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Reconsideration of Interlocutory Orders: A Critical Reassessment of Calloway v. Ford Motor Co. and Whether One Judge May Overrule Another

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RECONSIDERATION OF INTERLOCUTORY ORDERS: A CRITICAL REASSESSMENT OF *CALLOWAY V. FORD MOTOR CO.* AND WHETHER ONE JUDGE MAY OVERRULE ANOTHER

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The rule in North Carolina that one trial judge may not overrule another is commonly understood to prohibit reconsideration of interlocutory orders by a successor judge presiding at a later stage of the same proceeding. This Article contends that even under North Carolina's system of rotation of superior court judges, the efficient supervision of trials requires that judges exercise the traditional, inherent power to reconsider and modify, if necessary, such in fieri *orders. The authors trace the law of reconsideration of interlocutory orders back to the adoption of the North Carolina Code of Civil Procedure in 1868, just prior to the reinstatement of rotation under the 1875 amendments to the North Carolina Constitution. The authors argue that, for more than a century, the only orders precluded from reconsideration at the trial level were those of predecessor judge that were immediately reviewable under the appeals provision of the Code. The North Carolina Supreme Court's rationale in the 1972 case* Calloway v. Ford Motor Co., *however, has led the court of appeals to forbid the reconsideration of interlocutory orders and to allow renewed motions only of matters addressed to the discretion of the trial court on changed circumstances. The authors recommend that the supreme court disavow its rationale in* Calloway *and return to a traditional rule that is more workable than the strict jurisdictional prohibition now observed in North Carolina.*

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"The principle that no appeal lies from one judge of the Superior Court to another ... has no application to a mere interlocutory order."[1]

INTRODUCTION

Most attorneys practicing in North Carolina today are familiar with the simple rule recurring in recent case law that "[o]ne superior

1. Bland v. Faulkner, 194 N.C. 427, 429, 139 S.E. 835, 836 (1927). This statement contrasts with the oft-quoted language from *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972), that "no appeal lies from one Superior Court judge to another."

court judge may not overrule another."[2] Many attorneys understand this rule to mean that a trial judge lacks the power to reconsider and overrule an interlocutory order entered in the same case by another trial judge. The reasons for such a rule may seem rather obvious. The first is judicial economy. Litigation cannot efficiently progress to a trial and conclusion if intermediate decisions of the trial court are routinely reopened, reconsidered, and possibly overruled or modified. Second, such reconsideration would appear to encourage judge shopping. Third, and perhaps of more concern, permitting one judge to overrule another judge's decision could damage the relationship between the two judges. Fourth, routine reversals might also damage the public's perception that judges' decisions are based on the rule of law rather than on their individual proclivities. Finally, to allow reconsideration would appear to permit a judge to review the prior decision of another judge of coordinate jurisdiction for error. Such reconsideration would seem to subvert the normal appellate process whereby error is subject to review and correction in an appeal to a higher court. It is thus clear that powerful policies militate against the routine reconsideration of interlocutory orders.

Yet, powerful policies also caution against an absolute prohibition of reconsideration.[3] As litigation progresses,

2. Able Outdoor, Inc. v. Harrelson, 341 N.C. 167, 169, 459 S.E.2d 626, 627 (1995) (citing *Calloway*, 281 N.C. at 501, 189 S.E.2d at 488); *see also* Charns v. Brown, 129 N.C. App. 635, 638, 502 S.E.2d 7, 9 (1998) ("A superior court judge may not overrule the order of another superior court judge."); Huffaker v. Holley, 111 N.C. App. 914, 915, 433 S.E.2d 474, 475 (1993) ("North Carolina adheres to the rule that one superior court judge may not overrule the order of another superior court judge previously made in the same case on the same issue."); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 413, 428 S.E.2d 453, 458 (1993) ("One superior court judge may not overrule a judgment previously made by another superior court judge in the same action."); Whittaker Gen. Med. Corp. v. Daniel, 87 N.C. App. 659, 663, 362 S.E.2d 302, 305 (1987) ("[T]his Court has consistently held that one superior court may not overrule another."); Smithwick v. Crutchfield, 87 N.C. App. 374, 377, 361 S.E.2d 111, 113 (1987) ("The law is clear that one Superior Court judge may not reconsider and grant a motion for summary judgment previously denied by another judge."); Jenkins v. Wheeler, 81 N.C. App. 512, 514, 344 S.E.2d 371, 373 (1986) ("One superior court judge may not overrule another.").

3. Two of the foremost authorities in federal civil procedure explained these policies as follows:

> A wide degree of freedom is often appropriate when the same question is presented to different judges of a single district court. To be sure, unfettered reexamination would unduly encourage efforts to shop rulings from one judge to another, and might seem an undesirable denial of comity between colleagues. Substantial freedom is desirable nonetheless, particularly since continued proceedings may often provide a much improved foundation for deciding the same issue.

18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4478, at 794 (1981).

circumstances may change, issues may be resolved or clarified, and better perspectives or understandings of how the trial should proceed may evolve. The trial court's responsibility to ensure a fair trial requires some flexibility in reconsidering intermediate orders entered at earlier stages of the proceedings and certainly requires the authority to correct manifest error in earlier intermediate rulings. Nothing is gained, and much is sacrificed, if litigation must proceed in accordance with an obviously erroneous interlocutory ruling only to have the ruling corrected on appeal so that new litigation can commence.[4] These competing concerns have resulted in the rule followed by both the federal courts[5] and a majority of the states[6] that:

4. *Cf.* Dictograph Prods. Co. v. Sonotone Corp., 230 F.2d 131 (2d Cir. 1956). In *Dictograph*, a successor judge granted summary judgment for the defendants despite a previous denial of the motion by another judge. Judge Learned Hand considered "whether the denial had become 'the law of the case,' [that] must be accepted thereafter without re-examination." *Id.* at 134. Judge Hand noted that the denial of the motion for summary judgment was not appealable and that the consequence of forbidding reconsideration was that, if the denial was in error, the parties "would be compelled to suffer the loss of time and money involved in a trial that from the outset was unnecessary." *Id.* Judge Hand held that the successor judge had the discretion to reconsider and grant the motion for summary judgment. *See id.* at 136.

5. *See* John Simmons Co. v. Grier Bros. Co., 258 U.S. 82, 88 (1922) (noting that, at any time before final decree, the court may modify or rescind an interlocutory decree); Avitia v. Metropolitan Club of Chicago, Inc., 49 F.3d 1219, 1227 (7th Cir. 1995) (explaining that a judge may reexamine a ruling given a strong and reasonable conviction that it was wrong and if rescinding it will not cause undue harm to the party that had benefited); Murr Plumbing, Inc. v. Scherer Bros. Fin., 48 F.3d 1066, 1070 (8th Cir. 1995) (acknowledging the inherent power of the district court to reconsider and modify interlocutory orders before entry of judgment because the "law of the case" doctrine applies only to final judgments); *In re* Unioil, Inc., 962 F.2d 988, 993 (10th Cir. 1992) (stating that when the court is convinced that the interlocutory ruling is substantially erroneous "the only sensible thing to do is set itself right to avoid subsequent reversal"); Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 185 (5th Cir. 1990) ("[B]ecause the denial of a motion for summary judgment is an interlocutory order, the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law."); Union Mut. Life Ins. Co. v. Chrysler Corp., 793 F.2d 1, 15 (1st Cir. 1986) (stating that the law of the case doctrine does not limit the power of a court to change an interlocutory order at any time until the entry of judgment); *see also* FED. R. CIV. P. 54(b) (providing that all decisions are "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties"); WRIGHT & MILLER, *supra* note 3, § 4478, at 789 ("Although courts are often eager to avoid reconsideration of questions once decided in the same proceeding, it is clear that all federal courts retain power to reconsider if they wish."); Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. PA. L. REV. 595, 599 (1987) ("[G]iven the federal trial courts' unquestioned power to reconsider their earlier rulings . . . [l]aw of the case principles are . . . best understood as rules of sensible and sound practice that permit logical progression toward judgment, but that do not disable a court from altering prior interlocutory decisions in a case."). *But see* Pit River Home and Agricultural Coop. v. United States, 30

> although ordinarily a judge should hesitate to vacate, modify, or depart from the interlocutory order or ruling of another [judge] in the same case . . . [t]he general rule is that a judgment which is merely interlocutory may be set aside or modified even at a term subsequent to that at which it was rendered, and that until the rendition of a final judgment the interlocutory judgment remains within the control of the court.[7]

F.3d 1088, 1097 (9th Cir. 1994) (arguing that the law of the case doctrine applies to all interlocutory orders). *See generally* John A. Glenn, Annotation, *Propriety of Federal District Judge's Overruling or Reconsidering Decision or Order Previously Made in Same Case by Another District Judge*, 20 A.L.R. FED. 13 (1974) (surveying the law of reconsideration in the federal district courts).

6. *See* W.W. Allen, Annotation, *Interlocutory Ruling or Order of One Judge as Binding on Another in Same Case*, 132 A.L.R. 14, 15 (1941); *see also* Breen v. Phelps, 439 A.2d 1066, 1075 (Conn. 1982) (stating that the trial "judge may, in a proper case, vacate, modify or depart from the interlocutory order . . . of another judge in the same case"); Nationsbank, N.A. v. Ziner, 726 So. 2d 364, 366 n.1 (Fla. 1999) (noting that the "trial court has inherent authority to reconsider any of its interlocutory rulings prior to final judgment and the successor judge has the same authority . . . as the original judge"); Rowe v. State Bank of Lombard, 531 N.E.2d 1358, 1363 (Ill. 1988) (stating that a successor judge had authority to reconsider the denial of a motion for summary judgment made by a different judge of the same court, even though no additional facts or changed circumstances were presented); Otte v. Otte, 655 N.E.2d 76, 84 (Ind. Ct. App. 1995) (holding that the trial court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although the court should be loathe to do so absent extraordinary circumstances); City of Wichita v. Rice, 889 P.2d 789, 794 (Kan. Ct. App. 1995) (stating that an issue once decided should not be reconsidered unless it is clearly erroneous or manifestly unjust but that a court retains the inherent power to do so even where the same issue is presented to a different judge of the same court in the same case until entry of final judgment); Peterson v. Hopson, 29 N.E.2d 140, 145 (Mass. 1940) ("But until final judgment or decree there is no lack of power [to reconsider the order of the same or another judge], and occasionally the power may properly be exercised."); Kornberg v. Kornberg, 525 N.W.2d 14, 18 (Minn. Ct. App. 1995) ("A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances."); Johnson v. Cyklop Strapping Corp., 531 A.2d 1078, 1081 (N.J. 1987) (stating that the "trial court has inherent power, to be exercised in its sound discretion, to review, revise, reconsider, and modify its interlocutory orders at any time prior to entry of final judgment"); State v. Public Employees Retirement Bd., 882 P.2d 548, 551 (N.M. 1994) (noting that the trial court has the inherent authority to reconsider its interlocutory orders and that such reconsideration is proper even by the successor judge); Velez v. DeLara, 905 S.W.2d 43, 45 (Tex. App. 1995) (noting that the trial courts retain authority to reconsider any interlocutory order until the judgment becomes final); Caldwell v. Caldwell, 350 S.E.2d 688, 691 (W. Va. 1986) (holding that until final judgment, interlocutory orders are left to the plenary power of trial court). *But see* Harrity v. Medical College of Pa. Hosp., 653 A.2d 5, 8 (Pa. 1994) ("Where a motion has been presented and decided and where no new facts are presented in a motion seeking the same relief, the first order should be followed based on considerations of judicial economy and efficiency.").

7. Allen, *supra* note 6, at 15; *see also* Glenn, *supra* note 5, at 17–18 (stating that a federal district judge should not overrule or reconsider an order of another in the same

The majority rule is that judges do not lack the authority or jurisdiction to reconsider if they believe it is proper, which means that one superior court judge may overrule another.

North Carolina attorneys may be surprised to learn that North Carolina also followed the majority rule for at least one hundred years prior to the 1972 North Carolina Supreme Court case, *Calloway v. Motor Co.*,[8] which is consistently cited as holding that one judge may not overrule another. The *Calloway* opinion failed to explain why North Carolina should abandon the majority discretionary rule in favor of a rigid jurisdictional rule; indeed, *Calloway* failed even to recognize that much of its language could be read as challenging long-established rules of the law of reconsideration. Nevertheless, this interpretation of *Calloway* has, for the most part,[9] remained unchallenged by subsequent case law.

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case, but may do so when there are good reasons). One source defines the rule as follows:

> A trial court has discretionary power by leave of court to allow renewal of a motion, to allow successive motions and to permit a motion which has been denied to be revived and reconsidered. When a motion is before the court pursuant to permission to renew after a previous denial, the court's power to weigh the conflicting affidavits is the same as on the first consideration thereof, and it has the power to re-examine the evidence and arrive at a different conclusion if it thinks the ends of justice will be best served thereby.

56 AM. JUR. 2D *Motions, Rules, and Orders* § 28, at 22–23 (1971).

8. 281 N.C. 496, 189 S.E.2d 484 (1972).

9. First, it should be noted that Justice Higgins concurred only in the result in *Calloway*. *See id.* at 506, 189 S.E.2d at 491 (Higgins, J., concurring in the result). One wonders what troubled him about the rationale of Justice Sharp's opinion. It should also be noted that several post-*Calloway* opinions nevertheless use language clearly associated with the majority rule as stated in *Bland*. *See, e.g.*, State v. Stokes, 308 N.C. 634, 642, 304 S.E.2d 184, 190 (1983) ("[An interlocutory] order or judgment is subject to change during the pendency of the action *to meet the exigencies of the case.*") (emphasis added); State v. Duvall, 304 N.C. 557, 562, 284 S.E.2d 495, 498 (1981) ("[T]he Court of Appeals correctly stated the applicable law . . . concerning the *general impropriety* of a superior court judge's rectification of what he might perceive to be legal error in the prior ruling of another superior court judge in the same case.") (emphasis added); Holloway v. Wachovia Bank & Trust Co., 109 N.C. App. 403, 412, 428 S.E.2d 453, 458 (1993) (citing *Calloway*, 281 N.C. at 505, 189 S.E.2d at 490) ("[T]he trial court exercised *proper deference* towards that initial ruling.") (emphasis added). The issue was also addressed in Justice Huskins's dissent in *State v. Fearing*, 304 N.C. 499, 284 S.E.2d 479 (1981). Justice Huskins wrote:

> I further dissent from . . . the majority opinion in this case which holds that Judge Brown had no authority to entertain and act upon the State's renewed motion . . . for a special venire because Judge Browning had previously denied a similar motion . . . . It is my view that Judge Brown was not bound by the interlocutory order of Judge Browning and had authority, in his sound discretion as the trial judge, to order a special venire of jurors from another county if he determined such action was necessary to protect and promote the proper administration of justice.

304 N.C. at 509–10, 284 S.E.2d at 486 (Huskins, J., dissenting).

Whatever its holding, however, a review of the cases cited in *Calloway* suggests that the court may have misunderstood the issue before it, misinterpreted the applicable precedent, and applied case law that was not on point. This Article argues that *Calloway* merely recognized the authority of a successor judge, given changed conditions, to grant a motion to amend that had previously been denied by another judge and need not have reached the question of a successor judge's authority to reconsider an interlocutory order on substantially similar facts. This reading contradicts interpretations of *Calloway* that extrapolate from it the rule that one judge may not overrule another.[10]

Since *Calloway*, the North Carolina Supreme Court has remained largely silent on the authority of judges to reconsider interlocutory orders. The difficult task of crafting a coherent rule governing reconsideration of interlocutory orders from the language and analysis in *Calloway* has been left almost entirely to the court of appeals. In the twenty-eight years since *Calloway*, however, the court of appeals has failed to develop a functional rule that can be consistently applied. The cause of this failure has not been the court of appeals's lack of effort, but rather the difficulty of accommodating the *Calloway* analysis. This Article contends that *Calloway*'s credibility and precedential value do not survive scrutiny. Because *Calloway* is the only basis for North Carolina's minority rule, the North Carolina courts should return to the majority rule—a rule that arguably was never overruled and was always the better rule as a matter of policy.[11] Even if *Calloway*'s rationale is followed, the case

10. *See infra* notes 195–280 and accompanying text.

11. The pros and cons of reopening matters already decided are well established. First, reconsideration can be viewed as inefficient. *See* Carr v. Great Lakes Carbon Corp., 49 N.C. App. 631, 636, 272 S.E.2d 374, 378 (1980) ("The conservation of judicial manpower and the prompt disposition of cases are strong arguments against allowing repeated hearings on the same legal issues."); 1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.404[1], at II-3 (2d ed. 1996) ("[E]fficient disposition of the case demands that each stage of the litigation build on the last, and not afford an opportunity to reargue every previous ruling."). Second, reconsideration seems to encourage judge shopping. *See* State v. Duvall, 304 N.C. 557, 562, 284 S.E.2d 495, 498 (1981) (stating that if reconsideration is allowed "the orderly trial process could be converted into a chaotic, protracted affair as one party attempted to shop around for a more favorable ruling from another superior court judge"). Finally, reconsideration can be viewed as unseemly. *See Calloway*, 281 N.C. at 504, 189 S.E.2d at 490 (stating that a rule allowing reconsideration "is logically indefensible and could serve only to undermine the considerations of orderly procedure, courtesy and comity"). While these matters are important considerations that require a judge to hesitate before reconsidering, more important policy considerations argue against a strict jurisdictional rule. According to one commentator:

> The primary value contending against absolute preclusion is that of the trial court

does not compel the North Carolina Court of Appeals's extensions of the rule.

In Part I, this Article examines the nature of interlocutory orders by addressing such orders' appealability and distinguishing the related principles of res judicata and law of the case. Part I also places these issues in the historical context of the North Carolina case law from 1800 to 1972. Part II analyzes the facts of *Calloway*, the issues considered by the North Carolina Supreme Court in its opinion, and the cases cited therein. Part III reviews the subsequent case law that has interpreted and applied the *Calloway* analysis and argues that the standard that has developed is not working. The Article concludes in Part IV by recommending that North Carolina clarify, distinguish, or disavow *Calloway* and return to the rule that, although she should hesitate before doing so, one judge may overrule another.

I. INTERLOCUTORY ORDERS, APPEALABILITY, RES JUDICATA, AND LAW OF THE CASE

Judgments and orders of the court fall into two classes: final judgments and interlocutory orders.[12] A final judgment disposes of

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deciding correctly and wisely, thereby better serving the ends of justice, without either distorting the law or treating litigants unfairly. The efficiency gained through avoidance of appellate reversals and retrials is a valued by-product of correct trial rulings. When reconsideration is particularly likely to correct an erroneous ruling or to lead to a manifestly more just decision, the policies supporting law of the case preclusion are outweighed.

Steinman, *supra* note 5, at 605. Steinman also observes:

> [M]ere doubt as to the correctness of a prior ruling typically will not suffice to elicit reconsideration. When there is "mere doubt," as opposed to a clear conviction that a previous ruling was erroneous, there is no sufficient guarantee that the trial court's second decision will be more correct, more just, or more likely to stand up on appeal, to justify the various costs of reconsideration.

Id. at 605–06. *See generally* Allan D. Vestal, *Law of the Case: Single-Suit Preclusion*, 1967 UTAH L. REV. 1, 19 (1967) (discussing aspects of law of the case).

12. Some cases carefully note the distinction between an order and a judgment. *See, e.g.*, Hieb v. Lowery, 344 N.C. 403, 410, 474 S.E.2d 323, 327 (1996) (defining judgment); Curry v. First Fed. Sav. & Loan Ass'n, 125 N.C. App. 108, 112, 479 S.E.2d 286, 289 (1997) (" 'A judgment is a determination or declaration on the merits of the rights and obligations of the parties to an action,' . . . and an order is 'every direction of a court not included in a judgment.' ") (quoting Hunter v. City of Asheville, 80 N.C. App. 325, 327, 341 S.E.2d 743, 744 (1986)). *But see* State v. T.D.R., 347 N.C. 489, 495, 495 S.E.2d 700, 703 (1998) (interpreting the term "final order" in section 7A-666 of the North Carolina General Statutes). The Code of Civil Procedure of North Carolina of 1868, so important in the history of the law of reconsideration, codified the distinction between orders and judgments. Under the code, "[e]very direction of a court or Judge, made or entered in writing, and not included in a judgment, is denominated an order," N.C. CODE CIV. P. § 344 (1868), while a judgment was defined as "the final determination of the rights of the parties in the action." *Id.* § 216. A well-regarded commentator has also recorded the

the cause as to all the parties, leaving nothing to be judicially determined by the trial court. An interlocutory order, made while an action is pending, does not dispose of the case, but requires further action by the trial court to settle and determine the entire controversy.[13] Examples of interlocutory orders include rulings on motions to amend pleadings, to strike, to sever, to certify as a class action, to continue, for preliminary injunction, for special venire, for individual voir dire, for summary judgment, on discovery orders, on evidentiary rulings, as well as the denial of a 12(b)(6) motion to dismiss.

Interlocutory orders build upon each other to guide the litigation by clarifying and narrowing the issues as the matter proceeds through trial to a final disposition. While the litigation will not proceed to a final resolution if such intermediate orders are constantly revisited and reconsidered, this concern does not require a rigid rule that such orders are final and may never be reconsidered, modified, or overruled. Circumstances, perspectives, and understandings of how the trial should proceed may change, and issues may be resolved or clarified as litigation progresses. The trial court's responsibility to ensure a fair trial requires some flexibility in reconsidering intermediate orders entered at earlier stages of the proceedings. These competing concerns have resulted in a rule followed by both the federal courts[14] and a majority of the states[15] that judges have the discretionary authority to vacate, modify, or depart from the interlocutory order of another judge in the same case, even at a subsequent term, until the entry of a final judgment.[16]

North Carolina adhered to the majority rule for most of its history. In the late eighteenth and early nineteenth centuries, a North Carolina trial judge exercising equity jurisdiction had the power to reconsider his orders[17] so long as such decisions remained within the control of the court. An order remained *in fieri* —within the control

distinction, stating that "[a]n order is a mandate or determination of the court upon some subsidiary or collateral matter arising in an action, not disposing of the merits, but adjudicating a preliminary point or directing some step in the proceedings." HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 1, at 5 (1902).

13. *See* Veazey v. Durham, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

14. *See supra* note 5 and accompanying text.

15. *See supra* note 6 and accompanying text.

16. *See supra* note 7 and accompanying text.

17. Trial court judges even had the power to reconsider their judgments. *See* Kenon v. Williamson, 2 N.C. (1 Hayw.) 350, 352 (1796) ("Before it is finally pronounced and recorded, any mistakes may be rectified by a rehearing granted upon petition for that purpose, stating wherein the injustice is likely to happen.").

of the court, sometimes said to be within the "breast of the court"—until the end of the term at which the final judgment was enrolled.[18] Counsel secured a rehearing by certifying[19] in a petition[20] that reasonable cause[21] for such rehearing existed.

After North Carolina amended its constitution in 1868 to provide for the merger of common-law and equity practice[22] and mandated a new code of civil procedure,[23] the supreme court extended the authority to reconsider *in fieri* orders to code practice.[24] Under these cases a misapprehension of law or fact presented a proper case[25] for

18. One commentator noted that a decree is enrolled "as of the term in which the final decree was passed" and that "judgments, decrees or other orders ... are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and may then be set aside, vacated, modified or annulled by that court." 2 CHARLES FISK BEACH, JR., A TREATISE ON THE MODERN PRACTICE IN EQUITY § 831, at 827–28 (1894). Thus, before enrollment, "the decree ... may be altered by a rehearing before the same jurisdiction," JOHN ADAMS, THE DOCTRINE OF EQUITY 695 (2nd Am. ed., Philadelphia, T. & J.W. Johnson 1852), but "as soon as [e]nrollment has taken place it becomes a conclusive decree in Chancery, and can only be altered by an appellate jurisdiction." *Id.* at 696.

19. In *Wilcox v. Wilkinson*, 5 N.C. (1 Mur.) 11, 12–13 (1804), North Carolina adopted the English practice of granting a petition for rehearing as a matter of course if certified by counsel. *See* BEACH, *supra* note 18, § 830, at 833, 833 nn.4–5. Typically, counsel certified that there was reasonable cause for rehearing, but was not required to state the specific grounds. *See* ADAMS, *supra* note 18, at 700–01.

20. The procedure for "rectify[ing]" or "setting ... right" an order was argued by counsel in *Kenon v. Williamson*, 2 N.C. (1 Hayw.) 350, 351, 352 (1796) (contrasting bills of review and rehearings); *see also* Edney v. Edney, 81 N.C. 1, 3 (1879) (distinguishing the use of *viva voce* motion and written petition); BEACH, *supra* note 18, § 832, at 829 ("[A]n interlocutory decree may be set aside in some cases on mere motion; in others by petition for rehearing—the distinction ... not being clearly defined.").

21. *See* Walton v. Erwin, 36 N.C. (1 Ired. Eq.) 136, 140 (1840) (Ruffin, C.J.) (stating that a court of concurrent jurisdiction will reconsider an order where "[t]here were no means before the [first] court of forming a proper judgment, and hence the order must be attributed to surprize or undue influence as an ex parte motion"); Ashe v. Moore, 6 N.C. (2 Mur.) 383, 384 (1818) ("Every order made in the progress of a cause may be rescinded or modified, upon a proper case being made out."); *Wilcox*, 5 N.C. (1 Mur.) at 13, 14 (noting that a second rehearing may be allowed if there are substantial reasons against a decree, or "if a justice of the case demands a re-hearing"); *Kenon*, 2 N.C. (1 Hayw.) at 351–52 (discussing counsel's argument that a rehearing is appropriate to correct an interlocutory decree hastily or improvidently granted and stating that a rehearing is acceptable for correcting the injustice of a decree mistakenly granted).

22. *See* N.C. CONST. art. 4, § 1 (1868).

23. *See* N.C. CONST. art. 4, § 2 (1868).

24. *See* Welch v. Kingsland, 89 N.C. 179, 181 (1883) (stating that the power to modify erroneous orders during the progress of a cause "was a well settled rule in the courts of equity, but must be equally applicable to the present practice, which in its essential features, conforms to that prevailing in those courts"); Love & Co. v. Young, 69 N.C. 65, 66 (1873) (justifying the reconsideration of a post-1868 case by noting that "[a]ccording to the old equity practice, petitions to rehear were of every-day occurrence").

25. This rule appeared in leading secondary sources of the late 19th and early 20th

reconsideration even upon substantially similar facts—thus allowing correction by the trial court of any erroneous or unjust order.[26] In 1873 the court stated:

> We are not aware of any rule of law which forbids his Honor, at Spring Term, 1873, from reconsidering an interlocutory order made at Fall Term, 1872. According to the old equity practice, petitions to rehear were of every-day occurrence. If, while the proceeding was pending, the Judge became satisfied, that because of the insufficiency of the affidavit, or for other reason, the case was not properly

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centuries. For example, Professor Black asserted that rulings on motions incidental or collateral to the main controversy "are not technically binding on the court, as the law of the case, except that, as between the same parties and on the same showing of facts, the court is not required to consider the same question a second time." HENRY CAMPBELL BLACK, HANDBOOK ON THE LAW OF JUDICIAL PRECEDENTS OR THE SCIENCE OF CASE LAW § 86, at 280 (1912). But Black goes on to explain that "at the same time, if the court doubts the correctness of its former ruling, or desires a more thorough investigation of the question involved, it is no abuse of its discretion to permit the same question to be re-opened in another form." *Id.* § 86, at 281. Another noted authority, Professor A.C. Freeman, observed that the reasons for allowing discretionary reconsideration apply only to those proceedings from which no redress can be obtained by appeal, thus creating the possibility that misapprehension or inadvertence of the judge might cause grievous wrong. *See* A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 326, at 350 (2nd ed., San Francisco, A.L. Bancroft & Co. 1874) (citations omitted). A legal encyclopedia of the era describes the rule as such: "Leave to reargue will be granted where it appears that there is some decision or some principle of law which would have a controlling effect and which has been overlooked or that there has been a misapprehension of facts, but not otherwise." 14 THE ENCYCLOPEDIA OF PLEADING AND PRACTICE *Motions* § 14, at 174 (William M. McKinney ed., Long Island, Edward Thompson Co. 1899); *see also id.* § 15, at 189 (surveying states' practice as to when leave will be granted for renewal of motions).

26. For relevant North Carolina cases, see Revis v. Ramsey, 202 N.C. 815, 816, 164 S.E. 358, 358 (1932) (holding that where the first judge perhaps misapprehended the defendant's answer, the succeeding judge could exercise his discretion to grant a renewal of the motion to amend to set up the statute of limitations); Bland v. Faulkner, 194 N.C. 427, 429, 139 S.E. 835, 836 (1927) (correcting ex mero motu a perceived error of law and declining to submit to the jury issues directed to it by the preceding judge); State v. Dewey, 139 N.C. 556, 559, 51 S.E. 937, 938 (1905) (holding that it was within the power of the same judge to grant in his discretion a motion for bill of particulars that had been denied at an earlier term because the order was not res judicata); Allison v. Whittier, 101 N.C. 490, 496, 8 S.E. 338, 340 (1888) (stating that the same judge could reconsider an order upon further reflection or upon fuller information, such that "what may one day be refused may the next day be granted"); Maxwell v. Blair, 95 N.C. 317, 321 (1886) (stating that where an interlocutory decree for a sale of land contained an error, the clerk had the power to correct his earlier order of sale); *Welch*, 89 N.C. at 181 (holding that the court had the power to entertain a motion to vacate a prior order that was allegedly erroneous due to lack of jurisdiction of the prior judge and that the court should exercise its discretion "to promote the ends of justice"); Mebane v. Mebane, 80 N.C. 34, 41 (1879) (stating that although counsel couched the issue as relief from final judgment, an order on foreclosure of a mortgage was interlocutory and was thus modifiable to prevent serious and irremediable injury); *Love*, 69 N.C. at 66 (allowing a motion to dismiss after the same judge had denied the motion as matter of law at the prior term).

> constituted before him, it was his duty to dismiss the proceeding, notwithstanding he at Fall Term, 1872, failed to take the same view of the case.[27]

A. *Appealability of Interlocutory Orders Pending Entry of Final Judgment*

The status of interlocutory orders pending entry of final judgment differs significantly from the status of such orders after entry of final judgment because, as a general rule, interlocutory orders are not reviewable or correctable by the appellate courts until after the final judgment has been entered. As the North Carolina Supreme Court has explained:

> While final judgments are always appealable, interlocutory decrees are immediately appealable only when they affect some substantial right of the appellant and will work an injury to him if not corrected before an appeal from final judgment .... "A nonappealable interlocutory order ... which involves the merits and necessarily affects the judgment, is reviewable ... on appropriate exception upon an appeal from the final judgment in the cause ...." These rules are designed to prevent fragmentary and premature appeals that unnecessarily delay the administration of justice and to ensure that the trial divisions fully and finally dispose of the case before an appeal can be heard .... "There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders."[28]

Thus, the reason that the principle that no appeal lies from one superior court judge to another does not apply to interlocutory orders, and the reason for distinguishing interlocutory orders from final judgments at all, is because interlocutory orders are not typically *immediately* appealable. If interlocutory orders need reviewing and correcting during the progress of the case, the trial court must take such action because the rules prohibit immediate appeal. The

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27. *Love*, 69 N.C. at 66. In *Love*, the appellant argued that the denial of the motion to dismiss at the fall term was "final and conclusive" *Id.* (citing Brown v. Hawkins, 68 N.C. 444, 445 (1873)). *Love* noted that in *Brown* the decision that could not be reconsidered by another superior court judge was a final judgment—not an interlocutory order as in the case at bar. *See id.*

28. Bailey v. Gooding, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980) (quoting Veazey v. Durham, 231 N.C. 357, 362–63, 57 S.E.2d 377, 381 (1950)); *see also* N.C. GEN. STAT. § 7A-27 (1999) (addressing the appealability of interlocutory orders); *id.* at § 1-277 (addressing the appealability of interlocutory orders).

supreme court expressly acknowledged this division of review and correction authority in *Lutz v. Cline*,[29] in which the court stated that alleged error in interlocutory orders that are not immediately appealable may be "passed upon ... either by the superior court in correcting its own errors, or by this court upon appeal" after final judgment.[30]

Erroneous or ill-advised interlocutory orders that need correcting to provide a fair trial should be corrected, if possible, in time to provide that the trial is fair the first time the matter is tried.[31] Only the trial court can provide this timely review and correction of interlocutory orders that are not immediately appealable. There is no conflict with appellate review because the interlocutory orders that determine how the case is tried—even if such orders are reconsidered and modified during the litigation—will be subject to appellate review after the trial is complete and final judgment entered. The appellate court is positioned to consider whether the trial was fair and whether any final[32] interlocutory order unduly prejudiced the proceedings. The existence or legitimacy of a tentative interlocutory order that was subsequently reconsidered and modified or overruled should rarely be a matter for the appellate court's attention. The appellate court will only be concerned with the legitimacy of the interlocutory orders that actually guided the litigation.

The rule that interlocutory orders may be reconsidered is based upon the unavailability of the appeals process to cure a correctable

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29. 89 N.C. 186 (1883).

30. *Id.* at 187; *see also* FREEMAN, *supra* note 25, § 325, at 350 ("The reasons assigned for investing courts with a discretionary power in rehearing matters decided upon a motion are applicable only to those proceedings from which no redress can be obtained by appeal.").

31. It is simply more efficient to allow the trial court to reconsider interlocutory orders as necessary than it is to lock the court into its erroneous or hasty orders and then await correction at the appellate level. One commentator states the following:

> Regardless of rulings which have been made in a given case, the [trial] court knows that on appeal, incorrect rulings of law are subject to reversal. It seems obviously wasteful of the court's time to proceed to adjudicate a case using incorrect principles because of the reversal which will probably occur. This means that a [trial] court should apply the correct law regardless of earlier rulings on the matter. If the correct law is known through decided cases by controlling courts, then the trial court has no choice.

Vestal, *supra* note 11, at 19; *see also* Allen, *supra* note 6, at 16 ("[W]here no direct appeal lies from the previous erroneous ruling, [continuing the litigation on a defective foundation] may entail a serious waste of time, labor and expense.").

32. An interlocutory order would become "final" upon entry of the final judgment in the case. At that point the interlocutory order would no longer be within the control of the trial court and would be subject to appeal along with the final judgment.

order in a timely manner. If the appeals process is available, however, reconsideration need not be allowed and different rules might apply. In the early 1800s, appeal by right was available once there was a final judgment.[33] This changed, however, when in 1868 a new code of civil procedure[34] authorized immediate appeal—appeal prior to final judgment—of an interlocutory order when the order was made as a matter of law and affected a substantial right.[35] Certain interlocutory orders thus became immediately reviewable by the appellate courts prior to final judgment. It was not obvious, however, which interlocutory orders affected a substantial right.

The substantial right[36] provision of the new appeal statute[37]

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33. *See infra* note 59.

34. The North Carolina Constitution of 1868 mandated the new code of civil procedure. *See* N.C. CONST. art. 4, § 2 ("Three Commissioners shall be appointed by [the] Convention to report to the General Assembly ... rules of practice and procedure in accordance with the provisions of the foregoing section ...."). The Ordinance of the Convention of 1868 Appointing Code Commissioners was ratified March 13, 1868; the First Report of the Code Commissioners was raced to the General Assembly on July 15, 1868; and the second report followed on its heels on August 31, 1868. As the Second Report states, "the Commissioners did not hesitate to take the Code of New York as the basis of that to be prepared for this State ...." SECOND REPORT OF THE CODE OF COMMISSIONERS (Aug. 31, 1868) (in N.C. CODE CIV. P., AUTHORIZATION, xiv, xvi (1868)).

35. *See* N.C. CODE CIV. P. § 299 (1868). The Code read:

> An appeal may be taken from every judicial order or determination of a Judge of a Superior Court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial, [sic]

Id. Under code practice, the phrase "substantial right" refers to matters of substance rather than matters of mere form, *see* 3 C.J. *Appeal & Error* § 265, at 454 (1915) (citations omitted), and the term "substantial" has been said to exclude rulings on merely technical points. *See* BLACK, *supra* note 12, § 22, at 34. The language "in effect determines the action, and prevents a judgment from which an appeal might be taken" is traced to common law practice. *Id.* § 21, at 33 ("Under the common law system, ... an order which does not settle and conclude the rights involved in the action, and does not deny the party the means of further prosecuting or defending the suit, is not so far final as to be a proper subject of appeal.") (citations omitted). For cases interpreting clauses of this statute in North Carolina and other code states, see 3 C.J. *Appeal & Error* § 265, at 454–55 & n.22 (1915) (discussing the "substantial right" clause); *id.* § 266, at 455 nn.24 & 27–28 (discussing the "in effect determines the action" clause). The language from the Code of 1868 may be compared to current statutory provisions. *See* N.C. GEN. STAT. §§ 7A-27(b), 1-277 (1999).

36. Courts have struggled with developing a test to determine which interlocutory orders should be immediately appealable. The "substantial right" test "is more easily stated than applied" and must usually be determined "in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." Waters v. Qualified Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). *See generally* J. Brad Donovan, *The Substantial Right Doctrine and*

received considerable attention in the century that North Carolina operated under the code of civil procedure. Interpretation of the provision initially found the North Carolina Supreme Court focusing on the right of immediate review from orders concerning provisional remedies.[38] The status of orders related to pleadings, such as rulings on the pleading of written demurrer[39] or orders on motion to strike, also arose. These issues proved difficult to resolve; as a result, the court found itself reduced at one time or another to invoking "established practice" to explain the appealability of orders on motion to strike and decisions on demurrer.[40] In the wake of these

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Interlocutory Appeals, 17 CAMPBELL L. REV. 71 (1995) (summarizing the North Carolina cases applying the substantial right test); Robert J. Martineau, *Defining Finality and Appealability By Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717 (1993) (discussing the federal final judgment rule and the statutory and judicially created exceptions that allow immediate appeal of some interlocutory orders); John C. Nagel, *Replacing the Crazy Quilt of Interlocutory Appeals Jurisprudence With Discretionary Review*, 44 DUKE L.J. 200 (1994) (criticizing the attempts of federal courts to create a formula that would predictably and accurately decide whether or not a given interlocutory order should be eligible for immediate appeal); Willis Whichard, *Appealability in North Carolina: Common Law Definition of the Statutory Substantial Right Doctrine*, 47 LAW & CONTEMP. PROBS. 123 (1984) (outlining the North Carolina cases applying the substantial right test).

37. Although this Article concentrates on the immediate appealability of orders under the substantial right provision of the new appeal statute, other statutes under the Code of Civil Procedure of North Carolina and subsequent codifications, or under court rules, supporting immediate review of orders, may relate to the law of reconsideration. *See, e.g.*, N.C. SUP. CT. R. PRACT. 4(a)(2) (1974 Cum. Supp.) (remaining in effect until July 1, 1975).

38. *See* Baker v. Garris, 108 N.C. 218, 226, 13 S.E. 2, 4 (1891). In summarizing prior case law, *Baker* notes:

> [C]ertain interlocutory orders—such as the appointment of receivers, motions to vacate attachments, orders of arrest, and the like—were held to be res judicata unless affidavits were presented showing additional facts subsequently transpiring. Provisional adjudications of this character are mere incidents to an action, the ultimate rights of the parties being tried upon issues of law or fact raised by the pleadings.

Id.

39. There had been a distinction in North Carolina law between formal (or written) demurrer and oral demurrer (sometimes called demurrer *ore tenus*). Demurrer *ore tenus* was not a demurrer at all, but was equivalent to a motion to dismiss, and if overruled, was not the subject of immediate appeal. *See* Power Co. v. Peacock, 197 N.C. 735, 737–38, 150 S.E. 510, 511 (1929). *See generally* 3 C.J. *Appeal & Error* § 312, at 486 n.19[k] (1915) (distinguishing demurrer *ore tenus* in North Carolina from written demurrers, the former not being appealable); ATWELL CAMPBELL MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 445, at 446–47 (1929) (discussing types of demurrers); *id.* § 676, at 772–73 (discussing the appealability of both types of demurrer).

40. Regarding resort to "established practice" as an explanation of the appealability of grants or denials of demurrer, see MCINTOSH, *supra* note 39, § 676, at 772 (citing Commissioners of Wake County v. Magnin, 78 N.C. 181, 185 (1878)). Professor McIntosh states that "We have, however, over and over again entertained appeals from such orders

difficulties, the North Carolina Supreme Court ultimately subjected each class of decision to a court rule that provided for review only by writ of certiorari.[41]

Thus, in cases in which there is a final judgment or where an interlocutory order is immediately reviewable because it affects a substantial right, the appellate court may correct any error in the interlocutory order, and the rule allowing reconsideration of the interlocutory orders at the trial level need not apply. Well-known principles of law address how lower courts must respond to appealable or appealed orders or judgments, but these principles are not applicable to the established law of reconsideration. Nevertheless, this distinction was (and is) sometimes overlooked or misunderstood, occasionally resulting in confusion and misstatement of the applicable principles of law. Res judicata, law of the case, and acquiescence are powerful principles that address the relationship between the appellate and trial courts. They do not, however, address the relationship between trial judges presiding at different stages of the same litigation, and they do not apply to the issue of reconsideration of mere interlocutory orders as described herein.

[overruling a demurrer]; and although it may admit of doubt . . . yet is a matter of practice which experience can best test. But it ought not to be left at sea to wreck legal navigation." *Id.* A number of cases support the proposition that the same explanation applied to the appealability of orders on motions to strike. *See* Hill v. Stansbury, 221 N.C. 339, 341–42, 20 S.E.2d 308, 309 (1942) ("Some doubt has been expressed whether an order denying a motion to strike under C. S., 537, is immediately appealable .... However this may be, the established practice authorizes the appeal.") (citations omitted); Parrish v. Atlantic Coastline R.R. Co., 221 N.C. 292, 296, 20 S.E.2d 299, 302 (1942) (stating that the "right to appeal immediately in such cases seems to be firmly established"); Virginia Trust Co. v. Dunlop, 214 N.C. 196, 199, 198 S.E. 645, 647 (1938) ("We are not sure of plaintiff's right to appeal on this [denial of motion to strike further defense] under C. S., 638 .... But since the holding is adverse to plaintiff's contention, and the appeal has precedent, we prefer to decide the matter upon the merits.").

41. *See* N.C. SUP. CT. R. PRACT. 4(a)(2) (1974 Cum. Supp.) (remaining in effect until July 1, 1975). The writ was grounded in "conceived prejudice" on final hearing for orders allowing or denying a motion to strike allegations in pleadings and grounded in "conceived prejudice" to a substantial right for orders overruling most demurrers. *See id.* Immediate appeal still lay from orders sustaining a demurrer. *See, e.g.*, Cecil v. High Point, Thomasonite & Denton R.R., 266 N.C. 728, 730, 147 S.E.2d 223, 225 (1966) (holding that orders on motions to strike portions of a complaint were immediately reviewable by certiorari only, while orders on motions to strike an entire cause of action, plea in bar, or entire defense, were immediately appealable as a sustained demurrer); Mercer v. Hilliard, 249 N.C. 725, 728, 107 S.E.2d 554, 556 (1959) ("Rule 4(a) . . . limits the right of immediate appeal only in instances where the demurrer is *overruled.*") (emphasis added). It is important to note that Rule 4 expanded the definition of acquiescence, discussed *infra* in section I.C., to include failure to petition an appellate court for writ of certiorari under Rule 4.

B. *Res Judicata and Law of the Case*

Res judicata or claim preclusion precludes a second lawsuit when the same claim is involved, when the suit is between the same parties or those in privity with them, and when there was a final judgment on the merits in the earlier action.[42] Res judicata is inapplicable to reconsideration because it requires a final judgment—meaning that all decisions of the trial court are final and fully subject to appeal. Collateral estoppel or issue preclusion provides that once an issue of ultimate fact has been determined by a valid and final judgment the issue may not be relitigated by the same parties in a subsequent action.[43] Issue preclusion is inapplicable to reconsideration because it also requires a final judgment which is fully subject to appeal. As our supreme court has stated, "res adjudicata does not extend to ordinary motions incidental to the progress of a cause, for what may one day be refused may the next be granted."[44] Once a final judgment is entered, all interlocutory orders become final and subject to appeal.

The rules governing reconsideration of interlocutory orders apply only so long as there is no final judgment entered. Reconsideration of a *final* judgment is not allowed except in the limited context of reconsideration during the session at which the judgment was entered[45] or "reconsideration" as allowed pursuant to Rules of Civil Procedure 59 and 60,[46] or pursuant to motions for appropriate relief.[47] Once the session is over and the final judgment is truly final, it is subject to review for error only by appeal and is not subject to reconsideration.[48]

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42. *See* Howerton v. Grace Hosp., Inc., 130 N.C. App. 327, 330, 502 S.E.2d 659, 661 (1998).

43. *See* State v. Adams, 347 N.C. 48, 61, 490 S.E.2d 220, 226 (1997).

44. Mabry v. Henry, 83 N.C. 298, 301 (1880).

45. During the session at which they were entered, even final judgments are *in fieri*. *See* State v. Quick, 106 N.C. App. 548, 561, 418 S.E.2d 291, 299 (1992) (holding that judges can modify their own orders or final judgments during the same term); *see also* State v. Adcock, 310 N.C. 1, 14, 310 S.E.2d 587, 595 (1984) (stating that a trial judge may change his ruling on admissibility of evidence during the course of the trial).

46. *See* Lumsden v. Lawing, 117 N.C. App. 514, 517, 451 S.E.2d 659, 661 (1995) (holding that, upon remand from the court of appeals, the trial court had no jurisdiction to alter or modify its final judgment, which had been upheld on appeal, except as allowed pursuant to Rule 60(b)(6)); Garrison *ex rel.* Chavis v. Barnes, 117 N.C. App. 206, 210, 450 S.E.2d 554, 557 (1994) (stating that the appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under Rule 59(a)(8), and not Rule 60(b)).

47. *See* N.C. GEN. STAT. §§ 15A-1411 to 15A-1422 (1999).

48. *See* Smith v. Johnson, 125 N.C. App. 603, 607, 481 S.E.2d 415, 417 (1997) ("Having determined . . . that the motion is merely a request that the trial court reconsider its earlier decision and having determined that it does not qualify as a Rule 59(e) motion, and

Although courts occasionally define law of the case to encompass reconsideration, it is inapplicable because, in its traditional form,[49] there must have been an appeal even if no final judgment. Law of the case requires that an issue actually decided by the appellate court be binding on the trial court if the cause is heard again at the trial level.[50] When an appellate court remands a case for further proceedings, its decisions in the opinion become the law of the case, "both in the subsequent proceedings in the trial court and upon a later appeal, where the same facts and the same questions of law are involved."[51]

C. *Acquiescence or Imputed Law of the Case*

There is another aspect of law of the case analysis that impacts reconsideration, often referred to as acquiescence, although it might more accurately be called imputed law of the case. Imputed law of the case extends law of the case consequences to issues that could have been appealed but were not. In other words, the party had the right to appeal but did not do so and therefore acquiesced in the order's finality. Courts applied imputed law of the case in the following instances: (1) "The grant of the directed verdict in the first trial was a final judgment on the merits .... [Plaintiff] did not appeal from that judgment and that judgment thus became the law of the case on that claim and is 'binding upon the court in the second trial;' "[52] (2) "[Defendants] did not except to this ruling or pursue an appeal. Accordingly, it became the law of the case;"[53] and (3) "The

because there are no other provisions for motions for reconsideration [of final judgments], the motion was properly denied."). Rules of Civil Procedure 59 and 60, as well as motions for appropriate relief, do give another (or the same) trial judge authority to overturn a final judgment, but these are not a substitute for the appellate process. *See id.*

49. Traditional law of the case is vertical: actual determinations of a higher court in a given case will bind a lower court upon remand. Yet, law of the case is sometimes used to include the reconsideration of unappealed interlocutory orders, considering the effect of one judge's determination on the subsequent determination in the same case of another judge of coordinate jurisdiction. This "horizontal" law of the case involves different considerations and principles from vertical law of the case. This Article uses law of the case to refer solely to vertical law of the case, although many commentators and appellate judges do not follow this limited definition. *See, e.g.*, Vestal, *supra* note 11, at 15 ("Encompassed within the 'law of the case' is the situation where a trial court has ruled on a matter and the same matter is raised a second time at the trial level.").

50. *See* Grantham v. R.G. Barry Corp., 127 N.C. App. 529, 532, 491 S.E.2d 678, 680 (1997).

51. Sloan v. Miller Bldg. Corp., 128 N.C. App. 37, 41, 493 S.E.2d 460, 463 (1997).

52. Pack v. Randolph Oil Co., 130 N.C. App. 335, 337, 502 S.E.2d 677, 678 (1998) (quoting Duffer v. Royal Dodge, Inc., 51 N.C. App. 129, 130, 275 S.E.2d 206, 207 (1981)).

53. State Auto Ins. Cos. v. McClamroch, 129 N.C. App. 214, 218, 497 S.E.2d 439, 441 (1998).

defendant did not appeal from this order. It became, therefore, the law of the case, and other district judges were without authority to enter orders to the contrary."[54] Traditional law of the case requires that the appellate court actually addressed the issue that binds the lower court, while acquiescence or imputed law of the case requires only that the issue could have been the subject of an appeal but was not.

This analysis complicates the law of reconsideration because of the rule that interlocutory orders made as a matter of law can be immediately reviewed if they affect a substantial right.[55] Thus, if a dissatisfied party, who could have immediately appealed a judge's interlocutory order but instead chose not to do so, asks the trial judge to reconsider the order, imputed law of the case may prevent such reconsideration.[56] This was the situation in an 1880 case:

> Motions made in the progress of a cause to facilitate the trial, but which involve no substantial right and the decision of which is not subject to appeal to this court, may be renewed as subsequent events require, and are not obstructed by the former action of the court. But if the decision does affect a substantial right and may be reviewed and corrected on appeal, and the complaining party acquiesces, we see no reason why the decision should not be as conclusive of the matters decided as the determination of the action itself would be of the whole controversy.[57]

In a subsequent case, the North Carolina Supreme Court noted that there are many motions incidental to the progress of a cause that facilitate the trial but that are not subject to immediate appeal. But when a motion is made involving "a substantial right and is reviewable by appeal, but not appealed from, the decision must be as conclusive as a final judgment in the action."[58]

The issue of acquiescence first arose in North Carolina when the state's rules of civil procedure adopted a new appeals provision for

54. Johnson v. Johnson, 7 N.C. App. 310, 313, 172 S.E.2d 264, 266 (1970).

55. *See* N.C. GEN. STAT. §§ 1-277, 7A-27(d) (1999); *see also infra* notes 31–54 and accompanying text.

56. The unappealed interlocutory order might still be appealed subsequently as a part of the appeal from the final judgment. According to Wright and Miller, "[t]he fact that appeal might have been taken ... under an interlocutory appeal statute ... should not preclude ... review on appeal from a traditional final judgment. The opportunity for an earlier appeal is intended to protect the appellant, not to forfeit the right to later review." WRIGHT & MILLER, *supra* note 5, § 4433, at 307–08.

57. Sanderson v. Daily, 83 N.C. 67, 69–70 (1880).

58. Roulhac v. Brown, 87 N.C. 1, 4 (1882).

certain interlocutory orders.[59] Orders reviewable under this provision, but in which the aggrieved party acquiesced by not pursuing the immediate appeal, were held to be res judicata[60] and thus were not permitted to be reconsidered on substantially similar facts. The court invoked this prohibition most forcefully in cases of reconsideration by successor judges,[61] for an immediately appealable order reconsidered by a successor judge raised the specter of judge-shopping[62] and of unseemly conflicts between judges.[63]

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59. Between 1831 and 1868, litigants had the right to seek from the trial court certification for review of interlocutory orders. *See* 1 REVISED STATUTES OF THE STATE OF NORTH CAROLINA §§ 23, 28 (1837).

60. Apparently, in late 19th century cases in North Carolina, the expression "law of the case" was not consistently distinguished from "res judicata." *See, e.g.*, Jones v. Southern Ry. Co., 131 N.C. 133, 135, 42 S.E. 559, 560 (1902) ("From this there was no dissent, and by the unanimous opinion of this Court it became *res judicata* the law of the case."); Kramer v. Wilmington & Weldon R.R., 128 N.C. 269, 269–70, 38 S.E. 872, 872 (1901) ("The point decided on the former appeal is *res judicata* in this case between these parties. It was the duty of the Judge below to follow our decision."); Wright v. Southern Ry. Co., 128 N.C. 77, 79, 38 S.E. 283, 283 (1901) ("After this express decision on former appeal in this same case, . . . the present appeal is neither more nor less than an attempt to review the former ruling . . . by a second appeal presenting the same point, and this is not allowable." (citations omitted)); Warden v. McKinnon, 99 N.C. 251, 254, 5 S.E. 917, 919 (1888) ("Having been settled on that appeal, it was *res adjudicata*, and is not the subject of our review on this.").

61. Note that a mere interlocutory order remaining within the control of the court might be reconsidered by a successor judge without offending "the principle that no appeal lies from one judge of the Superior Court to another." Bland v. Faulkner, 194 N.C. 427, 429, 139 S.E. 835, 836 (1927); *cf.* 14 ENCYCLOPEDIA OF PLEADING AND PRACTICE *Motions* 179 (1899) (stating that leave of court is required for reargument on the same state of facts, whether the motion for leave was presented to the same or a different judge); *id.* at 187 (stating that a motion for leave to renew may be made to the same or a different judge). Not only has modern North Carolina practice permitted reconsideration before a different judge, at least in the context of a mere interlocutory order, pre-code equity practice seems to have preferred rehearing before a different banc of judges. *See* Wilcox v. Wilkinson, 5 N.C. (1 Mur.) 11, 12–13 (1804) ("It appears that this cause . . . has been once reheard; but that circumstance does not appear, in itself, of such decisive weight as to prevent a rehearing, more especially as it must have been at the time reheard by the same judges that made the decree.").

62. *See* Henry v. Hilliard, 120 N.C. 479, 487–88, 27 S.E. 130, 132 (1897) ("They waited for another Judge to come around and took their chances with him. He reviewed and overruled [his predecessor]. 'Such unseemly conflict as this' will not be tolerated by this court.") (citing Roulhac v. Brown, 87 N.C. 1, 4 (1882).).

63. *See, e.g.*, *Henry*, 120 N.C. at 487–88, 27 S.E. at 132 (quoting *Roulhac*, 87 N.C. at 4 (quoting *State v. Evans*, 74 N.C. 324, 325 (1876))); Mabry v. Henry, 83 N.C. 298, 302 (1880) (quoting *Evans*, 74 N.C. at 325, to the same effect); State v. Evans, 74 N.C. 324, 325 (1876) ("So we have the conflicting rulings . . . in the very same case—in fact, one Judge reverses the decision of the other Judge. How is this unseemly conflict of decision to be prevented? It can only be done by enforcing the rule, *res adjudicata*."). The reviewability of *Evans* seems to have been based on the court's unstated presumption that "an order denying a criminal defendant's motion to dismiss on double jeopardy grounds is directly appealable." 4 AM. JUR. 2D *Appellate Review* § 239, at 852 (1995). No case prior to 1876

The concept of acquiescence under North Carolina law was expanded by court rule in the mid-twentieth century. With the adoption of Rule 4 of the Rules of Practice in the Supreme Court, allowing for review by writ of certiorari of certain orders on motions to strike and on demurrer,[64] acquiescence came to include failure to petition an appellate court for writ of certiorari under this rule.

It is important to note, however, that neither the prohibition against reconsideration of an order in which one has acquiesced (nor, for that matter, the requirement of a proper case for reconsideration of an order not immediately reviewable) prevented a judge from reconsidering a matter based on new facts or conditions that arose after the initial motion.[65] When the renewal of a motion is based on

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has been found which adopts this rule for North Carolina. It is interesting to note that in a recent interpretation of N.C. GEN. STAT. § 15A-1444(d), the supreme court held the denial of a motion to dismiss on double jeopardy grounds to be interlocutory and unappealable. *See* State v. Shoff, 342 N.C. 638, 638, 466 S.E.2d 277, 277 (1996) (per curiam).

64. *See* N.C. SUP. CT. R. PRACT. 4(a)(2) (1974 Cum. Supp.) (remaining in effect until July 1, 1975).

65. *See* 14 ENCYCLOPEDIA OF PLEADING AND PRACTICE *Motions* 181–82 (1899); *see also* BLACK, *supra* note 25, § 88, at 286–89 ("A former decision will not stand as the law of the case and prevent a further consideration of the questions involved, when new facts or materially different evidence are presented at a subsequent stage of the case, which legally differentiate the case as then presented from that formerly decided."). Not all subsequent conditions will suffice, however. *See, e.g.*, BLACK, *supra* note 25, § 88, at 288 (stating that the court is "not required to enter upon a re-examination of the whole question in a second case on the same evidence or on additional evidence which is merely cumulative"); FREEMAN, *supra* note 25, § 325, at 350 (quoting Ray v. Connor, 3 Edw. Ch. 478, 479 (N.Y. Ch. 1841)) (" 'Affidavits which merely present additional or cumulative evidence on the points before presented, are not to be considered as showing new grounds for a motion.' ").

Many late-19th century cases acknowledge that mere interlocutory orders may be reconsidered on subsequent facts. *See* Miller v. Justice, 86 N.C. 26, 30 (1882) (stating that the court had the power to modify an interlocutory decree "to meet the justice and equity of the case, upon sufficient grounds shown for the same," such as where the prior order of accounting had not been complied with and further information by affidavits showed rapid devaluation of partnership properties); Sanderson v. Daily, 83 N.C. 67, 69–70 (1880) (stating that motions made in the progress of a cause . . . may be renewed as subsequent events require") (dicta); Shinn v. Smith, 79 N.C. 310, 314 (1878) (relying on affidavits providing fuller information as to ownership of the lands ordered sold as the basis for modification of the order). Immediately appealable orders also could be reconsidered on subsequent facts. *See* Baker v. Garris, 108 N.C. 219, 227, 13 S.E. 2, 4 (1891) ("In these cases certain interlocutory orders—such as the appointment of receivers, motions to vacate attachments, orders of arrest, and the like—were held to be res judicata unless affidavits were presented showing additional facts subsequently transpiring.") (referring to the acquiescence cases of *Wingo v. Hooper*, 98 N.C. 482, 4 S.E. 463 (1887), *Roulhac*, 87 N.C. at 1, and *Sanderson*, 83 N.C. at 67; and referring to the law of the case examples of *Pasour v. Lineberger*, 90 N.C. 159 (1884), *Mabry*, 83 N.C. at 298, and *Jones v. Thorne*, 80 N.C. 72 (1879)).

subsequent conditions, the new motion presents a different question from that considered in the first motion, and, strictly speaking, acquiescence is irrelevant because the consideration of the renewal is not a reconsideration of the unappealed interlocutory order.

D. Summary

Res judicata, law of the case, and acquiescence principles apply to situations that involve the relationship between the appellate and trial courts. They do not apply to situations that only involve the relationship between trial judges presiding at different stages of the same litigation. Yet, appellate courts have sometimes mistakenly applied the rules applicable to res judicata, law of the case, or acquiescence to situations involving the reconsideration of interlocutory orders in which there was no final judgment, no actual appeal, and no unexercised right to immediate appeal. When this occurs, the applicable discretionary rule of restraint (that a judge should hesitate to reconsider an interlocutory order) can be mistakenly described as an absolute rule of jurisdiction (that a judge has no authority to reconsider an interlocutory order).[66] Such a transformation is doubly mistaken, however, because the principles of res judicata, collateral estoppel, and law of the case are all generally viewed as powerful rules of practice that guide discretion, not as rules of jurisdiction.[67]

By the early 1970s, the law of reconsideration had evolved into a cogent legal doctrine. Mere interlocutory orders—orders that were not immediately appealable—could be reconsidered in a proper case. What was considered a proper case was to be determined by the presiding judge and did not require a new set of facts or a change of conditions. Orders that were immediately reviewable—orders made as a matter of law that affected a substantial right—could not be reconsidered unless there was a new set of facts or a change of conditions (although in such cases it is less accurate to say that reconsideration is allowed because the new facts or changed conditions also render the issue "new" and the consideration of the

66. *See* Glenn, *supra* note 5, at 17 (stating that the rule that "one federal judge *cannot* properly overrule the decision or order of another federal district judge in the same case" is more properly expressed as the rule that "a judge *should not* overrule or reconsider the previous decision or order of another judge") (emphasis added).

67. *See* Arizona v. California, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power."); Steinman, *supra* note 5, at 597 (stating that law of the case principles are "best understood as rules of sensible and sound practice that permit logical progression towards judgment, but that do not disable a court from altering prior interlocutory decisions in a case").

issue de novo). It was the immediate reviewability that was the crucial factor in the law of reconsideration. By the early 1970s, the case law had not established a functional rule to determine which interlocutory orders affected a substantial right and were therefore immediately reviewable, but the cases had established that certain interlocutory orders were immediately reviewable. According to the rules and case law, grants or denials of motions to strike were immediately reviewable.[68] Discretionary denials of motions to amend were not. This was the state of the law of reconsideration when the procedurally complicated case of *Calloway v. Motor Co.*[69] made its way into the courts of North Carolina.

II. CALLOWAY V. MOTOR CO.

A. In the Superior Court

In *Calloway*, a police officer who was injured in an automobile accident while on duty sued the manufacturer, Ford Motor Company, and the seller, Matthews Motors, Inc., for defective installation and inspection of seatbelts.[70] Neither defendant pled the statute of limitations in its answer. Approximately seventeen months after filing its answer, defendant Matthews moved for permission to amend its answer to allege the three-year statute of limitations. Superior court Judge Hasty denied the motion.[71] Several days later defendant Ford filed its amended answer alleging the statute of limitations. No order permitting Ford to file this answer was found in the record, but Ford's amended answer stated that it was filed "by leave of Court granted by the Honorable Fred H. Hasty."[72] Six days after Ford filed its amended answer, Matthews filed an amended answer which alleged the statute of limitations but, like Ford's amended answer, was "supported by no order in the record."[73] The plaintiff moved to

68. During 1970, when the trial court entered the interlocutory orders in question in *Calloway*, Rule 4 of both the Rules of Practice in the Supreme Court of North Carolina and the Rules of Practice in the Court of Appeals of North Carolina allowed a party who conceived prejudice from an order striking or denying a motion to strike allegations in pleadings, or an order overruling most demurrers, to petition the Court for a writ of certiorari. *See* N.C. SUP. CT. R. PRACT. 4 (1974 Cum. Supp.) (remaining in effect until July 1, 1975); N.C. CT. APP. R. PRACT. 4 (1970 & 1971 Cum. Supp.) (remaining in effect until January 20, 1971).

69. 281 N.C. 496, 189 S.E.2d 484 (1972).

70. *See id.* at 497, 189 S.E.2d at 486.

71. *See id.* at 498, 189 S.E.2d at 486.

72. *Id.* Initially the plaintiff took no action in response to Ford's filing an amended answer without first securing the court's permission. *See* discussion *infra* note 77.

73. 281 N.C. at 499, 189 S.E.2d at 487.

strike Matthews's amended answer on the ground that Judge Hasty had denied the company's motion to amend. This motion was granted by Judge Fate J. Beal, who apparently had rotated into the district to hold a session of court.[74]

Several months later, defendant Matthews again moved for permission to amend its answer to allege the statute of limitations. Matthews based its motion on Ford's asserting this defense and noted that the court's allowing Matthews "to enter the same plea would be just and equitable."[75] Two days later Ford moved for summary judgment on the statute of limitations issue, and two weeks later the plaintiff moved to strike Ford's amended answer on the grounds that it had been filed without the court's permission.[76] A third superior

74. Judge Beal's decision appeared only in the form of an undated handwritten notation in the margin of plaintiff's motion: "Motion ruled on and language deleted as marked on lines 5 and 6 of page 5 of amended answer. Fate J. Beal, Judge Presiding." The supreme court noted that "[t]his informal and confusing method of ruling upon a motion is expressly disapproved." *Calloway*, 281 N.C. at 499, 189 S.E.2d at 487. Judge Beal's ruling was even more confusing than the court noted. Plaintiff's motion had been to dismiss Matthews's amended answer in its entirety because no permission to file had been obtained. Judge Beal's ruling allowed the amended answer to stand with three further defenses not contained in the original answer, but the judge struck one parenthetical phrase contained in the third further defense that raised the statute of limitations issue. By not striking the entire amended answer, the judge's grant of plaintiff's motion to dismiss could be viewed as implying either (1) a partial grant of an implied motion to amend by defendant, or (2) a grant of an implied motion to amend by defendant, followed by a partial grant of a motion to strike by plaintiff. *See* Calloway v. Ford Motor Co., 11 N.C. App. 511, 514–15, 181 S.E.2d 764, 766 (1971) (Brock, J., dissenting) ("[P]laintiff filed a motion to dismiss the amended answer of Matthews Motors upon the grounds that leave to amend had been denied by Judge Hasty. [Only] the portion of the amended answer of Matthews Motors which pleaded the statute of limitations was stricken [by Judge Fate J. Beal]."), *rev'd*, 281 N.C. 496, 189 S.E.2d 484 (1972). In this sense, then, *Calloway* involved orders both on motions to amend and to strike. Further subtleties would have arisen had Judge Beal's simple notation been entered the prior summer, before North Carolina abolished the demurrer. *See* N.C. GEN. STAT. § 1A-1, Rule 7(c) (1969). Judge Beal's strike of the defendant's entire plea would have been immediately appealable as a sustained demurrer, rather than immediately reviewable as a grant of a motion to strike. *See* Cecil v. High Point, 266 N.C. 728, 730, 147 S.E.2d 223, 225 (1966) (stating that orders on motions to strike portions of a complaint were immediately reviewable by certiorari only, while orders on motions to strike an entire plea in bar were immediately appealable as sustained demurrers).

75. *Calloway*, 281 N.C. at 500, 189 S.E.2d at 500. One of Matthews's defenses was that Ford's negligence was primary and active while Matthews's negligence, if any, was passive and secondary. *See Calloway*, 281 N.C. at 499, 189 S.E.2d at 487. Matthews thus also argued that it was entitled to indemnity from Ford in the event that Matthews was found liable.

76. The unequal treatment of Ford and Matthews seems to be the crux of the matter in *Calloway*, but the *Calloway* opinion never resolves the issue nor does it divulge precisely how the issue fits into its analysis or decision. *Calloway* does note that the plaintiff initially gave notice of appeal of the summary judgment in favor of Ford but that

court judge, Judge Ervin, denied the plaintiff's motion to strike,[77] granted Ford's motion for summary judgment, and, several days later, declined to consider Matthews's motion to amend its answer to plead the statute of limitations. Judge Ervin's order recited that he was "inclined to grant this motion of Matthews" but that he lacked "the authority to exercise his discretion but must rule as a matter of law."[78] Judge Ervin's order mentioned both Judge Hasty's discretionary denial of Matthews's first motion to amend and Judge Beal's "entry on the pleadings in this cause," but was not more specific as to the basis for his ruling.[79]

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the appeal was subsequently withdrawn. *See id.* at 500, 189 S.E.2d at 487.

77. The record in *Calloway* reveals an issue that may have been of significance in this case but that was not directly addressed in the appellate opinions. The plaintiff did not file a motion to strike Ford's amended answer of May 8, 1970, which alleged the statute of limitations defense, until November 5, 1970—two weeks after Ford had filed its motion for summary judgment and over five months after plaintiff had moved to strike Matthews's amended complaint. *See Calloway*, 281 N.C. at 500, 189 S.E.2d at 487. In the November 6, 1970 motion, the plaintiff explained that the plaintiff had not bothered to read Ford's amended answer because Ford's attorney had, at the time he filed the amended answer, told plaintiff that the amended answer did not contain "any new matters except to plead the negligence of the City of Asheville." *Motion (Filed November 5, 1970)*, BRIEFS & RECORDS, SPRING TERM 1972, NO. 64, at 47. On this basis the plaintiff apparently acquiesced in Ford's filing its amended answer without first obtaining court approval. This may have been the basis for Judge Ervin's November 5, 1970 denial of the plaintiff's motion to strike Ford's amended answer on the grounds that Ford never had the court's permission to amend its answer. Interestingly, the supreme court apparently interpreted Judge Ervin's denial of the plaintiff's motion to strike Ford's amended answer as a grant of Ford's implied motion to amend. *See Calloway*, 281 N.C. at 505, 189 S.E.2d at 490 ("[T]hereafter, on 5 November 1980, Judge Ervin permitted Ford to plead the statute by refusing to strike the amended answer which Ford had filed without permission.").

78. *Calloway*, 281 N.C. at 500, 189 S.E.2d at 487.

79. *Id.* Judge Hasty's interlocutory ruling denying Matthews's motion to amend was not immediately appealable and so was subject to reconsideration by Judge Ervin if Judge Ervin deemed it a proper case for such reconsideration. Judge Beal's interlocutory ruling granting plaintiff's motion to strike Matthews's amended answer, however, did affect a substantial right and was immediately appealable. As explained *supra* note 74, however, Judge Beal's ruling could be read as merely a partial grant of Matthews's implied motion to amend its answer. Judge Ervin may have viewed Matthews's acquiescence as rendering Judge Ervin without authority to overrule Judge Beal absent a change of circumstance. Judge Beal's order was more than simply an acknowledgment that Matthews had never been granted the authority to amend its answer as it had alleged in its amended answer. If Judge Beal's ruling was in reality a reconsideration of Matthews's motion to amend, however, then perhaps it was not properly subject to immediate appeal and the rule of imputed law of the case.

B. *On Appeal to the North Carolina Court of Appeals*

The court of appeals granted Matthews's motion for certiorari[80] to review Judge Ervin's refusal to consider the renewed motion.[81] A two-judge majority of the court of appeals affirmed Judge Ervin's order,[82] but admitted no distinction, or significance of any such distinction, between interlocutory orders that were immediately reviewable and those that were not. Apparently, the majority did not consider the case law which held that grants or denials of motions to strike might affect a substantial right and be immediately reviewable, nor did they consider that the rule that no appeal lies from one superior court judge to another has no application to mere interlocutory orders. The majority upheld Judge Ervin, explaining

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80. It appears that Matthews initially treated Judge Ervin's interlocutory order as though it were immediately appealable. The court of appeals stated that when the case was called for oral argument Matthews moved that its appeal be treated as a petition for certiorari, and the petition "as a substitute for an appeal" was allowed. *See* Calloway v. Ford Motor Co., 11 N.C. App. 511, 513, 181 S.E.2d 764, 765 (1971), *rev'd*, 281 N.C. 496, 189 S.E.2d 484 (1972). Evidently, Matthews ultimately concluded that Judge Ervin's interlocutory ruling as a matter of law that he lacked authority to consider defendant's motion was not immediately appealable. The court of appeals's decision to treat the appeal as a petition for certiorari may indicate an agreement with this conclusion—or a lack of awareness of the issue. In reality, the refusal of a court to exercise its discretion due to perceived want of power may have been immediately appealable. *See, e.g.*, State Hwy. Comm. v. Hemphill, 269 N.C. 535, 537, 153 S.E.2d 22, 25 (1967) ("But if the exercise of a discretionary power of the Superior Court is refused upon the ground that it has no power to grant a motion addressed to its discretion, the ruling of the court is reviewable."); Tickle v. Hobgood, 212 N.C. 762, 763, 194 S.E. 461, 461–62 (1938) ("Where . . . the court denies [a motion for a bill of particulars or to require a pleading to be made more definite and certain] as a matter of law, without the exercise of discretion, the defendant is entitled to have the application reconsidered and passed upon as a discretionary matter."); Welch v. Kingsland, 89 N.C. 179, 180–81 (1883) (holding that the trial court's refusal, on grounds of want of power, to strike and vacate a prior order was immediately appealable); Merrill v. Merrill, 92 N.C. 657, 659 (1885) (noting that the question of whether or not the court had the discretionary power to introduce a new party plaintiff was immediately appealable); McKinnon v. Faulk, 68 N.C. 279, 280 (1873) (stating in dicta while entertaining an immediate appeal of an order allowing an amendment to the pleadings that "[w]hen [superior court judges] make *or refuse* to make amendments, under a mistake as to their power, this Court will review their action . . . .") (emphasis added).

81. *See Calloway*, 11 N.C. App. at 513, 181 S.E.2d at 765. The opinion of the supreme court later makes clear that Matthews appealed from both Judge Ervin's denial of the renewed motion for want of power and from the initial denial of its motion to amend by Judge Hasty.

82. The court of appeals's majority chose to ignore the significance of Judge Beal's grant of the motion to dismiss on Judge Ervin's decision, which also appeared in substance to be both the grant of a motion to amend and to strike. *See supra* note 74. The majority opinion of the court of appeals did not mention Judge Beal's order; indeed, even when quoting Judge Ervin's order, the opinion included the reference to Judge Hasty's order, while omitting all reference to Judge Beal's order.

that if Matthews "felt that Judge Hasty's order denying its motion to amend was erroneous, then relief should have been sought through the appellate courts," instead of refiling the same motion before Judge Ervin.[83]

To support this proposition the majority relied on three cases, *Greene v. Laboratories, Inc.*,[84] *In re Register*,[85] and *Bank v. Hanner*,[86] along with the "well settled principle of law that no appeal lies from one superior court judge to another."[87] None of the cases cited, however, stand for the proposition that the denial of a motion to amend affects a substantial right and is thus immediately appealable, nor do they contradict the rule, as stated in *Bland v. Faulkner*,[88] that the "principle that no appeal lies from one judge of the Superior Court to another ... has no application to a mere interlocutory order."[89] *Greene* and *Hanner* involved rulings on motions to strike where immediate review of the rulings was not pursued; successor judges were without authority to reconsider such orders because of acquiescence or imputed law of the case. *In re Register* was a final judgment case—not an interlocutory order case—where the party's failure to perfect the appeal from the final judgment rendered the judgment law of the case. In stating the basis for its ruling in *Calloway*, the court of appeals' majority appears to have misunderstood the cases and misapplied the rule.

Judge Brock dissented from the majority opinion but without directly challenging the majority's analysis.[90] Judge Brock was bothered by the unfairness of allowing one co-defendant to amend its answer to plead the running of the statute of limitations while

83. *Calloway*, 11 N.C. App. at 513, 181 S.E.2d at 766. It should be noted that in the supreme court's *Calloway* opinion, the court stated that Matthews had appealed Judge Hasty's order to the court of appeals and that the court of appeals had affirmed Judge Hasty's order. The supreme court's opinion stated that Matthews's appeal to the court of appeals assigned error to both Judge Hasty's and Judge Ervin's orders and that the court of appeals "affirmed the *orders* of the Superior Court." Calloway v. Motor Co., 281 N.C. 496, 500, 189 S.E.2d 484, 487 (1972) (emphasis added). The supreme court then appeared to affirm the court of appeals in this regard by stating that it was clear that "at the time Judge Hasty denied Matthews's motion to amend, there was no basis for any contention that he had abused his discretion." *Calloway*, 281 N.C. at 500–501, 189 S.E.2d at 488.

84. 254 N.C. 680, 120 S.E.2d 82 (1961).

85. 5 N.C. App. 29, 167 S.E.2d 802 (1969).

86. 268 N.C. 668, 151 S.E.2d 579 (1966).

87. *Calloway*, 281 N.C. at 501, 189 S.E.2d at 498.

88. Bland v. Faulkner, 194 N.C. 427, 139 S.E. 835 (1927).

89. *Id.* at 429, 139 S.E. at 836.

90. In his dissent, Judge Brock began by stating: "The straight line approach of the majority opinion in this case brings forth principles of law with which I have no quarrel ...." *Calloway*, 11 N.C. App. at 514, 181 S.E.2d at 766 (Brock, J., dissenting).

denying the same privilege to the other co-defendant. While he, unlike the majority, acknowledged the existence of Judge Beal's order, Judge Brock, too, ignored the possibility that it was the immediate reviewability of Judge Beal's ruling that may have deprived Judge Ervin of authority to reconsider. Judge Brock stated only that Judge Ervin clearly "felt" that both Judge Hasty's and Judge Beal's orders "were binding upon him as a matter of law."[91]

Thus Judge Brock did not challenge the majority's apparent claim that as a general rule a successor judge lacks authority to reconsider an interlocutory order previously entered, but instead focused on the equities of the case, remarking that "circumstances had so changed since the entry of Judge Hasty's order and the entry of Judge Beal's order that Judge Ervin was authorized to act in his discretion to meet the exigencies of the case."[92] To support this statement Judge Brock then quoted the rule that "[i]nterlocutory judgments or orders are under the control of the court and may be corrected or changed at any time before final judgment to meet the exigencies of the case."[93] Describing the equities (or exigencies) of the case as "changed circumstances" was, however, both an unnecessary gloss on the true test—changed circumstances is arguably a higher standard than exigencies of the case—and an inaccurate portrayal of the facts of *Calloway*. In fact, Judge Hasty apparently had the discretionary authority to deny Matthews's motion to amend and to grant Ford's motion to amend.[94] Once these decisions had been made, the consequences that would flow from such decisions were arguably not changed circumstances. If Judge Hasty allowed Ford to amend its answer to allege the statute of limitations, the fact that Ford would subsequently amend its answer to allege the statute of limitations and ultimately move for and be granted summary judgment on the statute of limitations issue is rather predictable and

91. *Id.* at 515, 181 S.E.2d at 767 (Brock, J., dissenting). Judge Beal's order was probably binding on Judge Ervin as a matter of law because rulings on motions to strike were immediately reviewable and so subject to imputed law of the case. Yet, if Judge Beal's decision is read as resolving only the issue of whether Matthews could file an amended answer without the permission of the court, then even if binding on Judge Ervin, it would not have conflicted with any decision Judge Ervin made with regard to the substance of the new motion seeking authority to amend.

92. *Id.* (Brock, J., dissenting).

93. *Id.* (Brock, J., dissenting).

94. The supreme court found no abuse of discretion in Judge Hasty denying Matthews's motion to amend, even in light of the fact that Judge Hasty may have allowed Ford's identical motion to amend. *See supra* note 83. If this was not an abuse of discretion, then it is doubtful that the clear and direct consequences of Judge Hasty's order could constitute new facts or circumstances.

not a surprise or a change of circumstances. Nevertheless, Judge Brock implied that it was this change of circumstance that somehow restored to Judge Ervin the authority to reconsider Matthews's motion to amend its answer.[95] Because of the dissent, Matthews was able to appeal the decision to the supreme court as a matter of right.[96]

C. *On Appeal to the North Carolina Supreme Court*

In reversing the court of appeals, the supreme court provided substantially more analysis of the reconsideration issue than was found in the court of appeals's three-paragraph, three-case-cite opinion. The supreme court's opinion included citation to *North Carolina Index*, *Corpus Juris Secundum*, *American Jurisprudence*, *American Law Reports*, and fourteen North Carolina Supreme Court cases. Despite its apparent consideration of other relevant resources, the supreme court essentially adopted the mistaken analysis of both the court of appeals's majority and dissent. The cases cited by the supreme court in *Calloway* are arguably all final judgment, immediately appealable interlocutory order, or acquiescence cases—cases that would allow reconsideration of mere interlocutory orders but that deny reconsideration when there has been a final judgment, when the interlocutory order affected a substantial right and so was immediately appealable, or when the interlocutory order was immediately reviewable but such right to review was not exercised. These cases do not support the propositions for which they are cited in *Calloway*.

1. Calloway's Flawed Rationale

Calloway began by noting that Judge Hasty's denial of Matthews's first motion to amend was not an abuse of discretion because Matthews had waited almost a year and a half after its answer had been filed to make its motion to amend.[97] The court apparently was affirming the court of appeals on this point.[98] The court then stated the issue before it as "whether Judge Ervin, in his discretion, had authority to permit an amendment which Judge Hasty, in his discretion, had denied earlier."[99] This statement of the issue ignored the impact, if any, of Judge Beal's " 'entry on the pleadings in

95. *See Calloway*, 11 N.C. App. at 515, 181 S.E.2d at 767 (Brock, J., dissenting).

96. An appeal lies of right from any decision of the court of appeals in which there is a dissent. *See* N.C. GEN. STAT. § 7A-30 (1999).

97. *See Calloway*, 281 N.C. at 501, 189 S.E.2d at 488.

98. *See supra* note 83.

99. *Calloway*, 281 N.C. at 501, 189 S.E.2d at 488.

this cause,' "[100] which was expressly referenced in Judge Ervin's order concluding that he lacked authority to exercise his discretion in a renewed motion to amend. Consideration of the effect of Judge Beal's order—and whether Judge Beal's order was the grant of a motion to strike or a motion to amend—would have raised the significance of immediate reviewability to the law of reconsideration.

The *Calloway* court then cited *North Carolina Index* for the "well established" rules that no appeal lies from one judge to another, that one judge may not correct another's errors of law,[101] and that one judge may ordinarily not modify, overrule or change the judgment of another judge.[102] This set of rules has been cited numerous times by subsequent cases to deny the authority to reconsider mere interlocutory orders.[103] The cases cited by *North Carolina Index* that established these rules, however, involve final judgments or immediately reviewable interlocutory orders.[104] They do not involve

100. *Id.* at 500, 189 S.E.2d at 487 (quoting the order of the trial judge).

101. The section of *North Carolina Index* cited by *Calloway*, 2 NORTH CAROLINA INDEX 2D *Courts* § 9 (1967), does not contain the language that the opinion attributes to it: "that one Superior Court judge may not correct another's errors of law." Although four cases cited in *North Carolina Index* contain similar language, *see In re* Burton, 257 N.C. 534, 541, 126 S.E.2d 581, 586 (1962) ("But one superior court judge may not modify, reverse or set aside a judgment of another superior court judge as being erroneous."); Cameron v. McDonald, 216 N.C. 712, 714, 6 S.E.2d 497, 498 (1940) (stating that errors of law in a final judgment could be remedied by appeal only); Price v. Life & Cas. Ins. Co. of Tenn., Inc., 201 N.C. 376, 377, 160 S.E. 367, 368 (1931) (holding that the court could not reverse as matter of law its ruling on evidence where a verdict was returned and judgment given); Wellons v. Lassiter, 200 N.C. 474, 477–78, 157 S.E. 434, 436 (1931) (holding that a final judgment may not be set aside at a subsequent term for error of law), none suggest the restriction applies to orders *in fieri*.

102. *See Calloway*, 281 N.C. at 501, 189 S.E.2d at 488.

103. *See* North Carolina Nat'l Bank v. Virginia Carolina Builders, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983); Transcontinental Gas Pipe Line v. Calco Enter., 132 N.C. App. 237, 241, 511 S.E.2d 671, 674–75 (1999); Atkinson v. Atkinson, 132 N.C. App. 82, 88, 510 S.E.2d 178, 181, *rev'd on other grounds*, 350 N.C. 590, 516 S.E.2d 381 (1999); McArdle Corp. v. Patterson, 115 N.C. App. 528, 531–32, 445 S.E.2d 604, 606–07 (1994); Dublin v. UCR, Inc., 115 N.C. App. 209, 219, 444 S.E.2d 455, 461 (1994); Madry v. Madry, 106 N.C. App. 34, 37–38, 415 S.E.2d 74, 77 (1992); Whitley's Elec. Serv., Inc. v. Walston, 105 N.C. App. 609, 610, 414 S.E.2d 47, 47–48 (1992); Smithwick v. Crutchfield, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987); Trydin Indus., Inc. v. American Mut. Liab. Ins. Co., 46 N.C. App. 91, 93, 264 S.E.2d 357, 359 (1980); Biddix v. Kellar Constr. Corp., 32 N.C. App. 120, 124, 230 S.E.2d 796, 799 (1977).

104. All of the cases cited in *North Carolina Index* deal with final judgments and immediately reviewable interlocutory orders. *See* Michigan Nat'l Bank v. Hanner, 268 N.C. 668, 670–71, 151 S.E.2d 579, 580–81 (1966) (applying the prohibition on coordinate appeal where the initial order was an immediately reviewable grant of a motion to strike); *In re* Burton, 257 N.C. 534, 540–41, 126 S.E.2d 581, 586 (1962) (noting that a habeas corpus proceeding is not a substitute for appeal); Cuthbertson v. Burton, 251 N.C. 457, 459, 111 S.E.2d 604, 605–06 (1959) (involving a compromise approved by the court treated as a final judgment); Davis v. Jenkins, 239 N.C. 533, 534, 80 S.E.2d 257, 258 (1954) (stating that

reconsideration of mere interlocutory orders. The rules cited by *Calloway* were indeed "well-established." They simply were not applicable to interlocutory orders that were not immediately reviewable, and they did not alter the rule stated in *Bland* that "[t]he principle that no appeal lies from one judge . . . to another . . . has no application to a mere interlocutory order."[105]

The court next cited *American Jurisprudence* for the proposition that the doctrine of res judicata does not apply to interlocutory decisions with the "same strictness" as to judgments,[106] and then cited *Temple v. Western Union Telegraph*,[107] as well as *North Carolina Index*, for the proposition that the doctrine does not apply unless the order involves a substantial right.[108] This "same strictness" concept was first alluded to in North Carolina law in a case pertinent to the law of reconsideration, *Mabry v. Henry*.[109] *Mabry* held that "the principle of *res adjudicata* does not extend to ordinary motions incidental to the progress of a cause, for what may one day be refused may the next be granted, but it does apply to decisions affecting a substantial right subject to review in an appellate court."[110] By

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an unappealed judgment may not be modified by another trial judge); Hall v. Shippers Express, Inc., 234 N.C. 38, 40, 65 S.E.2d 333, 335 (1951) (noting that the court has the right to retain jurisdiction until the end of the litigation); *In re* Adams, 218 N.C. 379, 381, 11 S.E.2d 163, 165 (1940) (noting that a habeas corpus proceeding is not a substitute for an appeal); Cameron v. McDonald, 216 N.C. 712, 714, 6 S.E.2d 497, 498 (1940) (noting that after final judgment the remedy for errors of law is by appeal only); Dail v. Hawkins, 211 N.C. 283, 283, 189 S.E. 774, 774 (1937) (noting that an order of abatement is final and correctable for error only on appeal, where it is not an irregular judgment); East Coast Fertilizer Co., Inc. v. Hardee, 211 N.C. 56, 58, 188 S.E. 623, 624 (1936) (stating that an order immediately reviewable as affecting substantial right may not be reconsidered); Edwards v. Perry, 206 N.C. 474, 475, 174 S.E. 285, 285 (1934) (holding that a consent order could not be stricken ex mero motu); Price v. Life & Cas. Ins. Co. of Tenn., Inc., 201 N.C. 376, 377, 160 S.E. 367, 368 (1931) (holding that the court could not reverse as a matter of law its ruling on evidence where a verdict had been returned and judgment given); Wellons v. Lassiter, 200 N.C. 474, 477–78, 157 S.E. 434, 436 (1931) (stating that a final judgment may not be set aside at a subsequent term for error of law). *North Carolina Index* also lists two cases dealing with child custody, an area of law which is a well-acknowledged exception to the plenary power of the court to reconsider on the same facts. *See* Stanback v. Stanback, 266 N.C. 72, 75–76, 145 S.E.2d 332, 334–35 (1965) (asserting that no review is allowed of a custody order without a showing of new facts); Neighbors v. Neighbors, 236 N.C. 531, 532–33, 73 S.E.2d 153, 154 (1952) (stating that a custody award is modifiable on changed circumstances).

105. Bland v. Faulkner, 194 N.C. 427, 429, 139 S.E. 835, 836 (1927).

106. *Calloway*, 281 N.C. at 501–02, 189 S.E.2d at 488 (citing 56 AM. JUR. 2D *Motions, Rules and Orders* § 30 (1971)).

107. 205 N.C. 441, 171 S.E.2d 630 (1933).

108. *See Calloway*, 281 N.C. at 502, 189 S.E.2d at 488 (citing 5 NORTH CAROLINA INDEX 2D *Judgments* § 37 (1968)).

109. 83 N.C. 298 (1880).

110. *Mabry*, 83 N.C. at 301 (citing FREEMAN, *supra* note 25, § 325, at 347, 349–50).

recognizing the "same strictness" concept, *Calloway* invoked *Mabry* and acknowledged the traditional rule followed in North Carolina that a trial court may reconsider an interlocutory order in a proper case.[111]

Notwithstanding this direct nod to the traditional rule, *Calloway* proceeded to misstate the rule by conditioning a different judge's authority to reconsider an interlocutory order on "a showing of changed conditions which warrant such action."[112] While admittedly changed conditions would be sufficient to justify reconsideration of any interlocutory order, because the court would not actually be reconsidering the initial order if conditions had sufficiently changed, changed conditions had not been required for reconsideration of mere interlocutory orders, such as the typical motion to amend a pleading.[113] *Calloway*'s misstatement of the rule amounts to treating all interlocutory orders alike, even after the court had just acknowledged a significant distinction between interlocutory orders entered in the court's discretion, as a matter of law, and as a matter of law affecting a substantial right.[114]

Although *Mabry* does not mention the "same strictness" concept directly, Freeman says that res judicata "is in general said not to be strictly applicable to motions," and notes that the " 'doctrine of *res adjudicata*, in its strict sense, does not apply to such motions made in the course of practice, and the court may, upon a proper showing, allow a renewal of a motion of this kind once decided.' " FREEMAN, *supra* note 25, § 326, at 351 n.1 (quoting Forde v. Doyle, 44 Cal. 635, 637 (1872)).

111. As noted earlier in this Article, a proper case for reconsideration of a mere interlocutory order arises to correct an order based on a misapprehension of then existing law (and presumably also to correct an order based on a misapplication of then existing law to then existing fact). *See supra* note 26 (quoting BLACK, *supra* note 25, § 86, at 280, 281). Some cases do seem to hold that the trial court may not reconsider a matter of law once decided. *See, e.g.*, Nowell v. Neal, 249 N.C. 516, 521, 107 S.E.2d 107, 110 (1959) ("The proper method for obtaining relief from legal errors is by appeal, G.S. 1-277, and not by application to another Superior Court. 'In such cases, a judgment entered by one judge of the Superior Court may not be modified, reversed or set aside by another Superior Court judge.' ") (quoting Davis v. Jenkins, 239 N.C. 533, 534, 80 S.E.2d 257, 258 (1954); citing Rawls v. Mayo, 163 N.C. 177, 180, 79 S.E. 298, 299 (1913)). As discussed *supra* note 101, the rule announced in these cases does not extend to orders *in fieri*. *But see infra* note 151 (discussing Burrell v. Transfer Co., 244 N.C. 662, 94 S.E.2d 829 (1956)).

112. *Calloway*, 281 N.C. at 502, 189 S.E.2d at 488.

113. In the rare case when injustice may be so manifest as to overcome the policy behind imputed law of the case, changed conditions may not be absolutely necessary for reconsideration of orders involving a substantial right. In other words, that which can overcome traditional law of the case can overcome what we have called "imputed law of the case." *See, e.g.*, 4 C.J. *Appeal and Error* § 3078, at 1099 & n.11 (1914) ("Under some circumstances, however, . . . an appellate court will review and reverse its former decision in the same case, more especially where it is satisfied that gross or manifest injustice has been done by its former decision . . . ." (citing Buncombe County Sch. Dir. v. City of Asheville, 137 N.C. 503, 50 S.E. 279 (1905))).

114. In its previous sentence, the court had cited *Temple v. Western Union Telegraph*

The chief case cited by *Calloway* in support of its novel interpretation of the rule is *Miller v. Justice*.[115] In *Miller*, reconsideration was based on subsequent facts showing that an order of accounting had become unjust,[116] and thus *Miller* did not modify the traditional rule. *Calloway* also claimed support from *Bland v. Faulkner*.[117] Far from supporting *Calloway*'s position, however, *Bland* is the leading case for the rule that a mere interlocutory order may be modified due to a misapprehension of law then existing raised ex mero motu by a successor judge under North Carolina's system of rotation.[118] *Miller* and *Bland* simply do not stand for the proposition for which *Calloway* cited them.[119]

Having abandoned the traditional rule in favor of a new rule that ratchets up the showing necessary for reconsideration of interlocutory orders from a "proper case" to "changed conditions,"[120] the court in *Calloway* then sought to justify its conclusion by observing that orders on motions to amend should be treated analogously to orders on motions to strike.[121] This argument, which is the heart of the rationale

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Co., 205 N.C. 441, 171 S.E. 630 (1933), to help distinguish the class of orders made as a matter of law affecting a substantial right from the class of orders to which the doctrine of res judicata does not apply strictly. *Temple* is also important, however, for dictum that contemplates the substitution of later discretion for an earlier exercise of discretion on substantially similar facts. *Temple* is therefore wholly in line with the tradition that changed conditions are not necessary to show a proper case for reconsideration of an interlocutory order. Regarding when a court should reconsider discretionary orders, the *Temple* court stated that:

> "[i]t is a matter for the sound discretion of the court whether under the circumstances of the case a demand for a bill of particulars should be granted or refused. This power of the court exists by virtue of its general power to regulate the conduct of trials, and it is incident to its general authority in the administration of justice. It is the same power in kind that courts have to grant a new trial on the ground of surprise."

Id. at 442, 171 S.E.2d at 630 (quoting 49 C.J. *Pleading* § 887, at 625–26 (1930)).

115. 86 N.C. 26 (1882).

116. *See id.* at 30.

117. 194 N.C. 427, 139 S.E. 835 (1927).

118. *See id.* at 429, 139 S.E. at 836.

119. A third case cited by *Calloway*, *Rutherford College, Inc. v. Payne*, 209 N.C. 792, 184 S.E. 827 (1936), also confirmed the adequacy of subsequent facts as one basis to justify a renewed motion. *Rutherford* involved an appeal to the superior court from the clerk of superior court's findings of fact and order denying defendant's motion for removal. *See id.* at 796, 184 S.E. at 829–30. Arguably, *Rutherford* is an instance of traditional law of the case, which, as discussed earlier in this Article, may be overcome rarely for manifest injustice, but which may be avoided on a showing of subsequent facts or parties.

120. As discussed *supra* note 65, the requirement of changed conditions means that no reconsideration is allowed but that a similar motion may be filed where conditions are so different that the ruling on the initial motion cannot be said to be overruled.

121. The structure of the court's argument is (1) both grants and denials of motions to strike irrelevant, improper, or prejudicial material from pleadings are rulings made as a

in *Calloway*, suggests that all orders on pleadings,[122] whether immediately reviewable or not, should be treated similarly. In this way, the court reiterated its reduction of the traditional rule of the law of reconsideration of interlocutory orders to the traditional corollary that a renewed motion may be considered on changed conditions. Rather than recognizing an inherent, discretionary power in the trial court to reconsider interlocutory orders not subject to immediate review, *Calloway* flatly denied the power to reconsider on substantially similar facts, at least insofar as orders on pleadings were at issue. A trial judge could not reconsider a denial of a motion to amend, just as he could not reconsider immediately reviewable orders on motions to strike or demur, unless there were changed conditions that distinguished sufficiently the renewal from the legal issue underlying the prior order.[123]

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matter of law involving no discretion which finally determine the rights of the parties; (2) likewise, discretionary grants of certain motions to amend may not be modified; (3) cases that seem to allow the reconsideration of discretionary denials of motions to amend should be explained as supervisory jurisdiction cases; (4) therefore discretionary denials of motions to amend, like these other orders on pleadings, may not be modified on substantially similar facts. *See Calloway*, 281 N.C. at 502–05, 189 S.E.2d at 489–90.

122. The argument presented in the rationale of the case does not solely cite cases where orders on motions to amend were at issue, although that is its focus. At least it can be said that the court stays within the confines of cases where orders on pleadings were in controversy. In its rationale, the court cites cases of grants and denials of motions to strike, *see Calloway*, 281 N.C. at 502, 189 S.E.2d at 489 (citing Greene v. Charlotte Chem. Lab., Inc., 254 N.C. 680, 120 S.E.2d 82 (1961); Wall v. England, 243 N.C. 36, 89 S.E.2d 785 (1955); Scottish Bank v. Daniel, 218 N.C. at 713, 12 S.E.2d at 226 (1940)), a grant of a motion to amend, *see id.* (citing Hardin v. Greene, 164 N.C. 99, 80 S.E. 413 (1913)), a grant of a motion to amend following sustained demurrer, *see id.* (citing State v. Standard Oil Co., 205 N.C. 123, 170 S.E. 134 (1933)), a grant of a motion to amend following mistrial, *see id.* (citing Dockery v. Fairbanks, 172 N.C. 529, 90 S.E. 501 (1916)), denials of motions to amend, *see id.* at 503–04, 189 S.E.2d at 489–90 (citing Dixie Fire & Cas. Co. v. Esso Standard Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965); Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963); Revis v. Ramsey, 202 N.C. 815, 114 S.E. 358 (1932)), and a denial of a motion for bill of particulars, *see id.* at 503, 189 S.E.2d at 489 (citing Townsend v. Williams, 117 N.C. 330, 23 S.E. 461 (1895)).

123. This argument by analogy in the rationale of *Calloway* sheds light on the court's explicit holding that "when one Superior Court judge, in the exercise of his discretion, has made an order denying a motion to amend, absent changed conditions, another Superior Court judge may not thereafter allow the motion," *Calloway*, 281 N.C. at 505, 189 S.E.2d at 490, and should be kept in mind when reviewing the court of appeals's characterization of *Calloway*, discussed in Section III. As we shall see, the court of appeals will require changed conditions for the "reconsideration" of discretionary orders, but will deny the trial judge's right to hear a renewed motion on an order made as a matter of law even if there were changed conditions. The explicit holding in *Calloway* does not support the court of appeals's reading, as it extends only to denials of motions to amend. Furthermore, the rationale in *Calloway* depends for its impact on treating immediately reviewable orders (those made as a matter of law affecting a substantial right) similarly to discretionary orders. There is no reason to think that *Calloway* denied the long-standing

The first step taken by *Calloway* in this argument was to assert that both grants and denials of motions to strike irrelevant, improper, or prejudicial material from pleadings are rulings made as a matter of law involving no discretion and finally determining the rights of the parties.[124] Two criticisms must be advanced against this initial premise, although, in point of fact, the premise was largely true at the writing of *Calloway*. First, viewing the motion to strike historically under the Code of Civil Procedure of North Carolina, it is not clear that such motion[125] was not directed to the court's discretion. The statute, as adopted in 1868, stated that "[i]f irrelevant or redundant matter be inserted in a pleading, it *may* be stricken out, on motion of any person aggrieved thereby."[126] The use of the word "may" points strongly to its discretionary nature.[127] Various scholarly treatments have taken the same view.[128] Thus it is arguable that under code

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rule that orders made as a matter of law affecting a substantial right could be "reconsidered" on changed conditions. Finally, the rationale in *Calloway* might be viewed as encompassing all other orders made as a matter of law (those not affecting a substantial right), thus requiring changed conditions for their "reconsideration" too. If not, however, then the long-standing rule that such orders could be modified even on substantially similar facts would remain the law, rather than the rule adopted later by the court of appeals.

124. *See Calloway*, 281 N.C. at 502, 189 S.E.2d at 489.

125. Under the Code of Civil Procedure of North Carolina, sham and irrelevant answers and defenses could be stricken under section 104 (later codified at CODE OF 1883 § 247, REVISAL OF 1905 § 472; CONSOLIDATED STATUTES OF NORTH CAROLINA § 510 (1920)), and irrelevant or redundant pleadings could be stricken under section 120 (later codified at CODE OF 1883 § 496; REVISAL OF 1905 § 261; CONSOLIDATED STATUTES OF NORTH CAROLINA § 537). *See* MCINTOSH, *supra* note 39, § 371, at 378–79 (discussing irrelevant or redundant allegations). Under the Code, motions to strike were a remedy for formal defects in pleadings that under the common law had been reached by special demurrer. *See* CHARLES T. BOONE, PLEADING UNDER THE CODES §§ 243–244, at 467–69 (1885).

126. N.C. CODE CIV. P. § 120 (1868) (emphasis added).

127. *See, e.g.*, Townsend v. Williams, 117 N.C. 330, 337, 23 S.E. 461, 463 (1895) ("The motion for a bill of particulars under The Code, section 259, rests in the discretion of the presiding Judge, and its grant or refusal is not reviewable. The words of the section are: 'The court *may*, in all cases, order a bill of particulars.' ") (citation omitted).

128. A scholar writing on the subject of code pleading in the late 19th century, when North Carolina's law of reconsideration was being thoroughly tested, Charles T. Boone, who frequently cited both New York and North Carolina law, pointed out that "a motion to strike out irrelevant or redundant allegations is addressed very much to the discretion of the court, and should be granted only where it is entirely clear that such matter is improper or irrelevant." BOONE, *supra* note 125, § 244, at 468–69; *see also* CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 87, at 552 (1947) ("Since the pleader should be permitted to state his case in his own way, so long as he fairly states his case, this power [to strike based on irrelevancy or redundancy] should be used with reluctance ... and the decision should rest ... in the discretion of the trial judge.") (citations omitted); MCINTOSH, *supra* note 39, § 476, at 508 (stating that denials of motion to strike as sham or frivolous are not immediately appealable) (citing Walters v. Starnes,

practice motions to strike irrelevant or redundant material from pleadings and motions to amend pleadings were both addressed to the discretion of the trial court. Consequently, the retort in *Calloway* that "incongruous" treatment of them would be "logically indefensible" has some basis in the original structure of the code.

But history is not necessarily logically defensible. Fifty years later, with the enactment of the Consolidated Statutes of North Carolina, the legislature provided that "[i]f irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, *but this motion must be made before answer or demurrer, or before an extension of time to plead is granted.*"[129] The North Carolina Supreme Court had difficulty applying this language. For instance, in one case the court argued that the language must be read as giving the aggrieved party a right that supports immediate appeal. Otherwise, the court stated, "he gets nothing which he would not have gotten without making a motion; whereas, the statute intends to give him something and to give it to him in time to be of service."[130] When in 1956 the court adopted Rule 4 of its Rules of Practice, which allowed a party to petition immediately for writ of certiorari concerning orders on motions to strike, it was clear that these orders were not mere interlocutory orders addressed to the court's discretion.[131] Although *Calloway*

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118 N.C. 842, 24 S.E. 713 (1896)). For a more current resource taking a similar perspective, see MOORE, *supra* note 11, § 12.37, at 12-93 to 12-99.

129. 1 CONSOLIDATED STATUTES OF NORTH CAROLINA § 537 (1920 & Supp. 1924) (emphasis added).

130. Hill v. Stansbury, 221 N.C. 339, 342, 20 S.E.2d 308, 309 (1942); *see also* 1 NORTH CAROLINA INDEX 2D *Appeal & Error* § 6, at 119 (1967) (stating that before 1956, immediate appeal was available from a grant or denial "of a motion to strike matter from a pleading as a matter of right") (citing, for example, Federal Reserve Bank v. Atmore, 200 N.C. 437, 439, 157 S.E. 129, 130–31 (1931) (affirming in an interlocutory appeal, on the grounds that the order did not affect a substantial right of defendant, a grant of motion to strike parts of an answer as irrelevant)). By way of contrast, some motions to strike are addressed to the court's discretion, rather than being made as a matter of right. As noted in *Parrish v. Atlantic Coast Line Railroad Co.*, 221 N.C. 292, 20 S.E.2d 299 (1942), "[i]f the motion [to strike] is made after answer or demurrer, or after an extension of time to plead is granted, then it becomes a matter of the court's discretion, and appeal can only be had from the final judgment and upon exception duly taken." *Id.* at 296–97, 20 S.E.2d at 302. *See generally* Henry Brandis, Jr. & Willis C. Bumgarner, *The Motion to Strike Pleadings in North Carolina*, 29 N.C. L. REV. 3, 21–26 (1950) (cited by *Calloway*, 281 N.C. at 502, 189 S.E.2d at 489) (concluding that orders on timely motions to strike allegations as irrelevant are immediately reviewable, while only grants of late-filed motions may be reviewed on an error standard; that orders on motions to strike for redundancy are treated similarly; that orders striking scandalous matter are reviewable; and that denials of motions to strike answers as frivolous are not immediately reviewable).

131. *See* N.C. SUP. CT. R. PRACT. 4(a)(2) (1974 Cum. Supp.) (remaining in effect until

correctly stated that orders on motions to strike material from pleadings were, in 1972, final rulings made as a matter of law,[132] the court's assertion that logic demands a similar treatment for orders on motions to amend is questionable. On the contrary, logic arguably demands that orders on motions to strike material from pleadings be classified as the discretionary, modifiable orders they had been under the 1868 code of civil procedure and orders on motions to amend still were in 1972.[133]

The second criticism of *Calloway*'s initial premise, the premise that both grants and denials of motions to strike irrelevant, improper or prejudicial material from pleadings are rulings made as a matter of law involving no discretion and finally determining the rights of the parties, is that the court does not sufficiently stress the reason that these orders, at least since 1930, "finally determine[] the rights of the parties."[134] After 1955, both grants and denials of motions to strike were immediately reviewable under Rule 4 of the Supreme Court Rules of Practice.[135] *Greene v. Laboratories, Inc.*,[136] cited by

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July 1, 1975).

132. This assertion is accurate if one is willing to read "final" in the sense of "supporting immediate review, and therefore unmodifiable at the trial level." "Appealable interlocutory orders," such as orders on motions to strike, have been distinguished from "merely interlocutory orders" both in the literature and in the cases; the former are often described as final in their nature and the latter as formal or technical in their nature. *See, e.g.*, BLACK, *supra* note 12, § 29, at 43 (stating that a decision on a demurrer not entering judgment but allowing to plead over is "merely interlocutory"); *id.* § 32, at 49 (explaining that, under code practice, an order affecting a substantial right is "final and appealable" and thus "granting or refusing a receiver should be considered as final for this purpose, since it does not turn upon a formal or technical point"); *id.* § 36, at 54 (noting that an order dissolving or refusing to dissolve attachments is generally considered "merely interlocutory," though one state holds that such order is "in its nature final"); *id.* § 36, at 54 (suggesting that in most jurisdictions an order quashing execution is "merely interlocutory [and] not a final judgment").

133. *See* Biggs v. Moffitt, 218 N.C. 601, 602–03, 11 S.E.2d 870, 871 (1940) (providing a short survey of amendments as of right and stating that prior to the adoption of the Revisal of 1905, a pleading could be amended as of course only when done before time for answering had expired).

134. *Calloway*, 281 N.C. at 502, 189 S.E.2d at 489.

135. *See* N.C. SUP. CT. R. PRACT. 4(a)(2) (1974 Cum. Supp.) (remaining in effect until July 1, 1975).

136. 254 N.C. 680, 120 S.E.2d 82 (1961). In *Greene*, the trial judge denied the first defendant's motion to strike paragraphs from the answer of a second defendant. *See id.* at 693, 120 S.E.2d at 91. The first defendant did not except to this order. *See id.* The second defendant amended its answer, bringing forward paragraphs to which the first defendant had objected, as well as other paragraphs. *See id.* The first defendant then moved to strike the objectionable paragraphs from the second defendant's amended answer, and the successor judge granted the motion. *See id.* On appeal, the supreme court held that the successor judge did not have authority to strike the same paragraphs that his predecessor would not strike, but that the strike would stand nonetheless under the supreme court's

Calloway, falls into this time period. *Greene* was reviewed by grant of certiorari, and held, among other things, that the grant of a motion to strike by the successor judge was made without authority due to a denial of the same by his predecessor, although it was allowed to stand under the court's supervisory jurisdiction.[137] Under *Greene's* survey of the law of reconsideration,[138] this lack of authority was due to the acquiescence of the moving party in the immediately reviewable denial of his motion to strike.[139] *Calloway* also cited two cases decided before 1956 to support its statement concerning motions to strike: *Wall v. England*[140] and *Scottish Bank v. Daniel*.[141] Both grants and denials of motions to strike were immediately appealable as a matter of practice at the time *Wall* was decided.[142]

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supervisory jurisdiction. *See id.* at 694, 120 S.E.2d at 91–92.

137. *See id.* at 694, 120 S.E.2d at 91.

138. *See id.* at 693–94, 120 S.E.2d at 91.

139. The Official Reporter of the opinion was so convinced of this reading that he included the following headnote in the North Carolina Reports:

> 17. Pleadings 34: Courts 6—Where one judge of the Superior Court has refused motion to strike certain allegations from a pleading and no appeal is taken therefrom, another judge of the Superior Court is without jurisdiction to allow motion to strike the identical allegation from the amended pleading, since one Superior Court judge may not modify or change an order of another Superior Court judge affecting a substantial right.

Greene, 254 N.C. at 682.

140. 243 N.C. 36, 89 S.E.2d 785 (1955).

141. 218 N.C. 710, 12 S.E.2d 224 (1940).

142. *See* Garrett v. Rose, 236 N.C. 299, 305, 72 S.E.2d 843, 847 (1952) (Ervin, J.) ("The question of the correctness of this ruling is properly before us because an immediate appeal lies from the granting of a motion to strike out parts of a pleading."); *see also* 1 NORTH CAROLINA INDEX 2D *Appeal & Error* § 6, at 119 (1967) (stating that before 1956, immediate appeal was available from a grant or denial "of a motion to strike matter from a pleading as a matter of right"). In the decades preceding *Wall*, the immediate appealability of denials of motions to strike proved especially difficult to decide. Where a substantial right was prejudiced, an immediate appeal would be supported. *See, e.g.*, Hill v. Stansbury, 221 N.C. 339, 341–42, 20 S.E.2d 308, 309 (1942) (stating that the denial of a motion to strike is immediately appealable if it affects a substantial right); Parrish v. Atlantic Coast Line R.R., 221 N.C. 292, 296, 20 S.E.2d 299, 302 (1942) (stating that "it may be that the rationale of this rule is that a substantial right is affected by the denial of a motion addressed to the right of the question rather than to the court's discretion"); Tar Heel Hoisery Mill v. Durham Hoisery Mills, 198 N.C. 596, 598, 152 S.E. 794, 795 (1930) ("If, however, an interlocutory order affects a substantial right of a party to the action, and is prejudicial to such right, he may appeal therefrom to this Court, and his appeal will be heard, and decided on its merits."). At least one case found a substantial right to be prejudiced. *See* Ellis v. Ellis, 198 N.C. 767, 768, 153 S.E. 449, 449 (1930) ("The denial of a motion made in apt time to strike from a complaint irrelevant and redundant matter affects a substantial right and is appealable. Conversely the granting of such motion is not such an interlocutory order as to foreclose review by the appellate court."). Where a substantial right was not prejudiced, an appeal would be dismissed as premature. *See, e.g.*, Privette v. Privette, 230 N.C. 52, 52–53, 51 S.E.2d 925, 925–26 (1949) (stating that where not unduly prejudicial to movant, an order denying a motion to strike was not immediately

Wall followed this rule, holding that where an order both strikes material and grants leave to amend, the aggrieved party may not replead the stricken material verbatim; the initial order striking that material is "not so much [] *res judicata*, as the law of the case,"[143] and the aggrieved party's remedy was to appeal the strike immediately.[144] *Daniel* is also consistent with the theme that an immediately appealable interlocutory denial of a motion to strike that has gone unappealed is binding.[145] Each authority cited by *Calloway* for the proposition that orders on motions to strike finally determine the rights of the parties base this rule not on the fact that the initial ruling was made as a matter of law, nor on the fact that it was a ruling about pleadings, but rather on the fact that these rulings were immediately reviewable as matters of law affecting a substantial right. Because orders on motions to amend had never been immediately reviewable under the appeals statute, nor as a matter of practice, nor under Supreme Court Rule 4, such orders were historically distinguishable from grants or denials of motions to strike. For this reason, cases holding that orders on motions to strike were subject to imputed law of the case, thus requiring changed conditions before a renewed motion may be considered, did not require identical legal treatment of orders on motions to amend or of any other order not subject to imputed law of the case.

Calloway next asserted that a successor judge may not reconsider

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appealable); *Tar Heel Hoisery Mill*, 198 N.C. at 598, 152 S.E. at 795 ("If the order does not affect a substantial right of the appellant, his appeal therefrom to this Court will be dismissed."). Examples of cases holding no prejudice to substantial right include *Pemberton v. City of Greensboro*, 203 N.C. 514, 515, 166 S.E. 396, 397 (1932) ("As no substantial right, of which the defendant can apparently complain, has presently been affected or impaired, the judgment will not be disturbed."), and *Tar Heel Hoisery Mill*, 198 N.C. at 598, 152 S.E. at 796 ("We are of the opinion that no substantial right of defendant has been impaired or affected to its prejudice . . . ."). *See generally* Brandis & Bumgarner, *supra* note 130, at 21–26 (concluding that orders on timely motions to strike allegations as irrelevant are immediately reviewable, while only grants of late-filed motions may be reviewed on an error standard; that orders on motions to strike for redundancy are treated similarly; that orders striking scandalous matter are reviewable; and that denials of motions to strike answers as frivolous are not immediately reviewable).

143. *Wall*, 243 N.C. at 39, 89 S.E.2d at 787.

144. *See id.*

145. *See Daniel*, 218 N.C. at 713, 12 S.E.2d at 226 ("When judgment was entered denying the motions of the defendants to strike . . . , neither defendant excepted thereto. Nor did they appeal therefrom. It thereupon became binding upon the defendants. They could not thereafter appeal to another judge of the Superior Court to review or to reverse the original order . . . ."). The interlocutory order appealed from in *Daniel* was the denial by the second judge of the renewed motion to strike, and as such it is clear that the court recognized the right to appeal immediately from the denial of motions to strike.

a discretionary grant of a motion to amend.[146] The court observed that "[l]ikewise, when one judge allows a motion to amend a pleading in his discretion ... a second judge may not strike it on the ground that the first erred in allowing it. He is 'under the necessity of observing the terms of the judgment allowing the [party] to amend.' "[147] *Calloway* cited *State v. Standard Oil Co.*[148] in support of this proposition. In *Standard Oil*, the initial order sustained a demurrer for failure to state facts sufficient to constitute a cause of action and granted leave to amend. The amended complaint restated the same insufficient facts and was stricken by the succeeding judge, for had he allowed it he would have in effect overruled as error the sustained demurrer of his predecessor.[149] As the court stated in affirming the strike, "[i]t is not open to the plaintiff [in filing the amended complaint] to say the original complaint does state facts sufficient to constitute a cause of action, for the judgment sustaining the demurrers, unappealed from, forecloses this position."[150] *Standard Oil*, then, does not stand for the proposition that a discretionary grant of a motion to amend may not be reconsidered on substantially similar facts, nor even that a successor judge may not correct the error of his predecessor who had granted such a motion.[151]

146. *See Calloway*, 281 N.C. at 504, 189 S.E.2d at 490 ("[W]hen a judge in his discretion allows a motion to amend his order binds another Superior Court judge ...."). In contrast to the conclusion drawn by *Calloway*, a majority of states seem to have followed the rule that "[a]n amended or supplemental pleading or count thereof may be stricken out in a proper case, even after it has been filed by leave of court." 49 C.J. *Pleading* § 979, at 689 (1930).

147. *Calloway*, 281 N.C. at 502, 189 S.E.2d at 489 (quoting State v. Standard Oil Co., 205 N.C. 123, 126, 170 S.E. 134, 135 (1933)).

148. 205 N.C. 123, 170 S.E. 134 (1933).

149. *Standard Oil* is not a case of one judge overruling another. The exception to the traditional, plenary power to reconsider was applicable to this case, and the second judge respected this exception by not allowing a motion that would have in effect overruled an immediately appealable order in which a party had acquiesced.

150. 205 N.C. at 127, 170 S.E. at 135 (citations omitted).

151. *Nationwide Mut. Ins. Co. v. Don Allen Chevrolet Co.*, 253 N.C. 243, 116 S.E.2d 780 (1960), arguably raised the same issue as *Standard Oil*, though Justice Bobbitt, writing for the court, thought it unnecessary to reach the question of reconsideration (what he termed "res judicata"). *See id.* at 252, 116 S.E.2d at 786. In *Nationwide*, Superior Court Judge Carr sustained a demurrer and allowed the plaintiff to amend its complaint. *See id.* at 244, 116 S.E.2d at 781. The defendant moved to strike all portions of the amended complaint that distinguished it from the original complaint. *See id.* at 247–48, 116 S.E.2d at 783. Superior Court Judge Sharp, who would one day sit on the supreme court and be assigned by Chief Justice Bobbitt to write the majority opinion in *Calloway*, granted the motion to strike and ordered the defendant to plead to the "amended complaint." *Id.* at 244, 116 S.E.2d at 781. If in fact, Judge Sharp's order left the plaintiff's complaint as it stood before amendment, the order, in effect, vacated the order of Judge Carr sustaining the initial demurrer. As the plaintiff had acquiesced in Judge Carr's immediately reviewable order,

Standard Oil simply held that a successor judge may not correct an order that is imputed law of the case. A sustained demurrer[152] was immediately appealable[153] under the provisions of the Consolidated Statutes in effect at the filing of *Standard Oil*,[154] and thus this initial

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Judge Sharp should not have reconsidered Judge Carr's sustained demurrer.

While the court in *Nationwide* did not discuss the impact of Judge Sharp's order on her predecessor's order to amend, in *Burrell v. Dickson Transfer Co.*, 244 N.C. 662, 94 S.E.2d 829 (1956), Justice Bobbitt, writing for the majority, had addressed the issue of the binding effect of a discretionary motion to amend where a demurrer had been sustained. *See id.* at 664–65, 94 S.E.2d at 831–32. In *Burrell*, the court interpreted orders of Judge Sharp—orders granting a motion to dismiss (a demurrer *ore tenus*) and allowing the plaintiff to amend its complaint—as the grant of a formal demurrer not pled and an order to plead over. *See id.* at 665, 94 S.E.2d at 832. On this interpretation, the court reversed a subsequent trial judge who quite understandably had treated Judge Sharp's grant of the demurrer *ore tenus* as a dismissal and her order to amend as surplusage. *See id.* at 664–65, 94 S.E.2d at 831–32. While *Burrell* did let stand Judge Sharp's order to amend, the case should not be read as supporting the rule laid down in *Calloway* that "when a judge in his discretion allows a motion to amend his order binds another Superior Court judge." *Calloway*, 281 N.C. at 504, 189 S.E.2d at 490. Rather, the holding in *Burrell* is consistent with the rule that a formal demurrer unappealed from should not be reconsidered. Unfortunately, *Burrell* grounded it holding on the fact that the interlocutory order in question was made as a matter of law and that a different judge attempted to correct it at a subsequent term. *See Burrell* at 665, 94 S.E.2d at 832. While these factors may have pertained to the reopening of final orders and judgments, the only factor which prohibited reconsideration of an interlocutory order under North Carolina law was the immediate reviewability of such order.

152. A written demurrer under the Code of Civil Procedure of North Carolina is technically interlocutory, the case being determined if a judgment of dismissal follows. *See* MCINTOSH, *supra* note 39, § 676, at 772. The written or formal demurrer seeks a ruling as a matter of law. *See id.* § 437, at 446. It is a pleading, not a motion calling for an order. *See id.* § 676, at 772.

153. The immediate appealability of these orders had not always been clear under code practice. In an early case, a decision on written demurrer was held immediately reviewable as a matter of established practice. *See id.* § 676, at 772 (citing Commissioners of Wake County v. Magnin, 78 N.C. 181 (1878)). The rule later crystallized that appeal would lie only from final judgment unless the decision on demurrer would end the case, which did not occur where a right to plead over was given. *See id.* Still, the issue sparked dissent. *See, e.g.*, Chambers v. Seaboard Airline Ry. Co., 172 N.C. 555, 557–58, 90 S.E. 590, 593 (1916) (Clark, C.J., dissenting) (stating that an appeal lies from an order overruling or sustaining a demurrer). The issue was not clearly resolved even after statutory change seemingly allowed immediate appeal by either party from a ruling on a demurrer. *See* MCINTOSH, *supra* note 39, § 676, at 772–73 ("[Section 15 of the Consolidated Statutes of North Carolina] provides for an appeal by either party from a ruling on demurrer, without any limitation, and whether this was intended to change the rule laid down in the cases cited does not appear to have been decided.").

154. *See* CONSOLIDATED STATUTES OF NORTH CAROLINA § 515 (1920). Section 515 stated:

> Within ten days after the return of the judgment upon the demurrer, if there is no appeal, or within ten days after the receipt of the certificate from the supreme court if there is an appeal, if the demurrer is sustained the plaintiff may move, upon three days notice, for leave to amend the complaint. If this is not granted, judgment shall be entered dismissing the action. If the demurrer is overruled the

order was imputed law of the case.[155]

Hardin v. Greene[156] is the final case cited by *Calloway* to support the proposition that a grant of a motion to amend may not be reconsidered. In *Hardin*, the first trial judge granted in his discretion a motion to amend to plead the statute of limitations. The second judge struck the pertinent language in the amended answer. The objection to the amendment, according to the order of the second judge, had been the lack of notice that the statute of limitations was to be pleaded. Apparently, there had been a former suit between the parties that had been dismissed under an agreement not to plead the statute of limitations.[157] Nonetheless, the majority reversed, stating that "[s]uch plea is not immoral, and under the terms of the order the defendant has as much right to set it up as any other plea."[158] Contrary to *Calloway*, it is not clear that this decision stands for the proposition that a successor judge has no authority to strike an amended answer.[159] At least three alternate readings may be suggested. The successor judge might have had jurisdiction under the appropriate statutes to strike the amendment as sham, frivolous,

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answer shall be filed within ten days after the receipt of the decision overruling the demurrer, if there is no appeal .... Otherwise the plaintiff shall be entitled to judgment by default final or by default and inquiry according to the course and practice of the court.

Id.

155. *Calloway* also cited *Dockery v. Fairbanks*, 172 N.C. 529, 90 S.E. 501 (1916), as in accord with *Standard Oil.* In fact, much like *Standard Oil, Dockery* has not been read by later cases as only involving a mere interlocutory order, and therefore provides little support for the proposition advanced in *Calloway* that the grant of a typical motion to amend—one that is merely interlocutory—may not be reconsidered. Rather, later cases appear to classify *Dockery* as involving an order affecting a substantial right, or one finally determinative of the rights of the parties. *See, e.g.*, Rutherford College, Inc. v. Payne, 209 N.C. 792, 796–97, 184 S.E. 827, 830 (1936); Broadhurst v. Board of Comm'rs, 195 N.C. 439, 444, 142 S.E. 477, 480 (1928); Bland v. Faulkner, 194 N.C. 427, 429, 139 S.E. 835, 836 (1927). In *Dockery*, the first judge granted a mistrial and right to amend to conform the pleadings to the facts proven. The initial action was for breach of contract and the amended complaint alleged fraud. The strike of the amended complaint by the successor judge was reversed on appeal. At least one commentator agrees with the successor judge in *Dockery* that such a variance is often held fatal. *See e.g.*, BOONE, *supra* note 125, § 219, at 423 ("Nor can there be a recovery for a tort in an action on contract. The principle is, that the case really set forth by a party in his pleading cannot be changed upon the trial into one of a different nature."). It may be worth noting that the supreme court in *Dockery* said the successor judge might not ground his reconsideration on the want of power of his predecessor. *See Dockery*, 172 N.C. at 530, 90 S.E. at 502.

156. 164 N.C. 99, 80 S.E. 413 (1913).

157. *See id.* at 102, 80 S.E. at 415 (Allen, J., dissenting).

158. *Id.* at 101, 80 S.E. at 414.

159. *See Calloway*, 281 N.C. at 503, 189 S.E.2d at 489 ("On appeal it was held that the judge at a subsequent term was without authority to strike the plea.").

redundant, or irrelevant, but not to strike for lack of notice. Or, the successor judge might have had the power to reconsider the order allowing the amended answer, but erred or abused his discretion in the exercise of the power. Finally, as the dissent in *Hardin* suggests, the successor judge might have had discretionary authority to strike the amendment, even if he could not set it aside as a matter of law.[160] Thus it is arguable that the holding later advanced in *Temple v. Western Union Telegraph Co.*,[161] that a court is at liberty, in its discretion, to strike out a discretionary order granted at a prior term,[162] may be distinguished from *Hardin* and may contradict the rule advanced at this point in *Calloway*.[163]

In summary, our analysis of North Carolina case law is at odds with *Calloway*'s general statement that "a second judge may not strike [an amended pleading filed under grant of motion to amend] on the ground that the first erred in allowing it."[164] Rather, a second judge is prohibited from striking if the doctrine of imputed law of the case blocks such reconsideration, as in *Standard Oil*. Of course, when not prohibited from reconsidering an order, the second judge might err or abuse his discretion in the exercise of his traditional, plenary power to reconsider mere interlocutory orders, as arguably was the case in *Hardin*. Thus, none of the cases cited by *Calloway* lends much support to the general statement that "a second judge may not strike [an amended pleading filed under grant of motion to amend] on the ground that the first erred in allowing it,"[165] nor to the broader restatement later asserted in *Calloway* that grants of motions to amend are binding on successor judges.[166]

In fact, *Calloway* itself provides good reason to think that some orders on pleadings, while in the control of the court, may be reconsidered, for the court cites four cases in which the initial denial of a discretionary motion was subsequently reconsidered and granted, and such reconsideration was upheld on appeal.[167] Despite the

160. *See Hardin*, 164 N.C. at 101–02, 80 S.E. at 414–15 (Allen, J., dissenting). This logic might be echoed in *Farris v. First Citizens Bank and Trust Co.*, 215 N.C. 466, 467, 2 S.E.2d 363, 363 (1939) (stating that, where the court allows a motion as matter of law, defendants are entitled to have the motion reconsidered and passed upon as matter of discretion) (citing Tickle v. Hobgood, 212 N.C. 762, 763, 194 S.E. 461, 474 (1938)).

161. 205 N.C. 441, 171 S.E. 630 (1933).

162. *See id.* at 442, 171 S.E. at 631.

163. That *Temple* might contradict *Calloway* is ironic, as *Calloway* cited *Temple* with approval. *See Calloway*, 481 N.C. at 502, 189 S.E.2d at 488.

164. *Calloway*, 281 N.C. at 502, 189 S.E.2d at 489.

165. *Id.* at 502, 189 S.E.2d at 489.

166. *See id.* at 502, 189 S.E.2d at 489–90.

167. *See id.* at 503–04, 189 S.E.2d at 489–90 (citing Dixie Fire & Cas. Co. v. Esso

absence of any language in these four cases supporting its interpretation, the *Calloway* court dismissed the substance of each case's holding by asserting that the supreme court had upheld the result in each case not based on its acknowledgement of the trial court's inherent power but based on the supreme court's exercise of its supervisory jurisdiction.[168] In *Townsend v. Williams*,[169] on review of an order overruling both the defendant's demurrer and motion to make more definite, the court stated that the refusal to order a bill of particulars could be reconsidered before trial because imputed law of the case did not apply to such a discretionary order.[170] Furthermore, *Revis v. Ramsey*[171] concluded that a proper case for reconsideration of a denial of a motion to amend is made when a misapprehension of fact is alleged,[172] because such denial is on an "ordinary motion[ ] incidental to the progress of a cause" not involving a substantial right.[173] Contrary to the suggestion in *Calloway*, neither of these cases indicated that the trial court lacked authority to reconsider the motion, or that the initial denial was an abuse of discretion, or that in upholding the successor judge's order the supreme court was exercising its supervisory jurisdiction.[174] While *Overton v. Overton*[175] and *Dixie Fire & Casualty Co. v. Esso Standard Oil Co.*,[176] both cited in *Calloway*, use language that could be mistaken as permissive, these cases explicitly invoke the principle that mere discretionary orders cannot be subject to imputed law of the case.[177] The traditional rule—

Standard Oil Co., 265 N.C. 121, 143 S.E.2d 279 (1965); Overton v. Overton, 259 N.C. 31, 129 S.E.2d 593 (1963); Revis v. Ramsey, 202 N.C. 815, 164 S.E. 358 (1932); Townsend v. Williams, 117 N.C. 330, 23 S.E. 461 (1895)). Beyond the four cases cited by *Calloway*, there is at least another that involves a grant of a discretionary motion that had earlier been denied, though admittedly it did not involve an initial motion to amend. *See* State v. Dewey, 139 N.C. 556, 559, 51 S.E. 937, 938 (1905) ("Besides, the appeal is now useless, for the motion for a 'Bill of Particulars' being a discretionary matter and its refusal not *res judicata*, the motion was renewed ... and was granted, and the defendant had the benefit of the bill of particulars before his trial....").

168. *See Calloway*, 281 N.C. at 504, 189 S.E.2d at 490.

169. 117 N.C. 330, 23 S.E. 461 (1895).

170. *See id.* at 337, 23 S.E. at 463.

171. 202 N.C. 815, 164 S.E. 358 (1932).

172. *See id.* at 816, 164 S.E. at 358 ("The motion made at the February Term is different from the one lodged at the October Term. The first was perhaps denied because it was thought the statute of limitations had already been pleaded.") (citation omitted).

173. *Id.* at 817, 164 S.E. at 358.

174. *See Calloway*, 281 N.C. at 504, 189 S.E.2d at 490.

175. 260 N.C. 139, 132 S.E.2d 349 (1963).

176. 265 N.C. 121, 143 S.E.2d 279 (1965).

177. *See Dixie Fire*, 265 N.C. at 130, 143 S.E.2d at 286 (stating that where a prior order does not affect a substantial right, and therefore is not res judicata, the party may move the superior court to reconsider); *Overton*, 260 N.C. at 146, 132 S.E.2d at 354 (same).

that interlocutory orders imputed to be law of the case may not be reconsidered by the trial court but that most if not all orders not so deemed may be reconsidered, whether made as a matter of law or in the court's discretion—is invoked by each of the four cases cited in *Calloway*.

Possibly because these four cases do not directly support *Calloway's* analysis that denials of motions to amend may not be reconsidered on substantially similar facts, the court turned finally to logical symmetry to bolster its position. Having earlier asserted that orders on most pleadings, such as motions to strike and grants of motions to amend, may not be reconsidered without a showing of changed conditions, the court concluded:

> We do not believe that in the foregoing cases the court intended to lay down the incongruous rule that when a judge in his discretion allows a motion to amend his order binds another Superior Court judge, but when he denies the motion in his discretion another may allow the motion irrespective of any change in conditions. Such a rule is logically indefensible and could serve only to undermine the considerations of orderly procedure, courtesy and comity, which engendered the rule that one judge may not overrule or modify the judgment of another.[178]

If orders on motions to strike and denials of demurrers have been treated as matters of law affecting a substantial right, this is due to the vagaries of legislation and to the great difficulty in extrapolating the appeals statute introduced in 1868, which authorized the immediate review of certain interlocutory orders.[179] Logic does not impel the conclusion that all interlocutory orders should be treated as immediately reviewable and thereby modifiable only on changed conditions, as *Calloway* apparently would require. Nor does logic impel that all orders on pleadings[180] or all orders on motions to amend[181] be so treated. Logic does not even impel that the

178. *Calloway*, 281 N.C. at 504, 189 S.E.2d at 490.

179. *See supra* notes 124–145 and accompanying text; *supra* notes 153–54 and accompanying text.

180. Although encyclopedic sources suggest that some courts have viewed orders on pleadings as unmodifiable as a class, support for such a position rests at least in part on cases involving initial orders that were immediately appealable. *See* 30A AM. JUR. *Judges* § 49 (1958) ("[S]ome cases support the doctrine that that view of a question of law which was taken by one judge in ruling on the pleadings is not to be departed from by another."); Allen, *supra* note 6, at 57 (citing Tallassee Power Co. v. Peacock, 197 N.C. 735, 150 S.E. 510 (1929); State v. Standard Oil Co., 205 N.C. 123, 170 S.E. 134 (1933)).

181. The narrowest holding of *Calloway* would be that changed conditions allowed consideration of this denial of a motion to amend.

order in *Calloway* itself[182] be viewed as unmodifiable without changed conditions—unless, of course, the pertinent order is seen not as the initial, discretionary denial of defendant Matthews's motion to amend, but rather as the immediately reviewable order striking defendant Matthews's unauthorized amendment that followed shortly thereafter.

2. *Calloway*'s Holding: The Requirement of Changed Conditions

The remainder of this section focuses on *Calloway*'s requirement of changed conditions. Even if one accepts the thesis advanced in this Article, *Calloway* would have been correct to require changed conditions for reconsideration if the focal order was that of the second judge, Judge Beal, which struck the relevant portion of Matthews's unauthorized amended answer. It is possible that it was this order, and not the denial by Judge Hasty of Matthews's initial motion to amend, that caused the third judge, Judge Ervin, to hesitate when faced with yet another motion to amend by defendant Matthews. This hesitation would be significant because Judge Beal's grant of Calloway's motion to strike defendant Matthews's amended answer was arguably immediately appealable and therefore not modifiable without changed conditions.[183] Judge Beal's order, underplayed by the supreme court in *Calloway*,[184] should be kept in mind when analyzing this question: had conditions sufficiently changed by the time of Matthews's third motion to amend[185] so that Judge Ervin could reconsider the orders entered on prior motion, even if one such order was imputed law of the case due to its immediate reviewability?

Judge Ervin was the third judge to preside in *Calloway*, and his precise ground for refusing to consider Matthews's renewed motion to amend was as follows:

182. This order was on defendant Matthews's initial motion to amend to plead the statute of limitations.

183. *See supra* notes 134–45 and accompanying text.

184. *See Calloway*, 281 N.C. at 501, 189 S.E.2d at 488 ("The question presented by this appeal is whether Judge Ervin, in his discretion, had authority to permit an amendment which Judge Hasty, in his discretion, had denied earlier.").

185. Judge Beal arguably treated the motion to strike Matthews's amended complaint as an implied motion by Matthews to amend its answer. Thus, Judge Ervin could have viewed the motion before him as Matthews's third motion to amend its answer.

> and it appearing to the Court that the Honorable Fred H. Hasty had by order dated May 4, 1970, denied an earlier motion of the defendant, Matthews Motors, Inc., to amend its answer to plead the three year statute of limitations in the exercise of his discretion; that subsequent to May 4, 1970, the co-defendant, Ford Motor Company, filed an amended answer pleading the three year Statute of Limitations against plaintiff; and it appearing further to the Court that the Honorable Fate J. Beal, Judge Presiding, made an entry on the pleadings in this cause; that the undersigned is inclined to grant the motion of Matthews Motors, Inc. dated October 20, 1970, so that said defendant can also allege the three year Statute of Limitations against plaintiff's claim, but does not have the authority to exercise his discretion but must rule as a matter of law.[186]

Ten days after Judge Hasty's order denying Matthews's motion to amend, Matthews filed an amended answer which alleged, inter alia, the running of the statute of limitations and which stated that it was filed with leave of court granted by Judge Hasty. The new pleading raising the defense of the statute of limitations was stricken by Judge Beal on plaintiff's motion, which had pointed out that leave to amend to plead the statute of limitations had been denied by Judge Hasty only ten days earlier.[187] Other than the filing of the amended answer by seller Matthews and a filing four days earlier by manufacturer Ford with a virtually identical preamble alleging that the amendment had been filed with the court's permission, there is no indication that Judge Hasty had reconsidered his denial of seller's motion to amend, and in its recital of the facts, the supreme court stated that "[t]his amended answer . . . is supported by no order in the record."[188] Furthermore, the supreme court refers to the manufacturer's virtually identical amendment as "the amended answer which Ford had *filed without permission*,"[189] which may indicate how the court viewed seller Matthews's amended answer.

It appears that Judge Hasty rotated out of the district shortly after denying the motion to amend filed by seller Matthews. Judge Beal was apparently holding court in the district when Ford filed its amended answer, which included the defense of the running of the statute of limitations, and asserted that the filing was with permission

186. *Order (November 12, 1970)*, BRIEFS & RECORDS, SPRING TERM 1972, NO. 64, at 54.

187. *See Calloway*, 281 N.C. at 499, 189 S.E.2d at 487.

188. *Id.*

189. *Id.* at 505, 189 S.E.2d at 490 (emphasis added).

of Judge Hasty—which action was quickly imitated by Matthews. It is possible that each defendant in fact received permission to amend its answer from Judge Hasty, but no such orders appear in the record. It is also possible, as the supreme court asserts in its opinion, that Ford, seeing Judge Hasty's denial of the motion of the similarly situated defendant, feared a denial, too, and so filed an amended answer without permission.

Calloway did not initially object to the amendment filed by Ford, but did move to strike the amended answer of Matthews.[190] Judge Beal granted Calloway's motion to strike as to those portions of the amended answer alleging the running of the statute of limitations. Because Judge Beal's order was on "a motion to strike an averment from a pleading ... he rule[d] as a matter of law, whether he allow[ed] or disallow[ed] the motion. No discretion [was] involved and his ruling finally determine[d] the rights of the parties unless it is reversed upon appeal."[191] As this was an immediately reviewable order in which Matthews acquiesced, it was imputed law of the case, and could thus not be reconsidered without new facts or a change of condition.

The ground on which Judge Beal struck the pertinent portion of the amended answer is not stated in the record, but he may have struck the amended pleading on the ground that no permission to amend had been granted. If Matthews amended its answer knowing that it lacked authority to do so and knowingly misrepresented to the court that it had such permission, then it is questionable whether allowing a subsequent motion to amend would ever be in furtherance of justice, even if such misconduct was considered in light of changed conditions.[192] Although subsequent facts may permit a successor judge to exercise discretion, still she should not exercise it to reward such behavior.

On whatever ground Judge Beal struck Matthews's amended answer, it is clear that at the time of this strike, defendant Ford had already filed its amended answer pleading the statute of limitations. Judge Beal was aware that his order resulted in the uneven treatment of the defendants because Ford had been allowed to so plead. For this reason, when the successor judge, Judge Ervin, faced yet another renewal of the motion by Matthews to amend its pleading, he could

190. *See supra* note 77.

191. *Calloway*, 281 N.C. at 502, 189 S.E.2d at 489.

192. The dismissal enjoyed by co-defendant Ford on the ground of the running of the statute of limitations might be such a changed condition.

not consider Ford's amendment of its pleading as a subsequent fact or material change in condition empowering him to hear Matthews's renewed motion. Ford's amended answer was a fact that existed at the time of Judge Beal's decision, that is, a fact that had been considered the last time Matthews moved to amend its answer.

Between Judge Beal's order on or after May 20 and Judge Ervin's order on November 12, 1970, there had been some new developments that Judge Ervin might have considered and that the supreme court indicated were changed conditions or new facts sufficient to give the judge jurisdiction to hear the renewed motion.[193] The court found it significant that Judge Ervin himself had ruled one week earlier that Ford's amended answer would not be stricken[194] and that Ford was entitled to summary judgment on the strength of its plea of the statute of limitations. It is worth considering whether these decisions in Ford's favor should fairly amount to new facts or changed conditions creating jurisdiction to hear Matthews's renewed motion to amend. Judge Ervin entered orders in favor of Ford even though Matthews's motion to amend its answer had been filed earlier. Had Judge Ervin responded to the motions in the sequence in which they were filed, the rulings affecting Ford would not have existed and could not then have been subsequent facts supporting reconsideration. It is not obvious that a judge's own orders in a case should amount to the changed conditions necessary for reconsideration of another order subject to imputed law of the case. Such a rule seems especially murky and undesirable as applied in this case, where the trial judge's prompt disposal of a summary judgment motion is later said to have created the jurisdiction he needed to hear an earlier filed motion. Judge Ervin may have rejected this argument. If Matthews's motion was not subject to reconsideration, it was not relevant whether or not Judge Ervin had waited the three weeks to enter his decision. Matthews had acquiesced in Judge Beal's reviewable order striking its amended answer, and no changed conditions occurred which should be said to so change the issue as to raise a legally distinct point. Arguably, then, *Calloway* wrongly decided that there was a change of condition distinguishing the

193. The new facts emphasized in *Calloway* do not exhaust the argument. Other new facts might legally differentiate the positions of Judges Beal and Ervin, such as a July ruling by Judge Beal on indemnification. *Calloway*, however, does not point to these as relevant new facts.

194. *Calloway* interprets this order as impliedly granting to Ford a motion to amend in order to plead the statute of limitations. That motion was never made, but was implied by its action of filing without permission six months earlier.

motion facing Judge Ervin from those motions which had faced Judges Hasty and Beal.

III. THE POST-*CALLOWAY* DEVELOPMENT OF THE RULE

A. *In the North Carolina Supreme Court*

As discussed in Section II, *Calloway* quoted, with apparent approval, the majority rule that "[i]nterlocutory orders are subject to change 'at any time to meet the justice and equity of the case upon sufficient grounds shown for the same.' "[195] Nowhere does *Calloway* explicitly overrule the majority rule that a successor judge may reconsider a mere interlocutory order on substantially similar facts. Indeed, a narrow reading of *Calloway*'s holding—that changed conditions sufficed to allow a successor judge to grant a motion to amend where an earlier motion to amend had been denied by another judge—is not inconsistent with the majority rule. It can be argued that the remaining legal analysis and rationale in *Calloway* is properly viewed as nonbinding dicta[196] that should be disregarded.[197] This may

195. *Id.* at 502, 189 S.E.2d at 488 (quoting Miller v. Justice, 86 N.C. 26, 30 (1882) and citing Bland v. Faulkner, 194 N.C. 427, 139 S.E. 835 (1927)).

196. The narrow holding in *Calloway* is consistent with the two traditional rules that (1) given substantially similar facts, a trial judge in a proper case has inherent power to reconsider orders that are not imputed law of the case; and (2) on changed conditions, a trial judge has jurisdiction to hear a renewed motion even if the order on the prior motion was imputed law of the case. Consistent with the second rule, as stated above, *Calloway* held that changed conditions empowered the third judge to hear the renewed motion to amend. As these two rules provide independent jurisdictional grounds to hear a renewal, and the court disposed of the case on the second rule, its opinion need not have reached the applicability of the first rule. In this sense, *Calloway*'s holding is not inconsistent with the first rule, though admittedly its rationale raises some serious questions. Nevertheless, the consistency of *Calloway*'s holding with prior law remains whether the impact of Judge Hasty's initial order was solely at issue on appeal, or whether the impact of both Judge Hasty's and Beal's orders were at issue. In the former case, a subsequent judge could have heard the renewal on changed conditions, and in the latter a subsequent judge could only have heard the renewal on changed conditions. In either case, *Calloway* had no need to address the scope of the power to reconsider on substantially similar facts. Insofar as a holding is confined to utterances in an opinion necessary to the settlement of the rights of the parties, *Calloway*'s discussion of the first traditional rule is dicta.

197. Two reasons for distinguishing holdings from dicta are accuracy and legitimacy: "[d]icta are less carefully considered than holdings, and, therefore, less likely to be accurate statements of law," and "dicta have no precedential effect because courts have legitimate authority only to decide cases, not to make law in the abstract." Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2000–01 (1994); *see also* Moose v. Comm'r, 172 N.C. 419, 433–34, 90 S.E. 441, 448–49 (1916) ("The question actually before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."). Dicta should not

have been what Justice Higgins had in mind when he concurred only in the result in *Calloway*.

The North Carolina Supreme Court cases that have discussed reconsideration in the years since *Calloway* have not clearly resolved the status of the pre-*Calloway* rule. Consider *Sales Co. v. Board of Transportation*, a case filed five years after *Calloway*.[198] In *Sales*, the court cited *Calloway* as authority for application of the majority rule to interlocutory orders:

> A severance order is an interlocutory order, that is, one incidental to the progress of the cause which does not affect a substantial right of the parties. As such, it may be subsequently modified by the presiding judge upon a determination that present circumstances warrant such action. "Interlocutory orders are subject to change 'at any time to meet the justice and equity of the case upon sufficient grounds shown for the same.' "[199]

Sales's focus on "present circumstances" might be read to endorse the continued applicability of the majority rule and a belief that *Calloway* had followed and applied the majority rule in its holding.

Subsequent supreme court cases are less easily interpreted as endorsing the pre-*Calloway* rule, but they still do not appear clearly to reject the majority rule. For instance, in *State v. Duvall*,[200] the court noted the "general impropriety" of a trial judge's correction of legal error in the prior ruling of another judge in the same case, which arguably restates the majority rule, albeit with a heavy emphasis on the need for hesitation by the successor judge, and also acknowledged the power of the court to consider a renewal upon "a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter."[201] In *State v. Stokes*,[202] the court cited *Duvall* for the proposition that "[t]o permit one superior court judge to overrule the final order or judgment of another would result in the disruption of the orderly process of a trial and the usurpation of the reviewing

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influence a later decision unless it logically assists in answering the new question. *See* Muncie v. Insurance Co., 253 N.C. 74, 79, 116 S.E.2d 474, 477 (1960). *See generally* Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 367–93 (1988) (examining the role of precedent in judicial decisionmaking).

198. 292 N.C. 437, 233 S.E.2d 569 (1977).

199. *Sales*, 292 N.C. at 444, 233 S.E.2d at 574 (quoting Calloway v. Ford Motor Co., 281 N.C. 496, 502, 189 S.E.2d 484, 488 (1972)).

200. 304 N.C. 557, 284 S.E.2d 495 (1981).

201. *Id.* at 562, 284 S.E.2d at 499.

202. 308 N.C. 634, 304 S.E.2d 184 (1983).

function of appellate courts."[203] This restriction to a "final order or judgment" is clearly consistent with the majority rule. *Stokes* goes on to restate with approval other versions of the majority rule: (1) "This rule [that one judge may not overrule another] does not apply, however, to interlocutory orders given during the progress of an action which affect the procedure and conduct of the trial;"[204] (2) "An interlocutory order or judgment does not determine the issues in the cause but directs further proceedings preliminary to the final decree;"[205] and (3) "Such order or judgment is subject to change during the pendency of the action to meet the exigencies of the case."[206] The actual holding in *Stokes* was that the successor judge (the trial judge) had authority to deny defendant's motion for individual voir dire of jurors even though the first judge had ordered individual voir dire in a pre-trial ruling.[207]

In *State v. Sams*,[208] the successor judge denied the defendant's motion to dismiss for speedy trial violation based on an order of the first judge granting the state a continuance and expressly stating that the time period associated with the continuance be excluded from the Speedy Trial Act's requirements.[209] Although *Sams* states that the successor judge "could not have given defendant relief for . . . alleged error" in the first judge's granting of the continuance (citing *Calloway* for the "well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law"),[210] this statement is dictum because the successor judge did not attempt to overrule or modify the first judge's order.[211] It is also relevant that *Sams* involved an appeal from a final judgment and that the defendant failed to except to and appeal the first judge's order; thus, to allow the defendant to argue that the successor judge committed error by failing to correct the first judge's erroneous order would, in *Sams*, have interfered directly with the appellate process.[212]

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203. *Id.* at 642, 304 S.E.2d at 189 (citing *Duvall*, 304 N.C. 557, 284 S.E.2d 495).
204. *Id.*
205. *Id.* at 642, 304 S.E.2d at 190.
206. *Id.*
207. *See id.*
208. 317 N.C. 230, 345 S.E.2d 179 (1986).
209. *See id.* at 234, 345 S.E.2d at 182.
210. *Id.* at 235, 345 S.E.2d at 182 (citing *Calloway*, 281 N.C. at 501, 189 S.E.2d at 488).
211. *See id.* at 234–35, 345 S.E.2d at 182–83.
212. As the court stated, "defendant took no exception to [the first judge's] order. He has therefore failed to preserve any error or mistake of law found therein for appellate review." *Id.* at 235, 345 S.E.2d at 182.

Able Outdoor, Inc. v. Harrelson[213] cites *Calloway* for the proposition that "[o]ne superior court judge may not overrule another,"[214] yet *Able Outdoor* is also not an interlocutory order case. Rather, in *Able Outdoor* there was a final judgment, and the defendant filed a Rule 60(b)[215] motion for relief from judgment on the grounds that the judgment was void. The successor judge granted the Rule 60(b) motion on the basis that the first judge lacked jurisdiction to enter the judgment. The court held that the first judge had jurisdiction to enter the judgment so that the successor judge's conclusion was erroneous.[216] Furthermore, although *Hieb v. Lowery*[217] cited *Calloway* for the proposition that "[o]rdinarily, one superior court judge may not modify or overrule the judgment of another superior court judge in the same case on the same issue,"[218] it too is not an interlocutory order case. It appears to be a final judgment case, as the plaintiffs' styled their motion as a Rule 60(b) matter, even though the court refused to consider the issue in Rule 60(b) terms. Nevertheless, the basis for the court's holding was not that the successor judge erred because he had overruled previous orders but that the successor judge's conclusion that he had statutory authority to modify "the previous judgments" was erroneous.[219]

Two other cases may be instructive. In *State v. McClure*,[220] the defendant, charged with first degree murder, accepted a plea bargain to second degree murder. The first judge to hear the matter rejected the guilty plea based upon the defendant's responses in open court that raised doubts as to the voluntariness of the plea. At the next session of court, the same plea bargain was presented to a second judge who found, after an extended inquiry, the plea to have been freely and voluntarily made and accepted the plea. On appeal, the defendant argued that the second judge had reversed, modified or

213. 341 N.C. 167, 459 S.E.2d 626 (1995).

214. *Id.* at 169, 459 S.E.2d at 627 (citing *Calloway*, 281 N.C. at 501, 189 S.E.2d at 488).

215. Rule 60(b) authorizes the court to relieve a party from a final judgment to serve the ends of justice, but it is not a substitute for appellate review and cannot be used to correct erroneous judgments.

216. *See id.* at 171, 459 S.E.2d at 628.

217. 344 N.C. 403, 474 S.E.2d 323 (1996), *modified on other grounds*, 134 N.C. App. 21, 1999 N.C. App. LEXIS 907 (1999), *review denied*, 351 N.C. 103, 1999 N.C. LEXIS 1238 (1999).

218. *Id.* at 407, 474 S.E.2d at 325 (citing *Calloway*, 281 N.C. at 501, 189 S.E.2d at 488).

219. The supreme court held that the court of appeals "did not err in concluding that Judge Sitton did not have authority under the provisions of N.C.G.S. § 97-10.2(j) to modify the previous judgments." *Id.* at 410, 474 S.E.2d at 327 (1996).

220. 280 N.C. 288, 185 S.E.2d 693 (1972).

overruled the first judge.[221] *McClure* avoided the issue by holding that the second judge's acceptance of the plea did not modify, overrule, or set aside the order of the first judge because the first judge's order had actually been only to continue the case (after refusing to accept the plea) so that the second judge had properly considered the plea de novo.[222] In *Atkinson v. Atkinson*,[223] the North Carolina Supreme Court reversed a decision by the court of appeals that had disagreed with the trial court's determination that a sufficient change of circumstance had occurred to allow reconsideration of a discretionary motion to dismiss.[224] Although one might argue that this constituted tacit approval of the court of appeals's basic analysis, if not of its ultimate conclusion, the actual holding in *Atkinson* differs little from that in *Calloway* because the court held that the intervening circumstances sufficed to allow reconsideration of an interlocutory order.[225] A question must be squarely before the court before its decision on the issue becomes binding.[226]

Thus, it is arguable that the supreme court has never explicitly overruled the long-standing rule in North Carolina that "[i]nterlocutory orders are subject to change at any time to meet the justice and equity of the case upon sufficient grounds shown for the same."[227] If binding precedent is limited to a court's determination of the specific legal consequence that attaches to a detailed set of facts,[228] then the holding in *Calloway*[229] did not alter the applicable

221. *See id.* at 294, 185 S.E.2d at 697.

222. *See id.* at 295, 185 S.E.2d at 697.

223. 350 N.C. 590, 516 S.E.2d 381 (1999) (per curiam).

224. *See id.*

225. In *Atkinson*, the supreme court again adopted language that is more reminiscent of the pre-*Calloway* rule: reconsideration is allowed when the "ends of justice" are best served by reconsidering the order. *See id.* (adopting the dissenting opinion of the court of appeals).

226. In *Rhyne v. Lipscombe*, 122 N.C. 650, 29 S.E. 57 (1898), the supreme court held that no appeal lay from statutorily created courts directly to the supreme court despite acknowledging that many appeals from these courts had been taken directly to the supreme court and that the supreme court had both heard and resolved the matters being appealed. These earlier cases did not establish the correctness of such direct appeals because the issue had never been properly raised or appealed in any of the cases and was therefore never properly before the court. *See id.* at 656–57, 29 S.E. at 58–59.

227. *Calloway*, 281 N.C. at 502, 189 S.E.2d at 488 (citations omitted).

228. This definition has been adopted by many commentators. *See, e.g.*, 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, 607 (1990) (stating that a case is important for what it decides—i.e., the what and not the why or how); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 298 (1989) ("[T]he judge has authority to pronounce only on issues that are properly raised by the particular facts of the case before her."); Paul W. Werner, *The*

pre-*Calloway* precedent. If so, then the line of court of appeals cases discussed in the following section might be of limited precedential value because the court of appeals is bound by stare decisis to follow the precedents of the supreme court and is not empowered to overrule such precedent.[230] Indeed, although it is an uncomfortable position to occupy, the trial courts are also obliged to follow the precedents of the supreme court[231] despite any clear language in opinions of the court of appeals that misrepresent those precedents.

B. In the North Carolina Court of Appeals

In the absence of more specific guidance from the supreme court, the court of appeals has fleshed out a rule that extends the *Calloway* analysis to *all* interlocutory orders. Unlike the narrow holding of *Calloway* (as distinguished from its rationale), the rule the court of appeals has developed is not compatible with the pre-*Calloway* majority rule. Although the court of appeals has coaxed several

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Straits of Stare Decisis and the Utah Court of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over-Application, 1994 BYU L. REV. 633, 639 (1994) ("When a court lays down a rule of law attaching a specific legal consequence to a detailed set of facts, the court must adhere to the legal principle it has announced by applying it in all subsequent cases that come before it presenting a similar factual premise."); *see also* Rodwell v. Rowland, 137 N.C. 617, 638, 50 S.E. 319, 327 (1905) ("More is needful to constitute a precedent than merely that a principle or doctrine is announced within the appropriate limits of a cause. [A] precedent must be a conclusion, a decision in a cause, and not a process of reasoning, an illustration, or analogy.") (quoting J.C. WELLS, RES ADJUDICATA & STARE DECISIS 531 (Des Moines, Mills & Co. 1879)).

229. Applying this definition of what constitutes binding precedent, the holding in *Calloway* was simply that on the unique facts as stated therein a judge has authority to grant a renewed motion to amend a pleading even when the motion had previously been denied by another judge.

230. The court of appeals has "no authority to overrule decisions of [the] Supreme Court and [has] the responsibility to follow those decisions 'until otherwise ordered by the Supreme Court.' " Dunn v. Pate, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (quoting Cannon v. Miller, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985)); *see also* Jones v. Kearns, 120 N.C. App. 301, 304, 462 S.E.2d 245, 246–47 (1995) (stating that the court of appeals is bound by the "clear and unambiguous precedent of our Supreme Court").

231. *See Dunn*, 106 N.C. App. at 60, 415 S.E.2d at 104 (stating that stare decisis is followed by the courts of this state and that under this doctrine the determination of a point of law by a court will generally be followed by a court of the same or lower rank if a subsequent case presents the same legal problem), *rev'd on other grounds*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (holding that the trial court properly followed the precedent of the United States Supreme Court concerning a constitutional question even when that result conflicted with an otherwise on-point holding of the North Carolina Supreme Court); State v. Daye, 78 N.C. App. 753, 756, 338 S.E.2d 557, 560 (1986) (stating that if an appellate court has squarely ruled that certain evidence does not support a certain factor, and the identical evidence is offered at the resentencing hearing to support the same factor, the trial court is bound by the appellate ruling, not because it is the law of the case, but because it is binding precedent directly on point).

versions[232] of the rule out of the imprecise language of *Calloway*, the rule that the court has settled on is that a trial judge has the power to modify or change an interlocutory order only when (1) the order was discretionary; and (2) there has been a change of circumstances.[233] This rule extends the requirement of changed conditions to all

232. Several cases appear to hold that reconsideration is always allowed if the previous interlocutory order was entered at a different stage of the proceeding. *See, e.g.*, Shamley v. Shamley, 117 N.C. App. 175, 184, 455 S.E.2d 435, 440 (1994) ("The rule does not apply where the prior order is rendered at a different stage of the proceedings, where the materials considered are not the same, and where the issues are not the same."); *see also* Smithwick v. Crutchfield, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987) (noting that the first order was "rendered at a different stage of the proceeding"). This holding is not inconsistent with *Calloway*'s apparent analysis that there are different categories of interlocutory orders with different applicable rules, e.g., "res judicata does not apply to decisions upon ordinary motions incidental to the progress of the trial with the same strictness as to a judgment," but the question remains whether ordinary motions incidental to the progress of the trial includes all interlocutory orders or only some subset thereof. *Calloway*, 281 N.C. at 501–02, 189 S.E.2d at 488; *see also* State v. Stokes, 308 N.C. 634, 642, 304 S.E.2d 184, 189 (1983) (holding that the trial judge was not bound by a pretrial order entered by another judge which provided for individual voir dire of prospective jurors because the rule that one judge may not review orders, judgments, or actions of another judge of coordinate jurisdiction does not apply to interlocutory orders given during the progress of action which affect procedure and conduct of trial). Another line of cases indicates that reconsideration is never allowed if the previous interlocutory order finally determined the rights of the parties. *See, e.g.*, McArdle Corp. v. Patterson, 115 N.C. App. 528, 532, 445 S.E.2d 604, 606–07 (1994) ("[W]here a judge rules as a matter of law, as on a motion for summary judgment, the rights of the parties are finally determined, subject only to reversal on appeal."); Whitley's Elec. Serv. v. Walston, 105 N.C. App. 609, 611, 414 S.E.2d 47, 48 (1992) ("Even though it is interlocutory in terms of appealability, a ruling on a motion for summary judgment involves an issue of law, not discretion .... Where a judge rules as a matter of law, the rights of the parties are finally determined, subject only to reversal on appeal."); American Travel Corp. v. Central Carolina Bank, 57 N.C. App. 437, 440, 291 S.E.2d 892, 894 (1982) (acknowledging that the rule prohibiting reconsideration "does not apply to interlocutory orders given in the progress of the cause" but then determining that this applies only to "merely interlocutory" orders and not to orders that finally determine a right); Carr v. Carbon Corp., 49 N.C. App. 631, 633, 272 S.E.2d 374, 376 (1980). This approach is also not clearly inconsistent with *Calloway*'s apparent analysis that there are different categories of interlocutory orders with different applicable rules. *See Calloway*, 281 N.C. at 502, 189 S.E.2d at 489 ("When a judge rules upon a motion to strike ... [,] he rules as a matter of law .... No discretion is involved and his ruling finally determines the rights of the parties.").

233. *See* Madry v. Madry, 106 N.C. App. 34, 38, 415 S.E.2d 74, 77 (1992) (stating that if the interlocutory order "is one which was addressed to the discretion of the trial judge, another trial court judge may rehear an issue and enter a contradictory ruling if there has been a material change in the circumstances of the parties") (citing *Calloway*, 281 N.C. at 505, 189 S.E.2d at 493); *Whitley's*, 105 N.C. App. at 611, 414 S.E.2d at 48 (stating that "there are two requirements which must be met before a modification of a prior interlocutory order is proper: (1) the prior order was discretionary and (2) there has been a substantial change in circumstances"); Iverson v. TM One, Inc., 92 N.C. App. 161, 164, 374 S.E.2d 160, 162 (1988); Stone v. Martin, 69 N.C. App. 650, 652, 318 S.E.2d 108, 110 (1984); *Carr*, 49 N.C. App. at 633, 272 S.E.2d at 376.

discretionary orders without regard to the orders' immediate reviewability under the appeals statute. Worse still, the rule absolutely precludes reconsideration of interlocutory orders made as a matter of law, even though neither the decision, holding, nor rationale of *Calloway* directly addressed the subject. Even if the pedigree of the court of appeals rule were not suspect, however, its rule has proven difficult to apply consistently and fairly, even on its own terms. For this reason alone, the court of appeals rule should be reconsidered.

1. No Clear Test for What Constitutes the Change in Circumstance That Establishes the Authority to Reconsider

The court of appeals rule expressly provides for jurisdiction to reconsider discretionary orders if there has been a sufficient change of circumstance or condition. The cases, however, fail to articulate a clear rule as to when such changes are sufficient.[234] For instance, in

234. *See* State v. Duvall, 304 N.C. 557, 562, 284 S.E.2d 495, 499 (1981) (holding that neither the mere passage of time between the date one superior court judge disposes of a motion and the date the same motion is subsequently renewed before another judge, nor the presentation of additional evidence upon a renewed motion, if such evidence does not consist of new and different facts which were not before the first judge originally ruling upon the motion, were changed circumstances sufficient to justify reconsideration); Home Indem. Co. v. Hoechst Celanese Corp., 128 N.C. App. 113, 121–22, 493 S.E.2d 806, 811–12 (1997) (holding that an action to determine insurance coverage for environmental contamination claims at 94 sites in 20 states, the entry of partial summary judgment effectively ending controversies as to all North Carolina sites, and plaintiffs' motion to amend the complaint to add 142 additional sites and claims to this case, constituted changed conditions which permitted the trial judge to overrule another superior court judge's order lifting an earlier stay and permitting the controversy to proceed by entering another order staying further litigation in North Carolina concerning sites located in other states); Dublin v. UCR, Inc., 115 N.C. App. 209, 220, 444 S.E.2d 455, 461–62 (1994) (holding that the trial court erred by vacating another judge's order of class certification as to the original defendants based on the addition of new defendants and purported new claims against them where the new defendants and purported new claims in no way affected the nature of the claims asserted against the original defendants, because there were no changed circumstances on the issue of class certification as to the original defendants). One further example is *Stone*, 69 N.C. App. at 650, 318 S.E.2d at 108. In this case, involving a civil suit, the defendants refused to respond to the plaintiffs' discovery requests even after a judge ordered them to respond. Consequently the first judge imposed Rule 37(b) sanctions. The defendants appealed from the order imposing sanctions, but it was upheld. The defendants then moved that the trial court set aside the sanctions that included an order of default, and the second judge granted the motion. The plaintiffs appealed, contending that second judge had "effectively conducted appellate review, without jurisdiction to do so, when he set aside the sanctions imposed by another superior court judge." *Id.* at 652, 318 S.E.2d at 100. The court of appeals held that the first judge's order imposing sanctions was a discretionary interlocutory order so that the second judge had authority to set aside the order if a change of circumstances warranted such action. The second judge noted: (1) that defendants had relied upon the good faith

Atkinson v. Atkinson,[235] the trial court found specific and detailed "intervening circumstances" that justified reconsideration of an order denying an earlier motion to dismiss, including the failure of the plaintiff to prosecute her case diligently, significant evidentiary problems caused by the delay in hearing the matter, and the failure of both parties to comply with discovery requirements. Despite acknowledging the authority of a judge to reconsider a discretionary interlocutory order if there has been "a material change in the circumstances of the parties," the court of appeals, without discussion or analysis, concluded that the circumstances enumerated by the trial judge "were not material changes in circumstances permitting the trial judge to overrule" the previous order.[236] Yet, one of the court of appeals judges dissented on the grounds that the noted changes in circumstances since the entry of the first order were sufficient to justify reconsideration.[237] Thus the four judges who had considered the matter were evenly split on the issue and yet the majority opinion did not even attempt to articulate the test that it applied. On appeal, the North Carolina Supreme Court reversed in a per curiam opinion "[f]or the reasons stated in the dissenting opinion."[238] The reason stated in the dissent was that although the first judge had held that "the ends of justice would best be served" by the denial of the motion to dismiss, the intervening circumstances caused the "ends of justice" to no longer be served by denying the motion.[239]

There is little guidance and little agreement as to what constitutes a sufficient change of circumstance or condition that restores the jurisdiction of a trial judge to reconsider an interlocutory order. Because this rule is jurisdictional, the consequences of misapplying it are severe. If a judge fails to recognize that the rule applies to prevent his reconsideration of an interlocutory order or if the judge applies the rule but mistakenly concludes that a sufficient change of circumstance has created jurisdiction to reconsider, then

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advice of counsel not to answer the discovery requests because the information was privileged; (2) that this advice was reasonably based on then-existing case law; and (3) that appellate decisions had restricted the scope of the privilege during the course of defendants' appeal, to their detriment. The court held that these facts constituted "a significant change of circumstances" since the first judge's imposition of sanctions. *Id.* at 652–54, 318 S.E.2d at 110–11.

235. 132 N.C. App. 82, 510 S.E.2d 178 (1999), *rev'd on other grounds*, 350 N.C. 590, 516 S.E.2d 381 (1999).

236. *Id.* at 88–89, 510 S.E.2d at 181.

237. *See id.* at 90, 510 S.E.2d at 182 (Greene, J., dissenting).

238. Atkinson v. Atkinson, 350 N.C. 590, 516 S.E.2d 381 (1999).

239. *Atkinson*, 132 N.C. App. at 90, 510 S.E.2d at 182 (Greene, J., dissenting).

the judge's decision upon reconsideration is a nullity for want of jurisdiction. An objection that the court has acted without jurisdiction can be made at any time, including for the first time on appeal, and there is no requirement that the error be raised or excepted to at the trial level—defects in jurisdiction are not waived by failure to object contemporaneously.[240] Indeed, the appellate court must consider the matter ex mero motu even if the parties never address the question.[241] On the other hand, if the judge mistakenly concludes that the rule applies so that he lacks jurisdiction to reconsider and so refuses to exercise his discretion to reconsider, that too is reversible error.[242] The consequences of misunderstanding or misapplying the rule can thus lead to remands, new trials, and reduced judicial efficiency.

2. No Adequate Response Available at the Trial Level When an Interlocutory Order is Based on a Manifest Error of Law

The interlocutory order in *Calloway* involved a discretionary matter and not a question of law; consequently, *Calloway* may not compel the conclusion that the rules governing reconsideration differ depending on whether the order involved a question of law or a discretionary ruling. Nevertheless, a long line of cases from the court of appeals has adopted this distinction.[243] The clearest rule followed

240. *See* State v. Sams, 317 N.C. 230, 235, 345 S.E.2d 179, 182 (1986) ("An order is void *ab initio* only when it is issued by a court that does not have jurisdiction. Such an order is a nullity and may be attacked either directly or collaterally, or may simply be ignored."); Vance Constr. Co. v. Duane White Land Corp., 127 N.C. App. 493, 494, 490 S.E.2d 588, 589 (1997) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action .... An objection to subject matter jurisdiction may be made at any time during the course of the action."); *see also* Able Outdoor, Inc. v. Harrelson, 341 N.C. 167, 169, 459 S.E.2d 626, 627 (1995) (stating that if the first judge did not have jurisdiction to act, his order was a nullity and the second judge could strike the order).

241. *See Vance Constr.*, 127 N.C. App. at 494–95, 490 S.E.2d at 589–90.

242. *See Calloway*, 281 N.C. at 505, 189 S.E.2d at 490–91 ("When a motion addressed to the discretion of the court is denied upon the ground that the court has no power to grant the motion in its discretion, the ruling is reviewable.").

243. A number of cases do not include this distinction in their analysis. For example, *Dublin v. UCR, Inc.*, 115 N.C. App. 209, 444 S.E.2d 455 (1994), defines the rule but does not mention any law/discretionary distinction when it states that "interlocutory orders are modifiable for changed circumstances" and "a subsequent judge could modify the order for circumstances which changed the legal foundation for the prior order." *Id.* at 219–20, 444 S.E.2d at 461.

It should be noted that the rule, as expressed by the court of appeals cases cited *supra* note 233, has never been expressly adopted by the supreme court. In *State v. Duvall*, 304 N.C. 557, 284 S.E.2d 495 (1981), the supreme court did not recognize a legal/discretionary distinction when it discussed "the general impropriety of a superior

by the court of appeals fails to provide for any circumstances under which an interlocutory order resolving a question of law can be reconsidered. But orders resolving legal issues are sometimes based on clear, manifest errors of law, for instance, the denial of a motion for summary judgment when case law clearly required the granting of the motion. The issue can also arise when the moving party is able, at some time after the order denying summary judgment is entered, to supplement its forecast of evidence sufficiently to show conclusively that there is no issue of material fact.[244] The rule allows no option for

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court judge's rectification of what he might perceive to be legal error in the prior ruling of another superior court judge in the same case," but acknowledged the authority to overrule upon a showing of sufficient changed circumstances. *Id.* at 562, 284 S.E.2d at 498. In *State v. Sams*, 317 N.C. 230, 345 S.E.2d 179 (1986), it is unclear whether the court is applying the rule, as the court is not clear whether the first judge's ruling was a matter of law or discretion. *See id.* at 234, 345 S.E.2d at 182.

244. The case law appears uncertain as to the significance of new evidence or new arguments on the authority to reconsider questions of law. For instance, in *Carr v. Carbon Corp.*, 49 N.C. App. 631, 272 S.E.2d 374 (1980), the defendant argued that the second judge properly considered the defendant's second motion for summary judgment because the "materials presented to the court on the second motion . . . were different from those at the [first] hearing." *Id.* at 632, 272 S.E.2d at 376. These additional materials included fourteen depositions and seven witness affidavits. The court of appeals held that the additional materials made no difference because "the legal issue raised by the second motion was identical to the legal issue on the first motion." *Id.* at 634, 272 S.E.2d at 377. The court opined that "[i]f defendants' contention is permitted to prevail, an unending series of motions for summary judgment could ensue so long as the moving party presented some additional evidence at the hearing on each successive motion." *Id.* The court also noted, however, that its rule did not always limit a party to one motion for summary judgment. Where the second motion "presents legal issues that are different from those raised in the prior motion, such motion would be appropriate." *Id.* at 635, 272 S.E.2d at 377. Questions may remain as to what constitutes a new "legal issue" in the context of summary judgment. *See, e.g.*, Hastings v. Seegars Fence Co., 128 N.C. App. 166, 168–69, 493 S.E.2d 782, 784 (1997) (stating that the first judge's denial of defendant's motion for summary judgment precluded a second judge from thereafter entering summary judgment in favor of defendant, although the second judge considered depositions which had not been before the first judge, where the legal issues raised by the pleadings remained the same); Taylorsville Fed. Sav. & Loan Ass'n v. Keen, 110 N.C. App. 784, 785, 431 S.E.2d 484, 484 (1993) (stating that a motion for summary judgment denied by one superior court judge may not be allowed by another superior court judge on identical legal issues) (citations omitted); Vandervoort v. McKenzie, 105 N.C. App. 297, 302, 412 S.E.2d 696, 699 (1992) (stating that it was error for a judge to determine defendant's second motion for summary judgment where another judge had denied a prior motion for summary judgment on identical issues by the same defendant even though materials presented to the court on the second motion were different from those at the hearing on the first motion); Metts v. Piver, 102 N.C. App. 98, 101–02, 401 S.E.2d 407, 408–09 (1991) (holding that an additional forecast of evidence does not entitle a party to a second chance at summary judgment on the same issues and rejecting defendants' claim that their second summary judgment motion addressed new issues). *But see Duvall*, 304 N.C. at 562–63, 284 S.E.2d at 498–99 (holding that it was error to grant the State's renewed motion for special jury venire from another county where new affidavits merely restated

the parties and the court to reconsider the summary judgment motion so as to avoid proceeding with a meaningless trial. This does indeed appear to be the rule followed by the court of appeals, although the case law reveals several caveats to the rule.

Some cases have held that the rule only applies if the second motion is identical to the first. Thus, if the first judge denied a 12(b)(6) motion to dismiss, then the second judge is prevented only from rehearing another 12(b)(6) motion to dismiss. Several court of appeals cases appear to apply this objective test.[245] For instance, in *Barbour v. Little*,[246] the court of appeals stated, "[t]here is no merit in plaintiffs' contention that, because Judge Lee denied defendants' motion made under Rule 12 (b)(6) to dismiss the complaint for failure to state a claim upon which relief can be granted on the grounds that there is no genuine controversy in existence, Judge Smith could not thereafter allow defendants' motion for summary judgment made *on the same grounds*. While one superior court judge

identical information given at the hearing on original motion); State v. Langdon, 94 N.C. App. 354, 356–57, 380 S.E.2d 388, 390 (1989) (noting that a second judge had authority to consider a second motion to suppress because the "defendant's second motion contained an additional allegation for suppression"); Furr v. Carmichael, 82 N.C. App. 634, 636–37, 347 S.E.2d 481, 483–84 (1986) (holding that issues in question are identical, and that reconsideration is therefore not allowed, where "no new affidavit or evidence based on discovery was filed or presented by either party at the hearing on defendants' motion for summary judgment that was not before the trial court at the hearing on plaintiffs' motion for summary judgment"); Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 331, 303 S.E.2d 365, 367 (1983) (stating that where one judge ruled on defendants' summary judgment motion only as to plaintiffs' contract claim and specifically declined to rule on plaintiffs' tort claim, it was proper for a second judge thereafter to rule on defendants' motion for summary judgment as to the tort claim).

245. *See* Whittaker Gen. Med. Corp. v. Daniel, 87 N.C. App. 659, 664, 362 S.E.2d 302, 305 (1987) (stating that the denial of a motion for summary judgment, based upon only a forecast of evidence, should not operate to bar the granting of a directed verdict or a judgment notwithstanding the verdict based on the evidence actually presented at trial), *rev'd in part on other grounds*, 324 N.C. 523, 381 S.E.2d 792 (1989); Alltop v. J.C. Penney Co., 10 N.C. App. 692, 694, 179 S.E.2d 885, 887 (1971) (stating that one judge's denial of a motion to dismiss for failure to state a claim does not prevent a second judge from granting a motion for summary judgment because the tests for each motion are different); *see also* Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650, 660–61, 464 S.E.2d 47, 56 (1995) (noting that the second judge's ruling that a party breached an agreement was more analogous to directing a verdict on the question of Lechmere's liability than to reconsidering the first judge's denial of summary judgment on the issue of breach). There is another variation of the objective test. *See* Tompkins v. Log Sys., Inc., 96 N.C. App. 333, 335, 385 S.E.2d 545, 546–47 (1989) (stating that the second judge was not foreclosed from considering the defendant's renewed motion for summary judgment where the plaintiff had taken a voluntary dismissal without prejudice and refiled his claim in a timely manner, because once refiled the case must be considered on its merits without reference to the disposition of the prior action).

246. 37 N.C. App. 686, 247 S.E.2d 252 (1978).

may not overrule another, the two motions do not present the same question."[247]

Other cases have, however, focused on the legal conclusions that formed the basis for a decision so that an order resolving a subsequent but different motion may not be based on a conflicting legal conclusion, and a judge may be constrained by the legal analysis underlying the previously entered interlocutory order. These cases look beyond a motion's label to the underlying legal conclusions.[248] For example, in *Estrada v. Jaques*,[249] the first judge granted the plaintiff's motion to file an amended complaint and stated in his order "only that the amendment related back" to the date the motion was heard.[250] The order did not reserve judgment as to the statute of limitations question.[251] The second judge later considered and granted defendants' motion for summary judgment on a statute of limitations defense. *Estrada* held that the second judge's granting of summary judgment "effectively overruled" the first judge's discretionary grant of plaintiff's motion to amend.[252] The court stated:

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247. *Id.* at 692, 247 S.E.2d at 255 (emphasis added).

248. *See* Thornburg v. Lancaster, 303 N.C. 89, 96, 277 S.E.2d 423, 428 (1981), *overruled on other grounds by* 320 N.C. 669, 360 S.E.2d 277 (1987) (stating that for the second judge "to refuse to grant the Rule 41(b) motion on the ground that he disagreed with the earlier [objectively different] order of a fellow superior court judge would ... have been erroneous"); Madry v. Madry, 106 N.C. App. 34, 37–38, 415 S.E.2d 74, 77 (1992) (stating that where the issue of the applicability of North Carolina General Statutes section 50–5.1 was the same, as were materials and arguments, labeling of the second order as summary judgment did not change its essential character nor authorize the second judge to overrule the denial of the motion to dismiss by the first judge); Iverson v. TM One, Inc, 92 N.C. App. 161, 165, 374 S.E.2d 160, 163 (1988) ("While the defendant did not label its motion to [the second judge] as one for summary judgment, that nonetheless was the essence of the request .... Therefore, [the second judge's] judgment dismissing the complaint had the effect of overruling [the first judge's] denial of defendant's motion for summary judgment and must be vacated."); Pittman v. Pittman, 73 N.C. App. 584, 588–89, 327 S.E.2d 8, 11 (1985) (stating that where the first judge denied a motion to dismiss, stating inexplicably that plaintiff "has not been guilty of laches," the second judge could not grant a subsequent motion for summary judgment on the apparent basis of laches because the second judge was "without authority to overrule, either expressly *or implicitly*, [the] prior determination") (emphasis added). *But see* Urbano v. Days Inn of America, Inc., 58 N.C. App. 795, 799, 295 S.E.2d 240, 242–43 (1982) (noting that where the first judge denied franchisor's motion for summary judgment, it is not error for a second judge to grant operator's motion for summary judgment, regardless of apparent logical inconsistency and identity of the legal issue, as "each defendant was entitled to have its motion considered and ruled upon separately").

249. 70 N.C. App. 627, 321 S.E.2d 240 (1984).

250. *Id.* at 636, 321 S.E.2d at 246.

251. *See id.*

252. *Id.*

> We presume that the court did not allow the amendment as a mere pointless gesture. We will not presume that having heard argument and allowed the amendment, [the first judge] then expected Estrada to affirmatively seek a ruling that the amendment thus allowed related back. The law does not require performance of vain acts .... By allowing [defendants'] motion for summary judgment on the statute of limitations defense ... [the second judge] effectively overruled [the first judge's] prior determination; by ruling that the amendment did not relate back, he effectively denied [plaintiff's] already granted motion. This he lacked authority to do. *Calloway v. Ford Motor Co.*[253]

This subjective analysis of previously entered interlocutory orders may be burdensome and subject to varying interpretations. A judge considering his authority to rule on a motion must first determine whether any identical motions have been filed in the case (the objective test), but then he must also consider and review non-identical motions and the orders entered for each in order to determine, if possible, the legal basis and whether or not there is a conflict with the legal basis which in his opinion would resolve the motion before him. Again, if this review is not performed (even if not requested by the parties) an appellate court may later determine that the judge lacked jurisdiction to consider the motion.[254]

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253. *Id.* at 636–37, 321 S.E.2d at 246–47.

254. In *State v. Smith*, 117 N.C. App. 671, 452 S.E.2d 827 (1995), objectively identical motions were held to raise different legal issues. *See id.* at 675, 452 S.E.2d at 829. Two defendants, Smith and Campbell, traveling together, were stopped by police officers and a packet of drugs was seized from each defendant. At Smith's trial on trafficking charges, the first judge suppressed the packet of drugs seized from Smith on the grounds that the initial stop was unconstitutional. Smith was then indicted for conspiracy based on the same transaction. He sought to suppress the packet of drugs seized from Campbell arguing that the second judge was bound by the first judge's holding that the stop was unconstitutional. The court upheld the second judge's order denying the motion to suppress on the grounds that the second judge "was asked to rule on an entirely new and different matter." *Id.* In *Sims v. Ritter Constr., Inc.*, 62 N.C. App. 52, 302 S.E.2d 293 (1983), plaintiffs sought to recover damages for breach of a building contract. Defendant moved to dismiss the complaint on the ground that the contract between the parties provided for arbitration of any disagreement arising out of the contract. The first judge agreed with defendant and ordered that all matters in controversy be submitted to arbitration. Seven months later the matter again came on for hearing before another judge who held that because "neither party having taken any action whatsoever to initiate arbitration proceedings, and [the first judge's] Order not specifying which party shall pay the expense or initiate such action, the Court therefore concludes that the matter should be placed on the trial calendar for disposition." *Id.* at 52–53, 302 S.E.2d at 294. Despite the fact that the second judge was clearly not overruling the legal analysis of the first judge—but rather the second judge was determining that subsequent events justified some sort of waiver of the contractual right to arbitration—the court held that the second

Case law has also created an exception that allows the second judge to overrule the first judge on a question of law if the question of law concerns the first judge's jurisdiction to have ruled on the initial matter. In *McAllister v. Cone Mills Corp.*,[255] the first judge denied defendant's Rule 12(b)(6) motion that was based on the ground that plaintiff's action was barred by the Workers' Compensation Act.[256] Subsequently, the defendant made a motion for summary judgment based on the same jurisdictional grounds as the 12(b)(6) motion that had been previously denied. The court of appeals held that the trial court did not err in granting summary judgment for defendant on the same issue previously ruled upon by the first judge.[257] The court stated that a court must dismiss a case "if it finds at any stage of the proceedings that it lacks subject matter jurisdiction," apparently even if such determination overrules the contrary legal conclusion of the first judge.[258]

The court of appeals has also found other legal principles that permit avoidance of the rule's harsh consequences. In *Graham v. Mid-State Oil Co.*,[259] plaintiff sued for conversion and unfair trade practices. Defendant's motion for summary judgment was granted as to the conversion claim but denied as to the unfair trade practice. At pretrial conference defendant asked a second judge to dismiss the unfair trade practice claim on the grounds that the first judge's granting of summary judgment as to the conversion claim implicitly precluded proceeding on the unfair trade practice claim. Failure to dismiss the claim would result in the parties proceeding to trial on the unfair trade practice issue when the basis for the claim, the conversion, had already been found not to exist. Dismissing the claim, however, would require the second judge to, in essence, grant the motion for summary judgment that the first judge had previously denied. The second judge dismissed the claim. Plaintiff appealed, arguing that the second judge had improperly overruled the first judge. The court of appeals affirmed the second judge, but did not apply the overrule analysis.[260] Instead, the court stated: "To hold otherwise would result in an inconsistent judgment. Inconsistent

judge's order was void because it overruled the first judge's order. *See id.* at 55, 302 S.E.2d at 295.

255. 88 N.C. App. 577, 364 S.E.2d 186 (1988).

256. *See id.* at 579, 364 S.E.2d at 187.

257. *See id.* at 579–582, 364 S.E.2d at 188–89.

258. *Id.* at 579, 364 S.E.2d at 188.

259. 79 N.C. App. 716, 340 S.E.2d 521 (1986).

260. *See id.* at 720, 340 S.E.2d at 524.

judgments are erroneous."[261]

If there is manifest error in a legal ruling that will serve as the basis for further litigation (and thus be subject to reversal on appeal), the trial court might consider correcting the error despite the argument that he or she has no jurisdiction to overrule the first judge's erroneous order. On appeal, the reviewing judges may find a way to uphold such an order that is legally correct and efficient, but nonetheless erroneous.[262] In *Smithwick v. Crutchfield*,[263] the plaintiff sued for damages sustained in a motor vehicle accident. Defendant counterclaimed, and the plaintiff replied by alleging that the defendant had signed a complete release that barred all claims. One judge dismissed defendant's counterclaim, and another judge denied defendant's motion for summary judgment, which was based upon the rule that a plaintiff may not sue for injuries sustained in an automobile accident, while at the same time relying upon a complete release given by the defendant to defeat the defendant's counterclaim for damages arising out of the same accident. Before a third judge, the defendant and the plaintiff offered as evidence the entire file in the lawsuit, and after considering the evidence and arguments of counsel, the court made findings of fact and entered judgment for defendant, concluding that plaintiff's claims were barred as a matter of law by the pleading of the release. Plaintiff appealed. The court of appeals held that although "rendered at a different stage of the proceeding," the legal issue resolved by the third judge was "precisely the same question of law" as previously decided by the second judge.[264] Thus, it was a rehearing of defendant's motion for summary judgment and violated the "principle that one Superior Court judge may not overrule another," and so was error even though legally correct.[265] In this case, however, the defendant had excepted to and appealed the second judge's denial of summary judgment so the court of appeals held that denial to be error and plaintiff's claim barred as a matter of law.[266] If the third judge had not ruled as he did, the parties would have proceeded with a pointless trial. Even if the legitimacy of the second judge's ruling had not been properly appealed, the appellate court may still have chosen to uphold the third judge's

261. *Id.*

262. *See* Greene v. Charlotte Chem. Lab., Inc., 254 N.C. 680, 694, 120 S.E.2d 82, 91 (1961) ("The ruling of Judge Hooks was legally correct, but erroneous nevertheless.").

263. 87 N.C. App. 374, 361 S.E.2d 111 (1987).

264. *Id.* at 377, 361 S.E.2d at 113.

265. *Id.*

266. *See id.*

erroneous (but legally correct) ruling by exercising its supervisory jurisdiction over the lower courts to avoid unnecessary delay in the administration of justice.[267]

Finally, it is also clear that the appellate courts will sometimes simply fail to recognize or acknowledge the effect of the rule. In *Shiloh Methodist Church v. Keever Heating & Cooling*,[268] the majority stated that the dispositive issue on appeal was "whether a successful service of process occurring within thirty days after issuance of a summons is valid (in the absence of an endorsement, alias summons or pluries summons) if there has been a prior unsuccessful attempt at serving that same summons."[269] The opinion resolved this issue, but then noted in a footnote that the plaintiff had asserted "an alternative argument" that "[the second judge] was without authority to grant summary judgment for the defendant on the same grounds that [the first judge] denied the defendant's motion to dismiss. We agree . . . [the second judge] effectively overruled [the first judge] and he did not have jurisdiction to do so."[270] This footnote thus agreed with Judge John's concurrence in the result that "[i]t is well established that one superior court judge may not overrule another."[271] Therefore, it would appear that the dispositive issue in this case was the lack of authority to overrule and that Judge Greene's majority opinion is dicta.

In another case, *Dunkley v. Shoemate*,[272] a law firm moved for permission from the court to appear as counsel for an absent defendant on a limited basis in order to protect the interests of the defendant's insurance company and to respond to discovery requests to the extent that it could provide reliable responses without having communicated with the defendant.[273] The first judge granted this motion. Plaintiff filed a motion to remove the law firm as counsel for defendant on the basis that the attorneys at the law firm had never spoken to defendant and defendant had never authorized the law firm to represent him, which facts had been admitted by the parties at the hearing on the first motion. The second judge denied this motion on the express basis that he had no authority to overrule the first judge's

267. *See Greene*, 254 N.C. at 694, 120 S.E.2d at 91.
268. 127 N.C. App. 619, 492 S.E.2d 380 (1997).
269. *Id.* at 621, 492 S.E.2d at 381.
270. *Id.* at 622–23 n.1, 492 S.E.2d at 382 n.1 (citing Calloway v. Ford Motor Co., 281 N.C. 496, 189 S.E.2d 484 (1972)).
271. *Id.* at 622, 492 S.E.2d at 382 (citing *Calloway*, 281 N.C. at 501, 189 S.E.2d at 488).
272. 350 N.C. 573, 515 S.E.2d 442 (1999).
273. *See id.* at 576, 515 S.E.2d at 444.

order allowing such representation.[274] The plaintiff did not appeal the first judge's order, but did appeal the second judge's order.[275] Both the court of appeals and subsequently the supreme court held that the second judge's order was erroneous because "a law firm or attorney may not represent a client without the client's permission to do so."[276] Neither the court of appeals nor the supreme court addressed the fact that the second judge did not rule on the substance of the plaintiff's motion but instead ruled that he had no authority to reconsider the motion in light of the first judge's ruling. Both courts simply ignored the rule and reached the substantive legal issue.[277]

C. *The Rule of the Court of Appeals in Practice: The Consequences of a Dysfunctional Rule*

Since *Calloway*, appellate courts have avoided defining the test of what constitutes sufficiently changed circumstances to permit reconsideration. One result of this reluctance to articulate the test has been the de facto adoption by many lawyers and judges of an over-simplified rule of thumb as the test governing reconsideration—that is, the unfortunate aphorism that one judge may not overrule another. Practicing attorneys, trial judges, and even appellate judges often fall back on the overstated and imprecise version of the rule as recently stated in *Able Outdoor, Inc. v. Harrelson*.[278] This simplified version of the *Calloway* rule clearly violates the majority rule, but it even violates the rule as applied in *Calloway*[279] and its progeny. If it is

274. *See* Dunkley v. Shoemate, 129 N.C. App. 255, 257, 497 S.E.2d 713, 714 (1998) ("Judge Battle considered himself bound by Judge Stanback's prior order allowing the representation and denied plaintiff's motion."), *rev'd on other grounds*, 346 N.C. 274, 485 S.E.2d 295 (1997).

275. *See* Dunkley v. Shoemate, 346 N.C. 274, 274, 485 S.E.2d 295, 295 (1997) (stating that an interlocutory order denying a motion to remove affected a substantial right and so was immediately appealable) (per curiam).

276. Dunkley v. Shoemate, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999).

277. Despite acknowledging that no appeal was taken from the first judge's order allowing the representation, the supreme court nevertheless overruled the order substantively because there was "no basis for allowing the motion to appear." *Id.* at 576, 515 S.E.2d at 444. *But see* State v. Sams, 317 N.C. 230, 234–35, 345 S.E.2d 179, 182–83 (1986) (holding that the appellate court could not review the first judge's ruling because the matter had not been properly appealed); Smithwick v. Crutchfield, 87 N.C. App. 374, 377, 361 S.E.2d 111, 113 (1987) (stating that the appellate court could review the first judge's ruling because the matter had been properly appealed).

278. 341 N.C. 167, 169, 459 S.E.2d 626, 627 (1995) ("One superior court judge may not overrule another."); *see also* Shiloh Methodist Church v. Keever Heating & Cooling, 127 N.C. App. 619, 622, 492 S.E.2d 380, 382 (1997) (John, J., concurring) (stating that "[i]t is well established that one superior court judge may not overrule another").

279. Even *Calloway* includes the modifier "ordinarily" in its statement of the rule: "[O]rdinarily one judge may not modify, overrule, or change the judgment of another

important for a trial court to manage and supervise the litigation pending before it, then a general belief of the bench and bar that judges have no authority to overrule other judges' earlier intermediate decisions may cause litigation to be undermanaged and undersupervised. For instance, even under the court of appeals's current rule (and clearly under the majority rule) a judge should consider a party's argument that the judge should reconsider a previously entered interlocutory order. After all, there may have been a sufficient change of circumstance to allow reconsideration of a discretionary order, or there may be new issues of law, jurisdiction, or other matters relating to the earlier order that resolved a legal question that would allow what might initially appear to be reconsideration. Yet application of the simple rule as stated in *Able Outdoor* can result in the court's refusal to hear and consider the grounds for reconsideration.[280] Anecdotal evidence suggests that the *Able Outdoor* statement is widely accepted as a complete statement of the rule and is sometimes applied to deny summarily a motion to reconsider.

The court of appeals's absolute prohibition of reconsideration of questions of law coupled with the appellate courts' inconsistency[281] in

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Superior Court judge previously made in the same action." Calloway v. Ford Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972).

280. Expressly allowing attorneys to seek reconsideration of interlocutory orders is not expected to result in a flood of such motions. As one commentator has noted from a jurisdiction that allows such motions:

> [I]n practice, lawyers do not misuse motions for reconsideration. Such motions are not filed as a matter of course and are usually only filed where the lawyer feels strongly that the judge has ruled erroneously. The reluctance of most trial lawyers to file motions to reconsider, except in those cases where they especially feel the trial judge has ruled incorrectly, accounts for the statement found in appellate decisions that while trial judges should not "use lightly" their power to modify another judge's nonfinal ruling, with respect to law of the case "courts must not afford this procedural doctrine undue emphasis."

Hon. Robert L. Gottsfield, *Law of the Case vs. Horizontal Appeals: Reconsideration of Issues by Successive Trial Judges*, 31 ARIZ. ATT'Y 23, 24 (1995) (citations omitted).

281. The appellate courts sometimes appear simply to ignore the rule and to address the substantive issue that is not properly before the court if the rule applies. Appellate opinions also undermine the impact of the rule when the underlying substantive issue is addressed and the rule against reconsideration is then mentioned as an alternative basis for the result. If the rule applies to deny the second judge's authority to reconsider, then the substantive issue is not before the appellate court. *See Shiloh*, 127 N.C. App. at 622, 492 S.E.2d at 382 (addressing and resolving the substantive issue on appeal despite agreeing in a footnote with the concurring opinion that the trial judge who entered the order had no authority to enter the order because a previous judge had already ruled on the matter); Sheppard v. Community Fed. Sav. & Loan, 84 N.C. App. 257, 261, 352 S.E.2d 252, 255 (1987) (stating within the context of finding substantive fault with the ruling of the successor judge that "he also in effect overruled another Superior Court judge, which

applying the harsh rule in certain cases may also encourage trial judges to consider a return to the majority rule, that reconsideration is proper "where there are good reasons to do so" or "when justice requires." When there is manifest error and adherence to the rule would clearly require further litigation grounded on such error, trial judges may decide that a proper case exists to reconsider and correct the manifestly erroneous legal ruling on the assumption that the appellate courts will find a way to uphold such manifestly appropriate orders.

CONCLUSION: RETURN TO THE PRE-*CALLOWAY*/MAJORITY RULE

The stated holding in *Calloway*—that changed conditions are required in order to allow reconsideration of discretionary denials of motions to amend—is historically unsupported and overly stringent. By not recognizing the unusual nature of the orders on motions to amend in the case before it and in the cases that it cited, the court in effect held purely discretionary orders on motions to amend subject to the doctrine of imputed law of the case, forcing trial judges to weigh changed conditions in situations that traditionally could be reconsidered in any proper case. The rationale in *Calloway* has misled lower courts into extending this requirement to all discretionary orders and into denying the power to reconsider matters of law altogether. Furthermore, if new facts were necessary for consideration of a renewed motion to amend, as claimed by *Calloway*, there were arguably no new facts before Judge Ervin sufficient to support a reconsideration in this case, and therefore the decision in *Calloway* may be wrong even on its own terms.

If, however, the holding in *Calloway* is viewed more broadly and is interpreted to have overruled or modified the majority rule, then it is still arguable that the *Calloway* rationale does not compel the rule that the court of appeals has formulated. Even if *Calloway* revised the rule to require a change of condition instead of a proper case in order to reconsider interlocutory orders, *Calloway* did not mandate that issues of law be treated differently from discretionary matters. Even under a revised rule there may be changes of condition that would justify reconsideration of an interlocutory order involving a question of law. Also, the court of appeals's rule is unclear as to the standard required to demonstrate the material change of circumstance that will justify reconsideration of a discretionary interlocutory order. This lack of clarity certainly originated with

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our law does not approve").

Calloway itself and its insistence on calling a judge's rulings on matters of law (Judge Ervin's denial of plaintiff's motion to strike Ford's amended answer and Judge Ervin's grant of Ford's motion for summary judgment) a "material change in conditions" and the "intervention of new facts."[282] Nevertheless, even if *Calloway* is read to have revised the rule, the supreme court should clarify what the standard should be for determining whether a change of circumstance has occurred that will support reconsideration.[283]

The Supreme Court of North Carolina should consider a return to the majority rule governing reconsideration of interlocutory orders. Balancing the pros and cons of reconsideration, the majority rule is both better policy and the better rule for properly managing ongoing litigation. The majority rule was never explicitly rejected by the North Carolina Supreme Court, and *Calloway* does not provide adequate analysis to support any change in the law or an adequate foundation for a new rule.[284] The efforts by the court of appeals to

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282. *Calloway*, 281 N.C. at 505, 189 S.E.2d at 490.

283. For instance, why were the undisputed new facts and changed conditions present in *Atkinson v. Atkinson*, 132 N.C. App. 82, 510 S.E.2d 181 (1999), *rev'd on other grounds*, 350 N.C. 590, 516 S.E.2d 381 (1999), nevertheless found to be insufficient to justify the trial judge's reconsideration? *See supra* notes 235–39 and accompanying text (explaining the facts and rationale of the court of appeals decision in *Atkinson*). Should they have been sufficient in comparison with the equities in *Calloway*? Also, in *Urbano v. Days Inn of America, Inc.*, 58 N.C. App. 795, 295 S.E.2d 240 (1982), a case similar to *Calloway*, plaintiff sued both the operator-franchisee and the non-operating-franchisor of a motel for negligence. *See id.* at 796–97, 295 S.E.2d at 241. One judge allowed the summary judgment motion of the operator-franchisee while a successor judge denied the summary judgment motion of the non-operating-franchisor—a result that seems comparable to the situation in *Calloway*. *See id.* at 797, 295 S.E.2d 241. The issue was not raised in *Urbano*, but if the denial of the non-operating-franchisor's summary judgment motion occurred prior to the grant of the operator-franchisee's motion would *Calloway* have supported a reconsideration of the non-operating-franchisor's summary judgment motion based on the grant of the operator-franchisee's motion?

284. Although it is the duty of the supreme court to adhere to its decisions, *see* Hill v. Railroad, 143 N.C. 539, 573, 55 S.E. 854, 868–69 (1906), the precedential authority of a case is " 'proportionately weakened' " when the point at issue " 'was not taken or inquired into at all [and] there is no ground for presuming that it was duly considered,' " Paterson v. McCormick, 177 N.C. 448, 456–57, 99 S.E. 401, 405 (1919) (quoting 15 C.J. § 333 (1918)). Furthermore,

> "It is no doubt true that even a single adjudication of this Court, upon a question properly before it, is not to be questioned or disregarded, except for the most cogent reasons, and then only in a case where it is plain that the judgment was the result of a mistaken view of the condition of the law applicable to the question .... [The doctrine of stare decisis] does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is contrary to reason. The authorities are abundant to show that in such cases it is the duty of the courts to re-examine the question."

Mial v. Ellington, 134 N.C. 131, 158, 46 S.E. 961, 970 (1903) (quoting Rumsey v. New

define and extend the new rule purportedly set out in *Calloway* have resulted in a rule that is not sufficiently predictable nor understandable. The supreme court should reconsider this area of the law and clarify, disavow, or overrule *Calloway*.

If North Carolina courts return to the majority rule that interlocutory orders not immediately reviewable may be reconsidered in a proper case, the appellate courts will need to define any limitations on the trial court's determination that a case is "proper." The trial court should generally allow counsel to be heard as to why a case is proper for reconsideration, and summary denial might be an abuse of discretion. If the trial court determines that the matter is proper for reconsideration, then the court should hear the matter and rule on the substantive issue raised. If, on the other hand, the court concludes the case is not a proper one for reconsideration, the court should be able to deny the motion to reconsider without considering the substance of the renewal. If the movant establishes a change of condition sufficient to render the previous ruling no longer applicable, then the substantive issue should be heard de novo and not as a matter of reconsideration. In such case, the trial court might abuse its discretion if it refused to provide the de novo hearing and to rule on the substantive issue raised. The trial court might also commit error in its initial determination as to whether the change of circumstances was sufficient to require a de novo consideration.

Reconsideration should never be routinely granted, and allowing reconsideration should not guarantee a modification or overruling of the previously entered order. Judges should hesitate before finding that a matter presents a proper case for reconsideration, but such a decision must rest largely in the discretion of the trial court. No factor will always be determinative in deciding whether or not reconsideration will be granted, but important factors that should be weighed include: (a) what stage the proceeding is in when the request for reconsideration is made because as trial or final disposition approaches, stability takes on increased importance; (b) whether a successor judge is reconsidering his own or a predecessor judge's prior ruling; (c) what level of doubt is involved regarding the appropriateness of the prior ruling; (d) what type of issue is involved and whether any prejudice would result in overruling the prior ruling;

York, 30 N.E. 654 (N.Y. 1892)). *But see* McGowan v. Davenport, 134 N.C. 526, 531–32, 47 S.E. 27, 29 (1904) ("We have never regarded a decision by *per curiam* order as a binding precedent . . . [I]t should not have the effect of overruling a previous decision based on a well-considered opinion, and especially when the latter was not commented on or even cited by the Court.").

(e) whether there has been any change in the applicable law; (f) whether the moving party is offering new evidence; (g) whether the issue involved in the first ruling was inadequately briefed; and (h) whether manifest injustice would result unless the court reconsiders the prior ruling.[285] It should also be noted that acquiescence or imputed law of the case might be more appropriately considered as a powerful factor favoring a refusal to reconsider rather than a rule that prohibits reconsideration in all cases.[286]

Should North Carolina return to the majority rule, much will remain to be resolved. North Carolina courts will have to grapple with such difficult questions as the proper limits of a judge's discretion to reconsider and the sufficiency of changed conditions to distinguish a renewal from an earlier motion. These difficulties, however, are no greater than those under current law. The determination of the sufficiency of changed conditions, for instance, is as difficult a question under current law as it would be under the majority rule. And the question of whether a judge may properly reconsider an order seems less subject to abuse or confusion than does the determination under current law of whether the strict jurisdictional prohibition against reconsideration applies. Whether a case is proper for reconsideration is a question best left to the able trial judge's discretion. Such a rule that trusts the trial judge's exercise of discretion is not unusual, nor is it a high price to pay to ensure the trial court's ability to administer the trial process effectively and to maintain its integrity. North Carolina's return to the majority rule would properly recognize the trial judges' inherent power to modify, overrule, change, and correct orders *in fieri*—a power that the trial court formerly enjoyed and a power necessary to the proper functioning of our judicial system.

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285. *See* Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1311 (Utah 1994) (stating that, in determining the propriety of reconsidering a prior ruling, the court can consider several factors, including when: (1) the matter is presented in a "different light;" (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider its prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court).

286. One noted commentator takes the strong position that "[t]he fact that appeal might have been taken from various intermediate orders under an interlocutory appeal statute or an expanded version of the final judgment rule should not preclude reconsideration by the trial court . . . ." WRIGHT & MILLER, *supra* note 5, § 4433, at 307; *see also* United States v. United States Smelting Ref. & Mining Co., 339 U.S. 186, 198–99 (1950) (stating that the election to forego a permissive interlocutory appeal does not transform a nonfinal decision into law of the case).