly stated as assessable in section 7A-305(d)(11). Expert witness fees prior to the legislative 2007 amendments were construed to not be assessable when the expert witnesses are the parties themselves.

632 S.E.2d at 210 (stating that because "[t]he plain language of section 7A-305(d) makes the items it sets forth 'assessable or recoverable[,]... nothing in [that section] requires a trial court to exercise its discretion under section 6-20 to award the items listed in section 7A-305(d)").

62. See, e.g., infra discussion accompanying notes 76-77 (describing how even "explicitly delineated" witness fees do not necessarily include all witness fees).
63. Priest, 663 S.E.2d at 354 ("Although Smith's statutory analysis leading to this conclusion is sound, the greater weight of authority from this Court is that costs enumerated in [section] 7A-305(d) must be awarded to the prevailing party.").
69. Dep't of Transp. v. Charlotte Area Manufactured Hous., Inc., 586 S.E.2d 780, 786 (N.C. Ct. App. 2003) ("We therefore decline to follow those opinions from this Court which purport to make trial exhibit expenses taxable in the discretion of a trial court.").
70. Id. at 785-86.
a result that seems to run contrary to the present language of section 7A-305(d).\textsuperscript{73}

This approach's greatest strength is that it allows for consistency in application, which seems fitting given that Article 28 of Chapter 7A is titled "Uniform Costs and Fees in the Trial Divisions."\textsuperscript{74} It is based on "paramount precedent"\textsuperscript{75} and does no "further violence to the plain meaning of [the costs statutes]."\textsuperscript{76} Its greatest downside is that the approach seems unable to adapt swiftly to change, as courts implementing this approach are handcuffed in that they are only able to tax costs according to the law as it currently stands, and those costs which were assessable at common law. The problem surrounding what actually constitutes a common law cost is a difficult one for these courts to solve. Do costs encompass those expenses allowed in cases that adopted the "reasonable and necessary" reasoning, or are they solely based on those costs assessable prior to the enactment of section 7A-305?

IV. THE IMPACT

Having set forth the law as it stood and the two approaches that have led to the problem surrounding costs in North Carolina, it is important to discuss the most recent case law and legislative amendments that have attempted to sort out the confusion. Section A will focus on the leading supreme court case, \textit{City of Charlotte v. McNeely},\textsuperscript{77} discussing its impact on recent court of appeals opinions and the solution here proposed. Section B will involve a discussion of opinions from the North Carolina Court of Appeals leading up to the 2007 amendment, while section C will discuss very briefly the landscape of the opinions of the court of appeals after the amendment, as no court has been faced directly with the new statute.\textsuperscript{78}

\textsuperscript{73} McNeely, 190 S.E.2d at 186 ("Clearly, the legislature did not contemplate that a party would disburse or become liable to himself for a fee when he testified as a witness for himself in his own case. Neither did it contemplate that a party would pay an officer to subpoena himself as a witness. The losing party is taxed with the costs of his adversary's witness only if the witness was subpoenaed and examined or tendered.").

\textsuperscript{74} N.C. GEN. STAT. §§ 7A-304 to -321 (emphasis added).

\textsuperscript{75} Smith v. Cregan, 632 S.E.2d 206, 211 (N.C. Ct. App. 2006).

\textsuperscript{76} Dep't of Transp. v. Charlotte Area Manufactured Hous., Inc., 586 S.E.2d 780, 785 (N.C. Ct. App. 2003).

\textsuperscript{77} 190 S.E.2d 179 (N.C. 1972).

\textsuperscript{78} N.C. GEN. STAT. § 7A-305.
A. The Supreme Court Speaks: City of Charlotte v. McNeely

The Supreme Court of North Carolina addressed the issue of what constituted costs in 1972, taking steps to clarify the law as it then stood.79 Justice Sharp (who later became Chief Justice) wrote the McNeely opinion, and her words have been cited in almost every costs-related case since. She began by stating several principles that should be kept in mind whenever the issue of costs is raised before stating the rule.80 First, at common law, no party in a civil suit was awarded costs, and each had to pay for their own witnesses.81 Second, all costs in the state are allowed pursuant to statute.82 She then went on to declare that the rule in North Carolina is that "[c]osts in this state, are entirely creatures of legislation, and without this they do not exist."83 Justice Sharp continued, reasoning that according to these principles, courts lack the ability to assess costs based solely on "mere equitable or moral grounds."84

It is easy to see why those courts that adhere to the "explicitly delineated" approach garner so much support from this case.85 By greatly circumscribing those costs which may be assessed, Justice Sharp set forth the basis for courts to strictly construe even those costs statutes enacted much later. In undertaking a detailed analysis of each cost sought, Justice Sharp cited case-law and statutes (where applicable) to either affirm, modify, or disallow those costs assessed (or not) by the court of appeals.86 While the opinion and its analytical framework is the starting point for many (indeed, most) opinions on costs, it is important to take note that the case was decided before many of the statutes that further muddled the area were enacted.

B. The Court of Appeals Cases– Pre-2007 Amendment

The cases from the North Carolina Court of Appeals that lead up to the 2007 amendment and those after it give great insight into the thought process of the court and the direction in which it has headed regarding the issue of costs. In some of these cases, the court specifically chose to adopt one of the two lines, whereas in others, the reason-

79. McNeely, 190 S.E.2d at 179.
80. Id. at 185.
82. McNeely, 190 S.E.2d at 185; see Costin v. Baxter, 29 N.C. 111, 112 (1846).
83. Id. (quoting Clerk's Office v. Comm'trs, 27 S.E. 1003 (N.C. 1897)).
84. Id. (quoting 20 C.J.S. COSTS §§ 1, 2 (1940)).
86. See McNeely, 190 S.E.2d at 184–88.
ing behind the ultimate costs decision was less clear. Ultimately, each case presented its court with the difficult task of choosing between two reasonable options. As will be shown, however, most of these courts seem to fall in line with the "explicitly delineated" approach outlined above.

_Coffman v. Roberson_ is one of the cases that leaves unclear which line of interpretation North Carolina courts utilize, although the "reasonable and necessary" line appears to be implicitly accepted by the court of appeals. Dealing with several costs (some explicitly delineated in the North Carolina General Statutes, others allowed by earlier opinions), Judge Tyson's opinion relied on a mixture of cases from both of the aforementioned approaches without expressly mentioning that he had done so. The opinion made guessing precisely which approach the court of appeals would adopt in a given case more arduous.

Less than a year later in _Department of Transportation v. Charlotte Area Manufactured Housing, Inc._, the court of appeals, noting that its cases "irreconcilably conflict" regarding the propriety of the assessment of certain costs, made it clear that adopting the "explicitly delineated" approach was the proper course of action for cost cases. The court supported this conclusion by undertaking a detailed comparison of each approach and its respective supporting cases, making the guidance it provided on the subject all the more commanding.

87. 571 S.E.2d 255, 261-62 (N.C. Ct. App. 2002) ("While case law has found that deposition costs are allowable under section 6-20, it has in no way precluded the trial court from taxing other costs that may be 'reasonable and necessary." (quoting _Minton v. Lowe's Food Stores, Inc._, 468 S.E.2d 513, 516 (N.C. Ct. App. 1996)).

88. _Id._ (addressing costs such as expert witness fees unrelated to the testimony before the court, "court costs, mediation costs, deposition costs, expert fees and expenses, witness mileage expenses, service of subpoenas, trial exhibits, and travel expenses for hearings and trial" (citations omitted)).


90. 586 S.E.2d 780, 785 (N.C. Ct. App. 2003) ("We thus conclude that the cases from this court irreconcilably conflict as to whether legislation permits the taxing of items not listed in the North Carolina General Statutes as assessable or recoverable costs. To resolve the present case, we must necessarily choose one approach . . . . We choose to follow the 'explicitly delineated' approach . . . ." (citations omitted)).

91. _Id._
But on the very same day, the court of appeals decided Cosentino v. Weeks.\textsuperscript{92} Engaging in much the same discussion of the two approaches as Charlotte Area Manufactured Housing, the court discussed the two types of discretion trial courts of the time had exercised.\textsuperscript{93} The first was the discretion to determine whether costs should be assessed\textit{at all} in a given action—a discretion expressly granted by statute.\textsuperscript{94} The second, more controversial use of discretion was the kind exercised in awarding "non-statutory common law costs."\textsuperscript{95} Without discussing in length the merits of the latter, the court nonetheless reiterated other opinions have held a trial judge did not abuse their discretion by granting some of the very costs at issue in the case before them.\textsuperscript{96} Affirming the trial court, the court showed itself unwilling to abandon the "reasonable and necessary" line of reasoning—reasoning that, on the very same day, it had chosen not to follow in Charlotte Area Manufactured Housing.\textsuperscript{97} Also important was the court's analysis regarding whether the assessment of common law costs were discretionary or mandatory.\textsuperscript{98} In holding that common law costs were to be treated as permissive, the court again cited from the "reasonable and necessary" line of cases,\textsuperscript{99} failing yet again to act on an opportunity to clarify the law.

In Lord v. Customized Consulting Specialty, Inc., Judge Steelman explained that because copy and telephone expenses and deposition and deposition related costs were not explicitly authorized by section 7A-305(d), the refusal of a trial judge to allow these costs under section 6-20 was not an abuse of discretion.\textsuperscript{100} Regarding expert witness fees, the court cited the general rule that only those costs related to experts subpoenaed to testify may be assessed, while too repeating that costs are not assessable absent enabling legislation or a finding

\begin{footnotes}
\item[92.] 586 S.E.2d 787 (N.C. Ct. App. 2003).
\item[93.] Id. at 790.
\item[95.] Cosentino, 586 S.E.2d at 790.
\item[97.] Id. at 791.
\item[98.] Id.
\item[99.] Id. at 789, 791 (citing Coffman, 571 S.E.2d at 261-62; Lewis, 537 S.E.2d at 507-08; Alsup v. Pitman, 390 S.E.2d 750, 750-52 (N.C. Ct. App. 1990)).
\end{footnotes}
they encompass common law costs. As to the fees of mediators, it was held that the trial court's refusal to assess the costs associated with mediation was error. In all of this, there was no mention of the two competing approaches. However, the opinion delineated the proper analysis for cost cases that has been frequently cited by later panels of the court of appeals, many of which cite Lord as failing to follow the "paramount precedent" established by the North Carolina Supreme Court in McNeely.

After Lord, two cases appeared to have implicitly adopted the "explicitly delineated" approach as the preferred method of analysis. Morgan v. Steiner and Smith v. Cregan both relied on the two situations in which costs may be assessed: pursuant to statute and those defined as common law costs. Morgan involved the straightforward application of the "explicitly delineated" line, discussing (among other costs) numerous expert witnesses subpoenaed to testify to the same material fact, and the court relied heavily on the application of section 7A-314(e). Smith once again discussed the divergent lines the court of appeals had taken in the past during its discussion of expert witness fees, stating that it had, in some cases, "[r]egrettably" failed to heed the supreme court's words in McNeely. The court ultimately held that section 6-20 did not require a court to exercise its discretion as pertains to those costs enumerated in section 7A-305(d), especially in light of the fact that the party seeking costs never received a judgment (as required under section 6-1).

C. The Reaction: Court of Appeals Cases Following the 2007 Amendment

Most of the cases the North Carolina Court of Appeals has dealt with in the wake of the 2007 amendments, discussed in Part II above,

101. Id.
102. Id. at 896.
106. Morgan, 619 S.E.2d at 519-22 (discussing deposition costs, costs for obtaining medical records, medication costs, cumulative expert witnesses, and trial exhibit fees).
107. Smith, 632 S.E.2d at 211 (holding certain expert witness fees not assessable in a negligence action and lamenting that "[r]egrettably, panels of this Court have differed in their willingness to apply the Supreme Court's directive").
108. Id. at 210-11.
have nevertheless been handled under the old statute, as their claims arose before the amendments went into effect on August 1, 2007.\textsuperscript{109} We have very little insight into what a court will do in light of the legislative changes, as we are only able to look at the court of appeals’ treatment of the issue just before the amendment for guidance. This in itself is another reason why it is very important for the North Carolina Supreme Court to take a case that incorporates the new law, and announce a clear rule for handing the costs question. Doing so will enable litigants to budget their litigation expenditures more strategically, and will provide necessary guidance to lower courts so the costs problem does not simply repeat itself.

V. The Decision

The best answer to the costs problem involves accepting the rationale of those courts that utilize the “explicitly delineated” approach, due in large part to the plain meaning of the controlling statutes. As stated, the costs listed in the amended version of section 7A-305(d) are meant to be “complete and exclusive,” and our look into the history surrounding this statute only furthers this interpretation.\textsuperscript{110} Taking into consideration recent opinions of the court of appeals and legislative amendments, the best way to deal with the costs that have been granted using the “reasonable and necessary” approach is to disallow those which were not assessable by law prior to 1983 (when section 7A-320 was enacted), or those which the “greater weight of authority” have established are not common law costs.\textsuperscript{111} Furthermore, under the doctrine of \textit{expressio unius est exclusion alterius}, a statute that lists items to which it applies inherently excludes those not encompassed in its listing, as section 7A-305(d) clearly does.\textsuperscript{112}

The “explicitly delineated” approach provides not only a level of flexibility for courts, but also sufficient guidelines and options that will likely make our system more consistent in the assessment of costs. As Judge Levinson stated in \textit{Charlotte Area Manufactured Housing} after an in-depth analysis of both approaches, “to follow the ‘reasonable and

\textsuperscript{109} Priest v. Safety-Kleen Sys., Inc., 663 S.E.2d 351, 352 n.1 (N.C. Ct. App. 2008) ("We note that the legislature amended [sections] 6-20 and 7A-305(d), effective 1 August 2007 . . . . However, plaintiffs brought their motion for recovery of costs on 5 January 2007, under the old version of the statutes.").

\textsuperscript{110} See \textit{supra} notes 13-34 and accompanying text (describing the history of and changes to certain “costs” statutes).


\textsuperscript{112} Evans v. Diaz, 430 S.E.2d 244, 247 (N.C. Ct. App. 1993).
The reasoning of the "explicitly delineated" rule is also more in-tune with the precedent of the supreme court and the recent opinions of the court of appeals. It is therefore the best option to promote uniformity in application.

VI. THE SOLUTION

The uncertainty surrounding the law of court costs in North Carolina is something that can be easily solved by our supreme court with a definitive statement regarding how the statutes shall be applied, which line of reasoning to utilize, and the extent of the trial judge's discretion. Adopting either the "reasonable and necessary" or the "explicitly delineated" approach will not only simplify our costs jurisprudence, but will also afford our citizens (and their attorneys) guidance by which to gauge their expectations as they proceed to court. Becoming involved in a lawsuit is a scary enough experience for many even without the uncertainty that our law creates regarding those costs a party may have to pay even after the conclusion of the suit.

After our high court makes a decision clarifying the law of costs, the doctrine of stare decisis will take hold, providing a guide for other courts in North Carolina and for attorneys as they prepare for trial. The recent post-amendment opinions of our court of appeals (which seem to adopt the reasoning of the explicitly delineated approach) would do further violence to the plain meaning of sections 6-1, 6-20, and 7A-320 and further erode the general rule that non-statutory costs are not taxable. The reasoning of the "explicitly delineated" rule is also more in-tune with the precedent of the supreme court and the recent opinions of the court of appeals. It is therefore the best option to promote uniformity in application.

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113. Dep't of Transp. v. Charlotte Area Manufactured Hous., Inc., 586 S.E.2d 780, 785 (N.C. Ct. App. 2003) ("We choose to follow the "explicitly delineated" approach because this approach is premised upon an interpretation of [section] 6-20 which is more consistent with the Supreme Court's pronouncement that costs are creatures of statute.").

114. Id. at 786 ("Without question, this Court is required to follow decisions of our Supreme Court until the Supreme Court orders otherwise." (citing Heatherly v. Indus. Health Council, 504 S.E.2d 102, 106 (N.C. Ct. App. 1998))).

115. Id. ("This panel also is required to follow precedent established by prior panels of this court. However, where an opinion from this Court has been inconsistent with prior decisions of this Court and our Supreme Court, we have declined to follow it." (citations omitted)); see Matter of Appeal from Civil Penalty, 379 S.E.2d 30, 36 (N.C. 1989); Heatherly, 504 S.E.2d at 106.

116. Green v. United States, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting) ("We should not be so unmindful, even when constitutional questions are involved, of the principle of stare decisis, by whose circumspect observance the wisdom of this Court as an institution transcending the moment can alone be brought to bear on the difficult problems that confront us.").

117. See supra text accompanying notes 13-36 (discussing the post-2007 amendments).
approach) can be conclusively endorsed by our supreme court if it adjudicates a case dealing with the issue, and therefore this question that has befuddled many will hopefully be resolved. After this action is taken, the law of costs will no longer present “a fork in the road” as it has for so many years, and North Carolinians can plan their day in court with consistency and clarity.

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