No. 279PA22 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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WESLEY WALKER v. WAKE COUNTY SHERIFF'S DEPARTMENT; GERALD M. BAKER, in his official capacity as Wake County Sheriff; ERIC CURRY (individually); WESTERN SURETY COMPANY; WTVD, INC.; WTVD TELEVISION, LLC; SHANE DEITERT	From N.C. Court of Appeals 21-661 From Wake 20CVS9039

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ORDER

Plaintiff's consent motion to dismiss appeal is allowed. The decision of the Court of Appeals is vacated. *See State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 289, 221 S.E.2d 322, 324–25 (1976) (vacating a decision of the Court of Appeals because the case became moot while on appeal) ("When a case becomes moot while on appeal, the usual disposition is simply to dismiss the appeal. This procedure, however, leaves the decision of the Court of Appeals undisturbed as a precedent when, but for intervening mootness, it might not have remained so. While we express no opinion as to its correctness, the better practice in this circumstance is to vacate the decision of the Court of Appeals." (internal citation omitted)); *see also N.C. Bowling Proprietors Ass'n, Inc. v. Cooper*, 375 N.C. 374, 374, 847 S.E.2d 745, 746

(2020) (dismissing appeal as moot and vacating order of lower court).

By order of the Court in Conference, this the 30th day of August 2023.

/s/ Allen, J.,
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of August 2023.

Grant E. Buckner
Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Mr. John M. Kirby, Attorney at Law, For Walker, Wesley - (By Email)
Mr. J. Nicholas Ellis, Attorney at Law, For Baker, Gerald M. (official capacity), et al - (By Email)
Mr. Jonathan E. Buchan, Attorney at Law, For WTVD, Inc., et al - (By Email)
Ms. Natalie D. Potter, Attorney at Law, For WTVD, Inc., et al - (By Email)
Mr. Dylan J. Castellino, Attorney at Law, For Baker, Gerald M. (official capacity), et al - (By Email)
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Justice DIETZ concurring.

Once again, this Court enters a routine order that draws an exaggerated, hyperbolic dissent from one of my colleagues. *See post* (Earls, J., dissenting). And, as is the case with so many of my colleague's dissents, one could be forgiven for thinking that doom is upon us.

My colleague accuses the majority of seeking "power" over reason, of engaging in a "radically destabilizing shift," of attempting to "brazenly warp the law," and on and on. Like so many of my colleague's dissents, this one has portions that read more like pulp fiction than a legal opinion.

Lawyers and judges are trained to push past empty rhetoric and weigh the strength of an argument on its merits. It is worth doing so here because reasonable jurists can disagree about how best to resolve this case. But that hardly means—as my dissenting colleague suggests—that "the integrity of our justice system" is now in question.

As an initial matter, our actions today are consistent with precedent. This Court has expressly held that when an appeal becomes moot while at this Court, we retain the power to vacate the lower court decision when we dismiss the appeal. *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 290 (1976).

The concern this Court identified almost 50 years ago in *Southern Bell* is the same one at issue here. As the Court explained, "When a case becomes moot while on

appeal, the usual disposition is simply to dismiss the appeal. This procedure, however, leaves the decision of the Court of Appeals undisturbed as a precedent when, but for intervening mootness, it might not have remained so." *Id.* (citation omitted). Thus, in *Southern Bell*, this Court chose to vacate the Court of Appeals decision so that it was not binding on the lower courts: "While we express no opinion as to its correctness, the better practice in this circumstance is to vacate the decision of the Court of Appeals." *Id.*

Our precedent also is far from unique. Federal appellate courts routinely vacate lower court orders when the parties reach a joint settlement or otherwise moot an appeal. As the U.S. Court of Appeals for the Federal Circuit once explained, "vacatur of the judgment at trial is appropriate when settlement moots the action on appeal." *U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728, 731 (Fed. Cir. 1992).

Finally, the Court's order in this case serves our state's jurisprudence. We allowed discretionary review here because the appeal raises questions significant to our jurisprudence and to the public interest. *See* N.C.G.S. § 7A-31 (2021). In particular, as the parties' briefing acknowledged, the Court of Appeals opinion may have unintentionally changed the law and put our state at odds with our sister states and with widely accepted doctrine found in the Restatement of Torts.

We are quite familiar with the issues presented. We spent months reviewing the parties' submissions before deciding to take up the case, and then we spent months more reviewing the parties' merits briefing ahead of the scheduled oral

argument in just over two months. Most importantly—and contrary to the dissent's assertions—we have deliberated "as a body" on the merits of this case, on the consequences of the legal issues presented, and on how best to resolve this appeal. As is often the case, my dissenting colleague did not agree with the outcome of the Court's deliberations and therefore discredits them. But that does not mean they never occurred.

Moreover, given the importance of the legal issues presented, vacating the lower court decision is certainly preferable to the alternative—which is to keep the case because of its importance to our state's law and to force the parties to continue litigating it. *See, e.g.*, *N.C. State Bar v. Randolph*, 325 N.C. 699, 701 (1989). This, too, is far from unprecedented. As recently as last year, this Court *denied* a request to voluntarily dismiss an appeal—thus forcing parties to continue litigating a case unwillingly—because of the importance of the issues involved. *See Harper v. Hall*, 383 N.C. 89, 114 (2022), *opinion withdrawn and superseded on other grounds on reh'g*, 384 N.C. 292 (2023).

Rather than force the parties here to endure further, costly litigation, we chose—after much debate—to vacate the lower court opinion, as we did in *Southern Bell*. This permits the Court of Appeals to refine its holding in future cases and perhaps avoid the issues that led us to review this case in the first place. One can reasonably disagree with our approach, but to claim that our decision comes "at the cost of the integrity of our justice system and our citizens' faith in it" is a bit unhinged.

The dissent also argues that vacating the Court of Appeals decision is "contrary to law." This is so, the dissent reasons, because the Rules of Appellate Procedure state that a published Court of Appeals opinion "remains binding precedent unless reversed by this Court."

But that language has never meant that a strict "reversal" following oral argument is the only means of overturning lower court precedent. This Court routinely disavows or vacates Court of Appeals precedent without the need for oral argument and without a formal ruling "reversing" it. Doing so is part of our constitutional role in supervising the decisions of the lower courts. *See*, *e.g.*, *State v. Ledbetter*, 372 N.C. 692 (2019) (denying petition for discretionary review but holding that the Court "disavows the language in the last paragraph of the Court of Appeals's decision"); *State v. Ore*, 383 N.C. 676 (2022) (summarily vacating Court of Appeals decision based solely on petition for discretionary review and response).

In sum, there is nothing earth-shattering about the Court's straightforward order in this case. As I said, reasonable jurists can disagree about how to resolve this case. I think it is fair, if one ends up on the losing end of that disagreement, to write separately and present an opposing legal view in a dissent. Two of my colleagues have done that in thoughtful dissents. *See post* (Morgan, J., dissenting and Berger, J., dissenting). But that is not what my other dissenting colleague has done. I write separately to emphasize that the reasonable differences of opinion that are present in this case do not warrant my dissenting colleague's angry rhetoric; the needless,

toxic disparagement; and the worn-out insistence that every routine disagreement at this Court portends the end of the public's faith in our justice system.

No. 279PA22 – Walker v. Wake Cnty. Sheriff's Dep't

Justice EARLS concurring in part and dissenting in part.

Today, this Court—without legal authority and without the benefit of argument, deliberation, or an opinion—reaches out and changes the law. Whatever the merits of the Court of Appeals decision in this case, it is improper for this Court to act to modify or vacate the Court of Appeals decision in these circumstances. To do so flouts basic principles of the judicial process, and it signals to North Carolinians that "[p]ower, not reason, is the new currency of this Court's decisionmaking." *See Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting). I agree that the appeal should be dismissed but dissent from the portion of the Order directing that the previously published opinion of the Court of Appeals "stands without precedential value."

Legislatures do have the general power to change the law on their own initiative. Courts, however, play a more limited role. Or at least they used to. For nearly 150 years, this Court has adhered to a key constraint on our authority: The doctrine of mootness. *See State ex rel. Martin v. Sloan*, 69 N.C. 128, 128 (1873) (holding when "neither party has any interest in the case except as to costs[,]" this Court is "not in the habit of deciding the case"); *State v. Richmond & Danville R.R. Co.*, 74 N.C. 287, 289 (1876) (holding the same). Put simply, we decline to "hear an appeal when the subject matter of the litigation has been settled between the parties or has ceased to exist." *Cochran v. Rowe*, 225 N.C. 645, 646 (1945).

Mootness serves twin aims. For one, it allows us to properly do our job. By only hearing live controversies, we "ensur[e] concrete adverseness that sharpens the presentation of issues." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 595 (2021) (cleaned up). Put another way, parties with a stake in the controversy have a stronger incentive to fully and effectively argue their case. And so this Court, by extension, has a firmer and more informed basis to make a decision.

The mootness doctrine also underpins deeper questions about this Court's constitutional authority. As we recognized almost a century ago, "[i]t is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, . . . to answer moot questions." *Poore v. Poore*, 201 N.C. 791, 792 (1931). In other words, we lack the constitutional power to engage in "mere academic inquiry." *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 204 (1942). It is "not [our] province"—and it "ought not . . . be [our] desire"—to "decide questions or causes unnecessarily." *Hasty v. Funderburk,* 89 N.C. 93, 94 (1883). In light of that limit on our authority, we have described mootness as a "fundamental principle," *Tryon*, 222 N.C. at 204, "a form of judicial restraint," *In re Peoples*, 296 N.C. 109, 147 (1978), and a "prudential limitation on judicial power," *Comm. to Elect Dan Forest,* 376 N.C. at 572. It ensures that this Court stays in its constitutionally prescribed lane. It keeps us off the toes of other branches, thus "respect[ing] the separation of powers by narrowing the circumstances" when we may second-guess their actions. *Cmty.*

Success Initiative v. Moore, 384 N.C. 194, 206–07 (2023). And most importantly, it ensures that we act only as the people have empowered us to.[1]

That doctrinal background underscores why the majority's action is such a "fundamental and radically destabilizing shift" in judicial power. *See Mole' v. City of Durham*, 384 N.C. 78, 92 (2023) (Earls, J., dissenting). When we agreed to hear this case, the parties were locked in a legal disagreement—one they asked this Court to resolve. But since then, they have "reached a full settlement of the dispute between them." Because "a controversy no longer exists between [the parties]," as they themselves concede, they ask us to dismiss their appeal. After all, there is nothing left for this Court to do because there is no longer a legal dispute for us to resolve. That should be the end of it. And indeed, for well over a century, when confronted with a moot case like this one, this Court has simply dismissed it.[2]

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[1] To be sure, there are exceptions to the mootness doctrine, *see, e.g., Chavez v. McFadden,* 374 N.C. 458, 467–68 (2020) (noting that a court may still consider a moot case if the legal issue is "capable of repetition, yet evading review," meaning that "the underlying conduct upon which the relevant claim rests is necessarily of such limited duration that the relevant claim cannot be fully litigated prior to its cessation and the same complaining party is likely to be subject to the same allegedly unlawful action in the future"), but there is no contention that any of those exceptions apply in this case.

[2] Our precedents are bursting with cases where we have dismissed an appeal when the case becomes moot without reaching out to change the law. *See, e.g., Hasty v. Funderburk,* 89 N.C. 93, 94 (1883) ("This court has repeatedly held, that when it appears that the matter in litigation in the action before it has been settled by the parties, or is disposed of in some other way, and it has thus become unnecessary to decide the questions presented by the appeal, it will not proceed to consider and decide them, but will dismiss the appeal."); *Kidd v. Morrison*, 62 N.C. (Phil. Eq.) 31 (1866) (dismissing dispute over slave because emancipation mooted the question); *State v. Richmond & Danville R.R. Co.*, 74 N.C. 287 (1876); *State v. Atl. & N.C. R.R. Co.*, 77 N.C. 299 (1877); *Cochran v. Rowe*, 225 N.C. 645 (1945) (dismissing appeal as moot when parties resolved dispute over property possession); *Simmons v. Simmons*, 223 N.C. 841, 843 (1944) (dismissing appeal as moot because the

The majority cites *State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.,* 289 N.C. 286, 289 (1976), referring to language in that opinion providing that "the better practice in this circumstance is to vacate the decision of the Court of Appeals." (citing Note, *Cases Moot on Appeal: A Limit on the Judicial Power,* 103 U. Pa. L. Rev. 772 (1955)). The 1955 note which provides the legal authority for the proposition being advanced is significantly more nuanced than the "better practice" language might suggest.[3] Most importantly, the "circumstance" addressed in that decision involved

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defendant discharged the ruling against him by "pa[ying] all amounts in arrears"); *In re Estate of Thomas*, 243 N.C. 783 (1956) (dismissing case as moot when defendants paid and plaintiffs accepted judgment); *Stanley v. Dep't of Conservation and Dev.*, 284 N.C. 15, 29 (1973) ("Whenever it appears that no genuine controversy between the parties exists, the Court will dismiss the action *ex mero motu*."); *In re Peoples*, 296 N.C. 109, 147–48 (1978); *Pearson v. Martin*, 319 N.C. 449, 451 (1987) ("Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." (quoting *In re Peoples*, 296 N.C. at 147)); *State ex rel. Rhodes v. Gaskill*, 325 N.C. 424, 425 (1989) (dismissing appeal as moot because, through the entry of a consent judgment, "the State and defendant have agreed upon and settled all matters in controversy between them as regards this proceeding"); *In re A.K.,* 360 N.C. 449, 452 (2006) ("The principal function of the judicial branch of government is to resolve cases or controversies between adverse parties. *See generally* U.S. Const. art. III, § 2; N.C. Const. art. I, § 18 *and* art. IV. When a legal controversy between opposing parties ceases to exist, the case is generally rendered moot and is no longer justiciable.").

[3] The author of the note cited by the majority was discussing *United States v. Munsingwear,* 340 U.S. 36 (1950), long before that decision was limited by the U.S. Supreme Court's clarification in *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18 (1994) that "[w]here mootness is the result of settlement rather than happenstance, however, the losing party forfeits the equitable remedy of vacatur." *Id.,* 513 U.S. at 25. Moreover, the article concludes by making the same argument that I am making here:

> For a court to make an exception to so fundamental a jurisdictional rule as the one precluding the decision of moot cases, certain safeguards should be erected to prevent the dangers against which the rule was designed to guard. Even though sound precedent may arise from a court's decision in a moot case involving questions of great public importance, it

an intervening, unilateral act by one party, namely that a new Utilities Commission issued a new Order, thereby mooting the controversy before us and sparking a separate wave of litigation over the new Commission Order. *See Utilities Comm.,* 288 N.C. at 288. Rather than a settlement by the parties, the original Order being appealed was no longer in effect. *Id.* That is very different from the posture of this case, where the parties agree that dismissal is appropriate because they have settled the controversy between them.

The second case cited in the majority's Order is even less applicable here. In *N.C. Bowling Proprietors Ass'n, Inc. v. Cooper*, 375 N.C. 374 (2020), this Court vacated a preliminary injunction that was no longer in effect because the underlying Executive Order had expired. *See Id.,* ("Since the challenged restriction in Executive Order 141 is no longer in effect against plaintiff, we dismiss this appeal as moot, vacate the 7 July 2020 preliminary injunction order, and remand to Superior Court, Wake County.") Vacating a preliminary injunction which, by nature is designed to temporarily preserve the status quo while the case proceeds, is quite different from vacating a substantive decision on the merits by the Court of Appeals after that court

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> should always be borne in mind that legislative or executive action can also accomplish this purpose in many instances,' and that it is to keep clear the lines of demarcation between the branches of government that the various restrictions on the judicial power were developed and should be maintained. When such a moot case is decided the courts should take every precaution to insure that adverse and complete argument, or its equivalent, is presented.

Note, *Cases Moot on Appeal: A Limit on the Judicial Power, supra* at 796.

had full briefing, heard argument, and conducted its deliberations to reach a decision on the merits.

Thus, referencing inapposite authority from inapplicable cases, the majority today departs from our "well-established and time-honored practices." *See Mole'*, 384 N.C. at 90 (Morgan, J., dissenting). Despite the absence of a legal dispute and despite the request of the parties to simply dismiss the appeal, the Court reaches out to do something that neither party has requested and, indeed, that the North Carolina Rules of Appellate Procedure do not currently contemplate, namely, that it will effectively "unpublish" the previously published Court of Appeals opinion in this matter by declaring it has no precedential value. For all intents and purposes, the Court effectively vacates the decision below. For future litigants, the Court of Appeals' ruling holds no precedential water. And by effectively vacating the opinion, the majority sends an unmistakable message that it disagrees on the merits. For trial courts and future appellate panels, the Court mysteriously sends the message that the Court of Appeals is wrong without explaining how or why.

To take this step here is not just unwise, it is contrary to law. Under our Rules of Appellate Procedure, a published Court of Appeals opinion—like the one in this case—remains a binding precedent unless reversed by this Court. *In re Civil Penalty*, 324 N.C. 373, 384 (1989); *see also* N.C. R. App. P. 30(e)(1), (4) (the Court of Appeals panel hearing the case decides if its opinion has value as precedent, but counsel and pro se parties may move for publication of an unpublished opinion). Deeper still, to

do so blows past fundamental principles of judicial restraint. As this Court has long recognized, when a case is extinguished, so too is our power to act. *See In re A.K.,* 360 N.C. 449, 452 (2006) ("The principal function of the judicial branch of government is to resolve cases or controversies between adverse parties. When a legal controversy between opposing parties ceases to exist, the case is generally rendered moot and is no longer justiciable." (cleaned up)); *see also Tryon*, 222 N.C. at 204; *Poore*, 201 N.C. at 792. No matter how much we dislike a result, we cannot conjure up jurisdiction by judicial fiat. By ignoring that principle—one "recognized in virtually every American jurisdiction," *Pearson v. Martin*, 319 N.C. 449, 451 (1987) (quoting *In re Peoples*, 296 N.C. at 147)—the effect is to write a blank check to retool the law.

The action the Court takes today is not inconsequential, particularly in light of what it telegraphs about our judicial system. The case was calendared for oral argument at our November 2023 session. We have not heard oral arguments. We have not deliberated as a body on the legal issues. And we have not written or exchanged opinions on whether the Court of Appeals was correct. In short, this case has not yet entered the crucible of our deliberative process.

Without any pretense of meaningful adjudication—without any semblance of "careful consideration and input from stakeholders," *Mole',* 384 N.C. at 98 (Earls, J., dissenting)—this Court changes the law.

The upshot of that decision is clear. By its action in this case, the Court seems to be sending the message that ordinary doctrines of mootness are no longer

operative. Moreover, the parties' oral arguments do not matter—we have not heard them. Our deliberations do not matter—we have not engaged in them. And our opinions do not matter—we have not written or exchanged any. All that matters is to achieve a particular result, namely, to make sure that no future litigants are bound by the legal rules articulated by the Court of Appeals in its opinion in this case. But that is not how our judicial system is supposed to work.[4]

The people of this state deserve more than "hasty and unexamined" jolts to the law. *See id.* at 92 (Earls, J., dissenting). And properly helmed, our judiciary curbs the arbitrary exercise of power by promoting consistency and certainty. *Id.* at 101. By continuing a trek down a different path, the action taken with this Order disserves those values, injecting yet more confusion, arbitrariness, and partisanship into North Carolina's legal system. This radical approach allows the Court to brazenly warp the law to its policy preferences unconstrained by the need to have a live controversy to decide through careful deliberation; this is at the cost of the integrity of our justice system and our citizens' faith in it.

I concur that the appeal should be dismissed and dissent from the remainder of the Court's Order.

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[4] In fact, some federal courts have found constitutional defects in the very existence of unpublished opinions. *See Anastasoff v. United States,* 223 F.3d 898, 901 (8th Cir.) (holding that rule declaring that unpublished opinions have no precedential effect is unconstitutional under Article III), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000); *see also United States v. Goldman*, 228 F.3d 942 (8th Cir. 2000); *In re Ark. Rules of Civ. Proc.*, 2007 Ark. LEXIS 332 (2007) (concluding that as a constitutional matter, published and unpublished opinions alike should be precedential).

Justice MORGAN joins in this concurring in part and dissenting in part opinion.

No. 279PA22 – Walker v. Wake County Sheriff's Department, et al.

Justice MORGAN dissenting.

I respectfully dissent from this Court's determination that, upon its allowance of the parties' Consent Motion to Dismiss, the opinion issued by the Court of Appeals will be unilaterally stripped by this Court of any precedential authority. Historically, in the event that the jurisdiction of the Supreme Court of North Carolina is invoked for the purpose of reviewing a decision from a lower forum and the state's highest court does not render a decision which alters the outcome of the lower forum in any way, the decision from the lower forum fully stands as our judicial system's determination of the matter. In applying this institutionalized principle to the present action, since this Court's jurisdiction was invoked for the purpose of reviewing the Court of Appeals decision at issue here and this Court ultimately did not render a decision which altered the case's outcome which emanated from the lower appellate court, then the entrenched standard which would be routinely implemented by this Court is the recognition of the Court of Appeals opinion as the final and citable result of the legal action. However, a majority of this Court once again chooses to pursue a newfound practice to confound the orderly methodology of this Court and our judicial system. This unfortunate overreach by a majority of this Court to deprive the Court of Appeals opinion of its appropriate precedential value is a bewildering indication of the extent to which this Court now goes in order to upend its institutionalized practices to achieve its desired ends.

For these reasons, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

No. 279PA22 – Walker v. Wake County Sheriff's Department, et al.

Justice BERGER dissenting.

To the extent the order entered by the Court today suggests that settlement of a case reflexively renders matters of law or legal inference moot, I respectfully dissent.

Given the current procedural posture of this case, our rules require that the parties must obtain leave of the Court before dismissal will be allowed. N.C. R. App. P. 37(2). One rationale supporting this rule is the recognition that significant jurisprudential issues must be resolved.[1] "While the federal constitution limits the federal 'Judicial Power' to certain 'Cases' and 'Controversies.' U.S. Const. Art. III, § 2, our Constitution, in contrast, has no such case or controversy limitation to the 'judicial power.' " *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 591.

While we will not hear cases "merely to determine abstract propositions of law," *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 399 (1996) (citations omitted), settlement on appeal does not necessarily render a case moot. *See also In re Peoples*, 296 N.C. 109, 147 (1978) (while the "usual response should be to dismiss the action" once it becomes moot, this Court also conceded that "the exclusion of moot

[1] *See Harper v. Hall*, 383 N.C. 89 (2022), 113-14, *reh'g granted*, 384 N.C. 1 (2023), *and opinion withdrawn and superseded on other ground on reh'g*, 384 N.C. 292 (2023) (a party seeking "to dismiss their own appeal in order to avoid a ruling by this Court" was denied because "th[e] issue is of great significance to the jurisprudence of our state and is squarely and properly before this Court.").

questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint."). Thus, settlement alone does not deprive this Court of jurisdiction where there remains an unresolved matter of law. *See* N.C. Const. art. IV, § 12 ("The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference."); and N.C.G.S. § 7A-26 (the Supreme Court has "jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, upon matters of law or legal inference[.]").