No. COA10-425 TWENTY-SIXTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

* *

BRIAN Z. FRANCE,	)	
	)	
Plaintiff,	)	
	)	From Mecklenburg County
v.	)	
	)	
MEGAN P. FRANCE,	)	
	)	
Defendant.	)	

* *

PLAINTIFF-APPELLANT'S BRIEF

* *


The Appellate Courts
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Filed
May 17, 2010
15:30

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PLAINTIFF-APPELLANT'S BRIEF

* *

ISSUES PRESENTED

I. DID THE TRIAL COURT ERR BY VACATING A SUMMARY JUDGMENT ORDER ISSUED IN CASE NUMBER 08 CVD 20661 BY THE HONORABLE N. TODD OWENS?

II. DID THE TRIAL COURT ABUSE ITS DISCRETION IN GRANTING THE MEDIA'S MOTION TO DETERMINE ACCESS TO JUDICIAL PROCEEDINGS AND DOCUMENTS?

III. DOES THE ACCESS ORDER ERRONEOUSLY DISREGARD THE PUBLIC'S COMPELLING INTEREST IN PRESERVING THE CONSTITUTIONALLY PROTECTED FREEDOM TO CONTRACT?

IV. DOES THE ACCESS ORDER ERRONEOUSLY DISREGARD THE PUBLIC'S COMPELLING INTEREST IN PRESERVING THE CONSTITUTIONALLY PROTECTED RIGHT OF A CITIZEN TO A REMEDY FOR AN INJURY DONE TO HIM?

V. DOES THE ACCESS ORDER ERRONEOUSLY DISREGARD THE PUBLIC'S COMPELLING INTEREST IN PRESERVING THE CONSTITUTIONALLY PROTECTED RIGHT TO PRIVACY?

STATEMENT OF THE CASE

Appellant Brian Z. France commenced Case Number 08 CVD 20661 on 11 September 2008 by filing a complaint in the district court against Appellee, which was assigned to the Honorable N. Todd Owens. (R S pp 262-371). On 20 October 2008, Appellant filed a Motion for Summary Judgment seeking an order authorizing and directing that all future documents and pleadings filed in that action and any subsequent action arising from the parties' Contract of Separation, Property Settlement, Child Support, Child Custody and Alimony Agreement (the "Separation Agreement") be filed under seal pursuant to the parties' confidentiality obligations as set forth in the Separation Agreement.[1] (R S pp 365-368). On 18 December 2008, Judge Owens entered Summary Judgment and Order to Seal Court Files (the "Owens Order") in Case Number 08 CVD 20661, finding that there were compelling countervailing public interests that justified limiting the public's right to access to the parties' private domestic dispute. (R S pp 365-368). Judge Owens directed the Clerk of Superior Court to seal all the pleadings and documents in 08 CVD

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[1] Appellant and Appellee are parties to a Separation Agreement that contains explicit confidentiality provisions intended to protect the privacy of the parties' minor children and private information regarding the parties' respective personal and financial affairs. The parties agreed to use their best efforts to ensure that any reference to the terms of the Separation Agreement, and the Separation Agreement itself, would be filed under seal in any future litigation between them. (R S pp 321-364). The gravamen of Appellant's Complaint in 08 CVD 28389 is that Appellee improperly disclosed confidential information in violation of the parties' Separation Agreement and has otherwise failed to abide by her obligations to co-parent the parties' minor children.

20661 and further directed that any pleadings and documents filed in any subsequent actions between the parties related to the Separation Agreement also be filed under seal. (R S pp 365-368). No appeal was taken from the Owens Order.

On 31 December 2008, Appellant filed a Second Complaint under seal in the Superior Court of Mecklenburg County ("Case Number 08 CVS 28389"). (R S pp 262-371). Case Number 08 CVS 28389 was subsequently transferred from Superior Court to District Court, and the file number was changed from 08 CVS 28389 to 08 CVD 28389. (R S p 463). All pleadings in Case Number 08 CVD 28389 have been filed under seal in accordance with the Owens Order.

On 29 September 2009, Appellant filed a Motion to Seal Proceedings, requesting that the trial court close the proceedings in 08 CVD 28389 to the public (the "Sealing Motion"). (R S pp 731-740). The Honorable Jena P. Culler conducted a hearing on the Sealing Motion on 15 October 2009 and issued an order denying the motion on 13 November 2009 (the "Order Denying Seal"). (R S pp 1823-1826). Appellant immediately filed a Notice of Appeal. (R S pp 1828-1829).[2]

On 17 November 2009, the Charlotte Observer and WCNC TV (the "Media") submitted a motion pursuant to N.C. Gen. Stat. § 1-72.1 requesting access to judicial proceedings and documents in 08 CVD 20661 and 08 CVD 28389. (R pp 5-13). Judge Culler

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[2] Appellant's appeal from the Order Denying Seal is the subject of Docket No. COA10-313 ("Appeal No. 1").

conducted a hearing on the Media's motion on 11 December 2009. (R p 14). On 18 December 2009, Judge Culler entered an Order Granting the Media's Motion to Determine Access to Judicial Proceedings and Documents (the "Access Order"). (R pp 14-19). The Access Order directs that the court file (including all pleadings and documents filed to date) for 08 CVD 20661 be unsealed and that all proceedings in the 08 CVD 20661 matter be open to the public. (R pp 18-19). The Access Order also unseals the court files in 08 CVS 28389 and 08 CVD 28389, and similarly directs that all proceedings in 08 CVD 28389 be open in accordance with the Order Denying Seal. (R p 19). The Access Order was effective 31 December 2009. On 21 December 2009, Appellant filed a timely Notice of Appeal of the Access Order. (R pp 20-21).

The following day, Appellant filed a "Petition for Writ of Supersedeas and Motion for Order of Temporary Stay" with this Court. (R p 35).[3] On 5 January 2010, this Court issued a Writ of Supersedeas staying enforcement of the Order Denying Seal and the Access Order. (R p 35).

The proposed record on appeal in this case was served on Appellee on 9 March 2010. Per agreement with the Media, the Media received the proposed record on 5 April 2010. The record on appeal was settled by agreement on 6 April 2010. (R pp 244-

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[3] On 23 December 2009, this Court issued an order granting a temporary stay *inter alia* of the Order Denying Seal. (R p 34). The Media and Appellee responded to Appellant's Petition for Writ of Supersedeas on 31 December 2009 and 4 January 2010, respectively.

245). The record was timely filed with this Court on 9 April 2010 and docketed on 14 April 2010. (R pp 244-245).

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

"[A]n appeal is permitted under N.C. Gen. Stat. § 1-277(a) and 7A-27(d)(1) if the trial court's decision deprives the appellant of a substantial right [that] would be lost absent immediate review." N.C. Dept. of Transportation v. Page, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995); N.C. Gen. Stat. § 1-277; N.C. Gen. Stat. § 7A-27(d)(1). Here, the Access Order infringes upon Appellant's judicially-created rights as set forth in the Owens Order and at least three of Appellant's constitutional rights that will be forever lost if the Access Order is not reviewed before a final judgment is entered: (i) the right to freely contract; (ii) the right to a remedy for Appellee's breach of a contract in the trial court under N.C. Const. art. I, § 18; and (iii) the right to privacy in matters related to the parenting of minor children and the parties' personal financial circumstances.

Judge Owens found that the public has a compelling countervailing interest in protecting the "sanctity of contracts," which when coupled with other compelling public interests, justified his Order sealing the parties' confidential Separation Agreement and all documents and pleadings related to that agreement in 08 CVD 20661, as well as in any subsequent litigation between the parties related to the parties' Separation Agreement. The Access Order abrogates the rights and

expectations created by the Owens Order by unsealing the very same documents that the Owens Order had sealed. Through the Access Order, the trial court has sent a clear signal that parties who choose to resolve marital disputes by entering into confidential separation agreements will not be able to seek redress in North Carolina courtrooms without exposing such private and confidential information to the public. This is contrary to North Carolina public policy. *See* Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219, *reh'g denied*, 342 N.C. 418, 465 S.E.2d 536 (1995) (finding that separation agreements deal with issues of "immense significance" and "that the public policy of this State encourages settlement agreements").

North Carolina courts consistently recognize that the bargained-for right of confidentiality is a substantial right and that harm caused by the disclosure of confidential information is irreparable. *See, e.g.*, Analog Devices, Inc. v. Michalski, 157 N.C. App. 462, 579 S.E.2d 449 (2003) (appeal involved a substantial right since any disclosure or misappropriation of trade secrets would be irreparable); Evans v. United Services Auto. Ass'n, 142 N.C. App. 18, 23-24, 541 S.E.2d 782, 786 (2001) (order compelling the production of privileged documents affected a substantial right); Cox v. Dine-A-Mate, Inc., 129 N.C. App. 773, 501 S.E.2d 353 (1998) (holding that "disclosure of trade secrets could affect a substantial right"). Here, the parties specifically agreed that the disclosure of confidential information contained in the Separation Agreement would give rise to "irreparable" harm. (R

S pp 321-364). Appellant's bargained-for contractual right of confidentiality with respect to matters affecting his minor children and his family's financial affairs will be irreparably lost unless Appellant is permitted to proceed with an immediate interlocutory appeal.

In addition, unless vacated by this Court, the Access Order will deprive Appellant of his constitutionally protected right to a remedy in the trial court for the injuries done to him by Appellee's breach of contract. *See* N.C. Const. art. I, § 18. Appellant is seeking the alternative remedies of damages, specific performance, or rescission based on Appellee's wrongful disclosure of confidential information. Yet, if the very same information that Appellee improperly disclosed is made part of the public record, the trier of fact may have no way to separate the harm done by Appellee's breaches from the harm caused by the dissemination of that same information in the trial court proceedings. Specific performance requiring Appellee to comply with the Separation Agreement's confidentiality provisions would likewise be meaningless once this information is in the public domain. The deprivation of Appellant's constitutional right to a remedy for Appellee's breach of contract is "substantial." Finally, the Access Order is subject to immediate appeal for the related but independent reason that it involves issues that are inextricably intertwined with the underlying claim for Appellee's breach of contract (including a determination of damages arising from that breach). *See* Davidson v. Knauff Ins. Agency, Inc., 93 N.C. App. 20, 376 S.E.2d 488 (1989) (holding

that because the issue of ownership of a process was so fundamentally intertwined with the remaining claims, the order clearly affected a substantial right). For all of these reasons, the Access Order affects substantial rights that will be irreparably lost if not reviewed by this Court, therefore this Court has jurisdiction of this appeal.

STATEMENT OF THE FACTS

Appellant and Appellee have been married to each other on two occasions and have two minor children. (R S pp 262-371). Each of those marriages lasted approximately two years.[4] Prior to their second marriage, the parties entered into a Prenuptial Agreement (the "Prenuptial Agreement"). (R S pp 277-320).

On 17 December 2007, four months prior to their second divorce, the parties entered into the Separation Agreement, which replaced the existing Prenuptial Agreement and provided Appellee with substantially greater financial benefits than she would have received under the Prenuptial Agreement. (R S pp 321-364). In consideration for these substantial benefits, Appellee agreed to abide by the obligations set forth in the Separation Agreement, including an obligation of confidentiality. (R S pp 321-364).

The confidentiality provision is one of only two provisions

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[4] The first marriage occurred on 20 September 2001 and lasted less than two years. (R S pp 262-371). The second marriage occurred on 18 October 2005. (R S pp 262-371). The parties separated for a second time on 1 October 2007 and were divorced on 29 April 2008. (R S pp 262-371).

that the parties deemed "material" in the Separation Agreement. (R S pp 321-364). In furtherance of that confidentiality obligation, the parties agreed to use their best efforts to ensure that any reference to the terms of the Separation Agreement, and the Separation Agreement itself, would be filed under seal in any future litigation between them. (R S pp 321-364). The parties further acknowledged that a breach of the Separation Agreement's confidentiality provisions would result in irreparable damage and injury. (R S pp 321-364).

Appellant alleges that Appellee violated the Separation Agreement by, among other things, communicating confidential information to third parties. Accordingly, on 11 September 2008, Appellant filed a Complaint (the "First Complaint") in Case Number 08 CVD 20661. (R S pp 365-368). The First Complaint did not set forth the particulars of the Separation Agreement. Instead, in order to comply with the Separation Agreement's confidentiality restrictions, Appellant indicated that he intended to file a second complaint (the "Second Complaint") disclosing the specific terms of the Separation Agreement, once an appropriate sealing order was in place. (R S pp 262-371). In support of his request for a sealing order, Appellant filed a Motion for Summary Judgment in Case Number 08 CVD 20661. (R S pp 365-368). On 18 December 2008, Judge Owens entered Summary Judgment and Order to Seal Court Files, which included the following findings of fact:

> There is a compelling countervailing public interest in protecting the privacy of parties as

> relates to the provisions of the Agreement concerning their young children and their financial affairs, and in avoiding damage or harm to the parties, their business interests, and their children which could result from public access to such provisions of the Agreement.
>
> There is a compelling countervailing public interest in protecting the sanctity of contracts such as the Agreement, where people bargain for and agree upon a mechanism to resolve future disputes in a confidential manner and other contract terms which are not contrary to law, and where each party relies on the other party to perform his or her obligations under the contract.
>
> The aforesaid countervailing public interests in paragraphs 2 and 3 above outweigh the public's interest in access to these court proceedings and any other court proceedings between the parties concerning the Agreement, including the documents filed in such court proceedings.

(R S pp 365-368).

The Owens Order directed the Clerk to seal all further pleadings and documents in Case Number 08 CVD 20661 and directed that any materials filed in any subsequent actions between the parties related to the Separation Agreement also be filed under seal. (R S pp 365-368).

On 31 December 2008, Appellant filed the Second Complaint under seal in accordance with the Owens Order. (R S pp 262-371).[5] The sealed Second Complaint specifically references provisions of the Separation Agreement and sets forth in detail Appellee's numerous breaches of its provisions. Appellant

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[5] The Second Complaint was originally filed in the Superior Court of Mecklenburg County in 08 CVS 28389. That case was subsequently transferred from to District Court, and assigned file number 08 CVD 28389. (R S p 463).

asserts alternative claims for relief including damages, specific performance, or rescission. (R S pp 262-371). The Second Complaint and all other pleadings or documents in 08 CVS 28389 and 08 CVD 28389 have been filed under seal in compliance with the Owens Order. (R S pp 365-368).

On 29 September 2009, in anticipation of a court-ordered hearing on various substantive motions that would require the parties to reference and disclose matters filed under seal, Appellant filed a motion with the District Court requesting that the trial court proceedings be closed to the public (the "Sealing Motion"). (R S pp 731-740). Appellant argued that during the course of those proceedings, confidential information filed under seal would necessarily be disclosed, thereby undermining the intent of the Owens Order and causing Appellant irreparable loss, injury and damage. (R S pp 731-740). On 13 November 2009, the trial court entered the Order Denying Seal. (R S pp 1823-1826). In diametric contrast to the Owens Order, the trial court found there was no compelling countervailing public interest that needed to be protected. (R S pp 1823-1826).[6]

On 17 November 2009, the Media filed a motion pursuant to N.C. Gen. Stat. § 1-72.1, requesting access to judicial proceedings and documents in 08 CVD 20661 and 08 CVD 28389. (R pp 5-13). The trial court conducted a hearing on the Media's

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[6] Appellant immediately filed a Notice of Appeal and moved for a stay of the proceedings pursuant to N.C. Gen. Stat. § 1-294. (R S pp 1828-1829).

motion on 11 December 2009. (R p 14). At the hearing, Appellant argued that under the unique circumstances of this case, granting the Media's Motion for Access would deprive Appellant of his constitutional right to a remedy for Appellee's breach of the Separation Agreement's confidentiality provisions because Appellant would be forced to divulge to the Media the exact materials and information that he sought to keep confidential and that Appellee wrongfully disclosed. (11 December 2009 T p 13 line 10 through p 29 line 5). The Media did not offer any testimony or documentary evidence in support of its motion for access. (11 December 2009 T p 4 line 20 through p 13 line 8; p 30 line 8 through p 35 line 14; p 39 line 12 through p 40 line 14).

On 18 December 2009, Judge Culler entered an Order Granting the Media's Motion to Determine Access. (R pp 14-19). The Access Order effectively vacates the Owens Order by directing that the court file (including all pleadings and documents filed to date) for 08 CVD 20661 be unsealed and that court proceedings in that matter be made open to the public. (R pp 18-19). The Access Order also unseals the court files in 08 CVS 28389 and 08 CVD 28389. (R p 19). The effective date of the Access Order was 31 December 2009. (R p 19).[7] On 21 December 2009, Appellant

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[7] Because (i) there will be no court *proceedings* in 08 CVD 20661 or 08 CVS 28389; and (ii) access to court *proceedings* in 08 CVD 28389 was already granted by the Order Denying Seal (R pp 17), the Access Order primarily affects access to court *pleadings and documents*.

filed a Notice of Appeal as to the Access Order. (R pp 20-21).[8] To date, enforcement of the Order Denying Seal and the Access Order has been stayed pursuant to this Court's Writ of Supersedeas. (R p 35).

ARGUMENT

I. INTRODUCTION.

The North Carolina Supreme Court has held that Article I, Section 18 of the North Carolina Constitution provides the public with a *qualified* right to attend civil court proceedings and to inspect the records of such proceedings. Virmani v. Presbyterian Health Services Corp., 350 N.C. 449, 479, 515 S.E.2d 675, 693 (1999). The Virmani Court emphasized that "[t]he qualified public right of access to civil court proceedings guaranteed by Article I, Section 18 is not absolute" and must yield as necessary (i) for the "fair administration of justice" or (ii) where there are "other compelling public purposes" for doing so. 350 N.C. 449, 476, 515 S.E.2d 675, 693 (1999).

On 18 December 2008, Judge Owens looked at the facts of this case and found that there were compelling countervailing public interests that justified sealing pleadings and documents

[8] Contemporaneously with the filing of the Notice of Appeal, Appellant filed a Motion for Stay seeking to stay the effect of the Access Order until such time as this Court could consider Appellant's appeals of the Access Order and the Order Denying Seal. (R pp 22-27). On 21 December 2009, Judge Culler entered an Order denying Appellant's Motion for Stay. (R p 31).

related to the parties' Separation Agreement. These compelling interests include: (i) the public's interest in "protecting the privacy of parties as relates to the provisions of the Agreement concerning their young children and their financial affairs" and (ii) the public's interest in "protecting the sanctity of contracts." Judge Owens concluded that these compelling public interests outweighed the public's *qualified* right to access court proceedings relating to the parties' private domestic dispute. (R S pp 365-368).

One year later, Judge Culler sat in the same courthouse, looked at the same parties, considered the same confidentiality language from the same Separation Agreement, and applied the same Virmani balancing test, yet reached a diametrically opposite conclusion. Based upon her irreconcilably conflicting conclusion, Judge Culler unsealed not only the pleadings and proceedings in Case 08 CVD 28389 but also those in the Owens' Case (08 CVD 20661).[9] As explained below, Judge Owens' summary judgment order sealing the court file in 08 CVD 20661 was a final judgment and Judge Culler had no authority to unilaterally vacate that judgment. *See* N.C. R. Civ. P. 54(a); Thomas M. McInnis & Associates, Inc. v. Hall, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986).

Moreover, even if the Owens' Order had not been a final judgment, Judge Culler exceeded her authority by purporting to

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[9] The Access Order also unseals all pleadings and proceedings in Case 08 CVS 28389.

vacate an order issued in Case 08 CVD 20661. The power of one trial court judge "is equal to and coordinate with that of another." *See* State v. Woolridge, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003). Thus, one district court judge may not generally modify, overrule, or change the orders of another district court judge. Id. Absent compelling circumstances or some intervening event, Judge Culler was bound to accept Judge Owens' findings of fact, including his finding that there are compelling public interests at stake which warranted his sealing order. Judge Culler disregarded those findings altogether. As explained more fully below, the Access Order ignored the binding findings of fact in the Owens Order, improperly applied the Virmani balancing test, and reached an erroneous conclusion of law. The Owens Order, on the other hand, properly applied the Virmani balancing test and reached a correct conclusion of law. Moreover, even if the Owens Order had been erroneous, it would have been within the exclusive province of an appellate court — *but not another trial court* — to make that determination.

The Access Order also disregarded compelling public interests in protecting and preserving fundamental constitutional rights that are manifest from the verified pleadings, including: (i) the freedom to contract; (ii) the right under N.C. Const. art. I, § 18 to a remedy in the trial court for an injury done; and (iii) the right of privacy in matters related to minor children and the parties' personal and financial affairs. Because the trial court erroneously disregarded these compelling countervailing public interests,

the Access Order must be vacated.

II. STANDARD OF REVIEW.

This case presents important questions of constitutional law that are appropriate for *de novo* review by this Court. "It is well settled that *de novo* review is ordinarily appropriate in cases where constitutional rights are implicated." Piedmont Triad Reg'l Water Auth. v. Summer Hills Inc., 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001). Moreover, alleged errors at law are similarly reviewed by this Court *de novo*. Downs v. State, 159 N.C. App. 220, 221-222, 582 S.E.2d 638, 639 (2003).

III. THE TRIAL COURT ERRED BY VACATING A SUMMARY JUDGMENT ORDER ISSUED IN CASE NUMBER 08 CVD 20661 BY THE HONORABLE N. TODD OWENS.

The Access Order and the Owens Order are legally irreconcilable. While Judge Owens concluded that "there are compelling countervailing public interests which outweigh the public's right to access to the documents filed in court proceedings between the parties concerning the Agreement" (R S pp 365-368), Judge Culler concluded that "there is no compelling countervailing public or governmental interest sufficient to keep the pleadings and filed documents" sealed. (R pp 14-19). The Access Order effectively vacates the Owens Order and directs that all sealed pleadings in Cases 08 CVD 20661, 08 CVS 28389, and 08 CVD 28389 be unsealed. (R p 19). The trial court exceeded the well-defined limits of its authority by purporting to vacate the Owens Order.

A. The Trial Court Had No Authority to Vacate Judge Owens' Order.

"A final judgment is one which disposes of the cause as to all parties, leaving nothing to be judicially determined between them in the trial court." Veazey v. City of Durham, 231 N.C. 357, 57 S.E. 2d 377 (1950). The only issue before Judge Owens was whether the court could seal the court files consistent with the confidentiality provisions of the Separation Agreement. On 18 December 2008, Judge Owens entered a "Summary Judgment and Order to Seal Court Files" that resolved the only claim at issue in case 08 CVD 20661, granted the relief Appellant requested, and left nothing to be judicially determined in the trial court. Judge Owens' Order operated as a final judgment, and Judge Culler had no authority to subsequently vacate that judgment. *See* Id.; N.C. R. Civ. P. 54(a).[10]

B. The Trial Court Had No Authority to Modify Judge Owens' Order.

The Owens Order applied to subsequent litigation between the parties involving the Separation Agreement, including 08 CVS 28389 and 08 CVD 28389. Judge Culler lacked authority to modify the duly entered Owens Order in Case 08 CVD 20661. Moreover, even if that order had been properly before her as an order entered in Case 08 CVD 28389, the law is well-settled that one

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[10] Even if Judge Owens' Order was deemed interlocutory, it involved the same substantial rights that are at issue in this appeal, and would have been immediately appealable. *See* Lloyd v. Carnation Co., 61 N.C. App. 381, 386-387, 301 S.E.2d 414, 417-418 (1983) (holding that plaintiff could have immediately appealed from an interlocutory summary judgment order); *see also* Reynolds v. Riggs, 687 S.E.2d (N.C. App. 2009).

trial judge has no authority to modify another trial judge's conclusions of law, even in the same case. State v. Woolridge, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003).

> It is well established in our jurisprudence that no appeal lies from one Superior Court judge to another . . . and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge.

Id. (quoting Calloway v. Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)). This rule applies with equal force to district court judges. In re Royster, 361 N.C. 560, 563, 648 S.E.2d 837, 840 (2007); Johnson v. Johnson, 7 N.C. App. 310, 313, 172 S.E.2d 264, 266 (1970).

"When an order is not appealed, it becomes the law of the case, and other district judges [are] without authority to enter orders to the contrary." Kelly v. Kelly, 167 N.C. App. 437, 443, 606 S.E.2d 364, 369 (2004) (holding that "trial court did not err by relying on another judge's findings, which were binding")(internal punctuation omitted); Johnson, 7 N.C. App. at 313, 172 S.E.2d at 266 ("The defendant did not appeal from this order. It became, therefore, the law of the case, and other district judges were without authority to enter orders to the contrary."). Accordingly, one judge may not reconsider a motion for summary judgment previously ruled upon by another judge. Smithwick v. Crutchfield, 87 N.C. App. 374, 377, 361 S.E.2d 111, 113 (1987). In Smithwick v. Crutchfield, the Court held that these principles were violated where "the sole issue before Judge Walker . . . was precisely the same question of law as

that previously decided by Judge Rousseau; and the materials and arguments considered by Judge Walker were substantially the same as those considered by Judge Rousseau." Id. at 377, 361 S.E.2d at 113 (1987).

Here, Judge Culler considered the same confidentiality provision of the Separation Agreement and applied the same Virmani balancing test that had been applied by Judge Owens one year before. The Access Order does not include any factual findings that would allow this Court to determine that any fact or circumstance changed between 18 December 2008 and 18 December 2009 to warrant Judge Culler reaching precisely the opposite legal conclusion from that reached by Judge Owens. (R pp 14-19). *Compare* N.C. Gen. Stat. § 1-72.1(c) ("The court shall issue a written ruling on the motion that shall contain a statement of reasons for the ruling sufficiently specific to permit appellate review."). To the contrary, it is apparent from the face of the Access Order that the only differences between the Owens Order and the Access Order are the conclusions reached by Judge Culler. It is simply not the province of one district court judge to countermand another district court judge's duly entered order. Appeals in civil cases must be taken from the district court directly to the Court of Appeals. Johnson, 7 N.C. App. at 313, 172 S.E.2d at 266. "If justice is to be administered in an orderly fashion in the district court division, these fundamentals must be observed." Id. Here, no such appeal was ever taken from the Owens Order. By vacating

the Owens Order, the trial court exceeded its authority and usurped the province of the Court of Appeals.

While Appellant recognizes that judges may modify an "interlocutory order" entered by another judge "in an appropriate context," that principle is not applicable to the facts of this case. First, as explained above, the trial court lacked authority to vacate an order in Case 08 CVD 20661, which had been resolved by a final judgment. Moreover, even interlocutory orders entered by a different judge in the same case may only be modified "for changed circumstances." State v. Duvall, 304 N.C. 557, 284 S.E.2d 495 (1981). Where, as here, there is no intervening event that gives rise to changed circumstances, "findings of crucial facts" are conclusive and binding on subsequent courts. Calloway v. Ford Motor Co., 281 N.C. 496, 501-502, 189 S.E.2d 484, 488 (1972).

Here, the existence of a Separation Agreement imposing confidentiality obligations on these parties – the basis for the compelling public interests in this litigation – has remained constant. The Access Order does not cite a single fact that would permit the trial court to conclude that the compelling countervailing public interests identified by Judge Owens no longer existed. The trial court failed to take Judge Owens' conclusive findings of fact into account, including the finding that the sealing order implicates compelling countervailing public interests such as the public's interest in "protecting the privacy of parties" and in preserving the "sanctity of contracts." Accordingly, the Access Order must be vacated.

IV. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE MEDIA'S MOTION TO DETERMINE ACCESS BECAUSE ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE UNSUPPORTED BY THE RECORD.

The findings of fact in the Access Order are not based on competent evidence. *See* Atwell v. Atwell, 74 N.C. App. 23, 328 S.E.2d 47 (1985). As set forth above, the Access Order plainly disregarded the findings of fact in the Owens Order, including findings that there are compelling public interests implicated by this case. *See* Calloway v. Ford Motor Co., 281 N.C. 496, 501-502, 189 S.E.2d 484, 488 (1972) (noting that "findings of crucial facts" are conclusive and binding absent changed circumstances). Without providing any clear evidentiary basis, the Access Order contains findings of fact and conclusions of law that are contrary to and irreconcilable with the Owens Order. A bare conclusion unaccompanied by the supporting grounds for that conclusion does not comply with N.C. Gen. Stat. § 1A-1, Rule 52(a)(1). *See* Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975).[11]

It is manifest from the verified pleadings in this case that the Access Order, which gives the public unfettered access to sealed and confidential materials that contain information Appellant contends Appellee improperly disclosed, imperils Appellant's constitutionally-protected right to contract, right

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[11] Notably, many of the "findings" in the Access Order are not appropriate "findings of fact," but instead are unsupported conclusions of law. *See* Peoples v. Peoples, 10 N.C. App. 402, 179 S.E. 2d 138 (1971) ("A 'conclusion of law' is the court's statement of the law which is determinative of the matter at issue between the parties."). As explained above, one judge may not alter the conclusions of law reached by another judge.

to a remedy in the trial court for an injury done to him, and right to privacy. The preservation of these constitutional rights is fundamental to the fair administration of justice and of paramount public interest, yet it is apparent that the trial court failed to consider *any* of these constitutional rights when applying the balancing test set forth by the Supreme Court in Virmani.

The balancing mandated by Virmani necessarily requires deliberate consideration of the interests on both sides of the scale before concluding, as the trial court did, that the public's right of access trumps any countervailing public interest. These vital public interests should not have been disregarded through reliance on conclusory and contradictory "findings of fact" stating that these interests do not exist. Even if the trial court had applied the proper legal standard under Virmani, without taking these compelling interests into account, the court would have nevertheless reached an erroneous legal conclusion. Accordingly, the Access Order must be vacated.

V. THE ACCESS ORDER ERRONEOUSLY DISREGARDS THE PUBLIC'S INTEREST IN PROTECTING AND PRESERVING UNCONDITIONAL CONSTITUTIONAL RIGHTS.

"The United States Supreme Court has never held that there is a constitutional right of public access to *civil* court proceedings or related court files." Virmani v. Presbyterian Health Services Corp., 350 N.C. 449, 479, 515 S.E.2d 675, 695 (1999) (emphasis added). Similarly, the North Carolina

Constitution "does not mandate public access to the sealed documents and record" in a civil proceeding. Id. at 478, 515 S.E.2d at 694. Against this legal backdrop, the Virmani Court held that it is the "paramount duty" of the trial court to exercise its "inherent power" granted under Art. IV, Section I of the North Carolina Constitution to control court "proceedings and records," including limiting access to such matters to the extent necessary to insure the fair administration of justice:

> Thus, even though court records may generally be public records . . . a trial court may, in the proper circumstances, shield portions of court proceedings and records from the public; the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has "no power" to diminish it in any manner. . . . This necessary and inherent power of the judiciary should only be exercised, however, when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial.

Virmani at 463, 515 S.E.2d at 685 (internal citations omitted).

The trial court committed reversible error in entering the Access Order because the verified pleadings establish that there are at least three compelling countervailing public interests that outweigh the public's right to access these domestic court proceedings: (i) the constitutional freedom to contract; (ii) the fundamental right of every person under N.C. Const. art. I, § 18 to obtain redress in the court for an injury done to him; and (iii) the constitutional right of privacy, particularly with respect to matters surrounding the parenting of minor children.

Each of these constitutional rights is sufficient standing alone to overcome the qualified right of public access to the court proceedings in this case. In combination, however, the public's interest in protecting and preserving these unqualified constitutional rights overwhelmingly outweigh the public's qualified right of access in this action.

A. The Access Order erroneously disregards the public's compelling interest in preserving the constitutionally protected freedom to contract.

Here, Appellant and Appellee bargained and gave valuable consideration for an enforceable confidentiality provision protecting the parties' minor children and their respective personal financial and business affairs. Both parties recognized that the confidentiality provision was not only integral to the Separation Agreement, but one of only two provisions deemed "material" to the Separation Agreement. (R S pp 321-364). The parties agreed to use their best efforts to ensure that any reference to the terms of the Separation Agreement, and the Separation Agreement itself, would be filed under seal in litigation between them, and agreed that any breach of the confidentiality provision could cause "irreparable" harm. (R S pp 321-364).

"The right of the parties to say upon what terms and conditions they are willing to . . . enter into a contract . . . is not to be lightly abridged. Indeed, it is no small part of the liberty of the citizen." Adkins v. Children's Hospital, 261 U.S. 525 (1923). Accordingly, Judge Owens correctly found that

the parties' right to contract was one of the compelling public interests that warranted sealing the court files:

> There is a compelling countervailing public interest in protecting the sanctity of contracts such as the Agreement, where people bargain for and agree upon a mechanism to resolve future disputes in a confidential matter and other contract terms which are not contrary to law, and where each party relies on the other party to perform his or her obligations under the contract.

(R S pp 365-368). By contrast, the Access Order incorrectly found that there was no public interest in preserving and protecting the expectations of parties who exercise their right to enter into confidentiality agreements. *Compare* Morris v. Holshouser, 220 N.C. 293, 17 S.E.2d 115 (1941) (holding that "the privilege of contracting is both a liberty and a property right"). Unless a contract is contrary to public policy or prohibited by statute, the freedom to contract requires that it be enforced. *See* Turner v. Masias, 36 N.C. App. 213, 243 S.E.2d 401 (1978).

There is no question that the parties had a right to enter into a contract for confidentiality under North Carolina law. *See* Chemimetals Processing, Inc. v. McEneny, 124 N.C. App. 194, 197, 476 S.E.2d 374, 376 (1996) (holding that claim for breach of nondisclosure agreement was likely to succeed on the merits); McElmurry v. Alex Fergusson, Inc., 2006 WL 572330, 14-15 (M.D.N.C. 2006) (holding that confidentiality agreement arose from an arms-length transaction, served a legitimate interest, and was enforceable). Indeed, trial courts routinely allow

parties to file materials containing confidential information under seal. *See, e.g.*, Vernon v. Cuomo, 2010 WL 935745, 2 (N.C. Super. 2010) (noting that report was filed under seal to protect IP portfolio and "other confidential information from public disclosure"); Thomas Cook Printing Co., Inc. v. Subtle Impressions, Inc., 2008 WL 4695734, 3-4 (N.C. Super. 2008) ("The Court is satisfied that sealing the parties' settlement agreement and supporting materials in this case is consistent with the interests of justice.").

The public interest in promoting the stability of separation agreements is no less deserving of protection. Indeed, the private resolution of familial disputes is encouraged under North Carolina law.

> [T]he law, should, when practicable, encourage the resolution of family issues without resort to court interference. . . . Separation of marital settlement agreements are, quite correctly, said to minimize the psychological and economic costs of divorce, to create better prospects for post-divorce cooperation between the parties, to lessen the impact of divorce upon children, and to promote judicial economy.

Pataky v. Pataky, 160 N.C. App. 289, 304, 585 S.E.2d 404, 414 (2003); Bromhal v. Stott, 341 N.C. 702, 462 S.E.2d 219, *reh'g denied*, 342 N.C. 418, 465 S.E.2d 536 (1995) (recognizing "that the public policy of this State encourages settlement agreements"); N.C. Gen. Stat. § 52-10.1 ("Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects . . . ").

If, in seeking to vindicate his constitutional right to contract for confidentiality in the Separation Agreement, Appellant is forced to publish the very Separation Agreement that he contracted to keep private and alleges that Appellee wrongfully disclosed, he will irreparably lose the benefit of his bargain. The trial court erred by disregarding the public's interest in protecting and preserving the right of parties to contract for confidentiality with respect to private matters concerning their minor children and financial affairs.

B. The Access Order erroneously disregards the public's compelling interest in preserving the constitutionally protected right of a citizen to a remedy in the trial court for an injury done to him.

Every citizen of North Carolina is guaranteed the right to a remedy in the trial court for an injury done to him.

> All courts shall be open; every person for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

N.C. Const. art. I, § 18. The *unconditional* constitutional promise that a litigant "shall have remedy" in court "for an injury done to him" is the bedrock of the civil justice system. By contrast, the public's qualified right of access to civil court proceedings – found in the exact same provision of the North Carolina Constitution – is derivative of and necessarily subordinate to the unconditional right to a remedy for every wrong. *See* Anderson v. Assimos, 146 N.C. App. 339, 344, 553 S.E.2d 63, 67 (2001), rev'd on other grounds, 356 N.C. 415, 572 S.E.2d 101 (2002) ("The promise was that '[j]ustice would be

available to all who were injured; *to this end*, the courts would be open.'") (emphasis added). Here, if Appellant's constitutional right to a remedy is trumped by the public's qualified right of access, there will be no justice available to Appellant. This could not be the result the Supreme Court intended when it considered these competing interests and instructed that "[t]he paramount duty of the trial judge is to supervise and control the course of the trial so as to prevent injustice," including specifically denying public access to proceedings and documents. Virmani at 463, 515 S.E.2d at 685. Accordingly, a trial court must follow the mandate of Virmani and exercise its "inherent power" to seal proceedings and documents where, as here, "the openness ordinarily required of government will be more harmful than beneficial." Virmani at 464, 515 S.E.2d at 685.

Here, the trial court failed to follow the Virmani mandate. Instead, the Access Order turns the N.C. Const. art. I, § 18 constitutional promise on its head and subjugates Appellant's unconditional constitutional right to a remedy for the injury he has suffered to the public's qualified right of access. By virtue of the Access Order, Appellant's ability to obtain redress for Appellee's breach of her confidentiality obligation will require Appellant to disclose the Separation Agreement and the very same confidential information that Appellant sought to safeguard in the first place. The disclosure of this confidential information thereby becomes the price of admission to the courtroom. Faced with this unconstitutional dilemma,

parties injured through disclosure of private information in breach of a confidentiality obligation will either have to forgo their constitutional right to a remedy or allow that exact same confidential information to be disseminated as the cost of their remedy. This is not and should not be the law.

Appellant will lose his right to a remedy if during the course of litigation the public is granted access to the very information that he contends was wrongfully disclosed by Appellee. Indeed, the harm caused by Appellee's improper disclosure of confidential information to select individuals would pale in comparison to the harm that will result if that confidential information (and more) is made accessible to the general public. It may be impossible to determine whether the "injury done to" Appellant by the publication of private matters was caused by Appellee's breaches or by the dissemination of the same information by the court. Likewise, any order requiring specific performance will be meaningless. There will be no way to "unring[] the bell" that will be rung when the confidential information at issue in the litigation is disclosed to the public. Id. (explaining that attempting to retract confidential information from the "public domain is like unringing a bell – a practical impossibility"). Virmani at 464, 515 S.E.2d at 685.

This result does not reflect a proper balance of the competing constitutional concerns, and it should not be embraced by this Court. The "fair administration of justice" contemplated by Virmani necessarily means that the constitutional promise that every citizen "shall have remedy"

may not be annulled through the very process of seeking it. Rather, the Court should give effect to the constitutional promise that Appellant (like every other North Carolina litigant) "shall have remedy" for his injury.

C. The Access Order erroneously disregards the public's compelling interest in preserving the constitutionally protected right to privacy.

Finally, the trial court erroneously failed to consider the public's interest in preserving the parties' constitutionally protected right of privacy in matters involving minor children and personal financial affairs. *See* Renwick v. News & Observer, 310 N.C. 312, 312 S.E.2d 405 (1984); *see also* Hall v. Post, 323 N.C. 259, 372 S.E.2d 711 (1988). The Owens Order found that the parties had a strong interest in keeping matters related to their children and personal financial affairs private and "in avoiding damage or harm to the parties, their business interests, and their children which could result" from disclosure of these private matters in litigation between the parties. (R S pp 365-368). That finding is unassailably correct.

The United States Supreme Court has recognized that safeguarding the physical and psychological well-being of minor children is a "compelling" interest that may warrant closure of courtroom proceedings. *See* Globe Newspaper Co. v. Superior Court for the City Of Norfolk, 457 U.S. 596, 102 S.Ct. 2613, 73 L. Ed. 2d 248 (1982). The North Carolina General Assembly has also recognized that privacy protections may outweigh the

public's right of access in matters relating to children. *See* N.C. Gen. Stat. § 7B-801 and § 7B-901 (2007); *see also* In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969); N.C. Gen. Stat. § 48-2-203 (1995). Likewise, courts in other jurisdictions have found that court proceedings involving children and domestic issues implicate special privacy concerns that may justify closing the courtroom to the public.

> [D]ivorce proceedings are the type of proceeding which have received protection against public scrutiny because the details thereof involve matters which are essentially private in nature and which lack any useful public purpose . . . . While the public has a right to know that its courts of justice are fairly carrying out their judicial functions, no legitimate purpose can be served by broadcasting the intimate details of a soured marital relationship.

Katz v. Katz, 356 Pa. Super. 461, 514 A.2d 1374, 1379 (1986); *see also* In re Marriage of R.E., 144 Wash. App. 393, 183 P. 3d 339 (Wash. App. Div. 1, 2008); *see also* P.B. v. C.C., 223 A.D.2d 294, 647 N.Y.S. 2d 732 (N.Y.A.D. 1 Dept. 1996).

This case does not concern Appellant in his role as a public figure but instead relates to the parties' parenting of minor children and private family financial affairs. In court proceedings in this matter, evidence will be presented relating to the children's residences, education, health, childcare locations, childcare providers, schedules, and activities. No legitimate purpose can be served by broadcasting this private and previously undisclosed information to the public.

In addition, this case will involve private financial matters that should be afforded the protection that the parties

bargained for in the Separation Agreement. As explained above, North Carolina courts routinely recognize the right of parties to contract for confidentiality. Indeed, a North Carolina statute *requires* courts to take measures to protect "an alleged trade secret," including the sealing of court records and conducting hearings *in camera*. N.C. Gen. Stat. § 66-156. The trial court's erroneous disregard of these privacy interests – interests that the Owens Order found *as fact* existed, which findings were conclusive and binding on the trial court – was legally and procedurally improper. The Access Order should be vacated.

CONCLUSION

The Owens Order contains findings of fact that unequivocally establish that there are multiple constitutional rights implicated by the Access Order, which unseals the pleadings and documents in Cases 08 CVD 20661, 08 CVS 28389 and 08 CVD 28389. Judge Owens' findings were conclusive and binding on the trial court, and in the absence of compelling changed circumstances, which do not exist, the trial court had no authority to vacate or modify the Owens Order. Moreover, the findings of fact set forth in the Owens Order are entirely consistent with the verified pleadings in this matter, which conclusively establish that there is a compelling countervailing public interest in protecting and preserving: (i) the right to freely contract; (ii) the right under N.C. Const. art. I, § 18 to a remedy in the trial court; and (iii) the right to privacy

in matters related to the parenting of minor children and personal financial matters. Lastly, the fair administration of justice requires that these proceedings remain sealed to insure that Appellant is not denied the constitutional promise – afforded every litigant in this state – of a remedy for the injury he has suffered.

The Access Order disregarded the compelling constitutional interests at stake in this case and consequently erred in its application of the balancing test set forth in Virmani. Accordingly, the Access Order should be vacated and this case should be remanded to the trial court for entry of an order denying the Media's Motion to Determine Access, in accordance with the Owens' Order.

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Respectfully submitted this the 17th day of May, 2010.

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N.C. R. App. P 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing PLAINTIFF-APPELLANT'S BRIEF has been filed this day via electronic filing and served this day to the attorneys or parties by email by sending it to the attorneys' office by a confirmed email receipt by 5:00 P.M. Eastern Standard Time and by hand delivery by leaving it at the attorneys' office with a partner or employee:

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NORTH CAROLINA STATE CONSTITUTION

PREAMBLE

We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.

ARTICLE I
DECLARATION OF RIGHTS

That the great, general, and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and government of the United States and those of the people of this State to the rest of the American people may be defined and affirmed, we do declare that:

Section 1. The equality and rights of persons.
We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness.

Sec. 2. Sovereignty of the people.
All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.

Sec. 3. Internal government of the State.
The people of this State have the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness; but every such right shall be exercised in pursuance of law and consistently with the Constitution of the United States.

Sec. 4. Secession prohibited.
This State shall ever remain a member of the American Union; the people thereof are part of the American nation; there is no right on the part of this State to secede; and all attempts, from whatever source or upon whatever pretext, to dissolve this Union or to sever this Nation, shall be resisted with the whole power of the State.

Sec. 5. Allegiance to the United States.
Every citizen of this State owes paramount allegiance to the Constitution and government of the United States, and no law or ordinance of the State in contravention or subversion thereof can have any binding force.

Sec. 6. Separation of powers.
The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.

Sec. 7. Suspending laws.
All power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised.

Sec. 8. Representation and taxation.
The people of this State shall not be taxed or made subject to the payment of any impost or duty without the consent of themselves or their representatives in the General Assembly, freely given.

Sec. 9. Frequent elections.

For redress of grievances and for amending and strengthening the laws, elections shall be often held.

Sec. 10. Free elections.
All elections shall be free.

Sec. 11. Property qualifications.
As political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office.

Sec. 12. Right of assembly and petition.
The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political societies are dangerous to the liberties of a free people and shall not be tolerated.

Sec. 13. Religious liberty.
All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.

Sec. 14. Freedom of speech and press.
Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.

Sec. 15. Education.
The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.

Sec. 16. Ex post facto laws.
Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted. No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted.

Sec. 17. Slavery and involuntary servitude.
Slavery is forever prohibited. Involuntary servitude, except as a punishment for crime whereof the parties have been adjudged guilty, is forever prohibited.

Sec. 18. Court shall be open.
All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

Sec. 19. Law of the land; equal protection of the laws.
No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

Sec. 20. General warrants.

General warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted.

Sec. 21. Inquiry into restraints on liberty.

Every person restrained of his liberty is entitled to a remedy to inquire into the lawfulness thereof, and to remove the restraint if unlawful, and that remedy shall not be denied or delayed. The privilege of the writ of habeas corpus shall not be suspended.

Sec. 22. Modes of prosecution.

Except in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.

Sec. 23. Rights of accused.

In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation and to confront the accusers and witnesses with other testimony, and to have counsel for defense, and not be compelled to give self-incriminating evidence, or to pay costs, jail fees, or necessary witness fees of the defense, unless found guilty.

Sec. 24. Right of jury trial in criminal cases.

No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo.

Sec. 25. Right of jury trial in civil cases.

In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable.

Sec. 26. Jury service.

No person shall be excluded from jury service on account of sex, race, color, religion, or national origin.

Sec. 27. Bail, fines, and punishments.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.

Sec. 28. Imprisonment for debt.

There shall be no imprisonment for debt in this State, except in cases of fraud.

Sec. 29. Treason against the State.

Treason against the State shall consist only of levying war against it or adhering to its enemies by giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. No conviction of treason or attainder shall work corruption of blood or forfeiture.

Sec. 30. Militia and the right to bear arms.

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed weapons, or prevent the General Assembly from enacting penal statutes against that practice.

Sec. 31. Quartering of soldiers.

No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner prescribed by law.

Sec. 32. Exclusive emoluments.

No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.

Sec. 33. Hereditary emoluments and honors.

No hereditary emoluments, privileges, or honors shall be granted or conferred in this State.

Sec. 34. Perpetuities and monopolies.

Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.

Sec. 35. Recurrence to fundamental principles.

A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty.

Sec. 36. Other rights of the people.

The enumeration of rights in this Article shall not be construed to impair or deny others retained by the people.

Sec. 37. Rights of victims of crime.

(1) Basic rights. Victims of crime, as prescribed by law, shall be entitled to the following basic rights:

- (a) The right as prescribed by law to be informed of and to be present at court proceedings of the accused.
- (b) The right to be heard at sentencing of the accused in a manner prescribed by law, and at other times as prescribed by law or deemed appropriate by the court.
- (c) The right as prescribed by law to receive restitution.
- (d) The right as prescribed by law to be given information about the crime, how the criminal justice system works, the rights of victims, and the availability of services for victims.
- (e) The right as prescribed by law to receive information about the conviction or final disposition and sentence of the accused.
- (f) The right as prescribed by law to receive notification of escape, release, proposed parole or pardon of the accused, or notice of a reprieve or commutation of the accused's sentence.
- (g) The right as prescribed by law to present their views and concerns to the Governor or agency considering any action that could result in the release of the accused, prior to such action becoming effective.
- (h) The right as prescribed by law to confer with the prosecution.

(2) No money damages; other enforcement. Nothing in this section shall be construed as creating a claim for money damages against the State, a county, a municipality, or any of the agencies, instrumentalities, or employees thereof. The General Assembly may provide for other remedies to ensure adequate enforcement of this section.

(3) No ground for relief in criminal case. The failure or inability of any person to provide a right or service provided under this section may not be used by a defendant in a criminal case, an inmate, or any other accused as a ground for relief in any trial, appeal, postconviction litigation, habeas corpus, civil action, or any similar criminal or civil proceeding. (1995, c. 438, s. 1.)

§ 1–277. Appeal from superior or district court judge.

(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause. (1818, c. 962, s. 4, P.R.; C.C.P., s. 299; Code, s. 548; Rev., s. 587; C.S., s. 638; 1967, c. 954, s. 3; 1971, c. 268, s. 10.)

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§ 1-294. Scope of stay; security limited for fiduciaries.

When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. The court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity. It may also limit such security to an amount not more than fifty thousand dollars ($50,000), where it would otherwise exceed that sum. (C.C.P., s. 308; Code, s. 558; Rev., s. 602; C.S., s. 655.)

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§ 1-72.1. Procedure to assert right of access.

(a) Any person asserting a right of access to a civil judicial proceeding or to a judicial record in that proceeding may file a motion in the proceeding for the limited purpose of determining the person's right of access. The motion shall not constitute a request to intervene under the provisions of Rule 24 of the Rules of Civil Procedure and shall instead be governed by the procedure set forth in this statute. The movant shall not be considered a party to the action solely by virtue of filing a motion under this section or participating in proceedings on the motion. An order of the court granting a motion for access made pursuant to this section shall not make the movant a party to the action for any purpose.

(b) The movant shall serve a copy of its motion on all parties to the proceeding in any manner provided in Rule 5 of the Rules of Civil Procedure. Upon receipt of a motion filed pursuant to this section, the court shall establish the date and location of the hearing on the motion that shall be set at a time before conducting any further proceedings relative to the matter for which access is sought under the motion. The court shall cause notice of the hearing date and location to be posted at the courthouse where the hearing is scheduled. The movant shall serve a copy of the notice of the date, time, and location of the hearing on all parties to the proceeding in any manner provided in Rule 5 of the Rules of Civil Procedure.

(c) The court shall rule on the motion after consideration of such facts, legal authority, and argument as the movant and any other party to the action desire to present. The court shall issue a written ruling on the motion that shall contain a statement of reasons for the ruling sufficiently specific to permit appellate review. The order may also specify any conditions or limitations on the movant's right of access that the court determines to be warranted under the facts and applicable law.

(d) A party seeking to seal a document or testimony to be used in a court proceeding may submit the document or testimony to the court to be reviewed in camera. This subsection also applies to (i) any document or testimony that is the subject of a motion made under this section and that is submitted for review for the purposes of the court's consideration of the motion to seal, and (ii) to any document or testimony that is the subject of a motion made under this section and that was submitted under seal or offered in closed session prior to the filing of a motion under this section. Submission of the document or proffer of testimony to the court pursuant to this section shall not in itself result in the document or testimony thereby becoming a judicial record subject to constitutional, common law, or statutory rights of access unless the document or testimony is thereafter introduced into evidence after a motion to seal or to restrict access is denied.

(e) A ruling on a motion made pursuant to this section may be the subject of an immediate interlocutory appeal by the movant or any party to the proceeding. Notice of appeal must be given in writing, filed with the court, and served on all parties no later than 10 days after entry of the court's ruling. If notice of appeal is timely given and given before further proceedings are held in the court that might be affected by appellate review of the matter, the court, on its own motion or on the motion of the movant or any party, shall consider whether to stay any proceedings that could be affected by appellate review of the court's ruling on the motion. If notice of appeal is timely given but is given only after further proceedings in the trial court that could be affected by appellate review of the ruling on a motion made pursuant to this section, or if a request for stay of proceedings is made and is denied, then the sole relief that shall be available on any appeal in the event the appellate court determines that the ruling of the trial court was erroneous shall be reversal of the trial court's ruling on the motion and remand for rehearing or retrial. On appeal the court may determine that a ruling of the trial court sealing a document or restricting access to proceedings or refusing to unseal documents or open proceedings was erroneously entered, but it may not retroactively order the unsealing of documents or the opening of testimony that was sealed or closed by the trial court's order.

(f) This section is intended to establish a civil procedure for hearing and determining claims of access to documents and to testimony in civil judicial proceedings and shall not be deemed or construed to limit, expand, change, or otherwise preempt any provisions of substantive law that define or declare the rights and restrictions with respect to claims of access. Without in any way limiting the generality of the foregoing provision, this section shall not apply to juvenile proceedings or court records of juvenile

proceedings conducted pursuant to Chapters 7A, 7B, 90, or any other Chapter of the General Statutes dealing with juvenile proceedings.

(g) Nothing in this section diminishes the rights of a movant or any party to seek appropriate relief at any time from the Supreme Court or Court of Appeals through the use of the prerogative writs of mandamus or supersedeas. (2001-516, s. 1.)

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Rule 52. Findings by the court.

(a) Findings. –

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

(2) Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b). Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party.

(3) If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

(b) Amendment. – Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59.

(c) Review on appeal. – When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings. (1967, c. 954, s. 1; 1969, c. 895, s. 12.)

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§ 48-2-203. Confidentiality of proceedings under Chapter.

A judicial hearing in any proceeding pursuant to this Chapter shall be held in closed court. (1995, c. 457, s. 2.)

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§ 66-156. Preservation of secrecy.

In an action under this Article, a court shall protect an alleged trade secret by reasonable steps which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action subject to further court order, and ordering any person who gains access to an alleged trade secret during the litigation not to disclose such alleged trade secret without prior court approval. (1981, c. 890, s. 1.)

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§ 7B-801. Hearing.

(a) At any hearing authorized or required under this Subchapter, the court in its discretion shall determine whether the hearing or any part of the hearing shall be closed to the public. In determining whether to close the hearing or any part of the hearing, the court shall consider the circumstances of the case, including, but not limited to, the following factors:

(1) The nature of the allegations against the juvenile's parent, guardian, custodian or caretaker;
(2) The age and maturity of the juvenile;
(3) The benefit to the juvenile of confidentiality;
(4) The benefit to the juvenile of an open hearing; and
(5) The extent to which the confidentiality afforded the juvenile's record pursuant to G.S. 132-1.4(l) and G.S. 7B-2901 will be compromised by an open hearing.

(b) No hearing or part of a hearing shall be closed by the court if the juvenile requests that it remain open.

(c) The adjudicatory hearing shall be held in the district at such time and place as the chief district court judge shall designate, but no later than 60 days from the filing of the petition unless the judge pursuant to G.S. 7B-803 orders that it be held at a later time. (1979, c. 815, s. 1; 1998-202, s. 6; 1998-229, ss. 5, 22; 1999-456, s. 60.)

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§ 52-10.1. Separation agreements.

Any married couple is hereby authorized to execute a separation agreement not inconsistent with public policy which shall be legal, valid, and binding in all respects; provided, that the separation agreement must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b). Such certifying officer must not be a party to the contract. This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and wife, or their attorneys, may be construed to constitute a separation agreement between such husband and wife. (1965, c. 803; 1977, c. 375, s. 3.)

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Article 7.

Judgment.

Rule 54. Judgments.

(a) Definition. – A judgment is either interlocutory or the final determination of the rights of the parties.

(b) Judgment upon multiple claims or involving multiple parties. – When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for judgment. – A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings. (1967, c. 954, s. 1.)

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So, we would ask Your Honor to grant our Motion that we be able to see both files or, in the alternative, that you would en camera, as the statute permits, review both files and decide what should be open and what should not be and find the appropriate findings. Thank you, Your Honor.

JUDGE CULLER: Thank you, Mr. Owens.

MR. STEPHENSON: Your Honor, Johnny Stephenson for Brian France. And if home is where the heart is, then I'm coming home, being here today. Mr. Owens is right, I am a double Tarheel, and all my family is born and raised and still lives in North Carolina. So, it's good to be here and I appreciate the privilege of arguing before you.

Mr. Owens and I agree about a lot of things. But one fundamental thing that we won't agree about is that this is a simple or a straightforward matter. I think, to the contrary, this is a particularly difficult and uniquely complex question, Constitutional

question, that Your Honor faces here today, and raised by the Observer's Motion.

And the reason that it is, is that the substantive law, which we're going to talk about and under which the Observer is proceeding, that substantive law, which is fundamentally Article I, Section 18 of the North Carolina Constitution, -- which, as a collateral matter, has been interpreted to provide public access to Court proceedings, and we don't dispute that -- at its core, its principal purpose, the reason that it exists is a Constitutional promise, unlike public access, that is not qualified. It is unqualified and it is literally the bedrock principle on which the entire system of civil justice is predicated. And that is the promise in Article I, Section 18, that every citizen, whether they are a public figure or not, Joe Lunchbucket or whomever, every citizen is Constitutionally promised a remedy for every injury to their person, to their

land, to their property. And every citizen is promised the fair administration of justice without denial, delay or favor. That is the Constitutional promise of Article I, Section 18.

And the Observer would turn that on its head and try to argue that they have public access, that the public has access here. And I appreciate the fact that the Observer doesn't understand or know enough about the facts that are at issue in our case, which make it unique, not like other matters. And because of what is effectively a perfect storm of circumstances around the issues in this case, the Court, with all respect, I think cannot permit public access without denying these litigants, and Mr. France in particular, the unqualified Constitutional promise of Article I, Section 18, which is a remedy for every injury to his property rights.

So, it is a lot more complicated because of the circumstances of this

case. And I'm going to come to the substantive law, but before we get there, -- And there's a boatload of good lawyers in this room --

JUDGE CULLER: I'll give you that.

MR. STEPHENSON: -- and there are going to be a lot -- there's a lot of law been argued, there will be a lot of law argued to you. But nobody in this courtroom is going to point to anything that is more profound or plain about why this issue that we're talking about needs to be sorted out by the North Carolina Court of Appeals than the basic common sense proposition that two judges, thoughtful and earnest, sitting on the same Court, in the same county, looking at the same facts and exactly the same law, reached diametrically opposite conclusions about what should happen.

And we respect and understand your Order, and we all understand that Judge Owens reached a different conclusion in weighing the law that we're going to talk about. And it is exactly that

circumstance and what's at stake here, the risk that if we proceed and we publish this case, there will be substantive rights that there is no doubt Mr. France has to enforce a valid, binding contract with Ms. France about matters that are intensely private, that relate to the welfare and the parenting of minor children, and that relate to private, personal financial issues, again, that relate to the minor children and to the France family.

And if we proceed and information about that is revealed in this proceeding while this issue is up to the North Carolina Court of Appeals, and the Court of Appeals decides Judge Owens is right and not Your Honor with respect to the Order that has previously been entered, it will be too late. And their decision will be rendered moot because we would have published things that should not have been published.

And so, it's complicated, and it's complicated because of the peculiar facts

of this case, not because one of these parties is a public figure, not because these folks have tried to contract for a private courtroom, but because they happen to be in a lawsuit that relates to the enforcement of a confidentiality provision and an alleged breach of that confidentiality provision, and it concerns matters relating to the welfare and the parenting of their children and private financial matters of the family. And so, it's those facts that make this different.

But it is the basic common sense proposition that two judges looking at the law and the facts, trying to do the right thing, reached exactly opposite conclusions, that tells us that we need the Court of Appeals guidance here to explain for the parties, for the public and for the Court what the right analysis is about these issues.

And it wouldn't matter, and we could let the Court of Appeals decide that issue while this case went forward,

except for the fact that this case can't go forward in a public way without denying Mr. France a remedy for the injury that he claims in this case. Because he claims in this case there has been a breach of the confidentiality agreement between he and Ms. France.

And if, through this proceeding, we publish everything that would otherwise be covered by that confidentiality agreement, we get to the end of the case, he has no remedy for the wrong. So, that is the thing that's unique about this case that makes it different. And by the way, means that the ruling here that we keep this case out of the public would not have any implications broadly, as the paper has suggested -- And, again, because Mr. Owens doesn't know the facts -- but it doesn't have broad application to other cases because it's the peculiar facts of this case that make it different.

So, let's look at what the law is. All right. The only legal -- We agree

about this. The law that's applicable here is North Carolina Statute 1-72.1, which is nothing but a procedural rule. No substantive law in that statute at all, I don't think there's any disagreement. It's just how they get to the courtroom here today. And then, the substantive law that's at issue is Article I, Section 18, that's the Constitutional provision that they invoke that says that they say entitles them to public access. It is the Statute 7A-109 which merely says that the Clerk is going to keep public records and that the public has access. We don't dispute that that's what that says. And it's *Virmani*, which is really the only substantive decision of the North Carolina Supreme Court that speaks to the analysis that the Court has to bring to bear here.

And I'll tell you one thing, Justice Mitchell ate a full breakfast before he wrote that decision, because it is about as steep in analysis, and as well-reasoned and thoughtful as we could

hope for. But all it does is provide a way of analyzing the facts of a particular case. And, again, we have no dispute with the paper about what *Virmani* says, except they don't give him - they don't give Justice Mitchell the full measure of his articulation about the rule to apply.

He says that there is a qualified right to public access, yes. But that qualified right must yield where the interest and fairness of justice, the fair administration of justice, would require that it yield, and where there are countervailing public interests that are compelling and sufficient for that qualified right to yield.

And unlike any other case that I could imagine that would come before you, this case implicates the most important public right, a Constitutional promise that if you've been injured, you will have a remedy. That is the foundation of the civil justice system.

And here -- because of the

peculiar facts of this case, not applicable in other cases -- here that unqualified, absolute bedrock principle of the civil justice system would be violated if we permitted public access, because we would be publishing those very confidential things that the lawsuit is seeking redress for. And there would be no way at the end of this lawsuit to get damages for the breach because it would already be out there. There would be no way to get specific performance for the breach because it's already out there. And even if you got recision for the breach, which we claim we are entitled to receive, it doesn't solve the problem because, if you rescind that agreement, these parties have another agreement that would then be applicable and which itself has confidentiality provisions in it.

And so, the point is that there is no way to get to the end of this case and for Mr. France to have a remedy if these proceedings are public. And it's only because, again, of the peculiar facts of

this case. So, under *Virmani*, in order to vindicate the most important public interest, which is the integrity of the Constitutional promise that if you've been injured you will have a remedy, we cannot make this proceeding public.

And if you go beyond that, which I don't believe we need to do, but if we do, and we look at the other factors that are implicated here, we've got the public interest in protecting minor children. This lawsuit relates to issues concerning the parenting and the welfare of minor children. This lawsuit relates to personal, private financial matters affecting minor children and affecting the finances or the personal financial information for the France family. There is no public interest, no legitimate public interest, in those propositions. And there is a compelling interest in keeping that information confidential.

And, finally, we've got the proposition of the sanctity of contract. Here, there's a valid, binding agreement

between these parties. It has a confidentiality obligation. We have a disagreement with Ms. France about whether it's been breached. We're going to litigate that issue. And if we're right, as we say we are, the Constitution says we have to have a remedy. And the only way to have one is to preserve the confidentiality. And there's no way to argue this case, there's no way to put on the evidence that has to be put on, without publishing the things that are covered by the confidentiality agreement that is at the core of this case.

And if you think about it, consider the absurdity of the proposition that two parties could enter into a contract. One of them could agree to pay substantial money to the other for that person's promise of confidentiality about certain information, certain information that is proper and appropriate to keep confidential. And the party who made the promise of confidentiality breaches that promise, forcing the party who paid the

money to sue.

In that lawsuit, the party who breached their promise says we don't really know if this can or should be closed, this proceeding, and the Court decides that it can't. You go forward, it's ultimately proved that the promise was breached, but the money has been paid and the party who pays the money doesn't get the benefit of their bargain; the party who made the promise does. And there's no remedy. There's no remedy at the end of the day precisely because the information about the lawsuit is now public, and all the things that were covered by the confidentiality agreement have been disclosed in open Court.

So, that's what's unique about this case. That's why under Article I, Section 18, that's why under *Virmani*, in this case the qualified right to public access must yield to vindicating the bedrock Constitutional proposition unique to this case, and in the face of the compelling countervailing interest,

again, unique to this case.

And if your Order, subject of a Notice of Appeal presently, is affirmed in the North Carolina Court of Appeals, we'll all come back and we'll proceed accordingly, and we'll have that direction. But if that Order is reversed and the case is remanded, if we had gone forward in the interim, and any of the information that is covered by the confidentiality obligations at issue in the lawsuit has been disclosed, we will have, to paraphrase Justice Mitchell, rung a bell that cannot be unrung. No way to fix that.

And so, here, because these propositions are so important, the Constitutional issues are so important, and, frankly, are so complicated, we would urge the Court to be cautious and to not take any action or permit any access that would unintentionally usurp the province of the Court of Appeals to resolve this issue and to give us direction where going forward would

disclose information that we can't undisclose once it's published.

And so, because the law requires it under the Constitution, under the very Constitutional provision that the paper cites, because we believe the balance of the considerations under *Virmani* require it, but also for the common sense and practical reason that if we do other than what we're suggesting, if we permit the access, we will not be able to undo the harm that has been done. And the principles are too important, the question is too close. Good, bright judges working hard to do the right thing have reached different conclusions about how to proceed.

And under all those circumstances, we believe that the prudent thing to do is to deny access to the Observer and to the public, to proceed, if you elect to proceed, in a closed courtroom for all the reasons that we have suggested, and let the litigants go forward. There will be a transcript. If the day ever comes

and it is determined that this should have been public, it could still be made public, but we would not have run afoul of the rights of the parties and the Constitutional promise of a remedy for every injury in the meantime.

Alternatively, you could stay the entire proceeding and you could let the issue be resolved by the Court of Appeals without the case going forward substantively, thereby not denying the paper any access or the public any access until we get direction from the Court of Appeals. I think that is a decision that, whatever the Court decides to do, we're prepared to proceed, either way.

But what we urge the Court not to do is to make a decision today or on the Motion by the paper that will ring a bell we can't unring. And I think it's the proper and prudent thing to do here and it will not affect other cases. It will certainly not permit other parties to privately contract for a closed courtroom, because it would require the

unique confluence, effectively the perfect storm. of facts and circumstances that we have here. And so, this case is unique, and we'd ask that you treat it that way. Thank you.

JUDGE CULLER: Thank you, Mr. Stephenson. Mr. Kornegay?

MR. KORNEGAY: Your Honor, I'm Russ Kornegay on behalf of my client, Megan France. We're sitting at this table, but we're sitting at this table with the Observer and the TV station because we arrived last. And so, I just want to make for the record --

JUDGE CULLER: So, we don't have the little table usually used by Counsel.

MR. KORNEGAY: Yes. I've never had the chance to sit at the little table. But, in any event, I just want to let you know that just because we're at this table does not mean we're aligned interests with them. They were nice enough to let us sit there.

I don't think we have anything to add other than what you've already heard and the materials that were previously

JUDGE CULLER: We are here in the France versus France matter on the Movant, the newspaper and television station's, Motion to determine access to the judicial proceedings and documents. I am expecting Mr. Owens?

MR. OWENS: Your Honor.

JUDGE CULLER: Very nice to meet you. And Mr. --

MR. LAM: Lam.

JUDGE CULLER: -- Lam. Very nice to meet you, sir. And I believe I'm familiar with some of the other folks; I see some new faces. I believe I met you, sir, at the last hearing, and you're next.

MR. STEPHENSON: Johnny Stephenson, Judge. Thank you for the pro hoc admission.

JUDGE CULLER: Nice to meet you, Mr. Stephenson. Okay. If we could you go ahead and proceed, Mr. Owens.

MR. OWENS: Thank you, Your Honor. We're here on what I believe is a fairly straightforward issue in terms of the Charlotte Observer's rights and WCNC's rights by statute, by Constitution and case law, to have access to the

proceedings that are otherwise -- have been sealed, as well as to keep the courtroom open in any future matters that are taken up by these particular litigants.

Your Honor, we have a Motion and Memo, I don't know whether you've had a chance to look at. You have? Then I will not bore you with any surplusage then.

To some degree, when you have these type of proceedings in a closed courtroom, it's a little bit like blind man's bluff, because most of which we know very little about what's in the files, all we know is what the docket sheet shows us -- we have appended that to our particular submissions. -- and what we have learned through one particular proceeding involving these parties before.

So, if I go through what we understand the facts and the procedure to be, if I err, these parties may know, -- they may choose not to correct me,

however, in open Court -- but we understand there have been not one lawsuit between these parties, but two. The first lawsuit was filed in District Court by Mr. France, 08-CVD-20661, against his former wife, we understand, Ms. France, on September the 11th, 2008.

It's our understanding, although it doesn't reflect on the computer printout, that Judge Owens, when he was on the bench, sealed that entire file and then also sealed his Order referencing his sealing of the file on December the 8th of 2008. We have no idea whether that case is pending, whether it has been dismissed, whether it is on appeal. We do not know. But the scope of our Motion is that by statute, by Constitution and by case law, we are entitled to at least, at a minimum, see Judge Owens' Order sealing the matter. But our Motion today is that we are entitled to see, as are others, the contents of that particular file.

We did not know until we went down

to the Courthouse to try to determine what had happened to the first action that there has, in fact, been a subsequent action originally filed in Superior Court by Mr. France, again, and he has added, it appears, a number of other plaintiffs in addition to himself. And that action is also filed against Ms. France.

He has added Janelle Associates, Jan Barefoot's private investigative group, Kelly Berlotti, who we understand to be a consultant with NASCAR, but stand corrected, at some level has some affiliation with NASCAR, NASCAR as a party plaintiff itself, and Ms. Amy France, which we understand to be Mr. France's sister.

Somehow, that action has been transferred to District Court; we do not know how. And that entire file has also been sealed. And this time, it's been sealed by an anonymous judge. We have no information or knowledge about why that case was sealed or who sealed it and when

it was sealed.

And the reason we think that's significant, Your Honor, because you are -- This is one -- There's not a lot of case law, not a lot of statutory law, not a lot of Constitutional law, as Your Honor is probably aware. But the total effect of what has happened is, unlike criminal cases where you're balancing fair trial for the defendant, you're balancing issues around impeding the State's investigation, you have apparently two civil litigants who are enjoying each other not very much. I assume there's a confidentiality clause, which at some level they believe, or Mr. France must believe, permits them not to come into our open Courts and litigate their differences just like the rest of us.

And if you look at this case law, look at the statute, we believe that's entirely inconsistent with the law, particularly in a civil case Mr. France not only started once but twice,

apparently. He not only started the second time by himself, but he added others, whom I assume are not in the courtroom today. I do not know who represents them, have no idea what their view is on the sealing or unsealing of any case. And we believe those actions, or -- in effect, it's a breach of 7A-109(a) in which our legislature said the public in civil proceedings has the right to inspect court records.

Your Honor, I hope, has had a chance to look at *Virmani versus Presbyterian*, which you may already be familiar with. More recently, there's been *In Re: Cooper*, which the North Carolina Court of Appeals had decided in a criminal proceeding in October of this year, involved an action by -- or by motion rather -- to find out what is underlying the search warrant procedures with a young woman who died tragically up in Chapel Hill. And while it was denied, the case law was very clear that absent a compelling or countervailing governmental

or public interest, these proceedings must be open. We cannot find any law to the contrary, although we obviously stand corrected.

And if I may, Your Honor, for your benefit, if you look at *Virmani* and look at *Cooper*, they basically say when there is a compelling countervailing public interest and closure of the Court proceedings or sealing of the documents is required to protect a countervailing public interest. And in the *Cooper* case, they talk about that the Constitutional right of access can be denied only by proof of a compelling governmental interest, and that a denial must be narrowly tailored to serve that interest.

We think here, on what few facts we do know, whether it's Mr. France or Ms. France, or both of them together, it really doesn't matter to us, they fall far short in this civil dispute by meeting this type of interest under the case law, again, the statute or the Constitution.

I would suggest to you these people are of a means that if they wanted to negotiate an arbitration forum or venue where they could fight privately as long as they wanted to, they could have done that. They chose not to do that, for whatever reason. Mr. France chose to be the Plaintiff. I'm assuming he has outstanding counsel, including a Carolina double-graduate, undergraduate and law school. They would have known that once I choose to litigate here, I will be treated like other people.

Now, clearly, the Court has the ability on a matter-by-matter basis to choose sealing whether it involves sensitive financial information or other types of issues. But to do a wholesale sealing of two cases, nothing else appearing -- we don't even know who the judge was -- is exactly what our founding fathers, our legislature and our judiciary don't want to have happen. The slippage you begin to see is, at least Judge Owens, you knew he was the judge

that sealed. The next time, you don't know who it is. How does anybody have the ability to know what's going to be litigated here in the courtroom?

Now, there's been some back and forth, if Counsel has been quoted correctly, about the nature of this, but courtrooms by definition are for the impolite. We are doing our best to litigate and resolve civil disputes, and they are often embarrassing, they are often very painful. And whoever designed the system said we would rather have that and have it be open so that our citizens know what to expect than to have closed doors where, I may suggest, power and influence have more than their say.

And that has been our presumption from the beginning. The North Carolina and U.S. Constitution support that, the case law supports that, the statute supports that. And we believe these litigants must have their disputes, just like Joe or Mary Lunchbucket have their disputes, just like the rest of us.

So, we would ask Your Honor to grant our Motion that we be able to see both files or, in the alternative, that you would en camera, as the statute permits, review both files and decide what should be open and what should not be and find the appropriate findings. Thank you, Your Honor.

JUDGE CULLER: Thank you, Mr. Owens.

MR. STEPHENSON: Your Honor, Johnny Stephenson for Brian France. And if home is where the heart is, then I'm coming home, being here today. Mr. Owens is right, I am a double Tarheel, and all my family is born and raised and still lives in North Carolina. So, it's good to be here and I appreciate the privilege of arguing before you.

Mr. Owens and I agree about a lot of things. But one fundamental thing that we won't agree about is that this is a simple or a straightforward matter. I think, to the contrary, this is a particularly difficult and uniquely complex question, Constitutional

submitted to you, other than we do have pending Motions alleging irreparable injury, irreparable harm and non-payment of substantial amounts of money that we want to be heard, and not in a year.

JUDGE CULLER: Thank you, Mr. Kornegay. Mr. Owens?

MR. OWENS: Thank you, Your Honor. If I may respond to Counsel, just point by point as I have understood them. No one has taken a remedy away from Mr. France. The statute -- the permission to have a remedy for whatever may have been caused is very different by which the process arrives at a remedy. Those cannot be confused.

The ringing of the bell, if you will, Mr. France should have thought about the ringing of the bell before he brought two lawsuits. He chose to avail himself of a public forum, which is Constitutionally protected. He chose to move into the Court with whatever the dispute may be. And, obviously, we did not know until Counsel mentioned, that

Your Honor had entered an Order and that there is an appeal. That's the first we've heard of that. Obviously, that does introduce a separate set of considerations for all of us.

But the substantive rights to which Counsel makes reference, and then at the same time says we'd like to move ahead, is exactly the kind of cake that they're not entitled to have and eat at the same time.

If, in fact -- And our Motion stands for what it is -- we believe that the appeal has been properly entered and jurisdiction has been divested of Your Honor, we would still like to see what's there. And I would be the first to agree with Counsel that at some level that is part of what's at measure. But these substantive rights that they don't get to proceed and move ahead and say at the end, oh, here's a transcript of what we did, that's not what the Constitution remotely was anticipating or the statute or *Virmani*, no matter how much Justice

Mitchell may have had to eat for breakfast.

The notion of -- Justice Mitchell was very careful to talk about the narrow tailoring of an exception by Findings of Fact and Conclusions of Law. Your Honor has that authority. What is perhaps the most offensive about this is the wholesale -- And I say that without casting dispersions -- is the wholesale sealing of the files. There's no sense of, all right, this is sensitive financial information, we're going to take that up differently, we're going to redact certain things, which happens, as Your Honor knows, every day. And I'm sensitive, too, as Counsel has raised. If there are issues involving matters, Your Honor obviously has the discretion and ability, like any other judge, to hear that. And that part of this case may not be part of what is going to be publicly heard, and Your Honor would make the appropriate findings.

But here you have the wholesale

sealing of the case and then the Order sealing the case. And then, the next time he brings a lawsuit with his friendly plaintiffs, we don't even know what happened there. That is absolutely not what any Constitution in North Carolina permits. *Virmani* doesn't permit it.

And I, too, have litigated over the sanctity of contracts. And the sanctity of Constitutional access versus the sanctity of contracts, to me, Your Honor, -- you know, Judge McMillan who used to be the Federal judge, said commercial litigation is really thieves fighting about money. I don't know anything about what's at issue here, but that doesn't trump anything.

Counsel mentions what would be absurd. What would truly be absurd, if word got out, guess what we can do? You and I can enter into a civil confidentiality clause, whether I'm a landlord or a tenant or a bank or a customer, think of a thousand different

opportunities, and once you sign on that dotted line, we are now in a closed courtroom. That is the absurdity of what their position is.

And to hear, trust us, this is unique, this is the perfect storm, every lawyer that ever brought a case in to talk about confidentiality would say, trust us, public, trust us, Your Honor, this is the perfect storm. Well, these halls have heard absolutely about everything, and people have had to litigate criminally and civilly. It's difficult, it's painful, it's hurtful, it is what the adversary system gives us. That is the by-product of what it is. But what we also have is openness.

I know what it means to come into this courtroom, and I make an informed decision. Mr. France is not a widow or orphan; he has outstanding counsel. He knew what he was bargaining for when he sued twice. So, Your Honor, if you have jurisdiction, to me, the least tenable would be let's proceed while this is

banging around at some level of the Court of Appeals. That absolutely strikes me as fundamentally unfair.

On the other hand, if there is an appeal, we have now learned something. Jurisdictionally, I don't believe you could do that anyway. But I trust these parties and you to come up with that answer. But, to me, there can't be that piecemeal justice. But we also believe we have the right to see, under the Constitution and *Virmani*, what has been wholesale denied to the public. Thank you.

JUDGE CULLER: Thank you again.

MR. STEPHENSON: Your Honor, just briefly. To correct one statement made by Counsel so he's not under a misapprehension -- I know the Court understands it -- there are no friendly plaintiffs. There are two parties in each of the lawsuits that were at question, Mr. France and Ms. France. And I understand that that's just a misunderstanding that Counsel has because of how he read the docket. But,

matters relating to the children and to the family. And that's appropriate and it's enforceable. And at the end of the day, we need a remedy for that breach. Only way to do it is to keep these proceedings closed, either by staying them pending a decision by the Court of Appeals, or by proceeding in a closed fashion while the Court of Appeals considers those issues. Thank you.

JUDGE CULLER: Okay.

MR. OWENS: Judge, I want to be real clear about piecemeal. We don't like piecemeal. And if I wasn't clear about that, I'd like to be clear now. Thank you for Counsel's correction.

I guess we live in a place where the litigants don't get to turn around and tell the institutions that are there, trust us, this is not going to be important to you, this is not salacious, this is not this, this is not that. That's not what our Constitution is about, that's not what our statute is about, that's not what our case law is

about.

I've heard excellent argument, I've seen no new authority. Maybe Your Honor has been presented with authority. I think the authority is limited that's there. And it is about the way in which our courts proceed. But other than that, we are finished.

And if Counsel has been correct that Your Honor has already ruled in this position, contrasting with Judge Owens, then please disregard all the bombast you heard from me earlier. Your Honor has obviously seized these facts.

MR. STEPHENSON: Your Honor, the only thing I will do at the close is just to hand up, not that you need it, but because the suggestion that no new law has been cited. It is the fact of law that they cited, simply that they cited the wrong proposition, and that's the Constitutional promise of Article I, Section 18. And it could not be clearer. It says every person --

MR. KORNEGAY: Would it be possible for us to get