

---

## NOTES

---

---

### TOWARD A STRONGER ECONOMIC FUTURE FOR NORTH CAROLINA: PRECEDENT AND THE OPINIONS OF THE NORTH CAROLINA BUSINESS COURT

---

ANDREW R. JONES\*

#### TABLE OF CONTENTS

I. INTRODUCTION .....	190
II. THE NORTH CAROLINA JUDICIAL SYSTEM .....	192
A. <i>Trial Courts</i> .....	192
B. <i>Appellate Courts</i> .....	194
III. THE NORTH CAROLINA BUSINESS COURT .....	195
A. <i>Development</i> .....	195
B. <i>Today</i> .....	198
IV. PRECEDENT AND APPELLATE DECISION-MAKING IN NORTH CAROLINA .....	201
A. <i>Binding Precedent</i> .....	202
B. <i>Persuasive Precedent</i> .....	204
V. CONFLICT: <i>ESTATE OF BROWNE V. THOMPSON AND GOLDSTEIN V. AMERICAN STEEL SPAN, INC.</i> .....	205
VI. THE CASE FOR TREATING BUSINESS COURT OPINIONS AS PERSUASIVE PRECEDENT .....	206
A. <i>Secures the Fundamental Purpose of the Business Court</i> ..	207
1. Cultivation of Judicial Expertise .....	208
2. Development of Complex Business Law.....	209

---

\*J.D., *magna cum laude*, Elon University School of Law, 2013; A.B. Davidson College, 2010. Spring 2013 Judicial Extern, North Carolina Business Court–Greensboro. The views expressed in this article are solely those of the author.

B.	<i>Advances the Recommendations of the Chief Justice's Commission on the Future of the Business Court</i> . . . . .	210
C.	<i>Follows the Business Court's Model, the Delaware Court of Chancery</i> . . . . .	212
D.	<i>Stays True to North Carolina Appellate Courts' Broad Acceptance of Persuasive Authority</i> . . . . .	213
VII.	CONCLUSION . . . . .	215

## I. INTRODUCTION

In the fall of 1995, North Carolina established the North Carolina Business Court (“the Business Court”), a forum specially designated for the resolution of complex business issues.<sup>1</sup> The Business Court was created as part of a statewide initiative to facilitate “the development of a strong economy for the people of the State” by improving the “complicated legal environment” in which businesses exist.<sup>2</sup> Specifically, by “assur[ing] a modern, responsive . . . judicial climate for businesses presently incorporated [in North Carolina] and those that may be looking to incorporate,” the Business Court is designed to enhance the state’s economic competitiveness.<sup>3</sup>

Less than two years after the Business Court was created, a movement toward specialized business courts was wholeheartedly embraced by the Ad Hoc Committee on Business Courts of the American Bar Association, which recognized business courts as “an idea whose time has come” and urged other states to “consider without delay the merits of such a specialized court in their jurisdiction.”<sup>4</sup> Although many jurisdictions heeded this call and established business courts of their own,<sup>5</sup>

<sup>1</sup> CHIEF JUSTICE’S COMMISSION ON THE FUTURE OF THE N.C. BUSINESS COURT, FINAL REPORT AND RECOMMENDATION 2 (2004) [hereinafter REPORT ON THE FUTURE OF THE COURT], available at [http://apps.americanbar.org/buslaw/committees/CL150011pub/materials/reports/NorthCarolinaReport\(2004\).pdf](http://apps.americanbar.org/buslaw/committees/CL150011pub/materials/reports/NorthCarolinaReport(2004).pdf). Setting aside the highly acclaimed Delaware Court of Chancery, North Carolina was the third state to establish such a specialized business court. See Mitchell L. Bach & Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 BUS. LAW. 147, 152-70 (2004).

<sup>2</sup> See Exec. Order No. 44, *North Carolina Commission on Business Laws and the Economy*, 9 N.C. Reg. 227 (May 16, 1994).

<sup>3</sup> See ANNUAL REPORT OF THE NORTH CAROLINA COMMISSION ON BUSINESS LAWS AND THE ECONOMY 5 (1995) [hereinafter COMMISSION REPORT].

<sup>4</sup> Ad Hoc Comm. on Bus. Cts., *Business Courts: Towards a More Efficient Judiciary*, 52 BUS. LAW. 947, 961 (1997).

<sup>5</sup> As of a survey published in 2011, twenty-two states had adopted some form of a specialized business court. See Lee Applebaum, *The Steady Growth of Business Courts*, in FUTURE TRENDS IN STATE COURTS 2011 70, 73 (Carol R. Flango et al. eds., 2011), available at <http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1820>.

the “pioneer”<sup>6</sup> North Carolina Business Court is widely regarded as one of the “most successful courts” specializing in complex business matters.<sup>7</sup> In fact, one commentator celebrated it as the “gold standard in established non-Delaware business courts.”<sup>8</sup>

Despite the Business Court’s purposeful conception and well-recognized success, the introduction of this specialized, innovative forum in the North Carolina judicial system has presented an important and unresolved question: what weight should opinions of the Business Court be afforded by appellate courts in North Carolina?<sup>9</sup> Two panels of the North Carolina Court of Appeals (“the Court of Appeals”) have spoken directly on this issue, and each has reached a different conclusion.<sup>10</sup> One asserted that Business Court opinions have no precedential value.<sup>11</sup> The other suggested that they are persuasive precedent subject to respectful consideration.<sup>12</sup> This article critically evaluates the Court of Appeals’ divergent treatment of Business Court opinions and suggests a definitive answer to the question of how those opinions should be treated.

In particular, Part I of this article surveys the structure of North Carolina’s judicial branch of government in an effort to understand the Business Court’s role in the North Carolina judicial system. Part II examines the unique development of the Business Court, including the policy rationale for its creation and expansion. Part III explores the role of precedent in appellate decision-making in this state and

<sup>6</sup> Ad Hoc Comm. on Bus. Cts., *supra* note 4, at 961 (recognizing the Business Court, along with other early adopted specialized business courts, as “pioneer business courts”).

<sup>7</sup> Andrew A. Powell, *It’s Nothing Personal, It’s Just Business: A Commentary on the South Carolina Business Court Pilot Program*, 61 S.C. L. REV. 823, 823 (2010).

<sup>8</sup> Anne Tucker Nees, *Making a Case for Business Courts: A Survey of and Proposed Framework to Evaluate Business Courts*, 24 GA. ST. U. L. REV. 477, 479 (2007).

<sup>9</sup> This question has been recognized and considered by other legal commentators since the Business Court’s creation. *E.g.*, Carrie A. O’Brien, *The North Carolina Business Court: North Carolina’s Special Superior Court for Complex Business Cases*, 6 N.C. BANKING INST. 367, 377 n.74 (2002) (citing Interview with Judge Ben Tennille, Special Superior Court Judge for Complex Business Cases) (noting that opinions of the Business Court are “likely not binding on other courts in North Carolina. . . . Exactly what the precedential value of the opinion is, however, is an open issue that the legislature or the Supreme Court should resolve.”); Bach & Applebaum, *supra* note 1, at 168 n.153.

<sup>10</sup> *Compare* Estate of Browne v. Thompson, 727 S.E.2d 573, 576 (N.C. Ct. App. 2012), *cert. denied*, 736 S.E.2d 495 (N.C. 2013), *with* Goldstein v. Am. Steel Span, Inc., 640 S.E.2d 740, 742 n.2 (N.C. Ct. App. 2007).

<sup>11</sup> *Estate of Browne*, 727 S.E.2d at 576.

<sup>12</sup> *Goldstein*, 640 S.E.2d at 742 n.2.

otherwise. Part IV examines the conflicting treatment of Business Court opinions in the *Estate of Browne v. Thompson*<sup>13</sup> and *Goldstein v. American Steel Span, Inc.*<sup>14</sup> opinions. Finally, Part V of this article directly answers the question raised by the conflicting Court of Appeals opinions and argues that Business Court opinions should properly be afforded respect and careful consideration as persuasive precedent.

## II. THE NORTH CAROLINA JUDICIAL SYSTEM

In order to understand the Business Court's role and function, it is first necessary to understand the basic structure of the North Carolina judicial system. The North Carolina Constitution ("the Constitution") establishes the judicial branch as a co-equal branch of state government.<sup>15</sup> Specifically, Article IV of the Constitution provides that "[t]he judicial power of the State shall . . . be vested in . . . a General Court of Justice."<sup>16</sup> The Constitution further provides that "[t]he General Court of Justice shall constitute a unified judicial system for purposes of jurisdiction, operation, and administration, and shall consist of an Appellate Division, a Superior Court Division, and a District Court Division."<sup>17</sup>

### A. Trial Courts

The Superior Court Division and the District Court Division constitute the trial courts of North Carolina's General Court of Justice. All trial court judges in North Carolina are elected by the voters,<sup>18</sup> with the notable exception of special superior court judges appointed by the Governor.<sup>19</sup> The trial courts are generally vested with original general jurisdiction of all justiciable civil and criminal matters in the state.<sup>20</sup>

---

<sup>13</sup> *Estate of Browne*, 727 S.E.2d at 576.

<sup>14</sup> *Goldstein*, 640 S.E.2d at 740.

<sup>15</sup> See N.C. CONST. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.").

<sup>16</sup> N.C. CONST. art. IV, § 1. This section also vests judicial power in a "Court for the Trial of Impeachments." *Id.* However, "[w]hile an undoubted exercise of judicial power, impeachment and removal from office are far less common than criminal prosecution and civil adjudication, the province of the General Court of Justice." JOHN V. ORTH, THE NORTH CAROLINA STATE CONSTITUTION 113 (2011). As such, the Court for the Trial of Impeachments is not a focus of this article.

<sup>17</sup> N.C. CONST. art. IV, § 2.

<sup>18</sup> *Id.* §§ 9(1), 10, 16.

<sup>19</sup> N.C. GEN. STAT. § 7A-45.1 (2011).

<sup>20</sup> *Id.* §§ 7A-240, 270.

For civil matters in the trial courts, the court of proper jurisdiction<sup>21</sup> is determined based largely on the amount in controversy.<sup>22</sup> Cases within the proper jurisdiction of the superior courts are cases involving more than \$25,000 at issue and cases in a few special categories.<sup>23</sup> Cases within the proper jurisdiction of the district courts are those involving \$25,000 or less at issue and domestic cases.<sup>24</sup> In criminal matters, the superior courts generally have exclusive original jurisdiction over felonies,<sup>25</sup> while the district courts generally have exclusive original jurisdiction over misdemeanor cases, juvenile cases, and infractions.<sup>26</sup>

There are also a number of innovative courts at the trial court level. These courts fall “[w]ithin the normal jurisdiction of the district and superior courts . . . [and] deal with cases for which the traditional adversarial justice system is not always appropriate, or for which the complexity of the cases requires the special attention of a single judge.”<sup>27</sup> Innovative trial courts include Family Courts, Drug Treatment Courts, and the Business Court.<sup>28</sup>

Trial courts are courts of record in that they “hold trials to determine the facts of cases.”<sup>29</sup> They are general courts of both law and equity.<sup>30</sup> Non-Business Court trial courts enter short orders upon the disposition of matters before them, typically drafted by one of the attorneys appearing before the court, exchanged with opposing counsel, and submitted for the presiding judge to sign.<sup>31</sup> In civil bench trials,<sup>32</sup>

<sup>21</sup> While certain matters may be designated “proper” or “improper,” these two trial court divisions have concurrent original jurisdiction over civil matters. This means that, while the determination of a specific civil action in the wrong division may be improper, the judgment rendered by the court in that case is not void or voidable solely for that reason. N.C. GEN. STAT. § 7A-242 (2011).

<sup>22</sup> N.C. GEN. STAT. § 7A-243 (2011).

<sup>23</sup> N.C. GEN. STAT. ANN. §§ 7A-243, 245-49 (West, Westlaw through S.L. 2013-257 of the 2013 Regular Session of the General Assembly).

<sup>24</sup> N.C. GEN. STAT. ANN. §§ 7A-243, 244 (West, Westlaw through S.L. 2013-257 of the 2013 Regular Session of the General Assembly).

<sup>25</sup> N.C. GEN. STAT. § 7A-271 (2011).

<sup>26</sup> *Id.* § 7A-272.

<sup>27</sup> NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, THE NORTH CAROLINA JUDICIAL SYSTEM 13 (2008) [hereinafter NORTH CAROLINA AOC], available at <http://www.nccourts.org/citizens/publications/documents/judicialsystem.pdf>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 665 S.E.2d 478, 485 (N.C. Ct. App. 2008).

<sup>31</sup> *See, e.g.*, 26TH DIST. SUPER. CT. CIV. R. 17.4; 26TH DIST. DIST. CT. CIV. R. 16.4.

<sup>32</sup> N.C. R. CIV. P. 52(a)(1).

and in other select circumstances,<sup>33</sup> these orders must contain findings of fact and conclusions of law. Detailed findings of fact and conclusions of law are generally not required in other trial court orders.<sup>34</sup> These orders are generally not publicly available outside of the files located in each county Clerk of Court's office and, in limited circumstances, on legal research databases.<sup>35</sup>

### B. Appellate Courts

The Appellate Division of the General Court of Justice includes two distinct courts: the North Carolina Supreme Court ("the Supreme Court") and the Court of Appeals.<sup>36</sup> The Supreme Court is the state's highest court, considering questions of law on cases appealed from the lower courts of the state, including the Court of Appeals.<sup>37</sup> The Supreme Court is made up of seven justices: the chief justice and six associate justices.<sup>38</sup> All of the justices are elected by the voters for eight-year terms.<sup>39</sup> When hearing a matter, these justices sit *en banc*.<sup>40</sup>

The Court of Appeals is the intermediate appellate court in the state and "was created to relieve the Supreme Court of a portion of its heavy caseload."<sup>41</sup> The Court of Appeals consists of fifteen members: a chief judge and fourteen judges.<sup>42</sup> Like Supreme Court justices, judges of the Court of Appeals are elected by the voters for eight-year terms.<sup>43</sup> When hearing a case, judges of the Court of Appeals sit in panels of three, rather than *en banc*, as the Supreme Court does.<sup>44</sup>

---

<sup>33</sup> The trial court is required to set forth specific findings of fact and conclusions of law when required by rule or statute. *E.g.*, N.C. R. CIV. P. 52(a)(2) (upon request of a party); N.C. GEN. STAT. § 15A-977(f) (2011) (when ruling on motions to suppress evidence); N.C. GEN. STAT. § 15A-1064 (2011) (before granting a mistrial); N.C. GEN. STAT. § 15A-1420 (2011) (when ruling on motions for appropriate relief).

<sup>34</sup> N.C. R. CIV. P. 52(a)(2).

<sup>35</sup> See COMMISSION REPORT, *supra* note 3, at 8 ("Often there will be no published, written opinion supporting [a trial court's] decision.")

<sup>36</sup> N.C. CONST. art. IV, § 5.

<sup>37</sup> NORTH CAROLINA AOC, *supra* note 27, at 3.

<sup>38</sup> N.C. GEN. STAT. § 7A-10 (2011).

<sup>39</sup> N.C. CONST. art. IV, § 16.

<sup>40</sup> John V. Orth, *Why the North Carolina Court of Appeals Should Have a Procedure for Sitting En Banc*, 75 N.C. L. REV. 1981, 1985 (1997) ("Although not expressly required to do so by the state constitution, the supreme court always conducts its judicial business *en banc*, that is, with all the justices sitting together.")

<sup>41</sup> NORTH CAROLINA AOC, *supra* note 27, at 3.

<sup>42</sup> N.C. GEN. STAT. § 7A-16 (2011).

<sup>43</sup> N.C. CONST. art. IV, § 16.

<sup>44</sup> N.C. GEN. STAT. § 7A-16 (2011).

Both the Supreme Court and the Court of Appeals only have jurisdiction to review questions of law or legal inference upon appeals from the lower courts.<sup>45</sup> The North Carolina Rules of Appellate Procedure include detailed briefing requirements for the parties before them.<sup>46</sup> Additionally, these appellate courts publish opinions upon the disposition of each case before them. The opinions are typically lengthy, with detailed explanations of the applicable rules of law and application of those rules to the facts of the particular case.<sup>47</sup> Appellate court opinions are publicly available on the Administrative Office of the Courts' website,<sup>48</sup> are published in state and regional reporters,<sup>49</sup> and are available on commercial legal research databases. In order to prepare such opinions, each justice of the Supreme Court and judge of the Court of Appeals is entitled to hire two law clerks, officially known as Research Assistants, who must be law school graduates.<sup>50</sup>

### III. THE NORTH CAROLINA BUSINESS COURT

#### A. *Development*

The Business Court is a comparatively recent addition to the North Carolina judicial system. On April 19, 1994, then-Governor Jim Hunt signed an Executive Order ("the Order") establishing the North Carolina Commission on Business Laws and the Economy ("the Commission").<sup>51</sup> The Order emphasized that "the State of North Carolina is committed to the development of a strong economy for the people of the State," while recognizing that "businesses exist in a complicated legal environment which can be unduly restrictive and hinder their ability to operate and grow and which can discourage new businesses from locating in the State."<sup>52</sup> As a result, the Order suggested, "building the long-term economic capacity for the people, communities, and enterprises of North Carolina" required a coordinated effort to examine the state laws and regulations affecting private enterprise and economic vitality.<sup>53</sup>

<sup>45</sup> *Id.* § 7A-26.

<sup>46</sup> *See* N.C. R. APP. P. 28.

<sup>47</sup> *See* BLACK'S LAW DICTIONARY 1201 (9th ed. 2009).

<sup>48</sup> *See* NORTH CAROLINA COURT SYSTEM, <http://appellate.nccourts.org/opinions/> (last visited Nov. 24, 2013).

<sup>49</sup> *See* N.C. GEN. STAT. § 7A-6 (2011).

<sup>50</sup> *Id.* § 7A-7(a).

<sup>51</sup> Exec. Order No. 44, *North Carolina Commission on Business Laws and the Economy*, 9 N.C. Reg. 227-28 (May 16, 1994).

<sup>52</sup> *Id.* at 227.

<sup>53</sup> *Id.*

To further this admirable effort, the Commission was created and tasked with recommending:

any needed changes in existing statutes and regulations which affect the operation of businesses in North Carolina, particularly Chapter 55 of the North Carolina General Statutes . . . and . . . any needed new statutes, rules and regulations designed to assure that North Carolina offers a legal environment which provides the flexibility and support to allow businesses to operate successfully in this state and which will attract them to locate and incorporate here.<sup>54</sup>

The Commission was made up of a number of stakeholders in this important conversation, including business leaders, attorneys, and government officials.<sup>55</sup> Then-Attorney General, and future Governor, Michael F. Easley, served as Chair of the Commission.<sup>56</sup>

In January 1995, after meeting several times, the Commission issued its final report.<sup>57</sup> The report made a number of recommendations designed to “assure a modern, responsive regulatory and judicial climate for businesses presently incorporated here and those that may be looking to incorporate here.”<sup>58</sup> One of its chief recommendations in attracting businesses to North Carolina was the creation of a specialized business court.<sup>59</sup> The Commission identified a model for this proposed court in the Delaware Chancery Court.<sup>60</sup> Specifically, the Commission recognized:

The Delaware Chancery Court is one reason many Fortune 500 companies choose to incorporate in that state. That court provides a high level of judicial expertise on corporate law issues. It has developed a substantial body of corporate law that provides predictability for business decision-making. Corporations litigating a corporate legal issue in the Delaware Chancery Court get a timely and well-reasoned written decision from an expert judge.<sup>61</sup>

The Commission noted that, by contrast, the North Carolina judicial system as it then existed provided corporations with no such confi-

---

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* See also COMMISSION REPORT, *supra* note 3, at 2.

<sup>56</sup> COMMISSION REPORT, *supra* note 3.

<sup>57</sup> *Id.* at 3.

<sup>58</sup> *Id.* at 5.

<sup>59</sup> *Id.* at 8.

<sup>60</sup> *Id.* The Delaware Court of Chancery is “nationally the best-known, most highly respected, and long-standing [specialized court] dealing with corporate and security matters.” Ad Hoc Comm. on Bus. Cts., *supra* note 4, at 955-56.

<sup>61</sup> COMMISSION REPORT, *supra* note 3, at 8.



dence.<sup>62</sup> As a result, “[I]ack of a ‘business court’ like the Delaware Chancery Court [put] North Carolina at a disadvantage when corporations [were] considering states in which to incorporate or do business.”<sup>63</sup>

As Chief Justice I. Beverly Lake of the North Carolina Supreme Court later recognized, there were two important ways in which the creation of the Business Court would further the Commission’s goal of assuring a modern, responsive, and attractive judicial system for businesses:

The first was the establishment of a court where complex business litigation could be handled by one judge from beginning to end, thus reducing the problems of discontinuity created by the normal rotation system. Secondly, the business court was established to generate a body of case law in our State on corporate governance issues.<sup>64</sup>

By creating judicial expertise and generating a body of case law on complex business and corporate issues, the court would provide welcome certainty and predictability about how the judicial system would handle business disputes.<sup>65</sup> These outcomes benefit not only the business community, “but also numerous persons throughout society, including employees, shareholders, creditors, suppliers, or customers of the companies involved.”<sup>66</sup>

---

<sup>62</sup> *Id.* Instead, “[t]here [was] little North Carolina case law on which the judge [could] rely. Often there [would] be no published, written opinion supporting the decision.” *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Memorandum from Chief Justice I. Beverly Lake, Jr. to all Superior Court Judges, Guidelines for Assignment of Cases to the N.C. Bus. Ct. (Mar. 7, 2001) [hereinafter Lake Memo], available at <http://www.ncbusinesscourt.net/OtherRefdocs/Guidelines%20for%20NCBC%20Assignment.pdf>.

<sup>65</sup> See, e.g., Michael Dayton, *Trend: Specialty Business Courts on the Rise*, N.C. LAW. WKLY., Mar. 22, 2004 (“Funneling commercial cases through one specialized forum can create predictability for business litigants with millions of dollars at stake . . . helping the business community decide whether to roll the dice on costly litigation.”); Jacqueline Bueno, *North Carolina To Establish Business Court*, WALL ST. J., Oct. 25, 1995, at S1 (“With the new business court, ‘there will be more predictability in the interpretation’ of business laws.”).

<sup>66</sup> Ad Hoc Comm. on Bus. Cts., *supra* note 4, at 953. Although the Business Court was created as a specialized forum for the resolution of complex business matters, it does not seek to decide cases in a manner that benefits business interests. Rather, as the Business Court has itself recognized, “[t]his Court’s judges do not . . . decide cases based on the prevailing economic winds, nor do we consider how best to promote a litigant’s business interests. Our oath is the same as that of any judge of this state—to apply the law and decide cases without regard to the parties who are before us.” Digital

Rather than creating a separate trial court division to house the new Business Court, similar to that under which the Delaware Court of Chancery operates, the Commission suggested that the Business Court be established through the Supreme Court's judicial rulemaking power.<sup>67</sup> The Business Court would serve as a special administrative division of the Superior Court Division and handle exceptional cases involving corporate law issues.<sup>68</sup> The Commission further recommended that an expert in corporate law matters be appointed to serve as a special superior court judge and preside over the Business Court.<sup>69</sup> This judge would develop judicial expertise and "issue a published, written opinion in all cases assigned to him or her"<sup>70</sup> in an effort to "generate a body of case law on corporate governance issues."<sup>71</sup>

In the fall of 1995, the Supreme Court established the Business Court by revising the General Rules of Practice for the Superior and District Courts ("the Rules of Practice") consistent with the Committee's recommendations; the North Carolina General Assembly, following suit, appropriated funds for the new Business Court.<sup>72</sup> In early 1996, North Carolina's first Special Superior Court Judge for Complex Business Cases, Judge Ben F. Tennille, was appointed and designated.<sup>73</sup> Consistent with the recommendations of the Committee, the Rules of Practice were revised to require the Business Court to issue written opinions upon disposition of a complex business case.<sup>74</sup>

### B. Today

As currently constituted, the Business Court exists as an innovative, specialized forum for the hearing of qualifying complex business disputes within the Superior Court Division of the General Court of Justice.<sup>75</sup> There are three judges sitting in the Business Court, one each maintaining primary chambers in Charlotte, Greensboro, and Ra-

---

Recorders, Inc. v. McFarland, 2007 NCBC 23, ¶ 74, No. 07 CVS 2247, 2007 WL 2570250, at \*8 (N.C. Super. Ct. June 29, 2007).

<sup>67</sup> COMMISSION REPORT, *supra* note 3, at 9.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Bach & Applebaum, *supra* note 1, at 167.

<sup>72</sup> REPORT ON THE FUTURE OF THE COURT, *supra* note 1, at 2.

<sup>73</sup> *Id.* See also Jack Scism, *Greensboro Lawyer Gets New Business Judgeship*, GREENSBORO NEWS & REC., Jan. 16, 1996, at B5.

<sup>74</sup> N.C. SUPER. CT. R. 2.1(b).

<sup>75</sup> NORTH CAROLINA AOC, *supra* note 27, at 15.

leigh.<sup>76</sup> These judges are not elected; rather, they are appointed as special superior court judges by the Governor and designated as Business Court judges by the Chief Justice of the Supreme Court.<sup>77</sup>

Generally, three types of cases come before the Business Court: mandatory complex business cases, discretionary complex business cases, and exceptional cases.<sup>78</sup> Mandatory complex business cases are those involving material issues related to: (1) the law governing corporations, partnerships, limited liability companies, and limited liability partnerships; (2) securities law; (3) antitrust law; (4) state trademark or unfair competition law; (5) intellectual property law; (6) the Internet; and (7) some specific tax law issues.<sup>79</sup> Any party may designate a case as a mandatory complex business case by filing a Notice of Designation if, in good faith, that party believes the action satisfies the criteria for designation set forth above.<sup>80</sup>

Discretionary complex business cases are assigned to the Business Court at the discretion of the Chief Justice of the Supreme Court upon recommendation—*ex mero motu* or on motion of any party—of a senior resident superior court judge, chief district court judge, or the superior court judge presiding over the case.<sup>81</sup> Discretionary complex business cases are typically those where:

the outcome will have implications for business and industry beyond the conflicts of the parties to the litigation. If a written decision on disposition of the case would provide predictability for others in the same busi-

---

<sup>76</sup> NORTH CAROLINA BUSINESS COURT: 2012 ANNUAL REPORT OF ACTIVITIES 3 [hereinafter 2012 ANNUAL REPORT], available at <http://www.ncbusinesscourt.net/Stats/CY2012%20NC%20Business%20Court%20Report.pdf>. As of this writing, Judge John R. Jolly, Jr. serves as the Chief Special Superior Court Judge for Complex Business Cases, with chambers at the Raleigh Court; Judge James L. Gale serves as a Special Superior Court Judge for Complex Business Cases, with chambers at the Greensboro Court; Judge Calvin E. Murphy serves as a Special Superior Court Judge for Complex Business Cases, with chambers at the Charlotte Court. *Id.*

<sup>77</sup> N.C. GEN. STAT. §§ 7A-45.1, 45.3 (2011); N.C. SUPER. CT. R. 2.2.

<sup>78</sup> Albert Diaz & A. Jordan Sykes, *The New North Carolina Business Court*, N.C. ST. B. J., Spring, 2008, at 26, 27.

<sup>79</sup> N.C. GEN. STAT. § 7A-45.4(a) (2011). See also 2012 ANNUAL REPORT, *supra* note 76, at 10.

<sup>80</sup> N.C. GEN. STAT. §§ 7A-45.4(b), (c) (2011). A plaintiff must file the notice contemporaneously with the complaint; an intervenor must file the notice contemporaneously with the motion for permission to intervene; a defendant must file the notice within 30 days of receipt of service of the pleading seeking relief from the defendant. N.C. GEN. STAT. § 7A-45.4(d) (2011).

<sup>81</sup> N.C. SUPER. CT. R. 2.1(a).

ness or industry in making their business decisions, the case will more likely be considered for designation.<sup>82</sup>

Exceptional cases are designated and assigned by the Chief Justice of the Supreme Court in his or her discretion, pursuant to Rule 2.1 of the Rules of Practice.<sup>83</sup> “While an exceptional case may be assigned to any special superior court judge, only a [B]usiness [C]ourt judge may hear a discretionary complex business case.”<sup>84</sup> Once a case is designated as a complex business case, it is assigned to one of the Business Court judges, who will preside over all trial-level proceedings in that action.<sup>85</sup>

Parties before the Business Court must adhere to a specific set of court rules set forth in the General Rules of Practice and Procedure for the North Carolina Business Court (“the Business Court Rules”).<sup>86</sup> The Business Court Rules supplement the North Carolina Rules of Civil Procedure and the Rules of Practice, and are designed to, *inter alia*, “provide better access to Court information for litigants, counsel, and the public.”<sup>87</sup> For example, parties before the Business Court must follow specific briefing requirements,<sup>88</sup> and it is “strongly encouraged” that all papers filed with the court are filed through the court’s electronic filing and service system.<sup>89</sup> Pleadings, motions, and briefs filed

---

<sup>82</sup> *Definition of a Complex Business Case*, N.C. BUS. CT., <http://www.ncbusinesscourt.net/history.htm> (last visited May 6, 2013). See also N.C. SUPER. CT. R. 2.1(d) (“Factors which may be considered in determining whether to make such designations include: the number and diverse interests of the parties; the amount and nature of anticipated pretrial discovery and motions; whether the parties voluntarily agree to waive venue for hearing pretrial motions; the complexity of the evidentiary matters and legal issues involved; whether it will promote the efficient administration of justice; and such other matters as the Chief Justice shall deem appropriate.”).

<sup>83</sup> N.C. SUPER. CT. R. 2.1.

<sup>84</sup> Diaz & Sykes, *supra* note 78, at 27 (citing Rule 2.1(b)).

<sup>85</sup> N.C. GEN. STAT. § 7A-45.4(f) (2011).

<sup>86</sup> Order Adopting the Amended Local Business Court Rules, N.C. BUS. CT. (July 31, 2006), <http://www.ncbusinesscourt.net/New/localrules/>.

<sup>87</sup> GEN. R. OF PRAC. AND P. FOR THE N.C. BUS. CT. 1.4 [hereinafter BCR].

<sup>88</sup> Compare BCR 15 (stating that, generally, all motions must be accompanied by a brief, requiring response briefs to be filed “within twenty (20) days after service of the brief supporting the motion” and reply briefs to be filed “within ten (10) days after service of the response”), with N.C. R. Civ. P. 5(a1) (stating that briefs in support or opposition of dispositive motions must be filed “at least two days before the hearing on the motion”).

<sup>89</sup> BCR 6.1.

with the Business Court are generally available on the Business Court's website, enabling easy public access to these documents.<sup>90</sup>

Rule 2.1(b) of the Rules of Practice requires the Business Court to issue a written opinion on the final disposition of a claim in every case before it.<sup>91</sup> Additionally, “[t]he judges often elect to write opinions on non-dispositive matters of first impression or novel issues.”<sup>92</sup> Like the appellate courts of this state—and notably distinct from the other trial-level courts—each Business Court judge is allowed two full-time law clerks to assist in this task.<sup>93</sup> Business Court opinions are publicly available on the court's website<sup>94</sup> and are also available on commercial legal research databases. The creation of and easy public access to these opinions—along with the parties' pleadings, motions, and briefs—represents an important way in which the Business Court disseminates a consistent body of case law on complicated business law issues in an effort to create a stable judicial climate.<sup>95</sup>

#### IV. PRECEDENT AND APPELLATE DECISION-MAKING IN NORTH CAROLINA

Precedent is an often-misunderstood doctrine “central to legal reasoning, briefs, arguments, decision-making, and opinion writing.”<sup>96</sup> The use of precedent is well recognized as the foundation of our sys-

---

<sup>90</sup> See BCR 27.1. The Business Court's embrace of advanced technology has been recognized as “[o]ne of the major differences between the Business Court and other courts in North Carolina.” O'Brien, *supra* note 9, at 378.

<sup>91</sup> N.C. SUPER. CT. R. 2.1(b).

<sup>92</sup> A PRIMER ON THE NORTH CAROLINA BUSINESS COURT, ASSOCIATION OF CORPORATE COUNSEL – CHARLOTTE CHAPTER 3 (2013), available at <http://www.acc.com/chapters/charlotte/upload/March-6-2013-North-Carolina-Business-Court-Materials.doc>.

<sup>93</sup> See *Contact Information*, N.C. BUS. CT., <http://www.ncbusinesscourt.net> (last visited May 6, 2013); REPORT ON THE FUTURE OF THE COURT, *supra* note 1, at 24 n.8 (“The services of a law clerk are indispensable for proper functioning of a Business Court installation. Due to the extremely complex and technical nature of complex business litigation, it is not possible for a single judge to manage a [business court caseload] without the assistance of a qualified research assistant.”).

<sup>94</sup> BCR 27.1.

<sup>95</sup> The business and legal communities look to Business Court opinions for guidance on difficult contemporary complex business issues. For example, in 2001, when then-Special Superior Court Judge for Complex Business cases Ben F. Tennille issued an opinion regarding SunTrust's challenge to the First Union-Wachovia merger, the Business Court website “got over 1,000 hits before 9 a.m.,” and “[m]ore than 30,000 people visited the website that day, including law firms from as far away as San Mateo, California.” O'Brien, *supra* note 9, at 382.

<sup>96</sup> 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, 608 (1990).

tem of common law jurisprudence.<sup>97</sup> Judge Ruggero J. Aldisert articulated a strong definition of precedent in the case of *Allegheny County General Hospital v. NLRB*,<sup>98</sup> when he said: “[a] judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts.”<sup>99</sup> Simply, the principle of precedent means “that like cases should be treated alike.”<sup>100</sup>

However, in our system of jurisprudence, all precedent is not alike. The precedential weight of a court’s opinion depends on a number of factors, including the source of the precedential opinion, the court in which the precedent is being considered, and the similarity of the facts of the case at issue to the representative case.<sup>101</sup>

#### A. *Binding Precedent*

A judicial decision is considered binding precedent when it furnishes the rule for a case involving similar material facts “arising in the same court or a lower court in the judicial hierarchy.”<sup>102</sup> More clearly, “[a] decision of a superior court is an authoritative [binding] precedent for all inferior courts in the same judicial hierarchy.”<sup>103</sup> This principle of binding precedent is recognized by the doctrine of *stare decisis*.<sup>104</sup> In North Carolina, under the doctrine of *stare decisis*, “[t]he

<sup>97</sup> See, e.g., William D. Bader & David R. Cleveland, *Precedent and Justice*, 49 DUQ. L. REV. 35, 35 (2011) (“Precedent is the cornerstone of common law method. It is the core mechanism by which the common law reaches just outcomes.”); William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 8 (1994) (“Blackstone . . . regarded precedent as the cornerstone of the common law, the principal bulwark against the usurpation of the rule of law by judicial tyranny.”).

<sup>98</sup> 608 F.2d 965 (3d Cir. 1979).

<sup>99</sup> Aldisert, *supra* note 96, at 606 (quoting *Allegheny Cnty. Gen. Hosp. v. NLRB*, 608 F.2d 965, 969-70 (3d Cir. 1979)). *Black’s Law Dictionary* further defines precedent as: “A decided case that furnishes a basis for determining later cases involving similar facts or issues.” BLACK’S LAW DICTIONARY 1015 (abr. 9th ed. 2009).

<sup>100</sup> Aldisert, *supra* note 96, at 608.

<sup>101</sup> See *id.*

<sup>102</sup> *Id.* at 606.

<sup>103</sup> *Id.* at 632-33. An obligation of a lower court to follow a decision of a superior court within its judicial system is also known as “vertical precedent” or “hierarchical precedent.” Jeffrey C. Dobbins, *Structure and Precedent*, 108 MICH. L. REV. 1453, 1460-61 (2010).

<sup>104</sup> Aldisert, *supra* note 96, at 607. “The expression *stare decisis* is but an abbreviation of *stare decisis et non quieta movere*,” which “is usually translated, ‘[t]o adhere to precedents, and not to unsettle things which are established.’” *Id.* at 626.

determination of a point of law by a court will generally be followed by a court of the *same or lower rank*.<sup>105</sup> As noted by the Supreme Court, observance of the doctrine of *stare decisis*:

is not only an expression of our respect for the opinions of our predecessors. It promotes stability in the law and uniformity in its application, which, in turn, enable people to predict with reasonable accuracy the consequences of their acts and business transactions. It gives protection to property rights acquired in reliance upon past decisions of this Court and marks the path which the trial courts may follow with some degree of assurance.<sup>106</sup>

Notably, the scope of binding precedent, and the doctrine of *stare decisis*, is narrow. A judicial legal determination “is to be considered authority” only in reference to the particular facts of the case.<sup>107</sup> This is because *stare decisis* is appropriately understood as “what the court *did*” given a very specific factual situation, “not what it *said*.”<sup>108</sup>

In application, the doctrine of *stare decisis* means that the Court of Appeals and the trial-level courts have “no authority to overrule decisions of the Supreme Court and [have] the responsibility to follow those decisions until otherwise ordered by the Supreme Court.”<sup>109</sup> Similarly, trial-level courts are bound by decisions of the Court of Appeals.<sup>110</sup>

---

<sup>105</sup> *Musi v. Town of Shallotte*, 684 S.E.2d 892, 896 (N.C. Ct. App. 2009) (citing *Dunn v. Pate*, 415 S.E.2d 102, 104 (N.C. Ct. App. 1992)) (emphasis added).

<sup>106</sup> *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 206 S.E.2d 141, 145 (N.C. 1974). See also *Potter v. Carolina Water Co.*, 116 S.E.2d 374, 378 (N.C. 1960) (“The salutary need for certainty and stability in the law requires, in the interest of sound public policy, that the decisions of a court of last resort affecting vital business interests and social values, deliberately made after ample consideration, should not be disturbed except for the most cogent reasons.”).

<sup>107</sup> *Am. Nat’l. Bank v. Fountain*, 62 S.E. 738, 740 (N.C. 1908).

<sup>108</sup> Aldisert, *supra* note 96, at 607 (emphasis added). It is for this reason that the well-accepted rule “when two opinions of [the Court of Appeals] conflict, we are obligated to follow the older of the two cases,” is not dispositive on the question of the precedential value of Business Court opinions. *Jailall v. N.C. Dep’t of Pub. Instruction*, 675 S.E.2d 79, 84 (N.C. Ct. App. 2009). There is not a conflict between what the *Estate of Browne* and *Goldstein* courts *did* in resolving a legal issue under a very specific factual situation; rather, there is a conflict between what they *said* about Business Court opinions.

<sup>109</sup> *Dunn v. Pate*, 431 S.E.2d 178, 180 (N.C. 1993).

<sup>110</sup> See, e.g., *Jenkins v. Wheeler*, 344 S.E.2d 371, 372 (N.C. Ct. App. 1986).

### B. *Persuasive Precedent*

Judicial decisions that are not binding precedent may be used as persuasive precedent. The legal maxim *ratio est legis amina* (reason is the soul of the law), accurately represents the concept of persuasive precedent.<sup>111</sup> In addressing an open question, when a court is persuaded by the reasoning and logic of the non-binding opinion of another court, it is more likely to treat that opinion as persuasive precedent and adopt the reasoning as its own.<sup>112</sup> By its very nature, then, persuasive precedent “depends for its influence upon its own merits, not upon any legal claim which it has to recognition.”<sup>113</sup> The factual similarity between the precedential opinion and the case at bar, the strength of the opinion’s reasoning, the “stature of the jurist who authored the opinion, and the level of the court from which the decision came” are all likely to be taken into account by a reviewing court in determining an opinion’s persuasiveness.<sup>114</sup>

Some common sources of persuasive authority are: decisions of appellate courts of other states;<sup>115</sup> decisions of federal courts;<sup>116</sup> plurality, concurring, and dissenting opinions;<sup>117</sup> and even opinions of lower courts within the same jurisdiction.<sup>118</sup>

---

<sup>111</sup> See *In re Truesdell*, 329 S.E.2d 630, 634-35 (N.C. 1985).

<sup>112</sup> *Id.*

<sup>113</sup> Aldisert, *supra* note 96, at 632.

<sup>114</sup> Barbara Bintliff, *Mandatory v. Persuasive Cases*, WEST GRP., [http://faculty.law.lsu.edu/toddbruno/mandatory\\_v\\_persuasive.htm](http://faculty.law.lsu.edu/toddbruno/mandatory_v_persuasive.htm) (last visited May 6, 2013). See also Dobbins, *supra* note 103, at 1462.

<sup>115</sup> See, e.g., *State v. Warren*, 114 S.E.2d 660, 666 (N.C. 1960) (finding the uniform action of the appellate courts of twenty-one states and the District of Columbia “overwhelming authority” that was “highly persuasive”); *DOCRX, Inc. v. EMI Servs. of N.C., LLC*, 738 S.E.2d 199, 202-03 (N.C. Ct. App. 2013) (applying appellate court decisions from Utah, Montana, and Colorado as persuasive precedent); *State v. Castaneda*, 715 S.E.2d 290, 294 n.1 (N.C. Ct. App. 2011) (“While decisions from other jurisdictions may have persuasive value, they are not binding on North Carolina courts.”).

<sup>116</sup> See, e.g., *Ellison v. Alexander*, 700 S.E.2d 102, 106 (N.C. Ct. App. 2010) (“Although we are not bound by federal case law, we may find their analysis and holdings persuasive.”); *DKH Corp. v. Rankin-Patterson Oil Co.*, 506 S.E.2d 256, 258-59 (N.C. Ct. App. 1998) (applying federal court decisions to provide guidance in determining the scope of a North Carolina statute).

<sup>117</sup> See, e.g., *Smallwood v. Eason*, 484 S.E.2d 526 (N.C. 1997) (adopting the rationale of the dissenting opinion from the Court of Appeals).

<sup>118</sup> *State v. Garcia*, 597 S.E.2d 724, 747 (N.C. 2004) (“[W]hile Court of Appeals decisions may be persuasive authority, ‘[t]his Court is not bound by precedents established by the Court of Appeals.’”) (quoting *N. Nat’l Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 316 S.E.2d 256, 265 (N.C. 1984)).



V. CONFLICT: *ESTATE OF BROWNE V. THOMPSON AND GOLDSTEIN V. AMERICAN STEEL SPAN, INC.*

As identified at the outset, the North Carolina Court of Appeals is in conflict over the proper weight it should afford Business Court opinions. On April 3, 2012, the Court of Appeals decided *Estate of Browne v. Thompson*,<sup>119</sup> an appeal from a decision of the Business Court. *Estate of Browne* involved a lawsuit by stockholders of Wachovia Corporation against the corporation, its successor, and its auditor.<sup>120</sup> The plaintiff stockholders alleged, in essence, that they were defrauded in a scheme to deceive them about the corporation's financial stability.<sup>121</sup> The defendants filed a motion to dismiss, which the Business Court granted because, under North Carolina law, the plaintiffs were not able to allege sufficient facts to state their claims.<sup>122</sup>

On appeal, the plaintiffs argued that the Court of Appeals should apply Delaware law—where the plaintiff stockholders would have standing to sue—instead of applying existing Supreme Court precedent.<sup>123</sup> In support of their argument, plaintiffs contended that North Carolina courts had previously cited the applicable Delaware law with approval, pointing to one decision of the Court of Appeals and two Business Court decisions.<sup>124</sup> The *Estate of Browne* court responded tersely, stating, “we are not free to blithely disregard” a decision of the Supreme Court, dismissing the prior Court of Appeals decision because it applied Delaware law, and declaring: “[t]he remaining cases cited by plaintiffs are decisions of the North Carolina Business Court. The Business Court is a special Superior Court, the decisions of which have *no precedential value* in North Carolina.”<sup>125</sup> The court then proceeded to distinguish the cited Business Court decisions from the matter before it.<sup>126</sup>

Notably, the *Estate of Browne* court's rebuke is not the first time the Court of Appeals has addressed the value of Business Court opinions.<sup>127</sup> Just over five years earlier, a different panel of the Court of

---

<sup>119</sup> 727 S.E.2d 573 (N.C. Ct. App. 2012).

<sup>120</sup> *Id.* at 574-75.

<sup>121</sup> *Id.*

<sup>122</sup> *Browne v. Thompson*, 2011 NCBC 4, ¶¶ 42, 56, No. 09 CVS 8588, 2011 WL 1675000, at \*5, \*8 (N.C. Super. Ct. Feb 23, 2011).

<sup>123</sup> *Estate of Browne*, 727 S.E.2d at 576.

<sup>124</sup> Plaintiffs-Appellants' Brief at 18, *Estate of Browne*, 727 S.E.2d 573 (No. COA11-852).

<sup>125</sup> *Estate of Browne*, 727 S.E.2d at 576 (emphasis added).

<sup>126</sup> *Id.*

<sup>127</sup> See *Goldstein v. Am. Steel Span, Inc.*, 640 S.E.2d 740, 742 (N.C. Ct. App. 2007).

Appeals decided *Goldstein v. American Steel Span, Inc.*<sup>128</sup> In that case, plaintiff Frank Goldstein brought an action against defendant American Steel Span, Inc., a seller of prefabricated metal buildings, alleging, *inter alia*, breach of a contract for the sale of two buildings.<sup>129</sup> The contract at issue included an arbitration clause, but that clause did not address the process or manner by which the potential arbitration would take place.<sup>130</sup> Finding “the terms of the arbitration clause . . . too indefinite,” the trial court denied defendant’s motion to stay the proceedings pending arbitration.<sup>131</sup> The court granted plaintiff’s motion for summary judgment and entered judgment against defendant.<sup>132</sup>

On appeal, the Court of Appeals held that the arbitration clause was enforceable because the Uniform Arbitration Act, as adopted in North Carolina, provided “gap fillers” for such a situation.<sup>133</sup> In rendering this decision, the court relied on points of law elucidated in a recent Business Court opinion.<sup>134</sup> After reference to the Business Court’s interpretation of the law at issue, the court added a footnote to explain: “the Business Court represents *merely persuasive* authority. However, we are mindful that the Business Court exists solely to hear complex business cases, and as such *are respectful* of its opinions.”<sup>135</sup> The Court of Appeals’ legal conclusion was consistent with the analysis from the Business Court opinion it cited as persuasive precedent.<sup>136</sup>

#### VI. THE CASE FOR TREATING BUSINESS COURT OPINIONS AS PERSUASIVE PRECEDENT

In the wake of the conflicting statements from the *Estate of Browne* and *Goldstein* decisions, an open issue remains: what weight should the appellate courts in North Carolina afford Business Court opinions? The North Carolina General Assembly or the North Carolina Supreme Court should resolve this question by establishing unequivocally that the statement of the *Goldstein* court is correct—opinions of the Business Court should be considered persuasive precedent by appellate

---

<sup>128</sup> *Id.* at 740.

<sup>129</sup> *Id.* at 741.

<sup>130</sup> *Id.* at 742.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 741.

<sup>133</sup> *Id.* at 742.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at n.2 (emphasis added).

<sup>136</sup> *See id.* at 742.

courts in North Carolina.<sup>137</sup> Admittedly, Business Court opinions should not—and likely could not—be binding precedent in any appellate court, primarily because the Business Court is a trial-level court, lower in the hierarchical structure of the judicial system.<sup>138</sup> As such, the Business Court’s final judgments are properly subject to review by the state’s appellate courts, and it is bound by *stare decisis* to precedent from above.<sup>139</sup>

Nonetheless, Business Court opinions should be entitled to respect and careful consideration as persuasive precedent. They should not be dismissed offhandedly as having no precedential value. There are four primary reasons why Business Court opinions should be recognized as persuasive precedent in the North Carolina appellate courts. First, such treatment will secure the State’s fundamental purpose in establishing the Business Court. Second, it is consistent with the recommendations of the Chief Justice’s Commission on the Future of the Business Court. Third, it is consistent with the Delaware Supreme Court’s treatment of opinions from the Court of Chancery, indisputably the model for North Carolina’s Business Court. Finally, such treatment is in keeping with our appellate courts’ generally broad acceptance of many types of persuasive authority, both judicial and non-judicial.

#### A. *Secures the Fundamental Purpose of the Business Court*

It is undoubtedly clear from the historical record that the Business Court was created in an effort to strengthen North Carolina’s economy.<sup>140</sup> The Commission’s theory was that establishing an innovative, stable forum for adjudicating complex business matters would foster a judicial climate attractive to out-of-state businesses and responsive to those already located in the state.<sup>141</sup> The Business Court was specifically designed to accomplish this goal in at least three primary ways:

<sup>137</sup> See *id.* at n.2 (“[T]he Business Court represents . . . persuasive authority.”).

<sup>138</sup> See *State v. Williams*, 686 S.E.2d 493, 505 n.1 (N.C. 2009) (“[W]e are not bound by decisions of a superior court.”); *State v. Ford*, No. COA06-1409, 2007 WL 1599166, at \*1 (N.C. Ct. App. June 5, 2007) (“While this court is bound by its own decisions, it is not bound by decisions of a trial court.”).

<sup>139</sup> See *Dunn v. Pate*, 431 S.E.2d 178, 180 (N.C. 1993).

<sup>140</sup> See *supra* Part II.A.

<sup>141</sup> *Id.* The accuracy of this rationale has been publicly challenged by at least one commentator. See John F. Coyle, *Business Courts and Interstate Competition*, 53 WM. & MARY L. REV. 1915 (2012). While a comprehensive argument can and should be made that well-designed business courts are effective at achieving their economic objective, such a discussion is outside of the scope of the present analysis. This article proceeds

(1) providing consistency in the litigation process by assigning each case to a single judge;<sup>142</sup> (2) cultivating a high level of judicial expertise on corporate law issues;<sup>143</sup> and (3) establishing a substantial body of case law on complex business matters in the state through the issuance of reasoned, written opinions upon the disposition of each matter before the court.<sup>144</sup> The *Estate of Browne* court's dismissive treatment of Business Court opinions<sup>145</sup> critically threatens the last two means by which the Business Court was designed to further its purpose.

### 1. Cultivation of Judicial Expertise

Dismissing Business Court opinions as having no precedential value frustrates the Business Court's ability to fulfill its purpose of cultivating judicial expertise in complex business matters. The selection of "expert[s] in corporate law matters"<sup>146</sup> and other highly qualified legal practitioners to serve as Business Court judges provides the Business Court with a strong foundation of knowledge. Further, as these judges "consistently hear particular types of cases, they develop expertise, experience, and knowledge enabling them to perform their functions more proficiently than they could without that expertise. They are more efficient, and the quality of their decisions is better."<sup>147</sup>

But what is the purpose of cultivating judicial expertise if it is to be kept in an echo chamber? Expertise at the trial level is certainly a noble goal that furthers the judicial certainty and predictability sought by businesses. However, many cases—especially those high-stakes, complex business matters assigned to the Business Court—are appealed to higher courts. For example, as of December 31, 2012, the Business Court had 247 cases pending before it, twenty-three of which went on to be appealed.<sup>148</sup> As the *Goldstein* court recognized, in order to realize the full potential of Business Court judges' expertise, their opinions should be acknowledged as well-reasoned, potentially persuasive authority by reviewing courts in later cases.

---

under the assumption that the policymakers' rationale for the creation of the Business Court is sound.

<sup>142</sup> See N.C. GEN. STAT. § 7A-45.4(f) (2011).

<sup>143</sup> See COMMISSION REPORT, *supra* note 3 and accompanying text; see also Dayton, *supra* note 65 and accompanying text.

<sup>144</sup> See Dayton, *supra* note 65 and accompanying text; see also Bach & Applebaum, *supra* note 1 and accompanying text.

<sup>145</sup> See *Estate of Browne v. Thompson*, 727 S.E.2d 573, 576 (N.C. Ct. App. 2012).

<sup>146</sup> COMMISSION REPORT, *supra* note 3, at 9.

<sup>147</sup> Ad Hoc Comm. on Bus. Cts., *supra* note 4, at 951.

<sup>148</sup> 2012 ANNUAL REPORT, *supra* note 76, at 4.

## 2. Development of Complex Business Case Law

The position taken in *Estate of Browne* also undermines the objective of creating a substantial body of case law on complex business matters in North Carolina. As discussed above, the Business Court is required to write appellate-style opinions upon the disposition of a matter in each case, specifically in order to establish this “body of North Carolina law to which the practicing bar, the bench, and the public could look to guidance.”<sup>149</sup>

Significant and purposeful structural differences between the Business Court and other superior courts in North Carolina suggest that the court was designed to further this goal. Similar to the North Carolina appellate courts, parties in the Business Court are bound to strict briefing requirements.<sup>150</sup> Adherence to these brief filing requirements enables the Business Court to thoroughly review each party’s legal arguments and also allows for the establishment of a detailed and easily accessible public record. Also, comparable to the appellate courts, the Business Court is staffed with two full-time law clerks.<sup>151</sup> These clerks work to assist the Business Court judge in producing thoroughly researched, well-reasoned opinions on the complex business matters before them. Finally, consistent with the goal of creating judicial predictability, the Business Court’s opinions are all easily accessible to the public via the Business Court’s webpage as well as on commercial legal research databases.<sup>152</sup>

For Business Court opinions to serve as a predictable body of corporate case law upon which businesses can comfortably rely, the opinions should be granted precedential weight by reviewing courts. If the *Estate of Browne* approach were widely adopted, the Business Court’s development of a substantial body of case law on complex corporate issues would be essentially meaningless outside of the court itself. Under that dismissive approach, businesses and legal observers could, at most, be able to foresee how one Business Court judge would rule on a certain legal issue. This treatment unwisely limits the predictability in business law matters that the Business Court was designed to achieve. On the other hand, the *Goldstein* court correctly recognized that the true purpose of the development of North Carolina case law

---

<sup>149</sup> REPORT ON THE FUTURE OF THE COURT, *supra* note 1, at 17.

<sup>150</sup> See N.C. R. App. P. 28; *see also* BCR 15.

<sup>151</sup> See *Contact Information*, *supra* note 93 and accompanying text; *see also* REPORT ON THE FUTURE OF THE COURT, *supra* note 93 and accompanying text.

<sup>152</sup> See Dayton, *supra* note 65 and accompanying text.

on complex business matters is so that it can be predictably evaluated as persuasive precedent in future cases.<sup>153</sup>

Further, the *Estate of Browne* statement seems to ignore the fact that many Business Court cases present issues of first impression.<sup>154</sup> As then-Judge Barbara Jackson of the Court of Appeals<sup>155</sup> recognized, “citation to persuasive authority often is necessary in a case of first impression.”<sup>156</sup> When the appellate courts consider novel complex business matters, the written opinions of the Business Court may be the best and only relevant North Carolina source available. As a result, the case law developed through Business Court opinions is quite instructive in these situations, and should be treated by reviewing courts with the due consideration it deserves.

B. *Advances the Recommendations of the Chief Justice’s Commission on the Future of the Business Court*

Treating Business Court opinions as persuasive precedent is consistent with the recommendations of the Chief Justice’s Commission on the Future of the Business Court (“the Future Commission”), a body designed to critically evaluate the function of the Business Court. Almost a decade into the Business Court’s existence, the Supreme Court created the Future Commission and tasked that group with studying “the functions and procedures of the North Carolina Business Court and compar[ing] them to those of other business courts.”<sup>157</sup> Implementation of the Future Commission’s recommendations would, in part, ensure that North Carolina maintained its competitive advantage over other states that were creating their own business courts.<sup>158</sup> Like

<sup>153</sup> *Goldstein v. Am. Steel Span, Inc.*, 640 S.E.2d 740, 742 n.2 (N.C. Ct. App. 2007).

<sup>154</sup> REPORT ON THE FUTURE OF THE COURT, *supra* note 1, at 15. *See, e.g.*, *Front St. Constr., LLC v. Colonial Bank, N.A.*, 2012 NCBC 25, Nos. 10 CVS 15759, 09 CVS 21562, 2012 WL 1669721 (N.C. Super. Ct. May 11, 2012) (addressing an issue of first impression as to the Financial Institutions Reform, Recovery and Enforcement Act’s exhaustion requirement); *Harris v. Wachovia Corp.*, 2011 NCBC 3, No. 09 CVS 25270, 2011 WL 1679625 (N.C. Super. Ct. Feb. 23, 2011) (analyzing an issue of first impression as to “whether personal relationships between shareholders and officers of a corporation are sufficient to establish a special duty separate and apart from the duties owed to all shareholders”); *Clark v. Alan Vester Auto Grp.*, 2009 NCBC 17, No. 06 CVS 141, 2009 WL 2181620 (N.C. Super. Ct. July 17, 2009) (discussing the concept of juridical link as a matter of first impression).

<sup>155</sup> Currently an Associate Justice of the North Carolina Supreme Court.

<sup>156</sup> *Ellison v. Gambill Oil Co.*, 650 S.E.2d 819, 823 n.2 (N.C. Ct. App. 2007) (Jackson, J., concurring in part and dissenting in part).

<sup>157</sup> REPORT ON THE FUTURE OF THE COURT, *supra* note 1, at 2.

<sup>158</sup> *Id.* at 5.

the Commission, the Future Commission was composed of a number of Business Court stakeholders and leaders in the legal profession.<sup>159</sup>

In its final report,<sup>160</sup> the Future Commission made two relevant recommendations that were not enacted. First, it recommended that “Business Court opinions constitute precedential authority in all subsequent complex business cases unless and until that opinion is legislatively overturned or reversed on appeal.”<sup>161</sup> The Future Commission noted that this reform would “promote the desired stability and predictability in complex business disputes.”<sup>162</sup>

Second, the Future Commission recognized that “North Carolina will be viewed as a preferred forum for the resolution of business disputes only if the special expertise being cultivated at the trial court level in the Business Court is complemented in the appellate division.”<sup>163</sup> To meet this goal, the Future Commission recommended the training of several appellate court judges in “the substantive areas of law likely to arise in Business Court cases.”<sup>164</sup> At least two of these judges would be assigned to hear each appeal from the Business Court.<sup>165</sup> The Future Commission further recommended that all appeals from the Business Court be the subject of published opinions.<sup>166</sup> The Future Commission believed that these recommendations would “help secure the fundamental goals of the North Carolina Business Court” because “the promotion of expertise at the appellate level will evidence a genuine commitment to the special concerns of the business community” and will “expand[ ] upon the expertise gained from specialized training.”<sup>167</sup>

---

<sup>159</sup> Interestingly, Judge Sanford Steelman, Jr.—the author of the *Estate of Browne* opinion—was a member of the Future Commission.

<sup>160</sup> REPORT ON THE FUTURE OF THE COURT, *supra* note 1.

<sup>161</sup> *Id.* at 14.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 15.

<sup>164</sup> *Id.* It was suggested that the training include the following substantive areas of law: “[c]laims arising under state and federal securities law; [c]laims arising under the North Carolina statutes governing corporations, partnerships, and limited liability companies; [c]orporate governance disputes; [t]he fiduciary duties of corporate officers and directors; [a]n trust laws; [i]ntellectual property law, including, but not limited to, software licensing disputes; [t]he Internet, electronic commerce, and biotechnology.” *Id.* at 16.

<sup>165</sup> *Id.* at 15.

<sup>166</sup> *Id.* at 17.

<sup>167</sup> *Id.*

Through these recommendations, the Future Commission recognized that true fulfillment of the Business Court's economic purpose would require judicial consistency at both the trial and appellate levels. According Business Court opinions persuasive precedential value furthers the Future Commission's aims of improving stability and predictability in the resolution of complex business matters. Such treatment will also ensure that North Carolina maintains its stature among the plethora of emerging state business courts.

*C. Follows the Business Court's Model, the Delaware Court of Chancery*

The Delaware Court of Chancery was expressly recognized as a model in the development of the Business Court.<sup>168</sup> The Commission acknowledged that the Court of Chancery "provides a high level of judicial expertise on corporate law issues" and "has developed a substantial body of corporate law that provides predictability for business decision-making."<sup>169</sup> Partly as a result, "[m]ore than 1,000,000 business entities have their legal home in Delaware including more than 50% of all U.S. publicly-traded companies and 64% of the Fortune 500."<sup>170</sup>

Importantly, Delaware's only appellate court, the Supreme Court of Delaware, recognizes the decisions of the Court of Chancery as persuasive precedent.<sup>171</sup> The Delaware Supreme Court has stated that Court of Chancery decisions "are entitled to be given great weight and consideration and ought not to be disregarded unless, upon re-examination, they appear to have been decided erroneously."<sup>172</sup> It is undoubtable that these principles of precedent have facilitated consistency in judicial expertise and predictability in case law on complex business matters in Delaware, in turn facilitating the success of that state in attracting business and industry.

---

<sup>168</sup> COMMISSION REPORT, *supra* note 3, at 8.

<sup>169</sup> *Id.*

<sup>170</sup> *Why Choose Delaware as Your Corporate Home?*, DEL. DEP'T OF ST., DIV. OF CORPS., <http://corp.delaware.gov> (last visited Apr. 28, 2013).

<sup>171</sup> *See, e.g.,* Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1171 (Del. 1995) ("We find the Court of Chancery's reasoning to be persuasive and affirm its determination."); Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1389 (Del. 1995) ("The Court of Chancery's holding . . . appears to be persuasive support."); Lynch v. Vikers Energy Corp., 429 A.2d 497, 501 (Del. 1981) (finding precedent for a ruling based on Court of Chancery opinions), *overruled on other grounds*; Weinberger v. UOP, Inc., 47 A.2d 701 (Del. 1983).

<sup>172</sup> *Zeeb v. Atlas Powder Co.*, 87 A.2d 123, 126 (Del. 1952).



If North Carolina truly believes the Delaware Court of Chancery model has merit and wishes to reap benefits similar to those Delaware has realized, its appellate courts should recognize the precedential value of its Business Court opinions, as the Supreme Court of Delaware recognizes the value of Court of Chancery decisions.

D. *Stays True to North Carolina Appellate Courts' Broad Acceptance of Persuasive Authority*

Mindful of the maxim *ratio est legis amina*,<sup>173</sup> the appellate courts in North Carolina have a history of looking broadly for sources of persuasive authority. As noted above, North Carolina appellate courts have looked to appellate courts in other states for guidance.<sup>174</sup> They have also found guidance in the opinions of federal appellate courts.<sup>175</sup> The Supreme Court even views the opinions of the Court of Appeals—the intermediate appellate court in the North Carolina judicial system hierarchy—as persuasive precedent.<sup>176</sup>

However, North Carolina appellate courts do not look only to other appellate courts' decisions as sources of persuasive authority. They also look to decisions of lower courts, even opinions of trial-level courts in other jurisdictions. For example, North Carolina appellate courts have found guidance in the opinions of federal district courts.<sup>177</sup>

---

<sup>173</sup> See *In re Truesdell*, 329 S.E.2d 630, 634-35 (N.C. 1985) (“Although we recognize that this Court is not bound by the decision from the Federal court, we are nevertheless mindful of the legal maxim, *ratio est legis amina*, reason is the soul of the law.”).

<sup>174</sup> See, e.g., *State v. Warren*, 114 S.E.2d 660, 666 (N.C. 1960) (finding the uniform action of the appellate courts of twenty-one states and the District of Columbia “overwhelming authority” that was “highly persuasive”); *DOCRX, Inc. v. EMI Servs. of NC, LLC*, 738 S.E.2d 199, 202-03 (N.C. Ct. App. 2013) (applying appellate court decisions from Utah, Montana, and Colorado as persuasive precedent); *State v. Castaneda*, 715 S.E.2d 290, 294 n.1 (N.C. Ct. App. 2011) (“While decisions from other jurisdictions may have persuasive value, they are not binding on North Carolina courts.”).

<sup>175</sup> See, e.g., *Crowley v. Crowley*, 691 S.E.2d 727, 733 (N.C. Ct. App. 2010) (“We find the Ninth Circuit Court of Appeals’ interpretation persuasive and in line with the spirit of our Court’s prior decisions”); *State v. Guice*, 541 S.E.2d 474, 485 n.1 (N.C. Ct. App. 2000) (“[W]e must only accord decisions of the Fourth Circuit such persuasiveness as they might reasonably command.”).

<sup>176</sup> *State v. Garcia*, 597 S.E.2d 724, 747 (N.C. 2004) (“[W]hile Court of Appeals decisions may be persuasive authority, this Court is not bound by precedents established by the Court of Appeals” (quoting *N. Nat’l Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 316 S.E.2d 256, 265 (N.C. 1984))).

<sup>177</sup> See, e.g., *In re Truesdell*, 329 S.E.2d at 635; *McCracken & Amick, Inc. v. Perdue*, 687 S.E.2d 690, 695 (N.C. Ct. App. 2009).

Likewise, our appellate courts have recognized that decisions of trial-level courts from other states can be persuasive.<sup>178</sup>

Further, North Carolina appellate courts have recognized a number of learned, non-judicial secondary sources as persuasive. For example, the Supreme Court has expressly recognized the Restatement (Second) of Torts as persuasive authority.<sup>179</sup> The Court of Appeals has recognized that “the Restatement (Second) of Contracts serves as persuasive . . . authority upon this Court.”<sup>180</sup> Opinions of the Attorney General have been recognized as persuasive.<sup>181</sup> Our appellate courts have also recognized as persuasive, and relied upon, law review articles, treatises, and other learned secondary sources.<sup>182</sup>

Consistent with the North Carolina appellate courts’ ready acceptance of persuasive authority, several decisions of the Court of Appeals have in fact treated Business Court opinions as having precedential value.<sup>183</sup> As of May 6, 2013, according to a search of the Westlaw legal database, Business Court opinions have been cited at least ten times as an independent authority by the Court of Appeals.<sup>184</sup> In at least three of these cases, as in *Goldstein*, the court cited a Business Court opinion favorably, as persuasive precedent.<sup>185</sup> This is the proper approach.

<sup>178</sup> See, e.g., *State v. Myers*, 146 S.E.2d 674, 675 (N.C. 1966) (“The decisions of the Virginia trial courts suppressing the evidence and holding the search warrant void, while persuasive, are not binding on the North Carolina courts.”).

<sup>179</sup> See *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 367 S.E.2d 609, 617 (N.C. 1988); *Hall v. Post*, 372 S.E.2d 711, 714 (N.C. Ct. App. 1988).

<sup>180</sup> *Williams v. Habul*, 724 S.E.2d 104, 110 (N.C. Ct. App. 2012).

<sup>181</sup> *Delhaize Am., Inc. v. Lay*, 731 S.E.2d 486, 495 n.6 (N.C. Ct. App. 2012) (“Opinions of the Attorney General ‘should be accorded some weight on the question presented, but they are not binding on this Court.’”) (quoting *Delconte v. State*, 329 S.E.2d 636, 639 n.3 (N.C. 1985)).

<sup>182</sup> See, e.g., *Hall*, 372 S.E.2d at 714; *Whitacre P’ship v. Biosignia, Inc.*, 591 S.E.2d 870, 879 (N.C. 2004); *Oberlin Capital, L.P. v. Slavin*, 554 S.E.2d 840, 845 (N.C. Ct. App. 2001).

<sup>183</sup> See, e.g., *Stephenson v. Langdon*, No. COA09-1494, 2010 WL 3469458, at \*6 (N.C. Ct. App. Sept. 7, 2010) (citing *Edgewater Servs., Inc. v. Epic Logistics, Inc.*, 2009 NCBC 20, 21, No. 05 CVS 1971, 2009 WL 2456868, at \*4 (N.C. Super. Ct. Aug. 11, 2009)); *Blitz v. Agean, Inc.*, 677 S.E.2d 1, 5 (N.C. Ct. App. 2009) (citing *Long v. Abbott Labs.*, 1999 NCBC 10, 42, No. 97 CVS 8289, 1999 WL 33545517, at \*9 (N.C. Super. Ct. July 30, 1999)); *Goldstein v. Am. Steel Span, Inc.*, 640 S.E.2d 740, 742 (N.C. Ct. App. 2007) (citing *Polo Ralph Lauren Corp. v. Gulf Ins. Co.*, 2001 NCBC 3, 12, No. 00 CVS 5440, 2001 NCBC LEXIS 11, ¶ 12 (N.C. Super. Ct. Jan. 31, 2001)).

<sup>184</sup> *Id.*

<sup>185</sup> See *Stephenson v. Langdon*, No. COA09-1494, 2010 WL 3469458, at \*6 (N.C. Ct. App. Sept. 7, 2010) (citing *Edgewater Servs., Inc. v. Epic Logistics, Inc.*, 2009 NCBC 20, 21, No. 05 CVS 1971, 2009 WL 2456868, at \*4 (N.C. Super. Ct. Aug. 11, 2009)); *Blitz*,

Business Court opinions should be treated consistent with the North Carolina appellate courts' favorable treatment of a wide variety of authorities. The Business Court was purposefully created to establish a body of case law on complex corporate issues written by experienced judges with the thorough research assistance of law clerks. Like the abundance of learned authorities relied upon by the appellate courts, Business Court opinions are researched and drafted with considerable care given to the issues presented. Importantly, decisions of the Business Court are also typically focused on North Carolina law. This factor alone should render its opinions more persuasive than judicial authority from another jurisdiction or secondary authority from non-judicial sources.

## VII. CONCLUSION

The *Estate of Browne* court's statement that Business Court opinions have no precedential value threatens to critically frustrate the purpose of the Business Court. As the historical record indicates, the Business Court was created in an effort to attract businesses to North Carolina with a modern, responsive, and predictable judicial climate. Holding that Business Court opinions have no precedential value endangers this important goal by devaluing the court's judicial expertise and ignoring its development of case law on novel complex business matters.

Such treatment is also inconsistent with the recommendations of the Chief Justice's Commission on the Future of the Business Court, which recognized that true fulfillment of the Business Court's economic purpose requires judicial consistency at both the trial and appellate levels. In addition, the *Estate of Browne* court's statement is in conflict with the Delaware Supreme Court's respectful consideration of the decisions of the Delaware Court of Chancery, the unquestioned model for the Business Court. Furthermore, dismissing Business Court opinions as having no precedential value contradicts the North Carolina appellate courts' broad acceptance of judicial and non-judicial sources as persuasive authority.

The North Carolina General Assembly or the North Carolina Supreme Court should resolve this open issue, consistent with the statement of the *Goldstein* court, by instructing that Business Court opinions

---

677 S.E.2d at 1; *Goldstein*, 640 S.E.2d at 742 (citing *Polo Ralph Lauren Corp. v. Gulf Ins. Co.*, 2001 NCBC 3, 12 (2001)).

are worthy of respectful and careful consideration as persuasive precedent by the appellate courts of North Carolina. Such treatment will allow the Business Court to fulfill its true purpose of creating a modern, responsive judicial climate that enables the development of a strong economy for the people of North Carolina.