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"Without Precedential Value" -- When the Justices of the Supreme Court of North Carolina are Equally Divided

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“WITHOUT PRECEDENTIAL VALUE”—WHEN
THE JUSTICES OF THE SUPREME COURT OF
NORTH CAROLINA ARE EQUALLY DIVIDED*

JOHN V. ORTH**

When the justices of the Supreme Court of North Carolina are equally divided, they routinely issue a per curiam order affirming the decision below but declaring that the decision of the lower court stands “without precedential value.” This result was reached in no less than ten cases in 2013. Part I of this Article traces the history of this formula since the first reported instance in 1893. Part II considers the changing context of these decisions as the North Carolina Court of Appeals became operational in 1967 and steadily grew in size and importance. Leaving a decision of the intermediate appellate court as the final judicial resolution but “without precedential value” means that the decision is res judicata but does not have the effect of stare decisis. As a consequence of this procedure, the decision of the court of appeals would have created a binding precedent if only it had not been reviewed by the supreme court. This Article concludes that the emergence of the court of appeals as a precedent-setting court in the last twenty-five years indicates the need to reconsider the effect of decisions by an equally divided supreme court and recommends that a court of appeals decision affirmed by an equally divided supreme court be recognized as having precedential value.

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INTRODUCTION

On December 20, 2013, the Supreme Court of North Carolina announced its decision in *State v. Franklin*.¹

PER CURIAM.

Justice BEASLEY took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See, e.g., Amward Homes, Inc. v. Town of Cary*, 367 N.C. 305, 716 S.E.2d 849 (2011) [sic]²; *Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010).

AFFIRMED.³

Franklin was only the latest of ten cases from 2013, all from decisions of the court of appeals, in which the participating justices were equally divided.⁴ The decision in each case was rendered in nearly

1. 367 N.C. 183, 752 S.E.2d 143 (2013) (per curiam).

2. The correct citation of *Amward Homes, Inc. v. Town of Cary* is: 365 N.C. 305, 716 S.E.2d 849 (2011).

3. *Franklin*, 367 N.C. at 183, 752 S.E.2d at 143.

4. The remaining nine cases were: *Samost v. Duke Univ.*, 367 N.C. 185, 751 S.E.2d 611 (2013) (per curiam) (Jackson, J., did not participate); *State v. Huss*, 367 N.C. 162, 749 S.E.2d 279 (2013) (per curiam) (Beasley, J., did not participate); *State v. Pizano-Trejo*, 367 N.C. 111, 748 S.E.2d 144 (2013) (per curiam) (Beasley, J., did not participate); *State v. Hough*, 367 N.C. 79, 743 S.E.2d 174 (2013) (per curiam) (Jackson, J., did not participate); *John Conner Constr., Inc. v. Grandfather Holding Co.*, 366 N.C. 547, 742 S.E.2d 802 (2013) (per curiam) (Beasley, J., did not participate); *Gonzalez v. Worrell*, 366 N.C. 501, 739 S.E.2d 552 (2013) (per curiam) (Beasley, J., did not participate); *Ochsner v. Elon Univ.*, 366 N.C. 472, 737 S.E.2d 737 (2013) (per curiam) (Jackson, J., did not participate); *Baysden v. State*, 366 N.C. 370, 736 S.E.2d 173 (2013) (per curiam) (Beasley, J., did not participate). In *State v. Craven*, 367 N.C. 51, 744 S.E.2d 458 (2013) (Beasley, J., did not participate), the justices were equally divided on one issue. In *John Conner Construction* the court also held that a petition for discretionary review of additional issues was improvidently allowed. 366 N.C. at 547, 742 S.E.2d at 802. A further case in which the justices were equally divided, *Tyndall v. Ford Motor Co.*, 367 N.C. 161, 162, 749 S.E.2d

identical language.⁵ Such a decision of the supreme court leaves the decision of the court of appeals as the final judicial resolution of the dispute. Not merely “left undisturbed,” the decision of the intermediate appellate court is “affirmed.”⁶ In consequence, the particular dispute resolved in each case cannot be relitigated by the parties. As to other state courts, however, the case stands on a different footing. While the decision of one panel of the court of appeals is generally binding on all other panels of that court,⁷ the decisions in these cases, although affirmed, stand “without precedential value.”⁸ It is not necessary for other panels or for the trial courts to follow the lead of the court of appeals⁹ if the same issues decided in these cases arise in others. This remarkable result means that the decisions of the court of appeals in these cases are res judicata, but do not produce the effect of stare decisis.¹⁰ The disputes are resolved, but no precedents are established. Even more remarkable is the fact that if the same ten cases had not been reviewed by the supreme court, the decisions of the court of appeals would stand *with* precedential value.¹¹

279, 279 (2013) (per curiam) (Beasley, J., did not participate), was an appeal from orders of the court of appeals, rather than a final decision.

5. The decision in *John Conner Construction* omits the words “is left undisturbed[.]” See 336 N.C. at 547, 742 S.E.2d at 802. Otherwise the wording of the court’s holding in all ten cases is identical. See cases cited *supra* note 4. In *Tyndall*, the interlocutory appeal, the orders issued by the court of appeals are “left undisturbed,” 367 N.C. at 162, 749 S.E.2d at 279; no mention is made concerning precedential value, nor are any cases cited.

6. *E.g.*, *Franklin*, 367 N.C. at 183, 752 S.E.2d at 143.

7. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (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.”).

8. *E.g.*, *Franklin*, 367 N.C. at 183, 752 S.E.2d at 143.

9. I have followed the lead of the supreme court and referred to the decision of a panel of the court of appeals as “the decision of the Court of Appeals,” although it leads to the odd conclusion that in cases in which a decision of the court of appeals (in that sense) is affirmed by an equally divided supreme court, the court of appeals is not bound by its own precedent. In cases in which a panel of the court of appeals is divided, as few as two judges can render a decision of the court of appeals. Without a procedure for sitting en banc, the court of appeals is no more than a collection of panels of three judges. See John V. Orth, *Why the North Carolina Court of Appeals Should Have a Procedure for Sitting En Banc*, 75 N.C. L. REV. 1981, 1982 (1997) (“In a real sense, the court of appeals as presently operated is not a single court at all, but only a collection of panels.”).

10. See *Reese v. Barbee*, 134 N.C. App. 728, 729–30, 518 S.E.2d 571, 573 (1999) (holding that the decision of a prior panel in an earlier phase of this litigation, *Reese v. Barbee*, 129 N.C. App. 823, 501 S.E.2d 698 (1998), affirmed by an equally divided supreme court in *Reese v. Barbee*, 350 N.C. 60, 510 S.E.2d 374 (1999) (per curiam), was and remained the law of the case).

11. *Pizano-Trejo, Huss, Hough, Ochsner, and Craven* involved discretionary review of a unanimous decision of a panel of the court of appeals pursuant to North Carolina

In all ten cases, the Supreme Court of North Carolina cited *Amward Homes*, *Goldston*, or both.¹² The decisions in those earlier cases, also decided by an equally divided court, were announced using the same language as in *Franklin*. In *Amward Homes* and *Goldston* the court cited further supporting cases. In *Amward Homes* it cited *Hall v. Toreros II, Inc.*¹³ In *Goldston* it cited *Formyduval v. Britt*¹⁴ and *Pitts v. American Security Insurance Co.*¹⁵ What was said with respect to *Amward Homes* and *Goldston* can be said in turn of *Hall*, *Formyduval*, and *Pitts*. All three were decided with the same words: “[T]he decision of the Court of Appeals is left undisturbed and stands

General Statutes section 7A-31. See *State v. Pizano-Trejo*, 367 N.C. 111, 111, 748 S.E.2d 144, 144 (2013) (per curiam); *State v. Huss*, 367 N.C. 162, 162, 749 S.E.2d 279, 279 (2013) (per curiam); *State v. Hough*, 367 N.C. 79, 79, 743 S.E.2d 174, 174 (2013) (per curiam); *Ochsner v. Elon Univ.*, 366 N.C. 472, 472, 737 S.E.2d 737, 737 (2013) (per curiam); *State v. Craven*, 367 N.C. 51, 51, 744 S.E.2d 458, 458 (2013). *John Conner Construction, Gonzalez*, and *Baysden* involved both an appeal from a decision of a divided panel of the court of appeals pursuant to North Carolina General Statutes section 7A-30(2) and discretionary review of additional issues pursuant to North Carolina General Statutes section 7A-31. See *John Conner Constr., Inc. v. Grandfather Holding Co.*, 366 N.C. 547, 547, 742 S.E.2d 802, 802 (2013) (per curiam); *Gonzalez v. Worrell*, 366 N.C. 501, 501, 739 S.E.2d 552, 552 (2013) (per curiam); *Baysden v. State*, 366 N.C. 370, 370, 736 S.E.2d 173, 173 (2013) (per curiam). *Franklin* and *Samost* involved an appeal from a decision of a divided panel of the court of appeals pursuant to North Carolina General Statutes section 7A-30(2). See *Franklin*, 367 N.C. at 183, 752 S.E.2d at 143; *Samost v. Duke Univ.*, 367 N.C. 185, 185, 751 S.E.2d 611, 611 (2013) (per curiam). The eleventh case, *Tyndall*, involved review of orders of the court of appeals pursuant to North Carolina General Statutes section 7A-32(b). See *Tyndall v. Ford Motor Co.*, 367 N.C. 161, 161, 749 S.E.2d 279, 279 (2013) (per curiam).

12. In *Franklin*, *Hough*, *John Conner*, and *Gonzalez* the Court cited both *Amward Homes*, 365 N.C. 305, 716 S.E.2d 849 (2011) (per curiam), and *Goldston v. State*, 364 N.C. 416, 700 S.E.2d 223 (2010) (per curiam). *Franklin*, 367 N.C. at 183, 752 S.E.2d at 143; *Hough*, 367 N.C. at 79, 743 S.E.2d at 174; *John Conner Construction*, 366 N.C. at 547, 742 S.E.2d at 802; *Gonzalez*, 366 N.C. at 502, 739 S.E.2d at 552. In *Samost*, *Huss*, and *Ochsner* it cited *Amward Homes* but replaced *Goldston* with *State v. Pastuer*, 365 N.C. 287, 715 S.E.2d 850 (2011) (per curiam). *Samost*, 367 N.C. at 185, 751 S.E.2d at 611; *Huss*, 367 N.C. at 162, 749 S.E.2d at 279; *Ochsner*, 366 N.C. at 473, 737 S.E.2d at 738. In *Baysden* the court cited *Goldston* but replaced *Amward Homes* with *Formyduval v. Britt*, 361 N.C. 214, 639 S.E.2d 443 (2007) (per curiam), and *Pitts v. American Security Insurance Co.*, 356 N.C. 292, 569 S.E.2d 647 (2002) (per curiam). *Baysden*, 366 N.C. at 370, 736 S.E.2d at 173. In *Pizano-Trejo* and *Craven* the court cited *Goldston* alone. *Pizano-Trejo*, 367 N.C. at 111, 748 S.E.2d at 144; *Craven*, 367 N.C. at 58, 744 S.E.2d at 462. The eleventh case, *Tyndall*, reviewing orders issued by the court of appeals, cited no cases. 367 N.C. at 161, 749 S.E.2d at 279.

13. See *Amward Homes*, 365 N.C. at 306, 716 S.E.2d at 850 (citing *Hall v. Toreros II, Inc.*, 363 N.C. 114, 114, 678 S.E.2d 656, 656 (2009) (per curiam)).

14. *Goldston*, 364 N.C. at 417, 700 S.E.2d at 223 (citing *Formyduval*, 361 N.C. 215, 639 S.E.2d 443 (citing *State v. Harrison*, 360 N.C. 394, 627 S.E.2d 461 (2006))).

15. *Id.* (citing *Pitts*, 356 N.C. 292, 569 S.E.2d 647 (2002) (per curiam) (citing *Reese*, 350 N.C. 60, 510 S.E.2d 374 (1999) (per curiam))).

without precedential value.”¹⁶ Each case cited further supporting cases, which repeated the formula with variations in a daisy chain of cases, extending back more than a century.¹⁷

Part I of this Article documents the exact language used in that line of cases beginning in 1893 and traces the emergence of the modern formula to cases decided in the 1980s. Part II considers the changing contexts of these decisions as the court of appeals became operational in 1967 and steadily grew in size and importance. Noting the difference between an appellate court mainly intended for the correction of errors and one looked to for precedential guidance on issues of law, this part concludes that the emergence of the court of appeals as a precedent-setting court indicates the need to reconsider the effect of a decision by an equally divided supreme court when reviewing a decision of the court of appeals.¹⁸

I. HISTORICAL DEVELOPMENT

The first North Carolina decision to explain the effect of an equal division of the justices was decided more than one hundred twenty years ago.¹⁹ On November 14, 1893, the supreme court

16. *Hall*, 363 N.C. at 114, 678 S.E.2d at 656; *Formyduval*, 361 N.C. at 216, 639 S.E.2d at 443; *Pitts*, 356 N.C. at 293, 569 S.E.2d 647–48.

17. *Compare Franklin*, 367 N.C. at 183, 752 S.E.2d at 143 (“[T]he decision of the Court of Appeals is left undisturbed and stands without precedential value.”), *with* *Town of Durham v. Richmond & Danville R.R. Co.*, 113 N.C. 240, 241, 18 S.E. 208, 208 (1893) (“[F]ollowing the uniform practice of appellate courts in such cases, the judgment below stands, not as a precedent, but as the decision in this case.”).

18. This article is concerned with appeals from the court of appeals that are decided by an equally divided supreme court, not with appeals from a superior court that are decided by an equally divided supreme court. From 1985 to 2013 inclusive, only two of fifty-four cases decided by a divided supreme court bypassed the court of appeals. *See State v. Long*, 365 N.C. 5, 705 S.E.2d 735 (2011); *Polk v. N.C. Farm Bureau Mut. Ins. Co.*, 328 N.C. 730, 403 S.E.2d 255 (1991). *See also* cases cited in Appendix III.

19. From its creation by statute in 1818 until 1868, the supreme court consisted of three judges. *See* JOHN V. ORTH & PAUL MARTIN NEWBY, *THE NORTH CAROLINA STATE CONSTITUTION* 130 (2d ed. 2013). The 1868 constitution, the first to give the court constitutional status, increased the total to five, but the post-Reconstruction amendments of 1876 reduced it again to three. *Id.* Since then, the size of the court has grown steadily: to five in 1888 by constitutional amendment; to seven in 1937 by statute as authorized by a constitutional amendment adopted in 1935. *Id.* Although the court today remains at a membership of seven, a constitutional amendment adopted in 1962 and carried over in the 1971 Constitution empowers the general assembly to increase the court’s membership to nine. N.C. CONST. art. IV, § 6; *see* JOHN V. ORTH & PAUL MARTIN NEWBY, *THE NORTH CAROLINA STATE CONSTITUTION* 130 (2d ed. 2013). Because the court normally operates with an odd number of justices, equal divisions occur only in cases of vacancy or recusal. For a historical review of the size of a supreme court, *see* JOHN V. ORTH, *HOW MANY JUDGES DOES IT TAKE TO MAKE A SUPREME COURT? AND OTHER ESSAYS ON LAW AND THE CONSTITUTION* 1–21 (2006).

announced its decision in *Town of Durham v. Richmond & Danville Railroad Co.*:²⁰

Clark, J.

In this case both the plaintiff and the defendants appealed. Mr. Justice Burwell did not sit, and the court is evenly divided. The appeals have now been standing on this docket four terms. Under these circumstances, following the uniform practice of appellate courts in such cases, the judgment below stands, not as a precedent, but as the decision in this case. Marshall, C.J., in *Etting v. Bank*, 11 Wheat. 59; Taney, C.J., in *Benton v. Woolsey*, 12 Pet. 27; and in *Holmes v. Jennison*, 14 Pet. 540; *Bridge Co. v. Stewart*, 3 How. 413, 424; Chase, C.J., in *U.S. v. Reeside*, 19 U.S. (Lawy. Ed.) 391; *Durant v. Essex Co.*, 8 Allen, 103. The appellants will respectively pay the costs, each in their own appeal. Plaintiff's appeal affirmed. Defendants' appeal affirmed.²¹

Unlike the recent cases in which the justices were equally divided, the decision in *Durham* was authored by one justice rather than announced per curiam, and it concluded by affirming the “[p]laintiff’s appeal” and the “[d]efendants’ appeal,”²² rather than by affirming the decision of the lower court. The judgment of the trial court remained the decision in this case, but—like all trial court decisions—it did not establish a precedent.

As authority on “the uniform practice of appellate courts in such cases,”²³ Justice Clark cited five decisions of the United States Supreme Court and one decision of the Massachusetts Supreme Judicial Court.²⁴ In the earliest case, *Etting v. Bank of the United*

20. 113 N.C. 240, 18 S.E. 208 (1893).

21. *Id.* at 240–41, 18 S.E. at 208 (footnote omitted) (quoting the Southeastern reporter). Note, the substantive text and formatting of the Southeastern and North Carolina reporters vary for this case.

22. I am not familiar with any other case in which an appeal from a lower court, as opposed to a decision of a lower court, was held to be affirmed, let alone two opposed appeals.

23. *Durham*, 113 N.C. at 241, 18 S.E. at 208.

24. See *id.* *Etting*, *Benton*, *Holmes*, *Bridge Co.*, and *Reeside* were decisions of the United States Supreme Court. See *infra* notes 25–30. A footnote to the decision in *Durham* indicated that the decision in *Reeside*, which was reported in Lawyers’ Edition but not in the U.S. Reports, was “not officially reported.” *Durham*, 113 N.C. at 241, 18 S.E. at 208 (1893). *Durant* was a decision of the Supreme Judicial Court of Massachusetts. See *infra* note 34. Consistent with practice at the time, Justice Clark cited the cases by the names of the reporters. The nominative reports are now incorporated, respectively, in the U.S. Reports and in the Massachusetts Reports. On the nominative reporters generally and the U.S. Reports in particular, see KENT C. OLSON, PRINCIPLES OF LEGAL RESEARCH § 7.1(c), at 235–36 (2009).

States,²⁵ Chief Justice Marshall's opinion discussed the substantive issue involved in the case and, after noting that several prior cases had been cited in the argument, concluded:

No attempt will be made to analyze them, or to decide on their application to the case before us, because the Judges are divided respecting it. Consequently, the principles of law which have been argued cannot be settled; but the judgment is affirmed, the Court being divided in opinion upon it.²⁶

As Marshall explained, the decision in *Etting* created no Supreme Court precedent: “[T]he principles of law which have been argued cannot be settled.”²⁷ The judgment of the lower court was affirmed, but Marshall said nothing about its precedential value. The wording used by Chief Justice Taney in *Benton v. Woolsey*²⁸ and *Holmes v. Jennison*²⁹ is similar, as is the wording used by Chief Justice Chase in *United States v. Reeside*.³⁰

The next cases relied on by the Supreme Court of North Carolina in *Durham* echoed the reasoning of *Etting*. *Washington Bridge Co. v. Stewart* was a proceeding in the United States Supreme Court subsequent to an earlier unreported decision by that Court in the same case.³¹ Justice Wayne, speaking for the Court, noted that as the decree appealed from had been previously affirmed, “[i]ts having been affirmed by a divided court, can make no difference as to the conclusiveness of the affirmance upon the rights of the parties.”³² That is, the decision affirmed by an equally divided Supreme Court was res judicata and became the law of the case. Similarly, *Durant v. Essex Co.* involved a subsequent state court proceeding in a case that

25. 24 U.S. (11 Wheat.) 59, 77 (1826). *Etting* involved a claim of fraud committed by James McCulloch, president of the Maryland branch of the Bank of the United States. *Id.* at 62–63. McCulloch had earlier been a party in the landmark constitutional case *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

26. *Etting*, 24 U.S. (11 Wheat.) at 78.

27. *Id.*

28. 37 U.S. (12 Pet.) 27, 31 (1838) (“[N]o opinion can be pronounced on the point, because the judges are equally divided upon it. Upon this division, the judgment of the court below is necessarily affirmed.”).

29. 39 U.S. (14 Pet.) 540, 561 (1840) (“The members of the Court, after the fullest discussions, are so divided that no opinion can be delivered as the opinion of the Court.”).

30. 19 L. Ed. 391, 392 (1869) (“The judges of this court being equally divided in opinion . . . it is ordered that the judgment of the Court of Claims be affirmed.”).

31. 44 U.S. (3 How.) 413, 413 (1845) (“The same case was before the court at January term, 1840, and the decree of the court below affirmed by the Supreme Court, but in consequence of the court being equally divided, no opinion was given, and no report of the case published.”).

32. *Id.* at 424 (citing *Etting*, 24 U.S. (11 Wheat.) 59 (1826)).

had previously been affirmed by an equally divided United States Supreme Court.³³ Justice Chapman, on behalf of the Massachusetts Supreme Judicial Court, agreed with Justice Wayne: “If a cause is brought up from a lower court on a question of law by exception or appeal, and the judges are equally divided, the judgment of the lower court is commonly affirmed.”³⁴ Once affirmed, it became the law of the case.

From 1893 until the creation of the court of appeals in 1967, the Supreme Court of North Carolina decided all cases in which the justices were equally divided with similar language.³⁵ At first, the court repeated the words of *Durham*: “[T]he judgment below stands, not as a precedent, but as the decision in this case.”³⁶ Later, the formula varied. Sometimes the court held that “the judgment appealed from stands, but not as a precedent,”³⁷ sometimes simply that “this decision does not become a precedent,”³⁸ or that “the judgment below will be affirmed without becoming a precedent.”³⁹ Often the court added, as in *Durham*, that it was “[f]ollowing the uniform practice of appellate courts in such cases,”⁴⁰ or that it was acting “according to the uniform practice of appellate courts,”⁴¹ or “in

33. 74 U.S. (7 Wall.) 107, 112 (1868). Justice Field, writing for the Court, described the entry of a judgment of affirmance by an equally divided court as “only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment.” *Id.* He added, citing *Etting*: “The legal effect would be the same if the appeal, or writ of error, were dismissed.” *Id.*

34. *Durant v. Essex Co.*, 90 Mass. (8 Allen) 103, 107–08 (1864) (citing *Etting*, 24 U.S. (11 Wheat.) 59 (1826)).

35. Cases from 1893 to 1967 in which the justices were equally divided are collected in Appendix I.

36. *Compare* *Durham v. Richmond & Danville R.R. Co.*, 113 N.C. 240, 240, 18 S.E. 208, 208 (1893), *with* *Puryear v. Lynch*, 121 N.C. 255, 256, 28 S.E. 410, 410 (1897) (“[T]he judgment below stands, not as precedent, but as a decision in the case.”), *and* *Morehead Banking Co. v. City of Burlington*, 124 N.C. 251, 251, 32 S.E. 558, 558 (1899) (“[T]he judgment below stands, not as a precedent, but as the decision in this case.”).

37. *Allen v. Mut. Life Ins. Co.*, 211 N.C. 736, 736, 190 S.E. 735, 735 (1937) (per curiam).

38. *Whitehead v. City of Charlotte*, 221 N.C. 539, 540, 20 S.E.2d 57, 57–58 (1942) (per curiam).

39. *Schoenith v. Town & Country Realty Co.*, 244 N.C. 601, 602, 94 S.E.2d 592, 593 (1956) (per curiam).

40. *Durham*, 113 N.C. at 241, 18 S.E. at 208 (quoting the South Eastern Reporter); *see* *Jenkins v. Suncrest Lumber Co.*, 187 N.C. 864, 864, 123 S.E. 82, 82 (1924) (“Following the uniform practice of appellate courts in such cases . . .”).

41. *Seay v. Sentinel Life Ins. Co.*, 208 N.C. 832, 833, 179 S.E. 888, 889 (1935) (per curiam).

accordance with the usual practice in such cases.”⁴² Sometimes the court stated that it was acting “in accord with the practice of the Court,”⁴³ or “[u]nder the Rule of the Court,”⁴⁴ or “according to [the] usual practice of the Court in such cases.”⁴⁵ Almost always the opinion stated, in one form of words or another, that affirmance by an equally divided supreme court did not create a precedent.⁴⁶

Even after the 1967 creation of North Carolina’s intermediate appellate court, the formula remained essentially the same. The first case to reach the supreme court and result in an equal division of the justices after the creation of the court of appeals was an appeal from a superior court, *Parrish v. Piedmont Publishing Co.*,⁴⁷ that had apparently been docketed before the new appellate court began to function.⁴⁸ In words reminiscent of *Durham*, the court announced: “[T]he judgment of the lower court is affirmed after the manner of the usual practice of appellate courts in such cases and stands as the decision in this case without becoming a precedent.”⁴⁹

The first case from the court of appeals to reach the supreme court and result in an equal division of the justices was *Sharpe v. Pugh*.⁵⁰ Without regard to the fact that the case was on appeal from a decision of the intermediate appellate court and not of a trial court, the supreme court announced the effect of its decision, citing *Parrish*: “This equal division requires that the decision of the Court of Appeals be affirmed without becoming a precedent.”⁵¹ A month later,

42. *Johnston v. Halifax Paper Co.*, 214 N.C. 828, 829, 199 S.E. 20, 20 (1938) (per curiam).

43. *Pafford v. J.A. Jones Constr. Co.*, 218 N.C. 782, 782, 11 S.E.2d 548, 549 (1940); *Mills v. Jones*, 213 N.C. 802, 802, 196 S.E. 308, 308 (1938) (per curiam); *Collins v. Sec. Mut. Life Ins. Co.*, 213 N.C. 800, 800, 195 S.E. 793, 793 (1938) (per curiam).

44. *Suiter v. Swift & Co. Fertilizer Works*, 221 N.C. 541, 542, 20 S.E.2d 293, 294 (1942) (per curiam).

45. *Bullard v. Hotel Holding Co.*, 225 N.C. 766, 767, 33 S.E.2d 480, 480 (1945) (per curiam); *Pafford*, 218 N.C. at 783, 11 S.E.2d at 549 (“[I]n accord with *the* usual practice in such cases . . .”) (internal emphasis added).

46. A few early cases simply affirmed the lower court. See *Miller v. Bank of Washington*, 176 N.C. 152, 161, 96 S.E. 977, 981 (1918) (“[T]he judgment of the Court below is affirmed.”); *Ward v. Odell Mfg. Co.*, 126 N.C. 946, 946, 36 S.E. 194, 194 (1900) (“[T]he judgment below is affirmed.”); *Boone v. Peebles*, 126 N.C. 824, 825, 36 S.E. 193, 194 (1900) (“[T]he opinion of the court below must prevail . . .”).

47. 271 N.C. 711, 157 S.E.2d 334 (1967) (per curiam).

48. Although the court of appeals became effective on January 1, 1967, the case made its way to the supreme court and bypassed the newly created court. See N.C. GEN. STAT. § 7A-16 (2013).

49. *Id.* at 711–12, 157 S.E.2d at 334.

50. 286 N.C. 209, 209 S.E.2d 456 (1974) (per curiam).

51. *Id.* at 210, 209 S.E.2d at 456–57.

the court decided *State v. Johnson*,⁵² an appeal from a decision of a superior court.⁵³ Again, the court cited *Parrish*: “[T]he judgment of the Superior Court stands affirmed in accordance with the usual practice in such cases and decides this case without becoming a precedent.”⁵⁴

From 1967 until 1985, whenever the justices were equally divided, regardless of whether the case causing the division reached the supreme court from a trial court or from the court of appeals, the court’s holding was substantially the same.⁵⁵ The judgment below was affirmed “without precedential value in accordance with the usual practice in this situation,”⁵⁶ or simply “without precedential value,”⁵⁷ or “without becoming a precedent.”⁵⁸ Occasionally, the supreme court elaborated that, “following the uniform practice of this Court and the ancient rule of *praesumitur pro negante*, the decision of the Court of Appeals is affirmed, not as precedent but as the decision in this case.”⁵⁹

52. 286 N.C. 331, 210 S.E.2d 260 (1974) (per curiam).

53. *Id.* at 332–33, 210 S.E.2d at 260. Pursuant to N.C. Gen. Stat. § 7A-31(b), the supreme court may certify a cause for review before determination by the court of appeals when in the opinion of the Supreme Court:

- (1) The subject matter of the appeal has significant public interest, or
- (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
- (3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or
- (4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.

N.C. GEN. STAT. § 7A-31(b) (2013).

54. *Johnson*, 286 N.C. at 332–33, 210 S.E.2d at 260.

55. Cases from 1967 to 1985 in which the justices were equally divided are collected in Appendix II.

56. *Townsend v. Norfolk S. Ry. Co.*, 296 N.C. 246, 249, 249 S.E.2d 801, 802 (1978) (per curiam) (affirming the decision of the court of appeals). *Townsend* was the first case decided by an equally divided supreme court in which the phrase “without precedential value” appeared. *Id.* In prior cases, the court typically stated that the decision below was affirmed “without becoming a precedent.” See, e.g., *Johnson*, 286 N.C. at 333, 210 S.E.2d at 260.

57. *Shields v. Bobby Murray Chevrolet, Inc.*, 300 N.C. 366, 370, 266 S.E.2d 658, 660 (1980) (per curiam) (affirming the decision of the court of appeals); *Greenhill v. Crabtree*, 301 N.C. 520, 522, 271 S.E.2d 908, 909 (1980) (per curiam) (affirming the decision of the court of appeals).

58. *State v. Greene*, 298 N.C. 268, 269, 258 S.E.2d 71, 72 (1979) (per curiam) (affirming the judgment of the superior court).

59. *Lynch v. Hazelwood*, 312 N.C. 619, 619, 324 S.E.2d 224, 224 (1985) (per curiam). *Lynch* cited a decision from the House of Lords, *R. v. Millis*, 10 Clark & Fin. 534, 907, 8 Eng. Rep. 844, 982 (H.L. 1844) (“[T]he votes were equal; that is, two for reversing and two

In 1985, in *Forbes Homes, Inc. v. Trimpi*,⁶⁰ the familiar formula from the recent cases was finally established:

PER CURIAM

Chief Justice Branch took no part in the consideration or decision of this case. The remaining members of this Court being equally divided, with three members voting to affirm the Court of Appeals and three members to reverse, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See State v. Johnson*, 286 N.C. 331, 210 S.E.2d 260 (1974).

Affirmed.⁶¹

It is noteworthy that in citing *Johnson*, which was an appeal from the decision of a superior court, the supreme court treated the decision of the court of appeals as no different from the judgment of a trial court. This was consistent with the then-prevailing view that the court of appeals was primarily a court for the correction of errors. Although twenty years later the supreme court would come to accept the intermediate appellate court as a precedent-setting court,⁶² it would fail to recognize that fact in the formula used to dispose of affirmances when the justices were equally divided.

Since 1985, in a large majority of the cases on review from the court of appeals in which the justices were equally divided, the supreme court's holding concluded with the words: "[T]he decision of the Court of Appeals is left undisturbed and stands without precedential value."⁶³ After *Forbes Homes*, a report on the "voting"

for affirming. Whereupon, according to the ancient rule in the law, *Semper praesumitur pro negante* [always a presumption in favor of denial], it was determined in the negative. Therefore the judgment of the Court below was affirmed"). *See also* E.F. Blankenship Co. v. N.C. Dep't of Transp., 318 N.C. 685, 685, 351 S.E.2d 293, 293 (1987) (per curiam) (using same language as *Millis*); *State v. Moore*, 317 N.C. 144, 144, 343 S.E.2d 430, 430 (1986) (per curiam) (same).

60. 313 N.C. 168, 326 S.E.2d 30 (1985) (per curiam).

61. *Id.* at 169, 326 S.E.2d at 30. The difference in the dispositive language between *Forbes* and the latest case is slight. *Compare* *State v. Franklin*, 367 N.C. 183, 183, 752 S.E.2d 143, 143 (2013) (per curiam) ("The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals."), with *Forbes Homes*, 313 N.C. at 169, 326 S.E.2d at 30 ("The remaining members of this Court being equally divided, with three members voting to affirm the Court of Appeals and three members to reverse.").

62. *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

63. *See infra* Appendix III (collecting cases from 1985 to 2013 in which the justices were equally divided).

became part of the formula,⁶⁴ in addition to the statement that the justices were equally divided. In only a few cases since *Forbes Homes* were the voters on each side of the divide named,⁶⁵ and rarely since *Forbes Homes* did the voters publish separate opinions, as had occurred early in the twentieth century.⁶⁶ Only occasionally did the court expressly state the issue on which the justices were divided,⁶⁷ as had occurred previously.⁶⁸

64. In *Miller v. Bank of Washington*, 176 N.C. 152, 96 S.E. 977 (1918), another case in which the justices were equally divided, Chief Justice Clark cited the Income Tax Case, *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), which he described in terms of how the justices "voted." 176 N.C. at 160, 96 S.E. at 981. "Voting" as a description of judicial decision making by an equally divided North Carolina Supreme Court first appeared in *In re Willis*, 286 N.C. 207, 208, 209 S.E.2d 457, 458 (1974) (per curiam) (affirming the judgment of the superior court), but did not become a part of the formula generally, although not invariably, used to describe an equally divided court until after *Forbes Homes* in 1985. See *infra* Appendix III (collecting cases from 1985 to 2013).

65. See *Reese v. Barbee*, 350 N.C. 60, 60, 510 S.E.2d 374, 374 (1999) (per curiam) ("Chief Justice Mitchell and Associate Justices Parker and Wainwright voted to affirm and Associate Justices Frye, Lake, and Orr voted to reverse the decision of the Court of Appeals."); *Roman v. Southland Transp. Co.*, 350 N.C. 549, 555, 515 S.E.2d 214, 218 (1999) ("With Chief Justice Mitchell and Justices Lake and Wainwright voting to affirm and Justices Frye, Parker and Orr voting to reverse . . ."); *Couch v. Private Diagnostic Clinic*, 351 N.C. 92, 93, 520 S.E.2d 785, 785 (1999) (per curiam) ("Justices Lake, Martin, and Wainwright . . . would vote to grant a new trial. Chief Justice Frye and Justices Parker and Orr . . . would vote to affirm the result reached by the Court of Appeals."). Although deprived of precedential value, the decisions of the court of appeals in these cases remain *res judicata* and the law of the case, binding subsequent proceedings. *Reese v. Barbee*, 134 N.C. App. 728, 730, 518 S.E.2d 571, 573 (1999).

66. *Roman*, 350 N.C. at 555, 515 S.E.2d at 218; *Hearne v. Sherman*, 350 N.C. 612, 617, 516 S.E.2d 864, 867 (1999). In *Miller v. Bank of Washington*, Chief Justice Clark defended the filing of opinions when the members of the supreme court were equally divided against Justices Walker and Allen, who thought "no opinions should have been filed in this case because the Court was evenly divided as to what the decision should be . . ." 176 N.C. at 170, 96 S.E. at 985. For the confusion that can be caused by opinions filed in a case affirmed by an equally divided Supreme Court, see *Enoch v. Alamance Cnty. Dep't of Soc. Servs.*, 164 N.C. App. 223, 249, 595 S.E.2d 744, 756 (2004) (citing opinion of one justice in *Hearne v. Sherman*, 350 N.C. 612, 515 S.E.2d 864 (1999), a case in which the justices were equally divided).

The Justices of the United States Supreme Court are also divided on the propriety of filing opinions when they are equally divided. Compare *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 561 (1840) (Taney, C.J.) ("The members of the Court, after the fullest discussions, are so divided that no opinion can be delivered as the opinion of the Court. It is, however, deemed advisable, in order to prevent mistakes or misconception, to state the opinions we have respectively formed."), with *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 264 (1960) (per curiam) (Brennan, J.) ("The usual practice of not expressing opinions upon an equal division has the salutary force of preventing the identification of the Justices holding the differing views as to the issue, and this may well enable the next case presenting it to be approached with less commitment.").

67. *Williams v. Vonderau*, 362 N.C. 76, 76, 653 S.E.2d 144, 144 (2007) (per curiam) ("On the issue of whether more than one incident of harassment is required before a trial court can enter a civil no-contact order under N.C.G.S. 50C-1(6), the members of the

For almost a century, from the Supreme Court of North Carolina's decision in *Durham* in 1893 until the creation of the court of appeals in 1967, appeals from a superior court decided by an equally divided supreme court were announced in similar language, often: "[T]he judgment of the Superior Court is affirmed in accord with the usual practice in such cases, and stands as the decision in this case without becoming a precedent."⁶⁹ After 1967, the wording in such cases continued to deny that affirmance of the judgment below created a precedent, whether that judgment was rendered by a superior court or by the court of appeals. After 1985, the formula used in *Forbes Homes*—"is left undisturbed and stands without precedential value"⁷⁰—became standard. In the twenty-first century, the Supreme Court of North Carolina continued to repeat it almost without exception.⁷¹ Although the words remained essentially

Court are equally divided . . ."); *Ripellino v. N.C. School Bds. Ass'n*, 361 N.C. 214, 215, 639 S.E.2d 441, 442 (2007) (per curiam) ("As to the appeal of right based on the dissenting opinion, the members of the Court are equally divided."); *Couch*, 351 N.C. at 93, 520 S.E.2d at 785 ("Justices Lake, Martin, and Wainwright believe that the error was prejudicial to the appealing defendant . . . Chief Justice Frye and Justices Parker and Orr are of the opinion that the error was not prejudicial to the appealing defendant . . .").

68. See, e.g., *Greenhill v. Crabtree*, 301 N.C. 520, 522, 271 S.E.2d 908, 909 (1980) (per curiam) ("The remaining six justices are equally divided as to whether Judge McKinnon erred in denying plaintiff's motion to set aside the notice of dismissal . . . 'for the reason that said dismissal was filed without any authority, express or implied, from the plaintiff, or anyone representing the plaintiff.'") (internal citations omitted); *Shields v. Bobby Murray Chevrolet, Inc.*, 300 N.C. 366, 370, 266 S.E.2d 658, 660 (1980) (per curiam) ("The remaining six justices are equally divided as to whether the defendant's evidence when considered in the light most favorable to the plaintiff shows as a matter of law that there has been no violation of G.S. 25-9-504 or G.S. 75-1.1."). See also *State v. Greene*, 298 N.C. 268, 269, 258 S.E.2d 71, 72 (1979) (per curiam); *Starr v. Clapp*, 298 N.C. 275, 277, 258 S.E.2d 348, 350 (1979) (per curiam); *Wachovia Mortg. Co. v. Austry-Barker-Spurrier Real Estate, Inc.*, 297 N.C. 696, 697, 256 S.E.2d 688, 689 (1979) (per curiam); *State v. Oxner*, 297 N.C. 44, 46, 252 S.E.2d 705, 706 (1979) (per curiam); *Townsend v. Norfolk S. Ry. Co.*, 296 N.C. 246, 249, 249 S.E.2d 801, 802 (1978) (per curiam).

69. *Pafford v. J. A. Jones Constr. Co.*, 218 N.C. 782, 783, 11 S.E.2d 548, 549 (1940) (per curiam).

70. *Forbes Homes, Inc. v. Trimpi*, 313 N.C. 168, 169, 326 S.E.2d 30, 30 (1985) (per curiam).

71. *But see John Conner Constr., Inc. v. Grandfather Holding Co.*, 366 N.C. 547, 547, 742 S.E.2d 802, 802 (2013) (per curiam) ("[T]he decision of the Court of Appeals stands without precedential value."); *Williams*, 362 N.C. at 76, 653 S.E.2d at 145 ("[T]he decision of the Court of Appeals is affirmed without precedential value."); *Ripellino*, 361 N.C. at 215, 639 S.E.2d at 442 ("[T]hose portions of the Court of Appeals opinion [on which the justices are equally divided] are affirmed without precedential value.") (employing slightly different language). When the justices of the supreme court are equally divided concerning interlocutory appeals of lower court orders, the orders are affirmed without mention of their precedential value. See, e.g., *Tyndall v. Ford Motor Co.*, 367 N.C. 161, 162, 749 S.E.2d 279, 279 (2013) (per curiam) ("[T]he orders of the Court of Appeals are

unchanged for more than one hundred years, the context in which they were used changed with the creation of the intermediate appellate court.

II. HISTORICAL CONTEXT

At the polls on November 2, 1965, the voters of North Carolina ratified a constitutional amendment that created the Appellate Division of the General Court of Justice, consisting of the supreme court and the court of appeals,⁷² and on January 1, 1967, the intermediate appellate court began to function.⁷³ For the first two years of its existence, the court of appeals operated with six judges;⁷⁴ in 1969 the number of judges increased to nine.⁷⁵ In 1977 the membership of the court was increased to twelve judges,⁷⁶ and in 2000 to fifteen.⁷⁷ Although the court of appeals has at some periods consisted of an even number of judges, an equal division of the judges is impossible because the court of appeals sits in panels of three judges each, assigned by the chief judge.⁷⁸

left undisturbed.”); *State v. Long*, 365 N.C. 5, 5, 705 S.E.2d 735, 735 (2011) (per curiam) (“[T]he order of the superior court is affirmed.”).

72. See AMENDMENTS TO THE CONSTITUTION OF NORTH CAROLINA, 1776–96, at 14 (comp. by John L. Sanders & John F. Lomax, Jr., 1997). After the revision of the North Carolina Constitution approved by the voters on November 3, 1970 (effective January 1, 1971), the provision appears in article IV, section 5. See ORTH & NEWBY, *supra* note 19, at 131.

73. See N.C. GEN. STAT. § 7A-16 (2013) (“The Court of Appeals is created effective January 1, 1967.”).

74. *Id.* (“The Court of Appeals . . . shall consist initially of six judges . . .”).

75. *Id.* (“Effective January 1, 1969, the number of judges is increased to nine . . .”).

76. *Id.* (“Effective January 1, 1977, the number of judges is increased to 12 . . .”). For the early history of the court of appeals, see DAVID M. BRITT, *COURT OF APPEALS OF NORTH CAROLINA: THE FIRST TWENTY-FIVE YEARS, 1967–1992* (1992).

77. § 7A-16 (“On or after December 15, 2000, the Governor shall appoint three additional judges to increase the number of judges to 15.”). In general, the North Carolina Constitution distinguishes justices of the supreme court from judges of the court of appeals. See, e.g., N.C. CONST. art. IV, §§ 6, 8, 16, 17, 22. Oddly, article IV, section 21, prohibiting diminishment of judicial salaries, mentions only “Judges.” N.C. CONST. art. IV, § 21.

78. § 7A-16. The members of each panel are assigned “in such fashion that each member sits a substantially equal number of times with each other member.” *Id.* The rotation of the judges was intended “to prevent the growth of diverging bodies of case law among various panels of fixed membership.” STATE OF N.C. COURTS COMM’N, REPORT OF THE COURTS COMMISSION TO THE NORTH CAROLINA GENERAL ASSEMBLY 7 (1967). Divergent bodies of case law became theoretically impossible after *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36–37 (1989) (holding that court of appeals decisions have precedential value)—except when a decision of one panel is affirmed by an equally divided supreme court and left “without precedential value.” See *Williams v. Vonderau*, 362 N.C. 76, 76, 653 S.E.2d 144, 145 (2007).

The motive for creating an intermediate appellate court in the 1960s was to ease the heavy caseload of the state supreme court, which had been made even heavier by contemporary criminal justice decisions of the United States Supreme Court that greatly increased post-conviction appeals.⁷⁹ For advice on creating the new court, the general assembly established the North Carolina Courts Commission (“the Commission”) by joint resolution in 1963 and specified that it would begin reporting to the general assembly in 1965.⁸⁰ In its analysis of the problem caused by the overcrowded docket, the Commission began with the fact that the functions of appellate courts in general are two-fold:

First, they correct error committed at the trial level which is prejudicial to a litigant, i.e., they attempt to insure justice in the individual case. Second, they develop the jurisprudence of the state through their reported decisions, i.e., they serve the precedential function of the common law system by declaring, expanding, and clarifying the case law of the state.⁸¹

In allocating these functions between the two appellate courts in the General Court of Justice, the Commission recommended that “those cases having this added dimension of general jurisprudential significance,” whether decisions of a trial court or of the court of appeals, should be reviewed by the supreme court, while “those cases which, in great numbers, do not have this added dimension” should be finally decided by the court of appeals.⁸²

Since the creation of the court of appeals in 1967, there has been an appeal of right from the court of appeals to the supreme court in any case that “directly involves a substantial question arising under the Constitution of the United States or of this State”⁸³ or “in which

79. STATE OF N.C. COURTS COMM’N, *supra* note 78, at 2. For a survey of the decisions of the United States Supreme Court that increased appeals to the Supreme Court of North Carolina, see A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 MICH. L. REV. 249, 260–64 (1968). For a retrospective overview, see MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 91–98 (1998).

80. See S.J. Res. 73, 1963 Gen. Assemb., 1963 N.C. Sess. Laws 1815. The Courts Commission was composed of fifteen members, at least eight of whom were members or former members of the general assembly, appointed jointly by the governor, the speaker of the house of representatives, and the chairmen of the house and senate judiciary committees. *Id.* The terms of the Commissioners expired in 1970. *Id.*

81. STATE OF N.C. COURTS COMM’N, *supra* note 78, at 12.

82. *Id.* at 13.

83. N.C. GEN. STAT. § 7A-30 (2013). The constitutional question “must be real and substantial rather than superficial and frivolous. It must be a constitutional question which has not already been the subject of conclusive judicial determination.” *State v. Colson*, 274 N.C. 295, 305, 163 S.E.2d 376, 383 (1968).

there is a dissent.”⁸⁴ In its discretion, the supreme court may also certify a cause for review after a decision by the court of appeals,⁸⁵ or directly from the trial court before a decision by the court of appeals.⁸⁶ In a few cases, there is an appeal of right from a trial court directly to the supreme court.⁸⁷

From the beginning, the distinction between the error-correcting and the precedent-setting functions of the court of appeals was difficult to maintain. As the Commission itself recognized: “These two functions of course are frequently carried on simultaneously. In many cases the general law is clarified or expanded in the very process of correcting trial court error in the individual case.”⁸⁸ The potential for confusion between these functions was only increased by the recommendation of the Commission that the court of appeals should print its opinions “in the same manner as the Supreme Court.”⁸⁹ Reported decisions are, as the Commission elsewhere

84. § 7A-30; *see also* N.C. R. APP. P. 16(b) (placing restrictions on the supreme court’s review of court of appeals cases when the appeal is based solely upon the existence of a dissenting opinion at the appellate level); Thomas L. Fowler, *Appellate Rule 16(b): The Scope of Review in an Appeal Based Solely upon a Dissent in the Court of Appeals*, 24 N.C. CENT. L. REV. 1, 5–6 (2001) (explaining how the right to appeal on the grounds that there is a dissent furthers the purposes of the two-tier court system).

85. Certification after determination by the court of appeals may be allowed when in the opinion of the Supreme Court:

- (1) The subject matter of the appeal has significant public interest, or
- (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
- (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court.

N.C. GEN. STAT. § 7A-31(c) (2013).

86. Certification before determination by the court of appeals may be allowed when in the opinion of the supreme court:

- (1) The subject matter of the appeal has significant public interest, or
- (2) The cause involves legal principles of major significance to the jurisprudence of the State, or
- (3) Delay in final adjudication is likely to result from failure to certify and thereby cause substantial harm, or
- (4) The work load of the courts of the appellate division is such that the expeditious administration of justice requires certification.

Id. § 7A-31(b).

87. *Id.* § 7A-27(a)(1) (Supp. 2014) (sentences of death); *id.* § (a)(3) (certain decisions of the business court); *id.* § (a)(1) (decisions holding a state statute “facially invalid” for violation of the North Carolina Constitution or federal law).

88. STATE OF N.C. COURTS COMM’N, *supra* note 78, at 12.

89. *Id.* at 10.

recognized, normally the means by which appellate courts develop “the jurisprudence of the state,” rather than merely correct error.⁹⁰

Despite the printed opinions—and the recognition that precedents could be established as errors were corrected—the court of appeals was not originally expected to play a major role in developing North Carolina case law.⁹¹ From this perspective, it was only natural for the supreme court to continue to use the form of words that it had developed to decide appeals from a trial court in cases in which the justices were equally divided. *Parrish* reached the supreme court on appeal from a superior court in 1967, the same year that the court of appeals first began to function.⁹² Equally divided, the supreme court announced the result using language that stretched back to Justice Clark’s decision in *Durham*.⁹³ The next time the justices were equally divided, in *Sharpe*,⁹⁴ the case was on review from a decision of the court of appeals. Within a month of deciding *Sharpe*, the court decided *Johnson*,⁹⁵ an appeal from a superior court. The decisions in *Sharpe* and *Johnson* were announced using similar language, both citing *Parrish*, without regard to whether the supreme court was reviewing a judgment of a superior court or a decision of the court of appeals.⁹⁶ Thereafter, *Johnson* was frequently cited when the justices were equally divided.⁹⁷

Yet even as the supreme court continued to repeat that a decision of the court of appeals affirmed by an equally divided supreme court was of no more precedential value than the decision of a trial court, the supreme court was growing increasingly comfortable with the court of appeals as a court that developed “the jurisprudence

90. *Id.* at 12.

91. *Id.* at 13.

92. 271 N.C. 711, 157 S.E.2d 334 (1967) (per curiam).

93. *Town of Durham v. Richmond & Danville R.R. Co.*, 113 N.C. 240, 240, 18 S.E. 208, 208 (1893) (“[T]he judgment below stands, not as a precedent, but as the decision in this case.”).

94. *Sharpe v. Pugh*, 286 N.C. 209, 209 S.E.2d 456 (1974) (per curiam).

95. *State v. Johnson*, 286 N.C. 331, 210 S.E.2d 260 (1974) (per curiam).

96. *See Sharpe*, 286 N.C. at 210, 209 S.E.2d at 457; *Johnson*, 286 N.C. at 333, 210 S.E.2d at 260.

97. Cases that cite *Johnson* on appeal from a judgment of a trial court include: *State v. Long*, 365 N.C. 5, 5, 705 S.E.2d 735, 735 (2011) (per curiam); *State v. Greene*, 298 N.C. 268, 269, 258 S.E.2d 71, 72 (1979) (per curiam). Cases that cite *Johnson* on review by appeal or certification from a decision of the court of appeals include: *Kempson v. N.C. Dep’t of Human Res.*, 328 N.C. 722, 723, 403 S.E.2d 279, 279 (1991) (per curiam); *Hochheiser v. N.C. Dep’t of Transp.*, 321 N.C. 117, 117, 361 S.E.2d 562, 562 (1987) (per curiam); *Shields v. Bobby Murray Chevrolet, Inc.*, 300 N.C. 366, 370, 266 S.E.2d 658, 660 (1980) (per curiam); *Townsend v. Norfolk S. Ry. Co.*, 296 N.C. 246, 249, 249 S.E.2d 801, 802 (1978) (per curiam).

of the state.”⁹⁸ In 1989, it expressly recognized the precedent-setting function of the court of appeals. In *In re Appeal from Civil Penalty*, the supreme court held: “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.”⁹⁹

The relatively recent emergence of the court of appeals as a precedent-setting court indicates the need to reconsider the effect of a decision by the supreme court when the justices are equally divided. Of course, affirmance by an equally divided supreme court, whether of a judgment of a superior court or of a decision of the court of appeals, creates no supreme court precedent. In this way, it differs from any other affirmance by the high court. As Chief Justice Marshall explained in *Etting*, the 1826 United States Supreme Court case cited in *Durham*: “[T]he principles of law which have been argued cannot be settled”¹⁰⁰—settled, that is, by the Supreme Court.

But a court of appeals decision affirmed by an equally divided supreme court *could* be allowed to have precedential value—to the same extent as any other decision of the court of appeals. In *Durant*, another case cited in *Durham*, Justice Field, writing in 1868 for the United States Supreme Court, described the entry of a judgment of affirmance by an equally divided court as “only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment”¹⁰¹—that is, that the decision is res

98. STATE OF N.C. COURTS COMM’N, *supra* note 78, at 12.

99. 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Decisions of a panel of the court of appeals may remain final statements of North Carolina law because of the interaction of this rule with section 7A-30 of the North Carolina General Statutes. N.C. GEN. STAT. § 7A-30 (2013) (providing right of review by the supreme court only if the case “directly involves a constitutional question” or if “there is a dissent”). Any plaintiff thereafter raising the same issue decided by a prior panel of the court of appeals should expect to lose in the trial court and in the court of appeals. Moreover, the decision of the panel of the court of appeals in the subsequent case should be unanimous, meaning that only if a petition for discretionary review is granted will the plaintiff have the opportunity to present the issue to the supreme court. *Id.* § 7A-31 (providing discretionary review by the supreme court only if the case is of “significant public interest,” “involves legal principles of major significance,” or “if the decision of the Court of Appeals appears to be in conflict with a decision of the Supreme Court”). Few plaintiffs will be likely to bear the cost in time and expense in the hopes of having that opportunity.

100. 24 U.S. (11 Wheat.) 59, 78 (1826).

101. 74 U.S. (7 Wall.) 107, 112 (1868). For a scholarly note on the effect of a decision by an equally divided court, see the observations of the reporter H.B. Wallace. 7 Wall. at 755 (“A judgment affirmed by a divided court binds inferior courts, and of course is a precedent in the court in which it was entered.”).

judicata. He added, citing *Etting*: “The legal effect would be the same if the appeal, or writ of error, were dismissed,”¹⁰² implicitly indicating that the lower court’s decision would have whatever precedential effect it would have had, had it not been appealed. When Justice Clark said in *Durham* that the judgment of the superior court “stands, not as a precedent, but as the decision in this case,”¹⁰³ he was simply recognizing the fact that trial courts are not precedent-setting courts.

Recognizing the precedential value of decisions of the court of appeals in cases in which the justices are equally divided would not lead to geographical variations¹⁰⁴ because the North Carolina Court of Appeals does not operate in territorial units.¹⁰⁵ But continuing to deny precedential value to decisions of the court of appeals affirmed by an equally divided supreme court does create jurisprudential dilemmas. Like cases may not be decided alike, violating a fundamental principle of due process.¹⁰⁶ In addition, inconsistent results can erode public confidence that the courts are administering equal justice under law.¹⁰⁷ Different results in similar criminal cases would be particularly troubling, since a final decision by a panel of the court of appeals affirmed by an equally divided supreme court would not be binding in a different case raising the same issue decided by a subsequent panel of the same court. In such a situation, it would be possible for one defendant to go free while another was convicted.¹⁰⁸

102. *Durant*, 74 U.S. (7 Wall.) at 112.

103. 113 N.C. 240, 18 S.E. 208 (1893). Justice Clark cited a subsequent proceeding in *Durant*, the decision of the Massachusetts Supreme Judicial Court, *Durant v. Essex Co.*, 90 Mass. (8 Allen) 103 (1864) (citing *Etting*, 24 U.S. (11 Wheat.) 59 (1826)).

104. Cf. William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29, 32 (1983) (observing that a United States court of appeals decision affirmed by an equally divided Supreme Court “has no binding effect in other circuits” and that “equal divisions can prolong a geographical inconsistency . . .”).

105. The Commission had expressly recommended against “dividing the State into a number of geographic divisions, over each of which a panel of the Court of Appeals would have exclusive control in appellate matters.” STATE OF N.C. COURTS COMM’N, *supra* note 78, at 8.

106. See JOHN V. ORTH, *DUE PROCESS OF LAW: A BRIEF HISTORY* 1–14 (2003).

107. See *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014) (“*Stare decisis*, we have stated, ‘is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’ *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). Although ‘not an inexorable command,’ *id.* at 828, *stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop ‘in a principled and intelligible fashion,’ *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986).”).

108. See generally JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 14–19 (6th ed. 2012) (discussing theories of criminal punishment); ORTH, *supra* note 106, at 1–14

Where a decision of a prior panel is affirmed by an equally divided supreme court, a subsequent panel confronting the same issue is free to reach a contrary result. In *Hardin v. KCS International, Inc.*,¹⁰⁹ for example, a unanimous panel of the court of appeals declined to follow a prior panel's decision affirmed by an equally divided supreme court, stating: "[W]e do not find [it] persuasive on this issue."¹¹⁰ On the other hand, a subsequent panel confronting the same issue decided by a prior panel that was affirmed by an equally divided supreme court may reach the same result. In *Lord v. Beerman*,¹¹¹ a unanimous panel, while recognizing that it was not bound by the prior decision, nonetheless found it to be "persuasive authority" and followed it.¹¹² Since neither *Hardin* nor *Lord* was subsequently reviewed by the supreme court, they *do* have precedential value, binding on subsequent panels of the court of appeals. Had the prior, reviewed decisions been allowed the same value as unreviewed decisions, inconsistent results would have been avoided and all final decisions of the court of appeals would have the same precedential value until reversed by a higher court.

CONCLUSION

Now that the court of appeals is a precedent-setting part of the Appellate Division of the General Court of Justice, there is no reason to continue to treat a decision of the court of appeals as if it were the judgment of a trial court. When the justices of the supreme court are

(detailing how unequal convictions conflict with principles of punishment and notions of due process).

109. 199 N.C. App. 687, 682 S.E.2d 726 (2009).

110. *Id.* at 694, 682 S.E.2d at 732 (rejecting the decision in *Currituck Assocs. v. Hollowell*, 166 N.C. App. 17, 601 S.E.2d 256 (2004), *aff'd by an equally divided supreme court*, 360 N.C. 160, 622 S.E.2d 493 (2005) (per curiam)); see also *Daniels v. Durham Cnty. Hosp. Corp.*, 171 N.C. App. 535, 540–41, 615 S.E.2d 60, 64 (2005) (rejecting the decision in *Campbell v. Pitt Cnty. Mem'l Hosp., Inc.*, 84 N.C. App. 314, 352 S.E.2d 902 (1987), *aff'd by an equally divided supreme court*, 321 N.C. 260, 362 S.E.2d 273 (1987)) ("[T]he North Carolina Supreme Court was evenly divided and accordingly affirmed the *Campbell* opinion, but stripped it of precedential value."), *discretionary review denied*, 360 N.C. 289, 628 S.E.2d 247 (2006); *Elliot v. N.C. Dep't of Human Res.*, 115 N.C. App. 613, 620, 446 S.E.2d 809, 813 (1994) (rejecting the decision in *Kempson v. N.C. Dep't of Human Res.*, 100 N.C. App. 482, 397 S.E.2d 314 (1990), *aff'd by an equally divided Supreme Court*, 328 N.C. 722, 403 S.E.2d 279 (1991)) ("We must . . . analyze this question without regard to this Court's decision in *Kempson*."), *aff'd per curiam*, 341 N.C. 191, 459 S.E.2d 273 (1995).

111. 191 N.C. App. 290, 664 S.E.2d 331 (2008).

112. *Id.* at 296 n.3, 664 S.E.2d at 336 n.3 (reaching the same result as in *Sharpe v. Pugh*, 21 N.C. App. 110, 203 S.E.2d 330, *aff'd by an equally divided supreme court*, 286 N.C. 209, 209 S.E.2d 456 (1974) (per curiam), and rejecting defendants' citation of *Sharpe* as "controlling authority" but noting that it "may be persuasive authority in this case . . .").

unable to decide a case on review from the court of appeals because they are equally divided, the decision of the court of appeals should be left undisturbed and stand as the decision in this case. Period.

APPENDIX I. NORTH CAROLINA SUPREME COURT CASES IN WHICH
THE JUSTICES WERE EQUALLY DIVIDED: 1893 TO 1967

***Town of Durham v. Richmond & Danville Railroad Co.*, 113 N.C. 240, 240–41, 18 S.E. 208, 208 (1893)** (“[T]he court is evenly divided Under these circumstances, following the uniform practice of appellate courts in such cases, the judgment below stands, not as a precedent, but as the decision in this case.”).

***Puryear v. Lynch*, 121 N.C. 255, 256, 28 S.E. 410, 410 (1897)** (per curiam) (“[T]he Court is evenly divided. The practice of appellate courts in such cases is that the judgment below stands, not as a precedent, but as the decision in the case.”).

***Morehead Banking Co. v. City of Burlington*, 124 N.C. 251, 251–52, 32 S.E. 558, 558 (1899)** (per curiam) (“[T]he Court is evenly divided. According to the settled practice of appellate courts in such cases, the judgment below stands, not as a precedent, but as the decision in this case.”).

***Boone v. Peebles*, 126 N.C. 824, 825, 36 S.E. 193, 195 (1900)** (“[T]he other members of the Court being equally divided . . . the opinion of the court below must prevail”).

***Ward v. Odell Manufacturing Co.*, 126 N.C. 946, 946, 36 S.E. 194, 194 (1900)** (“[T]he Court being equally divided, the judgment below is affirmed.”).

***Miller v. Bank of Washington*, 176 N.C. 152, 161, 96 S.E. 977, 981 (1918)** (“The Court being evenly divided, the judgment of the Court below is affirmed.”).

***Jenkins v. Suncrest Lumber Co.*, 187 N.C. 864, 864, 123 S.E. 82, 82 (1924)** (“[T]he Court is evenly divided in opinion. Following the uniform practice of appellate courts in such cases, the judgment of the lower court is affirmed and stands, not as a precedent, but as the decision in this case.”).

***McCarter v. Atlanta & Charlotte Air Line Railway Co.*, 187 N.C. 863, 864, 123 S.E. 88, 88 (1924)** (“The Court being evenly divided in opinion . . . the judgment of the lower court is affirmed, and stands as the decision in this case without becoming a precedent.”).

***Town of Hillsboro v. Merchants & Farmers Bank*, 191 N.C. 828, 828, 132 S.E. 657, 657 (1926)** (per curiam) (“The Court being evenly

divided in opinion . . . the judgment of the court below is affirmed and stands as the decision in this case without becoming a precedent.”).

***Raynor v. Jefferson Standard Life Insurance Co.*, 193 N.C. 385, 385, 137 S.E. 137, 137 (1927)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the lower court is affirmed and stands, according to the uniform practice of appellate courts, as the decision in this case, but without becoming a precedent.”).

***Lawrence v. Fidelity Bank*, 193 N.C. 841, 841, 137 S.E. 427, 427 (1927)** (per curiam) (“The Court being evenly divided in opinion . . . the ruling of the lower court is affirmed and stands, according to the uniform practice of appellate courts, as the decision in this case, without becoming a precedent for the future.”).

***Gooch v. Western Union Telegraph Co.*, 196 N.C. 823, 824, 146 S.E. 803, 803 (1929)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed and stands as the decision in this case without becoming a precedent.”).

***Town of Tarboro v. Johnson*, 196 N.C. 824, 824, 146 S.E. 803, 803 (1929)** (per curiam) (“[T]he Court being evenly divided in opinion, the judgment of the Superior Court is affirmed, and stands as the decision in this case without becoming a precedent.”).

***Parsons v. Board of Education*, 200 N.C. 88, 89, 156 S.E. 244, 244 (1930)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed and stands as the decision of this case, without becoming a precedent.”).

***Durham v. Lloyd*, 200 N.C. 803, 803, 157 S.E. 136, 136 (1931)** (per curiam) (“The court being evenly divided in opinion . . . the judgment is affirmed, in accordance with the practice in this Court. This decision disposes of the appeal, without becoming a precedent.”).

***Hunter Manufacturing & Commission Co. v. Leak Manufacturing Co.*, 201 N.C. 823, 824, 159 S.E. 411, 411 (1931)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed and stands as the decision in this particular case, without becoming a precedent for the future.”).

***Nebel v. Nebel*, 201 N.C. 840, 840, 161 S.E. 223, 223 (1931)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed and stands as the decision of this action, without becoming a precedent.”).

***First National Bank & Trust Co., v. Hood ex rel Central Bank & Trust Co.*, 207 N.C. 862, 863, 177 S.E. 16, 16 (1934)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the

Superior Court is affirmed, and stands as the decision in this proceeding, without becoming a precedent.”).

***Seay v. Sentinel Life Insurance Co.*, 208 N.C. 832, 833, 179 S.E. 888, 889 (1935)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed and stands, according to the uniform practice of appellate courts, as the decision in this case, without becoming a precedent.”).

***Sondy v. Yates*, 208 N.C. 836, 836, 181 S.E. 326, 326 (1935)** (per curiam) (“The Court being equally divided in opinion . . . the judgments of the Superior Court are affirmed in accordance with the usual practice in such cases, and stand as the decisions in these cases without becoming precedents.”).

***Smith v. Powell*, 208 N.C. 837, 837, 181 S.E. 325, 325–26 (1935)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed in accordance with the usual practice of appellate courts, and stands as the decision in this case without becoming a precedent.”).

***Martin v. Southern Railway Co.*, 208 N.C. 843, 843, 181 S.E. 745, 746 (1935)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed, as the disposition of this appeal, without becoming a precedent, in accordance with the practice of the Court.”).

***Joyner v. St. Paul Fire & Marine Insurance Co.*, 208 N.C. 843, 844, 182 S.E. 111, 112 (1935)** (per curiam) (“The Court being equally divided in opinion . . . the order of the Superior Court is affirmed in accordance with the usual practice in such cases, and stands as a decision in this case without becoming a precedent.”).

***Sessoms v. Atlantic Coast Line Railroad Co.*, 208 N.C. 844, 845, 182 S.E. 112, 112 (1935)** (per curiam) (“The Court being equally divided in opinion . . . the judgment of the Superior Court is affirmed in accordance with the usual practice in such cases, and stands as the decision in this case without becoming a precedent.”).

***Hayes v. City of Hickory*, 208 N.C. 845, 845, 182 S.E. 111, 111 (1935)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed, and stands as the decision in this case without becoming a precedent.”).

***State v. Swan*, 209 N.C. 836, 837, 183 S.E. 285, 286 (1936)** (per curiam) (“In accord with the established practice, the court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed, and stands as the decision in this case without becoming a precedent.”).

***Holderfield v. Pou*, 209 N.C. 844, 844, 183 S.E. 373, 373 (1936)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed and stands as the decision in this action without becoming a precedent.”).

***Brown v. Equitable Life Assurance Society of the United States*, 210 N.C. 825, 825, 185 S.E. 429, 429 (1936)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed and stands as the decision in this case, without becoming a precedent.”).

***Ferrell v. Metropolitan Life Insurance Co.*, 210 N.C. 831, 831, 187 S.E. 575, 575 (1936)** (per curiam) (“The Court being equally divided in opinion . . . the judgment of the Superior Court is affirmed in accordance with the usual practice in such cases, and stands as the decision in the instant case without becoming a precedent.”).

***Gott v. Prudential Insurance Co. of America*, 210 N.C. 832, 832, 187 S.E. 572, 573 (1936)** (per curiam) (“The Court being equally divided in opinion . . . the judgment of the Superior Court is affirmed and stands as the decision in this case, without becoming a precedent.”).

***Cole v. Atlantic Coast Line Railroad Co.*, 211 N.C. 591, 599, 191 S.E. 353, 358 (1937)** (“One member of the Court . . . being absent, and the remaining four being equally divided in opinion . . . the judgment of the Superior Court, accordant with the usual practice in such cases, is affirmed and stands as the decision in the instant case, without becoming a precedent.”).

***Jackson v. Branch Banking & Trust Co.*, 211 N.C. 733, 733–34, 189 S.E. 763, 764 (1937)** (per curiam) (“One member of the Court . . . being absent, and the remaining four being equally divided in opinion . . . the judgment of the Superior Court, accordant with the usual practice in such cases, is affirmed and stands as the decision in this case, without becoming a precedent.”).

***Allen v. Mutual Life Insurance Co.*, 211 N.C. 736, 737, 190 S.E. 735, 735 (1937)** (per curiam) (“One member of the Court . . . being absent, and the remaining four being equally divided in opinion . . . the judgment of the Superior Court, accordant with the usual practice in such cases, is affirmed and stands as the decision in this case, without becoming a precedent.”).

***Virginia Trust Co. v. Merrick*, 211 N.C. 739, 740, 191 S.E. 5, 6 (1937)** (per curiam) (“One member of the Court . . . the remaining four being equally divided in opinion . . . the judgment of the Superior Court, in accord with the usual practice in such cases, is affirmed and stands as the decision of this case, without becoming a precedent.”).

***Collins v. Security Mutual Life Insurance Co.*, 213 N.C. 800, 800, 195 S.E. 793, 793 (1938)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed, as the disposition of this appeal, without becoming a precedent, in accord with the practice of the Court.”).

***Mills v. Jones*, 213 N.C. 802, 802, 196 S.E. 308, 308 (1938)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed, as the disposition of this appeal, without becoming a precedent, in accord with the practice of the Court.”).

***Johnston v. Halifax Paper Co.*, 214 N.C. 828, 829, 199 S.E. 20, 20 (1938)** (per curiam) (“One member of the Court . . . not sitting, and the remaining six being equally divided in opinion . . . the judgment of the Superior Court is affirmed in accordance with the usual practice in such cases, and stands as the decision in the present case, without becoming a precedent.”).

***Outlaw v. City of Asheville*, 215 N.C. 790, 790, 1 S.E.2d 559, 560 (1939)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed as the disposition of this appeal without becoming a precedent in accordance with the practice of the Court.”).

***Toxey v. Meggs*, 216 N.C. 798, 798, 4 S.E.2d 513, 513 (1939)** (per curiam) (“One member of the Court . . . not sitting, and the remaining six being evenly divided in opinion . . . the judgment of the Superior Court is affirmed, accordant with the usual practice in such cases, and stands as the decision in the instant case, without becoming a precedent.”).

***Howard v. Queen City Coach Co.*, 216 N.C. 799, 800, 4 S.E.2d 616, 616 (1939)** (per curiam) (“One member of the Court . . . not sitting, and the remaining six being evenly divided in opinion . . . the judgment of the Superior Court is affirmed, accordant with the usual practice in such cases, and stands as the decision in the instant case, without becoming a precedent.”).

***Pafford v. J. A. Jones Construction Co.*, 218 N.C. 782, 783, 11 S.E.2d 548, 549 (1940)** (per curiam) (“One member of the Court . . . not sitting, and the remaining six being evenly divided in opinion . . . the judgment of the Superior Court is affirmed in accord with the usual practice in such cases, and stands as the decision in this case without becoming a precedent.”).

***Elmore v. General Amusements*, 221 N.C. 535, 536, 19 S.E.2d 5, 5 (1942)** (per curiam) (“One member of the Court . . . not sitting, and the remaining six being evenly divided in opinion . . . the judgment of

the Superior Court stands affirmed as the disposition of this appeal without becoming a precedent, accordant with the usual practice in such cases.”).

***Smith v. McDowell Furniture Co.*, 221 N.C. 536, 536–37, 19 S.E.2d 17, 18 (1942)** (per curiam) (“One member of the Court . . . not sitting, and the remaining six being evenly divided in opinion, the judgment of the Superior Court is affirmed in accord with the usual practice in such cases, and stands as the decision in this case without becoming a precedent.”).

***Whitehead v. City of Charlotte*, 221 N.C. 539, 540, 20 S.E.2d 57, 57–58 (1942)** (per curiam) (“Upon consideration of the appeal the Court was evenly divided—three to three Therefore, the judgment of the court below stands affirmed, and this decision does not become a precedent.”).

***Suiter v. Swift & Co. Fertilizer Works*, 221 N.C. 541, 542, 20 S.E.2d 293, 294 (1942)** (per curiam) (“Upon the hearing of the matter, the Court divided three to three Under the Rule of Court, the judgment of the court below stands affirmed, and this decision does not become a precedent.”).

***Wells v. Wells*, 222 N.C. 748, 748, 21 S.E.2d 832, 832 (1942)** (per curiam) (“The Court being equally divided in opinion . . . the judgment of the Superior Court is affirmed as the disposition of this appeal without becoming a precedent, in accord with the practice of the Court.”).

***Gardner v. McDonald*, 223 N.C. 854, 855, 25 S.E.2d 397, 397 (1943)** (per curiam) (“One member of the Court . . . not sitting, and the remaining six being evenly divided in opinion . . . the judgment of the Superior Court stands affirmed as the disposition of this appeal, without becoming a precedent, accordant with the usual practice in such cases.”).

***Gardner v. McDonald*, 223 N.C. 555, 555, 27 S.E.2d 522, 522 (1943)** (“On original appeal, one member of the Court not sitting, and the remaining six being evenly divided in opinion . . . the ruling stood affirmed as to the disposition of the appeal without becoming a precedent.”).

***Bullard v. Hotel Holding Co.*, 225 N.C. 766, 766–67, 33 S.E.2d 480, 480 (1945)** (per curiam) (“One member of the Court . . . not sitting, and the remaining six being evenly divided in opinion . . . the judgment of Superior Court is affirmed, according to usual practice of the Court in such cases, and stands as the decision in this case—without becoming a precedent.”).

***Whitehurst v. Anderson*, 228 N.C. 787, 788, 44 S.E.2d 358, 358 (1947)** (per curiam) (“The Court, one member not sitting, being evenly divided in opinion . . . the judgment of the Superior Court is affirmed, accordant with the usual practice in such cases, and stands as the decision in this case, without becoming a precedent.”).

***MacClure v. Accident & Casualty Insurance Co. of Winterthur, Switzerland*, 230 N.C. 661, 661, 55 S.E.2d 192, 192 (1949)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed and stands as the decision in this case without becoming a precedent.”).

***James v. Rogers*, 231 N.C. 668, 669, 58 S.E.2d 640, 640 (1950)** (per curiam) (“One member of the Court . . . not sitting, and the remaining six being evenly divided in opinion . . . the judgment of the Superior Court stands affirmed after the manner of the usual practice in such cases, and as the disposition of the appeal, without becoming a precedent.”).

***Samuels v. Bowers*, 232 N.C. 522, 522, 61 S.E.2d 448, 448 (1950)** (per curiam) (“[T]he remaining members of the Court being equally divided in opinion, the petition to rehear is dismissed. The case as reported will remain the law of the case but does not constitute a precedent.”).

***State v. Brown*, 242 N.C. 602, 602, 89 S.E.2d 157, 158 (1955)** (per curiam) (“[T]he six sitting members being equally divided in opinion . . . the judgment of the Superior Court is affirmed, without becoming a precedent.”).

***Mid-Continent Refrigerator Co. v. Davenport*, 242 N.C. 603, 603, 89 S.E.2d 153, 153 (1955)** (per curiam) (“[T]he six sitting members being evenly divided in opinion . . . the judgment of the Superior Court is affirmed, without becoming a precedent.”).

***State v. Smith*, 243 N.C. 172, 172, 90 S.E.2d 328, 328 (1955)** (per curiam) (“The Court being evenly divided in opinion . . . the judgment of the Superior Court is affirmed without becoming a precedent.”).

***Schoenith v. Town & Country Realty Co.*, 244 N.C. 601, 602, 94 S.E.2d 592, 593 (1956)** (per curiam) (“The members of the Court being evenly divided . . . the judgment below will be affirmed without becoming a precedent.”).

Allen v. Southern Railway Co.*, 256 N.C. 700, 702, 124 S.E.2d 871, 872 (1962)** (per curiam) (“The Court being equally divided, the judgment below is affirmed. The judgment appealed from stands, but not as a precedent.”) *rev’d* by ***Brotherhood of Railway & Steamship

***Clerks, Freight Handlers, Express & State Employees v. Allen*, 373 U.S. 113 (1963).**

***Burke v. Carolina & Northwestern Railway Co.*, 257 N.C. 683, 683, 127 S.E.2d 281, 281 (1962)** (per curiam) (“The other Justices, being equally divided . . . the judgment of the superior court is affirmed without the decision becoming a precedent.”).

APPENDIX II. NORTH CAROLINA SUPREME COURT CASES IN WHICH THE JUSTICES WERE EQUALLY DIVIDED: 1967 TO 1985

***Parrish v. Piedmont Publishing Co.*, 271 N.C. 711, 711–12, 157 S.E.2d 334, 334 (1967)** (per curiam) (“The Court being evenly divided in opinion, three members of the Court being of the opinion that the demurrer should be sustained and three members of the Court being of the opinion that the demurrer should be overruled . . . the judgment of the lower court is affirmed after the manner of the usual practice of appellate courts in such cases and stands as the decision in this case without becoming a precedent.”).

***Sharpe v. Pugh*, 286 N.C. 209, 210, 209 S.E.2d 456, 456–57 (1974)** (per curiam) (“The six members of the Court who heard the appeal were equally divided . . . This equal division requires that the decision of the Court of Appeals be affirmed without becoming a precedent.”).

***In re Willis*, 286 N.C. 207, 208, 209 S.E.2d 457, 458 (1974)** (per curiam) (“[T]he members of the Court were equally divided, three members voting to affirm and three members voting to reverse the judgment of the superior court. This equal division requires that the judgment entered in the superior court be affirmed without becoming a precedent.”).

***State v. Johnson*, 286 N.C. 331, 332–33, 210 S.E.2d 260, 260 (1974)** (per curiam) (“The remaining six justices being equally divided in opinion . . . the judgment of the Superior Court stands affirmed in accordance with the usual practice in such cases and decides this case without becoming a precedent.”).

***Townsend v. Norfolk & Southern Railway Co.*, 296 N.C. 246, 249, 249 S.E.2d 801, 802 (1978)** (per curiam) (“The remaining six justices are equally divided . . . Thus, the opinion of the Court of Appeals is affirmed without precedential value in accordance with the usual practice in this situation.”).

***State v. Oxner*, 297 N.C. 44, 46–47, 252 S.E.2d 705, 706 (1979)** (per curiam) (“The remaining six justices are equally divided . . . Thus, the opinion of the Court of Appeals is affirmed

without precedential value in accordance with the usual practice in this situation.”).

***Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 297 N.C. 696, 697, 256 S.E.2d 688, 689 (1979)** (per curiam) (“The remaining six justices are equally divided Therefore, the decision of the Court of Appeals is affirmed without precedential value in accordance with the usual practice in this situation.”).

***State v. Greene*, 298 N.C. 268, 269, 258 S.E.2d 71, 72 (1979)** (per curiam) (“The remaining six justices are equally divided In accordance with the usual practice and long established rule, this equal division requires that the judgment of the trial court be affirmed without becoming a precedent.”).

***Starr v. Clapp*, 298 N.C. 275, 277, 258 S.E.2d 348, 350 (1979)** (per curiam) (“The remaining six justices are equally divided Thus, the opinion of the Court of Appeals is affirmed without precedential value in accordance with the usual practice in this situation.”).

***Shields v. Bobby Murray Chevrolet, Inc.*, 300 N.C. 366, 370, 266 S.E.2d 658, 660 (1980)** (per curiam) (“The remaining six justices are equally divided Accordingly, the opinion of the Court of Appeals is affirmed without precedential value.”).

***Wayfaring Home Inc. v. Ward*, 301 N.C. 518, 519–20, 272 S.E.2d 121, 122 (1980)** (per curiam) (“The justices are equally divided as to whether the decision of the Court of Appeals should be affirmed or reversed. Chief Justice Branch and Justices Britt and Carlton vote to affirm; Justices Huskins, Copeland and Exum vote to reverse. Therefore, in accordance with our practice, the decision of the Court of Appeals is left undisturbed without precedential value.”).

***Greenhill v. Crabtree*, 301 N.C. 520, 522, 271 S.E.2d 908, 909 (1980)** (per curiam) (“The remaining six Justices are equally divided In accordance with the usual practice and long established rule, this equal division requires that the opinion of the Court of Appeals be affirmed without precedential value.”).

***Felton v. Hospital Guild of Thomasville, Inc.*, 307 N.C. 121, 121–22, 296 S.E.2d 297, 297 (1982)** (per curiam) (“[T]he members of this Court being equally divided, with three members voting to affirm, and three members voting to reverse, the decision of the Court of Appeals is left undisturbed as the law of the case but stands without precedential value.”).

APPENDIX III. NORTH CAROLINA SUPREME COURT CASES IN WHICH THE JUSTICES WERE EQUALLY DIVIDED: 1985 TO 2013

***Eason v. Gould, Inc.*, 312 N.C. 618, 618, 324 S.E.2d 223, 224 (1985)** (per curiam) (“The remaining members of this Court being equally divided, with three members voting to affirm the Court of Appeals and three members voting to reverse, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Lynch v. Hazelwood*, 312 N.C. 619, 619, 324 S.E.2d 224, 224 (1985)** (per curiam) (“The Court is evenly divided. Under these circumstances, following the uniform practice of this Court and the ancient rule of *praesumitur pro negante*,¹¹³ the decision of the Court of Appeals is affirmed, not as precedent but as the decision in this case.”).

***Forbes Homes, Inc. v. Trimpi*, 313 N.C. 168, 169, 326 S.E.2d 30, 30 (1985)** (per curiam) (“The remaining members of this Court being equally divided, with three members voting to affirm the Court of Appeals and three members to reverse, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***State v. Moore*, 317 N.C. 144, 144, 343 S.E.2d 430, 430 (1986)** (per curiam) (“The Court is evenly divided. Under these circumstances, following the uniform practice of this Court and the ancient rule of *praesumitur pro negante*, the decision of the Court of Appeals is affirmed, not as precedent but as the decision in this case.”).

***Vick v. Davis*, 317 N.C. 328, 328–29, 345 S.E.2d 217, 217 (1986)** (per curiam) (“[T]he Court is evenly divided. Under these circumstances, following the uniform practice of this Court, the decision of the Court of Appeals is affirmed, not as precedent but as the decision in this case.”).

***E.F. Blankenship Co. v. North Carolina Department of Transportation*, 318 N.C. 685, 685, 351 S.E.2d 293, 293 (1987)** (per curiam) (“The Court is evenly divided. Under these circumstances, following the uniform practice of this Court and the ancient rule of *praesumitur pro negante*, the decision of the Court of Appeals is affirmed, not as precedent but as the decision in this case.”).

***Campbell v. Pitt County Memorial Hospital, Inc.*, 321 N.C. 260, 266, 362 S.E.2d 273, 276 (1987)** (“The remaining members of the Court are equally divided on the issue presented, with three members

113. Usually in the form *semper praesumitur pro negante*, the maxim refers to a presumption in favor of the negative.

voting to affirm the Court of Appeals and three members voting to reverse. The decision of the Court of Appeals on this issue is thus left undisturbed and stands without precedential value.”).

***Hochheiser v. North Carolina Department of Transportation*, 321 N.C. 117, 117, 361 S.E.2d 562, 562 (1987)** (per curiam) (“The remaining members of this Court were equally divided with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Bruce v. Memorial Mission Hospital, Inc.*, 325 N.C. 541, 541, 385 S.E.2d 144, 145 (1989)** (per curiam) (“The remaining members of this Court were equally divided with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Kempson v. North Carolina Department of Human Resources*, 328 N.C. 722, 723, 403 S.E.2d 279, 279 (1991)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm, and three members voting to reverse, the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Polk v. North Carolina Farm Bureau Mutual Insurance Co.*, 328 N.C. 730, 730, 403 S.E.2d 255, 255 (1991)** (per curiam) (“The remaining members of this Court were equally divided with three members voting to affirm the decision of the Superior Court and three members voting to reverse. Therefore, the decision of the Superior Court is left undisturbed and stands without precedential value.”).

***Nesbit v. Howard*, 333 N.C. 782, 782, 429 S.E.2d 730, 731 (1993)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Proctor v. North Carolina Farm Bureau Mutual Insurance Co.*, 335 N.C. 533, 535, 439 S.E.2d 112, 113 (1994)** (“The remaining members of the Court are equally divided with three members voting to affirm the decision of the Court of Appeals . . . and three members voting to reverse. Accordingly, that portion of the decision of the

Court of Appeals...is left undisturbed and stands without precedential value.”).

***Tate v. Christy*, 339 N.C. 731, 731, 454 S.E.2d 242, 242 (1995)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***County of Lenoir v. Moore*, 340 N.C. 104, 104, 455 S.E.2d 158, 158 (1995)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Peal by Peal v. Smith*, 340 N.C. 352, 352, 457 S.E.2d 599, 599 (1995)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Moore v. City of Creedmoor*, 345 N.C. 356, 372, 481 S.E.2d 14, 24 (1997)** (“The remaining members of the Court are equally divided on this issue, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Therefore, as to this issue, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Shakelford v. City of Wilmington*, 349 N.C. 222, 222, 505 S.E.2d 80, 80 (1998)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Reese v. Barbee*, 350 N.C. 60, 60, 510 S.E.2d 374, 374 (1999)** (per curiam) (Chief Justice Mitchell and Associate Justices Parker and Wainwright voted to affirm and Associate Justices Frye, Lake and Orr voted to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Hayes v. Town of Fairmont*, 350 N.C. 81, 81, 511 S.E.2d 638, 638 (1999)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals.

Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Roman v. Southland Transportation Co.*, 350 N.C. 549, 555, 515 S.E.2d 214, 218 (1999)** (“With Chief Justice Mitchell and Justices Lake and Wainwright voting to affirm and Justices Frye, Parker and Orr voting to reverse, the decision of the Court of Appeals is affirmed without precedential value.”).

***Hearne v. Sherman*, 350 N.C. 612, 616, 516 S.E.2d 864, 867 (1999)** (“The remaining members of the Court being equally divided, the decision of the Court of Appeals is affirmed without precedential value.”).

***Couch v. Private Diagnostic Clinic*, 351 N.C. 92, 93, 520 S.E.2d 785, 785 (1999)** (per curiam) (“Justices Lake, Martin, and Wainwright believe that the error was prejudicial to the appealing defendant and would vote to grant a new trial. Chief Justice Frye and Justices Parker and Orr are of the opinion that the error was not prejudicial to the appealing defendant and would vote to affirm the result reached by the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Medical Mutual Insurance Co. of North Carolina v. Mauldin*, 353 N.C. 352, 353, 543 S.E.2d 478, 478 (2001)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Pitts v. American Security Insurance Co.*, 356 N.C. 292, 293, 569 S.E.2d 647, 647–48 (2002)** (per curiam) (“The remaining members of the Court were equally divided, with two members voting to affirm the decision of the Court of Appeals and two members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Robinson v. Byrd*, 356 N.C. 608, 608, 572 S.E.2d 781, 782 (2002)** (per curiam) (“The remaining members of the Court were equally divided, with three members voting to affirm the decision of the Court of Appeals and three members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Crawford v. Commercial Union Midwest Insurance Co.*, 356 N.C. 609, 609, 572 S.E.2d 781, 781 (2002)** (per curiam) (“The remaining members of the Court were equally divided, with three members voting to affirm the decision of the Court of Appeals and

three members voting to reverse. Therefore, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***State v. Holden*, 359 N.C. 60, 60, 602 S.E.2d 360, 360 (2004)** (per curiam) (“The members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”) (internal footnote omitted).

***Currituck Associates-Residential Partnership v. Hollowell*, 360 N.C. 160, 160, 622 S.E.2d 493, 493 (2005)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Barham v. Hawk*, 360 N.C. 358, 358, 625 S.E.2d 778, 778 (2006)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***State v. Harrison*, 360 N.C. 394, 394, 627 S.E.2d 461, 461 (2006)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***State v. Bauberger*, 361 N.C. 105, 105, 637 S.E.2d 536, 536 (2006)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Ripellino v. North Carolina School Boards Association*, 361 N.C. 214, 215, 639 S.E.2d 441, 442 (2007)** (per curiam) (“[T]he members of the Court are equally divided. Therefore, those portions of the Court of Appeals opinion are affirmed without precedential value.”).

***Formyduval v. Britt*, 361 N.C. 215, 216, 639 S.E.2d 443, 443 (2007)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three

members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Masood v. Erwin Oil Co.*, 361 N.C. 579, 579, 650 S.E.2d 595, 595 (2007)** (per curiam) (“[T]he members of the Court are equally divided. Therefore, the Court of Appeals opinion is left undisturbed without precedential value.”).

***Williams v. Vonderau*, 362 N.C. 76, 76, 653 S.E.2d 144, 144–45 (2007)** (per curiam) (“[T]he members of the Court are equally divided, with three members voting to affirm and three members voting to reverse. Accordingly, the decision of the Court of Appeals is affirmed without precedential value.”).

***Weaver v. Sheppa*, 362 N.C. 341, 342, 661 S.E.2d 733, 733 (2008)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Hall v. Toreros II, Inc.*, 363 N.C. 114, 114, 678 S.E.2d 656, 656 (2009)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Heatherly v. State*, 363 N.C. 115, 115, 678 S.E.2d 656, 657 (2009)** (per curiam) (“[T]he remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Goldston v. State*, 364 N.C. 416, 416–17, 700 S.E.2d 223, 223 (2010)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***State v. Long*, 365 N.C. 5, 5, 705 S.E.2d 735, 735 (2011)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the order of the superior court. Accordingly, the order of the superior court is affirmed.”).

***State v. Pastuer*, 365 N.C. 287, 287, 715 S.E.2d 850, 850 (2011)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Amward Homes, Inc. v. Town of Cary*, 365 N.C. 305, 306, 716 S.E.2d 849, 850 (2011)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Baysden v. State*, 366 N.C. 370, 370, 736 S.E.2d 173, 173 (2013)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Ochsner v. Elon University*, 366 N.C. 472, 473, 737 S.E.2d 737, 738 (2013)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Gonzalez v. Worrell*, 366 N.C. 501, 502, 739 S.E.2d 552, 552 (2013)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***John Conner Construction, Inc. v. Grandfather Holding Co.*, 366 N.C. 547, 547, 742 S.E.2d 802, 802 (2013)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals stands without precedential value.”).

***State v. Hough*, 367 N.C. 79, 79, 743 S.E.2d 174, 174 (2013)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***State v. Craven*, 367 N.C. 51, 58, 744 S.E.2d 458, 462 (2013)** (“The six participating members of the Court are equally divided Consequently, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***State v. Pizano-Trejo*, 367 N.C. 111, 111, 748 S.E.2d 144, 144 (2013)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***State v. Huss*, 367 N.C. 162, 162, 749 S.E.2d 279, 280 (2013)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***Tyndall v. Ford Motor Co.*, 367 N.C. 161, 162, 749 S.E.2d 279, 279 (2013)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the orders of the Court of Appeals. Accordingly, the orders of the Court of Appeals are left undisturbed.”).

***Samost v. Duke University*, 367 N.C. 185, 185, 751 S.E.2d 611, 611 (2013)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

***State v. Franklin*, 367 N.C. 183, 183, 752 S.E.2d 143, 143 (2013)** (per curiam) (“The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value.”).

