THE COST AND CONFUSEDNESS OF THE NORTH CAROLINA SYSTEM OF PRE-FINAL JUDGMENT APPEALS

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The purpose of this presentation is to describe some features of the North Carolina appellate system, identify some problems, and suggest some possible ways of ameliorating the problems.

The subject is civil interlocutory appeals, that is, appeals from court orders in civil cases that are not "final judgments," and, especially, the virtually unique[2] North Carolina "substantial right" interlocutory appeal. A chief problem is that in many circumstances no one-- neither the lawyers nor the judges, let alone the litigants who are paying for the whole enterprise-- knows which interlocutory orders are appealable. The consequence of this uncertainty is that cases often come to be consigned to judicial limbo, only to find they've been waiting in the wrong line and spending money and time on efforts that have been wasted.

The time may be ripe for consideration of changes to the appellate process: two recent legislative enactments affecting appellate jurisdiction[3] show that the General Assembly is willing to modify appellate jurisdiction rules. Chief Justice Martin has stated his intent to establish a study commission "in order to evaluate the operation of the court system and make recommendations to the General Assembly,"[4] with efficiency improvements as one of his stated aims. The 2014 publication by the Appellate Rules Committee of the "Guide to Appealability of Interlocutory Orders" (the "Guide")[5] has shown how arcane the subject has become, though the Guide's caution that it "is often difficult to predict with certainty whether an interlocutory order is immediately appealable"[6] needs to be taken seriously.

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[2] There is no "substantial right" interlocutory appeal in federal court. The legal encyclopediae cite "substantial right" interlocutory appeal cases from approximately a dozen states. Westlaw searches for the word "interlocutory" in proximity to "substantial right" show the terms to be employed most in cases from North Carolina and Ohio, with low usage or no usage in other states.

[3] Amendments to N.C. Gen. Stat. § 7A-27 and enactment of N.C. Gen. Stat. § 50-19.1, discussed below.

[4] "Mark Martin's Administration of Justice Plan for NC," available at http://www.martinforchiefjustice.com/mark-martins-justice-plan-for-nc/ (last visited January 8, 2015). Also see Chief Justice Martin's Investiture Ceremony remarks at http://www.nccourts.org/news/documents/Chief-Justice-Martin-2015-installation-ceremony-remarks.pdf (last visited January 8, 2015).

[5] Available at http://www.ncbar.org/media/109596/arcguidetoappealability.pdf (last visited January 8, 2015).

[6] *Id.* at "Statement of Purpose."

The time also seems to be at hand for additional Supreme Court attention in this area: following the 2014 amendment,[7] N.C. Gen. Stat. § 7A-27 now provides for direct appeal of Business Court rulings to the Supreme Court. This will be the first time since the 1967 creation of the Court of Appeals that the Supreme Court will be dealing with a steady diet of direct civil appeals, and some of those appeals are going to be from interlocutory orders.

I. FRAMING THE LEGAL ISSUE.

A. Appellate Jurisdiction Basics.

The focus of this presentation is on civil cases in the North Carolina appellate courts, particularly the Court of Appeals. Up to now, the Court of Appeals has been handling roughly 95% of the North Carolina appellate caseload.[8] Federal statutes and cases, and North Carolina statutes governing criminal and juvenile appeals, are referenced for purposes of comparison.

"Interlocutory" orders. The appellate jurisdiction of the North Carolina Court of Appeals is as prescribed by statute.[9] By statute, parties in North Carolina courts are entitled to appeal from "final judgments."[10] In federal court, litigants are permitted to appeal from "final decisions."[11]

Per Rule 54(b), N.C. Rules Civ. Proc., any order or ruling by a lower court that is not a final judgment or final decision is termed "interlocutory." The much-cited 1950 *Veazey* decision, which substantially predated North Carolina's adoption of the Rules of Civil Procedure, continues to be quoted: "An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) (citation omitted).

Per Rule 54(b), interlocutory orders are generally not appealable: in the language of the Rule, such orders are not "subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes."

Partial final judgments under Rule 54(b). North Carolina Rule 54(b) defines "final judgment" in two alternative ways: (i) an order that finally and fully resolves *all claims*, counterclaims, cross-claims, etc., *in the case;* or (ii) an order that finally decides matters as to *some* one or more, but less than all, of the "claims or parties" and includes a trial court

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[7] Session Law 2014-102.

[8] See charts at p. 16-17, below.

[9] N.C. Const., Art. IV, §§ 7, 12(2). *Cf. id.* § 1 (inherent judicial authority), § 12(1) (authority of Supreme Court).

[10] N.C. Gen. Stat. § 7A-27(b).

[11] 28 U.S.C. § 1291.

finality determination with "no just reason for delay" language.[12] The difference between the two alternatives is the scope of the final judgment: the entire case; or, alternatively, either an entire "claim" or all claims involving a particular party. Federal Rule 54(b) has significantly different language, but both Federal and North Carolina Rule 54(b) provide the same two alternative paths to finality.

Partial final judgments-- what is an entire "claim"? The "no just reason for delay" certification allows appeal only if the trial court has finally decided an entire "claim." "[I]t is important in applying Rule 54(b) to distinguish the true multiple claim case from the case in which only a single claim based on a single factual occurrence is asserted but in which various kinds of remedies may be sought." *Tridyn Industries, Inc. v. American Mutual Ins. Co.*, 296 N.C. 486, 490, 251 S.E.2d 443, 446-47 (1979).

Generally speaking, all theories of recovery asserted and all remedies sought against a particular party arising out of a particular subject must have been decided, including damages, before a Rule 54(b) finding can make an order something that can be appealed as a "final judgment." *Tridyn Industries, supra. Also see, e.g., Rioux v. Accurate Home Inspection, Inc.*, 2011 WL 2201186, *5 (N.C. App., June 7, 2011) (unpublished) ("Because the issues of the validity of the contract and the limitation of liability clause are not claims for relief, immediate appeal of the trial court's order under Rule 54(b) is not available."); *Evans v. United Services Automobile Ass'n*, 142 N.C. App. 18, 23, 541 S.E.2d 782, 786 (2001) ("the trial court attempted to certify the matter [a discovery ruling concerning privilege] for appeal pursuant to Rule 54(b) of the Rules of Civil Procedure, finding that its rulings affected a substantial right of defendants. The trial court's order was not, however, 'final' in nature, and the trial court may not make an interlocutory order immediately appealable by a Rule 54(b) certification.")

While the United States Supreme Court has refused to define what constitutes a single "claim" (*Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 743 n. 4 (1976)), the North Carolina concept of what constitutes a "claim" is probably the same as is currently applied in federal court. *E.g., Acumen Re Management Corp. v. General Security National Ins. Co.*, 769 F.3d 135, 141-43 (2d Cir. 2014). The exact boundaries of what constitutes a single

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[12] As to the language required under Rule 54(b), see *Smoky Mountain Sanctuary Prop. Owners Ass'n, Inc. v. Shelton*, 2014 WL 6432979, at *4 (N.C. App. Nov. 18, 2014) (unpublished):

> With regard to Rule 54(b) certification, although the trial court classified its judgment as "final," it did not certify it as immediately appealable or expressly declare that there was no just reason for delay of appeal. Our Supreme Court has held that a trial court's designation of a judgment as "final" does not make it immediately appealable under Rule 54(b). *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979). Therefore, defendants are not entitled to immediate appeal of the judgment based on a Rule 54(b) certification.

Notwithstanding the citation, *Tridyn* does not address the language that must be included in trial courts' Rule 54(b) orders. However the *Smoky Mountain* ruling does appear to be consistent with the language of Rule 54(b).

claim (per the Second Circuit, "operative facts" the same, as opposed to "separate and distinct" issues) are difficult to define, but can be well identified in most cases.

Orders deciding liability but reserving damages for later determination are not "final judgments," even if they include a "no just reason for delay" finding. *Tridyn, supra*. The same rule applies in federal court. *Liberty Mutual Ins. Co. v. Wetzel*, *supra*.

New law (2013)-- entire "claim" and unresolved claims for fees and costs: *Duncan v. Duncan*. A frequent issue that affects finality in civil litigation is claims for costs and attorney fees. As of June 13, 2013, finality is not affected by unresolved questions of attorney fees or costs. *Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013). Essentially the same result applies in federal court, but the federal treatment is addressed by Federal Rules of Civil Procedure 54(d) ("Costs; Attorney Fees") and 58(e) ("Cost or Fee Awards"), and Rule 4(a)(4) of the Federal Rules of Appellate Procedure, for which there are no North Carolina equivalents. See Appendix.

> **Comment**: *Duncan* is a potential malpractice trap and a potential source of jurisdictional mess. Following entry of judgment, a party has no right to wait on appeal until the trial court resolves fee and costs issues. Some trial judges might prefer to deal with fees and costs before the case leaves their docket, and this can apparently be accomplished by the trial court withholding the "entry" of judgment until fees and costs have been dealt with. See N.C. Gen. Stat. § 1A-1, Rule 58. Consideration should be given to amendment that would let trial courts "send it all up at once," even if judgment has been rendered and notice of appeal has been given.

Entire "claim": G.S. 50-19.1. As of 2013, North Carolina family law cases have special statutory rules concerning finality:

> Notwithstanding any other pending claims filed in the same action, *a party may appeal* from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution *if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action.* A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in this section. An appeal from an order or judgment under this section shall not deprive the trial court of jurisdiction over any other claims pending in the same action.

N.C. Gen. Stat. § 50-19.1 (emphasis added).

> **Comment**. This statute appears to be a good model for other areas in which policymakers determine that interlocutory appeals should be allowed. Note that the second sentence makes the timing of the interlocutory appeal

discretionary with the appealing party,[13] and that the final sentence provides that the trial court retains jurisdiction over the unappealed part of the case.

Conclusion. Subject to Rule 54(b), and subject to the new rule in *Duncan* that unresolved issues of fees and costs do not affect finality, and subject to N.C. Gen. Stat. § 50-19.1, any order by a North Carolina court that does not resolve all issues in the case is an "interlocutory" order; any right to appeal that order must, therefore, be based on "expressly" stated provisions in other statutes or rules.

B. The Philosophy Behind the (Purported) General Rule Denying Appealability of Interlocutory Orders.

In both the courts of North Carolina and in federal courts, most interlocutory orders are not appealable. The federal courts refer to this principle as the "final-judgment rule" and base it principally on considerations of efficiency.

> In applying *Cohen* 's collateral order doctrine, we have stressed that it must never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered. Our admonition reflects a healthy respect for the virtues of the final-judgment rule. Permitting piecemeal, prejudgment appeals, we have recognized, undermines efficient judicial administration and encroaches upon the prerogatives of district court judges, who play a special role in managing ongoing litigation.

Mohawk Industries, Inc. v. Carpenter, supra, 558 U.S. 100, 106-07 (2009) (citations omitted).

North Carolina cases do not use the "final-judgment rule" terminology, but they express much the same philosophy and, like the federal courts, ground this view principally in considerations of efficiency. The most quoted description of the practical problem interlocutory appeals can present is the "no more effective way to procrastinate" language in *Veazey v. Durham, supra*:

> There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals,

[13] This discretionary "appeal it now or appeal it later" feature has counterparts in statutory language governing personal jurisdiction appeals under G.S. 1-277(b) and in case law interpreting "substantial right" appeals (*see Department of Transportation v. Rowe,* 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999)-- "where a party is entitled to an interlocutory appeal based on a substantial right, that party may appeal but is not required to do so. To the extent language in *Charles Vernon Floyd, Jr. & Sons, Inc. v. Cape Fear Farm Credit,* 350 N.C. 47, 51, 510 S.E.2d 156, 159 (1999), suggests otherwise, it is hereby disavowed.")

> and to enable courts to perform their real function, i.e., to administer "right and justice * * * without sale, denial, or delay." N.C. Const. Art. I, Sec. 35.

231 N.C. at 363-64, 57 S.E.2d at 382.

Veazey, an opinion authored by Justice Ervin and written with his unique style, cites the Magna Carta as well as the North Carolina Constitution. The *Veazey* principle that interlocutory appeals should be limited because they cause unnecessary delay is firmly established in North Carolina cases, examples of which include *Tridyn, supra; Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 579 (1999) (also quoting *Veazey*); and *State v. Fayetteville St. Christian School*, 299 N.C. 351, 358, 261 S.E.2d 908, 913 (1980), *affirmed on rehearing*, 299 N.C. 731, 265 S.E.2d 387 (1980) ("Our refusal to allow defendants' appeal is not a surrender to technical requirements of finality. The statutes and rules governing appellate review . . . are designed to streamline the judicial process, to forestall delay rather than engender it.") According to Westlaw, *Veazey* has been cited in 559 North Carolina cases, including 38 cases during the twelve months ended June 30, 2014.

> **Comment**. In North Carolina courts, the concept expressed in *Veazey* is largely an illusion: the courts and the Legislature have made interlocutory appeals a prominent feature of the North Carolina legal landscape. The Appellate Rules Committee's Guide to Appealability of Interlocutory Orders lists eighty "practical examples" of trial court rulings, and states "The vast majority of the categories of orders discussed below have been held to be appealable under the substantial right doctrine." Guide p. 9.
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> Moreover, the basic premise of *Veazey*-- that interlocutory appeals cause delay-- is sometimes right, but sometimes wrong: it depends on the case, the appeal, and what happens during the appeal. For a counter-*Veazey* perspective, see Judge Eagles' Order Certifying Case for Immediate Appeal in *Richardson v. Bank of America*, case no. 02-CVS-2398 (Durham County) (Oct. 10, 2005), included in the Appendix.

C. "Substantial Right" Interlocutory Appeals.

The principal authority for appeal of interlocutory orders rendered by North Carolina courts in civil cases is found in two statutes, N.C. Gen. Stat. §§ 1-277(a) and 7A-27, each of which allows appeals from any order "which affects a substantial right." The language of section 1-277(a) is substantially identical to language first enacted in North Carolina in

1868.[14] Section 7A-27 was enacted in 1967 and contains similar language to section 1-277(a), but (unlike section 1-277(a)) refers solely to interlocutory orders in "a civil action or proceeding."

The New York "substantial right" appeal statute, from which the North Carolina statute was copied,[15] remains part of New York law today, notwithstanding 1960-era repeal efforts,[16] but is not cited very frequently, apparently because New York has another statute authorizing interlocutory appeal that is even more permissive. *See* N.Y.C.P.L.R. § 5701(a)(iv) (McKinney 2014).

The 2014 publication of the Guide shows the breadth of "substantial right" appeals. The Guide classifies cases into eleven major categories, including jurisdiction, "traditional affirmative defenses," "purely procedural" matters, immunities, privileges and orders concerning counsel. The taxonomy also includes two "miscellaneous" categories that cover thirty-two types of "substantial right" rulings that are not otherwise classified. In total, the Guide summarizes whether eighty types of orders do, or do not, give rise to a right of appeal, most all of which are candidates for appealability under the "substantial right" statutes rather than other, more specific, interlocutory appeal statutes.

Review of the Guide confirms two points. First, appeals under the "substantial right" statutes represent, by far, the largest category of interlocutory appeals in civil cases in the North Carolina state courts. Second, case law as to what rulings are appealable under the "substantial right" statutes is, at a minimum, complex and nuanced.

"Substantial right" interlocutory appeals in criminal and juvenile cases. The focus of this presentation is on civil cases, but some reference should be made to the rules that govern the appealability of interlocutory orders in criminal and juvenile cases.

"Substantial right" interlocutory appeals are probably not available in criminal cases, notwithstanding the breadth of the "any action or proceeding" language of section 1-277(a). *State v. Henry*, 318 N.C. 408, 409, 348 S.E.2d 593 (1986) (*per curiam*) sounds definitive:

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[14] See The [1868] Code of Civil Procedure of North Carolina (https://books.google.com/books?id=7K8wAQAAMAAJ&pg=PA211&dq=north+carolina+code+of+1868&hl=en&sa=X&ei=Bp-mVNiiEsOlNs6fgvAN&ved=0CDMQ6AEwBA#v=onepage&q&f=false), § 299. Immediately prior to 1868, North Carolina permitted appeal of interlocutory orders only with permission of the trial judge, and interlocutory appeals did not divest the trial court of jurisdiction to "make all necessary orders for preparing the cause for trial as fully as if the said appeal had not been taken." See 1854 Revised Code of North Carolina (http://www.archive.org/details/revisedcodeofnor1854nort), Chap. 4, §§ 22-24.

[15] 1868 Code of Civil Procedure, *supra*, at p. xvi.

[16] Robert MacCrate et al, *Appellate Justice in New York* (American Judicature Society, 1982) at 87 ("Efforts to tighten provisions of the CPLR permitting appeals to the Appellate Division from intermediate orders were made in 1958 and 1961, but failed because of widespread opposition among members of the bar. Opinion is still divided today.")

"There is no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case . . . ." While this language sounds conclusive, it may not be: it appears in a *per curiam* opinion, lacks supporting reasoning and has not been reconciled with the "any" language of section 1-277(a).

> **Comment**. As with N.C. Gen. Stat. § 50-19.1, the statutes governing appeal in criminal cases (principally N.C. Gen. Stat. §§ 15A-1444 and 1445) afford an example of a situation in which the Legislature has prescribed interlocutory appeal rules with specificity.

Juvenile Subchapter I "Abuse, Neglect and Dependency" cases, sometimes referred to as "Rule 3.1" or "TPR" cases,[17] apparently *can* be the subject of a "substantial right" interlocutory appeal.

> An interlocutory appeal may be taken when a judicial order "affects a substantial right claimed in any action or proceeding." N.C.G.S. § 1–277(a) (2005). This Court has stated that the substantial right test is rooted in the particular facts of a case and the procedural context in which the trial court's order was made. Respondent-father offers no argument that the 25 May 2005 order has affected a substantial right, and we decline to construct one for him.

In re A.R.G., 361 N.C. 392, 396-97, 646 S.E.2d 349, 352 (2007) (juvenile "3.1" case). *Also see In re S.D.W.*, __ N.C. App. __, 745 S.E.2d 38, 41-42 (2013) (order depriving biological father of child of right to participate in adoption proceeding affects a substantial right and is appealable), *reversed as to substantive issue but not as to jurisdiction*, __ N.C. __, 758 S.E.2d 374 (2014). However G.S 7B-1001, dealing with appeals in Subchapter I cases, provides "Only the following juvenile matters may be appealed" and there is no mention of any "substantial right" interlocutory appeals. The "only" language of section 7B-1001 seems pretty explicit in negating a role for "substantial right" interlocutory appeals, but the courts have held otherwise.

No cases involving "substantial right" interlocutory appeals in juvenile Subchapter II (Delinquency) cases have been noted.

[17] "Rule 3.1" refers to Rule 3.1 of the Rules of Appellate Procedure, which typically concern proceedings for the termination of parental rights (hence, "TPR"). Such cases are a prominent component of the Court of Appeals docket. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) ("We hold that, just as a State may not block an indigent petty offender's access to an appeal afforded others, so Mississippi may not deny M. L. B., because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent.")

D. Other Statutory Rights of Interlocutory Appeal in Civil Cases.

North Carolina has statutes that specifically permit appeal of rulings as to personal jurisdiction (G.S. 1-277(b)) and from orders denying arbitration (G.S. 1-569.28(a)). These statutes are included in the Appendix. The subjects of these statutes are often addressed by reference to "substantial right" rather than, or in conjunction with, references to these more specific statutes.[18]

E. Certiorari.

Under N.C. Gen. Stat, § 1-269, "[w]rits of certiorari, recordari, and supersedeas are authorized as heretofore in use." Per Rule 21(a)(1) of the Rules of Appellate Procedure:

> The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, *or when no right of appeal from an interlocutory order exists*, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

(Emphasis added.) However the appellate courts have made inconsistent use of certiorari as a means of reviewing interlocutory orders. Sometimes certiorari is employed in the manner suggested by the italicized language of Appellate Rule 21(a), above. *E.g., NRC Golf Course, LLC v. JMR Golf, LLC*, __ N.C. App. __, 731 S.E.2d 474, 477-78 (2012) ("because the case *sub judice* is one of those exceptional cases where judicial economy will be served by reviewing the interlocutory order, we will treat the appeal as a petition for a writ of certiorari and consider the order on its merits."). *Also see Smith v. Smith*, 179 N.C. App. 652, 634 S.E.2d 641(2006) (unpublished) ("Because there is conflicting authority as to whether the denial of a motion to intervene affects a substantial right, we choose to exercise our discretion to grant the grandfather's petition for writ of certiorari and reach the merits of this appeal."-- footnote omitted). However sometimes certiorari is denied because of "the

[18] The use of "substantial right" language in connection with such cases makes it difficult to identify appeals that are truly based on the "substantial right" statutes. As to personal jurisdiction, a Westlaw search indicates that during the twelve months ended June 30, 2014, there were 11 Court of Appeals cases that mentioned section 1-277(b), but were 45 cases that mentioned "personal jurisdiction," 18 cases that mentioned "personal jurisdiction" and " interlocutory," and 14 cases that mentioned all of "personal jurisdiction" and "interlocutory" and "substantial right." Four cases from this period mention "personal jurisdiction" and "interlocutory" and "substantial right," but do not mention section 1-277 or either of its subdivisions.

As to arbitration, there were *no* Court of Appeals cases during this period that mentioned section 1-569.28. However there were 37 cases that mentioned "arbitration," 10 cases that mentioned both "arbitration" (or its cognates) and "interlocutory," and 8 cases that mentioned all of "arbitration" (or its cognates) and "interlocutory" and "substantial right."

general policy principles counseling against entertaining interlocutory appeals." *Hamilton v. Mortgage Information Services, Inc.*, 212 N.C. App. 73, 86, 711 S.E.2d 185, 194 (2011).

F. Effect of Interlocutory Appeal on Trial Court Jurisdiction.

The rule in North Carolina is that a proper interlocutory appeal generally brings trial court proceedings to a halt.[19] N.C. Gen. Stat. § 1-294 provides that an appeal "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*." (Emphasis added.) However notwithstanding the italicized language, the general rule is divestiture of trial court jurisdiction: "Generally, N.C.G.S. § 1–294 operates to stay further proceedings in the trial court upon perfection of an appeal." *In re M.I.W.*, 365 N.C. 374, 377, 722 S.E.2d 469, 472 (2012).[20] There are a number of cases that contain blanket language that suggest all-encompassing loss of trial court jurisdiction, except for matters incident to the appeal. *E.g.*, *Espinosa v. Tradesource, Inc.*, __ N.C. App. __, 752 S.E.2d 153, 171 (2013), *review denied*, 763 S.E.2d 391 (N.C. 2014) ("It is well established that, as a general rule, 'an appeal takes *a case* out of the jurisdiction of the trial court' and, thereafter, the court is *functus officio*." (*quoting Sink v. Easter*, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975)) (emphasis added).

The "*functus officio*" doctrine is said to derive from a purported "basic rule" of jurisdiction. In *Wiggins v. Bunch*, 280 N.C. 106, 110, 184 S.E.2d 879, 881 (1971), the North Carolina Supreme Court quoted approvingly the following language from *Switzer v. Marzall*, 95 F. Supp. 721 (D.D.C. 1951): "The basic rule is that two courts cannot have jurisdiction of the *same case* at the same time, and that on perfecting of appeal the lower court is ousted of its jurisdiction." (Emphasis added.) *RPR & Associates, Inc. v. University of North Carolina*, 153 N.C. App. 342, 346-47, 570 S.E.2d 510, 513-14 (2002) contains the following summary:

> As a general rule, once a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio. See Bowen v. Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748, 749 (1977); *Sink v. Easter*, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975). *Functus officio*, which translates from Latin as "having performed his or her office," is defined as being "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." *Black's Law Dictionary* 682 (7th ed.1999). Thus, when a court is *functus officio*, it has completed its duties pending the decision of the appellate court. The principle of *functus officio* stems from the general rule that two courts cannot ordinarily have jurisdiction of the same case at the

[19] *See generally* Thomas L. Fowler, "Functus Officio: Authority of the Trial Court After Notice of Appeal," 81 *N.C.L. Rev.* 2331 (2003).

[20] Per *In re M.I.W.*, this rule has been substantially modified by statute for matters addressed by the Juvenile Code. See G.S. § 7B-1003 (in Appendix).

same time. *See Wiggins v. Bunch*, 280 N.C. 106, 110, 184 S.E.2d 879, 881 (1971).

RPR & Associates had an extraordinary outcome: it held that because the appealability of the order at issue was a close question, even though the order *was* appealable, the appeal did *not* divest the trial court of jurisdiction.[21]

> **Comment**: Note in *Wiggins* (and *RPR*) the phrase "the same case." This language is broader than the language in section 1-294 (the "matter embraced" within "the judgment appealed from"), and is also broader than the rule that is applied in federal court ("aspects of the case involved in the appeal").[22]

As is implied by the phrase "as a general rule," there are some exceptions to the *functus officio* doctrine.

> [T]he lower court nonetheless retains jurisdiction to take action which aids the appeal, and to hear motions and grant orders, so long as they do not concern the subject matter of the suit and are not affected by the judgment appealed from.

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[21] The Court of Appeals ruled as follows:

> Although this Court eventually held that defendant's appeal affected a substantial right, and was thus immediately appealable, such a holding was not a foregone conclusion. . . . As noted *supra*, the trial court had the authority to determine whether or not its order was immediately appealable. . . . . The reasonableness of the trial court's decision to proceed with trial is underscored by the fact that both this Court and the Supreme Court repeatedly rejected defendant's attempts to stay the lower court proceedings or otherwise remove jurisdiction from the trial court. Defendant does not contend that the proceeding before the trial court was otherwise flawed or resulted in prejudice to defendant.
>
> Because the trial court had the authority to determine whether its order affected defendant's substantial rights or was otherwise immediately appealable, the trial court did not err in continuing to exercise jurisdiction over this case after defendant filed its notice of appeal. The trial court's determination that the order was nonappealable was reasonable in light of established precedent and the repeated denials by the appellate courts of this State to stay proceedings. . . .

153 N.C. App. at 348-49, 570 S.E.2d at 514-15.

[22] *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance-- it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.")

> Likewise, a trial court may ordinarily suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise it considers proper for the security of the rights of the adverse party while an appeal is pending.

Songwooyarn Trading Co. v. Sox Eleven, Inc., 219 N.C. App. 213, 216-17, 723 S.E.2d 569, 571-72 (2012) (citations omitted). *Cox v. Dine-A-Mate, Inc.*, 131 N.C. App. 542, 544-45, 508 S.E.2d 6, 7-8 (1998), contains the discussion of trial court actions which are permitted because "not affected by the judgment appealed from":

> In this case, the trial court did not impermissibly proceed on a matter included within the action pending before this Court on appeal. The matters pending before this Court were: (1) the enforceability of the forum selection clause contained within the written employment agreement; (2) the enforceability of the covenant not to compete contained within the written employment agreement; and (3) the existence of trade secrets. It follows that the trial court did not lack subject matter jurisdiction to enjoin Defendants from proceeding with the separate New York Action, as the propriety of the New York Action was not a question involved in the then-pending appeal of the North Carolina Action.

However these rules do not address numerous issues that might arise in connection with interlocutory appeals. For instance:

- May discovery continue before the trial court notwithstanding an appeal of an order that rules on a motion challenging venue?

- Similarly, may discovery continue notwithstanding an appeal of a denial of a motion for class certification? The denial of a motion to dismiss based on *res judicata* or on the purported exclusivity of a workers compensation remedy?

- Does an appeal from a denial of a motion to dismiss one defendant (e.g., for lack of personal jurisdiction or based on an immunity defense) require that pretrial proceedings come to a halt against the other defendants?

It has become clear that certain trial court actions following notice of appeal are *not* permitted. One issue that has arisen with some frequency is the authority of a trial court to enter an order as to attorney fees or costs during the pendency of an appeal. See discussion of *Duncan v. Duncan* in section I.A, above. It appears to be clear that that a proper notice of appeal cuts off jurisdiction over fee awards.

> In *McClure*, this Court held that a trial court lacked subject matter jurisdiction under N.C. Gen. Stat. § 1–294 . . . to enter an order awarding attorneys' fees and costs after notice of appeal had been filed as to the underlying judgment." *In re Johnson*, 212 N.C. App. 535, 544, 714 S.E.2d 169, 175 (2011) (citing *McClure*, 185 N.C. App. at 471, 648 S.E.2d at 552). Further, "if an award of attorneys' fees is the result of a party's prevailing as

> to the underlying judgment, then the issue of attorneys' fees cannot be deemed a 'matter included in the action and not affected by the judgment appealed from,' . . . and, therefore, the trial court lacks jurisdiction to enter an order awarding attorneys' fees following appeal of the judgment." *Johnson*, 212 N.C. App. at 544, 714 S.E.2d at 175) (quoting N.C. Gen. Stat. § 1–294).

Jackson v. Tim Maguire, Inc., 2013 WL 1616031, *7-8 (N.C. App. April 16, 2013) (unpublished) (citations added). The issue may arise with greater frequency in the future, given the Supreme Court's recent ruling in *Duncan v. Duncan*, *supra*, holding that unresolved fee issues do not keep a ruling from being a "final judgment."

> **Comment**: Lots of cases include a demand by one side that the other side pay its attorney fees. The issue may arise under contract provisions or under the applicable law (*e.g.*, N.C. Gen. Stat. § 75-16.1). Fee awards generally involve some consideration of attorney time records. Many courts have noted that the fee assessment process is itself a form of "satellite litigation."[23] The amounts involved may be quite large.[24] It may be easier for a judge to consider a fee application shortly after deciding the merits of a case, rather than a year or more later, after an appeal of the merits issue has been concluded. Indeed, during the time an appeal is considered, the judge who issued the merits ruling may have rotated elsewhere or left the bench.
>
> As commented in section I.A, above, trial courts seemingly can avoid the problem by deferring entry of judgment, but it might make sense to adopt some sort of process that would provide a clear path for a prevailing party to present a request for costs and attorney fees notwithstanding the pendency of an appeal, such as is provided in Federal Rules of Civil Procedure 54(d) and 58(e) (in Appendix).

Another issue that arises is whether a Rule 59 or Rule 60 motion may be addressed by the trial court following a notice of appeal. In *Wiggins v. Bunch*, *supra*, the North Carolina Supreme Court held:

> The general rule . . . is not changed by Rules 59 and 60 of the New Rules of Civil Procedure. Here, when the appeal was taken the trial court was divested of jurisdiction except to aid in certifying a correct record.

280 N.C. at 111, 184 S.E.2d at 882. *Also see, e.g., FSI, Inc. v. Newson*, 2013 WL 5947132, *7 (N.C. App. Nov. 5, 2013) (unpublished), *citing Lovallo v. Sabato*, 216 N.C. App. 281, 715 S.E.2d 909 (2011); *Curry v. First Fed. Sav. & Loan Ass'n of Charlotte*, 125 N.C. App. 108, 109-10, 479 S.E.2d 286, 287 (1997). It is, however, possible to pursue a *conditional* Rule 60(b) motion before the trial court in order to obtain a statement of how the trial court

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[23] *E.g., In re Trans Union Privacy Litigation*, 664 F.3d 1081, 1083 (7th Cir. 2011).

[24] *E.g., Out of the Box Developers, LLC v. Doan Law, LLP*, 2014 WL 4298329, *13 (N.C. Business Court, Aug. 29, 2014) (fee award of $467,827.63).

would be inclined to rule if it had jurisdiction. See *Bell v. Martin*, 43 N.C. App. 134, 143, 258 S.E.2d 403, 409 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980), and cases citing *Bell*, including, most recently, *FSI, Inc. v. Newson*, *supra*. A similar procedure is provided under Rule 62.1 of the Federal Rules of Civil Procedure (included in Appendix).

One principle that is well established is that an *improper* notice of appeal-- that is, a purported appeal from an unappealable interlocutory order-- does not divest the trial court of jurisdiction.

> [A] litigant cannot deprive the Superior Court of jurisdiction to try and determine a case on its merits by taking an appeal to the Supreme Court from a nonappealable interlocutory order of the Superior Court. A contrary decision would necessarily require an acceptance of the paradoxical paralogism that a party to an action can paralyze the administration of justice in the Superior Court by the simple expedient of doing what the law does not allow him to do, i.e., taking an appeal from an order which is not appealable.

Veazey, *supra*, 231 N.C. at 364, 57 S.E.2d at 382-83. *Also see RPR & Associates, Inc. v. University of North Carolina*, *supra*.

II. NUMBERS

A. The Court of Appeals Docket.

Dispositions. The focus of the numbers part of this presentation is cases in the North Carolina Court of Appeals. According to the Statistical and Operational Report-- Appellate Courts published by the AOC,[25] the Court of Appeals has been handling over 90% of the North Carolina appellate caseload.

Cases Disposed (All)

	N.C. App.	S. Ct.	N.C. App. %
2009-10[26]	1,588	105	94%
2010-11	1,781	105	94%
2011-12	1,801	84	95%
2012-13	1,582	143	92%
2013-14	1,484	N/A	

[25] http://www.nccourts.org/Citizens/SRPlanning/Statistics/Operational.asp.

[26] July 1, 2011 through June 30, 2012, etc.

Appeals (filings) in civil cases. The Statistical and Operational Reports also provide information about "civil"[27] appellate filings.

"Civil" Appeals Filed

	N.C. App.	S. Ct.	N.C. App. %
2009-10	961	59	94%
2010-11	942	50	95%
2011-12	912	57	94%
2012-13	850	58	94%
2013-14	814	N/A	

New legislation[28] and a possible new philosophy at the Supreme Court may result in this mix changing in future years, with a higher proportion of civil appeals being handled by the Supreme Court.

Type of disposition. The Statistical and Operational Reports also provide information about how frequently the Court of Appeals disposes of cases other than by written opinion. The numbers have been remarkably consistent: each year 12%-13% of the Court of Appeals dispositions are "other" than "by written opinion."

Court of Appeals-- Type of Disposition

	By Written Opinion	"Other"	% "Other"
2009-10	1,389	199	13%
2010-11	1,559	220	12%
2011-12	1,571	230	13%
2012-13	1,369	213	13%
2013-14	1,303	181	12%

[27] The meaning of "civil" as applied to cases in the Appellate Division varies. The Statistical and Operating Summary classifies "juvenile" cases as a sub-category of "civil" cases. However the Court of Appeals in its lists of opinions (discussed below) classifies cases in four categories (civil, criminal, "juvenile-3.1" and "juvenile-criminal"). As discussed above, "Juvenile-3.1" refers to Rule 3.1 of the Rules of Appellate Procedure, which typically concern proceedings for the termination of parental rights. The following chart classifies cases the way the Statistical and Operating Summary classifies them: "juvenile-3.1" (but not "juvenile-criminal") is treated as a component of "civil."

[28] S.L. 2014-102, amending N.C. Gen. Stat. § 7A-27.

2013-14 opinions by case type. For 2013-14, we reviewed additional data sources. One was the lists of opinions issued by the Court of Appeals, both published and unpublished, which are issued with the opinions. These lists have a breakdown by case category that gives greater detail about Court of Appeals decisions than is provided by the Statistical and Operating Reports.

Classification of Opinions Issued by Court of Appeals
July 1, 2013-June 30, 2014 per Opinion Lists

Civil[29]	524
Juvenile 3.1	148
Criminal	602
Juvenile-Criminal	21
Total	1,295

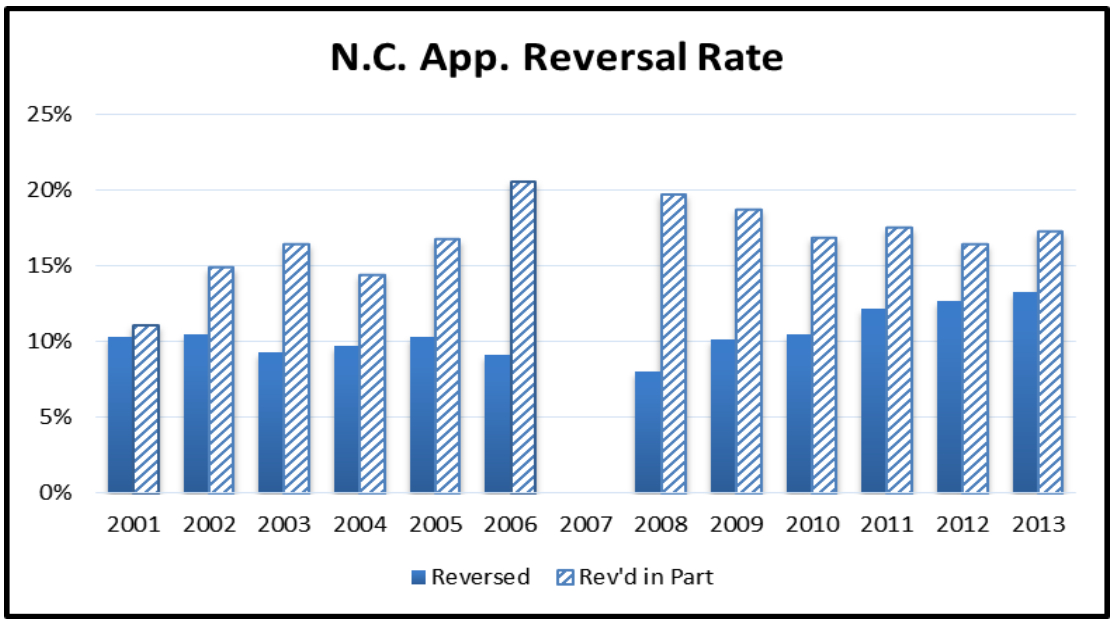
Two notes to these numbers: First, these are only Court of Appeals cases that were decided by written opinion, either "published" or "unpublished." These do not include cases from the "other" group. Second, the total shown here differs slightly from the total number of dispositions by written opinion shown in one of the preceding charts, where the number of dispositions was drawn from the Statistical and Operating Report for 2013-14.

B. Reversal Rates.

Reversal rates, expressed as percentages, will differ depending on the denominator used, that is, on how one answers the question "percentage of what." In the April 2014 article in *Trial Briefs*,[30] reversal rates for the North Carolina Court of Appeals were calculated by dividing the number of cases "reversed" as shown in the Statistical and Operational Reports by the total number of dispositions. The use of the total number of dispositions, rather than the number of cases "disposed by written opinion," has the effect of reducing reversal rates. The following graph, drawn from the *Trial Briefs* article, shows reversal rates that were calculated in this manner.

[29] "Civil" as used here means something different than "civil" as used in the preceding table. See note 27, above.

[30] J. Hartzell, "Probability of Success on Appeal: Reversal Rates for the Fourth Circuit and the North Carolina Court of Appeals," *Trial Briefs*, April 2014, pp. 31-34.



(The years refer to the twelve month period ending on June 30 of the indicated year. Data for 2007 was not available.)

A problem with this method of calculation is that many of the cases disposed of other than by written opinion were not disposed of by any judicial decision, but rather were cases in which the appeal was withdrawn. It appears that for the twelve months ended June 30, 2014, 62% of the 181 cases not disposed of by written opinion were "withdrawn," with the balance of such cases having been "dismissed" by court action.

A reversal rate in which the denominator of the percentage calculated was the total number of cases "disposed by written opinion" follows:

N.C. App. Reversal Rate

	Reversed ("R")	Reversed in Part ("RIP")	Total (R + RIP)
2008-09	11.6%	21.5%	33.1%
2009-10	12.0%	19.3%	31.3%
2010-11	13.9%	20.0%	33.9%
2011-12	14.5%	18.8%	33.3%
2012-13	15.3%	19.9%	35.2%
2013-14	15.0%	21.1%	36.1%

These reversal rates are somewhat higher than the rates shown in the preceding graph.

Comparison between federal reversal rates and North Carolina reversal rates is beyond the scope of this presentation, but is discussed at length in the 2014 *Trial Briefs*

article. Federal appellate case statistics do not provide any "reversed in part" category, and the "reversed" percentages tend to be lower than current North Carolina Court of Appeals reversal rates. [31]

C. "Substantial Right" Docket.

The following discussion draws on yet a third data source, Westlaw. According to Westlaw, there were 1,310 opinions issued by the Court of Appeals during 2013-2014.[32]

How often are "substantial right" and "interlocutory" mentioned? Of these 1,310 cases decided by written opinion, 92 used both the word "interlocutory" and the phrase "substantial right" somewhere in the case; 91 used "interlocutory" and "substantial right" within 100 words of each other, and 89 used "interlocutory" and "substantial right" within 50 words of each other. Thus, it might seem that during the twelve months ended June 30, 2014 there were approximately 90 Court of Appeals cases in which "substantial right" interlocutory appeals were mentioned. Any such conclusion must be taken with a grain of salt, however, because of the Court of Appeals tendency to refer to "substantial right" even when considering interlocutory appeals that are specifically authorized by section 1-277(b) (personal jurisdiction) or by provisions concerning appeal of certain rulings dealing with arbitration (discussed at section I.D, above). Also see section III.E, below, concerning how often appeals of interlocutory orders are dismissed.

Types of cases containing "interlocutory" and "substantial right." All but one of these 92 cases appears to be a "civil" case: one is a juvenile case; none is a criminal case; none is a "juvenile-criminal" case.

According to the lists of opinions issued by the Court of Appeals, the Court issued written opinions in 524 "civil" cases. Thus, it appears that 17% of civil cases decided by written opinion (91 out of 524) mention "substantial right" interlocutory appeals. But see the "grain of salt" comment, above, and the discussion in section III.E, below.

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[31] The all-Circuit reversal rate for the United States Courts of Appeals during the twelve months ended March 31, 2014 was 7.0 percent, but the reversal rate in civil cases was between twelve and thirteen percent.
http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2014/tables/B05Mar14.pdf.

[32] The Westlaw search was:

PR ("Court of Appeals") & DA (AFT 6/30/2013) & DA (BEF 7/1/2014)

This search was intended to capture cases with "Court of Appeals" in the "preliminary" Westlaw field (below the citation and above the title) and the date range after 6/30/2013 and before 7/1/2014. Note that the Westlaw results show fifteen more cases than were identified on the lists of opinions issued by the Court of Appeals, and seven more cases than reflected in the Statistical and Operational Report.

III. EVIDENCE OF UNCERTAINTY OF "SUBSTANTIAL RIGHT."

In North Carolina, there are a significant number of appeals of interlocutory orders that are pursued pursuant to the "substantial right" statutes. The meaning of the statutes is often uncertain and, hence, the appealability of many interlocutory orders is uncertain. North Carolina has failed to adopt procedures to mitigate the negative effects of this uncertainty.

I offer the following arguments in support of my contention that the meaning of "substantial right" is often uncertain. I think most observers who have looked at the issue would concede that "substantial right" *sometimes* has *some* level of uncertainty. The questions are "how often?" and "how much uncertainty?"

A. The Guide.

The Guide to Appealability of Interlocutory Orders includes cases dealing with eighty types of lower court orders as "practical examples" of interlocutory appealability. Review of the Guide will cement some appreciation of the complexity of the subject. Admittedly, complexity is not the same as unpredictability. However the Guide does include the following statements in its "Statement of Purpose" preamble:

> While this Guide attempts to illustrate the appealability of many practical examples of interlocutory orders, it is often difficult to predict with certainty whether an interlocutory order is immediately appealable in a particular case. The appealability of interlocutory orders is often dictated by a fact-intensive, case-by-case analysis. . . .
>
> . . . Furthermore, the law of appealability-- especially the substantial right doctrine-- is constantly evolving.

B. Statements by Courts.

There is a large volume of North Carolina case law stating that "substantial right" must be decided on a case-by-case basis. *E.g., Gilbert v. N. Carolina State Bar*, 363 N.C. 70, 75, 678 S.E.2d 602, 605 (2009) :

> We consider whether a right is substantial on a case-by-case basis. "It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

This "facts of the particular case" language appears frequently.[33]

[33] A related point: as noted below, a common mode of judicial analysis is to state that the court "will not construct arguments or find support for" a right of appeal from an

C. The Supreme Court's 3-3 Split in *Tyndall v. Ford Motor Company*.

In *Tyndall v. Ford Motor Company*, the defendant filed a motion to dismiss based on former G.S. 1-50(a)(6), a statute of repose. The motion was denied. Defendant Ford pursued an appeal. The Court of Appeals dismissed the appeal. The Supreme Court granted review, then ruled:

> Justice BEASLEY took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the orders of the Court of Appeals. Accordingly, the orders of the Court of Appeals are left undisturbed.

749 S.E.2d 279 (N.C., Nov. 8, 2013).

So what is the current status of the appealability of the denial of a motion to dismiss based on a statute of repose? The Court of Appeals has held that such rulings are not appealable:

> In addition, we note that our Supreme Court has previously determined that a motion to dismiss "based on a statute of limitation[s] does not [a]ffect a substantial right and is therefore not appealable." *Thompson v. Norfolk S. Ry. Co.*, 140 N.C.App. 115, 121, 535 S.E.2d 397, 401 (2000) (citing *Johnson v. Insurance Co.*, 215 N.C. 120, 1 S.E.2d 381 (1939)). For this purpose, we see no reason to treat a motion for summary judgment based on the statute of repose differently than a motion to dismiss based on the statute of limitations.

Lee v. Baxter, 147 N.C. App. 517, 520, 556 S.E.2d 36, 38 (2001). However inasmuch as the Supreme Court has split 3-3 on the issue, no one knows.

> **Comment**: *Tyndall* was not a "particular facts of the case"-type situation, but rather presented a categorical issue akin to immunity: does the denial of a motion to dismiss based on a statute of repose automatically give rise to a "substantial right" interlocutory appeal because a party claiming the benefit of a statute of repose (like a party claiming entitlement to immunity) would have a right to avoid the burdens of trial. *Cf.* (dealing with immunity) *Craig ex rel. Craig v. New Hanover County Board of Education*, 363 N.C. 334, 337-38, 678 S.E.2d 351, 354 (2009), *quoting Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) that "[t]he entitlement is an *immunity from suit* rather than a

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interlocutory order, followed by a conclusion that the appellant's arguments are lacking. Since June 30, 2013 there have been 28 cases that use the phrase "construct arguments" in proximity to the word "interlocutory." A remarkable examples of this mode of analysis is *Cox v. Smith-Cox*, 2014 WL 6907495 (N.C. App. Dec. 2, 2014) (unpublished), involving an effort to appeal from an order of contempt. The Court of Appeals held that even though contempt rulings are subject to "substantial right" interlocutory appeal, because *appellant had failed to make argument to this effect* the appeal would be dismissed.

mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial." (Emphasis in original.)

This "right to avoid trial" appears also to be the basis on which the North Carolina Supreme Court found that denial of summary judgment based on *res judicata* affects a substantial right (*Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993)), though the Court of Appeals has interpreted *Bockweg* differently. See note 38, below.

In my view, *Tyndall* reflected an inability by the Supreme Court to decide a fundamental "substantial right" question. It would seem that many-- perhaps most-- errors on "substantial" matters are subject to being corrected eventually following final judgment.[34] A key task in clarifying the meaning of "substantial right" would seem to be identification of circumstances, like immunity, in which a party somehow has a right not to be put to the burden of going through trial.

D. Supreme Court Reversals of Court of Appeals.

The Supreme Court has reversed a number of Court of Appeals determinations about whether various interlocutory orders did, or did not, affect a substantial right. The Court of Appeals errors are evidence of the uncertain meaning of "substantial right" in a variety of contexts. See:

- *Gilbert v. North Carolina State Bar*, 363 N.C. 70, 77, 678 S.E.2d 602, 606 (2009) (reversing Court of Appeals determination that injunction against State Bar was not immediately appealable);

- *Burton v. Phoenix Fabricators and Erectors, Inc.*, 362 N.C. 352, 661 S.E.2d 242 (2008) (reversing Court of Appeals determination that denial of motion to dismiss based on exclusivity of workers compensation was not immediately appealable);

- *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 569 (2007) (reversing Court of Appeals determination that denial of a pastor's motion to dismiss, which raised First Amendment issues, was not immediately appealable);

- *North Carolina Dept. Of Transp. v. Stagecoach Village*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) (reversing Court of Appeals determination

[34] Exceptions would include asserted error involving disclosure of confidential information (once disclosed, confidentiality is forever lost), certain forms of injunctive relief, and contract rights such as noncompetition covenants that will disappear over time. Errors that do not appear to affect case outcome may also be effectively unreviewable following final judgment.

that joinder order in case affecting title to real estate was not immediately appealable);

- *Sharpe v. Worland,* 351 N.C. 159, 166, 522 S.E.2d 577, 581 (1999) (reversing Court of Appeals' determination that privilege ruling was not immediately appealable, holding "when, as here, a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial, the challenged order affects a substantial right under sections 1-277(a) and 7A-27(d)(1). To the extent such cases as *Kaplan v. Prolife Action League of Greensboro,* 123 N.C. App. 677, 474 S.E.2d 408 (1996), differ, they are overruled.").

Note that in each of these five cases, the Supreme Court ruled that the Court of Appeals had been too narrow in its interpretation of "substantial right."

E. Court of Appeals Dismissals of "Substantial Right" Appeals.

To determine the frequency with which cases decided by written opinion were dismissed as improper "substantial right" interlocutory appeals, a further Westlaw search was performed for cases that included the words "interlocutory" and "substantial right" and "dismissed,"[35] then a case-by-case review was done of the 72 cases that resulted from this search.

It appears that during the twelve months ended June 30, 2014, forty-three (43) appeals were dismissed by written opinion on the ground that they constituted an interlocutory appeal that was not justified under the "substantial right" statutes. A further eight appeals were dismissed in part.

How significant are these numbers? One way of looking at it is that a mere 43 cases out of 1,310 cases decided by written opinion (3.3%) were dismissed as improper "substantial right" appeals. Another way of looking at it is that 42 cases out of 524 civil cases (8.2%) were dismissed as improper "substantial right" interlocutory appeals. A third way to look at it is that these numbers suggest that about half of the "substantial right" interlocutory appeals (43 out of 90) were dismissed.

OPINIONS BY NC APP. 2013-14

Written opinions	Classified "civil"	Civil appeals with "substantial right"	"SR" appeals dismissed
1,310	524	89 (17% of civil)	41 (46% of "SR")

[35] Westlaw search:

PR ("Court of Appeals") & DA (AFT 6/30/2013) & DA (BEF 7/1/2014) & interlocutory & "substantial right" & dismissed

Yet another way of looking at the issue would be to exclude those appeals that concern subjects that are specifically authorized by N.C. Gen. Stat. § 1-277(b) (personal jurisdiction) or § 1-569.28(a) (denial of arbitration). See note 18 in the discussion at section I.D, above. This would yield a *substantially* higher figure for the dismissal percentage.

The fact that roughly half of "substantial right" appeals are dismissed (more, if the personal jurisdiction and arbitration cases are eliminated) appears to be strong confirmation that the uncertainty in this area is pervasive.

IV. PROBLEMS AND COSTS.

Of the ten civil case opinions issued by the Court of Appeals on October 21, 2014, four (40%) were solely concerned with the question of whether the appeal was proper. In all four of these civil cases, the Court of Appeals decided the appeal was not proper and dismissed the appeal.

In each appeal, the parties assembled a printed record for the Court of Appeals, submitted one or more transcripts (or excerpts) of trial court proceedings, and presented briefs to the Court on the substantive issues in the appeals. Two of the dismissed civil cases arose from lower court rulings that had been rendered a year prior to the Court of Appeals' opinions; the other two arose from lower court rulings that had been rendered eight and nine months prior to the Court of Appeals' opinions.[36] In these four cases-- 40% of the Court of Appeals' civil opinions issued on October 21-- the appeal process was not only a waste of time, it was an expensive waste of time, consuming not only the parties' resources, but also the resources of the court system.

Appeals occur because, in some sense or another, at least one party (the appellant, at least) wants an answer to a question. Many times the precise reason the party wants an answer to a question is to *avoid* wasted time and wasted energy. Consider Judge Eagle's order in *Richardson* (see Appendix), involving class certification and liability determinations, but seeking to avoid the trouble and expense of notifying the class and doing individual damages calculations pending appellate review. The establishment of legal principles governing a particular case can be strongly helpful in getting cases settled (as it was in *Richardson*), so there can be very substantial benefit to getting answers to questions other than avoiding waste. But avoiding waste-- avoiding confused legal messes created when things go forward in a certain way and then an appeals court later says "that was all wrong"-- avoiding this is a desire that trial courts and parties often (usually) share. No one wants to look like a clown.

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[36] *Campbell v. Campbell*, __ N.C. App. __, 764 S.E.2d 630 (trial court ruling rendered twelve months prior to Court of Appeals opinion); *Whitehurst Investment Properties, LLC v. Newbridge Bank*, __ N.C. App. __, 764 S.E.2d 487 (twelve months); *Boykin v. Selco Construction, Inc.*, COA 14-405 (unpublished) (nine months); *Rooks v. Blake*, COA 14-486 (unpublished) (eight months).

A. Cost Number One: Wasted Appellate Record and Briefing.

When a party appeals, the party seeks to get the appeals court to review some judicial act, such as the denial of a motion to dismiss. The parties' briefs, and the assembled record, address themselves to the merits of that issue-- that is, to the substantive issue sought to be presented on appeal.

In dismissing an appeal, the Appellate Division declines to look at the merits. Thus, the time and effort expended in record preparation and briefing are wasted.

An appeal-by-permission process (like certiorari, or like some of the federal procedures included in the Appendix) avoids the risk of wasted merits briefing. On the other hand, a sequenced appeal in which jurisdiction must first be briefed and decided, followed by briefing and decision on the merits, could prolong the overall appellate process.

B. Cost Number Two: Delay (Appellate Side).

When the Appellate Division retains jurisdiction of a case on appeal for a number of months, the time awaiting decision tends to be "dead time." Certainly it is dead time with respect to the issue that is the subject of the appeal. Often it is dead time also for the case as a whole. A front-end determination of appellate jurisdiction would reduce the delay.

C. Cost Number Two (Continued): Delay (Trial Court Side).

If an interlocutory appeal is proper, then the "general" rule is that the trial court loses jurisdiction of the case. If the appeal is improper, jurisdiction is not lost, but trial courts may be reluctant to address appealability, given the complexity and uncertainty of the "substantial right" standard, particularly when the same question is pending before an appellate court. *RPR & Associates*, discussed in section I.F above, was an unusual case.

Section 1-294 authorizes continuation of proceedings not "involved" or "affected by" the appeal, but further trial court action can be difficult to obtain, particularly given the oft-stated general rule and precedents holding that the trial court is *functus officio* with respect to *the case*.

One form of a contrary general rule is provided for in N.C. Gen. Stat. § 50-19.1. A further contrary general rule, whereby *discovery* may generally go forward, may be worth considering. If a halt to trial court proceedings is addressed through motions to stay rather than by automatic stay, this would be another aspect of ways in which the general rule could be revised.

D. Cost Number Three: Trial Court Support, Sub-Optimal Outcomes.

The North Carolina system of appellate review does not afford trial courts much opportunity to address the needfulness or helpfulness of an interlocutory appeal. Judge Eagles' Order (see Appendix) is extraordinary.

There is a value in having lower court proceedings go forward in an efficient manner, and there is value in having lower courts' input as to efficient administration. Conversely, there is a cost associated with inefficiency, and there is a cost when a key participant in the administration of a case (the trial judge) is not afforded a voice in the timing of appellate review.

Federal law allows a trial court to express its views through 28 U.S.C. § 1292(b):

> When a district judge, in making in a civil action an order not otherwise appealable under this section, *shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation*, he shall so state in writing in such order. The Court of Appeals . . . may thereupon, in its discretion, permit an appeal to be taken from such order . . . .

(Emphasis added.) A somewhat similar provision appears in the statutes governing appeal from bankruptcy courts. See 28 U.S.C. § 158(d)(2), in the Appendix.

North Carolina's appellate statutes should give efficient administration of justice a primary place in the determination of when interlocutory appellate review will be permitted. Trial judges should be given a principal role in determining whether an interlocutory appeal will promote efficient administration of justice.

E. Cost Number Four: Respect for Civil Justice System.

When appellate courts entertain full briefing in appeals, then issue rulings that dismiss the appeal, and do so many months after the trial court rulings that are the subject of the appeals, this may tend to diminish respect for the civil justice system and its participants: citizens with business in the courts expect the process to proceed with reasonable efficiency. Dismissed appeals are a waste of time and a waste of money.

When appellate courts dismissing appeals do so while employing critical language about the dilatory effects of interlocutory appeals and/or the competence of counsel, the negative effect may be magnified: if the non-availability of an appeal is obvious, the issue should be easy to resolve and the dismissal could, presumably, be able to be rendered quickly; if the non-availability of an appeal is not obvious, the appellate courts should be able to explain the problem so that future litigants can avoid repeating the error and critical judicial language would seem to be unwarranted.

And when appellate courts' explication of the law is inconsistent and unpredictable, the effect is further compounded.

V. POSSIBLE IMPROVEMENTS

The following purported "improvements" proceed from several premises. One is that an informed system of appellate review should afford some opportunity for review of

issues that can help move cases toward final resolution. Firstly, however, the appellate process should do no harm: if appeals are to be dismissed, they should be dismissed promptly.

Allowance of appeal, or not, should depend on the substance of the issue presented, not on the Rule number cited in a motion and probably not on the quality of the jurisdictional argument presented in a brief.

Informed lawyers should, by studying cases, be able to reach a reasonably accurate prediction as to appealability.

While an interlocutory appeal is considered, there is no need for a presumption or general rule that the trial court has no ongoing role in moving the case forward.

The following are among measures that might be helpful.

A. Expedited Determination of Appellate Jurisdiction.

There are multiple ways it might be possible to expedite appellate determination of jurisdiction:

- One possibility could be to allow dismissals to be considered even before the record on appeal is filed. This would have the benefit of dispensing with the cost and delay associated with preparation of transcripts and the assembly of the record on appeal, but would require rethinking how an appeal first comes to the attention of the appellate court.

- A change that seemingly could be accomplished without amendment to statutes or the Rules of Appellate Procedure would be for the appellate courts to proactively call for jurisdictional briefing whenever appeals from interlocutory orders are presented, or whenever interlocutory appeals are presented that are not authorized under clear precedent.

    - The appellate court could defer merits briefing pending determination of jurisdiction. This could, however, have the effect of slowing things down.

    - Presumably a call for briefing on the issue of appealability would eliminate frequent dismissals based on an appellant's failure to address the appealability issue.

- In any event, it would be helpful for rulings on jurisdiction to provide a reasoned explanation that will be reported in Westlaw.

Enactment of appeal-by-permission statutes such as 28 U.S.C § 1292(b) and Federal Rule 23(f) could also be a method by which appeals courts make front-end decisions about appellate jurisdiction in specified areas.

B. Clear Expansion of Continuing Trial Court Jurisdiction.

When an appeal is taken from an interlocutory order, it is questionable whether automatic application of a general case-wide *functus officio* rule is necessary or helpful to the efficient administration of justice. It might make more sense to dispense with the general rule in connection with interlocutory orders and, instead, to allow trial court proceedings to go forward to the greatest extent possible. In light of the case law decided while N.C. Gen. Stat. § 1-294 has been in effect, this would presumably require amendment to section 1-294.

One issue that deserves particular attention concerns requests for costs and attorney's fees. It would make sense to adopt some sort of process that would provide a clear path for a prevailing party to present a request for costs and attorney fees notwithstanding the pendency of an appeal. More fundamentally, however, courts should focus on the practical question of how a case can be moved forward most efficiently while preserving parties' rights.

C. Adoption of Efficient Administration as Basis for Interlocutory Appeal.

The principal federal appeal-by-permission routes (28 U.S.C. §§ 158(d)(2)(A) and 1292(b), Rule 23(f)) appear to be intended to foster efficient administration of justice. It makes sense to have a procedure such as the process Judge Eagles created in *Richardson* that would enable appellate review so as to avoid big wastes of time. As an example, defendants should have some avenue by which they can at least seek appellate review of class certification.

D. Giving Trial Courts a Greater Voice.

Rule 54(b) allows trial courts to express a view about whether an appeal should be pursued only under limited circumstances: when an entire "claim" has been decided or a party has been completely dealt with. There may be other circumstances in which a trial court should be allowed to request guidance. 28 U.S.C. §§ 158(d)(2)(A) and 1292(b) prescribe circumstances which allow trial courts to declare whether an immediate appeal would help matters

E. Principled Interpretation of "Substantial Right."

Opinions addressing "substantial right" interlocutory appeals often fail to provide quality guidance. Part of the reason is that cases deciding "substantial right" appealability often follow an "appellant has failed to carry her burden" format, in which the court begins by stating general judicial disapproval of interlocutory appeals, possibly by quoting *Veazey*'s "there is no more effective way to procrastinate" language. There then follows a statement that it is appellant's burden to offer argument demonstrating the existence of "substantial right" grounds. This statement of burden is often coupled with an admonition that the court "will not construct arguments" for appellant. When dismissing an appeal, the court then typically concludes that the appellant has failed to carry her burden of demonstrating appealability. Such rulings provide no guidance.

Sometimes opinions that attempt to explain "substantial right" doctrine do so in a way that appears to compound confusion. Examples include opinions concerning the appealability of rulings dealing with immunity[37] and *res judicata*.[38]

Lawyers and judges could benefit from clearer rules, even at the price of diminished flexibility. After all, discretionary review of interlocutory orders is supposedly available through certiorari.

[37] *Compare Craig ex rel. Craig v. New Hanover County Board of Education, supra* (363 N.C. at 337-38, 678 S.E.2d at 354) ("[t]he entitlement is an *immunity from suit* rather than a mere defense to liability; and . . . it is effectively lost if a case is erroneously permitted to go to trial.") (emphasis in original) *with, e.g., Atlantic Coast Conference v. Univ. of Maryland*, __ N.C. App. __, 751 S.E.2d 612, 617 (2013) ("because our case law remains ambiguous as to the type of jurisdictional challenge presented by a sovereign immunity defense, the ability of a litigant raising the defense to immediately appeal may vary, to some extent, based on the manner in which the motion is styled.")

[38] *Compare Bockweg v. Anderson, supra* (333 N.C. at 491, 428 S.E.2d at 161) ("*res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff . . . . Denial of the motion could lead to a second trial in frustration of the underlying principles of the doctrine of *res judicata*. Therefore, we hold that the denial of a motion for summary judgment based on the defense of *res judicata* may affect a substantial right, making the order immediately appealable.") *with, e.g., Country Club of Johnston County, Inc. v. U.S. Fidelity & Guaranty. Co.*, 135 N.C. App. 159, 164, 519 S.E.2d 540, 544 (1999) (appealability of *res judicata* ruling depends on showing "not only that one claim has been finally determined and others remain which have not yet been determined, but that (1) the same factual issues would be present in both trials *and* (2) the possibility of inconsistent verdicts on those issues exists") (emphasis by court).

APPENDIX

INTERLOCUTORY APPEAL STRUCTURES

Statute		Trial Court Certification?	Appeals Court Permission?
North Carolina General Statutes			
"Substantial right"			
§ 1-277(a)	"substantial right"	N	N
§ 7A-27(b)	"substantial right"	N	N
Other NC Civil			
§ 1-277(b)	personal jurisdiction	N	N
§ 1-569.28(a)	arbitration	N	N
certiorari		N	Y
Partial Final			
§ 1A-1, Rule 54(b)	partial final judgments	Y	N
§ 50-19.1	domestic cases	N	N
Juvenile and Criminal			
§ 7B-1001	juvenile code subchapter I	N	N
§ 7B-2602	juvenile code subchapter II	N	N
§ 15A-979	motion to suppress (by prosecution)	N	N
§ 15A-1444	criminal (by defendant)	N	N
§ 15A-1445	criminal (by prosecution)	N	N
Federal			
28 U.S.C. § 158(d)	bankruptcy	Y	Y
28 U.S.C. § 1292(a)	injunctions	N	N
28 U.S.C. § 1292(b)	certified issues	Y	Y
28 U.S.C. § 1453(c)	remand	N	Y
Rule 23(f)	class actions	N	Y
certiorari		N	Y
"collateral order"	immunity (e.g.)	N	N

CONSTITUTION OF NORTH CAROLINA

ARTICLE IV

Sec. 12. Jurisdiction of the General Court of Justice.

(1) Supreme Court. The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts. The Supreme Court also has jurisdiction to review, when authorized by law, direct appeals from a final order or decision of the North Carolina Utilities Commission.

(2) Court of Appeals. The Court of Appeals shall have such appellate jurisdiction as the General Assembly may prescribe. . . .

* * * * *

NORTH CAROLINA GENERAL STATUTES

* * * * *

§ 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.

§ 1-278. Interlocutory orders reviewed on appeal from judgment.

Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.

* * * * *

§ 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.

* * * * *

§ 1-569.28. Appeals.

(a) An appeal may be taken from:
  (1) An order denying a motion to compel arbitration;
  (2) An order granting a motion to stay arbitration; . . .

* * * * *

§ 1A-1, 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. . . .

* * * * *

§ 7A-27. Appeals of right from the courts of the trial divisions.

(Effective: October 1, 2014)

. . . (b) Appeal lies of right directly to the Court of Appeals in any of the following cases:

(1) From any final judgment of a superior court, other than the one described in subsection (a) of this section, or one based on a plea of guilty or nolo contendere, including any final judgment entered upon review of a decision of an administrative agency, except for a final judgment entered upon review of a court martial under G.S. 127A-62.
(2) From any final judgment of a district court in a civil action.
(3) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which that does any of the following:
  a. Affects a substantial right.
  b. In effect determines the action and prevents a judgment from which an appeal might be taken.
  c. Discontinues the action.
  d. Grants or refuses a new trial.
  e. Determines a claim prosecuted under G.S. 50-19.1.

(4) From any other order or judgment of the superior court from which an appeal is authorized by statute. . . .

* * * * *

§ 50-19.1. Maintenance of certain appeals allowed.

Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action. A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in this section. An appeal from an order or judgment under this section shall not deprive the trial court of jurisdiction over any other claims pending in the same action.

* * * * *

FEDERAL STATUTES, RULES

* * * * *

28 U.S.C. §158. Appeals

. . . (d)(2)(A) The appropriate court of appeals shall have jurisdiction of appeals described in the first sentence of subsection (a) if the bankruptcy court, the district court, or the bankruptcy appellate panel involved, acting on its own motion or on the request of a party to the judgment, order, or decree described in such first sentence, or all the appellants and appellees (if any) acting jointly, certify that—

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;

(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or

(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken;

and if the court of appeals authorizes the direct appeal of the judgment, order, or decree.

(B) If the bankruptcy court, the district court, or the bankruptcy appellate panel—

(i) on its own motion or on the request of a party, determines that a circumstance specified in clause (i), (ii), or (iii) of subparagraph (A) exists; or

(ii) receives a request made by a majority of the appellants and a majority of appellees (if any) to make the certification described in subparagraph (A);

then the bankruptcy court, the district court, or the bankruptcy appellate panel shall make the certification described in subparagraph (A). . . .

* * * * *

28 U.S.C. §1292. Interlocutory decisions

. . . (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. . . .

* * * * *

28 U.S.C. §1453. Removal of class actions

. . . (c) REVIEW OF REMAND ORDERS.—

(1) IN GENERAL.—Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not more than 10 days after entry of the order. . . .

* * * * *

FEDERAL RULES OF CIVIL PROCEDURE

* * * * *

Rule 23 (f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

* * * * *

Rule 54. Judgment; Costs. . . .

(d) Costs; Attorney's Fees.

(1) Costs Other Than Attorney's Fees. Unless a federal statute, these rules, or a court order provides otherwise, costs--other than attorney's fees--should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) Attorney's Fees.

(A) Claim to Be by Motion. A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment; . . .

* * * * *

Rule 58. Entering Judgment. . . .

(e) Cost or Fee Awards. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

* * * * *

Rule 62.1. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;
(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue. . . .

* * * * *

FEDERAL RULES OF APPELLATE PROCEDURE

* * * * *

Rule 4. Appeal as of Right--When Taken . . .

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion: . . .

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58; . . .

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

* * * * *

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
02 CvS 02398

JUANITA RICHARDSON, and
ROBERT and GLORIA GOWER,
Plaintiffs

v.

BANK of AMERICA, N.A. and
NATIONSCREDIT FINANCIAL
SERVICES CORPORATION,
Defendants.

ORDER CERTIFYING
CASE FOR IMMEDIATE
APPEAL

This matter is before the Court generally pursuant to an Order of the Chief Justice designating this case as "exceptional" pursuant to Rule 2.1 of the General Rules of Practice and assigning the case to the undersigned judge. Since this case was assigned to the Court in 2002, the Court has entered numerous orders encompassing dozens of decisions, covering everything from discovery, to class certification and management, to the statute of limitations, to summary judgment, to damages. To date, the Court has allowed partial summary judgment for the defendants on certain statute of limitations grounds, partially allowed plaintiffs' motion for summary judgment and partially allowed defendants' motion for summary judgment on liability issues; dismissed Bank of America from the case; denied cross-motions for summary judgment as to punitive damages against defendant NationsCredit; and established a process whereby those class members who have prevailed on liability can seek compensatory damages. The Court has ruled on other pending issues concerning the trebling of compensatory damages and pre and post judgment interest. The Court has thus dismissed numerous

parties and numerous claims. See, e.g., Department of Transportation v. Olinger, __ NCApp ___ (August 16, 2005); Garris v. Garris, 92 N.C. App. 467, 470 (1988).

The case now is in a posture to move into the individual damages-determination phase and for a jury trial on punitive damages. These two proceedings will take significant time and resources of the Court and the parties. At this stage, nothing is likely to happen to clarify the record or to make disputed issues moot. This Court deems all of its decisions to date to be final and not subject to revision.

If an appeal were to happen in the usual course, that is, after a trial on punitive damages, after additional notices to the class are drafted and mailed, and after hundreds of individual damages calculations are undertaken, it could result in significant wasted time and resources and in confusion to class members. For example, if it is ultimately determined that the Court should have dismissed the good faith and fair dealing claim or the punitive damages claim, then the upcoming jury trial will have been for no purpose and a waste of time. On the other hand, if it is ultimately determined that the Court should not have dismissed as much of the case as it did, or it the Court's legal decision about the calculation of compensatory damages was mistaken, then another trial would be needed and some or all of the damages determinations would have to be done over again.

On the other hand, an appeal now would allow the appellate courts to review all of the Court's decisions to date which a party chooses to challenge and when the case comes back, the Court and the parties could proceed to the next stage, if any, with confidence. Even if this Court's rulings are upheld in their entirety, an appeal at this time (rather than later) will almost certainly result in a quicker final resolution of all the claims.

In summary, now seems to be a good time for all of the Court's decisions and determinations to be brought before the appellate courts for review. There is

no just reason to delay appeal of the Court's orders up to this point, and immediate appeal and/or review will promote judicial economy.

The Court will retain jurisdiction to approve and require a notice to all class members about the current status of this litigation, and to deal with a pending motion concerning payment of a court reporter that is unrelated to any other part of this case.

Now therefore, it is hereby ORDERED that:

1. All of the decisions of this Court up to and including today's date are now suitable for immediate interlocutory appeal or a petition for discretionary review.
2. Other than to require and approve a Class Notice as required by separate Order of the Court and to deal with a pending motion concerning payment of a court reporter, further action in this case is deferred until such time as either the time for appeal from this order and today's other orders has expired or the North Carolina appellate courts have ruled on or dismissed the certified interlocutory appeal. Counsel shall keep the Court informed of all developments in any appellate proceedings.
3. The Court has arranged for an unfiled copy of this Order to be faxed to counsel on the date of signature. The Clerk shall mail a filed copy of this Order to all counsel of record.

This 10 day of October, 2005.

Catherine C. Eagles
Superior Court Judge Presiding