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ARTICLES

HOLDING, DICTUM . . . WHATEVER

THOMAS L. FOWLER¹

*“Dictum is one of the commonest yet least discussed of legal concepts. Every lawyer thinks he knows what it means, yet few lawyers think much more about it.”*²

According to a learned friend of mine, the practical significance of the holding/dictum distinction is overrated. My friend says that the holding/dictum distinction has always been a difficult one to apply,³ that law schools make little effort to teach it, and that practicing attorneys and judges only raise the distinction when they have already decided what they want to do and are looking for an after-the-fact justification of their decision. My friend didn’t say it, but he would agree with the commentator who declaimed:

The principle of stare decisis is constricting. A statement of the law that conflicts with the view of a judge or an attorney may be decisive unless it can be avoided. Labeling the statement a dictum is one simple means of evasion. Few desire to endanger such a useful tool by subjecting it to the destructive light of analysis. A vague smokescreen is often a better weapon in the courtroom than a precise argument that the court may understand and therefore reject.⁴

Under my friend’s theory, all statements found in an appellate opinion are fair game to be cited as being the law, and the compelling nature of the statement is based more on the clarity of its pronouncement and its author, rather than on an analysis of whether the statement resolved a necessary issue in the narrow matter that was

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2. Note, *Dictum Revisited*, 4 STAN. L. REV. 509 (1951-52).

3. Many share my friend’s opinion in this regard. E.g., Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2003 n. 1 (1994): “[N]o universal agreement exists as to how to measure the scope of judicial holdings. Consequently, neither is there agreement as to how to distinguish between holdings and dicta.” See also Earl Maltz, *The Nature of Precedent*, 66 N.C.L. REV. 367, 393 (1988): “Rather than being a simple, easily defined monolith, the doctrine of stare decisis is a complex, multifaceted phenomenon whose diverse components reflect a variety of values. Such phenomena typically defy full and accurate description.”

4. *Dictum Revisited*, *supra* note 2.

technically before the appellate court. My friend says that under current practice, statements in appellate opinions are valued along a continuum rather than divided into the two classes: (1) statements that are binding, i.e., holdings; and (2) statements that can be, but need not be, followed, i.e., dicta.⁵ Is my friend right?

I. HAS ELECTRONIC LEGAL RESEARCH DEVALUED THE HOLDING/DICTUM DISTINCTION?

Part of the problem may stem from the widespread use of electronic legal research. Years ago you might have begun your legal research by using *Strong's Index* to find a case that addressed the legal issue at hand. You would have read the case you found in *Strong's*—probably the entire case—to see if it was on point. Then you might have Shepardized the case to learn of later cases and developments in this area of the law. You would have gone to the library stacks, pulled all the listed cases, piled them on the table, and read each, one by one. Because you would have read each opinion, you would know what each case was about, what issues were important to the case and what issues were marginal or tangential. And because of how you were led to the case (i.e., Shepardizing an on-point case), you would, in general, not be interested in the tangential issues that happened to be contained in the case you were reading—it would only be by coincidence that such issues would be relevant to the issue you were researching. But even if it was coincidentally relevant, you would know it was only tangential to the case because you would have read the entire case. But a Westlaw, Lexis-Nexis, or Loislaw search of the case law changes things.

5. Most would agree that any statement, explanation, rationale, or observation that is 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, is not binding precedent, because the appellate court lacks jurisdiction to pronounce any rule on hypothetical issues. Some go further, however, and declare that the holding in a case consists only of the facts of the case and the outcome—all else, including any explanation, reasoning, justification or rationale, even if directly related and necessary to the result, is dicta—maybe powerful and convincing dicta, but dicta nonetheless. See Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L. J. 161, 162 (1930-31) (“[T]he 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 PEPP. L. REV. 605, 606 (1990) (“[A] case is important only for what it decides: for ‘the what,’ not for ‘the why,’ and not for ‘the how.’”). For a general discussion of holding and dictum see Richard B. Cappalli, *What Is Authority? Creation And Use Of Case Law By Pennsylvania's Appellate Courts*, 72 TEMP. L. REV. 303, 320 (1999) (The holding “is not merely anything said by the precedent setting court, but rather is the court’s decision on the material facts combined with the legal principles being applied. The court’s rationale helps the precedent interpreter understand the appropriate breadth of the holding.”).

When you plug in the key words or phrases to do your Boolean search⁶ of the text of the centuries of appellate opinions in North Carolina, you immediately get all the cases that satisfy the query. And you are taken directly to the part of the opinion where your key words or phrases are found. If, there on your computer screen, is a sentence that says what you want it to say, you may conclude that your research is done. You may choose not to read the rest of the case to find out the specific issues that were the subject of the appeal. You may also choose not to look carefully at the remaining results of your search—even though those results may reveal a line of on-point cases overlooked by the first case you found. In other words, despite finding the perfect language contained in a sentence in a case that has not been overturned, your electronic search does not tell you of the importance of that sentence to the opinion in which it appears. The language may have been inadvertent or tangential or not intended as the holding of the case. In other words, it might be dictum. And a whole other line of cases might actually state the controlling law on your issue. But the electronic search is so efficient, so inclusive and so easy—who wants to spend the time reading the entire case or checking all 157 cases listed in the search results, when the perfect language appeared in case number twelve? The temptation to just go with it is powerful.

More evidence of a trend toward the blurring of any crucial distinction between holding and dictum is the Supreme Court's recent amendment to Appellate Rule 30(e)(3). Rule 30(e) allows the Court of Appeals to decide not to publish certain opinions in the official reporter. In recent years, as many as two-thirds of the Court of Appeals' opinions are reported "per Rule 30(e)," ⁷ i.e., they are not published in the Court of Appeals Reports. Despite former Rule 30(e)'s explicit direction that such unpublished opinions of the Court of Appeals were not precedential, and should not be cited or considered by any court for any purpose except in the case in which the decision was rendered, there has always been an interest in discovering and using

6. Boolean searching is based on a system of symbolic logic developed by George Boole, a 19th century English mathematician. Boolean search techniques are used to perform accurate searches without producing many irrelevant documents. When you perform a Boolean search, you search the computer database for the keywords that best describe your topic. The power of Boolean searching is based on combinations of keywords with connecting terms called operators. The three basic operators are the terms AND, OR, and NOT. For a general discussion of Boolean searching see, Lynn Foster, *Electronic Legal Research, Access to the Law, and Citation Form For Case Law: Comparison, Contrasts, and Suggestions for Arkansas Practitioners*, 16 U.A.R.K. LITTLE ROCK L.J. 233, 238-43 (1994).

7. See generally Alan D. Woodlief, Jr., *Unpublished Decisions of the North Carolina Court of Appeals: Look but Don't Touch*, NORTH CAROLINA BAR JOURNAL, Volume 7, Number 2, Summer 2002, at 16.

the law in these cases. Probably in part for this reason,⁸ but clearly in large part because of the ease and inexpensive cost, in 2002 the North Carolina judicial system began posting the text of all the unpublished decisions on the court system's home page on the internet⁹—albeit without a search engine. Once posted on the internet it may have been inevitable that these unpublished opinions would find their way into legal briefs and argument, despite Rule 30(e)'s directive. Perhaps acknowledging this trend, effective October 7, 2002, Rule 30(e)(3) was amended to read:

An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to whom the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g) ("Additional Authorities"). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.¹⁰

Leaving, for the moment, the fascinating question of how attorneys will access and research these unpublished opinions,¹¹ it does appear that this new rule will create a new class of "non-precedential" precedent—the effect of which will be to further diminish the holding/dic-

8. Also possibly because of a federal case, *Anastasoff v. United States*, 223 F.3d 898, vacated as moot on reh'g en banc, 235 F.3d 1054 (8th Cir. 2000), (in which the Eighth Circuit Court of Appeals held a rule that stated unpublished opinions were not precedential was unconstitutional. For a discussion of this issue see Thomas L. Fowler, *Unpublished Decisions: Should Precedent Be "Managed" or Simply Followed?*, NORTH CAROLINA BAR JOURNAL, Volume 7, Number 2, Summer 2002, at 10.

9. The URL for the North Carolina Court System Home Page is: <http://www.nccourts.org>. The Court of Appeals' opinions are located at: <http://www.aoc.state.nc.us/www/public/html/opinions.htm>

10. N.C. R. APP. P. 30(e)(3) (2002).

11. It seems likely that Lexis-Nexis and Westlaw will begin to publish all or a part of these unpublished opinions—in both hard copy and electronic form. Attorneys may feel compelled to include these "unpublished decisions" in their research on the grounds that it would be malpractice (or at least bad practice) not to research these "unpublished" opinions that could have "precedential value." The only way to research such cases would be using Lexis-Nexis or Westlaw, unless the unpublished opinions begin to be published in the official reporter (an oxymoron) or unless the court system adds a search engine to the unpublished decisions published electronically on the court system's web site.

tum distinction. The statements found in the officially published opinions will be the super-precedent (or maybe the super-dicta), while statements found in the unpublished opinions (which the Rule states do not “constitute controlling legal authority”) may nevertheless be offered for whatever “precedential value” they may have. This direction appears to endorse the continuum approach to evaluating the statements found in the Court of Appeals’ unpublished decisions, which, as was noted above, constitute, at present, two-thirds of the opinions handed down by that Court.

II. IS THE HOLDING/DICTUM DISTINCTION INCONSISTENTLY APPLIED BY OUR COURTS?

In addition to the impact of technology on this issue, the temptation to fudge on the application of the holding/dictum distinction is, in all candor, somewhat legitimized by certain opinions of our appellate courts which obscure—and arguably trivialize¹²—the holding/dictum distinction itself. Such analysis can make the holding/dictum distinction—hard to apply even for judges genuinely seeking to apply it prior to having made their decision—seem not worth the effort.¹³ An example is the line of appellate cases that have applied Rule 68 of the Rules of Civil Procedure. Although these cases reveal that the Supreme Court has embraced an interpretation of Rule 68 that is difficult to justify in light of the statute taken as a whole, much more troubling is the inconsistent, inarticulate and occasionally disingenuous application of the holding/dictum analysis in this line of cases. To

12. See, e.g., *State v. Pike*, 532 S.E.2d 543, 544 (N.C. App. 2000), in which the court stated “we refuse to expand the ruling in this case to other factual situations.” The statement is clearly non-binding dicta in that it addresses issues not before the court (i.e., whether the ruling applies to other imagined or unimagined factual situations), but it is nevertheless striking in its insistence that lower courts ignore the analysis, reasoning and explanation in the *Pike* opinion itself. One commentator classifies instances of “precedent abuse” as follows: (a) treating a dictum as holding; (b) falsely distinguishing a precedent; and (c) classifying an opinion’s language as holding. Richard B. Cappalli, *What Is Authority? Creation And Use Of Case Law By Pennsylvania’s Appellate Courts*, 72 TEMP. L. REV. 303, 306 (1999).

13. The author has opined about this before with regard to the Supreme Court case of *State v. Fly*: “Attorneys and trial judges must distinguish between holding and dictum contained in appellate cases to determine which statements in an opinion are binding precedent and which are mere tools for predicting how the appellate court may rule in the future on matters never previously before the court. The analysis and the language chosen by the Court in *Fly* obscure the normal guideposts that lower courts must locate to complete this holding/dictum determination. As a result the lower courts will be encouraged to abandon the difficult determination of what the law is, i.e., determining the holding of the case, and to substitute the determination of what the law will be based upon the various statements found in the opinion without regard to whether such statements are holding or dictum. The rule of law suffers when all statements in an appellate opinion are deemed worthy of consideration only in direct proportion to their perceived usefulness in predicting future decisions.” Thomas L. Fowler, *Of Moons, Thongs, Holdings and Dicta: State v. Fly and the Rule of Law*, 22 CAMPBELL L. REV. 253, 259-60 (2000).

appreciate this aspect of these cases, we must first review the purpose and language of Rule 68.

A. *Rule of Civil Procedure 68, Offers of Judgment.*

Rule 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 the making of the offer.* The fact that an offer is made but not accepted does not preclude a subsequent offer.¹⁴

The language of Rule 68(a) is virtually identical to Federal Rule of Civil Procedure 68.¹⁵ Rule 68 was intended to encourage settlement of civil actions prior to trial.¹⁶ 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 not more favorable than the offer of judgment that was not accepted.¹⁷ Thus, if the offer of judgment was for \$5,000 and the judgment finally obtained was for \$1,000, then plaintiff cannot recover for its litigation costs incurred after the date of the offer of judgment, and, in addition, 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

14. N.C. R. APP. P. 68 (2002) (emphasis added).

15. *Roberts v. Swain*, 521 S.E.2d 493, 495 (N.C. App. 1999).

16. See *Poole v. Miller*, 464 S.E.2d 409, 412 (N.C. 1995) (Parker, J. dissenting), "The objective of . . . Rule [68] is to encourage settlements."; *Scallon v. Hooper*, 293 S.E.2d 843, 844 (N.C. App.), *disc. rev. denied*, 295 S.E. 2d 480 (1982), "The purpose of Rule 68 is to encourage settlements and avoid protracted litigation."

17. "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." Lesley S. Bonney, et.al., *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 380 (1997).

part of the court costs,¹⁸ for instance pursuant to N.C. Gen. Stat. § 6-21.1¹⁹ or N.C. Gen. Stat. § 75-16.1.²⁰ Rule 68 was thus intended to place a significant burden on the plaintiff to terminate the litigation when the defendant submits a reasonable offer of judgment.²¹ 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's fees and other costs that may be shifted, if Rule 68 applies. Rule 68 was intended to be, and should be, an effective tool to unclog the civil court calendars.²² But, in North Carolina, it isn't.

18. See *Marek v. Chesny*, 473 U.S. 1 (1985), where the 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).

19. N.C. GEN. STAT. § 6-21.1 (2002). *Allowance of counsel fees as part of costs in certain cases*: "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 obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs."

20. N.C. GEN. STAT. § 75-61.1 (2002). *Attorney fee*: "In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, 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."

21. See *Marek* 473 U.S. at 11, in which the 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." *Marek* explained: "To be sure, application of Rule 68 will require plaintiffs to 'think very hard' about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates. This effect of Rule 68 . . . is in no sense inconsistent with the congressional policies underlying [the statutes allowing reasonable attorney's fees to prevailing parties]. . . . We specifically noted that prevailing at trial 'may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved.' . . . In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff—although technically the prevailing party—has not received any monetary benefits from the postoffer services of his attorney."

22. There have been several proposals to modify federal Rule 68 to make it more effective. See generally 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.

Taken as a whole,²³ it is obvious that Rule 68 intends for the amount of the offer of judgment to be compared with the amount of the jury verdict to determine if the latter is “more favorable” than the offer.²⁴ The offer of judgment must always include plaintiff’s costs incurred up to the date of the offer of judgment,²⁵ and that amount will, of course, be included in any final judgment if the matter goes to trial. Thus, in most cases,²⁶ plaintiff’s costs incurred up to the date of the offer of judgment will be a wash and need not even be calculated prior to comparing the offer of judgment amount to the jury verdict 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 compared, not with the jury verdict standing alone, but instead with the

23. This article will not go into a detailed examination of the statutory interpretation performed in *Poole v. Miller*, *supra* note 16. 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 attorneys fees, raising questions about whether a “judgment finally obtained” must include such post-trial matters. See *Gibbons v. Cole*, 513 S.E.2d 834, 839 (N.C. App. 1999) (trial court could not consider motion for attorney’s 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).

24. See Jonathan R. Bumgarner, *Rule 68—Should Costs Incurred After The Offer Of Judgment Be Included In Calculating The “Judgment Finally Obtained”*—The So-Called Novel Issue In *Roberts v. Swain*, 24 CAMPBELL L. REV. 245, 261-62 (2002): “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”

25. See *Aikens v. Ludlum*, 440 S.E.2d 319, 321 (N.C. App. 1994), 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.

26. 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). See generally *Marryshow v. Flynn*, 986 F.2d 689 (4th Cir. 1993).

jury verdict *plus* all attorney's fees and costs awarded by the court, including the attorneys' fees and costs *incurred after* the offer of judgment.²⁷ 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 attorneys 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 consider a reasonable settlement offer would be substantially diminished.²⁸

B. *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*,²⁹ plaintiff sought \$300,000 in damages. Defendant filed an offer of judgment for \$5,001, "together with all costs accrued except attorneys' fees." It was refused. The jury's award to plaintiff was only \$3,500. After determining that the defendant's offer of judgment 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 \$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." The Court proceeded to note that the trial court had 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

27. See *Marryshow*, 986 F.2d at 692 (emphasis added). "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.*"

28. "Including costs and attorney fees incurred after an offer of judgment in calculating 'the judgment finally obtained' discourages the settlement of cases." Jonathan R. Bumgarner, *Rule 68—Should Costs Incurred After The Offer Of Judgment Be Included In Calculating The "Judgment Finally Obtained"*—*The So-Called Novel Issue In Roberts v. Swain*, 24 CAMPBELL L. REV. 245, 262 (2002):

29. 296 S.E.2d 459 (N.C. 1982).

expert witness fees and most of the attorneys' fees "were incurred after the offer of judgment was made."³⁰

Purdy thus expressly stated that the offer of judgment of \$5001 was to be compared to the jury verdict of \$3,500 in order to determine whether or not Rule 68 applied, and based on this comparison the Court held that costs incurred by plaintiff after the offer for judgment were not awardable. Because *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 *Purdy*. Had *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 *Poole v. Miller*.³¹ In *Poole*, plaintiff sought \$300,000 in damages and defendant tendered an offer of judgment for \$6,000 together with costs accrued. 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. The offer was declined and the matter proceeded to trial. The jury returned a verdict of \$5,721.73. The plaintiff moved for, and was granted, costs for its expert witnesses and attorneys fees pursuant to N.C. Gen. Stat. § 6-21.1. For the most part, these costs and attorneys fees were incurred *after* the date of the offer of judgment. Thus, the final judgment entered by the trial court included post-offer costs, and totaled \$9,058.21. The trial judge compared this figure to the offer of judgment and determined that it was more favorable than the offer. Defendant appealed, arguing that under *Purdy*, the jury verdict of \$5,721.73 was less favorable than the offer of judgment of \$6,000, and Rule 68's cost shifting clause thus applied, so that plaintiff was not entitled to any post-offer costs, so that the Court of Appeals should vacate that part of the final judgment awarding such post-offer costs. That is exactly what the Court of Appeals concluded, expressly relying on *Purdy* as the controlling precedent. The Court of Appeals stated: "This case is controlled by *Purdy v. Brown*," and that "[u]nder *Purdy v. Brown*, final judgment is the jury verdict; it does not include costs such as expert witness fees, attorney's fees, and

30. *Id.* "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." The court did note that pursuant to G.S. 6-21.1 and Rule 68, the trial court did have discretion to award to plaintiff its attorneys fees incurred prior to the date of the offer of judgment.

31. 448 S.E.2d 123 (N.C. App. 1994), *rev'd*, 464 S.E.2d 409 (N.C. 1995).

interest incurred after the offer of judgment.”³² But plaintiffs appealed to the Supreme Court.³³

Surprisingly the 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” and that the “judgment finally obtained” did not mean the jury verdict but instead meant the final judgment rendered by the trial court—and that it would include post-offer costs awarded by the trial court. The *Poole* Court expressly stated that it had “determined that ‘judgment finally obtained’ for purposes of Rule 68 is the final judgment entered by the court.”³⁴ But even more surprisingly, the *Poole* Court stated that the Court of Appeals’ *Poole* decision had “inappropriately relied upon this Court’s decision in *Purdy v. Brown*.”

This was so, the Supreme Court stated because “*Purdy* did not specifically address the issue currently presented: whether ‘judgment finally obtained’ pursuant to Rule 68 is equivalent to the jury’s verdict.” This statement surprises because *Purdy* 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—for 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*.³⁵ 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 dis-

32. *Poole*, 448 S.E.2d at 125.

33. 464 S.E.2d 409 (N.C. 1995).

34. In reaching its conclusion, *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*, 507 S.E.2d 894 (N.C. 1998)(*emphasis added*).

35. 521 S.E.2d 493 (N.C. App. 1999), *rev’d in part*, 538 S.E.2d 566 (N.C. 2000).

agreed with the trial court's application of *Poole* to the case. The Court explained:

In holding that the 'judgment finally obtained' did not equal the jury verdict, the Supreme Court in *Poole* merely held that 'judgment finally obtained' is calculated by using the jury verdict along with costs. *Id.* The Court in that case did not direct the trial court to include costs incurred after the offer of judgment in that calculation. The issue in this case is therefore novel to North Carolina: Should costs incurred after the offer of judgment be included in calculating the 'judgment finally obtained' under Rule 68. We answer: No. . . .

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 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.³⁶

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."³⁷ But the Supreme Court also addressed the basis for the Court of Appeals decision, i.e., the extremely narrow reading of the 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.'³⁸

36. *Roberts v. Swain*, 521 S.E.2d 493, 495-96 (N.C. App. 1999), *rev'd*, 538 S.E.2d 566 (N.C. 2000).

37. *Roberts v. Swain*, 538 S.E.2d 566, 567 (N.C. 2000).

38. *Id.* at 250 (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

C. *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*, which also follows the holding of the U.S. Supreme Court in *Marek v. Chesny*. 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 can not receive post-offer costs or attorney fees. The problem with the *Poole v. Miller* 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 this costs determination, 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, necessitating 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.³⁹

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 had 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. And the

in calculating the “judgment finally obtained,” even where attorney’s fees are awarded under a federal statute.” *Roberts v. Swain*, 538 S.E.2d 566, 569 (N.C. 2000).

39. 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. Bumgardner*, 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. *Blackmon v. Bumgardner*, 519 S.E.2d 335 (N.C. App. 1999). Is this a legitimate backdoor approach to accomplishing the true purpose of Rule 68 despite the roadblock created by *Poole* and *Roberts*?

Court of Appeals was arguably correct in its evaluation of the *Purdy* precedent. In any event, 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 clearly 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.⁴⁰ Maybe the final word for this section 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.⁴¹

Alone among the justices, Justice Parker appears to be correct on both her interpretation of Rule 68 and her evaluation of what constitutes precedent.

III. SEARCHING FOR GOOD LAW: A CAUTIONARY TALE FOR TODAY’S ATTORNEYS

The holding/dictum distinction is, then, misunderstood, misapplied and under subtle attack, even by those purporting to apply it. But the rumors of its total demise are exaggerated. Ignore it at your peril.

Consider your representation of a husband who wants to get a divorce and an equitable distribution of marital property. Several

40. One question raised by the claim in *Roberts* that the Court had “approved the calculations” and by doing so had established a precedent, is the extent to which holdings or precedent can be created by implication. Such *sub silentio* holdings are acknowledged from time to time by our courts. See Thomas L. Fowler, *The Law Between The Lines: Sub Silentio Holdings*, NORTH CAROLINA STATE BAR JOURNAL, Volume 7, Number 3, Fall 2002, at 22-25.

41. *Roberts v. Swain*, 538 S.E.2d 566, 569 (N.C. 2000)

months after you file your civil suit, the wife's attorney moves, pursuant to Rule 17 of the North Carolina Rules of Civil Procedure, for appointment of a guardian ad litem to represent the wife during the suit. The motion asserts that although the wife has never been found to be incompetent, she has a history of schizophrenia, that her mental state is such that she is not able to assist in the ongoing litigation, and that the wife herself desires the appointment of a guardian ad litem. You read Rule 17.⁴² You conclude the motion looks legitimate. At lunch, however, you mention this development to a friend who handles more guardianship matters than you ever have. She says that at a recent CLE she attended the speaker said judges no longer had authority under Rule 17 to find a party incompetent and to appoint a guardian ad litem.⁴³ You plan a visit to the law library.

At the library you pull a treatise on North Carolina civil procedure⁴⁴ and look up Rule 17. You find this statement:

[C]ase law reveals that whenever a substantial question of a litigant's competency has been presented to the court, it is incumbent upon the judge to suspend further proceedings until this issue has been resolved. Contrary to prior law, however, the court can proceed no further as this issue must be determined pursuant to G.S. 35A-1102. When incompetency is raised, the pending action or proceeding must be stayed until an adjudication has occurred in a separate competency proceeding.⁴⁵

This appears to be on point and the case cited for this proposition⁴⁶ is a 1989 case from the North Carolina Court of Appeals, *Culton v. Culton*. The entire cite to *Culton* is as follows: "*Culton v. Culton*, 96 N.C. App. 620, 386 S.E.2d 592 (1989)."⁴⁷ You pull the *Culton* case. You read it.

42. N.C. R. App. P. 17(b)(2) provides, in part: "In actions . . . when any of the defendants are . . . incompetent persons . . . they must defend by general or testamentary guardian . . . or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian . . . the court in which said action . . . is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such . . . incompetent persons"

43. This part of the hypothetical actually happened. I did ask an experienced guardianship attorney about the question and she did respond as stated.

44. G. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE (Michie Law Publishers, Second Edition, 1995).

45. *Id.* at page 357.

46. Actually Wilson cites several cases in this footnote (fn 178) but the other cases cited, *Hagins v. Redevelopment Commission*, 165 S.E.2d 490 (N.C. 1969), *Sheppard v. Community Fed. Sav. and Loan*, 352 S.E.2d 252 (N.C. App.), *cert. denied*, 356 S.E.2d 6 (N.C. 1987), and *Rutledge v. Rutledge*, 179 S.E.2d 163 (N.C. App. 1971), do not address the proposition for which they are cited—indeed, none of these cases mentions Chapter 35A. *Culton* is the only case cited that cites Chapter 35A and discusses the relationship between Chapter 35A and Rule 17.

47. See WILSON, *supra* note 41, at 357, fn 178.

Culton is directly on point. The trial judge heard defendant's Rule 17 motion for a guardian ad litem, found the defendant incompetent and appointed a guardian ad litem. The plaintiff appealed and the Court of Appeals reversed the trial judge. The lone *Culton* headnote reads:

Though N.C.G.S. Section 1A-1, Rule 17 may have once allowed the trial court to conduct a competency hearing, the trial court in this action for divorce and equitable distribution lacked jurisdiction to make a determination with respect to defendant's competency, since N.C.G.S. Section 35A-1101 et seq. set forth the sole procedure for determining incompetency of infants and adults.⁴⁸

As you are snapping the green Court of Appeals' Report shut, something catches your eye. You open up the book again to *Culton*. Under the headnote appears the phrase "Judge Phillips *dissenting*." Hmmmm. Better check that out, you guess. Sure enough, Judge Phillips' dissent says that the legislature did not intend G.S. Section 35A-1101 et seq. to change the judge's authority under Rule 17. "Judicial efficiency requires the continued efficacy of Rule 17 in situations such as exist here and I do not believe the Legislature intended otherwise," according to Judge Phillips.⁴⁹ You recall that a dissent in a Court of Appeals decision generates a right to appeal to the North Carolina Supreme Court.⁵⁰ Although the treatise on North Carolina civil procedure did not indicate any appeal of *Culton*, a prudent attorney should nonetheless make recourse to Shepard's, you mutter. You locate Shepard's, you find the cite, and you are stunned to see that in 1990 the North Carolina Supreme Court reversed *Culton*.⁵¹ In light of the civil procedure treatise and the reported CLE commentary, how could this be, you moan?

You locate the Supreme Court's opinion in *Culton* and read it. You note that the Supreme Court reversed the Court of Appeals *on a technicality*! The Supreme Court held that the husband lacked standing to appeal the trial court's order appointing the guardian ad litem for his wife,⁵² and that, in any event, the order was interlocutory and therefore not immediately appealable.⁵³ Thus the Supreme Court held that

48. *Culton v. Culton*, 386 S.E.2d 592 (N.C. App. 1989).

49. *Id.*, at 623.

50. N.C. GEN. STAT. § 7A-30; see also N.C. R. APP. P. 14.

51. *Culton v. Culton*, 398 S.E.2d 323 (N.C. 1990), *rev'g* 386 S.E.2d 592 (N.C. App. 1989).

52. The Court stated: "[The Husband] has not been directly or injuriously affected by the order appointing a guardian ad litem for defendant." *Culton v. Culton*, 398 S.E.2d 323, 325 (N.C. 1990).

53. Although an interlocutory order can be immediately appealable if it affects a substantial right, as provided in G.S. Section 7A-27(d), in *Culton*, the husband never argued, nor established, that he was entitled to an appeal of right under G.S. Section 7A-27(d). *Culton*, 398 S.E.2d at 325.

the Court of Appeals should have dismissed the appeal, and the Court remanded the case to the Court of Appeals for such dismissal.

The Supreme Court's opinion, therefore, never touched the Court of Appeals' determination that G.S. Section 35A-1101 et seq. set forth the sole procedure for determining incompetency thereby preempting this aspect of Rule 17, you think. Because the Supreme Court's *Culton* opinion reversed the Court of Appeals' *Culton* opinion *on other grounds*—and particularly on technical grounds—the Court of Appeals' *Culton* opinion must still be good law, right? That would explain the reliance on *Culton* by both the CLE expert and the North Carolina civil procedure treatise. You will tell the judge that the *Culton* precedent requires that he dismiss the wife's Rule 17 motion. It sounds good and seems logical. But something makes you uneasy. You think it might be that legal research and writing course you had first year but you're not sure why.

Nevertheless, you Shepardize *Culton*. You find that the Court of Appeals' opinion has never been cited in any opinion other than the Supreme Court's *Culton* opinion. You also use your computer to electronically search the text of all of the appellate opinions in North Carolina since 1989 for any case that mentions both Rule 17 and Chapter 35A of the General Statutes. You discover that the only two opinions that mention both Rule 17 and Chapter 35A are the two *Culton v. Culton* decisions. Intrigued, and with a little time on your hands, you search the secondary sources. You find some sources which appear to accept *Culton* as good law⁵⁴ and other sources which interpret Rule 17

54. In the "Case Notes" section that follows G.S. Section 1A-1, Rule 17, in Lexis Publishing's Annotated General Statutes of North Carolina, the following appears as an "Editor's Note": "The case of *Rutledge v. Rutledge* [citation omitted] and similar cases which had heretofore expanded a trial court's authority under this rule, giving it the ability to determine competency in certain circumstances, have been preempted by the enactment of Section 35A-1101 et seq. See *Culton v. Culton*, 96 N.C. App. 620, 386 S.E.2d 592 (1989)." N.C. GEN. STAT. § 1A-1, Rule 17, Case Notes, § III (Infants and Incompetents) (1999), Vol. 1, at page 870. *Culton* is also subsequently cited for related propositions in the case notes for N.C. GEN. STAT. § 1A-1, N.C. R. APP. P. 17, and N.C. GEN. STAT. §§ 35A-1101 and 35A-1102, where *Culton* is noted as having been "reversed on other grounds." See Case Notes to N.C. GEN. STAT. §§ 35A-1101 and 35A-1102 (Lexis Publishing, 1999), Vol. 7, at pages 139-40. One law review article states: "A hearing before the clerk of court is the exclusive process for adjudicating incompetency in North Carolina." For this proposition the article cites "*Culton v. Culton*, 96 N.C. App. 620, 386 S.E.2d 592 (1989), *rev'd* on other grounds, 327 N.C. 624, 398 S.E.2d 323 (1990)." Laura M. Wolfe, *Comment, A Clarification of the Standard of Mental Capacity in North Carolina for Legal Transactions of the Elderly*, 32 WAKE FOREST L. REV. 563, 565, fn 15 (1997). In the 1994 Wake Forest Law School's CLE, *Representing the Elderly and the Incapacitated Child*, Chapter 6, entitled "How to Handle Guardianship for the Elderly and Incapacitated Child" states: "Chapter 35A is the exclusive procedure available under North Carolina Law for adjudicating adults . . . to be incompetent. Case law may support the exclusive domain of the clerk's jurisdiction. . . ." and for this proposition cites "*Culton v. Culton*, 96 N.C. App. 620, 386 S.E.2d 592, *rev'd* 327 N.C. 624, 398 S.E.2d 323 (1990)" at page 127, fn 22. In the N.C. TRIAL JUDGES' BENCH BOOK (Institute of Government, 1996), at Chapter 27, page 3, it states that Rule 17 "describes means of appoint-

as though the Court of Appeals' *Culton* opinion did not exist.⁵⁵ You despair that you have done all the legal research that you know how to do and you still don't know if *Culton* is good law. Maybe the law really is arbitrary, you think. Maybe good law is whatever you convince the judge it is. But what will convince the judge, you wonder?

A. *Is the Court of Appeals' Opinion in Culton v. Culton Good Law?*⁵⁶

1. Is it precedent?

The majority opinion in the Court of Appeals' *Culton v. Culton* decision may be useful in predicting what the law in North Carolina will be but it does not establish what the law presently is. The Court of Appeals' *Culton v. Culton* decision has no precedential value and is not controlling. It is even possible to argue that *Culton* isn't even dicta but rather is something else.

The Supreme Court's decision in *Culton* essentially vacated the Court of Appeals decision because it held that the Court of Appeals never had authority or jurisdiction to hear or consider the substantive issue. Thus when jurisdiction to proceed returned to the district court

ment of a guardian ad litem when incompetency has already been determined. The sole procedure for determining incompetency is set forth in G.S. Chapter 35A (G.S. 35A-1102 et seq.). *Culton v. Culton*, 96 N.C. App. 620 (1989)."

55. W. BRIAN HOWELL, SHUFORD NORTH CAROLINA CIVIL PRACTICE AND PROCEDURE (Harrison Co., Fifth Edition, 1998)(Section 17-15, Suits Against Infants Or Incompetents (at pages 244-46), interprets Rule 17 without mention of Chapter 35A and without citation of *Culton v. Culton*); MICHAEL J. MCCANN & JOHN L. SAXON, THE LAW AND THE ELDERLY IN NORTH CAROLINA (Institute of Government, Second Edition, 1996) (Chapter 9, Incompetency and Guardianship, in its section discussing "Procedure for Determining Incompetency," Chapter 35A is mentioned in a footnote that ends with this sentence: "In civil cases, determinations of incompetence may be made for the limited purpose of complying with the requirement that a special representative, a guardian ad litem, be appointed to represent the interests of a party who is incompetent. G.S. 1A-1, Rule 17 (Supp. 1994)." There is no mention of *Culton v. Culton*).

56. I use the phrase "good law" because it is ambiguous. Good law might be limited to what is precedential or it might include any dictum that is authoritative and persuasive—or maybe dictum that is just persuasive. Thoughtful commentators have suggested that the traditional holding/dictum distinction is either illusory or inadequately understood. See Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2003-2004 (1994) ("[N]o universal agreement exists as to how to measure the scope of judicial holdings. Consequently, neither is there agreement as to how to distinguish holdings and dicta."). Compare *Coastland Corporation v. N.C. Wildlife Res.*, 517 S.E.2d 661, 664 (N.C. App. 1999) (the court addressed and resolved an issue that it acknowledged was not necessary to its decision and expressed its resolution of the issue as a holding "dicta though it be."); *Shiloh Methodist Ch. v. Keever Heating & Cooling*, 492 S.E.2d 380 (N.C. App. 1997)(the Court's majority opinion addressed and resolved the substantive issue raised by the appellant but in a footnote conceded the legitimacy of the "alternative argument" discussed by the Court of Appeals judge who concurred in the result only—this argument was that the trial judge lacked authority to rule on the issue in the first place. This agreement with the concurrence would appear to transform the concurrence into the opinion of the Court and the purported majority opinion into dicta.).

judge, following remand and dismissal of the appeal as mandated by the Supreme Court, the matter was in the same posture as it was prior to the appeal—meaning that the district court's order appointing a guardian ad litem pursuant to Rule 17 to represent the wife during the lawsuit was in effect during the rest of the proceeding. There is no indication that the husband renewed his appeal of this issue at the conclusion of the proceeding once a final judgment was entered.

In light of the Supreme Court's decision, the Court of Appeals' *Culton* opinion clearly did not compel the district court judge to change her order—thus it could not have been precedential. It is also doubtful whether the opinion, because it was vacated, could even have served as a basis for a reconsideration by the trial judge of her interlocutory order.⁵⁷ The Court of Appeals' *Culton* opinion is simply a nullity. If the Court of Appeals had properly decided *Culton*, it would have dismissed the appeal as interlocutory and never have addressed the substantive issue. Therefore, the *Culton* trial court was not, and subsequent trial courts considering the issue could not be, bound by its analysis or stated holding.

This conclusion is consistent with the rule that only final decisions can serve as the source for *stare decisis*.⁵⁸ In this case the final decision was that of the Supreme Court holding that the matter had not been properly appealed. There are two consequences of the Supreme Court reversing or vacating the Court of Appeals' *Culton* opinion on grounds other than those stated in the Court of Appeals' opinion. First, resolution of the issue resolved by the Court of Appeals became unnecessary to the decision in the case (i.e., the attempted appeal was improper regardless of whether or not Chapter 35A amended Rule 17) and thus such resolution became dicta⁵⁹ and lost its status as the holding of the case.⁶⁰ As dicta, it can not be precedential.⁶¹ Second, because the Supreme Court resolved the case as it did, there was no

57. According to the Court of Appeals, a trial judge has the power to modify or change an interlocutory order only where: (1) the order was discretionary, and (2) there has been a change of circumstances. *Iverson v. TM One, Inc.*, 374 S.E.2d 160, 162-63 (N.C. App. 1988). The vacated Court of Appeals' *Culton* decision should not suffice as a change of circumstance. For an article questioning the basis for the Court of Appeals' rule as stated in *Iverson*, see Thomas L. Fowler and Thomas P. Davis, *Reconsideration of Interlocutory Orders: A Critical Reassessment of Calloway v. Motor Co. and Whether One Judge May Overrule Another*, 78 N.C.L. REV. 1797 (2000).

58. 20 AM. JUR. 2D COURTS § 152 (2002), *Judicial Precedents As Binding Or Persuasive*, at page 439 (nonfinal decisions have no stare decisis effect).

59. Or maybe it became, not dicta, but "advice"—see discussion in Section II, C.

60. STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING, Little Brown and Co., 1985, at page 36. "[A] basic principle of common law adjudication is that a judge is empowered to decide the case before the court and only the case before the court. A judge has no authority at common law to enact an authoritative general rule to govern parties and situations that were not before the court. The judge in Case 1 could not decide how Case 3 must be decided, however broadly she may craft a rule to explain the decision in Case 1."

possibility for review by the Supreme Court of the Court of Appeals' analysis of Chapter 35A's effect on Rule 17. This preemption of even the possibility of Supreme Court review is significant.

Precedential status is not denied a Court of Appeals decision simply because no review by the Supreme Court actually occurred.⁶² If the Court of Appeals decision in *Culton* had not been appealed to the Supreme Court (or if there had been no dissent and the defendant's petition for discretionary review was denied by the Supreme Court⁶³), then the Court of Appeals' decision would stand as the final decision and it would be precedential. But this status appears to change when review by the Supreme Court is unavailable in any event. For instance, when the Supreme Court is evenly divided as to whether to affirm or reverse a decision of the Court of Appeals, the decision of the Court of Appeals is left undisturbed but it stands "without precedential value."⁶⁴ Also of significance are instances where the Supreme Court concludes that a matter before it has become moot

61. "[A]lthough the dicta of our Supreme Court are entitled to due consideration, such dicta are not binding on this court." *Napowso v. Langston*, 381 S.E.2d 882, 888 (N.C. App. 1989). As stated in *Moose v. Commissioners*, 90 S.E. 441, 448-49 (N.C. 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." See also *In Re Lynette H.*, 374 S.E.2d 272 (N.C. 1988) (In a civil commitment case the trial court found the respondent not to be mentally ill and therefore not committable under the statute but the trial court also held that the applicable statute was unconstitutional. The Court of Appeals affirmed. The Supreme Court vacated the Court of Appeals' opinion noting that once the trial court found the respondent not to be mentally ill the matter was concluded and there was no jurisdiction to consider the constitutionality of the applicable statute.).

62. It should be noted that in some states intermediate appellate courts function only as error-correcting courts and the opinions of these intermediate appellate courts are expressly denied any precedential status. OKLA. STAT. ANN., tit. 20, Section 30.5 (West 1991) (providing that "[n]o opinion of the Court of Appeals shall be binding or cited as precedent unless it shall have been approved by the majority of the Justices of the Supreme Court for publication in the official reporter . . ."); see also *Ashleigh E. Bausch, Metro Renovation, Inc. v. Nebraska Dept. of Labor: Is It Binding? Separation of Powers and the Conflict Surrounding the Binding Authority of the Decisions of the Nebraska Court of Appeals*, 30 CREIGHTON L. REV. 129 (1996) ("Case law . . . recognizes that legislatures can determine the precedential effect of intermediate court decisions without violating the essential functions of the judicial branch."). Compare *Lynch v. Universal Life Church*, 775 F.2d 576, 580 (4th Cir., 1985) ("The North Carolina Court of Appeals is a court of statewide jurisdiction, and its decisions are binding on state trial courts in the absence of a conflicting decision by the North Carolina Supreme Court.").

63. See N.C. GEN. STAT. § 7A-31 (2002) (Discretionary review by the Supreme Court).

64. *Reese v. Barbee*, 510 S.E.2d 374 (N.C. 1999); *State v. Johnson*, 210 S.E.2d 260 (N.C. 1974); *Durham v. R.R.*, 113 N.C. 240, 241 (1891). Note that in these cases although the Court of Appeals' decision has no precedential value, it is the final decision in the case and as such becomes the law of the case and is determinative of the rights of the parties. *State ex rel. Utilities Comm. v. Public Staff*, 370 S.E.2d 567, 570 (N.C. 1988); *Felton v. Hospital Guild*, 296 S.E.2d 297, 297 (N.C. 1982).

during the appeal requiring that the Court decline to proceed with the appeal. In such cases, the Court has opined that simply dismissing the appeal may improperly leave the decision of the Court of Appeals undisturbed as precedent “when, but for intervening mootness, it might not have remained so.”⁶⁵ In such cases, the Supreme Court has stated, “the better practice . . . is to vacate the decision of the Court of Appeals”⁶⁶—presumably leaving the Court of Appeals’ decision with no precedential value. In light of these cases it might also be premised that because the Supreme Court’s resolution of *Culton* pre-empted any possible review of the Court of Appeals’ decision as to the effect of Chapter 35A on Rule 17, the Court of Appeals’ decision should not be accorded precedential value.

Finally, it must be noted that because the substantive issue resolved by the Court of Appeals was determined not to have been properly before it, the Court of Appeals had no authority to address the issue. Thus, the Court of Appeals’ pronouncements on the issue amounted to an advisory opinion on an issue not properly before the court.⁶⁷ Case law is clear that our courts lack jurisdiction to issue advisory opinions and that in any event any such advisory opinions have no precedential authority.⁶⁸

2. Is it authoritative dicta?

If the Court of Appeals’ *Culton* opinion is not precedential it nevertheless might have persuasive value. Language in appellate opinions is generally held to be either holding or dicta, and dicta is generally

65. *Utilities Comm. v. Southern Bell Telephone Co.*, 221 S.E.2d 322, 325 (N.C. 1976).

66. *Messer v. Town of Chapel Hill*, 485 S.E.2d 269, 270 (N.C. 1997)(vacating the Court of Appeals decision and citing *Utilities Comm. v. Southern Bell Telephone Co.*, 221 S.E.2d 322, 325 (N.C. 1976).

67. “The function of appellate courts . . . is not to give opinions on merely abstract or theoretical matters, but only to decide actual controversies injuriously affecting the rights of some party to the litigation, and . . . questions or cases which [are] . . . academic are not a proper subject of review.” 5 AM. JUR. 2D APPEAL AND ERROR 761 (1962).” *Kirkman v. Wilson*, 401 S.E.2d 359, 361 (N.C. 1991). See also *Martin v. Piedmont Asphalt & Paving*, 448 S.E.2d 380, 381-82 (N.C. 1994)(“[T]he Court of Appeals failed to follow established precedent to the effect that the appellate courts of this state will not issue opinions where there is no genuine controversy between the parties before them.”).

68. “[A]dvisory opinions formerly issued on occasion by [the Supreme] Court merely expressed the individual opinions of the subscribing justices and have no precedential authority.” *State ex rel. Martin v. Preston*, 385 S.E.2d 473, 481 (N.C. 1989) See also *In re Advisory Opinion*, 335 S.E.2d 890, 891 (N.C. 1985) (“The North Carolina Constitution does not authorize the Supreme Court as a Court to issue advisory opinions. . . . Because these opinions have been, and constitutionally can only be, opinions of individual members of the Court and not the Court itself, they have not and could not have the force of law. Advisory opinions of the justices as individuals may be persuasive authority for the points of law addressed, but they are in no sense binding or obligatory on those points.”).

held to be either intended (judicial) or unintended (obiter) dicta.⁶⁹ Intended dicta can be persuasive to the extent it is viewed as predictive of how the Court will rule if the issue is properly raised in a future appeal.

In this case, however, the *Culton* analysis may be open for debate. Opposing acceptance of the Court of Appeals' *Culton* opinion is the fact that the four judges who considered the issue—the district court judge and the three Court of Appeals judges—split evenly on their interpretation of the statutes. The district court judge and Court of Appeals Judge Phillips concluded that Chapter 35A did not amend Rule 17. Additionally it might be noted that the authority granted to the trial judge in Rule 17 might be interpreted as a codification of an inherent power of the trial court “to do all things that are reasonably necessary for the proper administration of justice.”⁷⁰ This approach may have provided the basis for Judge Phillips' dissent in *Culton*.

3. But is it even dicta or is it ex curia commentary by commentators who happen to be appellate judges?

Because the opinion was vacated and because if the Court of Appeals had properly dismissed the appeal its *Culton* opinion would not exist, it is arguable that the Court of Appeals' *Culton* opinion should have no more status than a law review article or an editorial in the local newspaper on the issue written by a Court of Appeals' judge. Although this distinction may be legitimate, it also may make no practical difference. A dictum should be considered and followed to the extent it is helpful and persuasive,⁷¹ and the same measure seems rea-

69. According to BLACK'S LAW DICTIONARY: “Statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are obiter dicta, and lack the force of an adjudication.” Some cases and commentators distinguish dicta that are mere remarks made in passing from dicta that are deliberately made for the purpose of being followed by the trial courts. Because the latter (i.e., intended or judicial dicta) are interpreted to be authoritative expressions or deliberate statements of the law by an appropriate court there is some reason to treat them with more respect—and perhaps endow them with some precedential value. See the comprehensive discussion of these issues in Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI-KENT L. REV. 655, 698-730 (1999).

70. In *Re Alamance County Court Facilities*, 405 S.E.2d 125, 129 (N.C. 1991). See also *Bell v. Smith*, 140 S.E.2d 542, 543 (N.C. 1965) (this case considered the trial court's inherent authority over appointment of a guardian ad litem for an incompetent party).

71. “[Dicta] should not influence the decision in this case unless it logically assists in answering the question we are now called upon to decide.” *Muncie v. Insurance Co.*, 116 S.E.2d 474, 477 (N.C. 1960); “We, therefore, adhere and follow the rule laid down by way of dictum in *Whitehurst v. Gotwalt* . . . not under the doctrine of stare decisis, but by reason of its soundness.” *Ryan v. Trust Co.*, 70 S.E.2d 853, 857 (N.C. 1952).

sonably applicable to argument and analysis found in law review or newspaper articles—or in vacated Court of Appeals' opinions.⁷²

IV. CONCLUSION

One commentator, either a wise man or a jokester (it's hard to tell), has opined that "[t]he true meaning of stare decisis—the proposition that the rule of a precedent provides a very, very, very good reason for deciding similar cases in the same way—depends upon the meaning of the phrase 'very, very, very good reason.'"⁷³ If this definition is accurate, then maybe an implied precedent is a "very, very good reason," a clear dictum is a "very good reason," and any statement at all is a "good reason." But I, for one, hate to see the holding/dictum distinction go gentle into that good night.

Although the holding/dictum distinction (or said another way, the precedential/persuasive distinction) may not be healthy, is sometimes obscure and is not immune from manipulation by result-oriented attorneys and jurists, those who take legal argument seriously⁷⁴ must not rest once they have discovered relevant language in an appellate opinion. It makes a difference if the language is obiter dicta, intended dicta or a necessary part of the case's holding. Attorneys and judges should not forego this analysis.⁷⁵

Attorneys should also not forego a review of the subsequent history of a Court of Appeals' opinion that contains a proposition they wish to present to the court. There is an important distinction between Court of Appeals' opinions that are "*overruled on other grounds*" and those that are "*reversed on other grounds*" or "*vacated on other grounds*." "*Overruled on other grounds*" means that a subsequent opinion of the Supreme Court,⁷⁶ arising out of a different case, over-

72. In addition to holding, judicial dictum and obiter dictum, one commentator suggests a fourth category for judicial statements—he calls it judicial "advice." See Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 729 (1999). One example of judicial advice might be *State v. Ferebee*, 529 S.E.2d 686, 690 (N.C. App. 2000) where the court stated: "[T]hough the issue is not before us we believe the trial courts would be well advised to define the phrase 'reasonable fear' during its instructions in cases decided under the prior or current version of G.S. § 14-277.3(a)."

73. Michael Sean Quinn, *Argument and Authority in Common Law Advocacy and Adjudication: An Irreducible Pluralism of Principles*, 74 CHI.-KENT L. REV. 655, 698 (1999).

74. For several fascinating articles on this subject see "Symposium on Taking Legal Argument Seriously," 74 CHI.-KENT L. REV. 317-822 (1999).

75. Regarding the trial court's authority to distinguish holding from dictum, see Thomas L. Fowler, *Of Moons, Thongs, Holdings and Dicta: State v. Fly and the Rule of Law*, 22 CAMPBELL L. REV. 253 (2000).

76. The Court of Appeals may not overrule itself. In the Matter of Appeal from Civil Penalty, 379 S.E.2d 30, 37 (N.C. 1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

turned the specific proposition in the Court of Appeals' opinion. Other holdings in the Court of Appeals' opinion, that were not before the Supreme Court, remain final decisions (assuming they were final decisions in the first place) and remain entitled to whatever precedential status they had prior to the Supreme Court decision that overruled only the one proposition in the Court of Appeals' opinion. "*Reversed on other grounds*" or "*vacated on other grounds*," however, indicate that the Supreme Court was reviewing the *same* case and that the Supreme Court's opinion, rather than the Court of Appeals' opinion, was the final decision in the case. As discussed in Section II, a Supreme Court opinion that reverses or vacates a Court of Appeals' decision on less than all the issues addressed by the Court of Appeals' opinion can render those other resolutions as no longer of precedential value—although they may remain persuasive dicta that a court may choose to follow.⁷⁷

77. See *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 476 S.E.2d 434, 438 (N.C. App. 1996)(the Court noted that an earlier Court of Appeals decision, *Martin I*, resolved a substantive issue but was subsequently overruled on procedural grounds by the Supreme Court, which vacated *Martin I* as, inter alia, an advisory opinion. The *Kisiah* Court stated that "[a]lthough *Martin I* has no precedential effect, it is nonetheless instructive.").