Cross-Appeals: What, Why, When, and How in North Carolina's Federal and State Appellate Courts

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Filing a notice of appeal subjects a trial court's judgment (or, in appropriate circumstances, interlocutory order) to appellate review. But, what, exactly, does a notice of appeal subject to review? If you're an appellee, and are dissatisfied with some aspect of the judgment, this question can be of paramount importance.

A notice of appeal subjects a trial court's judgment to appellate review only to the extent that the judgment was unfavorable to the appellant. Generally speaking, if the appellee seeks to make the judgment more favorable to itself, or less favorable to the appellant, then a cross-appeal is required.

Cross-appeals are a regular—but relatively infrequent—occurrence in the federal and state appellate courts in North Carolina.[2] Thus, while most appellate practitioners and appellate judges will have some familiarity with cross-appeals, as Justice Scalia remarked in Jennings v. Stephens, "familiarity and clarity do not go hand-in-hand." 574 U.S. 271, 276 (2015).

Clarity on cross-appeals is important because the failure to file a cross-appeal can result in forfeiture of appellate review. This guide helps litigants avoid that unfortunate result by explaining the following:

- What are cross-appeals, and in what kinds of situations does one find them?
- What is not a cross-appeal, and when may an appellee challenge a trial court's ruling without filing one?

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[1] These written materials reflect the views of the presenters. They do not reflect the views of the North Carolina Department of Justice, the Attorney General, or any of the Department's or Attorney General's clients.

[2] Only about twenty Fourth Circuit opinions issued in 2020 mentioned cross-appeals. About the same number of North Carolina Court of Appeals opinions issued in 2020 mentioned cross-appeals.

- How and when does one file a cross-appeal?
- Why does the cross-appeal requirement exist, is it jurisdictional or a rule of practice that courts have discretion to overlook, and what can an appellee do if it failed to file a cross-appeal but wishes to challenge the judgment?
- How does one brief and argue a cross-appeal?
- When are cross-appeals possible in an interlocutory posture?
- How does one present "cross issues" in the North Carolina Supreme Court?

In addressing these issues, this guide discusses the applicable rules under federal and state law, with a focus on the Fourth Circuit for federal law.[3]

I. What Is a Cross-Appeal?

In a typical appeal, the appellant, who lost in the trial court, appeals for the purpose of reversing a judgment that is unfavorable to the appellant, while the appellee, who won in the trial court, seeks to uphold the judgment.

A cross-appeal occurs when the appellee wants more than to uphold the trial court's judgment, and seeks to change some aspect of the judgment that is unfavorable to itself. In other words, a cross-appeal is "an appeal by the appellee." "Appeal," Black's Law Dictionary (11th ed. 2019).

The federal and state courts have developed very similar, and perhaps identical, doctrines on cross-appeals—as is shown below.

A. Cross-appeals in federal court

The leading case on cross-appeals in federal court is United States v. American Railway Express Co., 265 U.S. 425 (1924), in which the Supreme Court explained that:

> [T]he appellee may not [without filing a cross-appeal] attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter

[3] This guide largely focuses on civil appeals, but notes a few distinctions and examples from the criminal context.

not dealt with below.

Id. at 435.

Thus, if the appellee seeks to either (1) expand the relief granted to itself under the judgment, or (2) lessen the relief granted to the appellant, then a cross-appeal is needed. Each situation is discussed in more detail below.

Cross-appealing to expand the relief granted to the appellee. An appellee's desire to expand the relief granted to itself under a judgment can occur where a plaintiff-appellee—or in a criminal case, the government-appellee—prevailed in the district court, but did not receive all of the relief it requested. The following recent cases presented this situation.

- In Mayor of Baltimore v. Azar, the Mayor and City Council of Baltimore, who obtained an injunction prohibiting the federal government from enforcing an anti-abortion regulation within Maryland's borders, were required to cross-appeal to obtain review of their argument that the district court erred by limiting the scope of the injunction to Maryland. 973 F.3d 258, 294-95 (4th Cir. 2020) (en banc). Because the Mayor and City Council did not cross-appeal, the Fourth Circuit "declined to consider this argument." Id. at 295.

- In Driskell v. Summit Contracting Group, Inc., 828 F. App'x 858, 860-61, 871-72 (4th Cir. 2020), an employment-discrimination case involving a jury verdict in favor of the plaintiff, after the defendant appealed, the plaintiff cross-appealed to challenge the district court's ruling that he could recover only one of punitive damages or attorneys' fees.

- In United States v. Buckman, 810 F. App'x 184, 185 (4th Cir. 2020), a criminal case, after the government obtained a conviction and sentence for unlawful possession of a firearm, and the defendant appealed, the government cross-appealed to challenge the district court's failure to apply a sentencing enhancement under the Armed Career Criminal Act.

Cross-appealing to lessen the relief granted to the appellant. An appellee's desire to lessen the relief granted to the appellant can occur where there was a split decision in the trial court, such that the judgment grants some relief to the plaintiff and other relief to the defendant, and each wants to lessen the relief granted to the other; or where the party that prevailed in the district court appeals first to expand the relief granted to itself by the judgment, and the losing party seeks to lessen the relief granted to the prevailing party.

- Ward v. AutoZoners, LLC, 958 F.3d 254 (4th Cir. 2020), an employment-discrimination case, involved the first situation. There, the district court granted the defendant's motion for summary judgment on the plaintiff's claim of constructive discharge, but allowed the plaintiff's claims of discrimination and intentional infliction of emotional distress to proceed to trial. After the jury rendered verdicts for the plaintiff on the latter two claims and the defendant appealed, the plaintiff cross-appealed to challenge the grant of summary judgment for the defendant on the claim of constructive discharge. Id. at 262-63.

- Wantou Siantou v. CVS Rx Servs. Inc., 822 F. App'x 204 (4th Cir. 2020) (unpublished), another employment-discrimination case, involved the second situation. There, the plaintiff prevailed at trial, but appealed the denial of his motion for attorneys' fees. The defendant cross-appealed, seeking to overturn the jury verdict for the plaintiff. Id. at 205; see Wantou Siantou v. CVS Rx Servs. Inc., No. PWG-17-0543, 2019 WL 5864587 (D. Md. Nov. 5, 2019).

- United States v. Davis, 631 F. App'x 200, 200-01 (4th Cir. 2016) (unpublished), a criminal case, also involved the second situation. There, the government obtained a conviction and sentence, but appealed the district court's sentencing calculations. In his response brief, the defendant sought to challenge another sentencing ruling by the trial court, which the Fourth Circuit declined to consider because the defendant did not cross-appeal. Id. at 200-01.

In each of the six situations discussed above, the appellant's notice of appeal was not sufficient to allow the appellee to challenge aspects of the judgment that were unfavorable to the appellee. Instead, to change an aspect of the judgment that was less than what the appellee sought in the district court, or that was favorable to the appellant, the appellee had to cross-appeal.

B. Cross-appeals in state court

Similar principles govern cross-appeals in North Carolina's state courts. For instance, the North Carolina Supreme Court has held that an appellee must file a cross-appeal whenever it seeks "affirmative relief in the appellate division rather than simply arguing an alternative basis in law for supporting the judgment." Alberti v. Manufactured Homes, Inc., 407 S.E.2d 819, 826 (N.C. 1991). Applying that principle, the North Carolina Court of Appeals has explained that an appellee must cross-appeal whenever it seeks appellate review of "alleged errors that purport to show that the judgment [below] was erroneously entered and that an altogether different kind of judgment should have been entered" instead. Harllee v. Harllee, 565 S.E.2d 678, 684 (N.C. Ct. App. 2002). Accordingly, as in federal

court, a cross-appeal is necessary both when an appellee seeks to expand the relief that it won below,[4] and when it seeks to diminish the relief granted to another party.[5]

II. What Is Not a Cross-Appeal?

Two situations are frequently mistaken for cross-appeals:

(1) an appellee's attempt to convince an appellate court to adopt an argument that the trial court rejected or did not address, but that supports the trial court's judgment and thus would not change the relief granted by the judgment; and

(2) an appellee's attempt to reverse something other than the judgment appealed by the appellant.

As is explained below, in the first situation, no separate appeal is needed; in the second, a separate appeal is needed, but that appeal is not a cross-appeal.

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[4] See, e.g., Berens v. Berens, 837 S.E.2d 215 (N.C. Ct. App. 2020) (unpublished) (after husband appealed alimony award, seeking to reduce amount of award, wife cross-appealed, seeking to increase amount of award); Wilson v. Wilson, 714 S.E.2d 793, 796-97 (N.C. Ct. App. 2011) (declining to review appellee's argument that she should have been awarded additional child support because she failed to cross-appeal); CDC Pineville, LLC v. UDRT of N.C., 622 S.E.2d 512, 521 (N.C. Ct. App. 2005) (declining to review appellee's argument that trial court erred by not awarding appellee more damages because appellee failed to cross-appeal).

[5] See, e.g., Erie Ins. Exchange v. Smith, 2021-NCCOA-63, ¶¶ 27-29 (declining to review appellee insurer's argument that trial court erred by holding that it had to provide insurance coverage to insured because insurer did not cross-appeal); Semelka v. University of North Carolina, 854 S.E.2d 34, 46-47 (N.C. Ct. App. 2020) (university, which prevailed on former professor's wrongful termination claim, cross-appealed determination that professor was entitled to pay until appeals process was complete); State v. Williams, 725 S.E.2d 7, 9-10 (N.C. Ct. App. 2012) (declining to consider argument by appellee county officials that partial remission of bond to bail-bonds company was error because officials failed to cross-appeal).

A. Asking an appellate court to affirm a judgment based on an argument rejected or not addressed by the trial court is not a cross-appeal

A cross-appeal is not necessary, in either federal or state court, if the appellee challenges the trial court's reasoning, but does not seek to change the relief granted by the trial court.

As the U.S. Supreme Court explained in American Railway:

> [I]t is settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.

265 U.S. at 435.

The Supreme Court's 2015 decision in Jennings illustrates this principle. There, Robert Mitchell Jennings, a Texas man who had been convicted of capital murder and sentenced to death, filed a petition for habeas relief in federal district court, raising three claims of ineffective assistance of counsel during the sentencing phase of his capital trial. Jennings, 574 U.S. at 273-75. The district court granted relief on the first two claims, but denied relief on the third, and ordered the State to release Jennings from custody, unless, within 120 days, the State granted him a new sentencing hearing or sentenced him to imprisonment for a term of years. Id. at 275. After the State appealed, the Fifth Circuit reversed the grant of relief on Jennings' first two claims. Id. While Jennings argued that the district court had erred in denying relief on the third claim, the Fifth Circuit declined to review that issue because Jennings had not filed a cross-appeal. Id.

The Supreme Court granted certiorari to decide whether Jennings was required to file a cross-appeal to challenge the district court's ruling on the third claim, and then reversed. Id. at 275, 283. The Supreme Court noted that, under the district court's judgment, Jennings had the right to a new sentencing hearing or a term of imprisonment, and the State had the right to retain Jennings in custody pending resentencing or to commute his sentence. Id. at 276. Jennings' success on claim three on appeal would not change either his or the State's rights under the judgment. Id. Thus, without filing a cross-appeal, Jennings was entitled to challenge the district court's ruling on claim three, and, in fact could have "urge[d] [in] support of the judgment" "any potential claim that would have entitled [him] to a new sentencing proceeding." Id. at 278 (quotation omitted).

North Carolina's appellate courts apply similar principles. Rule 28(c), for example, provides that "[w]ithout taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the

appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken." N.C. R. App. P. 28(c). Based on this rule, North Carolina courts have consistently held that appellees, without filing a cross-appeal, can advance arguments on appeal for affirming the judgment below that the trial court itself might not have adopted—including arguments that the trial court expressly rejected. See, e.g., Harllee, 565 S.E.2d at 684-85 (holding that appellee, without appealing, could argue alternative grounds for affirming trial court's holding that premarital agreement was unenforceable).

Not requiring appellees to file a cross-appeal in circumstances like these makes sense given the other rules that govern appeals in federal and North Carolina courts, moreover. There are many instances where prevailing parties would lack standing to appeal a judgment in their favor. For example, section 1-271 of the North Carolina General Statutes provides that only a "party aggrieved" may appeal from a trial court's judgment. N.C. Gen. Stat. § 1-271. The same principles apply in federal court. See Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 333 (1980) ("Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom.").

Relying on this doctrine, federal and North Carolina appellate courts have previously dismissed cross-appeals filed by prevailing parties, holding that prevailing parties must proceed as appellees and present alternative grounds for affirming the decision below. See, e.g., Moore v. Moore, 203 F.3d 821, 2000 WL 37749, at *2 n.5 (4th Cir. 2000) (unpublished) (declining to consider cross-appeal because "no aspect of the judgment below was adverse to" the appellee); Templeton v. Apex Homes, Inc., 595 S.E.2d 769, 772 (N.C. Ct. App. 2004) (holding that when "a party has prevailed below and any subsidiary adverse rulings will not subject the party to collateral estoppel on those issues," that party may not appeal); McInerney v. Pinehurst Area Realty, Inc., 590 S.E.2d 313, 316 (N.C. Ct. App. 2004).[6]

[6] While appellees may ask North Carolina's appellate courts to affirm a judgment on alternative grounds, they are not required to do so. The North Carolina Supreme Court recently clarified that when a trial court rules for an appellee but does not address each of the arguments that the appellee advanced that might support the trial court's judgment, the appellee does not waive those alternative arguments by choosing not to press them on appeal. The appellee may instead properly choose to wait to present those alternative arguments on remand if the appellant prevails in its appeal. See City of Asheville v. State, 794 S.E.2d 759, 766 n.11 (N.C. 2016).

B. An appeal of an order that is separate from the judgment appealed is also not a cross-appeal

Another situation that can be confused with a cross-appeal occurs when an appellee seeks to reverse an order other than the specific order or judgment appealed by the appellant. This situation is not a cross-appeal; instead, the appellee must separately appeal from the specific order or judgment that it seeks to reverse. This issue has created some confusion in North Carolina's state courts, so the discussion below focuses on how this issue has been addressed in those fora.

As an initial matter, for many cross-appeals, an appellee need not worry about this issue. That is so because when an appellee cross-appeals from a final judgment, that cross-appeal should generally allow the appellee to challenge most orders the trial court entered before final judgment. Section 1-278 of the General Statutes provides that when a party appeals "from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment." N.C. Gen. Stat. § 1-278; see also Charles Vernon Floyd, Jr. & Sons, Inc. v. Cape Fear Farm Credit, ACA., 510 S.E.2d 156, 158-59 (N.C. 1999), abrogated on other grounds by Dep't of Transp. v. Rowe, 521 S.E.2d 707, 709-10 (N.C. 1999). Applying this rule to cross-appeals, filing a cross-appeal from a final judgment should allow an appellee to challenge many of the trial court's orders that preceded entry of final judgment, provided those orders affected the judgment. See Miller v. Carolina Coast Emergency Physicians, LLC, 2021-NCCOA-212, ¶ 30 (effectively applying this rule without referencing section 1-278).[7]

The situation is different, however, if the appellee seeks to cross-appeal from an order that is not encompassed by a final judgment.

For instance, before entry of final judgment, section 1-278 does not apply. In those situations, when a party appeals from an interlocutory order that precedes entry of final judgment, a cross-appellant can only challenge the specific interlocutory order from which the appellant has appealed. Cross-appeals from interlocutory orders are further discussed below. See infra pp 24-28.

[7] Despite section 1-278, the Court of Appeals has on occasion refused to consider arguments concerning intermediate orders when parties cross-appealed from what appeared to be final judgments. See Smith v. Smith, 786 S.E.2d 12, 31-32 (N.C. Ct. App. 2016); Monin v. Peerless Ins. Co., 583 S.E.2d 393, 399 (N.C. Ct. App. 2003). In these cases, the cross-appellants might have failed to raise section 1-278 when the other party argued that the cross-appeals that challenged the intermediate orders were deficient.

Looking beyond interlocutory orders, the Court of Appeals has also faulted appellees in several other situations for trying to use cross-appeals to challenge orders other than the specific order that another party appealed. In those situations, improperly filed cross-appeals have resulted in the Court of Appeals holding that it could not review an order that the cross-appellant tried to appeal:

- **Post-Judgment Orders:** The Court of Appeals has held that parties may not seek to appeal a final judgment by filing a cross-appeal from an order entered after the final judgment, such as a later award of attorney's fees. For instance, in Rice v. Danas, Inc., a trial court entered a final judgment on the merits that was favorable to the defendant, and then, more than a year later, denied the defendant's motion for attorney's fees and its motion seeking to impose sanctions on the plaintiff. When the defendant appealed the denial of its motions, the plaintiff tried to cross-appeal the final judgment. The Court of Appeals held that the plaintiff could not do so, because the defendant's request for attorney's fees was "a separate proceeding" from the earlier proceedings that had produced the final judgment on the merits. 514 S.E.2d 97, 102 (N.C. Ct. App. 1999).[8]

- **Family-Law Orders:** The Court of Appeals also recently reached a similar conclusion in the family-law context. For orders that resolve family-law disputes, a specialized statute provides that orders that resolve claims for child support, alimony, and equitable distribution of property are all final judgments when entered, even if other claims remain pending when those claims are resolved. See N.C. Gen. Stat. § 50-19.1. Against that backdrop, in Slaughter v. Slaughter, the Court of Appeals considered a case where a trial court had entered three separate orders in quick succession in the same case, resolving claims for alimony, child support, and equitable distribution. When the appellant noticed appeals from the alimony and equitable-distribution orders, the appellee filed a cross-appeal from the equitable-distribution order, which had already been appealed, and from the child-support order, which had not. The Court of Appeals responded by dismissing the appellee's putative cross-appeal from the child-support order—which was filed after the deadline for an initial appeal, and thus was untimely as a stand-alone appeal. In doing so, the Court of Appeals held that, "[i]n a matter in which multiple,

[8] Federal Rule 4(a)(4)(A) stays the deadline for appealing the judgment if certain post-judgment motions are filed (including some motions for attorney's fees), and thus serves, in federal court, to combine the appeal of the final judgment with the appeal of certain post-judgment orders.

separate orders issue, and one party appeals from some, but not all, of those orders, a cross-appellant who files her cross-appeal . . . shall be limited to appeal from only those orders challenged in the original appeal." 803 S.E.2d 419, 428-29 (N.C. Ct. App. 2017).

- **Judgments Against Other Defendants:** The Court of Appeals has also held that a defendant cannot appeal a judgment entered against it by cross-appealing from a distinct judgment entered against another defendant. For instance, in Surratt v. Newton, a trial court entered two judgments against two defendants, who had both failed to adequately maintain a home rented to the plaintiff over distinct, non-overlapping periods. One defendant appealed from the judgment, and the other defendant later cross-appealed. The Court of Appeals, however, dismissed the cross-appeal, holding that the cross-appellant could not premise its appeal on the other defendant's appeal, because cross-appeals can only be filed by "parties to th[e] same appeal," and the cross-appellant was not a party to the other defendant's appeal. 393 S.E.2d 554, 557-58 (N.C. Ct. App. 1990).

In sum, appellees should pay careful attention to whether the ruling they seek to overturn is encompassed by an order or judgment that has already been appealed, such that a cross-appeal is proper, or whether a separate appeal is the proper means to obtain review.[9]

[9] When a party cannot proceed as a cross-appellant in state court, but instead must notice a separate appeal, it's possible that two closely related appeals from the same proceeding could proceed separately in state court, with separate records, separate briefing schedules, and separate oral arguments. Parties, however, can take steps to avoid this result. First, if multiple notices of appeal are filed before the record on appeal is filed in the appellate division, the appellants can ensure that all appeals are heard together by submitting a single record on appeal that includes multiple notices of appeal. See N.C. R. App. P. 9(a)(1)(i) (directing parties to include copies of the notice of appeal in the record on appeal). Second, if multiple records are filed, parties can also move for their appeals to be consolidated for briefing and argument. See id. R. 40 (allowing appeals to be consolidated when they "involve common issues of law").

III. When and How to File a Cross-Appeal

The rules that govern filing cross-appeals are similar in the federal and North Carolina appellate courts; however, as discussed below, there are notable differences with regard to deadlines and preparation of the record on appeal.

A. Deadline for filing a cross-appeal

1. Federal court

In civil cases, the deadline for an appellee to file a notice of appeal (and thus create a cross-appeal) is generally either thirty days from entry of the judgment or order appealed from, or fourteen days from the filing of the appellant's notice of appeal—whichever is later.[10]

This deadline comes from two places: first, Rule 4(a)(1)(A), which provides that, in a civil case in which a United States government entity is not a party, a notice of appeal must be filed with the district court clerk within thirty days after entry of the judgment or order appealed from; and, second, Rule 4(a)(3), entitled "Multiple Appeals," which states:

> If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

Fed. R. App. P. 4(a)(1)(A) & 4(a)(3).[11]

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[10] The federal rules expressly provide for different deadlines in criminal cases, which depend on whether the defendant or government is the appellant. If the government is the appellant, the deadline for the defendant to file a cross-appeal is fourteen days from the filing of the government's notice of appeal. Fed. R. App. P. 4(b)(1)(A)(ii). If the defendant is the appellant, then the deadline for the government to file a cross-appeal is thirty days from the filing of the defendant's notice of appeal. Fed. R. App. P. 4(b)(1)(B)(ii).

The state rules also treat civil and criminal cross-appeals differently, in that Rule 3(c) allows an appellee to file a notice of appeal within ten days after the first appellant's notice of appeal is filed, while Rule 4(a), which governs the time for notices of appeal in criminal cases, is silent on this issue.

[11] In cases involving a United States entity, the deadline for a cross-appeal is either sixty days from entry of the judgment or order appealed from, or fourteen days from the filing of the appellant's notice of appeal—whichever is later. Fed. R. App. P. 4(a)(1)(B) & 4(a)(3).

2. State court

North Carolina's rules for the filing of cross-appeals in civil cases are similar to the federal rules, and appear relatively straightforward. However, at least one major ambiguity lurks beneath their surface, which the North Carolina courts appear not to have addressed before.

The deadline for an appellant to notice an appeal in a civil case in state court is generally thirty days after entry of judgment. See N.C. R. App. 3(c). If such a notice is timely "filed and served by a party," then Rule 3(c) provides that "any other party may file and serve a notice of appeal within ten days after the first notice of appeal was served on such party." Id. Thus, unlike in federal court, the time to notice a cross-appeal runs from service of the initial notice of appeal, not from its filing, and the appellee has four fewer days than in federal court to decide whether to cross-appeal.

The purpose of providing additional time to file a notice of appeal after an initial notice is filed is to eliminate the need to file "protective" appeals. Before the current rule was adopted, a party who was content to accept a judgment, but who wanted to appeal if the other party appealed, had "been forced to give notice of appeal against the possibility that [the other] party [would] take appeal at the last moment." 1-5 Elizabeth B. Scherer & Matthew N. Leerberg, North Carolina Appellate Practice and Procedure § 5.05 (2018) (quoting official commentary to Rule 3 from 1975). Providing cross-appellants ten additional days was meant to eliminate this need to file a protective appeal that a party would ultimately dismiss if the other party chose not to appeal. Nevertheless, providing additional time to cross-appeal has created a new trap for litigants. As noted above, litigants sometimes mistakenly rely on the cross-appeal deadline to try to notice appeals from orders from which they should have appealed within thirty days of the order's entry. See supra pp 8-10.

Another possible trap is built into North Carolina's cross-appeal rules, because the time to file a cross-appeal is ambiguous in at least one circumstance. This ambiguity occurs when the appellant files the initial notice of appeal early within the thirty-day period after entry of a judgment or order. In that circumstance, the rules aren't entirely clear whether an appellee must file a cross-appeal within ten days of the first notice of appeal, or whether the appellee may choose to file a cross-appeal after that deadline, so long as the cross-appeal is filed within thirty days of the entry of order. In other words, the rules don't clearly specify if the filing of an initial notice of appeal can cut short the time that another party would have to appeal, absent the filing of the initial notice. Given this ambiguity, cross-appellants should likely err on the side of caution by filing a cross-appeal within ten days of service of the initial notice, even if that deadline is before

thirty days have passed since the entry of the appealed judgment or order.[12]

B. Contents of the notice of appeal

In both federal and state court, the rules that govern the contents of an appellant's notice of appeal apply equally to an appellee's notice of a cross-appeal. Those rules are discussed briefly below.

1. Federal court

The federal rules require a notice of appeal to (A) specify the party or parties taking the appeal, (B) identify the judgment, order, or part thereof being appealed, and (C) name the court to which the appeal is taken. Fed. R. App. P. 3(c)(1). Requirement (B) merits some further discussion.

Similar to the approach in North Carolina's courts, discussed above, the Fourth Circuit interprets a notice of appeal from a final judgment to give the Court jurisdiction to review all previous rulings leading to the judgment. See In re Boswell, 238 F.3d 410, 2000 WL 1713877, at *2 (4th Cir. 2000) (unpublished) (citing McLaurin v. Fischer, 768 F.2d 98, 101 (6th Cir. 1985)). Thus, if an appellant has noticed an appeal of a final judgment, to obtain review of any rulings unfavorable to itself, an appellee may simply notice an appeal of the final judgment and need not specify the orders in which those rulings were made.

Appellees should be aware, however, that a notice of appeal subjects underlying rulings to appellate review only if a final judgment was involved, and only if the notice of appeal actually specifies the final judgment as the subject of the appeal. If the notice of appeal specifies only certain orders and not the final judgment as the subject of the appeal, then review will be limited to those orders specified. Id. (citing Gunther v. E.I. Du Pont de Nemours & Co., 255 F.2d 710, 717-18 (4th Cir. 1958)).

2. State court

The state rules similarly require a notice of appeal to designate "the party or parties taking the appeal," "the judgment or order from which appeal is taken," and "the court to which appeal is taken." N.C. R. App. P. 3(d). The notice must also be signed by counsel, or, when a party represents itself, by the party. Id.

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[12] Under Rule 27(a), the time to file a cross-appeal is extended if it falls on a weekend or legal holiday. See E. Brooks Wilkins Family Med., P.A. v. WakeMed, 784 S.E.2d 178, 184 (N.C. Ct. App. 2016) (applying Rule 27(a) to the deadline to file a notice of appeal). Rule 27(b) also normally extends by three days the time to take any action following the service of a notice, but by its own terms, that rule does not apply to the filing of notices of appeal under Rule 3(c).

As in the federal context, the second requirement—that a notice of appeal list the judgment or order appealed—merits additional discussion.

When cross-appealing from a final judgment, a cautious cross-appellant might choose to list in its notice of appeal any intermediate orders that it intends to challenge on appeal. Taking this step might be prudent, because the Court of Appeals has occasionally stated that it prefers that parties list all such orders in their notices of appeal. That preference is surprising, because in Floyd & Sons, the Supreme Court suggested that that practice was unnecessary, given the rule that intermediate orders generally merge into final judgments under section 1-278. 510 S.E.2d at 159, abrogated on other grounds by Rowe, 521 S.E.2d at 709-10. Nevertheless, even after Floyd & Sons, the Court of Appeals has still stated that "the better practice without doubt would be to designate each order appealed from in an appellant's notice of appeal." Wells v. Wells, 512 S.E.2d 468, 471 (N.C. Ct. App. 1999). The Court of Appeals has even gone so far as to suggest that any notice of appeal that does not list all challenged orders that precede final judgment is "in violation of Rule 3(d)," even if section 1-278 still authorizes review of orders that are not expressly listed in the notice of appeal. Tinajero v. Balfour Beatty Infrastructure, Inc., 758 S.E.2d 169, 175 (N.C. Ct. App. 2014).

Given this precedent, careful cross-appellants might choose to list any orders preceding entry of final judgment that they intend to challenge on appeal, in addition to the final judgment. In doing so, however, they should be careful to clarify that they are cross-appealing from the final judgment, not filing an untimely appeal from orders entered months or perhaps years ago.

C. The record on appeal

The process for preparing the record on appeal (and the joint appendix in federal court) for a cross-appeal should generally be the same as with any other appeal—provided the parties to the appeal are inclined to cooperate.

1. Federal court

In federal court, the record on appeal can be thought of in three relevant parts: the documents filed in the district court docket, transcripts of relevant district court proceedings, and the joint appendix. Each part is discussed below.

In all appeals, including cross-appeals, the district court clerk prepares a certified copy of all documents filed in the district court docket, and makes it available to the court of appeals. Fed. R. App. P. 10(a)(3).

The appellant is responsible for ordering any transcripts needed for the appeal (within fourteen days of the appellant's notice of appeal). Fed. R. App. P. 10(b)(1). With a cross-appeal, the cross-appellant is responsible for ordering transcripts that are necessary for the cross-appeal that were not ordered by the

appellant (within fourteen days of the cross-appellant's notice of appeal). 4th Cir. Loc. R. 10(c)(1); Fed. R. App. P. 10(b)(3)(B). The Fourth Circuit Local Rules "encourage[]" the parties to agree on ordering those parts of the transcript that are needed for both the appeal and cross-appeal and to apportion the costs between them. 4th Cir. Loc. R. 10(c)(1).

The joint appendix, while not technically part of the record on appeal, is a compilation of those portions of the record that are relevant to the issues on appeal. See Fed. R. App. P. 30. The appellant—which, in the case of a cross-appeal, generally means the party who filed its notice of appeal first—is responsible for compiling and filing the appendix with its opening brief. Fed. R. App. P. 30(a)(1) & (3), 28.1(a) & (b). However, as with the record on appeal in state court (discussed below), the appellant is required to first serve a proposed appendix on the appellee, and both parties are responsible for ensuring that the appendix contains all relevant documents (and that it does not contain unnecessary documents), hence the name "joint appendix." Fed. R. App. P. 30(b)(1); see also 4th Cir. Loc. R. 30(c). The process for preparing and filing the joint appendix should be the same for a cross-appeal as for any other appeal. See Fed. R. App. P. 30(b)(1).

2. State court

In state court, preparing the record is very different from the process in federal court, in that the record is entirely compiled by the parties (rather than the trial court clerk) and can potentially take many months to assemble. Compiling the record in a cross-appeal, moreover, can present unique challenges. Before discussing those challenges, however, it may be helpful to summarize briefly how a record is prepared in an appeal with a single appellant.

The time to prepare the record begins to run when a notice of appeal is filed. After noticing an appeal, the appellant has fourteen days to identify the transcripts that it believes are needed for the appeal, then contract with a transcriptionist (if proceedings have not already been transcribed), and finally serve copies of the contract and a "transcript documentation" form on the appellee. N.C. R. App. P. 7(b)(2), (4). If the appellee believes that additional transcripts are needed, it has twenty-eight days after the notice of appeal is filed to make the same arrangements. Id. Once the transcriptionist receives a copy of the transcription contract, he or she then has ninety days in most cases to complete any transcripts. Id. R. 7(e)(1).

After this sometimes lengthy prelude, the process usually moves forward as follows: Forty-five days after all transcripts are received (or forty-five days after the last notice of appeal is filed, if later), the appellant serves a proposed record on the appellee. Id. R. 11(a), (b). Then, within thirty days, the appellee serves objections and amendments to the proposed record on the appellant. Id. R. 11(c).

Afterwards, within ten days, the parties usually come to an agreement to settle the record, to prevent the record from settling as a matter of law on the basis of the objections and amendments alone. Id. Finally, once the record is settled, the appellant has fifteen days to file the record and pay a docketing fee, at which point the clerk's office dockets the appeal and assigns a case number. Id. R. 12.

In large measure, the rules do not establish any special procedures to govern compiling the record during a cross-appeal. The rules do, however, clarify that "[w]hen there are . . . cross-appellants, there shall nevertheless be but one record on appeal." Id. R. 11(d). This rule ensures that, in cross-appeals, the appellant and cross-appellant do not create two separate records that are filed separately, receive different case numbers, and then serve as the basis for two distinct appeals. This rule also requires the appellant and cross-appellant to collaborate with each other and any other appellees to prepare a single record on appeal.

In most cross-appeals, this process should be uneventful. But for parties that refuse to work together cooperatively, the process can break down, because the record-compilation rules are not designed to accommodate cross-appeals. For instance, the rules do not clearly specify how the initial proposed record on appeal should be prepared in a cross-appeal. The rules seem to contemplate that the appellant and cross-appellant—who are both appellants under the state rules—should cooperate and serve a single proposed record on each other and any other appellees. See id. R. 11(b) (merely stating that "the appellant shall . . . serve upon all other parties a proposed record," without further guidance). But the rules provide no automatic mechanism to resolve disputes between the appellant and cross-appellant, creating the possibility that disagreements could prevent them from serving a proposed record within the forty-five-day deadline for doing so.

To address these potential shortcomings, Rule 11(d) creates a safety valve to stop quarrels among appellants from derailing the process. It provides that "[i]n the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs." Id. R. 11(d). Thus, when appellants cannot agree on how to assemble the record, judicial management of the process may be necessary.[13]

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[13] A final word should be said about the record-compilation process in cross-appeals. Rules 10(b) and 10(c) direct the parties, at the conclusion of the record, to list the "proposed issues" that they intend to raise on appeal, while clarifying that failure to list an issue does not limit the issues that they can ultimately argue in their briefs. N.C. R. App. P. 10(b), (c). This practice is a vestige of the old requirement, now discarded, that parties "assign errors" in the record before filing

IV. Why File a Cross-Appeal?

A. Reasons for the cross-appeal requirement

The cross-appeal requirement generally serves three interests:

(1) Notice—to the appellant (and potentially other parties) that the cross-appellant seeks to change some aspect of the judgment that the appellant would lack standing to challenge on appeal;

(2) Finality—in the sense that aspects of a judgment or order not appealed by the party aggrieved by them will be deemed final and not subject to change on appeal; and

(3) Accuracy—by ensuring that issues that may alter a trial court's judgment are fully briefed before being decided by an appellate court.

See Greenlaw v. United States, 554 U.S. 237, 259 (2008) (Alito, J., dissenting).

There is a lack of consensus on whether these interests weigh in favor of treating the cross-appeal requirement as jurisdictional—meaning that, if the appellee does not file a notice of appeal, then the appellate court lacks jurisdiction to either expand the relief granted by the trial court's judgment to the appellee, or to lessen the relief granted to the appellant—as opposed to a rule of practice that appellate courts have discretion to overlook. Federal and North Carolina courts have taken somewhat different approaches to this issue.

B. Is a cross-appeal jurisdictional?

1. Federal court

The United States Supreme Court has repeatedly declined to decide whether the cross-appeal requirement is jurisdictional, as opposed to a rule of practice that the federal appellate courts have discretion not to enforce in appropriate circumstances. See, e.g., El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473,

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their briefs. In the past, failure to assign errors in the record provided yet another way for cross-appellants to waive issues inadvertently. In theory, for instance, a cross-appellant could properly file a cross-appeal to modify the relief below, and yet still waive appellate review of any argument for doing so, because it had mistakenly failed to assign any errors in the record. See, e.g., Harllee, 565 S.E.2d at 684 (explaining that, under the old rules, "review on appeal [was] limited to a consideration of those assignments of error set out in the record on appeal"). Those days, fortunately, are now over.

479-80 & nn.2-3 (1999); Greenlaw, 554 U.S. at 245. However, the Supreme Court has described the cross-appeal requirement as "inveterate and certain," suggesting that the requirement may be jurisdictional. Greenlaw, 554 U.S. at 249 (quoting Morley Constr. Co. v. Maryland Cas. Co., 300 U.S. 185, 191 (1937)).

The Fourth Circuit, on the other hand, has held that the cross-appeal requirement is a rule of practice, and is not jurisdictional. Tug Raven v. Trexler, 419 F.2d 536, 548 (4th Cir. 1969). Thus, in the absence of a cross-appeal, the Fourth Circuit has discretion to review an argument by the appellee that, if successful, would change the relief granted by the judgment. United States v. Hill, 927 F.3d 188, 209 & n.7 (4th Cir. 2019), cert. denied, 141 S. Ct. 272 (2020). Of course, even so, to ensure that the Fourth Circuit will review an argument that is subject to the cross-appeal requirement, an appellee should file a cross-appeal.

2. State court

The North Carolina Supreme Court has held that the failure to file a timely initial notice of appeal is jurisdictional, see, e.g., Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co., 657 S.E.2d 361, 365 (2008), but does not appear to have ever addressed whether the failure to file a cross-appeal is jurisdictional.

The Court of Appeals, however, has repeatedly, and just as recently as several months ago, held that the failure to file a cross-appeal deprives it of jurisdiction to consider a cross-appellant's arguments. See, e.g., Erie, 2021-NCCOA-63, ¶ 29 (holding that because appellee "did not notice [an] appeal" that requested modification of the trial court's judgment, the Court of Appeals did "not have jurisdiction under Rule 28(c) over [the appellee's] arguments"); Gum v. Gum, 421 S.E.2d 788, 792 (N.C. Ct. App. 1992) (holding that Court of Appeals lacked jurisdiction to consider appellee's arguments for modifying order below because it had not "file[d] a written notice of appeal in accordance" with Rule 3).[14]

But this lack of jurisdiction doesn't necessarily mean that North Carolina's appellate courts are powerless to review an appellee's arguments for modifying the judgment below if no notice of appeal is filed. Rule 21 allows the appellate courts to issue writs of certiorari to "permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action." N.C. R. App. P. 21(a)(1). On occasion, the Court of Appeals has relied on the writ of certiorari to review issues for which the appellee should have filed a cross-appeal, but failed to do so. For instance, in Phelps v. Duke Power Co.,

[14] The Court of Appeals has also relatedly held that it lacks jurisdiction to consider a cross-appellant's arguments when the cross-appellant mistakenly filed a cross-appeal in a situation where an independent appeal was necessary. See, e.g., Slaughter, 803 S.E.2d at 427-29; Surratt, 393 S.E.2d at 557-58.

the Supreme Court noted that the Court of Appeals had exercised its discretion to issue the writ to review whether a trial court erred in calculating the interest on a money judgment owed to the appellee where no cross-appeal was filed. The Supreme Court then proceeded to review the decision of the Court of Appeals and adopted certain of the non-appealed arguments advanced by the appellee. 376 S.E.2d 238, 239-40 (N.C. 1989). And since Phelps, the Court of Appeals has occasionally granted similar certiorari relief to appellees that mistakenly failed to file a cross-appeal. See, e.g., Jonna v. Yaramada, 848 S.E.2d 33, 54 (N.C. Ct. App. 2020) (issuing writ to vacate child-support order for which appellee failed to file a cross-appeal).

Nevertheless, whenever possible, appellees should avoid relying on the writ of certiorari to seek to modify an order from which appellees have not cross-appealed. Issuing the writ is "extraordinary" relief, and the Court of Appeals frequently exercises its discretion to decline to review the orders of trial courts when appeals are not allowed by regular procedural rules. See, e.g., Bellows v. Asheville City Bd. of Educ., 777 S.E.2d 522, 523 n.2 (N.C. Ct. App. 2015).

V. How to Brief and Argue a Cross-Appeal

There is a stark difference in the federal and state rules' treatment of briefing and arguing cross-appeals: namely, the federal rules expressly address the subject, while the state rules are silent. This has led to a stark difference in the number of briefs filed in a cross-appeal in federal and state court: the federal rules limit that number to four, whereas, in a state court cross-appeal, there are typically a whopping six briefs. Likewise, the lack of treatment of cross-appeals in the state rules can create confusion about the structure of oral argument in cases involving them.

A. Briefing cross-appeals

1. Federal court

Rule 28.1, which was adopted in 2005, expressly governs the briefing process for cross-appeals, and does so in significant detail.[15]

[15] Before Rule 28.1 was adopted, the federal circuits had different rules on the number and length of briefs for cross-appeals, the color of cover pages, and the filing deadlines. 16AA Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3974.10 (5th ed.). Rule 28.1 reflects the majority practice among the circuits with respect to each of these issues, except the length limit on an appellee's principal

By default, that rule provides that the party who files its notice of appeal first is deemed the appellant. Fed. R. App. P. 28.1(b). If notices of appeal are filed on the same day, then the plaintiff in the proceeding below is the appellant. Id. However, these designations may be modified by agreement of the parties, or by court order. Id.

Rule 28.1 limits the number of briefs in a cross-appeal to four: the appellant's opening brief, the appellee's principal and response brief, the appellant's response and reply brief, and the appellee's reply brief.

The appellant files its opening brief first—within forty days after the record is filed. Fed R. App. P. 28.1(c)(1), (f)(2). The appellant's opening brief must comply with the content requirements in Rule 28(a), which apply to any other appellant's opening brief. Fed. R. App. P. 28.1(c)(1). As with a typical appellant's brief, the length limit is 30 pages or 13,000 words, id. R. 28.1(e)(1), (2)(A), and the color of the cover must be blue, id. R. 28.1(d).

The appellee/cross-appellant files a single principal brief that serves as its response to the appellant's opening brief and as the opening brief in the cross-appeal. Id. R. 28.1(c)(2). This brief must be filed within thirty days after the appellant's principal brief is served. Id. R. 28.1(f)(2). The appellee's brief must comply with the requirements of Rule 28(a), except the brief need not include a statement of the case unless the appellee is dissatisfied with the appellant's statement. Id. R. 28.1(c)(2). The length limit is 35 pages or 15,300 words (longer than a typical response or opening brief because it serves as both a response and opening brief), id. R. 28.1(e)(1), (2)(B), and the cover must be red, id. R. 28.1(d).

The appellant then must file a response in the cross-appeal and may, in the same brief, reply to the appellee's response to the appeal. Id. R. 28.1(c)(3). The appellant's response and reply brief must be filed within thirty days after the appellee's principal and response brief is served. Id. R. 28.1(f)(3). The brief must generally comply with the requirements for a typical response brief in Rule 28(b), except it need not include another disclosure statement. See id. R. 28.1(c)(3), R. 28(b). The length limit is 30 pages or 13,000 words, id. R. 28.1(e)(1), (2)(A), and its color must be yellow, id. R. 28.1(d).

Finally, the appellee may file a reply brief in the cross-appeal, which must be filed within twenty-one days of service of the appellant's response and reply brief (but at least seven days before argument). Id. R. 28.1(c)(4), (f)(4). The reply must contain a table of contents, table of authorities, and certificate of compliance. See id. R. 28.1(c)(4), 28(a)(2)-(3) & (10). The length limit is fifteen pages, or 6,500

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and response brief, which is now longer than any of the superseded local rules allowed. Id.

words, id. R. 28.1(e)(1), (2)(C), and the color must be gray, id. R. 28.1(d). Notably, the appellee's reply brief must address only the issues presented by the cross-appeal. R. 28.1(c)(4). This last point is important, in that the Fourth Circuit has stricken reply briefs that are not limited to the issues presented in the cross-appeal. See, e.g., Bierman Family Farm LLC/King Mulch/King Farms v. United Farm Family Ins. Co., 812 F. App'x 139, 145 n.6 (4th Cir. 2020) (unpublished).

2. State court

Unlike the federal rules, North Carolina's rules do not establish specific procedures for briefing cross-appeals. Instead, they simply provide that "[w]ithin thirty days after the record on appeal has been filed with the appellate court, the appellant shall file a brief." N.C. R. App. P. 13(a)(1) (emphasis added). This rule does not expressly reference cross-appeals, but in Alberti, the Supreme Court held that the rule's use of the term "appellants" covers cross-appellants as well. 407 S.E.2d at 826. For that reason, it held that cross-appellants must file an opening brief within the same time that a normal appellant would. Id. And in fact, for cross-appellants, the consequences for not filing an opening brief can be disastrous. If cross-appellants wait to present their cross-appeal arguments in the response brief that they file as appellees, North Carolina courts have on occasion dismissed their cross-appeals altogether. See, e.g., id.; Countrywide Home Loans, Inc. v. Reed, 725 S.E.2d 667, 670 (N.C. Ct. App. 2012); see also N.C. R. App. P. 13(c) ("If an appellant fails to file and serve a brief within the time allowed, the appeal may be dismissed on motion of an appellee or on the court's own initiative.").[16]

Accordingly, for those cross-appeals in North Carolina's courts where there are two parties, six briefs will frequently be filed instead of the three that are normally filed in most appeals. Both the appellant and cross-appellant will file opening briefs. N.C. R. App. P. 13(a)(1). Both sides will then file response briefs thirty days later, answering the arguments made in the other side's opening brief. Id. And then, within fourteen days, both sides may also file reply briefs,

[16] Dismissing a cross-appeal where a cross-appellant has failed to file an opening brief might no longer be appropriate. In the years since the Supreme Court decided Alberti, the Court has clarified that failure to comply with non-jurisdictional requirements of the appellate rules should not normally result in an appeal's dismissal. See Dogwood, 657 S.E.2d at 365-66. Moreover, punishing a cross-appellant for failing to file an opening brief makes little sense. After all, the party that is arguably the most prejudiced by a cross-appellant's failure to file an opening brief is the cross-appellant itself, because the cross-appellant has forfeited the chance to file a reply brief.

countering the arguments made in the response briefs. Id.; see also R. 28(h).[17]

Needless to say, that is a lot of briefing, both for the parties to draft and for the court to review. To avoid this deluge of briefing, cross-appellants might consider moving under Rule 2 (which authorizes deviations from the rules) to proceed as an appellee for purposes of briefing, restoring the normal three-part briefing sequence that prevails in most appeals. In many cases, a cross-appellant would not choose to seek that relief, because it would mean losing the right to file a reply brief. But in certain cases—especially those where the cross-appellant only challenges a small portion of the decision below, like the interest awarded on a judgment—seeking this relief may be in everyone's interest, especially the court's.

B. Arguing cross-appeals

1. Federal court

Unlike North Carolina's rules (discussed below), the federal rules specifically address how oral argument should be conducted during a cross-appeal.

Rule 34 mandates that "a cross-appeal . . . must be argued when the initial appeal is argued," unless the court orders otherwise. Fed. R. App. P. 34(d). Thus, unless the court affirmatively splits a cross-appeal into two arguments, cases with cross-appeals will proceed with a single argument. Rule 34 also expressly provides that Rule 28.1, noted above, "determines which party is the appellant and which is the appellee for purposes of oral argument." Id. That rule usually designates the party that filed its notice of appeal first as the appellant. Id. R 28.1(b).

On their face, these rules would appear to provide for oral arguments in cross-appeals to follow the familiar three-part sequence used in most appeals, where each side receives twenty total minutes of argument time, and where there is an opening, a response, and a rebuttal. 4th Cir. Loc. R. 34(d).[18] That result

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[17] In a case where the appellant and cross-appellant are both aligned against another appellee, a more familiar briefing schedule would normally be followed, with the appellant and cross-appellant filing opening briefs, the appellee filing a response brief, and the appellant and cross-appellant filing reply briefs. For an example of such a case, see State ex. rel. Utilities Commission v. Stein, where the Attorney General (the appellant) and the Utilities Commission's Public Staff (the cross-appellant) both sought to reverse certain of the Commission's orders, which Duke Energy (the appellee) defended. 851 S.E.2d 237, 256 (N.C. 2020).

[18] The Fourth Circuit Local Rules provide for only fifteen minutes per side in social security disability cases, black lung cases, labor cases that primarily challenge the sufficiency of the evidence, and criminal cases that primarily involve application of the sentencing guidelines. 4th Cir. Loc. R. 34(d).

seems to follow from the rules because Rule 34 provides that only the appellant is entitled to "open[ ] and conclude[ ] the argument," Fed. R. App. P. 34(c), and Rule 28.1 in turn only designates one party—the party that appealed first—as the appellant. Id. R 28.1(b). Thus, it would appear that cross-appellants argue second and do not receive a rebuttal, notwithstanding their cross-appeals.

In practice, however, that is not how oral arguments normally proceed in cross-appeals in the Fourth Circuit. In cross-appeals, the Fourth Circuit allows "both [the] appellant and [the] appellee [to] reserve rebuttal time." Clerk's Office of the United States Court of Appeals for the Fourth Circuit, Appellate Procedure Guide at 60 (February 2021) (emphasis added). As a result, unless the appellee chooses to waive its rebuttal, cross-appeals proceed with a four-part argument sequence, with the appellant arguing first, the appellee arguing second, the appellant then providing a rebuttal, and the appellee then closing the argument with its own rebuttal.

2. State court

North Carolina's rules provide little direct guidance on how oral argument in cross-appeals should proceed. Rule 30 simply states that "[t]he appellant is entitled to open and conclude the argument." N.C. R. App. P. 30(a)(1). Though this rule does not expressly address cross-appeals, one might reasonably assert that requiring cross-appellants to proceed as appellees, who argue second and have no right of rebuttal, would violate Rule 30. That is so because Rule 30 provides that appellants are entitled to open and close argument, and cross-appellants are appellants with respect to their cross-appeal under the state rules. Cf. Alberti, 407 S.E.2d at 826 (holding that similar language in Rule 13 requires cross-appellants to file an appellant's opening brief). As a result, one could argue that cross-appellants are entitled to a sequence of argument that preserves their ability to argue first with respect to their cross-appeal and then provide a rebuttal.

In practice, however, Rule 30 normally doesn't play a decisive role in determining how argument in cross-appeals is conducted. In most cross-appeals in state court, the parties negotiate with each other with respect to how argument should be conducted and arrive at an agreement, notify the court about how they plan to proceed, and then the court normally accepts that arrangement (providing each side sticks to its allotted thirty minutes total). Parties should ask the clerk's office whether it would be preferable to set an argument sequence via letter to the clerk's office or via motion to the court. Making these arrangements in advance is helpful, because otherwise there could be confusion at argument about who should be speaking when.

Parties in cross-appeals in state court sometimes agree to proceed under a four-part argument sequence that is similar to how cross-appeals are argued in the Fourth Circuit. For example, such a sequence occurred last summer in DiCesare v.

Charlotte-Mecklenburg Hospital Authority, a cross-appeal from the business court to the Supreme Court. In that case, (1) the appellant first argued its primary appeal, (2) the cross-appellant then responded to the primary appeal and argued its cross-appeal, (3) the appellant then responded to the cross-appeal and offered a rebuttal for its appeal, and (4) the cross-appellant finally closed with a rebuttal with respect to its cross-appeal.[19]

Parties in cross-appeals in state court also sometimes agree to proceed under the familiar three-part argument sequence used in most appeals. Under that sequence, the appellant argues first, the cross-appellant argues second, and then only the appellant receives a rebuttal. For the cross-appellant, the downside of this approach is that it denies the cross-appellant a rebuttal. The upside, however, is that it simplifies argument considerably: It allows the cross-appellant to address all issues in the case during a single uninterrupted block of argument time, and it may make it easier for the court to focus its attention on the merits of the case, and not on the procedural oddities of cross-appeals.

VI. Advanced Topics in Cross-Appeals

Finally, here are some additional pointers concerning two additional topics that touch on cross-appeals, but that don't directly fit under the topics already discussed. The first topic addressed below is how cross-appeals function within the unique context of an interlocutory appeal. The second is how the North Carolina Supreme Court hears "cross issues," which are similar to cross-appeals in certain respects, but diverge in many others.

A. Interlocutory cross-appeals

In addition to final-judgment appeals, cross-appeals may arise in interlocutory appeals, where an appellee seeks to expand its rights or lessen its adversary's rights under an interlocutory order. Special attention should be paid in interlocutory appeals to whether there is appellate jurisdiction over the cross-appeal. A broad overview of the rules governing jurisdiction over interlocutory cross-appeals in federal and state court are laid out below.

1. Federal court

The federal appellate courts have jurisdiction to review an interlocutory cross-appeal if (a) the ruling cross-appealed is itself subject to immediate appellate review, by statute, certification, or the collateral-order doctrine, or (b) the ruling

[19] A video of this oral argument is available on the Supreme Court's YouTube channel, at https://www.youtube.com/watch?v=HLg5MrIO7nM.

appealed by the appellant is subject to review, and the cross-appeal is subject to pendent appellate jurisdiction.

a. Immediately reviewable cross-appeals

Appellate review in the federal courts is generally limited to final orders. 28 U.S.C. § 1291. However, interlocutory appeals are allowed in some situations. For example, section 1292(a) provides jurisdiction over a limited class of interlocutory orders, including orders granting or denying injunctions, granting or denying receivers, and in certain admiralty cases. 28 U.S.C. § 1292(a). Section 1292(b) also allows a district court to certify "controlling question[s]" of law for immediate review. Id. § 1292(b). In addition, under the collateral-order doctrine, the federal courts of appeals have jurisdiction over immediate appeals of rulings that are collateral to the merits of the action. To fall under this category, an issue appealed must (1) conclusively determine a disputed question, (2) be completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment. Shipbuilders Council of America v. U.S. Coast Guard, 578 F.3d 234, 239 (4th Cir. 2009) (quoting Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375 (1987)).

If a cross-appeal involves an issue for which there is a statutory right to an immediate appeal, has been certified by the district court under section 1292(b), or falls under the collateral-order doctrine, then appellate jurisdiction should exist over the cross-appeal.

b. Pendent appellate jurisdiction

If there is no independent basis for interlocutory appellate jurisdiction over the cross-appeal, the cross-appeal may still be reviewable if the requirements of pendent appellate jurisdiction are satisfied. Under that doctrine, once the court of appeals has accepted review over one issue, it may consider other issues that overlap with the issue under review. O'Bar v. Pinion, 953 F.2d 74, 80 (4th Cir. 1991). However, for pendent appellate jurisdiction to be proper, either (1) the overlapping issue must be "inextricably intertwined" with the issue for which jurisdiction exists, or (2) consideration of the overlapping issue must be necessary to ensure meaningful review of the issue for which jurisdiction exists. Taylor v. Waters, 81 F.3d 429, 437 (4th Cir. 1996) (citing Swint v. Chambers Cnty. Comm'n, 115 S. Ct. 1203, 1212 (1995)).

In the Fourth Circuit, the potential for pendent appellate jurisdiction over interlocutory cross-appeals has arisen most frequently in cases involving orders denying a defendant's claim of immunity from suit—such as qualified immunity—at the dismissal stage or at summary judgment. See, e.g., Bellotte v. Edwards, 629 F.3d 415 (4th Cir. 2011); Rowland v. Perry, 41 F.3d 167 (4th Cir. 1994). However, in such cases, the Fourth Circuit has repeatedly declined to exercise

pendent appellate jurisdiction over cross-appeals, finding that the requirements of such jurisdiction were not satisfied. See, e.g., Bellotte, 629 F.3d at 427 (dismissing cross-appeal of summary judgment for defendants on claim challenging validity of search warrant); Rowland, 41 F.3d at 175 (declining to review cross-appeal of motion for leave to amend complaint). Thus, while pendent appellate jurisdiction may be available for interlocutory cross-appeals, in practice, it seems to rarely exist.

2. State court

Similar principles govern cross-appeals from interlocutory orders in state court, but North Carolina's appellate courts appear to have greater discretionary authority to hear cross-appeals from interlocutory orders than do the federal courts.

Like in federal court, the default rule in state court is that parties can only appeal from final judgments. See N.C. Gen. Stat. § 7A-27(a)(2), (a)(5), (b)(1), (b)(2). In certain instances, however, parties may appeal from interlocutory orders. In particular, parties may appeal an interlocutory order (1) if the order "affects a substantial right," see id. §§ 1-277(a), 7A-27(a)(3)(a), (b)(3)(a); (2) if the order can be appealed under a specific statute that authorizes an interlocutory appeal, see, e.g., id. § 1-277(b) (authorizing appeal of orders that decline to accept a personal-jurisdiction defense); or (3) if the order has been certified for immediate appeal by a trial court under Civil Rule 54(b). See N.C. R. Civ. P. 54(b).[20]

When a party cross-appeals from an interlocutory order, the cross-appellant will normally be required to show that some basis exists for exercising appellate jurisdiction over the issue that it would like the court to address. In certain situations, the cross-appellant might be able to make that showing, as could occur when an interlocutory order affects the substantial rights of both parties. But when cross-appellants cannot make such a showing, the Court of Appeals has sometimes refused to consider interlocutory cross-appeals. See, e.g., Daughtridge v. N.C. Zoological Society, Inc., 785 S.E.2d 729, 732 (N.C. Ct. App. 2016); N.C. Railroad v. City of Charlotte, 437 S.E.2d 393, 396-97 (N.C. Ct. App. 1993); cf. Parker v. Town of Erwin, 776 S.E.2d 710, 729 (N.C. Ct. App. 2015) (hearing interlocutory cross-appeal, but only because order at issue had been certified as a final judgment under Civil Rule 54(b)).

However, this precedent doesn't necessarily mean that cross-appeals will always fail in state court when it appears that, standing alone, there would not be

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[20] For more guidance on what orders may be appealed, see the Guide to the Appealability of Interlocutory Orders, at: https://www.ncbar.org/wp-content/uploads/2020/07/ncba_appellate_rules_committee_guide_to_appealability.pdf.

any jurisdictional basis for them. North Carolina's appellate courts have discretionary authority to review them, arguably on two grounds.

First, the Court of Appeals sometimes exercises what is effectively pendent appellate jurisdiction over cross-appeals, though it doesn't appear to have ever used that specific term to describe its practice. For instance, to avoid "fragmentary appeals," the Court sometimes hears interlocutory cross-appeals without a clear jurisdictional basis for doing so. RPR & Assocs., Inc. v. State, 534 S.E.2d 247, 252 (N.C. Ct. App. 2000). Specifically, the Court of Appeals has explained that when an issue is "not itself immediately appealable, but [is] related to an issue properly before the Court," and when the issue "involves the application of the same rules to the same facts and circumstances" as the issue that is already on appeal, the Court may properly decide to review that issue. Washington v. Cline, 761 S.E.2d 650, 654 (N.C. Ct. App. 2014). Stated differently, the Court of Appeals may choose to decide non-appealable issues that "are closely interrelated" with those issues that are already before the Court. Providence Volunteer Fire Dep't v. Town of Weddington, 800 S.E.2d 425, 430 (N.C. Ct. App. 2017). Granting this relief, however, is "discretion[ary]," and it appears to be the exception rather than the rule. Id. Thus, the Court of Appeals has suggested that reviewing interlocutory orders that resolve issues that are not immediately appealable is only appropriate where doing so would "promote judicial economy" and where the issues that are not themselves subject to immediate appeal are "relatively clear-cut." Bynum v. Wilson Cty., 746 S.E.2d 296, 300 (N.C. Ct. App. 2013), rev'd on other grounds by 758 S.E.2d 643 (N.C. 2014).

Washington v. Cline provides a good example of a case where an appellee successfully relied on these principles to obtain review of an order that was not subject to immediate appeal. There, a superior court granted a motion to dismiss based on insufficient service of process for some, but not all, defendants. The court then certified its dismissal of certain defendants from the case for immediate appellate review under Civil Rule 54(b). The plaintiff appealed from the certified order, and one of the defendants who had filed an unsuccessful motion to dismiss based on improper service cross-appealed. 761 S.E.2d at 653-54. The Court of Appeals ultimately decided to review the non-certified denial of the defendant's motion to dismiss, because the Court concluded that the defendant's cross-appeal involved the same facts and circumstances at issue in the plaintiff's main appeal. Id. at 654.

Second, the writ of certiorari, discussed above (see supra pp 18-19), provides another mechanism for appellees to obtain review of interlocutory decisions that might not be immediately appealable in their own right. Rule 21 not only allows the writ to issue "when the right to prosecute an appeal has been lost by failure to take timely action;" the writ can also issue "when no right of appeal from an interlocutory order exists." N.C. R. App. P. 21(a)(1).

The Supreme Court's recent decision in DiCesare v. Charlotte-Mecklenburg Hospital Authority is a good example of how appellees facing an interlocutory appeal can use the writ to their advantage. 852 S.E.2d 146 (N.C. 2020). In that case, health-care consumers sued a hospital, alleging statutory antitrust claims and a separate claim under the state constitution's anti-monopoly clause. Id. at 149. The hospital moved for judgment on the pleadings on all claims. Id. at 150. The business court held that the consumers had stated a claim under the anti-monopoly clause, but that their statutory claims failed. Id. at 150-51. After the business court certified the dismissal of the statutory claims for immediate appeal under Civil Rule 54(b), the hospital asked the Supreme Court to issue the writ to review the constitutional claim as well. The Court granted the writ, held that the business court should have dismissed the constitutional claim, and affirmed its dismissal of the statutory claim. Id. at 151, 170. Thus, through the writ, the hospital effectively turned an appeal that only had potential downside into a complete victory, achieving even more relief than the hospital had initially won in the business court.

Thus, when appellees face interlocutory appeals in North Carolina's courts, they should carefully consider whether to cross-appeal and seek certiorari relief. Attempted cross-appeals in these circumstances will frequently be unsuccessful, but the potential upside can be considerable.

B. How to raise cross-issues in the North Carolina Supreme Court

Finally, below are a few notes about "cross issues" in the North Carolina Supreme Court. When the North Carolina Supreme Court reviews cases that were first appealed to the Court of Appeals, situations sometimes arise that resemble cross-appeals from orders of trial courts (referred to below as direct appeals). However, the rules that govern these situations diverge considerably from the rules that govern regular cross-appeals. These distinctive rules, along with four of their more unusual features and ambiguities, are described below.

1. Supreme Court review, generally

Those cases where multiple parties seek review in the Supreme Court diverge from traditional cross-appeals in large part because parties don't enjoy the same rights of automatic appeal to the Supreme Court that they do to the Court of Appeals. In the Court of Appeals, by filing a proper notice of appeal, parties can force that Court to hear an appeal and decide whatever issues the parties preserved below and argued in their briefs that the Court views as being necessary to resolve the appeal. See, e.g., N.C. R. App. P. 10(a)(1), 28(a). In contrast, in the Supreme Court, when that Court hears a case that was first appealed to the Court of Appeals, it does not automatically have authority to decide all preserved and briefed arguments. Instead, the Supreme Court's review is limited to those issues

that are properly before the Supreme Court under the rules. See, e.g., Hammond v. Saini, 766 S.E.2d 590, 591 n.2 (N.C. 2016); Estate of Fennell ex rel. Fennell v. Stephenson, 554 S.E.2d 629, 632 (N.C. 2001); see also N.C. R. App. P. 16, 28(a).[21]

There are three primary ways that a party can ask the Supreme Court to review a case and decide certain issues.

- A party can file a petition for discretionary review that specifically states "each issue for which review is sought," which the Court then has discretion to hear or not. N.C. R. App. P. 15(c); see also N.C. Gen. Stat. § 7A-31.

- When a judge on the Court of Appeals dissents, a party can notice an appeal to the Supreme Court that is limited to the issues encompassed in the dissent, which the Supreme Court must hear. N.C. R. App. P. 14(b)(1); N.C. Gen. Stat. § 7A-30(2).

- When a case presents a "substantial" constitutional question, a party can also notice an appeal to the Supreme Court, though in effect the Court has discretionary authority to decline to hear these appeals and in fact rarely hears them. N.C. R. App. P. 14(b)(2), N.C. Gen. Stat. § 7A-30(1); see also Stephenson, 554 S.E.2d at 632.

Whatever the means of review, the deadline for a party to notice an appeal or file a petition is the same: Absent an event that tolls the deadline (like a request for rehearing in the Court of Appeals), the deadline falls thirty-five days after the date that the Court of Appeals releases its decision in a case.[22]

2. Designating cross-issues

After a petition or notice has been filed, the rules create three mechanisms that allow other parties—normally the parties that largely prevailed in the Court

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[21] The Supreme Court also sometimes hears direct appeals from trial courts. See, e.g., N.C. Gen. Stat. § 7A-27(a). Cross-appeals in those cases are generally governed by the same rules that have already been described in the preceding sections. This section discusses those cases where the Supreme Court reviews a case where appeals are initially filed in the Court of Appeals.

[22] The deadline to file a petition or notice an appeal is actually fifteen days after the Court of Appeals releases the mandate in a case. See N.C. R. App. P. 14(a), 15(b). The mandate is usually released twenty days after a decision is issued. See id. R. 32(b). Thus, the deadline to file a petition or notice an appeal is normally thirty-five days after an opinion issues.

of Appeals—to ask the Supreme Court to review additional issues that the petitioner or appellant did not list in its petition or notice of appeal. These three mechanisms are:

- First, after a petition is filed, another party can file a cross-petition that affirmatively asks the Supreme Court to review the decision below and decide additional issues. See N.C. R. App. P. 15(b).

- Second, after a petition is filed, another party can respond to the petition and ask the Court not to hear the case. In doing so, however, it can state additional issues that it would like the Court to address if it does agree to hear the case. See id. R. 15(d). The Supreme Court sometimes refers to these lists of additional issues in responses as being "conditional petitions," though that term itself does not appear in the rules. See, e.g., Griffin v. Absolute Fire Control, Inc., 2021-NCSC-9, ¶ 1.

- Third, after a notice of appeal is filed, another party can file a notice of cross-appeal, either premised on a dissent or a substantial constitutional question. See N.C. R. App. P. 14(a), (b).

Like regular cross-appeals, the party that is responding to a first-filed petition or notice of appeal has at least ten days to seek relief under these three mechanisms. Id. R. 14(a), 15(b), 15)(d).[23]

Perhaps most importantly, unlike regular cross-appeals, a prevailing party in the Court of Appeals likely has to ask the Supreme Court to consider cross-issues even when the party merely seeks to defend, and not change, the Court of Appeals's decision. In other words, even when a party would like the Supreme Court to consider an argument that, if accepted, would only have the effect of affirming the decision below on alternate grounds, then that party likely must affirmatively ask the Court to review that issue, provided that that issue isn't already encompassed within an issue for which the other party is already seeking

[23] This shared ten-day deadline can be more complex than it might first appear. For instance, when parties respond to petitions for discretionary review, they frequently rely on Appellate Rule 27(b), which extends by three days most deadlines to take action following the service of a document. But as noted above, see supra note 12, that rule does not apply to notices of appeal. So it would appear that a party actually has more time to respond to a petition than to notice a cross-appeal. Furthermore, it is also unclear whether the early filing of a petition or notice of appeal can cut short the thirty-five-day period that another party would normally have to file a petition or notice themselves. As stated above, a similar ambiguity exists when notices of appeal are filed in trial court. See supra pp 12-13.

review.[24]

This divergence from the way that direct appeals are handled derives from the structure of the rules. As noted above, in direct appeals from trial courts, Rule 28(c) allows appellees, "[w]ithout taking an appeal," to "present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment." N.C. R. App. P. 28(c). But that rule likely does not apply when the Supreme Court hears cases that were first appealed to the Court of Appeals. Rule 28(c) appears in the portion of the rules that contain "general provisions," and the more specific rules that govern practice in the Supreme Court seem to trump it. Rule 16, for instance, makes it clear that "review in the Supreme Court is limited to consideration" of issues stated in a petition for discretionary review or the response thereto, stated in a notice of appeal based on a dissent, and stated in a notice of appeal based on a substantial constitutional question. Id. R. 16(a), (b); see also id. R. 28(a). Thus, a prevailing party in the Court of Appeals likely needs to affirmatively ask the Supreme Court to consider cross-issues in certain instances.

3. Ambiguities, and traps for the unwary

The rules that govern appeals from the Court of Appeals to the North Carolina Supreme Court, while different from the rules that govern direct appeals, might appear relatively straightforward at first glance. However, they have at least four unusual features and ambiguities that can potentially frustrate and confuse litigants. Two of these concern the process by which parties ask the Court to review issues, while the other two involve the briefing process that follows the filing of petitions and notices of appeal.

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[24] Consider, for example, the Supreme Court's recent decision in Piazza v. Kirkbride, 827 S.E.2d 479 (N.C. 2019). There, an appellant noticed an appeal based on a dissent and filed a petition that asked the Court to consider additional issues, which it granted. The appellee did not ask the Court to review any issues in a response to the petition, but then argued an alternate ground for affirming the Court of Appeals's decision anyway: It argued that the appellant had invited error by requesting the jury instruction that it later challenged on appeal. The Supreme Court agreed with the appellee that the Court of Appeals's decision could be affirmed based on invited error. But the Court didn't reach that conclusion because it held that the appellee could make any argument that supported the decision below. The Court instead reached this conclusion because it held that whether the appellant had invited error was "inherently intertwined" with the issue that the appellant itself had asked the Court to review and was therefore properly before the Court. Id. at 498 n.13.

The first ambiguity concerns whether parties must ever file a cross-petition or cross-notice when an issue is already properly before the Supreme Court. Take, for example, a case where a trial court awards damages to a prevailing party, but that party believes that it should have received more and the losing party believes that the prevailing party should have received less or nothing at all. Both sides properly appeal and cross-appeal to the Court of Appeals. That Court affirms the trial court. The losing party at trial then petitions for discretionary review and, in its petition, frames the issue for the Supreme Court's review so broadly that it not only encompasses whether less relief should have been awarded, but also whether more relief should have been awarded. In a direct appeal, the prevailing party would have to notice a cross-appeal to protect its rights in this situation. But in this different context, the rules aren't clear whether the prevailing party would forfeit any right to ask for greater relief if the petition were granted and it had opposed the petition and not asked the Court to hear any additional issues in its response. Given this ambiguity, a party in this situation might choose to protect its rights by affirmatively asking the Court to decide whether different relief should have been granted at trial if the petition is granted, even though doing so might be unnecessary.

The second unusual feature of the rules is that they don't provide any additional time for parties to file a cross-petition in response to a notice of appeal, and don't provide any additional time for parties to file a cross-appeal in response to a petition. This feature of the rules can be problematic for prevailing parties in the Court of Appeals in certain situations:

- For instance, imagine a case that doesn't involve constitutional issues where the Court of Appeals adopts one of the two alternate arguments that a party advances, but one judge dissents in favor of the losing party solely on the issue reached by the majority. The losing party then files a dissent-based notice of appeal, just at the end of the thirty-five day period for filing a petition. If the prevailing party wanted to ask the Court to review its alternate argument, it would have no way of doing so, because the deadline to file a petition already would have passed, and because no cross-appeal would be possible.

- Likewise, imagine a case where the Court of Appeals largely rules for one party, but one judge dissents in favor of the prevailing party on a small issue, like the interest owed on a trial judgment. The losing party then files a petition for discretionary review, just at the end of the thirty-five day period for filing a dissent-based appeal. In responding to the petition, the prevailing party could ask the Court to exercise its discretion to review the issue encompassed in the dissent if the Court granted the losing party's petition. But the prevailing party would have lost its ability to require the Court to decide that issue, through filing a dissent-based appeal.

These lacuna in the rules make little sense. Nevertheless, the harm that they might cause parties can be mitigated to a certain degree, because mechanisms exist in the rules that allow parties to work around them. First, a party that didn't completely prevail in the Court of Appeals could file a "protective" petition or notice within the regular time for seeking such relief, which that party could then dismiss if the other party chose not to seek review itself in the Supreme Court. See supra p 12 (discussing protective notices). Second, a party facing a dissent-based appeal could also possibly file a petition for certiorari, asking the Supreme Court to review issues not encompassed in the dissent. See, e.g., State v. Hyman, 817 S.E.2d 157, 167 (N.C. 2018) (granting such a petition after the losing party in the Court of Appeals filed a dissent-based appeal).

The third unusual feature of the rules concerns the deadlines for submitting briefs in the Supreme Court. When a party files a dissent-based appeal, the appellant must file its opening brief within thirty days of filing the notice. N.C. R. App. P. 14(d)(1). However, when a party files a petition for discretionary review or notices an appeal based on a constitutional issue, briefing does not start immediately. Instead, the time to file an opening brief is tolled until the Supreme Court agrees to hear the case. Id. R. 14(d)(1), 15(g)(2). And the same is also true when the appellant has filed both a dissent-based notice of appeal and a petition for discretionary review that asks the Court to review additional issues. Id. R. 14(d)(1).

There is one circumstance, however, where the filing of a petition for discretionary review does not toll all briefing deadlines. No tolling occurs when an appellant has filed a dissent-based appeal, standing alone, and another party has filed a petition for discretionary review. See id. R. 14(d)(1) (limiting tolling to those instances where "the appellant has filed a petition for discretionary review" (emphasis added)). In this circumstance, the rules strangely require the appellant to begin briefing its dissent-based appeal before the Court has decided whether to consider other aspects of the case. See id.

This lack of tolling might be meant to benefit the appellant, by preventing the appellee from being able to delay consideration of the appellant's dissent-based appeal by filing a petition for discretionary review. For those appellants who fail to appreciate this aspect of the rules, however, the lack of tolling can be devastating. If appellants mistakenly believe that their time to file an opening brief is tolled, their failure to timely file an opening brief could possibly lead to the dismissal of their appeal. Id. R. 14(d)(2); cf. Alberti, 407 S.E.2d at 826.

Moreover, even if this rule were meant to benefit appellants, appellants often choose not to take advantage of it. To avoid fragmentary briefing, appellants facing this situation sometimes move the Court to stay all briefing deadlines until the Court has ruled on petitions filed by other parties. Indeed, just last year, the Court granted such a request after an appellant moved for this relief along with all

the other parties in the case. See Order, Sound Rivers v. N.C. Dep't of Envtl. Quality, No. 306A20 (N.C. July 27, 2020). Accordingly, appellants facing this situation should carefully consider whether immediate briefing or delayed briefing is in their interest.

The fourth unusual feature of the rules also concerns briefing. In many cases, the rules do not clearly specify whether parties raising a cross-issue must file opening briefs or may wait and file a response brief. But as shown below, the rules also contain a tool that allows parties to eliminate this ambiguity.

When cases solely involve a dissent-based or constitutional appeal, the rules fortunately are clear on this point. The appellant—the party that filed the notice of appeal—must file an opening brief, and the appellee—the party that did not file a notice of appeal—later files a response brief. N.C. R. App. P. 14(d)(1).

But this clarity recedes when a case involves petitions for discretionary review and multiple parties ask the Court to review different issues. In those cases, Rule 15(i)(2) controls when a party is an appellant that must file an opening brief, and when a party is an appellee that only files a response brief. Id. R. 15(g)(2) (providing that "appellants" must file opening briefs in cases involving petitions). That rule provides that "'appellant' means the party aggrieved by the determination of the Court of Appeals," and that "'appellee' means the opposing party." Id. R. 15(i)(2).

Unfortunately, what it means to be a "party aggrieved" in this context is unclear. Notably, this phrase mirrors the term used in section 1-271, discussed above, which governs when parties may appeal from the orders of trial courts and provides that they may only do so if they are a "party aggrieved." N.C. Gen. Stat. 1-271. Construing section 1-271, the Supreme Court has held that an "aggrieved party is one whose rights have been directly and injuriously affected by the action of the court," Culton v. Culton, 398 S.E.2d 323, 325 (N.C. 1990), and has further clarified that section 1-271 prevents a party that entirely prevailed in the trial court from appealing. Teague v. Duke Power Co., 129 S.E.2d 507, 512 (N.C. 1963).

It's possible that section 1-271 and Rule 15(i)(2) should be read in tandem, so that a party aggrieved under the statute would also be aggrieved under the rule. On the other hand, it's also possible that Rule 15(i)(2) shouldn't be read in total lockstep with section 1-271, because doing so could produce unusual results. For instance, a party that largely prevailed in the Court of Appeals might be aggrieved by some aspect of the decision and yet have decided not to ask the Supreme Court to review the issue that aggrieved it. In that situation, if Rule 15(i)(2) were read in lockstep with section 1-271, then such a party would still be an appellant that would have to file an opening brief, even if it hadn't asked the Court to review the issue that aggrieved it. So, in sum, it isn't clear if section 1-271 provides a reliable guide for interpreting Rule 15(i)(2).

In any event, given the plain text of Rule 15(i)(2), it might be reasonable to assume that a party would not be aggrieved—and therefore would not need to file an opening brief—if it received all the relief that it sought in the Court of Appeals. It is hard to see, for example, how a party could be aggrieved by a decision of the Court of Appeals that dismissed the only claim against the party, or that granted the party all the damages or injunctive relief it sought.

That is not, however, how this rule has been interpreted in recent years. The clerk's office of the Supreme Court has sometimes informed parties that if they responded to a petition for discretionary review and listed additional issues in their response, then the default rule is that those parties are appellants under the rules and should therefore file an opening brief.[25] This reading of the rules has had the effect of mandating cross-appeal-style briefing in situations where it would otherwise be absent. For instance, in one recent case, a party merely asked the Supreme Court to affirm a decision that dismissed the only claim against it, and yet still filed opening, response, and reply briefs. See, e.g., Defendant-Appellee's Kinston Charter Academy's New Brief, State v. Kinston Charter Acad., No. 16PA20 (Nov. 25, 2020). This briefing sequence would never occur in an equivalent case in the Court of Appeals, because a party that prevailed entirely below could only possibly make alternate arguments that support the judgment below.

Fortunately, the rules create a mechanism that allows parties to avoid this confusion and the burdens of cross-appeal-style briefing. The rules provide that, no matter whether a party is aggrieved under Rule 15(i)(2) or not, the Supreme Court "may designate either party an appellant or appellee for purposes" of briefing. N.C. R. App. P. 15(i)(2). Consistent with this rule, the Supreme Court has granted motions that asked it to designate parties as appellees and thereby eliminated any confusion over which parties had to file opening briefs. See, e.g., Order, New Hanover Cnty. Bd. of Educ. v. Stein, No. 339A18-1 (N.C. Feb. 7, 2019). Thus, if

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[25] It appears that the clerk's office interprets the rules to default to cross-appeal-style briefing whenever a response to a petition for discretionary review lists additional issues in such a manner as to make the response a "conditional petition." Strangely, a party may be able to avoid having its response deemed a conditional petition by not asking the Court to consider additional issues and then listing them at the end of the response, but instead stating elsewhere in the body of the response the additional issues that the party will argue in its response brief if the other side's petition is granted. For an example of this approach, see the response filed in State v. Noble, where the responding party listed additional issues in its response, and the Court did not docket the response as a conditional petition. See State's Response to Defendant's Petition for Discretionary Review at 12-13, State v. Noble, No. 12P19 (N.C. Jan. 18, 2019).

doubt exists about whether a party is an appellant that must file an opening brief, parties could consider asking the Court to resolve that ambiguity. Also, if the parties informally agree at the outset of briefing that one party will proceed as an appellee, it's unlikely that the Court will closely scrutinize whether that party should have proceeded as an appellant instead.

* * *

All this is to say that any appellee should—as soon as a notice of appeal or petition for discretionary review is filed (or even before)—closely scrutinize the arguments the appellee may wish to make in the appeal and determine whether making those arguments would require the filing of its own notice of appeal or petition for discretionary review (or designating issues in its response), and if yes, to do so in a timely manner. We hope this guide helps with those endeavors.