North Carolina Common Law Parol Evidence Rule

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This Article evaluates the application of the parol evidence rule by the courts in North Carolina. The Article explores the tortured and murky history of the rule, to which many of the difficulties associated with its application are surely attributable. Although the North Carolina courts do a fine job with certain groups of cases, including those with merger clauses, this Article points out the continuation and exacerbation of an earlier tendency to avoid real analysis by citing and quoting fragments of the parol evidence rule seemingly at random. Especially alarming is the obvious omission of serious inquiry into the parties' intention to make a final writing. Because it is subsumed within the issue of completeness by the courts, there is a strong likelihood that finality will be assumed or presumed by the courts even in cases where the writing is informal and rudimentary. The liberal tendency marked by prior commentators to admit extrinsic evidence that is credible and not contradictory is still observable, but it is now challenged by a line of cases that applies a stringent "four corners" test. The unpredictable and chaotic state of the parol evidence rule in North Carolina poses a serious enough threat to most contracts to warrant intervention and explication of the rule by the state supreme court.
INTRODUCTION

The thrust of the parol evidence rule ("PER") is to make written terms effective as the terms of a contract as a matter of law. That sounds like a relatively simple and unobjectionable function. In reality, the rule has so eluded reason as to inspire a whole catalog of dark metaphor and phantasmagorical description for which it is famous.¹ Such is its associated uncertainty and confusion that Eric Posner recently observed that "[i]n virtually every jurisdiction, one finds . . . cries of despair."² Despite the odds, much has been written in an attempt to bring a measure of predictability and uniformity to the case law. Such efforts might have been more successful but for a fundamental split between the two greatest authorities of the past century, Samuel Williston and Arthur L. Corbin.³ The fervency of their disagreement about the PER diluted whatever potential their work might otherwise have had in clarifying the law; arguably it merely fed the prevalent confusion and hysteria, resulting in a kind of

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1. Much of this is gathered in Part I, although some is scattered throughout this Article. By no means is all of it captured here. See infra Part I.
judicial hopelessness. So great has been their influence that it is nearly impossible to talk about what the courts do with the PER without characterizing it by reference to Williston or Corbin.

In North Carolina, the exploration of the PER was conducted by giants in the law. In 1932, a seminal article was co-authored by Dean Charles T. McCormick and James H. Chadbourn, who was then editor-in-chief of the North Carolina Law Review. In 1955, John P. Dalzell brought their work up to date in a second piece. Their work provides a secure foundation for this Article. Because the subject is timeless, the recommendations of these luminaries remain sterling even after so many years, and it is with a heightened sense of responsibility to their legacy and to the practitioners and judges of this state who have benefited from it that this reassessment of the rule is undertaken.

Part I of this Article demonstrates the confusion and complexity of the PER. Its origins are examined, highlighting an irrational mystical belief in the talismanic quality of the written word that has little to do with real transactions. Part II provides a simple Discussion Model to serve as a convenient point of reference, so that the reader may follow the discussion in the outline of the rule. The very heated controversy between Corbin and Williston is described in Part III. These preliminary parts of this Article provide important background for Part IV, which explicates the case law in North Carolina. Part IV has a number of divisions, which either mirror or extend the organization of the rule shown in the Discussion Model of Part II and are typical of most, if not all, PERs. The issue of finality is emphasized and the application of a poorly crafted presumption of finality and completeness is criticized. Because the law pertaining to interpretation has influenced PER analysis in North Carolina, attention is given to an array of tests for ambiguity. Part V undertakes a more sophisticated look at the rule, pulling together the prior text and offering some suggestions for practice in North Carolina and in other states with similar rules. The conclusion begs the courts to avoid the great potential for harm that the PER

5. McCormick had moved from Texas to join the law faculty at the University of North Carolina in 1926, rising to the deanship a year later. Eventually, after succeeding Wigmore at Northwestern at the latter's request, he was to become dean at Texas.
6. Chadbourn became a celebrated member of the Harvard Law faculty.
7. John P. Dalzell, Twenty-Five Years of Parol Evidence in North Carolina, 33 N.C. L. REV. 420 (1955). Like McCormick, Dalzell was a faculty member at the University of North Carolina School of Law.
threatens, urging them to fashion a coherent rule with more predictable and humane results.

I. INAUSPICIOUS BEGINNINGS

A. The North Carolina Parol Evidence Rule in Brief: Then and Now

In 1932, by comparison to a benchmark rule they extrapolated from Wigmore, Chadbourn and McCormick concluded with regret that North Carolina had "abrogated the parol evidence rule for most purposes." Generalizing from their study, Corbin concluded that most other states were just as liberal and just as confused as the Old North State. In 1955, Dalzell confirmed the continuation of this pattern, suggesting that North Carolina's rule might actually go beyond the liberality of Corbin's or Wigmore's in admitting extrinsic evidence of contract terms:

[North Carolina's] parol evidence rule is certainly not the rule supported by Williston, and in some decisions it seems to afford the written contract even less protection than does the rule stated by Corbin and Wigmore. As pointed out in the earlier article, there is a tendency in North Carolina when parol evidence is offered as affecting a written contract without a merger clause, to handle it in two questions, one for the court, the other for the jury. First, the court would decide whether there was any necessary contradiction between the parol evidence and the writing, such total inconsistency as would make co-existence of the written agreement and the oral agreement impossible. If no contradiction were found, the jury is left to say whether the alleged oral agreement was made; if so, it is enforced. For if the oral agreement was made, it is
concluded that the writing was incomplete, a partial integration only.\footnote{11}{Id. at 428 (footnote omitted) (citing Chadbourn & McCormick, supra note 4, at 157).}

More than fifty years later, change has finally come; unfortunately, it is not for the better. Today, the North Carolina PER defies characterization as liberal or conservative, having deteriorated to a state of chaotic unpredictability. In this, the state is by no means alone, most states having been described recently as "consistently erratic."\footnote{12}{See Peter Linzer, The Comfort of Certainty: Plain Meaning and the Parol Evidence Rule, 71 FORDHAM L. REV. 799, 807 (2002) (quoting John D. Calamari & Joseph M. Perillo, A Plea For a Uniform Parol Evidence Rule and Principles of Contract Interpretation, 42 IND. L.J. 333, 343–44 (1967) (citations omitted)).} In fact, "[s]uch is the confusion that in any state a decision may be reached which is ludicrous in result and analysis, or sensible in result but strained in analysis."\footnote{13}{Id.} It may be that the cases are unprincipled because the rule of law itself is obscure and difficult out of all proportion to the benefits it yields. A related possibility is that the reduction of class hours devoted to the study of contract law has reduced students’ mastery of the PER, leaving counsel unable to disentangle the rule’s complexities.

Whatever the cause, the prevailing methodology seems to gather fragments of the rule from randomly selected cases and toss them randomly into the text of a decision. Words and phrases gleaned from prior cases are quoted, often in clusters, without apparent regard for consistency in the precedent relied upon or for the articulation of a coherent rule. Rarely does any analysis follow the selected quotations or, if there is any, it tends to be conclusory. Such practice defies rational analysis. Reduced to unconnected words without historical or doctrinal context, the words and phrases of the fragmentary North Carolina PER may be recounted and assessed for their import, but the use of these PER fragments by the courts cannot be organized into a systematic account of the rule.\footnote{14}{See infra Part IV.B. (discussing the application of the PER in North Carolina cases).} The current methodology gives prophetic significance to Thayer’s 1898 complaint that as to the PER, "there is a grouping together of a mass of incongruous matter, and then it is looked at in a wrong focus."\footnote{15}{Chadbourn & McCormick, supra note 4, at 151 (quoting JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 390 (Boston, Little, Brown, and Co. 1898) (internal quotation marks omitted)). Thayer was speaking not of a general failure of PER methodology as is described in this Article, but of the relatively minor error of assigning the rule to the law of evidence rather than to the...}
Such a rule defies characterization: it is neither consistently liberal nor conservative. No longer can anyone count on North Carolina courts to champion the admission of credible extrinsic evidence, as they used to do. Nor, on the other hand, is the rule a dependable exclusionary tool; although there is certainly a line of cases running counter to the old liberalism, exhibiting an implacable determination to maintain inviolate the sanctity of the writing, it is not applied with consistency. Nor can the rule claim a middle-of-the-road status given the wild swings in the case law from one extreme to the other. What is fair to say is simply that, despite the most determined effort, no useful generalization has been found for what North Carolina courts are doing or will do next with the PER.

There is, however, a robust exception observable in two groups of cases where the general fragmentary methodology gives way to a satisfyingly nuanced and principled analysis. In one group, the PER analysis is informed, shaped, and given meaning by an external factor, such as a recordation requirement. Cases involving restrictive covenants exemplify this group, with the courts applying the PER conservatively, justified by policy concerns and conventional risk allocation. The second group of cases has in common the judicial expertise that comes from frequent litigation. For example, North Carolina courts approach controversy over the terms of consent decrees and insurance contracts in strikingly different ways that seem well attuned to the details of underlying policy, bargaining context, language, syntax, and precedent, paying close attention to the nature of the process that typically leads to such written agreements. Both these groups reveal the courts’ confident awareness of the practical significance of what is included in the writing and what is not. A knowledgeable attorney has a good chance of predicting what the court will do with the PER in these cases.

B. A Murky History

Almost the only thing universally agreed upon about the PER is its notorious difficulty and complexity. As Thayer famously said of it, “[f]ew things are darker than this, or fuller of subtle difficulties.” The rule has yielded little but “fog and mystery.” McCormick went

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substantive law of contract. See JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 390 (Boston, Little, Brown, and Co. 1898).

16. See infra Part IV.A.

17. THAYER, supra note 15, at 390.

even further than Thayer: there is no agreement about the rule among courts and commentators beyond the most superficial level.\textsuperscript{19} There is no single version for which there is a sufficient consensus even to build a discussion in North Carolina, much less nationwide.\textsuperscript{20} Rather than resolving disagreement, discussion seems to proliferate it. Even the rule's name is misleading, confusing generations of law students.\textsuperscript{21}

Nevertheless, the name remains unchanged despite Thayer's and Wigmore's having demonstrated once and for all, more than a century ago, that the PER is not a rule of evidence at all, but a substantive rule of contract law.\textsuperscript{22} Although it does have the effect of excluding evidence, the PER does so by substantively limiting the terms of an agreement to those in the formal writing.\textsuperscript{23} A term agreed to earlier is inadmissible only because it has been superseded by the writing as a matter of law. Not surprisingly, the decree of the great commentators denying the PER's legitimacy as a rule of evidence was not accepted universally or instantaneously. The scholarly community embraced the change. Secondary authorities, given great deference by the North Carolina courts, have long agreed that the PER is not a rule of evidence, but of substantive contract law. These

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  \item \textsuperscript{19} See Chadbourn & McCormick, supra note 4, at 151. Disagreement extends to the PER's scope (does it cover interpretation?), basic content (what proves completeness and why is it called total integration?), and rationale (credibility? sacredness of writing? fear of juries? superseded terms?), as well as many more detailed particulars.
  \item \textsuperscript{20} See Ralph James Mooney, A Friendly Letter to the Oregon Supreme Court: Let's Try Again on the Parol Evidence Rule, 84 OR. L. REV. 369, 372 (2005) (stating that there is no clear definition of the rule, nor standards for resolving any issues the rule might raise). Chadbourn and McCormick had to simplify the Wigmore rule by teasing away all peripheral issues in order to use it as a model for discussion. See Chadbourn & McCormick, supra note 4, at 152.
  \item \textsuperscript{21} "Parol" is a misnomer to the extent it suggests the rule excludes only oral terms. Whether the rule is one of "evidence" is discussed immediately below. See infra notes 22-37 and accompanying text. Peter Linzer introduced the rule as "Neither Holy Nor Roman." Linzer, supra note 12, at 799. He explained, "[i]n fact, like that political anachronism, the Holy Roman Empire, the parol evidence rule fits none of the words in its name: it is not limited to parol—that is, oral—testimony, it is not evidentiary, and it is not really a rule." \textit{Id.} at 802.
  \item \textsuperscript{22} THAYER, supra note 15, at 390-483. Thayer referred to the rule as the "so-called 'Parol Evidence Rule.' " \textit{Id.} at 410. Chadbourn and McCormick noted with approval that "Thayer and Wigmore have shown convincingly that, despite the popular notion, it is not a rule of evidence based on a supposed superior probative force of written over unwritten evidence. It is rather a rule of substantive law defining what facts are legally effective when there is a writing." Chadbourn & McCormick, supra note 4, at 152 (citing THAYER, supra note 15, at 390; 5 WIGMORE, supra note 8, \S 2400).
  \item \textsuperscript{23} See Calamari & Perillo, supra note 18, at 334.
\end{itemize}
include all editions of Wigmore, Williston, and Corbin. The Uniform, Federal, and North Carolina Rules of Evidence all have omitted the PER from their coverage. Also strongly rejecting the evidentiary connection are a number of secondary North Carolina authorities customarily relied on by the state supreme court in its opinions on issues of evidence and contract law. When evidence texts have included short discussions of the PER, they have done so grudgingly and as a concession to tradition, abandoning the rule altogether in the context of the interpretation of writings, where the complexity of the issue makes the task not worth the effort. One author universally and reverently relied on in North Carolina evidentiary cases chided the court, cautioning that it “cannot make a rule of evidence out of something that is not. It can only mean that here is one proposition of substantive law that must be taken advantage of in an unusual manner.” Evidence scholars have shown relief in being rid of the PER and the most recent edition of Brandis and Broun on North Carolina Evidence omits it altogether.

However, the Supreme Court of North Carolina has been reluctant to abandon its historic insistence that the rule belongs to the law of evidence. For a while, the poor rule seemed doomed to homelessness. When the high court stopped insisting that the PER was a rule of evidence, it still avoided conceding the question outright. Instead, the court equivocated, calling the rule “a well established rule of evidence and of substantive law” and then

25. 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 258, at 227 n.3 (6th ed. 2009) [hereinafter BRANDIS & BROUN].
26. 2 HENRY BRANDIS, JR., BRANDIS ON NORTH CAROLINA EVIDENCE § 573 (3d ed. 1988); 2 HENRY BRANDIS, JR., STANSBURY'S NORTH CAROLINA EVIDENCE § 251 (Brandis rev. 1973) [hereinafter STANSBURY].
27. 2 STANSBURY, supra note 26, § 261.
28. Modern evidence scholars are glad to be able to turn their backs on the PER, if the comments of Kenneth S. Broun and the late Henry Brandis in conversation with the author are typical. See E-mail from Kenneth S. Broun, Henry Brandis Professor of Law, University of North Carolina School of Law, to Caroline N. Brown, Professor of Law, University of North Carolina School of Law (Apr. 15, 2009, 16:50:19 EST) (on file with the North Carolina Law Review). Evidence texts have finally begun to omit the PER from coverage.
29. 1 BRANDIS & BROUN, supra note 25, at xxi.
30. See Chadbourn & McCormick, supra note 4, at 152 n.4 (“In North Carolina the rule is treated as one of evidence.”).
insisting that it was "unnecessary to choose."32 Fortunately, the court of appeals took up the tacit invitation and has clearly recognized the PER as a substantive rule of contract law.33 Having ignored many opportunities to nudge the lower court back into its old position, the Supreme Court of North Carolina has been sending tacit signals of acquiescence by pointing (correctly) to irrelevance as the basis for refusing to admit extrinsic evidence under the PER.34

Thus, haltingly, the PER has crept into a corner of its own near the foundation of contracts, where it belongs. It might be supposed that the move from evidence has helped to clarify the rule, but such a supposition would be mistaken. This contracts rule that purports to give effect to parties' intentions without any effort to ascertain what they are provokes as much wariness in its new place as it ever had in the old.35 Thus, Wigmore's deprecation of it as the "most discouraging subject in the whole field"36 of evidence is matched by Judge Dyer's uncomplimentary metaphor of "a treacherous bog in the field of contract law."37

Despite its classification having only recently been settled, the PER is no youngster. It is an Old One born of a "primitive formalism which attached a mystical and ceremonial effectiveness to the carta
and the seal.” McCormick called it a “mysterious legal ban” in the Yale Law Journal, going on to elaborate:

[C]onvenient as this dark and tortuous ritualism was in enabling the trial judge to retain control over issues not safe to be trusted to the jury, yet the veiled inconsistencies and irrational mysticism of this protective phraseology which is draped around the written document began to impart a sense of uneasiness.

Some hold that the King's Bench created the PER in The Countess of Rutland's Case, while others insist it was Sir Edward Coke's own fabrication in his report of the case. The rule ascribes a

38. Charles T. McCormick, *The Parol Evidence Rule as a Procedural Device for Control of the Jury*, 41 YALE L.J. 365, 369 n.8 (1932) (quoting 5 WIGMORE, supra note 8, § 2426). With Wigmore, McCormick also credited Thayer for the origins of the PER. *Id.* Thayer defines “carta” as a formal document required by law in a transaction, signifying “more than written evidence.” *THAYER, supra* note 15, at 395. McCormick explained, the writer merely ventures to submit that this formalism, abandoned elsewhere in so many areas of modern law, had here a special survival value—the escape from the jury—which led the judges to retain for writings the conception that they had a sort of magical effect of erasing all prior oral agreements.

McCormick, *supra*, at 369 n.8. It has been said that “Bards claim[ed] that crystals and other stones can hold words within them, and thus are aids to the memory.” SUSAN FRASER KING, *LADY MACBETH* 53 (2008), but the author has been unable to find an authoritative source for the assertion. The legend brings to mind Oliver Wendell Holmes' famous insistence that “a word is not a crystal,” deploring the legal tendency to give words the talismanic effect formerly given crystals, to ensure order and veracity. For further discussion of Holmes' quote, see *infra* note 356 and accompanying text.


40. *Id.* at 372.


Coke reports Popham, C. J., as saying, in the Countess of Rutland’s case: “Also it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory.”
talismanic virtue to the written word, purporting through a sort of alchemy or necromancy to draw the single true intention from the word’s essential nature or through an exercise of divination by the court. McCormick describes the words often used by North Carolina courts in applying the rule, saying the “phrase becomes a shibboleth, repeated in ten thousand cases.” His criticism was not aimed at the particular words so much as at the methodology by which the PER is applied. North Carolina cases, then as now, read much like a catalog of verbal charms, as if the act of recitation itself “enables the judge to head off the difficulty at its source, not by professing to decide any question as to the credibility of the asserted oral variation, but by professing to exclude the evidence from the jury altogether because forbidden by a mysterious legal ban.”

The case that is perhaps the oldest in the state to apply the PER, Smith v. Williams, involved the sale of a slave. The judge expressed his belief that “there can be no doubt that the rule is as ancient as any in the law of evidence, and that it existed before the necessity of reducing any act into writing was introduced.” The writing provided:

Know all men by these presents, that I, Obed Williams, of the county of Onslow, and State of North-Carolina, have bargained and sold unto David Smith, of the aforesaid county and State, one negro fellow, named George, about thirty years of age, for and in consideration of three hundred dollars. I do warrant and defend the said negro against the lawful claim or claims of any

McCormick, supra note 38, at 367 n.3 (quoting Countess of Rutland’s Case, 77 Eng. Rep. at 90).

43. McCormick, supra note 38, at 369 (“Parol evidence is inadmissible to vary, contradict, or add to the terms of a written instrument.”) (internal quotation marks omitted). Identical or virtually identical tests are found in Century Commc'n. Inc. v. Housing Auth., 313 N.C. 143, 146, 326 S.E.2d 261, 264 (1985) (holding extrinsic evidence is not permitted to “add to, detract from, or vary” the terms of an integrated writing); Rowe v. Rowe, 305 N.C. 177, 185, 287 S.E.2d 840, 845 (1982) (citing 2 STANSBURY, supra note 26, § 251) (consent divorce order); Hoots v. Calaway, 282 N.C. 477, 486, 193 S.E.2d 709, 715 (1973); Godfrey v. Res-Care, Inc., 165 N.C. App. 68, 76, 598 S.E.2d 396, 402 (2004) (stating that the PER prohibits evidence of prior oral agreements “to vary, add to, or contradict the terms of a written instrument intended to be the final integration of the transaction” (quoting Hall v. Hotel L’Europe, Inc. 69 N.C. App. 664, 666, 318 S.E.2d 99, 101 (1984))); Thompson v. First Citizens Bank & Trust Co., 151 N.C. App. 704, 709, 567 S.E.2d 184, 189 (2002).

44. McCormick, supra note 38, at 369.

45. Id.; see also Chadbourn & McCormick, supra note 4, at 154 (disapproving three methods for the court to determine whether the PER applies). For a discussion of cases implementing McCormick’s characterization of the PER, see supra note 43.

46. 5 N.C. (1 Mur.) 426 (1810).

47. Id. at 432.
person or persons whomsoever, unto him the said Smith, his heirs and assigns forever. Given under my hand this 29th January, 1802.

OBED WILLIAMS.

Teste, GEORGE ROAN

Contending that the contract's oral terms were entitled to the same treatment as those in the writing, the plaintiff pointed out that "contracts by our law are distinguished by specialty [i.e., sealed writings] and by parol; that there is no third kind, and that whatever is not a specialty, though it be in writing, is by parol." Because the writing was not sealed, and thus not entitled to the high status given a "specialty," the plaintiff saw no barrier to his proving that defendant had made an oral warranty giving assurance that the slave was healthy, when in fact he was "afflicted with a rupture." A witness had overheard the oral warranty made at the time of the transaction, so that there was no issue of its credibility; nor was a writing required by other law as a formality. Thus, the court was faced with the discrete issue whether to give special legal significance to an unsealed writing that, according to the law of the time, was no more than mere evidence of the contract it recited. The court rejected the oral warranty, citing The Countess of Rutland's Case. Having "resolved that it was very inconvenient that matters in writing should be controlled by averment of parties, to be proved by uncertain

48. Id. at 426.
49. Id. at 429.
50. Id. at 426.
51. Id. at 431–32. ("By the Common Law of England, there were but few contracts necessary to be made in writing. Property lying in grant, as rights and future interests, and that sort of real property, to which the term incorporeal hereditament applies, must have been authenticated by deed. So the law remained until the stat. 32 H. 8, which, permitting a partial disposition of land by will, required the will to be in writing; but estates in land might still be conveyed by a symbolical delivery in presence of the neighbors, without any written instrument; though it was thought prudent to add security to the transaction by the charter of feoffment. The statute of 29 Car. 2, commonly called the statute of frauds, has made writing and signing essential in a great variety of cases wherein they were not so before, and has certainly increased the necessity of caution in the English Courts, with respect to the admission of verbal testimony, to add to or alter written instruments, in cases coming within the provisions of that statute. That law being posterior to the date of the charter under which this State was settled, has never had operation here; so that the Common Law remained unaltered until the year 1715, when a partial enactment was made of the provisions of the English statute.").
52. See id. at 427.
testimony of slippery memory, and should be perilous to purchasers, farmers, &c,"53 the court was of the opinion that:

[T]he parties, by making a written memorial of their transaction, have implicitly agreed, that in the event of any future misunderstanding, that writing shall be referred to, as the proof of their act and intention: that such obligations as arose from the paper, by just construction or legal intendment, should be valid and compulsory on them; but that they would not subject themselves to any stipulations beyond their contract; because, if they meant to be bound by any such, they might have added them to the writing; and thus have given them a clearness, a force, and a direction, which they could not have by being trusted to the memory of a witness. For this end, the paper is signed, is witnessed, and is mistakenly recorded.54

As the discussion of presumptions below indicates, the influence of Smith v. Williams is still discernible.55 However, the convenience emphasized by the court in Smith v. Williams as a rationale for precluding proof of a contemporaneous oral agreement has so far proven elusive. Ironically, this rule that purports to provide the courts with a certainty-filter for the legally effective words of a contract lacks both a common vocabulary and a commonly acknowledged methodology.56

II. DISCUSSION MODEL

Because not even the most elementary discussion can proceed without words that have recognizable meaning and a framework for organizing decisions, a model of the utmost simplicity is set out here. It represents the author's own idea of the most basic skeleton of a useful composite rule, developed over years of teaching and after having read virtually all the North Carolina PER cases. Some of its parts reflect widespread consensus, while others are derived from North Carolina practice or, where there is uncertainty or conflict,

53. Id. at 432.
54. Id. at 430–31.
55. See infra notes 238–44 and accompanying text.
56. Mooney, supra note 20, at 372 ("In part, the parol evidence rule is so ‘dark and difficult’ for us all because, amazingly, there exists even today no definitive statement of the rule."). Peter Linzer says, "[s]o, instead of a parol evidence ‘rule,’ there is a continuum of many different approaches, all using the same name and often using the same words." Linzer, supra note 12, at 807.
from what the author considers best practice. The model is offered here for the sake of convenience rather than in contention for its merit. It is intended to provide the least controversial generic background against which the startling differences between Williston’s and Corbin’s versions of the PER may also be compared with a minimum of confusion. Those who are already knowledgeable should find the model no impediment, while those with less confidence in their mastery of the rule may find it useful to come back to the model periodically throughout later sections of this Article. Although it provides a template by which North Carolina practice may be evaluated, its simplicity should make it useful elsewhere as well.

The PER benefits from a fresh start, albeit only a hypothetical and limited one, for much that is wrong with it is probably owed to its unbearable and inescapable complexity. To maintain the usefulness of the model, subissues are omitted from it and it is constructed to minimize controversy. As fascinating as the threads of controversy are, any inclination to pursue them has been resisted in the interest of maintaining the focus of this Article. Because the author’s observation is that attorneys as well as students are often mystified by the Restatements’ use of specialized language such as “integration,” “partial integration” and “total integration,” that terminology is avoided in this Article except for an occasional parenthetical to

57. Where the model reflects the author’s opinion about best practice, the issues are explored below in text rather than here as a justification for inclusion in the model. See infra notes 60–73 and accompanying text.

58. There are too many variations of the PER in North Carolina and elsewhere, to make a credible contention for correctness. However, it is as unobjectionable as the author can make it. Those readers who prefer to compare the Discussion Model to an “official” version may wish to consult Restatement (Second) of Contracts sections 209–18 (PER) and sections 200–04 (Interpretation); many other provisions pertain to each of these topics. This recommendation is for readers’ convenience and is not intended to suggest that the second Restatement is more authoritative than any other version of either the PER or the rules of interpretation of contracts.

59. However, it may help the experienced reader to know where controversy is an unavoidable part of or adjunct to the simple rule of the model, especially since not all controversy is recognized by the courts whose opinions reveal it. What sort of writing is required for the rule’s application and what indicates that the parties regard it as final are issues that have produced controversy in North Carolina without the courts’ acknowledgement. Issues that seem to have generated conscious controversy include the test for inconsistency/contradiction as opposed to permissible supplementation (particularly with regard to terms implied by law), the test for completeness, the degree to which interpretation is implicated in the PER proper, the test for ambiguity and the relevance of ambiguity to the PER (as opposed to interpretation), and applicability of the plain meaning rule to exclude a meaning shared by both parties. This list is not exhaustive.
prevent confusion. Ordinary words seem sufficient and are more likely to reduce confusion than to add to it.

I. TERMS OF THE CONTRACT

A. A final written contract ("integration") bars contradictory extrinsic terms from any prior agreement (oral or written) or from a contemporaneous oral agreement ("extrinsic terms").

B. A written contract that is not only final but also complete ("total integration") bars not only contradictory but also supplementary extrinsic terms.

60. Words in bold are central terms discussed in more detail later in this Article.

61. 3 CORBIN, supra note 3, § 588. A writing that is not fairly characterized as "the contract" is safe from the PER, although it may raise statute of frauds issues. See 4 CAROLINE N. BROWN, CORBIN ON CONTRACTS (STATUTE OF FRAUDS) § 22.1 (Joseph M. Perillo ed., 1997).

62. Wigmore is said to have begun the usage of "integration" to designate finality, although it is sometimes attributed to Williston. 3 CORBIN, supra note 3, § 588. The terminology was adopted in the Restatement of Contracts and continued in the Restatement (Second) of Contracts and in Corbin's treatise. See id.; RESTATEMENT (SECOND) OF CONTRACTS § 209 (1981); RESTATEMENT OF CONTRACTS § 228 (1932). "Total" or "complete" integration indicates not merely finality, but also completeness, while "partial" integration denotes an agreement that is final, but does not include all matters agreed to. See RESTATEMENT (SECOND) OF CONTRACTS § 210 (1981).

63. "Extrinsic terms" in this Article is used as a shorthand indication of terms not in the written contract that are vulnerable to being barred by the PER. All agree that these include all prior oral and written agreements and contemporaneous oral agreements, but there is less unanimity about contemporaneous writings. These are often included as part of the final writing, or treated as separate "collateral" agreements that are enforceable apart from the writing. Corbin's treatment of contemporaneous written agreements is slightly different from that used here, but not for reasons that would undermine the discussion of the rule in this Article. See 3 CORBIN, supra note 3, § 588. Corbin seems to have subsumed such agreements within the major labels of "prior" or "subsequent," with the ordinary effect of such timing. Id. Thus, another writing roughly contemporaneous with the written contract might be deemed prior and so within the exclusion of the rule, or subsequent and hence outside its reach as an ordinary modification. Id. In North Carolina, contemporaneous writings are generously given effect as part of the final writing ("integration"). Zinn v. Walker, 87 N.C. App. 325, 334, 361 S.E.2d 314, 319 (1987) ("[S]eparate contracts relating to the same subject matter and executed simultaneously by the same parties may be construed as one agreement." (citing 3 CORBIN, supra note 3, § 578; 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 578 (Supp. 1984); Williams v. Mobil Oil Corp., 83 A.D.2d 434, 439-40 (N.Y. App. Div. 1981))). This is true even where one contract states that there are no other agreements between the parties. See 3 CORBIN, supra note 3, § 578; Chapel Hill Spa Health Club, Inc. v. Goodman, 90 N.C. App. 198, 202, 368 S.E.2d 60, 62 (1988) ("A general rule of contracts is that all contemporaneously executed instruments relating to the subject matter of the contract are to be construed together in order to determine what was undertaken and to effectuate the intention of the parties.").

64. Finality under this rule is identical to that under the preceding rule in I.A. See supra notes 61-63 and accompanying text.
C. The PER never bars later agreements;\textsuperscript{65} nor does it bar relevant extrinsic evidence introduced to prove invalidity or that no contract was made.\textsuperscript{66}

\section*{II. MEANING (INTERPRETATION)}\textsuperscript{67}

\begin{footnotesize}
\begin{enumerate}
\item Arthur L. Corbin, \textit{The Parol Evidence Rule}, 53 YALE L.J. 603, 607 (1944). "It is now perfectly clear that informal contracts, whether written or oral, can be modified and discharged by a subsequent agreement, whether written or oral." \textit{Id.}
\item See Chadbourn & McCormick, supra note 4, at 167-70. Fraud may thus be shown by extrinsic evidence, but not if the writing itself negates it, for example, by making clear that no such representation was made or relied upon. It should be noted that unlike the PER, the statute of frauds may bar a later agreement if a term required by the statute is omitted from the writing and no exception applies. See Corbin, supra note 65, at 609-10; 4 BROWN, supra note 61, § 22.1. When the statute of frauds is considered, care should be taken to be sure the omitted term is actually required by the statute to be in the writing. Under the U.C.C. rule, U.C.C. § 2-201 (1977), N.C. GEN. STAT. § 25-2-201 (2007), the only term required is quantity. For an argument that not even quantity is required, see 4 BROWN, supra note 61, § 21.2; Caroline N. Bruckel (now Brown), \textit{Consideration in Exclusive and Nonexclusive Open Quantity Contracts Under the U.C.C.: A Proposal for a New System of Validation}, 68 MINN. L. REV. 117 passim (1983). Section 2-209 of the U.C.C., codified at section 25-2-209 of the North Carolina General Statutes, does not add essential terms to the statute of frauds writing. The PER, which attaches exclusionary legal consequences to a writing, should not be confused with the statute of frauds, which attaches similar legal consequences to the \textit{absence} of a writing. Under the U.C.C., a no-oral-modification clause may also preclude oral modification, although the common law is to the contrary. U.C.C. § 2-209(2) (1977). Like the North Carolina citations, references to the uniform version of U.C.C. Article 2 are to the original Code as enacted by states, not to the 2003 revision.
\item Whether interpretation is a part of the parol evidence rule is not a matter of perfect consensus. See Linzer, supra note 12, at 800-01 nn.6-12. Linzer greeted the issue with his own contribution to the rule's collection of metaphor: "[T]he parol evidence rule and the plain meaning rule are conjoined like Siamese twins. Even though many academics and more than a few judges have tried to separate them, the bulk of the legal profession views them as permanently intertwined." \textit{Id.} at 801. The decision to include interpretation here is a pragmatic one, reflecting what the North Carolina courts do. The issue of ambiguity is a central theme of the cases whether they sound in PER or interpretation, with parties shifting fluidly from one topic to the other and the courts seeming to mix the two. Meaning attributed to words in a written contract may be based upon extrinsic evidence that indicates agreement (sometimes tacit or implied) between the parties. In such cases, courts may understandably bring to bear the principles of the parol evidence rule to determine admissibility of the extrinsic agreement: it seems a pointless cavil to object based upon doctrinal purity. The dictionary that is applied to contract terms may be a public one or an idiosyncratic one reflecting common purposes or background. It is not a big stretch to think of such a thing as a contract term. It might be asserted that interpretation does not vary depending upon integration or complete integration. See 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.12 (rev. ed. 1998). However, the North Carolina cases give so little attention to a formal analysis of complete integration as to obfuscate any distinction. Furthermore, under Williston's view (the first \textit{Restatement}'s), integration does make a difference. See Calamari & Perillo, supra note 18, at 347.

This part of the model is limited to issues pertinent to this Article except insofar as is necessary to provide context. This model is based on current North Carolina case law, rather than on general precepts, and is offered not as a set of rules that govern
\end{enumerate}
\end{footnotesize}
A. Unambiguous words in a written contract are given their ordinary or “plain” meaning, 68 except that
1. The parties' actual mutual understanding 69 applies unless made irrelevant by separate rule of law such as record notice for real property. 70
2. One party's understanding applies if the facts indicate that the other ought to bear the risk of disagreement or misunderstanding, 71 or
3. A meaning applies that is appropriately supported by evidence of a trade usage or custom, course of dealing, or course of performance.

B. Extrinsic evidence is admissible to resolve ambiguity 72 in a written contract. Ambiguity may be shown, inter alia, by
1. A conflict in the terms of the writing,
2. The absence of any application for the term within the four corners of the writing.\(^{73}\)

3. Susceptibility of the term to more than one reasonable meaning, or

4. Susceptibility of the term to either of the parties' meanings.

### III. THE BIG SPLIT

The great PER dispute is whether and to what degree a writing may prove its own completeness as against otherwise relevant evidence to the contrary. This great question permeates issues of completeness, contradiction, and ambiguity, but not finality, which is regarded by all as a matter of actual intention.\(^{74}\) In most jurisdictions, completeness is the crucial issue, but in North Carolina, at least below the level of the state supreme court,\(^{75}\) the quarrel seems to permeate the entire PER landscape, inexplicably drawing the interpretation element of ambiguity into the mix. It seems likely that the principal difficulty in North Carolina is confusion, rather than a theoretical split. State courts characteristically resort to a fragmentary collection of formulae chosen from prior cases. In any given case, it is impossible to guess which formula will be chosen. Often inconsistent formulae are layered one upon the other.

Traditionally, it has been well established that the PER and interpretation issues turn on the parties’ "intentions," but the meaning of that word is a matter of fierce disagreement. Two opposing schools of thought are recognized, Williston's often being characterized as "conservative" while Corbin's is called "liberal."\(^{77}\) Given the vicissitudes of academic politics,\(^{78}\) those descriptors are useful more to predict the comparative likelihood of extrinsic terms coming in than to signal alignment with conventional politics.\(^{79}\)

73. See Posner, supra note 2, at 535.
74. See Restatement of Contracts § 228 (1932); 3 Corbin, supra note 3, § 588; 2 Williston, supra note 3, § 633 n.13.
75. The supreme court hears many fewer PER cases than does the court of appeals.
79. See generally Peter Linzer's characteristically pungent comment: "For the past quarter-century, the Democrats have sounded like Republicans, the Republicans made
Williston’s view, expressed in the first Restatement of Contracts in 1932, looked to the writing itself as the best proof of intent under the PER. What was indicated within the “four corners” of a writing trumped extrinsic evidence under the rule, even in the face of clear proof that the parties agreed to something quite different from what the writing said. Intent, to Williston, was a legal concept, not a factual one, at least in this context. Corbin, at the opposite extreme, together with the Restatement (Second) and the Uniform Commercial Code, conceived of intent as a factual matter referring to the parties’ actual intentions. The goal of contract law, as he saw it, was to give effect to those intentions whenever possible. Not surprisingly, while the PER loomed large in Williston’s system, justified (as he thought) by predictability and certainty, it was no favorite of Corbin’s.

Experience seems to give the victory to Corbin. Williston expected his version of the PER to diminish litigation, enhancing uniformity, but its history fails to substantiate his hopes even in New York—a Williston jurisdiction if there ever was one. Judge Dyer of the Fifth Circuit Court of Appeals elaborated upon the case law:


See 2 WILLISTON, supra note 3, §§ 631–50.


An excellent example is Smith v. Williams, 5 N.C. (1 Mur.) 426 (1810), discussed supra in notes 46–56 and accompanying text.

2 WILLISTON, supra note 3, § 633. “That the intention of the parties is not relevant in courts adopting the same approach as Williston has been recognized in a number of opinions.” Calamari & Perillo, supra note 18, at 340.

N.C. GEN. STAT. § 25-2-202 (2007) (PER); § 25-1-303 (revised Art. 1 on course of dealing, course of performance, and usage of trade, merging original §§ 25-1-205 and 25-2-208). Llewellyn, the Chief Reporter of the U.C.C. and drafter of Article 2, was the protégé of Corbin. The U.C.C. is omitted from substantive discussion here.

See Calamari & Perillo, supra note 18, at 339 (“When Professor Corbin speaks of the intent of the parties he emphatically means their actual expressed intent.”).

3 CORBIN, supra note 3, § 582 (“It would have been far better had no such rule ever been stated.”); see also Corbin, supra note 65 passim (describing his opposition to the PER).

See Linzer, supra note 12, at 807 (“In a vast variety of contractual settings those principles have been the subject of a long line of modern Court of Appeals decisions before and since [the ‘hard’ PER was reinstated in the strongest terms in the seminal 1990 decision W.W.W. Associates, Inc. v. Gianconteri, 566 N.E.2d 639 (N.Y. 1990). Not surprisingly, not only in the Court of Appeals, but in the state court system generally, the most frequently litigated issue in commercial controversies concerns the exclusion or admission of parol evidence in determining the meaning and effect of written agreements and instruments. This has spawned a vast number of Appellate Division and lower court decisions.” (citing Calamari & Perillo, supra note 18, at 343–44)); Stephen Rackow Kaye, The Parol Evidence Rule Generally, in 3 NEW YORK PRACTICE SERIES—COMMERCIAL
Interspersed in this quagmire are quicksand-like state court decisions, which appear equitable in specific situations but remain perilous for legal precedent. Federal courts, attempting to clarify, have sometimes but confused and compounded muddled interpretation of the axiom. Thus we tread cautiously in this morass.  

He did find some solace in “the relatively sure path of New York law.” Still, even in New York, the rule creates havoc. In 1990, New York’s high court attempted once more to lay down the law in *W. W. W. Associates, Inc. v. Giancontieri.* If the number of cases citing *Giancontieri* is any indication, the effort has not been successful in stemming litigation. Long ago, Corbin had had enough, exclaiming, “[A]re we to continue like a flock of sheep to beg the question at issue, even when its result is to ‘make a contract for the parties,’ one that is vitally different from the one they made for themselves?”

Corbin’s sheep metaphor is well taken, for what is at issue is not a small thing. It is not a matter of semantics or methodology or technicalities, nor is it ultimately a question of admitting or excluding evidence. The stunning import of the PER goes much further, expanding the effect of the statute of frauds well beyond the categories of contracts it encompasses. The effect of the PER, in the final analysis, is to prohibit oral agreements from being made at all, at least in transactions important enough to produce a writing.

The PER serves well enough to guard negotiated deals from superseded terms, but that is a function well outside the scope of

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88. Chase Manhattan Bank v. First Marion Bank, 437 F.2d 1040, 1045 (5th Cir. 1971).
89. *Id.*
91. It is said to have been cited 567 times in seventeen years. Kaye, *supra* note 87, § 41:9.
92. 3 CORBIN, *supra* note 3, § 582.
94. See 4 BROWN, *supra* note 61, § 12.1. The statute of frauds furthers this goal by imposing a writing requirement upon significant categories of contracts. *Id.*
95. There is little evidence that the rule is needed for this purpose. The case law indicates that transactions negotiated over time are treated by the parties as representing interpretation issues rather than PER ones. See, e.g., State v. Philip Morris USA, Inc., 359
experience of most ordinary people, who do not make contracts by a process of negotiated drafts. Faxes and e-mail reduce the likelihood of a bad experience under the PER for many entrepreneurs and small businesses who might otherwise be at risk,96 protecting them by contemporaneous writings that are outside the rule, or better still, by modifications.97 Otherwise the PER is a wolf, hell-bent on tearing to pieces the freedom of contract of Corbin’s sheep. Because the rule makes no distinction between significant commercial transactions and home repair contracts, its effect is especially alarming for the consumer. We, who never get a chance to negotiate anyway, listen credulously as the salesperson (who also believes what he is saying) assures us: “Just sign this. It’s just a formality. Don’t worry—I’ve never seen it enforced in all the years I’ve been with the company. That’s not how we do business. I’d change it if I had the authority, but it’s a nationwide form. Here, call my boss. . . . No, she can’t change it either.”98

Not surprisingly, strong feelings have been expressed about subsuming the parties’ clearly proven mutual intentions to a paper construct, but not everyone finds it abhorrent. Williston was convinced it served higher principles.99 Even before the case that is credited with the birth of the PER,100 we are told that Justice Brook “thundered from the bench”.101

N.C. 763, 772–81, 618 S.E.2d 219, 225–30 (2005) (interpreting the effect of the Fair and Equitable Tobacco Reform Act of 2004 on the National Tobacco Grower Settlement Trust; neither party argued that an extrinsic term should be recognized).

96. The usefulness of faxes and e-mails to avoid PER issues was suggested in an e-mail to the author by Jim Phillips of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP in Greensboro, N.C. and, at the time, Chair of the UNC Board of Governors. See E-mail from Jim Phillips, Attorney, Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, to Caroline N. Brown, Professor of Law, University of North Carolina School of Law (Apr. 27, 2009, 09:22:08 EDT) (on file with the North Carolina Law Review).


98. One strategy sometimes effective in such circumstances is to agree to sign the contract if a handwritten amendment is signed afterwards. The salesperson may lack authority, however.

99. 2 WILLISTON, supra note 3, § 607; accord RESTATEMENT OF CONTRACTS § 230 illus. 1 (1932) (noting that a term has the single objective meaning attributed to it by a hypothetical “reasonably intelligent person”).

100. The Countess of Rutland’s Case, (1604) 77 Eng. Rep. 89 (K.B.). For a discussion of the historical significance of this case, see supra notes 41–42 and accompanying text.

101. Calamari & Perillo, supra note 18, at 348.
The party ought to direct his meaning according to the law, and not the law according to his meaning, for if a man should bend the law to the intent of the party rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance and to destroy all learning and diligence.\(^\text{102}\)

The contrary view was expressed even more furiously by Jeremy Bentham, condemning what he called “an enormity, an act of barefaced injustice ... a practice exactly upon a par (impunity excepted) with forgery.”\(^\text{103}\)

IV. THE PAROL EVIDENCE RULE AS APPLIED IN NORTH CAROLINA

In North Carolina, the influence of each of the viewpoints set out above is discernible in the cases, although it is not the goal of this Article to parse them. Sometimes the courts seem to make a de facto compromise between the two extremes of Williston and Corbin. Perhaps because the adversaries use the same terminology, opposite elements often coexist in the same case without apparent judicial awareness of the dissonance. Although there are discrete instances of its sensible and principled application, for most purposes the PER in North Carolina is broken, all that remains being fragmentary pieces.

A. Well-Reasoned Categories

As indicated above, there are some contexts in which the state’s courts apply the PER with a particularly sure hand, producing results that seem well reasoned and predictable. North Carolina courts are adept at applying the PER in the context of merger clauses, whether businesses\(^\text{104}\) or consumers\(^\text{105}\) are affected. Merger clauses

\(^{102}\) Id. (quoting Thockmerton v. Tracy, (1554) 75 Eng. Rep. 222, 251 (K.B.)) (internal quotation marks omitted).

\(^{103}\) Id. (quoting 5 Jeremy Bentham, Rationale of Judicial Evidence 590 (London, Hunt and Clarke 1827)). For a discussion of Bentham’s views on the importance of written contracts see id. at 341 n.41.

\(^{104}\) See, e.g., Med. Staffing Network, Inc. v. Ridgway, — N.C. App. —, 670 S.E.2d 321, 326 (2009). For a further discussion of this case, see infra notes 262–67 and accompanying text. See also Zinn v. Walker, 87 N.C. App. 325, 333, 361 S.E.2d 314, 318 (1997) (“Where giving effect to the merger clause would frustrate and distort the parties’ true intentions and understanding regarding the contract, the clause will not be enforced: ‘... to permit the standardized language in the printed forms... to nullify the clearly understood and expressed intent of the contracting parties would lead to a patently unjust and absurd result ...’ When, however, as in the present case, the parties’ conduct indicates their intentions to include collateral agreements or writings despite the existence of the merger clause and the parol evidence is not markedly different, if at all, from the
represent the parties’ explicit agreement about the effectiveness of their extrinsic agreements and so are peripheral to the focus of this Article. However, the importance of these cases justifies their brief mention here to acknowledge the courts’ adept handling of them, balancing the rebuttable presumption created by the clause against context and parties’ conduct, while looking for meaningful agreement and clear intentions.

State courts also produce consistent and well-reasoned opinions in certain categories of cases in which the result follows historically strong public policies or where frequent litigation yields a seasoned and expert judiciary. These include insurance contracts, restrictive covenants, and separation agreements with their related consent judgments. The first two categories usually involve interpretation, which the courts typically conduct with care and subtlety, construing them fairly and, where ambiguity is found, applying well-established and policy-derived rules of construction against the insurer-drafter and against restrictions on land use. Separation agreements, whether or not made consent judgments, are messier doctrinally, the context probably explaining why the courts use a “harder” PER approach to enhance certainty of arrangements between divorcing spouses by excluding terms that are omitted entirely from the writing, and at the same time a “softer” approach when interpretation is at issue. In this way, by interpreting the written terms liberally, they ascertain the parties’ actual intentions, giving them effect whenever both sides’ arguments are plausible. In the process, they also avoid fatal indefiniteness, a real risk in agreements that are often poorly written contract, the parties’ intentions should prevail.” (quoting Loving Co. v. Latham, 20 N.C. App. 318, 329, 201 S.E.2d 516, 524 (1974)).

105. See Chapel Hill Spa Health Club, Inc. v. Goodman, 90 N.C. App. 198, 202, 368 S.E.2d 60, 62 (1988) (avoiding the effect of the merger clause partly on the grounds that other writings relating to the same subject matter and signed contemporaneously are to be construed together).

106. Although the courts are to be congratulated upon the excellence of opinions in which the judges have expertise born of experience, these opinions actually underline the serious problem with the PER. A rule making the admissibility of evidence rest upon a judge’s conclusions about finality, completeness, or “plain meaning” is just as predictable as the judge making the determination.

107. See Posner, supra note 2, at 534. The terms have their intuitive meaning, so that “hard” denotes Williston’s PER, attributing insofar as possible a fixed meaning to the written word. “Soft” refers to Corbin’s version, which seeks the parties’ actual intentions. See id.

108. See id.

drafted, sometimes by the parties themselves, and which may reflect emotional and economic stresses foreign to commercial agreements. Although the courts always recite the applicability of general contract principles, these cases represent groups in which a high degree of predictability is possible.

B. General Confusion

The fragments of the North Carolina PER appear scattered indiscriminately throughout the cases. The choices available to the Supreme Court of North Carolina are not limited to accepting Corbin's invitation to discard the PER, or, at the opposite pole, embracing Williston's hard rule to make most extrinsic evidence inadmissible to supplement written contracts. There are many options between these two extremes.

The discussion below highlights issues of difficulty and confusion in the North Carolina PER cases. It is organized by reference to the Discussion Model. However, when the cases vary from the model, the terminology used to introduce sections and subsections of the discussion is drawn from the cases. The discussion is intended to facilitate a comparison between the North Carolina cases and generally accepted conventions of the PER.

1. Finality

a. The First Requirement: A Written Contract

In determining whether the PER is applicable, a court's first task is to determine whether the parties' contract has been reduced to a writing intended by the parties to be final as to one or more of its terms. There are two parts to this inquiry, the first being the ascertainment of a writing of such a nature as to call into application the PER. The author has found no version of the PER that does not condition its application upon the parties' having reduced their agreement to writing. Only a writing that constitutes "the contract" is entitled to the protection of the PER. Lesser writings, such as an

*per curiam*, 360 N.C. 56, 620 S.E.2d 862 (2005) (grounding the reversal in the reasons stated in Judge Hunter's dissent).

100. See supra Part II.

111. *See* *Restatement (Second) of Contracts* § 209(2) (1981); *supra* notes 61-62 and accompanying text.

112. See, e.g., 3 *Corbin, supra* note 3, § 588 ("The 'parol evidence rule,' in whatever form it is stated, never purports to be applicable unless the 'contract' has been reduced to 'writing.' There must be a 'written contract.' ").
evidentiary memorandum or a note or informal summary, do not invoke the rule.\textsuperscript{113} However, the written contract need not be complete to qualify.\textsuperscript{114} That makes the nature of the requisite writing elusive, so that it is all the more crucial that a court confronting anything but the most formal contract take care to address the issue explicitly. When the parties have conceded or assumed that a writing is final, the court should acknowledge such facts explicitly to avoid setting a dangerous precedent of skipping the issue of finality.

It is absolutely essential that the PER be reserved for written contracts; care must be taken to avoid applying the rule to anything less than the parties’ intentional and conscious reduction of agreed terms to writing. This is so important because of the disastrous nature of the PER’s effect upon the parties’ agreement in other cases. Once invoked, the rule protects the writing from extrinsic evidence that the court believes to be contradictory.\textsuperscript{115} The contradictory term is inadmissible, even when both parties acknowledge that they actually made the extrinsic agreement.\textsuperscript{116} Furthermore, it is a small step to an erroneous finding of completeness that bars all oral terms.

The danger of erroneously allowing a lesser writing to trigger the rule is brought home most vividly when one considers that the PER bars promises made orally in the very act of executing the writing.\textsuperscript{117} To illustrate the danger, suppose the buyer of a violin jots down a receipt. It says “Payment in full is acknowledged for one Stradivarius.”\textsuperscript{118} The buyer, who is concertmaster for a major symphony orchestra, says to the seller as she hands the receipt to him for his initials, “I’m persuaded this is the real thing, even though your price is so low. Of course, I’ll have its provenance established professionally. It’ll be one of my favorites, though, no matter what.”

\textsuperscript{113} See id. Such informal writings often satisfy the statute of frauds, which is quite another matter. See 4 BROWN, supra note 61, § 22.1.

\textsuperscript{114} See Mooney, supra note 20, at 384–85 (challenging the Oregon courts to examine a writing carefully for finality and subsequently to avoid a presumption of completeness).

\textsuperscript{115} See RESTATEMENT (SECOND) OF CONTRACTS § 209(2) (1981). The issue, though one of fact, is for the court. Id.

\textsuperscript{116} For example, the trial court returned a judgment notwithstanding the verdict for the defendant in Hoots v. Calaway, 15 N.C. App. 346, 353, 190 S.E.2d 328, 332 (1972), aff’d, 282 N.C. 477, 488, 193 S.E.2d 709, 716 (1973), setting aside a jury verdict for the plaintiff based upon the jury’s finding that the seller had made an extrinsic promise to repay the buyer for any shortfall of acreage. Id. The court of appeals’ reversal and the supreme court’s affirmation thereof were based upon a holding that the evidence did not contradict the writing. Id.

\textsuperscript{117} The author has not found any version of the PER that does not bar extrinsic evidence from a contemporaneous oral agreement.

\textsuperscript{118} The facts are drawn very loosely from Smith v. Zimbalist, 38 P.2d 170, 170 (Cal. Dist. Ct. App. 1934). The case had nothing to do with the PER.
Later, when the violin turns out to be merely valuable but not a Stradivarius, she sues the seller for damages for breach of warranty, claiming that the value of the violin as a Stradivarius would have been thirty percent higher than the purchase price. The writing may be held to have created an express warranty that the violin is a Stradivarius. If the court also holds that the writing invokes the PER and that it was meant to be the final expression of the terms it includes, its effect will be to prevent proof of the buyer's oral statement, which contradicts the written "warranty." She might as well never have said that she planned to have the violin's provenance established by an expert, that she was purchasing it for its excellence in her own estimation, or that she accepted the risk that the violin was not a Stradivarius. Even if the buyer is truthful about everything, the seller will be held liable for damages. The consequences are catastrophic if a court misses the condition that restricts the PER to written contracts, and not anything less.

Like other parts of the PER, the first requirement is easy to express, but not always so easy to apply. The extremes of an informal note or receipt and a formal contract ceremonially signed after a completed process of negotiation ought to be handled with dispatch. However, there are recent cases in North Carolina that undermine such a confident declaration. In Hoots v. Calaway, the vendor's son, an attorney, handwrote on a legal pad a "Memorandum of Sale" just after the buyer of two tracts of farmland near Advance, North Carolina had given his check for the down payment. The writing recited the total price, acknowledged the receipt of the down payment, and set out details of installment payments and escrow, but it described the land simply as "2 farms in Advance, N.C. (400 acres more or less)." It was signed only by the seller, Calaway. Hoots later discovered the land was some forty-two acres short of the 400 he said were guaranteed by Calaway, who had promised to refund the $275 per acre purchase price in that event. Alleging that the price had been quoted to him per acre, Hoots sued for the refund. The trial court excluded his evidence on PER grounds, but the supreme court affirmed the appellate court's reversal.

119. See infra Part IV.B.1.b (discussing intention in the context of finality).
121. Id. at 481, 193 S.E.2d at 712.
122. Id. at 480, 193 S.E.2d at 711. In fact, Hoots recounted Calaway's reassuring him by telling Hoots of his own refund from the prior seller in similar circumstances. Id.
Chief Justice Bobbitt's opinion began auspiciously: "When a contract is reduced to writing, parol evidence cannot be admitted."\textsuperscript{124} He was attentive to the evidence, describing the writing as being "on its face . . . an informal document" acknowledged by the seller to have been intended as a receipt and "a summary recital of the payment terms and agreement as to the sale, but not the complete agreement."\textsuperscript{125} At this point, the court should have determined whether the Memorandum of Sale was a written contract. Although completeness is not required to trigger the PER, the Memorandum's omission of any description of the land cannot be attributable to any intention consistent with reduction of the contract terms to writing.\textsuperscript{126} Certainly it would be plausible to omit a legal description at this point, but when the buyer has already paid the down payment, something more descriptive than the land's proximity to Advance would be expected in a "written contract." Calaway's acknowledgment that the writing was meant as a receipt for payment could be indicative that only the payment terms could safely be regarded as reduced to writing.\textsuperscript{127} However, on this issue, which is preliminary to and a condition for the application of the PER, all relevant evidence comes to bear.\textsuperscript{128} Hoot's credible evidence of Calaway's assurances to him about repayment for a shortfall in acreage and the conformance of the total price to a per-acre computation indicate that not even the payment terms were reduced to writing in the Memorandum of Sale.

Not realizing the significance of the writing's informality and omissions, the Hoots court went straight to the issue of the writing's incompleteness, skipping the crucial writing requirement altogether.\textsuperscript{129} It treated the PER as applicable, regarding the "Memorandum of Sale" as a final writing.\textsuperscript{130} Fortunately, incompleteness of the writing limited the rule's effect to barring contradictory evidence, but that meant that the court had to work to

\textsuperscript{124} Hoots, 282 N.C. at 486, 193 S.E.2d at 715 (quoting Stern v. Benbow, 151 N.C. 460, 462, 66 S.E. 445, 446 (1909)).
\textsuperscript{125} Id. at 488, 193 S.E.2d at 716.
\textsuperscript{126} See id. at 481, 193 S.E.2d at 712.
\textsuperscript{127} See 3 CORBIN, supra note 3, § 588 (including receipts, inter alia, under the heading "What is a 'Written Contract' or an 'Integration'? A Note or Memorandum Is Not an 'Integration' ").
\textsuperscript{128} 2 STANSBURY, supra note 26, § 252.
\textsuperscript{129} Hoots, 282 N.C. at 485-86, 193 S.E.2d at 714-15.
\textsuperscript{130} Id. at 488, 193 S.E.2d at 716.
find the per-acre sale consistent\(^{131}\) with the “total price” quoted in the writing. More significantly, it also means that *Hoots* is poor precedent for later cases involving informal writings.

Another case involving a receipt similar to that in *Hoots* is *Johnson v. Honeycutt*.\(^{132}\) Honeycutt sold to Johnson a sixteen-foot dump truck bed and equipment for $2,500 for which Johnson paid for by check. The only writing was Honeycutt’s signed receipt, which provided: “1 16 Ft Virginian Dump Bed, Wet line, Pump Hoist & Console. Sold to James Johnson for $2500.00. Paid check."\(^{133}\) Two years later he re-sold the truck bed for another $1,400 because Johnson had failed to remove it.\(^{134}\) When Johnson sued him, the PER was held to bar Honeycutt’s efforts to prove that a pick-up date had been set.\(^{135}\) Although there are obvious credibility problems with Honeycutt’s contentions, the PER is not designed to be the means to avoid them. Not the least of the problems with the case is that the receipt can hardly be characterized as a “written contract.”\(^{136}\)

At the opposite pole from the informal scantiness of the memoranda and receipts in *Hoots* and *Johnson* is *Cananwill, Inc. v. EMAR Group, Inc.*,\(^{137}\) in which the writing is a formal, detailed, standard commercial contract for workmen’s compensation insurance with two merger clauses as well as no-ororal-modification and no-ororal-waiver clauses.\(^{138}\) *Cananwill* is a well-reasoned reminder that the writing condition of the PER’s application is only one aspect of what is often referred to as “finality.” A second inquiry is necessary to ascertain whether the parties intended the writing as the final expression of one or more of the contract’s terms. In *Cananwill*, the insurance company successfully challenged the writing’s finality, but the case leaves no doubt that the parties in *Cananwill* had reduced to writing many of the terms of their agreement.

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\(^{131}\) It notes that the writing says “400 acres, more or less” and that the price is consistent with Hoot’s contentions. *Id.*


\(^{133}\) *Id.* at *2.

\(^{134}\) *Id.* at *3.

\(^{135}\) *Id.* at *4–7. The court awarded treble damages for unfair and deceptive trade practices. *Id.* at *5.*

\(^{136}\) Finality of the writing as well as completeness are also issues in *Johnson*, since the prohibited evidence is supplementary. See infra notes 207–10 and accompanying text. Although Honeycutt conceded the PER on appeal, the court went on to discuss it. *Johnson*, 2006 N.C. App. LEXIS 249, at *5–7. Fortunately, the case lacks precedential effect, being unpublished.

\(^{137}\) 250 B.R. 533 (M.D.N.C. 1999) (mem.).

\(^{138}\) *Id.* at 538.
Many, perhaps most, writings lie between the two poles of Cananwill and Hoots. As to the cases in the middle, Corbin explains,

[i]t seems to be a good deal of uncertainty and misunderstanding as to what constitutes a “written contract.” This is one of those conceptions that are looked upon as so obvious and certain of meaning as not to require definition, explanation, or discussion. As in many other instances the certainty is an illusion.\(^{139}\)

Fortunately, especially when the focus is on the issue of completeness,\(^{140}\) the parties themselves often resolve this first requirement of a “written contract,” treating as a foregone conclusion the presence or absence of the requisite writing.\(^{141}\) However, when the issue is in contention, it is important that the court consider all relevant evidence to determine whether a writing or writings constitutes “the contract.”\(^{142}\) It is clear that the writing need not be complete,\(^{143}\) for the PER gives a separate effect to a complete writing over and above a merely final one, barring supplementary terms as well as contradictory ones.\(^{144}\) How, then, to determine whether a writing is sufficient to invoke the PER in the first place?\(^{145}\) What the writing says is an important factor: for example, if it recites that it is “the contract” or contains a merger clause, it helps to prove a “written contract.” The opposite conclusion may follow for a writing made at a mid-point in a steady stream of communications about the same terms. Contemplating further negotiations as to terms included or anticipating a further formal writing indicates something less than a “written contract.” Careful assessment of all the facts will help to ensure a proper decision in the case at bar and to ensure that it will not be erroneously relied upon in future cases as well.

\(^{139}\) See infra Part IV.B.2.

\(^{140}\) See supra note 3, at § 588.

\(^{141}\) See infra notes 152–56 and accompanying text.

\(^{142}\) See infra Part IV.B.2.

\(^{143}\) A good example of a “written contract” that is not complete is the four sentence mediated settlement agreement in *Capps v. NW Sign Indus. of N.C.*, No. COA06-1297, 2007 N.C. App. LEXIS 1816, at *4–5 (N.C. Ct. App. Aug. 21, 2007). *Capps* is discussed further infra at notes 160–68 and accompanying text.

\(^{144}\) See supra note 3, at § 588.

\(^{145}\) Some guidance is provided in the text and cases cited in supra note 3, §§ 587–88. Care should be taken, however, for Corbin often weaves together issues of finality and completeness, which does not suggest that he was confused, but may produce that effect in others.
However, the mere presence of the necessary kind of writing is not enough to make the PER applicable. As Cananwill aptly illustrates, such a writing is a condition to the PER's applicability, but it is not a sufficient condition. Finality is also required.  

b. The Second Requirement: Parties' Actual Intention of Finality

The PER does not apply at all unless the writing is intended by the parties to be their final expression of agreement as to one or more terms. The Restatements' word is "integration," but the ordinary word "finality" suffices and is used in this Article to avoid adding another layer of complexity to an already confusing topic. "Finality" is used in its ordinary sense to mean that the parties plan no further negotiations as to the particular term(s) and that they intend the writing to trump all their prior negotiations.

146. See Cananwill, 250 B.R. at 547; supra notes 61–63 and accompanying text.
147. Cananwill, 250 B.R. at 547.
148. See id. (quoting HENRY BRANDIS, JR., BRANDIS ON NORTH CAROLINA EVIDENCE § 251 (2d ed. 1982)). Although signatures are indicative of the intent, it is not necessarily fatal to a finding of finality that one signature or even both are missing if the explanation is sufficiently persuasive. See 3 CORBIN, supra note 3, §§ 587–88 (examining what sorts of writings trigger application of the PER). The focus is on the parties' intent to reduce at least one of the terms to a final writing. No particular formalities are required, although their presence or absence may be important factors indicating the parties' intent as to formality. See Calamari & Perillo, supra note 18, at 336. The writing need not contain all the terms to trigger the PER, but it must be intended as the final expression of agreement for the terms included. See id. If the last expression is not in writing, the PER does not apply. See id. at 334; see also 2 WILLISTON, supra note 3, § 631 (articulating that subsequent oral statements are not admitted under the PER).
149. See RESTATEMENT (SECOND) OF CONTRACTS § 209(1) (1981) ("An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement."). For explication of the reasons for the special terminology of the Restatements, see 3 CORBIN, supra note 3, § 539.
150. McCormick emphasizes the theoretical significance of the word "integration": "Where an earlier tentative oral expression is followed by a later writing, then if the writing was intended to supersede the earlier expression, the law gives it that effect. This, in effect, is the theory of 'integration.' " McCormick, supra note 38, at 374. This author wonders with Corbin whether "new confusion was caused and [whether] it has been used according to the system of Humpty Dumpty rather than with the meaning of Wigmore. It certainly has not yet simplified the application of the 'parol evidence rule' or eliminated the previously prevailing variations and inconsistencies." 3 CORBIN, supra note 3, § 588. For the reasons cited by Corbin, this Article abandons the language of integration in favor of ordinary language. See id.
151. The PER does not prevent the parties from changing their minds. If in the future they modify the written term, the PER does not bar proof of the modification. This is implicit in the very rule itself, which affects only prior and contemporaneous extrinsic terms, not future ones. In this, the Discussion Model is accurate for every version of the PER. See supra note 65 and accompanying text.
Whether the parties have intended the writing to be final is a factual issue upon which all relevant evidence is brought to bear.\footnote{152}{See Cananwill, 250 B.R. at 548; Restatement (Second) of Contracts § 209 cmt. c (1981); Restatement of Contracts § 228 cmt. a (1932). The Restatement test gives effect to an appearance of "completeness and specificity," but it gives way to other evidence establishing a lack of finality. \textit{Restatement (Second) of Contracts} § 209(3) (1981).} This includes, but is not limited to, the writing itself, even if it has a merger clause.\footnote{153}{In Cananwill the merger clause was ineffective to negate the parties' intentions, as demonstrated by their prior words of agreement as well as their conduct, indicating that other terms would apply to their insurance contract and clearly establishing that the writing was not final. \textit{See Cananwill}, 250 B.R. at 548; \textit{see also} \textit{Restatement (Second) of Contracts} § 209(3) (1981) (describing circumstances in which appearance of completeness may lead to a writing's being "taken to be an integrated agreement").} Of course, the PER does not prevent the extrinsic agreement's being proven for this purpose, since the rule is not even applicable until a final written contract has been established. The issue of finality can never be determined by the application of the PER, for the rule rests upon the finding of finality, not the other way around.

The issue of a writing's finality is traditionally characterized as one of law, but only because it is decided by the court sitting without a jury.\footnote{154}{Calamari & Perillo, supra note 18, at 336.} Substantively, the practice is the same in North Carolina.\footnote{155}{See id. at 548.} It makes sense that the court should hear the issue of intent to make a final writing, since the extrinsic evidence designed to be kept from the jury by the PER must be taken into account on that issue. It is, however, a question of fact, upon which all relevant evidence is admissible.\footnote{156}{See id. at 384 ("[S]o few courts examine seriously the first, 'integrated at all' issue . . . .").}

Finality is for the most part a relatively simple matter.\footnote{157}{See \textit{id.} at 383 ("[S]o few courts examine seriously the first, 'integrated at all' issue . . . .").} Although acknowledged as "the first crucial question in most parol evidence rule disputes,"\footnote{158}{Mooney, supra note 20, at 384.} it is rarely litigated as a separate issue.\footnote{159}{See \textit{infra} Part IV.B.1.c.} When the controversy focuses upon completeness, finality may seem obvious to everyone and is thus often conceded or assumed. Because finality is linked with completeness in the test to exclude supplementary evidence, there is a tendency to pair the two all the time. Doing so suggests that the PER answers both issues. Such an assumption leaves the PER wide open to abuse and opportunism.
Conflating finality with completeness invites courts to treat them together as conclusions of law. It makes a great deal of difference, for finality should be sought in all the evidence without limitation from the PER. It also encourages a sort of judicial reflex to protect anything in writing, insulating the scantiest, sketchiest, most incidental writing and rendering nugatory the parties’ actual agreement.

It is perhaps symptomatic of fundamental misconceptions about the nature of the PER that the issue of finality, as rarely as it ordinarily comes up, has reached appellate courts repeatedly in North Carolina in recent years. It is rarely identified and addressed coherently.

Contemporaneous oral agreements, where no fraud is involved, often raise finality issues. An example is Capps v. NW Sign Industries of North Carolina. In Capps, the defendants alleged that they had signed what they thought was only a key-points summary following a mediated settlement agreement, relying upon the mediator’s alleged promise that a settlement agreement including a confidentiality agreement “with teeth” would be executed afterwards. What was signed was only five sentences long, leaving out many details.

161. In other words, conditioning payments over time upon the employee’s silence. Id. at *4.
162. Id. at *17–18. The signed settlement agreement provided:

1. [Defendants] agree to offer and . . . [plaintiff] agrees to accept the sum of $124,000 in full and final settlement of all claims;

2. The parties agree that they shall execute mutual dismissal of all claims against each other and counsel for the parties shall withdraw any existing appeals;

3. The parties agree that the terms of this settlement are confidential and the parties further agree that if asked they will represent that this matter was resolved to the mutual satisfaction of all parties; and

4. The parties shall bear their own costs.

Id.

163. Id. at *19–20. Defendants pointed out that it does not contain any schedule of payment, does not state whether the contemplated settlement proceeds are to be paid in a lump sum or over time, does not state when the payment is due, does not state where or how the payment is to be made, does not provide for full releases of the parties, their agents, successors and assigns, . . . does not contain any enforcement mechanism for the summary language that does exist . . . about confidentiality of the settlement . . . [and] does not provide for disclosure of the amount of the settlement to the parties’
The defendants apparently expressed doubt about the finality of so brief a settlement agreement by inartfully using the word "ambiguous." This led the court completely off the subject, provoking the observation that neither brevity nor the omission of terms necessarily creates ambiguity. It seems likely that the case may rest, at least in part, upon doubts about the credibility of defendants' contentions, given the emphasis that the court gives to deficiencies in the record on appeal. The PER, however, is not a tool to take credibility issues from the jury outside the context of a final writing.

In view of its astonishing brevity and summary nature, the signed agreement in Capps should not have been given the effect of a final writing. If the context of mediated settlement raises a customary rule of finality, there is no allusion to it. The prompt spate of e-mails sent by defendant in an apparent effort to secure a negotiated contract following the settlement seems strongly supportive of its contention that the settlement agreement was only a key-points settlement.

When finality was challenged, the tenor of the court's response in Capps suggests that every writing is final as a matter of law. There is a good deal of evidence suggesting that the court regards the PER as applying whenever there is any writing at all, without examining its qualification as "the contract" or looking into its finality. This is a

accounts, CPAs and other professionals that will need the settlement amount to prepare the parties' taxes and provide other financial services.

Id. at *19.

See id. at *20–21.

See id. at *22–23. The court held that the record's inadequacy cost defendants the opportunity to rely upon a recognized PER exception for mode of payment and discharge. See id. at *21–23 (citing Jefferson Standard Life Ins. Co. v. Morehead, 209 N.C. 174, 176, 183 S.E. 606, 607 (1936)).

The PER applies only when the parties have intended to reduce their agreement to a final writing. See supra notes 115–19 and accompanying text.


See, e.g., Root v. Allstate Ins. Co., 272 N.C. 580, 587, 158 S.E.2d 829, 835 (1968) ("The general rule is that when a written instrument is introduced into evidence, its terms may not be contradicted by parol or extrinsic evidence, and it is presumed that all prior negotiations are merged into the written instrument." (citing Fox v. S. Appliances, Inc., 264 N.C. 267, 270, 141 S.E.2d 522, 525 (1965)); Barger v. Krimminger, 262 N.C. 596, 598, 138 S.E.2d 207, 209 (1964) (per curiam); Jefferson Standard Life Ins. Co. v. Morehead, 209 N.C. 174, 175, 183 S.E. 606, 607 (1936) ("It is well-nigh axiomatic that no verbal agreement between the parties to a written contract, made before or at the time of the execution of such, is admissible to vary its terms or to contradict its provisions. As against the recollection of the parties, whose memories may fail them, the written word abides. The rule undoubtedly makes for the sanctity and security of contracts.") (internal citations omitted).
startling and dangerous development and one of which Williston would have disapproved as vehemently as Corbin.¹⁷⁰

One likely reason for the failure to recognize the importance of the factual issues involved in the judicial inquiry as to the presence of a final writing is that the courts reflexively couple finality with completeness, becoming blind to the critical distinction between them. This tendency is observable in Rowe v. Rowe:¹⁷¹

[T]he rule is intended to apply only to final, totally integrated writings; that is, those writings relating to a transaction which are intended to supersede all other agreements regarding that transaction. If the writing supersedes only a part of the transaction, it is a partial integration and other portions of the transaction may be shown by parol evidence.¹⁷²

The Rowe quotation suggests that finality and completeness are properly handled together and from a retrospective focus upon the issue of the writing's having superseded another. The suggestion is misleading, in part because finality looks not only backward to see whether the writing puts a cap on what has gone before, but also forward to whether something yet to come is anticipated. Being the condition of the rule's application, finality must be decided first, without the evidentiary strictures that are imposed by the PER.

To similar effect is Bost v. Bost,¹⁷³ which sets out a rule designed to clarify the law:

It is a well established rule of evidence and of substantive law that matters resting in parol leading up to the execution of a written contract are considered as varied by and merged in the written instrument. . . . [T]he parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound. “The writing is conclusive as to the terms of the bargain.” Applying this rule to the instant case, the parties are presumed to have integrated their negotiations and agreements into the written memorial embodying the unequivocal terms and conditions of their separation agreement.¹⁷⁴

¹⁷⁰. See supra notes 81–86 and accompanying text.
¹⁷¹. 305 N.C. 177, 287 S.E.2d 840 (1982).
¹⁷². Id. at 185, 287 S.E.2d at 845 (citing 2 STANSBURY, supra note 26, § 251) (emphasis added).
¹⁷³. 234 N.C. 554, 67 S.E.2d 745 (1951).
¹⁷⁴. Id. at 557, 67 S.E.2d at 747 (quoting Williams v. McLean, 220 N.C. 504, 506, 17 S.E.2d 644, 646 (1941)) (emphasis added).
The phrase "when they reduce their contract to writing" acknowledges that a writing is required. This issue is related to, but quite different from the question of the parties’ intention that the writing be their final expression of agreement as to one or more of its terms.

Although Bost, which involves a separation agreement providing for release and relinquishment of property rights, probably reaches the right result, its language, as quoted above, would spell disaster for such skeletal memoranda as were used in Johnson and in Capps. Nothing in Bost shows that finality is a matter of intent to be determined from the facts by the court. Nothing separates finality from the issue of completeness, an issue the court answered in the affirmative.

Another example of a failure to appreciate the nature and significance of the finality issue is Mayo v. North Carolina State University, in which the court applied the PER to prevent North Carolina State University from asserting an unwritten policy relating to the university’s July 1 fiscal year. The university sought to garnish a tenured professor’s salary to recover summer salary paid after his resignation had been accepted. The court recited testimony that “petitioner’s employment agreement consisted only of his appointment letter, his annual salary letter, and the policies adopted and amended by the UNC Board of Governors and by the NCSU Board of Trustees.” From this, the court drew its conclusion about finality without further discussion: “It therefore appears the parties intended the above documents to be the final integration of the employment agreement.”

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175. See supra notes 111–15 and accompanying text.
176. Fortunately, when it has cited Bost, the court has done so in terms that clarify its significance, choosing that part of the opinion that emphasizes the unique context in which the words appear. In Lane v. Scarborough, 284 N.C. 407, 200 S.E.2d 622 (1973), the court intimates an intention to limit Bost to its context. Id. at 411, 200 S.E.2d at 625 (“We also point out that the ‘term separation and property settlement agreement’ in the absence of clear language or impelling implications connotes not only complete and permanent cessation of marital relations, but a full and final settlement of all property rights of every kind and character.” (quoting Bost, 234 N.C. at 557, 67 S.E.2d at 747)).
178. Id. at 510, 608 S.E.2d at 122.
179. Id.
180. Id. at 509, 608 S.E.2d at 121–22. There were actually a series of appointment letters as his career progressed. See id. at 508 n.2, 608 S.E.2d at 121 n.2.
181. Id. at 509–10, 608 S.E.2d at 122.
However, although the court may look to all relevant evidence for the parties' intention of finality, one need go no further in *Mayo* than the writings themselves to reach the opposite conclusion from the court's. The writings reveal with clarity that they cannot be regarded as final expressions of intent even upon the narrow issue of compensation and its associated policies. The writings represent a dynamic agreement in which change is expected and provided for. For one thing, the parties expressly contemplate a new salary letter each year. The successive appointment letters no doubt were expected as well, in connection with each event of tenure and promotion. Even more significant is the express provision in each appointment letter making the professor's employment "subject to all policies adopted and amended by the UNC Board of Governors and by the NCSU Board of Trustees." This language seems to contemplate the contract terms' continual adjustment as new policies are adopted or existing policies modified by the university's governing bodies.

The deficiencies of the state courts' approach to finality become clearer upon comparison with the federal court's methodology, applying state law, in *Cananwill, Inc. v. EMAR Group, Inc.* In *Cananwill*, an insurer agreed to provide workers' compensation insurance for the bankrupt. An initial agreement specified retrospectively rated terms, a more expensive insurance in which the premium is based upon claims paid. This original intention never changed, despite issuance of a standard policy including the less expensive version. When the insurer later sent a Premium Deferral Agreement, the insured failed to sign it only because of minor quibbles unrelated to the retrospective terms. Upon the insured's bankruptcy, however, the trustee sought to recover the excess premiums. Considering all the relevant evidence, the court in *Cananwill* found the formal standard contract not to be intended as final: both parties expected the terms to be retrospective. The court said: "A court initially must determine whether the writing was

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182. See id. at 506, 608 S.E.2d at 119.
183. See id. at 508 n.2, 608 S.E.2d at 121 n.2.
184. Id. at 506, 608 S.E.2d at 119.
185. 250 B.R. 533 (M.D.N.C. 1999).
186. Id. at 537.
187. Id.
188. Id. at 538. Insured's Director of Risk Management testified to that effect, noting that such circumstances were commonplace and of no concern to anyone. Id.
189. Id. at 548.
‘integrated.’ Only findings of integration [finality] will implicate the parol evidence rule . . . .”  

When it is found that the requisite reduction to writing has occurred and that the parties have intended one or more of the written terms as final, the PER may be applied to bar certain extrinsic terms. The pool of extrinsic evidence eligible to be excluded by the rule includes all agreements made prior to the final writing, whether the prior agreements were oral or written, and oral agreements that were made contemporaneously with the writing. It is important at this stage to distinguish the effect of finality from that of completeness of the writing.

c. The Effect of Finality: Exclusion of Contradictory Extrinsic Terms

When a writing is intended to be final, its effect under the PER is to bar contradictory extrinsic terms or, in other words, terms that are inconsistent with the final written contract. In North Carolina, the rule is that the test of inconsistency is made by comparison with the express terms of the written contract. In 1932, observing North Carolina's abandonment of the PER, Chadbourn and McCormick noted an exception “in cases of contradiction,” by which, they said, the North Carolina courts meant “‘total inconsistency’ between the alleged oral transaction and the writing.”

To the extent that the holding of Bost v. Bost rests upon contradiction, it does not depart from the “total inconsistency”

190. Id. at 547 (quoting Smith v. Cent. Soya of Athens, Inc., 604 F. Supp. 518, 524 (E.D.N.C. 1985)).
192. See, e.g., N.C. Nat'l Bank v. Gillespie, 291 N.C. 303, 308, 230 S.E.2d 375, 378 (1976) (applying, among other exceptions, a rule allowing a whole contract to be proven where only part is in writing, as long as there is no general writing requirement and the extrinsic evidence is not contradictory); Lancaster v. Lancaster, 138 N.C. App. 459, 466, 530 S.E.2d 82, 86–87 (2000) (barring the wife’s evidence that she and her husband actually agreed to terms other than those in the separation agreement).
195. The court’s reasoning is not altogether clear, for it combines language relating to completeness with that applicable to finality. This makes it difficult to pinpoint whether the proffered evidence violates the rule by supplementing an already complete contract or by contradicting one that is merely final. Supplementation seems to be the point of barring a promise “to do something beyond the plain words and meaning of [the] written contract.” Id. at 558, 67 S.E.2d at 747. However, as the text indicates, contradiction seems to play an important part as well, although the difference is subtle. See id. at 557, 67 S.E.2d at 747. Since the court clearly considers the separation agreement to be complete
standard above. The wife in Bost sought to prove a prior oral agreement giving her an interest in her husband's company with a right to proceeds from its sale.\textsuperscript{196} The court said, "The term 'separation and property settlement agreement' in the absence of clear language or impelling implications connotes not only complete and permanent cessation of marital relations, but a full and final settlement of all property rights of every kind and character."\textsuperscript{197} It found the oral agreement to be "in direct contravention of the written instruments by the terms of which she released and relinquished to her husband all property rights."\textsuperscript{198} Adding additional property to that provided by the written contract would "vary its terms,"\textsuperscript{199} contradicting the contextual connotation of completeness that is the very nature of the "separation and property settlement agreement."\textsuperscript{200} The court's holding in Bost was premised upon its experienced appreciation of the meaning of a particular kind of agreement. The extrinsic agreement was compared to the express terms as used in the particular context of a separation agreement; this is not a test based on what the writing looks like, its facial appearance of completeness, nor is it a test of consistency with gapfillers implied by law. The same approach is taken in Lane v. Scarborough,\textsuperscript{201} an interpretation case that quotes Bost.\textsuperscript{202}

However, there are also some cases that do test contradiction not only against the writing's express terms but also against terms implied by law. As a matter of policy, both Williston and Corbin agreed that a term implied by law should never trump one to which the parties have actually agreed.\textsuperscript{203} Chadbourn and McCormick cited a time-of-performance term as the "classic case" illustrating implication by operation of law.\textsuperscript{204} The notion that an extrinsic agreement should be disallowed when a reasonable time has been implied, said the distinguished authors, is understood to be at odds with the parties'
intensions “for the simple reason that in most cases the transacting parties will not know of such a rule.” They backed up this assertion by noting that “Williston’s incisive argument has successfully exploded the notion that rules of law are always to be considered a part of the contract of the parties based on their presumed intention to include them.” The debate whether extrinsic evidence should be tested for consistency against terms implied by law is a pressing issue in North Carolina, properly falling under the heading of finality.

Even if the writing in Johnson v. Honeycutt were held to be a final writing sufficient to invoke the PER, the extrinsic term of a pick-up date for the truck bed is supplementary to the writing, not contradictory. The pick-up date sought to be proven by the seller does not contradict any express terms of the agreement, nor is there any reason to believe that the parties actually contracted by reference to the “reasonable time” term implied by law so as to make a different agreement actually inconsistent. Testing contradiction against terms implied by law would render unnecessary any finding of completeness in most cases, since a great many holes in a writing could be filled by implied terms prior to testing for contradiction. That is especially true in a Uniform Commercial Code (U.C.C.) case like Johnson because of the liberal gapfillers provided in Part 3 of Article 2 of the U.C.C. and for which section 25-2-204(3) of the General Statutes of North Carolina makes ample provision.

205. Id. at 167.
206. Id. at 166 (“To assume first that everybody knows the law, and second, that everyone thereupon makes his contract with reference to it and adopts its provisions as terms of the agreement, is indeed to pile a fiction upon a fiction, and certainly without any necessity, for where different conclusions are reached by means of the fiction than would be reached without it, they are not preferable to the opposite ones. . . . Doubtless, law frequently is adopted by the parties as a portion of their agreement. Whether it is or not in any particular case, should be determined by the same standard of interpretation as is applied to their expressions in other respects.” (quoting 2 WILLISTON, supra note 3, § 615)).
209. See supra notes 132–36 and accompanying text (discussing reduction to writing as a requirement for application of the PER); see also infra note 258 and accompanying text (discussing the presumption of completeness).
210. N.C. GEN. STAT. § 25-2-204(3) (2007) (“Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”).
Moreover, Johnson is not alone, for the state supreme court reached a similar conclusion almost sixty years ago in McKay v. Cameron.\(^{211}\) It seems unlikely, nevertheless, that the court sitting today would be inclined to approve these cases.

Once the PER has been invoked by the court’s finding a certain kind of writing that is intended by the parties as their final expression of agreement as to one or more contract terms, the exclusion of contradictory evidence is the rule’s first effect. It is not, however, its last or its most awesome effect. A court that proceeds to a finding of completeness goes on to exclude extrinsic supplementary evidence that violates no term of the writing, but is perfectly compatible with it. This goes far beyond prohibiting contradiction, for it negates terms actually agreed upon that are textually unobjectionable by reference to the writing itself. The exclusion rests upon a legal presumption that is the PER’s more striking and dangerous effect. Completeness, unlike finality, may have no real connection to the parties’ actual intentions. The rule itself governs the decision whether the writing is complete, making the test for completeness the principal battleground for the rule’s proponents and its detractors.

2. Completeness

Completeness\(^{212}\) is referred to in the language of the Restatements as “whole”\(^{213}\) or “complete integration.”\(^{214}\) Whether a writing is complete is an issue that follows sequentially from the identification of a final written contract. When the issue of completeness is taken up by a court, finality of the written contract has already barred contradictory extrinsic terms.\(^{215}\) A finding of completeness also bars supplementary extrinsic terms.\(^{216}\) As a general matter, the issue of completeness is for the court; whether and to what degree it involves

\(^{211}\) [231 N.C. 658, 661, 58 S.E.2d 638, 639 (1950).]

\(^{212}\) [See supra note 64 and accompanying text.]

\(^{213}\) [RESTATEMENT OF CONTRACTS § 229 (1932).]

\(^{214}\) [RESTATEMENT (SECOND) OF CONTRACTS § 210 cmt. 1 (1981).]

\(^{215}\) A reminder is useful here, that “extrinsic terms” in this Article means terms coming from any prior agreement, whether written or oral, and oral agreements made contemporaneously with the writing. See supra note 63 and accompanying text (explaining extrinsic terms).

\(^{216}\) [RESTATEMENT (SECOND) OF CONTRACTS § 213(2) (1981); RESTATEMENT OF CONTRACTS § 237 (1932). If the writing is found ambiguous (under the widely applied general rule), extrinsic evidence is admissible to interpret or construe it. See supra note 72 and accompanying text (discussing interpretation).]
factual determinations depends upon whether the court hews more closely to the position of Williston or Corbin.\textsuperscript{217}

Because finality has already caused the PER to be invoked before the writing is tested for completeness, it is possible for courts to derive the test for completeness from the rule itself in a sort of bootstrapping methodology that Corbin disliked and Williston embraced. The vehemence of their opposite feelings cannot possibly be overstated. Corbin insisted that all relevant evidence should be brought to bear upon the issue of completeness, including, for example, the credibility of the extrinsic agreement, the parties’ situations, purposes, negotiations, prior dealings, course of performance if any, commercial context, etc.\textsuperscript{218} The point of the quest for Corbin was to enforce the parties’ real mutual intentions.\textsuperscript{219} Williston, on the other hand, sought to enhance the certainty and predictability of the written word.\textsuperscript{220} From his standpoint, the parties’ intentions should ideally be discernible from the writing itself as a matter of law, allowing the writing to prove itself complete without anything more than a peek at the extrinsic agreement in order to determine whether the final writing reasonably appeared to cover it.\textsuperscript{221}

In contrast to their neglect of the finality issue, North Carolina cases do explicitly address completeness prior to determining the admissibility of a prior agreement. If it was ever true, as was claimed by Dalzell, that the courts of the state simply tested for credibility of the extrinsic agreement and then admitted it,\textsuperscript{222} it is so no longer. There is a substantial group of hard PER cases that determine completeness primarily by the appearance or even the mere presence of a writing. Their analysis does not seem to turn upon any particular formula’s being recited. Most, though not all, of these hard cases are devoid of anything resembling the careful factual analysis found in

\textsuperscript{217} Although the extrinsic evidence is meant to be kept from the jury, there is good reason to allow the jury to determine a contested issue of fact involved in the determination of completeness if it does not violate that principle.

\textsuperscript{218} This is not intended to be an exhaustive list.

\textsuperscript{219} Corbin’s position is evident throughout his treatise’s discussion of the PER. See 3 CORBIN, supra note 3, §§ 573–96. As Calamari & Perillo say, “w]hen Professor Corbin speaks of the intent of the parties he emphatically means their actual expressed intent.” Calamari & Perillo, supra note 18, at 339.

\textsuperscript{220} See 2 WILLISTON, supra note 3, § 633. Williston’s methodology for determining what he called “intent” with regard to a written contract that is both final and complete is set out in Calamari & Perillo. Calamari & Perillo, supra note 18, at 338–39.

\textsuperscript{221} Cf. Calamari & Perillo, supra note 18, at 388 (describing Williston’s strict adherence to the writing itself).

\textsuperscript{222} See Dalzell, supra note 7, at 428.
the landmark cases from other jurisdictions that are generally cited to exemplify the Willistonian methodology.\textsuperscript{223} The North Carolina analysis of the completeness issue is characteristically confusing and conclusory, marked by formulaic recitals of strings of quoted fragments of the rule.

\textit{Mayo v. North Carolina State University},\textsuperscript{224} discussed above for its finality issue,\textsuperscript{225} is an illustrative example for completeness analysis as well. The \textit{Mayo} court held that North Carolina State University could not garnish a professor’s salary to recoup an overpayment after his announced resignation from the faculty; the policy depended upon by the university was barred by the PER.\textsuperscript{226}

The opinion is confusing, leaping from one issue to another without transition. The court began with what seems to suggest that the issue was construction or interpretation of the contract:\textsuperscript{227}

With all contracts, the goal of construction is to arrive at the intent of the parties when the contract was issued. The intent of the parties may be derived from the language in the contract. When the contract language is unambiguous, our courts have a duty \textit{to construe and enforce the contract as written}, without disregarding the express language used. However, if a contract contains language which is ambiguous, a factual question exists, which must be resolved by the trier of fact.\textsuperscript{228}

However, the court showed no concern about the meaning of the contract;\textsuperscript{229} instead, it seemed to focus upon the “plain meaning


\textsuperscript{225} \textit{See supra} notes 177–84 and accompanying text.

\textsuperscript{226} \textit{Mayo}, 168 N.C. App. at 509–10, 608 S.E.2d at 121–22.

\textsuperscript{227} \textit{Id.} at 508, 608 S.E.2d at 120. The court moved from interpretation immediately to the requirement of certainty and specificity for an employment contract, recognizing compensation as an essential term and leading Judge Hunter in his dissent to characterize the majority as holding that the contract fails for lack of certainty. \textit{Id.} at 511, 608 S.E.2d at 122 (Hunter, J., dissenting). However, the PER bar, which immediately precedes the majority’s ruling against any debt owed by the professor to the university, seems to have been at the heart of the majority’s opinion. \textit{Id.} at 509–10, 608 S.E.2d at 121–22 (majority opinion).

\textsuperscript{228} \textit{Id.} at 508, 608 S.E.2d at 120 (emphasis added) (citations omitted).

\textsuperscript{229} \textit{See id.} at 508, 608 S.E.2d at 121. No facts indicate any doubt about the meaning of the agreement and the court’s conclusion that the agreement is clear and unambiguous simply recites the payment terms found in the writings. \textit{Id.}
rule" commonly applied where the meaning of contract terms was at issue. In contrast to the PER itself, traditionally soft in North Carolina, although often confusingly worded, this rule of interpretation is a hard one, at least on its face. The plain meaning rule is a Willistonian rule, one that relies upon the writing to prove itself. This analytical sidestep might refocus the court upon the words of the writing, which the court will “construe and enforce as written,” except that there is no alternative interpretation or construction involved.

Focusing upon the perceived necessity to exclude the offending policy, the court may have cited interpretation cases inadvertently. The invulnerability of the “unambiguous” written term to a different meaning may be a stand-in for the bar of contradictory extrinsic terms that results from a final written contract. The fragments of the rule that the court strung together from several different sources may simply fail to represent a coherent framework for PER analysis. That bodes ill for future cases.

A page later, having found in a footnote that the writing was a “full integration of the employment agreement,” the court returned to the PER, which it set out:

“The parol evidence rule prohibits the admission of parol evidence to vary, add to, or contradict a written instrument intended to be the final integration of the transaction.” “The rule is otherwise where it is shown that the writing is not a full integration of the terms of the contract,” or “[w]hen a contract

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230. Enforcing the contract as written, as the quoted passage requires for unambiguous contracts, enforces the “plain” or “clear” meaning of the agreement, consistent with the so-called “plain meaning rule.” The latter is less a “rule” than a method of interpretation that emphasizes the common meaning of words with as little attention as possible to context. It is generally applied without definition, apparently upon the assumption that it has its own “plain meaning.” For example, Eric Posner never defines the “plain meaning rule” in his eponymous article The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation. See Posner, supra note 2, at 540. An economic variant of a definition is supplied by Avery Wiener Katz: “[F]or a given audience or interpreter, plain meaning corresponds to the interpretation associated with the interpreter’s ordinary or zero-cost context—that is, the context that the interpreter can apply with minimal work.” Avery Wiener Katz, The Economics of Form and Substance in Contract Interpretation, 104 COLUM. L. REV. 496, 521 (2004). For the conventional use of “plain” and “clear” together or as synonyms, see 3 CORBIN, supra note 3, § 542 (noting that some context is required to find language “plain and clear”).

231. See infra Part IV.B.2.b.i. As the cases gathered in Part IV.B.2.b.i. suggest, the application of the “plain meaning” rule in North Carolina is often nuanced; it can be softened as the context requires. See infra Part IV.B.2.b.iii.

232. Mayo, 168 N.C. App. at 509 n.2, 608 S.E.2d at 121 n.2. The discussion above notes the inadequacy of the court’s analysis of finality. See supra Part IV.B.1.a.
is ambiguous, parol evidence is admissible to show and make certain the intention behind the contract."233

This statement of the PER suffers from the discontinuity that comes from a string of quotations strung together from different sources without adequate connection. Substantively, the quoted rule is commendable in referring to "a written instrument intended to be the final integration," but the court does not follow up by actually conducting the necessary factual inquiry, as is indicated above in the discussion of finality. Furthermore, Mayo purports to bar proof not only of contradiction, but also of additional extrinsic terms upon finality alone.234 To render consistent extrinsic terms inadmissible requires more than finality; it rests upon completeness, a "total" or "complete" integration.

The second sentence quoted above says, "[t]he rule is otherwise where it is shown that the writing is not a full integration."235 This fails to indicate in what regard the rule is "otherwise." Is the PER not applicable at all? Does the integrated writing bar extrinsic evidence for some purposes, but not others? Where is the evidence of completeness? The words change the effect of the rule "where it is shown that the writing is not a full integration"; this must mean that the party seeking to introduce the extrinsic evidence bears the burden of proving incompleteness. This, then, is another indication that the court is applying a rule modeled upon Williston's, by which a writing proves itself to be "intended" as the final and complete expression of the parties' agreement. There is nothing in the case, however, that prevents the PER's attaching itself to any and every writing indiscriminately.

A further word is useful about the PER formula recited in Mayo, barring extrinsic evidence to "vary, add to, or contradict" the written contract. It is identical to that which inspired a droll comment from Chadbourn and McCormick: "The oral agreement will always add to or vary the writing. If it does not there is no necessity for proving it.


234. See supra notes 177-84 and accompanying text.

This fallacy is doubtless produced by the thoughtless repetition of the traditional phraseology of the rule."236

a. Completeness by Presumption

In the decades since Dalzell wrote in 1955, North Carolina courts have given heavy weight to superficial aspects of written agreements, no doubt in order to avoid submitting factual issues to a jury. They have elevated writings to a final and complete expression of the parties' agreement by applying presumptions of the parties' intentions, sometimes acknowledging the presumption explicitly and at other times, not, as seems to be the case in Mayo v. North Carolina State University.237 A presumption methodology uncoupled from the facts yields inconsistent results, especially when it is applied without first establishing finality.

Perhaps the original version of the North Carolina presumption may be traced to 1810, when, in Smith v. Williams,238 the court posed to itself the PER issue: "Whether oral evidence is proper to extend and enlarge a contract which the parties have committed to writing?"239 The court answered itself as follows:

The first reflection that occurs to the mind upon the statement of the question, independent of any technical rules, is, that the parties, by making a written memorial of their transaction, have implicitly agreed, that in the event of any future misunderstanding, that writing shall be referred to, as the proof of their act and intention: that such obligations as arose from the paper, by just construction or legal intendment, should be valid and compulsory on them; but that they would not subject themselves to any stipulations beyond their contract; because, if they meant to be bound by any such, they might have added them to the writing; and thus have given them a clearness, a force, and a direction, which they could not have by being trusted to the memory of a witness.240

The quoted passage reveals the basis and import of the presumption, which is an implicit agreement to be bound by the meaning attributed by the court to the writing and by no terms

236. Chadbourne & McCormick, supra note 4, at 154.
238. 5 N.C. (1 Mur.) 426 (1810). The case is discussed supra at notes 46–56 and in the accompanying text.
239. Id. at 430.
240. Id. at 430–31.
outside it. The implicit agreement spoken of by the court does not arise from the facts of the transaction, but solely from the writing itself. That it is an agreement born of judicial mandate rather than the buyer's manifested intention is very clear because the oral assurance was made at the same time as the writing, negating any concerns about superseding terms. The account of a disinterested witness who overheard the warranty matches the buyer's, so that the there were also no concerns about credibility. It is beyond imagination that the court accurately described the buyer's intentions as being reflected in the "implicit agreement."

Thus, the "implicit agreement" in Smith is implied by law and arises in large part from the instinctive impulse of the judge to elevate written over oral terms. Not least in its attributes is that the meaning and legal import of the writing is a matter for the court, not the jury. Smith v. Williams does not establish what kind of writing triggers the presumption; although the court focuses upon the nature of the writing that gives rise to such legal consequences, the distinction to be drawn is between a sealed "specialty" and an ordinary signed writing. It does not provide much guidance to modern courts.

Probably the most widely cited version is found in Neal v. Marrone:

A contract not required to be in writing may be partly written and partly oral. However, where the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent.

241. Id.
242. See id. at 431.
243. Id.
244. Id. at 429.
245. The presumption's popularity may be due in part to its having been quoted at length with some approval in 2 STANSBURY, supra note 26, § 253.
246. 239 N.C. 73, 79 S.E.2d 239 (1953).
247. Id. at 77, 79 S.E.2d at 242.
The presumption follows the deliberate reduction to writing of contract terms, but it poses a great many questions: (1) whether the presumption requires a final writing or presumes it; (2) whether it applies to a writing that is final with regard to fewer than all the terms of the contract; (3) how broad or narrow is the language giving the presumption's effect to "all their engagements as to the elements dealt with in the writing"; (4) why and to what effect is the issue of interpretation (e.g., uncertainty) included in the rule; (5) what is meant by "substitute a new and different contract"; (6) what is the relationship of this sentence to the PER set out at the end of the quoted passage: "Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement."

A disturbing oddity in the *Neal v. Marrone* rule is that it apparently bars extrinsic, noncontradictory evidence by the presumption of having been "intended by the parties to represent their engagements as to the elements" in the writing. This apparent expansion of the effect of finality comes close to making a separate little PER for each contract term, treating it as complete and perhaps barring anything within its scope. Ordinarily, if found merely final but not complete, the contract would be treated as one entirety, with consistent additional terms admissible, no matter how closely related they are to the written ones. Thus, terms would be admissible that would further the written objectives or provide a richer context, for example, to inform expectation or enhance certainty for purposes of damages.

Although the court later clarified and corrected *Neal v. Marrone* in *Craig v. Kessing*,\(^2\)\(^4\)\(^8\) the correction in *Craig* is contextual, having to do with an alleged alteration of the writing after signing.\(^2\)\(^4\)\(^9\) Few PER cases involve similar facts, so the explanation has little application in ordinary use. In fact, the language in *Craig* that does speak to the usual PER case creates a new problem by purporting to limit the rule's application to writings that are final and complete (totally or completely integrated).\(^2\)\(^5\)\(^0\) The suggestion has the authority of long

\(^{249}\) Id. at 34–35, 253 S.E.2d at 265 (1979).
\(^{250}\) See id. at 34, 253 S.E.2d at 265–66. The court in *Craig* said of *Neal's* presumption, furthermore, it does not adequately explain why evidence of the particular terms in question is inadmissible under the partial integration theory.

It appears to be well settled in this jurisdiction that parol testimony of prior or contemporaneous negotiations or conversations inconsistent with a written
precedent, as far back at least as 1906, but like virtually all the North Carolina fragmentary versions, has never proven helpful. It may be fortunate that the correction in Craig is often ignored.

In Root v. Allstate Insurance Co., considering whether a lease included the basement, the court said, “[t]he general rule is that when a written instrument is introduced into evidence, its terms may not be contradicted by parol or extrinsic evidence, and it is presumed that all prior negotiations are merged into the written instrument.”

However, Justice Branch insulated the presumption within a nest of more carefully drawn tests. He immediately noted as a “modification of the above stated rule” that

[t]he legal effect of a final instrument which defines and declares the intentions and rights of the parties cannot be modified or corrected by proof of any preliminary negotiations or agreement, nor is it permissible to show how the parties understood the transaction in order to explain or qualify what is in the final writing, in the absence of an allegation of fraud or mistake or unless the terms of the instrument itself are ambiguous and require explanation.

Judge Branch added:

It is a well-established general rule that if the parties reduce their entire contract or agreement to writing, whether under seal or not, the court will not hear parol evidence to vary or change it, unless for fraud, mistake or the like; but if it appear that the entire agreement was not reduced to writing, or if the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement

contract entered into between the parties, or which tends to substitute a new or different contract for the one evidenced by the writing, is incompetent. This rule applies where the writing totally integrates all the terms of a contract or supersedes all other agreements relating to the transaction. The rule is otherwise where it is shown that the writing is not a full integration of the terms of the contract. The terms not included in the writing may then be shown by parol.

Id. at 34–35, 253 S.E.2d at 265–66 (internal citations omitted).
251. See Evans v. Freeman, 142 N.C. 61, 64–65, 54 S.E. 847, 848 (1906).
253. Id. at 587, 158 S.E.2d at 832.
254. Id. at 587, 158 S.E.2d at 835.
255. Id. (quoting Orion Knitting Mills v. U.S. Fid. & Guar. Co., 137 N.C. 565, 569, 50 S.E. 304, 305 (1905)) (internal quotation marks omitted).
between the parties, and, in such a case, what was meant, is for
the jury, under proper instructions from the court.\textsuperscript{256}

Although the presumption would be less destructive of party
intentions if courts generally took such care, it adds nothing to the
analysis and operates like a legal version of an attractive nuisance,
luring courts into error.

It is indicative of the deficiencies of the presumption
methodology that it must be discussed here as a separate matter,
appearing like an ill-fitting undergarment between the conventional
PER topics of finality and completeness. However, the confusing
interweaving of the two issues is not peculiar to North Carolina. In
fact, the Restatement (Second) of Contracts executes what feels like a
backwards march, providing for a finding of finality based upon the
appearance of a writing's completeness: "Where the parties reduce an
agreement to a writing which in view of its completeness and
specificity reasonably appears to be a complete agreement, it is taken
to be an integrated agreement unless it is established by other
evidence that the writing did not constitute a final expression."\textsuperscript{257}

With the minimal factual underpinning of the specificity of the
written terms and the parties' reduction of their agreement to writing,
the appearance of completeness effectively creates a rebuttable
presumption of finality. Some protection is provided against
overzealous application of this provision by the invitation to negate
the finding by "other evidence" establishing that the writing is not
final.

Although the subject of this provision is a finding of finality,
which ultimately is based upon all relevant evidence, it is useful to
examine it as a basis of comparison of the presumption methodology
in North Carolina. The Restatement's presumption rests upon
something more than the mere presence of a writing. It utilizes a
Williston-type test of completeness, but hedged about by cautionary
language. First, it is triggered not by just any writing, but by the
parties having "reduce[d] an agreement to writing." The first words
emphasize the formality of a writing, suggesting intentionality, rather
than mere happenstance, such as receiving from the other party a
writing to which the recipient attaches no significance. The word

\textsuperscript{256} Id. at 590, 158 S.E.2d at 837 (quoting Cumming v. Barber, 99 N.C. 332, 335–36, 5
S.E. 903, 904–05 (1888)) (internal quotation marks omitted).

\textsuperscript{257} RESTATEMENT (SECOND) OF CONTRACTS § 209(3) (1981). It seems fairly
unobjectionable, but it is confusing to invoke the appearance of completeness to support a
finding of finality.
"reduction" connotes a conscious and intentional process that entails going to some trouble.258

The presumption is often used as a generalized standard, apparently thought to resolve both finality and completeness. However, because finality is a question of actual expressed intent, while completeness may be tied by the PER to the appearance and content of the writing itself, it is dangerous and difficult to provide for both in one rule of presumption. The biggest danger is that a court will overlook evidence that the parties never intended to make a final writing as the court of appeals did in Mayo.259 Like much of the North Carolina methodology, many of the problems created by the presumption are likely attributable to plucking isolated quotations from prior opinions without attention to factual, legal and syntactic context. Attention to underlying policy is omitted in many cases and facts are too often ignored. The presumption is an unwieldy and imprecise tool and ought to be discarded.

If it is to be retained, it makes the best sense to restrict the presumption of completeness to a context in which its principled application reflects a real factual context as in Bost v. Bost.260 Bost's is not a free-ranging presumption, but is tied to the narrow context of separation agreements.261 Unfortunately, Bost seems to have re-established the influence of the presumption as a general PER device. Since Bost there has been a widespread practice in North Carolina of resolving PER and interpretation issues by applying a presumption like a large bandage to cover every PER problem.

An unusual presentation of the completeness issue in Medical Staffing Network, Inc. v. Ridgway262 involved a different presumption arising from a merger clause. After the parties had signed a second formal contract, a controversy arose over its effect upon the first formal contract's covenant not to compete.263 What is unusual is that the issue here is framed as one of novation rather than the PER, a strategy that may have been beneficial in helping the court to bypass

258. It is believed that such language excludes the receipt in Johnson v. Honeycutt. See supra notes 132–36 and accompanying text.
261. See supra note 176 and accompanying text (discussing Lane v. Scarborough, 355 N.C. 763, 618 S.E.2d 227 (2005)).
263. Id. at ___, 670 S.E.2d at 324–25.
264. Id. at ___, 670 S.E.2d at 325–26.
the confused, fragmentary North Carolina PER. However, Corbin could have included Medical Staffing Network in his PER section on substituted contracts. The analysis is the same for novation as it would be for the PER issue, assuming that the court would approach novation and substitution from the same perspective in the spectrum of rule choices between pure Williston and pure Corbin.

The analysis in the case has elements of both Williston and Corbin, but Corbin clearly dominates in the end. There are two significant indications of his influence: (1) the merger clause does not by itself prove that the second formal written contract was intended as a novation, or, in the language of the PER, a final and complete written contract (total integration):265 and (2) the ultimate test of the merger clause’s effectiveness is whether “it would frustrate the parties’ true intentions.”266 If the PER were the issue, the test applied would be directed to the finality and completeness of the second writing. The merger clause triggers a rebuttable presumption that the written contract “represents the final agreement between the parties,” but this gives way to extrinsic evidence which the court admits to show “the parties’ overall intended purposes of the transaction in each case and whether admission of parol evidence will contradict or support those intentions as expressed in the writing(s).”267

Although the exceptions above show the North Carolina courts’ typical care in determining whether a merger clause establishes a writing’s completeness, it is nevertheless true that such clauses often tip the balance in that direction. When completeness is found, extrinsic terms that are consistent with the writing are excluded along with those that are contradictory. It is easy to see the potential for overlap with the issue of interpretation, since that issue may be framed in terms of the parties’ explicit or tacit agreement to an idiosyncratic meaning. Not surprisingly, although there is some question whether interpretation is an issue to which the PER applies, it has proven impossible to tease these topics apart from one another.268

265. See id. at __, 670 S.E.2d at 325–26.
266. Id. at __, 670 S.E.2d at 326 (citing Zinn v. Walker, 87 N.C. App. 325, 333, 361 S.E.2d 314, 318 (1987)).
267. Id. at __, 670 S.E.2d at 326. (quoting Zinn v. Walker, 87 N.C. App. 325, 333, 361 S.E.2d 314, 318 (1987)) (internal quotation marks omitted).
268. See supra note 67.
b. Completeness: Interpretation and Ambiguity

Notwithstanding the controversy over the inclusion of interpretation as a PER issue, there is little doubt that an understanding of each substantially enriches mastery of the other. Thus, it is an easy decision to include interpretation in this Article to the extent that it informs the inquiry into the PER’s application in North Carolina. A look at interpretation is especially valuable in light of the court’s use of ambiguity not only as a factor permitting extrinsic evidence for purposes of interpretation but also as an indicator of incompleteness under the PER.

Historically, the PER battle has been said to lie in the field of completeness, with a parallel controversy raging over standards of interpretation. As to the latter, North Carolina cases are more likely than in a PER context to adopt a hard Willistonian rule in the form of a “plain meaning,” “four corners” approach. At least, that is the methodology most cases utilize if their language can be taken at face value. There is virtual unanimity in North Carolina that a finding of ambiguity is required, as by Williston’s approach, before...
extrinsic evidence is admissible to construe or interpret the meaning of the terms of a final written contract. However, analysis of what the courts actually do reveals a mixture of approaches, with many cases utilizing a test of ambiguity that rests upon assessment of the meanings actually given to the term by each party. Such cases show an admixture of a strong influence from Corbin and the Restatement (Second) of Contracts to mitigate the effects of the “plain meaning” standard.

However, ambiguity plays another role in North Carolina cases. As indicated in the discussion above, ambiguity has crossed the line from interpretation into the PER proper to become a prominent feature of some of the formulae applied in North Carolina to determine completeness or even sometimes finality. Neal v. Marrone inserted a “free of uncertainty” component into the completeness test under the PER and has been often cited for its test of completeness. The appearance of ambiguity as an issue under North Carolina’s modern PER may be just a sign of confusion. On the other hand, a reference to a writing’s lack of ambiguity or its “plain meaning” may represent a slightly befuddled Willistonian focus upon the appearance of the writing as proof of the parties’ intentions relative to it.

The role of ambiguity and the tests by which it can be identified constitute a major secondary battleground in North Carolina. Some decisions apply a hard “plain meaning” rule, although with an eye to customary or context-specific meanings. A second group freely admits extrinsic evidence, using a soft Corbin-inspired rule of interpretation, designed to give effect to the parties’ real discernible intentions; these admit all relevant evidence, including the parties’ purposes, situations at making, and objects to be accomplished. A third group of cases apply a mixed test, citing “plain meaning” precedent, but looking beyond the writing itself for the parties’ intentions.

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274. 2 WILLISTON, supra note 3, § 609. Corbin, not a believer in semantic certainty, would consider all relevant evidence as to the meaning of any term, without any necessity to find ambiguity first. 3 CORBIN, supra note 3, § 542.

275. E.g., Cox v. Cox, No. C0A06-873, 2007 WL 2244671, at *3 (N.C. Ct. App. Aug. 27, 2007) (holding, in a case involving a consent judgment, that the court was not limited to the four corners of the agreement but should take into account the controversy, purpose, and events involved in the litigation).

276. 239 N.C. 73, 79 S.E.2d 239 (1953).

277. Id. at 77, 79 S.E.2d at 242.

278. See id.

279. It seems likely that the prominent inclusion of a quotation from Neal v. Marrone in Stansbury may be responsible for the case’s influence. 2 STANSBURY, supra note 26, § 252.
intentions. The cases within the three groups are not so consistent as to be predictable: their methodologies are too haphazard to support an inference of doctrinal preferences. Nor is it possible to tease away true PER cases from those involving interpretation and construction and so achieve at least a descriptive doctrinal purity in this Article. Consequently, the explication of ambiguity that follows is drawn from both PER and interpretation cases. Given the characteristically mechanical and formulaic methodology of the North Carolina PER cases, it does not seem to matter which of the many formulae is applied, so there is no attempt to catalog them here. All the old phrases are still extant and enough has been said of them by Chadbourn and McCormick and by Dalzell. What follows focuses instead upon the role of ambiguity and the tests by which its presence is demonstrated or negated.

i. The Hard Test: Plain Meaning and Four Corners

A true "plain meaning" test is rare in North Carolina. The most restrictive test possible would invoke a plain meaning rule without any mention of ambiguity. Such a test would indicate the court's certainty that its meaning is the only reasonable one and that the judicial eye is by nature well-equipped to spot ambiguity arising from the context of the words within the writing's four corners. In such opinions, ambiguity is likely to be recognized only when the writing's terms conflict or where the term in question has no obvious application within the four corners of the writing.280 This is often referred to as a "four corners" test, exemplified in the recent landmark New York case of W.W.W. Associates, Inc. v. Giancontieri.281 The conclusion may rest upon precedent, as in the Mobil Oil case below, or it may reflect informal judicial notice of something like immanent meaning. Hard rules are thought by their proponents to enhance predictable results, justifying unjust individual results on grounds of the public good.282 The detractors of such rules grant the injustice as their inevitable outcome but doubt the public benefit asserted as their justification.283 As asserted in the Discussion

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281. 566 N.E.2d 639 (N.Y. 1990) (rejecting extrinsic evidence that a contract provision was included solely for the benefit of one party, who might therefore waive it).

282. Williston said the certainty was "more than an adequate compensation for the slight restriction put upon the power to grant and contract." 2 WILLISTON, supra note 3, § 612.

283. See 3 CORBIN, supra note 3, § 575.
Model above, a well-proven meaning or one acknowledged to have been shared by both parties should prevail over any other meaning in the absence of an established rule of law to the contrary protecting a third party whose interest is at stake.

*Mobil Oil Corp. v. Wolfe* shows how thoroughly interwoven are issues of interpretation with the PER in North Carolina. Defendants signed guaranty agreements in which the words “signed, sealed and delivered” appeared above their signatures and “L.S.” beside them. They sought to introduce parol evidence to show they did not understand what the seal signified and had not been given any explanation of it and that they did not intend to make a sealed instrument.

Although it is not made explicit in the opinion, it seems evident that the defendants saw ambiguity in the variety of meanings the seal had come to bear. They did not seek to prove a different term, but to show a different meaning of the seal term in the writing. However, the supreme court barred the extrinsic evidence, relying upon an old PER case. The court’s confusion between the PER (triggered by finality and completeness) and interpretation (triggered under the hard rule by ambiguity) is shown in the holding: “We hold that where, as here, there is no ambiguity on the face of the instrument as to the adoption of the seal, such testimony is barred by the parol evidence rule.”

*State v. Philip Morris USA Inc.*, on the other hand, is a nuanced, careful analysis in which ample justification is made for

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284. *See supra* notes 68–73 and accompanying text.

285. Such third party protections include, for example, the record notice requirement in *Runyon v. Paley*, 331 N.C. 293, 313, 416 S.E.2d 177, 191 (1992) and the protections U.C.C. Article 3 gives to holders in due course. U.C.C. §§ 3-305, 3-306 (1990).


287. The court defined “L.S.” as “an abbreviation for ‘Locus sigilli,’ which means ‘the place of the seal.’ The symbol is well understood in law and commerce to be a seal.” *Id.* at 37 n.1, 252 S.E.2d at 810 n.1 (quoting BLACK’S LAW DICTIONARY 1014 (rev. 4th ed. 1968)).


289. *Mobil Oil*, 27 N.C. at 39, 252 S.E.2d at 811 (citing Bell v. Chadwick, 226 N.C. 598, 600, 39 S.E.2d 743, 744 (1946)).

290. *Id.* at 37, 252 S.E.2d at 809.

291. 359 N.C. 763, 618 S.E.2d 219 (2005). The court found there was no tax offset adjustment under the National Tobacco Growers Settlement Trust for 2004, where no assessments were scheduled under the 2004 Fair and Equitable Tobacco Reform Act (“FETRA”) law until March 2005 and the tobacco companies were obligated to continue payments to the trust until they actually paid a FETRA obligation. *See id.* at 781, 618 S.E.2d at 230.
relying upon the "plain meaning" rule to construe the National Tobacco Growers Settlement Trust for the effect, if any, of a subsequent change in law. The court properly scrutinized the whole contract, not just any one particular term. It examined the language itself as well as the syntax for indications of the parties' intent at time of execution, giving the words their common meaning because of the "degree of lawyerly scrutiny each word ... doubtless underwent" in drafting. The purposes of both parties for each contested provision, as well as for the agreement as a whole were taken into account to settle the parties' disagreement as to its meaning. The rule that written contracts are construed against the drafter was

292. *Id.* at 775, 618 S.E.2d at 227.
293. *Id.* at 773, 618 S.E.2d at 225 ("Since the object of construction is to ascertain the intent of the parties, the contract must be considered as an entirety. The problem is not what the separate parts mean, but what the contract means when considered as a whole." (quoting Jones v. Casstevens, 222 N.C. 411, 413-14, 23 S.E.2d 303, 305 (1942)) (internal quotation marks omitted)).
295. *Id.* at 775, 618 S.E.2d at 227 (noting that settlors conceded the great detail and precision of drafting).
296. For example, it "appears" to the court that a purpose is that "Settlors ... not receive offsets for assessments not tied directly to cigarette production," so that both "for the same year" and "in connection with" both modify "paid." *Id.* at 776, 618 S.E.2d at 227 (internal quotation marks omitted). Then, the court rejected a reading of other language to mean that the new law itself triggered the offset adjustment, pointing to a qualifier in that paragraph and continuing.

Furthermore we very much doubt the trial court's construction of the wording ... reflects the original understanding of the parties. The court would allow a Tax Offset Adjustment even if the government never collects the assessments due under a qualifying change of law and hence never spends them for the benefit of tobacco farmers. Under those circumstances, tobacco farmers would receive reduced distributions (or no distributions) from the Phase II Trust and nothing from the government. The negative financial implications of this scenario for tobacco farmers are obvious.

*Id.* at 777, 618 S.E.2d at 228. *Phillip Morris USA Inc.* sets a standard based not upon mechanical or formulaic rules, but upon real analysis.
297. *Id.* at 779, 618 S.E.2d at 229 ("Certainly the most compelling reason for rejecting [Settlor's interpretation] is that, taken to its logical extreme, it could defeat the express purpose of the Phase II Trust. As previously explained, the Trust was crafted to protect tobacco farmers from economic harm caused by the MSA [Master Settlement Agreement]."). The court said the trial court acknowledged unfairness to the farmers of its holding, but that it emphasized equally burdensome results to the Settlors the other way. The Supreme Court of North Carolina pointed out that the Settlors knew at the beginning that a tobacco buyout might take longer than the Trust's obligation period, noting it took seven years to reach FETRA. *See id.* at 780, 618 S.E.2d at 229. After considering the purposes of both sides it found that it "r[an] squarely counter to the express purpose of the Trust" to leave farmers without the extra income for years. *See id.*
acknowledged but not applied because the Trust Agreement expressly stated that neither party was to be considered the drafter.

Ironically, the leading case on interpretation, *Lane v. Scarborough*, is based upon a PER case, *Bost v. Bost*. In *Lane*, Justice Sharp held that an implied right to inherit from a deceased spouse was inconsistent with the language of a separation agreement in which the parties released property rights and rights to administer each others' estates. Although framed as an interpretation case involving implication in fact, the inheritance right in *Lane* can also be understood as an extrinsic term governed by the PER. Either way, concerns for finality, certainty, and predictability as to the property division in the settlement agreement were equally implicated, which may explain the case's atypically hard interpretation rule.

Justice Sharp began conventionally with a Corbin-like formula seeking the parties' intentions in "the subject matter, the end in view, the purpose sought, and the situation of the parties at the time." However, she immediately backed away, asserting that "the intention of the parties" is a question of law for the court when there is no disputed fact or ambiguity in the written contract. She then looked to see whether the inheritance right was to be implied in fact in this agreement.

The decision in *Lane* justified its "four corners" approach by pointing out that "the term "separation and property settlement agreement" in the absence of clear language or impelling implications connotes not only complete and permanent cessation of marital relations, but a full and final settlement of all property rights of every kind and character." In light of that connotation, additional terms, including those creatively implied in fact, are fairly characterized as contradictory.

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298. The rule is applied selectively, most notably in cases where one of the parties is in a group thought more than usually likely to be taken advantage of by those situated the other party, for example, insurance cases. As authority for the rule of construction against the drafter, the court cites *Chavis v. S. Life Ins. Co.*, 318 N.C. 259, 262, 347 S.E.2d 425, 427 (1986). *Phillip Morris USA Inc.*, 359 N.C. at 773 n.14, 618 S.E.2d at 225 n.14.
299. *Id.*
301. 234 N.C. 554, 67 S.E.2d 745 (1951). See supra notes 173-76 and accompanying text (discussing *Bost v. Bost*).
304. *Id.*
305. *Id.* at 411, 200 S.E.2d at 625.
306. *Id.* (quoting *Bost*, 234 N.C. at 557, 67 S.E.2d at 747).
One danger of a hard rule is that a court may go so far as to impose its own meaning over the meaning attributed to a term by both of the parties, without justification in the facts or in the general context. This occurred in *Walton v. City of Raleigh*, 307 in which the court construed a consent judgment in a way that not only ran counter to the attested understandings of both parties, but also left the plaintiffs considerably worse off than they would have been without it. 308 In *Walton*, the plaintiffs sought access to sewer lines for which Wake County had obtained an easement across their land. The consent judgment provided plaintiffs' access to the sewer lines "subject to ... obtaining tap-on privileges from the appropriate governing bodies." 309 Raleigh (the county's successor) refused until plaintiffs connected to water lines, which were located at such distance that it would cost $270,000. The court read the consent judgment to require Raleigh's consent as the "appropriate governing body," which it could deny until the plaintiffs complied with its regulations. 310 The court was confident of its reading of the agreement even when the plaintiffs pointed out that, without it, they would be entitled with all other property owners to connect to the sewers. To the plaintiffs' argument that having both original parties in opposition to the court's interpretation made the consent judgment ambiguous, the court responded, "Parties can differ as to the interpretation of language without its being ambiguous, and we find no ambiguity here." 311

There is no indication that the city relied to its detriment on a particular interpretation or of any public policy concerns in *Walton*. Moreover, the court failed to acknowledge what appeared to be expert interpretation afforded by the county's attorney, whose affidavit along with plaintiffs' was held inadmissible. 312 A dispute in

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308. *See id.* at 881, 467 S.E.2d at 411-12.
309. *Id.* at 880, 467 S.E.2d at 411.
310. *Id.* at 881, 467 S.E.2d at 411.
311. *Id.* at 881-82, 467 S.E.2d at 412.
312. *Id.* at 881, 467 S.E.2d at 411. Compare to *Cowell v. Gaston County*, ___ N.C. App. ___, 660 S.E.2d 915, 920 (2008), showing the court's characteristically careful analysis in an insurance case, noting the testimony of an assistant county manager that he did not consider inspection a "professional service."

Having offered Beasley as not only a reasonable person, but one of its employees most qualified to interpret the contested insurance policies, defendant may not now argue the opposite. This testimony raises at least a question of material fact concerning defendant's reasonable understanding of the coverage it was purchasing. Beasley's testimony further provides some evidence *as to defendant's intent and understanding* of the coverage it was purchasing.
which both contracting parties side with one another against the court's reading should at least be entitled to a second look. In Walton, there was no factual analysis to substantiate the "plain meaning" attributed to the term by the court.

ii. The Soft Test

Coexisting beside the hard test cases is a group exemplifying a fact-oriented analysis strongly suggestive of Corbin's influence. At first glance, few decisions seem to fit this category. North Carolina cases nearly always say that they are using a plain meaning approach. However, a more careful reading may expose a different standard. Often the standard is a very liberal one.

Many cases define ambiguity by tests that include the term's susceptibility to either of the party's particular meanings. An illustrative case is Kimbrell v. Roberts, a suit by a creditor against a corporation's guarantor for breach of sale of stock and debentures, in which the court found an ambiguity "where the terms of the contract are reasonably susceptible to either of the differing interpretations proffered by the parties." This standard is very liberal, requiring examination and an implicit evaluation of the reasonableness in context of each of the parties' asserted understandings. Not only are these courts examining extrinsic evidence, but it is of the subjective variety, limited in its relevance, of course, by the usual rule of the objective theory of contracts. The filter of reasonableness protects to some extent against errors and gives the parties a good opportunity to have their full arguments heard and the court an equivalent opportunity to ensure that the analysis comports with legal standards. However, the court went considerably beyond this, finding that the very fact of a dispute was some indication of ambiguity. This is perhaps the most liberal test that still retains any PER at all. The

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313. Id. (emphasis added) (internal citations omitted).
314. Id. at 73, 650 S.E.2d at 447.
315. See Root v. Allstate Ins. Co., 272 N.C. 580, 585–86, 158 S.E.2d 829, 834 (1968) ("A contract, express or implied, executed or executory, results from the concurrence of minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree." (quoting Prince v. McRae, 84 N.C. 674, 675 (1881))).
language of the writing is characteristically given great significance in such cases, but it gives way to a clearly proven intention, as long as it has not been superseded. The goal of these cases is to give effect to the parties' actual expressed intentions.

A substantial and consistent line of cases provides a soft rule for insurance cases, evaluating a term's ambiguity from the perspective of a reasonable person in the insured's position and exhibiting vigilance against "slippery" terms, which in one case included the word "you." The liberal rule applied in Kimbrell traces back to a 1970 insurance case, Wachovia Bank & Trust Co. v. Westchester Fire Insurance Co., which obviously has not been limited to insurance cases, as it might have been given its reference to the rule of strict construction against the insurer.

Majestic Cinema Holdings, LLC v. High Point Cinema involved a duty asserted to be implied in fact by interpretation of the written contract. Like Lane v. Scarborough, it could easily be framed as a PER case rather than one of interpretation. At issue in Majestic Cinema was a tenant's liability to pay back rent accumulated during a period when his payment was excused by the landlord's failure to have open a certain square footage of adjacent retail space. As a matter of strategy, it is possible that the case was not presented as a PER issue because no such term was actually agreed to. The landlord presented it as one of interpretation, contending the duty was lurking unexpressed as an inherent term of the written lease.

The court began by reciting a common refrain, that if a contract's meaning "is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein." Nevertheless, the court did examine the writing to determine whether it might also be susceptible to the landlord's reasoning, concluding that his interpretation would necessitate

317. See Cowell, - N.C. App. at --, 660 S.E.2d at 920.
319. Id. at 354, 172 S.E.2d at 522 ("No ambiguity, calling the above rule of construction into play, exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend.").
322. Majestic Cinema, - N.C. App. at --, 662 S.E.2d at 22.
323. Id. at --, 662 S.E.2d at 22 (quoting Duke Energy Corp. v. Malcolm, 178 N.C. App. 62, 65, 630 S.E.2d 693, 695 (2006)).
specific language. "Therefore," it said, "we cannot say the landlord's interpretation of the contract is reasonable. We hold the meaning of the contract is clear and only one reasonable interpretation exists." The analysis in the case points to an ambiguity rule much like that in *Kimbrell*, although the rule stated emphasizes a "reasonable person" test.

A case noteworthy for its attention to the facts in resolving the issue of ambiguity is *Litvak v. Smith*, although the court scarcely paused to administer the test itself. In *Litvak*, the obligation of a real estate purchaser was conditioned upon his obtaining final approval for rezoning to residential use. Turned down by the board, he appealed, at which point the seller called it quits. The court found the purchaser's failure to obtain rezoning approval within a reasonable time constituted a failure of condition precedent, allowing the vendor to terminate the contract. Carefully analyzing the terms of the contract as to time for performance as well as the parties' conduct afterwards, the court directed its inquiry to the parties' intention at the time of making. Like *Kimbrell*, this court found ambiguity in the susceptibility of the language to either of the parties' meanings. Considering express provisions relating to time and circumstances as well as conduct of the parties relative to time, the court held for the vendor, concluding, "it is patently unreasonable to require defendant to keep the contract open pending resolution of plaintiffs' uncertain and indefinite litigation with the Town of North Topsail Beach."

iii. Mixed Tests

Many cases fall between the two extremes. There are two sorts. One group is mixed in the sense of applying a hard test to one kind of issue and a soft test to another. Separation agreements as a group fall into this category. The other group mixes soft and hard tests together as to the same issue. Some of these no doubt illustrate no more than confusion, with the rule fragments strung together without making any distinction between them. Others make a way among the fragments, hewing to a middle course neither quite hard nor soft.

324. Id. at __, 662 S.E.2d at 23.
326. Id. at 203, 636 S.E.2d at 328.
327. Id. at 206, 636 S.E.2d at 329–30.
328. Id. at 206, 636 S.E.2d at 330.
329. Id. at 209, 636 S.E.2d at 331.
330. Id. at 209, 636 S.E.2d at 331–32. *Litvak* is another case in which implication in fact and interpretation/construction issues are so closely related as to invoke either the PER or rules of interpretation or both.
These cases tend to give strong emphasis to the words used in the writing, but with less confidence that something like a DNA profile is possible for words, especially if the evidence of the parties’ interpretations is very credible. They may be apt to keep a stronger focus on the context in which the writing was drafted than do hard-rule cases. The principled mixed cases reflect attention to extrinsic evidence, but at a distance. They do not, for example, refer to the separate meanings attached by each of the parties to determine ambiguity. It seems likely they would apply the parties’ mutual meaning even if the term is unambiguous, unless third parties or society in general is likely to be injured. Courts in this group may ask whether a term is susceptible of more than one “reasonable” meaning even after finding a plain meaning for the term.

Mixed-test cases often recite a “plain meaning” rule, but then look beyond the four corners of the writing for extrinsic indications of ambiguity. Where these cases often vary from the soft-test cases is in restricting the ambiguity test to the meaning given the term by “reasonable persons” rather than the litigants themselves. The difference may not be great, because the litigants must establish their credibility in order that their meanings be considered by the court in soft-test cases. It is possible, however, that extrinsic evidence is examined with a more favorable eye or that more of it is considered by the soft-test courts.

Separation agreements as a group (because they rarely involve both extrinsic terms and interpretation in the same case) are good examples of mixed tests. North Carolina courts often use a hard PER for these cases, but a soft rule of interpretation. A “hard” Willistonian PER test is applied to exclude extrinsic terms not only to contradict the writing but to supplement it as well. The separation agreement itself is the virtually exclusive witness to its own finality and completeness. This technique gives the writing the effect of

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331. This is opposite to the mixture suggested in Charles J. Goetz and Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 309, 309 n.127 (1985), which is criticized by Posner, *supra* note 2, at 559–60. After exploring what he calls “conflicting” assumptions, Posner concludes, “[b]ecause the ambiguity rules and completeness rules overlap so much, with both of them referring essentially to the use of extrinsic evidence to interpret writings that do not allocate obligations in sufficient detail, the use of different assumptions for each argument is not justified.” Posner, *supra* note 2, at 560. He is speaking generally, not of separation agreements, and his arguments are economic ones. This author believes the strategy evolved by the North Carolina courts for separation agreements works admirably and makes good sense both economically and by more relational or traditionally normative standards.
marking emphatically the end of the parties' relationship and signifying the end of controversy, at least as to property. The terms that are in the writing cannot be challenged and those that are outside can never come in. As long as the writing looks final and complete to the court's experienced eye, it fixes property rights permanently. Neither party being able to add or subtract from it, both can depend upon it to go forward. Lane v. Scarborough\textsuperscript{332} provides authority for applying such a hard test to limit the implication of terms\textsuperscript{333} that are not obviously necessary to carry out the writing's express terms.

The separation agreements that exemplify mixed tests often use a soft rule of interpretation to determine the meaning of the express written terms.\textsuperscript{334} This likely reflects the experienced court's awareness of the circumstances in which these agreements may be signed. Executed in an emotionally charged context, often with minimal assistance of counsel if any, the separation agreement's words may require judicial support to become decipherable, much less fully credible as reflections of both parties' intentions. Not surprisingly, courts often look at all relevant evidence to understand what the parties actually meant. Attentive interpretation and construction may also prevent the agreement's being held fatally indefinite. An excellent example is provided by Judge Hunter's dissent in Jackson v. Jackson,\textsuperscript{335} relied upon by the supreme court as grounds for its reversal.\textsuperscript{336} Judge Hunter applies a plain meaning rule, but with such attention to the facts and such informed pragmatism that what seems "plain" to the judge have might seemed equally plain to Corbin. The contract was saved from being lost to vagueness and uncertainty by practical interpretation and extrinsic evidence to bolster terms made ambiguous by their lack of specificity.

A good example of the kind of mixed cases that interweave hard and soft rules together is Root v. Allstate Insurance Co.,\textsuperscript{337} which combines plain meaning language requiring an unambiguous contract to be interpreted "as written"\textsuperscript{338} with the liberal instruction that

\begin{itemize}
  \item \textsuperscript{332} 284 N.C. 407, 200 S.E.2d 622 (1973).
  \item \textsuperscript{333} What is meant here are those terms implied in fact, not terms implied by law.
  \item \textsuperscript{335} 169 N.C. App. 46, 54, 610 S.E.2d 731, 736 (2005) (Hunter, J., dissenting), rev'd and remanded per curiam, 360 N.C. 56, 59, 620 S.E.2d 862, 863 (2005) (grounding the reversal in the reasons stated in Judge Hunter's dissent).
  \item \textsuperscript{336} Jackson v. Jackson, 360 N.C. 56, 56, 620 S.E.2d 862, 863 (2005).
  \item \textsuperscript{337} 272 N.C. 580, 158 S.E.2d 829 (1968).
  \item \textsuperscript{338} Id. at 583, 158 S.E.2d at 832.
\end{itemize}
"'[t]he heart of a contract is the intention of the parties, which is to be ascertained from the expressions used, the subject matter, the end in view, the purpose sought, and the situation of the parties at the time.'"339

_register v. white_,340 also an insurance case, declares its middle-of-the-road position very clearly: "An ambiguity can exist when, even though the words themselves appear clear, the specific facts of the case create more than one reasonable interpretation of the contractual provisions."341 It applied the reasonable person test for ambiguity as is characteristic of this mixed-test group: "'[A] contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language . . . is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured.'"342

Marking a trend toward a predictable analysis may be easier in cases involving interpretation than in pure PER cases. Outside a few distinctive categories, the PER cases in North Carolina defy prediction. Not even a common rationale can always be found. Some of the doctrinal inconsistency and haphazard analysis is due to the prevailing methodology, which is to quote fragments of the rule from prior cases and string them together without analysis; some, no doubt, is due to simple confusion. Certainly one answer to the problems in the cases is to pay greater attention to the facts. One might suppose that the other part of the obvious solution is to be sure that the authority relied upon is both internally consistent and consistent with the court's own policies and goals. The problem is that the identification of those policies and goals may be frustrated by the complexity of the PER itself.

V. PAROL EVIDENCE RULE RATIONALE, STRATEGY, AND INTERPLAY WITH INTERPRETATION

Some of the mysteries cloaking the PER have serious practical implications that may stymie the best efforts of bench and bar to shape the case law into a coherent and principled whole.

339. _Id._ at 583, 158 S.E.2d at 832 (quoting _Sell v. Hotchkiss_, 264 N.C. 185, 191, 141 S.E.2d 259, 265 (1965)).
341. _Id._ at 695, 599 S.E.2d at 553.
342. _Id._ at 699, 599 S.E.2d at 556 (quoting _Grant v. Emmco Ins. Co._, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978)).
One such mystery is the PER's rationale, which explains why that foundation subject appears at the end of this Article, rather than at the beginning: its assessment requires some understanding of the cases themselves. Just as there is no authoritative version of the rule itself, there is no consensus rationale. As frustrating as that may be, it does not diminish the PER's use as an ideal strategic tool.

One rationale universally recognized for the PER is to prevent terms superseded in later stages of negotiation from being revived by juries. For example, the jury is properly prevented from hearing of a favorable duration term, later discarded in exchange for a better price under the final written contract. If that were the only goal, the rule might have no role in a judge-tried case, for no matter how well-proven the earlier agreement, the court will not be misled to apply the superseded term because judges understand how contract negotiations work. Perhaps it is because this function of the PER is so well understood to be a baseline rationale\(^3\) that it seems largely a self-policing principle seldom necessitating litigation.\(^4\)

Credibility is much more often invoked as a rationale,\(^3\)\(^4\) but concentrating on credibility makes for inconsistent case law.\(^3\)\(^4\) When

\(^3\) See, e.g., Craig v. Kessing, 297 N.C. 32, 35, 253 S.E.2d 264, 265 (1979) ("This rule applies where the writing totally integrates all the terms of a contract or supersedes all other agreements relating to the transaction.").

\(^4\) But see Dalzell supra note 7, at 437 ("The possibility that the agreement was made as part of the provisional tentative arrangements preceding the final agreement, and surrendered in the bargain finally signed, sealed and delivered—that possibility seems to be ignored.").

\(^3\) See, e.g., Nicholas R. Weiskopt, Supplementing Written Agreements: Restating the Parol Evidence Rule in Terms of Credibility and Relative Fault, 34 EMORY L.J. 93, 103 n.41 (1985) ("Evidence of oral collateral agreements should be excluded only when the fact finder is likely to be misled. The rule must therefore be based on the credibility of the evidence." (quoting Masterson v. Sine, 436 P.2d 361, 554 (Cal. 1968) (Traynor, C.J.)) (citing 3 CORBIN, supra note 3, § 582)); see also McCormick, supra note 38, at 369 ("[The PER] enables the judge to head off the difficulty at its source, not by professing to decide any question as to the credibility of the asserted oral variation, but by professing to exclude the evidence from the jury altogether."). For a North Carolina example of credibility as a rationale, see Jefferson Standard Life Insurance Co. v. Morehead, 209 N.C. 174, 175, 183 S.E. 606, 607 (1936) ("It is well-nigh axiomatic that no verbal agreement between the parties to a written contract, made before or at the time of the execution of such contract, is admissible to vary its terms or to contradict its provisions. As against the recollection of the parties, whose memories may fail them, the written word abides. The rule undoubtedly makes for the sanctity and security of contracts.").

\(^4\) See McCormick, supra note 38, at 369 ("This all-inclusive prohibition by rule of law against any competition of oral agreements with written was effective enough as a jury-excluding formula, but as an actual standard of decision for judges it was wholly illusory."). Dalzell thought that most people “have made their agreement in writing in order to have a record of the contract terms that is precise, permanent and reliable. They
a party’s veracity is in doubt, the PER may be invoked to prevent her from undermining a written term with an inconsistent oral one. The court need only recite the rule, which bars an extrinsic term on grounds that it contradicts a writing intended as final. So far, so good, but suppose the next case features a highly credible or even a conceded extrinsic term that contradicts the final writing. In many such cases, at least where the earlier term is not superseded, North Carolina courts seem to regard the conflict between the two agreed-to terms as evidence of ambiguity in the written term. When ambiguity is the focus, the inquiry ordinarily falls under the heading of “interpretation.” The switch from ascertaining the terms of the agreement to determining the meaning of the written term supplies a context for giving effect to both terms actually agreed to by the parties if they can be made consistent. This scenario makes evident the difficulty of teasing apart interpretation and the PER, no matter how strong the theoretical justification for doing so.

One could envision, on very similar facts with parties who are sophisticated and represented by counsel, that the PER might not be raised at all, the interpretation issue being presented by itself as it is in State v. Philip Morris U.S.A., Inc. In such a case, the specter of enforcing a superseded term becomes a real danger. A North Carolina court might be inclined to circle the wagons by relying upon a “plain meaning” rule to deny any effect to such extrinsic evidence. As an alternative, the PER can be raised on the court’s own motion as a substantive rule of contract law. If the understanding originated in a promise, representation, or discussion prior to the final writing, it could be addressed as a term. The PER’s mechanism works well to avoid an inconsistent, superseded term when a contract has been negotiated sequentially. The usefulness of novation as an alternative

intend the integration as protection against forgetfulness and against falsehood.” Dalzell, supra note 7, at 421.

347. Of course, the parol evidence rule bars prior written terms as well as prior and contemporaneous oral ones, but the credibility issue invariably arises in the context of oral terms.

348. The issue of finality is rarely addressed explicitly in North Carolina cases. Finality should rest upon actual intent rather than a legal fiction, because the PER does not apply until after a final writing is executed.

349. See supra notes 313–16 and accompanying text. But see Walton v. City of Raleigh, 342 N.C. 879, 881–82, 467 S.E.2d 410, 412 (1996) ("Parties can differ as to the interpretation of language without its being ambiguous . . . .").

PAROL EVIDENCE RULE

...
to admit and give effect to an extrinsic term that was clearly or
concealedly agreed to and consistent with the writing. In this case, a
different line of cases may be invoked barring contradiction but not
supplementation. In the alternative, the court may regard the
existence of the extrinsic term as an indication of the writing's
incompleteness.

CONCLUSION

Justice Holmes once said, "A word is not a crystal, transparent
and unchanged; it is the skin of a living thought and may vary greatly
in color and content according to the circumstances and the time in
which it is used." His words capture a large part of Corbin's
argument in favor of a liberal PER, if indeed there must be one at all.
The Supreme Court of North Carolina responded to Professor
Dalzell's earlier criticisms:

Although Professor Dalzell in his law review article is
somewhat critical of the North Carolina rule as being too
liberal, he does state that while some courts emphasize the
protection of the written instrument from invasion, the
emphasis in North Carolina is rather in the direction of giving
the proponent of the oral agreement a chance to prove that it
was made if he can, and that by so doing the North Carolina
decisions may sometimes come closer to enforcing the contract
that should be enforced than do the more conservative
authorities.

If the court today would endorse that statement, it must be
dismayed by the more recent case law. The prevailing North Carolina
methodology has degenerated into a fragmented recitation that
deproves the rule of what is perhaps its principal justification, which is
predictability. The legal landscape is littered with PER fragments
that might have been linked together to frame a rule with doctrinal
consistency, capable of providing guidance to practitioners and
judges. The effect of reading the North Carolina PER cases is

355. That is the effect of the cases identified above as implementing a liberal Corbin-
type approach or a soft rule of interpretation. The assertion in the text assumes that the
relevant rationale is credibility alone, i.e., that there is no danger of giving effect to a
superseded term.
befuddlement and frustration, or as Justice Susie Sharp was fond of saying, "Confusion worse confounded!"\textsuperscript{358}

Furthermore, to the extent that Williston's analysis has become entrenched, the court that defended its principles against Dalzell's criticisms has additional cause for dismay in that the benignity of the formerly liberal approach to parol evidence seems to be giving way to a cold indifference to the reality of the transactions involved. Justice Holmes' warning about the contextuality of language is instructive for those who are bewitched by the fantasy of a fixed and unchanging verbal universe. In the service of their ideal, they disregard well-proven obligations undertaken and relied upon by parties who do not view their transactions as legal fictions. Applied without constraint of context, the effect of a hard PER is all the more bitter because it fails to provide a talisman against confusion and perplexity. No one has yet ascertained the cost to society and to those affected by apparent judicial indifference, of finding their just expectations sacrificed in the pursuit of a verbal holy grail.

Of course, even a coherent and just rule may have incoherent and unjust effects. In North Carolina, however, the PER is neither intrinsically coherent nor just. Having been reduced to fragmentary

\textsuperscript{358} Newton v. Standard Fire Ins. Co., 291 N.C. 105, 117, 229 S.E.2d 297, 304 (1976) (Sharp, J., concurring). In her concurrence, Justice Sharp asserted that, in overruling a case in dictum, the majority “can only further confuse an area of the law which is rapidly becoming confusion worse confounded.” \textit{Id.} At the time of the Newton case, this author was law clerk to Justice James G. Exum, Jr., who wrote the majority opinion.

There is a substantial catalog of North Carolina cases that have used the phrase, usually without attribution and sometimes with hilarious results. A good example of the latter is \textit{Turner v. L.L. Murphrey Hog Co.}, 43 N.C. App. 314, 317-18, 258 S.E.2d 825, 827 (1979), in which a jury foreman asked the judge, “Was there an average of 34 pigs weighing less or did each pig weigh less than 40 pounds?” When the judge’s response was unhelpful, the foreman asked a second time: “Was it average or each?” The judge’s response was, “Each has nothing to do with average.” The exchange inspired the court to comment, “John Milton in Paradise Lost described Hell as, ‘Confusion worse confounded.’ The ‘hellish’ position in which the participants to this comedy of errors found themselves is manifest in the colloquy between the jury and the judge.” \textit{Id.} at 318, 258 S.E.2d at 827.

In the earliest case, \textit{Young v. Young}, 81 N.C. 91 (1879) (involving a procedural issue of misjoinder), the court encountered “‘confusion worse confounded’” as a result of too great an abundance and diversity of case law and commentary. \textit{Id.} at 97. The subject had become “complex, uncertain, and defiant of logic,” leaving judges and commentators “adrift” without meaningful guidance. \textit{Id.}

No doubt, the PER provokes sentiments similar to those expressed in \textit{Young}. Frustration and confusion generate hopelessness, which undercuts the analytical process; in turn, the fragmentary and quixotic case law breeds greater and greater frustration and confusion. It is instructive that the court in \textit{Young} seems to have gained something by its explicit acknowledgment of the “confusion worse confounded,” for it went on to decide the case methodically and with apparent confidence that it had reached a just result.
snippets, it is equally incoherent and unfair as applied. Thus, not only is legal enforceability denied to terms that have clearly been agreed to, but the application of the rule is so poorly marshaled that it stands little chance of operating to good effect.

As widespread confusion and frustration\textsuperscript{359} predominate in the state courts, federal courts have been left largely to fend for themselves. In \textit{Smith v. Central Soya of Athens, Inc.}\textsuperscript{360} a well-reasoned case from the Eastern District of North Carolina, the court could hardly have helped but observe, "[I]t is impossible to reconcile all of the statements of the parol evidence rule contained in North Carolina cases . . . ."\textsuperscript{361} Unfortunately, the hopeful observation in \textit{Central Soya} that North Carolina common law opinions were beginning to mirror the "certainly better-drafted"\textsuperscript{362} U.C.C.\textsuperscript{363} has proven premature. Rarely, if ever, is a case overruled in North Carolina for error in the words used to represent the PER itself, leaving many inconsistent lines of precedent in North Carolina undisturbed, co-existing as approximate equals. No doubt, confusion generated by the rule's difficulty is partly to blame, for no one can be sure what is correct and what erroneous. It is tempting to believe that some may have given up the effort. What is undeniable is that the prevailing preference for formulaic recitation rather than analysis masks profound differences between one version of the PER and the next. Over time, the mind slips away from anything repeated mechanically,\textsuperscript{364} gradually mixing in a half-conscious idiosyncratic content and ending with nonsense, somewhat in the same way that half-listening to song lyrics distorts their meaning. Personal

\begin{footnotesize}
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\item \textsuperscript{359} 2 \textsc{Kenneth S. Broun, Brandis & Broun on North Carolina Evidence} § 260 (5th ed. 1993) ("It is impossible to reconcile all the statements of the rule contained in the North Carolina cases."); \textit{see also} \textsc{John N. Hutson & Scott A. Miskimmon, North Carolina Contract Law} § 5-4 (2001) ("The fact is that the parol evidence rule is difficult of application (and is likely to remain so even in UCC cases); and, unless a precedent for the particular situation can be found, it is hazardous to predict the ultimate disposition of any case in which an asserted oral agreement deals with the same general subject matter as the writing and does not squarely contradict its express terms. . . . [The North Carolina decisions] are inevitably somewhat indefinite; and, in situations not governed by the Uniform Commercial Code, it is not surprising to find that specific applications to miscellaneous types of contracts seem to be inconsistent.").
\item \textsuperscript{360} 604 F. Supp. 518 (E.D.N.C. 1985).
\item \textsuperscript{361} \textit{Id.} at 523.
\item \textsuperscript{362} \textit{Id.} at 524 n.5. For a discussion of how North Carolina courts are mirroring the Uniform Commercial Code analysis, see \textit{id.} at 523 n.4, 524 n.5.
\item \textsuperscript{363} \textsc{N.C. Gen. Stat.} § 25-2-202 (2007).
\item \textsuperscript{364} \textit{See, e.g.,} McCormick, \textit{supra} note 38, at 380 ("[Courts have inherited the] anaesthetic qualities of the language-technique about 'contradicting,' 'admissibility,' and 'completeness' . . . .").
\end{enumerate}
\end{footnotesize}
experience fills in what is uncertain. Children hear, “Gladly the cross-eyed bear,” not “Gladly the cross I’d bear”; a teenager sings tunelessly,

I’m in the mood for love,
Simply because you’re near me,
Funny Butt, when you’re near me,
I’m in the mood for love.365

Doctrinal haziness has erased the demarcations between inconsistent lines of PER precedent, allowing them to coexist when they ought not. Nonsense is the result, but in this case it is not funny. Intervention by the Supreme Court of North Carolina is sorely needed to take matters in hand. The task need not be a nightmare. The current inconsistency permits some room to maneuver, but it leaves the bench and the bar perplexed. If flexibility is the goal, why not embrace Corbin’s version of the rule, which allows all relevant evidence to be considered in order to give effect to the parties’ actual intentions? The U.C.C. PER, carrying with it the imprimatur of legislative approval, provides great encouragement to do so. Even if the hard approach seems to the court the wiser alternative, it would seem preferable to the current chaos. “A review of the cases suggests a serious doubt whether this method of administration is a sufficient safeguard for the stability of . . . transactions to meet the needs of the business elements of the community366 or the personal transactions of the citizens of the state.

366. These are the closing words in 1932 of James Chadbourn and Charles McCormick. Chadbourn & McCormick, supra note 4, at 176.