SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

EMERGING ISSUES IN APPELLATE PRACTICE AND PROCEDURE

Presented by: **Matt Leerberg and Beth Scherer**
434 Fayetteville Street, Suite 2800| Raleigh, NC 27601
E: matt.leerberg@smithmoorelaw.com; beth.scherer@smithmoorelaw.com

Overview

- Changes to appellate jurisdiction
- Appellate review outside the normal routes
- When constitutional powers collide
- Trial court jurisdiction during appeals
- Error and issue preservation

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

CHANGES TO APPELLATE JURISDICTION

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Jurisdiction over business court cases

- Section 7A-27 now states: "Appeal lies of right directly to the Supreme Court . . . [f]rom any final judgment in a case designated as a mandatory complex business case . . . or designated as a discretionary complex business case"
- It also applies to any interlocutory order of a Business Court Judge that does any of the following:
  - Affects a substantial right
  - In effect determines the action and prevents a judgment from which an appeal might be taken
  - Discontinues the action
  - Grants or refuses a new trial
- Effective 1 October 2014, and "applies to actions designated as mandatory complex business cases on or after that date"

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Jurisdiction over TPR cases

- Section 7A-27 now says: "Appeal lies of right directly to the Supreme Court in . . . [a]ny order that terminates parental rights or denies a petition or motion to terminate parental rights"

- Section 7B-1001 now provides that "appeal of a final order of the court shall be made directly to the Supreme Court" for the above *and* orders ceasing reunification efforts if the right to appeal has been preserved, a TPR petition is filed within 65 days, and a separate notice of appeal is filed

- Effective for appeals filed on or after 1 January 2019

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Jurisdiction over class certification orders

- Section 7A-27 now says: "Appeal lies of right directly to the Supreme Court in . . . [a]ny trial court's decision regarding class action certification under G.S. 1A-1, Rule 23"

- Effective when it became law (26 April 2017)

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Jurisdiction over orders declaring laws unconstitutional

- In 2014, section 7A-27 was modified to say: "Appeal lies of right directly to the Supreme Court from any order or judgment of a court, either final or interlocutory, that holds that an act of the General Assembly is facially invalid on the basis that the act violates the North Carolina Constitution or federal law"
- It did not apply to criminal proceedings, collateral attacks on criminal judgments, or taxpayer appeals
- Effective when it became law (7 August 2014) and applied to "any claim filed on or after that date or asserted in an amended pleading on or after that date"
- Stricken in Senate Bill 4, which became effective 16 December 2016

Jurisdiction over orders declaring laws unconstitutional

- The Court of Appeals has been given jurisdiction over an interlocutory order that "[g]rants temporary injunctive relief restraining the State or a political subdivision of the State from enforcing the operation or execution of an act of the General Assembly as applied against a party in a civil action"
- Only applies when the State or a political subdivision is a party
- Exception for facial challenges heard by a three-judge panel removed by Senate Bill 4
- Effective when it became law (7 August 2014)

APPELLATE REVIEW OUTSIDE THE NORMAL ROUTES

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

En banc review

- Section 7A-16 now states that the Court of Appeals "shall sit in panels of three judges each and may also sit en banc to hear or rehear any cause upon a vote of the majority of the judges of the court"
  - N.C. Constitution: The structure, organization, and composition of the Court of Appeals shall be determined by the General Assembly; the Court shall have not less than five members, and may be authorized to sit in divisions, or other than en banc
- Section 7A-30 allows for appeal to the Supreme Court upon a dissent "when the Court of Appeals is sitting in a panel of three judges"
  - An appeal is not "effective" until after an en banc decision, or until after the time for filing a motion for rehearing has expired or the Court of Appeals has denied the motion for rehearing
- Effective when it became law (16 December 2016)

En banc review

- Appellate Rule 31.1 was adopted 22 December 2016, effective immediately

- A majority of the judges may order that an appeal be heard or reheard en banc
  - Not favored, and therefore not ordered unless necessary to secure or maintain uniformity of the court's decisions or the case involves a question of exceptional importance
  - Similar to Federal Appellate Rule 35

- None granted yet

En banc review

- Initial hearing:
  - At any point after the appellant's brief is filed but no later than 15 days after the filing of the appellee's brief
  - Court will rule within 30 days after the case is fully briefed
  - Does not stay time to file briefs
- Rehearing:
  - Within 15 days after the opinion has been filed
  - Court will rule within 30 days after the motion is filed
  - Denial triggers time to seek further review
  - Opinion vacates the original panel opinion
  - Party can seek stay of mandate
  - Heard before motion for panel rehearing

What power does an en banc court have?

- *In re Civil Penalty* (N.C.1989): Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court"

- Key questions:
  - Can the Court of Appeals sitting en banc overrule a panel opinion of the Court of Appeals from an earlier case?
  - Can the Court of Appeals sitting en banc overrule a prior en banc determination of the Court of Appeals?

- Answers:
  - No firm answer yet, but…

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

A comparison to Fourth Circuit practice

- *McMellon v. United States* (4th Cir. 2004) (en banc)
  - A panel technically "has the statutory and constitutional power" to overrule another panel, but as a matter of prudence should not
  - If published opinions are conflicting, the earlier opinion should be followed
  - Only the en banc court can overrule a panel decision
- *United States v. Whitley* (4th Cir. 1985) (Murnaghan, J., dissenting)
  - An en banc court "is free to overrule earlier opinions, even, of course, an opinion which itself emanated from an *en banc* appeal"

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Discretionary review in the Supreme Court

- Section 7A-31 was enacted in 1967
- First recognized by Supreme Court in *Peaseley v. Virginia Iron, Coal & Coke Co.* (1973): "Under this statute this Court is to review only those cases of substantial general or legal importance or in which review is necessary to preserve the integrity of precedent established by this Court"
- In 1974, the Supreme Court called it "a sweepingly broad statute"

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Discretionary review in the Supreme Court

- Statutory criteria for PDR Priors (Bypass PDRs) are listed in section 7A-31(b):
  - Subject matter has significant public interest
  - Case involves legal principles of major significance
  - Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm
  - The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification
  - The subject matter of the appeal is important in overseeing the jurisdiction and integrity of the court system (**)

Discretionary review in the Supreme Court

- Section 7A-31 now provides that "certification may be made by the Supreme Court before determination of the cause by the Court of Appeals when in the opinion of the Supreme Court . . . [t]he subject matter of the appeal is important in overseeing the jurisdiction and integrity of the court system"

- Effective when it became law (26 April 2017)

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Discretionary review in the Supreme Court

- Statutory criteria for cases already decided by the Court of Appeals are listed in section 7A-3(c)1:
  - Subject matter has significant public interest
  - Case involves legal principles of major significance
  - Decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Supreme Court's supervisory jurisdiction

- Don't forget: the Supreme Court's jurisdiction is set by the *Constitution*, not the General Assembly
- Even though as a practical matter the PDR statutes establish the ordinary bounds for the Supreme Court's exercise of discretionary review, the Court retains the ability to exercise its general supervisory authority
- *State v. Todd* (N.C. 2017)
  - Statute forecloses appeal based on a dissent
  - It is beyond question that a statute cannot restrict this Court's constitutional authority
  - Exercised constitutional authority to review the merits

Supreme Court's supervisory jurisdiction

- *But* the Constitution only gives the Supreme Court "jurisdiction to review upon appeal any decision of the courts below"
  - Administrative agencies are not "courts below"
  - Art. IV, § 3: magistrates, district courts, superior courts, clerks of superior court, and the Court of Appeals

- Appellate Rule 15: No PDR Priors from Industrial Commission, State Bar, Property Tax Commission, Board of State Contract Appeals, or Commissioner of Insurance decisions

- Constitutional exception for direct appeals from the Utilities Commission when authorized by law,
  - General rate cases directly appealable under § 7A-29.

Certiorari review of business court decisions

- The federal system has 28 U.S.C. § 1292(b)
  - When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order . . . .
- Business court cases reviewed without a *right* to immediate appeal?
  - *Kornegay Family Farms, LLC v. Cross Creek Seed, Inc.*
  - *DiCesare v. Charlotte-Mecklenburg Hosp. Auth.*

WHEN CONSTITUTIONAL POWERS COLLIDE

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Relevant constitutional provisions

- Article IV, Section 1:
  - The judicial power of the State shall be vested in a General Court of Justice
  - The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it

- Article IV, Section 12:
  - The Supreme Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts
  - The Court of Appeals shall have such jurisdiction as the General Assembly may prescribe
  - The General Assembly shall by general law provide a proper system of appeals

Relevant constitutional provisions

- Article IV, Section 13:
  - The Supreme Court shall have exclusive authority to make rules of procedure and practice for the Appellate Division
  - The General Assembly may make rules of procedure and practice for the Superior Court and District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court
  - If the General Assembly should delegate to the Supreme Court the rule-making power, the General Assembly may, nevertheless, alter, amend, or repeal any rule of procedure or practice adopted by the Supreme Court

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Constitutions, rules, and statutes in certiorari review

- *State v. Stubbs* (N.C. 2015)
  - Appellate Rules cannot take away jurisdiction given to the Court of Appeals by the General Assembly
  - Appellate Rule 21 was amended

- *State v. Biddix* (N.C. Ct. App. 2015)
  - First opinion: withdrawn
  - Second opinion: the plain language of Appellate Rule 21 trumped the statutory language in section 15A-1444, and the court was without authority to invoke certiorari
  - Dissenting opinion said that Rule 21 does not limit the court's ability to issue writ of certiorari
  - The defendant withdrew his notice of appeal to the Supreme Court

Constitutions, rules, and statutes in certiorari review

- *State v. Thomsen* (N.C. 2016)
  - Default rule that the Court of Appeals has jurisdiction to review a lower court judgment by writ of certiorari; controls unless a more specific statute applies
- *State v. Ledbetter* (N.C. Ct. App. 2016)
  - 2015 decision: no right to appeal under the statute, Appellate Rule 21 did not apply, and the court declined to invoke Appellate Rule 2
  - Remanded by the Supreme Court in light of *Thomsen* and *Stubbs*
  - 2016 decision: this is not a jurisdictional issue but rather a procedural issue, and under Rule 21 no procedural mechanism exists to issue certiorari without Rule 2

Constitutions, rules, and statutes in certiorari review

- *State v. Jones* (N.C. Ct. App. 2017)
  - A statutory right to seek certiorari may not be limited or restricted by the provisions of Appellate Rule 21
  - *Biddix* and *Ledbetter* are not binding because they failed to follow controlling Supreme Court precedent

TRIAL COURT JURISDICTION DURING APPEALS

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Functus officio doctrine

- Under North Carolina law, the longstanding general rule is that an appeal divests the trial court of jurisdiction over a case until the appellate court returns its mandate
- Pending the appeal, the trial judge is *functus officio*, which is defined as being without further authority or legal competence because the duties and functions of the original commission have been fully accomplished
- For over a century, the Supreme Court has recognized that an appeal operates as a stay of all proceedings at the trial level as to issues that are embraced by the order appealed
- So what *can* the trial court do?

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Statutory codification

- Section 1-294 provides: "When an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein"

- In 2015, it was amended to include the exception: "unless otherwise provided by the Rules of Appellate Procedure"

- No rules have been passed yet

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

The current landscape

- *SED Holdings, LLC v. 3 Star Props., LLC* (N.C. Ct. App. 2016)
  - The trial court reasonably concluded that its injunction was not immediately appealable and was *not* functus officio
  - The trial court retained jurisdiction to enter orders related to contempt proceedings while an appeal was pending
  - As a side note, Judge Robinson sua sponte determined that he lacked jurisdiction to proceed when the Supreme Court granted the PDR in *SED I*

The current landscape

- *Plasman v. Decca Furniture (USA), Inc.* (N.C. Ct. App. 2017)
  - Similar to *SED Holdings*
  - Held: (1) a trial court properly retains jurisdiction over a case if it acts reasonably in determining that an interlocutory order is not immediately appealable, and (2) that determination may be considered reasonable even if the appellate court ultimately holds that the challenged order is subject to immediate review.

Jurisdiction over post-trial motions

- *Bell v. Martin* (N.C. Ct. App. 1979):
  - It appears to us that the better practice is to allow the trial court to consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending. At the time the motion is made in the lower court the movant should notify the appellate court so that it may delay consideration of the appeal until the trial court has considered the 60(b) motion. Upon an indication of favoring the motion, appellant would be in position to move the appellate court to remand to the trial court for judgment on the motion and the proceedings would thereafter continue until a final, appealable judgment is rendered. An indication by the trial court that it would deny the motion would be considered binding on that court and appellant could then request appellate court review of the lower court's action.

Proposed amendments

- Add 60(b) motions to those that toll appeal deadline (if filed within 10 days)
- Give trial courts authority to rule on post-trial motions
- Instruct trial courts to issue indicative rulings on 60(b) motions
- Allow trial courts authority to rule on motions for attorneys' fees or costs
- Give trial courts authority to enforce injunctions and protective orders

ERROR AND ISSUE PRESERVATION

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Basics of error preservation

- Appellate Rule 10:
  - Party must have presented a timely request, objection, or motion, stating the specific grounds if the specific grounds were not apparent from the context
  - Complaining party must obtain a ruling upon the party's request, objection, or motion
  - Any issue properly preserved may be made the basis of an issue on appeal

Assignments of error

- Beth has lots to say about them

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Any exceptions to Appellate Rule 10?

- Appellate Rule 10(a):
  - Any such issue that was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted *or which by rule or law was deemed preserved or taken without any such action*, including, but not limited to, whether the judgment is supported by the verdict or by the findings of fact and conclusions of law, whether the court had jurisdiction over the subject matter, and whether a criminal charge is sufficient in law, may be made the basis of an issue presented on appeal

Preserved by rule or law

- Subject matter jurisdiction
- Fatally defective indictments
- Failure by trial court to follow a statutory mandate
- Apparent from the context

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

Preserved by rule or law

- *Duke Power Co. v. Winebarger* (N.C. 1980)
  - Whether an objection has been preserved is a question of appellate procedure for which the Court, not the legislature, has final authority
  - Appellate Rule 10 *plus* Civil Procedure Rule 46 allowed a party to preserve continuing objections

- *State v. Oglesby* (N.C. 2007)
  - Evidence Rule 103 conflicts with Appellate Rule 10 and is therefore unconstitutional to the extent of a conflict

- *State v. Mumford* (N.C. 2010)
  - A statute preserving certain arguments did not conflict with any specific Appellate Rule and operated as a "rule or law" under Appellate Rule 10

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW

State v. Romano (N.C. 2017)

- Majority opinion:
  - The State did not advance these arguments at the suppression hearing; accordingly, the issues are waived and are not properly before this Court
  - The State had the opportunity but failed to raise the argument

- Dissenting opinion:
  - It is beyond dispute that the State briefed the argument before the Court of Appeals and again before this Court
  - Did the State really have to make an alternative argument, in the face of then-binding case authority that supported its main argument?
  - Appellate Rule 10 only applies if the specific grounds were not apparent from the context

Invoking Appellate Rule 2

- *State v. Campbell* (N.C. 2017)
  - Court of Appeals noted that a previous panel had invoked Appellate Rule 2 to review a similar argument
  - Precedent cannot create an automatic right to review via Rule 2

- *In re A.U.* (N.C. Ct. App. 2017) (unpublished)
  - Although we are not bound by this Court's prior decisions regarding whether to invoke Rule 2 under similar circumstances, we find the analysis and reasoning underlying those decisions instructive to this case.

Questions?

- Matt Leerberg
  - matt.leerberg@smithmoorelaw.com
  - (919) 755-8759

- Beth Scherer
  - beth.scherer@smithmoorelaw.com
  - (919) 755-8790

SMITH MOORE LEATHERWOOD
ATTORNEYS AT LAW