NO. COA22-256 THIRTEENTH JUDICIAL DISTRICT

BEFORE THE NORTH CAROLINA COURT OF APPEALS

MAURICE DEVALLE Petitioner/Appellee	)	
v.	)	From Columbus County
	)	No. 20CVS1273
N.C. SHERIFF'S EDUCATION AND TRAINING STANDARDS COMMISSION Respondent/Appellant)	)	

APPELLEE DEVALLE'S RESPONSE TO APPELLANT'S "MEMORANDUM OF ADDITIONAL AUTHORITY" AND REQUEST FOR THE MEMORANDUM AND ATTACHMENTS TO BE DISREGARDED AND STRICKEN AS VIOLATIVE OF RULE 28(g) OF THE N.C. RULES OF APPELLATE PROCEDURE

Now comes Appellee Maurice Devalle and respectfully submits this Response to Appellant's purported "Memorandum of Additional Authority" filed late yesterday afternoon, less than two days before the scheduled oral argument.

Appellee Devalle respectfully submits that Appellant's filed memorandum and Devalle's Response herein should be submitted to the assigned three judge panel immediately so that this matter can be decided prior to oral argument on Wednesday November 2, 2022; otherwise, Appellee Devalle will be prejudiced by having to prepare to address the 68 pages of materials.

Because the Appellant's purported "additional authority" is in fact not additional authority at all but is clearly rather an effort to jam new evidentiary contentions into the record, the Appellant's filing should not just be disregarded, it should be stricken.

As purported grounds for its filing, Appellant only cited to N.C. App. R. 28(g), which provides:

> Additional authorities. Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by failing a memorandum thereof with the clerk of the court and serving copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument.

Appellant's memorandum violates both the letter and spirit Rule 28(g). The relevant operative term in this court's rule is *authority*. In this context, the term authority plainly means *precedent*.

Appellant's filing consists of 68 pages of small font single spaced attachments, which fall into the following categories: 1) a petition and amended petition and related documents in a recently filed civil action in Columbus County involving the Sheriff there, in Civil File No. 22 CV 990[1]; 2) many affidavits filed by *one party* in that civil action; and 3) a newspaper opinion article that appeared in the *News & Observer* on October 25.

The Appellant's filed memorandum is a serious misuse of Rule 28(g). There is no reasonable argument that what is contained in

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[1] The undersigned counsel has been informed by counsel in Columbus County that the petition and amended petition have been *dismissed*. If this is confirmed as true, this presents even greater concerns.

Appellant's filing is "additional authority." Appellee Devalle's position advanced herein is supported by Justice Neil Gorsuch and several federal Circuit Courts.

This occupational licensing case was tried on December 3 and 4, 2019., and the evidence closed then. The Appellant Commission is now directly attempting to inject new contended evidence into the record disguised as "additional authorities."

Appellee Maurice Devalle's name does not appear anywhere in the 68 pages submitted to this Court. Appellee Devalle was not in any way a party or a witness to the recent civil filing. In short, Maurice Devalle has absolutely nothing to do with any contention in any of the 68 pages.

As provided in this Court's clear rule, Rule 28(g) affords parties an opportunity to cite additional *authority – but not to jam petitions, affidavits and newspaper articles into the record somehow couched as "authority."*

The meaning of authority as used in Rule 28(g) can be inferred from the precise and complete language and context of the rule. Legal authority has been defined as "a judicial decision, statute, or rule of law that establishes a principle; precedent." https://legal-dictionary.thefreedictionary.com/authority

In the difficult time constraints imposed by Appellant's filing, the undersigned counsel could not find any case from this Court interpreting Rule 28(g). Devalle asserts that the likely reason for the complete lack of appellate precedent is that Rule 28(g) is palpably clear. There is, however, substantial judicial interpretation of the highly similar federal appellate rule which permits the citation of supplemental authority, but not what the Attorney General is trying to do here.

Federal Appellate Rule 28(j) is a similar rule:

> (j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before

> decision—a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 350 words. Any response must be made promptly and must be similarly limited.

The Federal Rule has been interpreted consistent with Devalle's position. In *Niemi v. Lasshofer*, 728 F.3d 1252, 1262 (10th Cir. 2013), the Court stated the proper function of Rule 28(j) is "to advise the court of 'new authorities' a party has learned of" after briefing or oral argument. Its purpose is not "to introduce any sort of new issue after briefing is complete." *Id.* The reasoning in *Neimi* is especially persuasive – it was authored by then Circuit Judge Neil Gorsuch.

Justice Gorsuch and the Tenth Circuit in *Niemi* cautioned that allowing improper supplementation "invites an unsavory degree of tactical sandbagging by litigants." *Id.* (citations omitted).

In *Trans-Sterling, Inc. v. Bible*, 804 F.2d 525, 528 (9th Cir. 1986), a party sought to supplement the record pursuant to Rule 28(j). The Court stated: "Rule 28(j) permits a party to bring new *authorities* to the attention of the court; it is not designed to bring new evidence through the back door." *Id.* (emphasis in original).

See *Packsys v. Exportadora De Sal, S.A de C.V.*, 899 F.3d 1081, 1090 n.5 (9th Cir. 2018) ("Rule 28(j) permits a party to bring new *authorities* to the attention of the court; it is not designed to bring new evidence through the back door." *Manley v. Rowley*, 847 F.3d 705, 710 n.2 (9th Cir. 2017). In *Packsys*, the Court found that submission of confidential materials from an arbitration proceeding constituted evidence and not supplemental authority).

In *Lawrence v. Chabot*, 182 F. App'x 442, 455 n.5 (6th Cir. 2006), the Court found that the effort to supplement the record with information about a person's bar admission constituted improper use of Rule 28(j)

because such information was not "supplemental authorities at all;" it was evidence.

In Spiegla v. Hull, 481 F.3d 961, 965 (7th Cir. 2007), the Seventh circuit explained that "a Rule 28(j) letter. Rule 28(j) permits parties to briefly apprise the court of new or previously undiscovered authority pertinent to arguments made orally or in the briefs."

As explained in *DiBella v. Hopkins*, 403 F.3d 102, 118 (2d Cir. 2005), "Rule 28(j) *cannot* be used to submit new evidence to the appeals court" citing several cases). See *United States v. Bortnovsky*, 820 F.2d 572, 575 (2d Cir. 1987) ("Pursuant to Rule 28(j)[,] ... counsel may submit 'pertinent and significant authorities [which] come to the attention of a party after the party's brief has been filed, or after oral argument but before decision....' In making any such submission, a party is strictly forbidden from making additional arguments or from attempting to raise points clarifying its brief or oral argument." (quoting Fed. R. App. P. 28(j))).

In all due respect to the *News & Observer*, it borders on the ludicrous for anyone to suggest that an opinionated newspaper article is legal authority or precedent for an appellate court. The same is true for affidavits from another civil case where neither party here is a party in the other case. The lengthy briefs of the parties and the *Amicus Curiae* brief provide this Court with substantial authorities from this Court and our Supreme Court.

The rules of this Court are vitally important as they stake out the procedures by which parties seek justice. Our appellate rules promote fairness. See *State v. Hart*, 361 N.C. 309, 310, 644 S.E.2d 201, 202 (2017) ("Compliance with the Rules is required.")

The Attorney General of North Carolina should have known that the materials submitted as "additional authority" were not additional authority and are nothing more than a post-trial effort to smear a non-party witness in this case with completely inadmissible new contentions.

Wherefore, this Court should find that Appellant's attempted use of Rule 28(g) is unreasonable, improper, unfair, and prejudicial, and this Court should both disregard and strike the Appellant's purported Rule 28(g) filing; further, this Court and should consider other relief to Appellee as this Court deems just and proper in the interest of justice – including dismissal of the appeal.

/s/ J. Michael McGuinness
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CERTIFICATE OF SERVICE

I hereby certify that I have served this Response on Ms. Ameshia Cooper, Counsel for the Appellant Commission, P.O. Box 629 Raleigh, N.C. 27602 via email to acooper@ncdoj.gov this 1st day of November, 2022.

/s/ J. Michael McGuinness
J. Michael McGuinness
The McGuinness Law Firm