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## GUIDE TO APPEALABILITY OF INTERLOCUTORY ORDERS

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the North Carolina Bar Association  
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## **STATEMENT OF PURPOSE**

The Appellate Rules Committee of the North Carolina Bar Association prepared the *Guide to Appealability of Interlocutory Orders* to assist North Carolina lawyers appearing in North Carolina's state appellate courts.

This Guide was prepared as a condensed primer on appeals from interlocutory orders in North Carolina. It is not meant to be a scholarly effort. It is not meant to address every issue pertaining to appeals of interlocutory orders. It is not meant to address the appealability of every type of interlocutory order. 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. Thus, different facts may warrant different results from those set forth herein.

Reviewing this Guide is not a substitute for reviewing statutory provisions governing appeals from interlocutory orders, the North Carolina Rules of Appellate Procedure, or decisions of the Supreme Court of North Carolina or the North Carolina Court of Appeals. To the extent that the Guide appears to interpret a statutory provision, rule, or appellate decision, any interpretation has no precedential value. Furthermore, the law of appealability—especially the substantial-right doctrine—is constantly evolving. The Committee urges attorneys who consult this Guide to perform their own independent research rather than relying on this brief Guide as a definitive statement of the law.

The Committee appreciates the advice and comments of those who use the Guide. Please send suggestions via email to [govaffairs@ncbar.org](mailto:govaffairs@ncbar.org), or by conventional mail to the Appellate Rules Committee, North Carolina Bar Association, P.O. Box 3688, Cary, NC 27519.

## TABLE OF CONTENTS

STATEMENT OF PURPOSE .....	I
<b>I. INTRODUCTION.....</b>	<b>1</b>
<b>A. What Is an Interlocutory Order? .....</b>	<b>1</b>
<b>B. Terminology .....</b>	<b>2</b>
<b>C. Types of Immediately Appealable Interlocutory Orders.....</b>	<b>2</b>
1. Appeals of interlocutory orders “affecting a substantial right” .....	3
2. Appeals of interlocutory orders pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure .....	4
3. Other statutory grounds for immediately appealing interlocutory orders .....	5
<b>II. GENERAL PRINCIPLES.....</b>	<b>5</b>
<b>A. Burden Is on the Appellant .....</b>	<b>5</b>
<b>B. Denials of Dispositive Motions Generally .....</b>	<b>6</b>
<b>C. When to Appeal .....</b>	<b>7</b>
<b>D. How to Appeal .....</b>	<b>9</b>
<b>III. APPEALABILITY OF CERTAIN INTERLOCUTORY ORDERS       IN CIVIL CASES: PRACTICAL EXAMPLES .....</b>	<b>9</b>
<b>A. Orders Affecting Jurisdiction or Similar Defenses .....</b>	<b>10</b>
1. Subject-matter jurisdiction .....	10
2. Personal jurisdiction.....	10
3. Sufficiency of service or process .....	10
4. Improper venue .....	11
5. Improper venue based on forum-selection clause.....	11
6. Challenges to subject-matter jurisdiction under the exclusivity provision of the North Carolina Workers’ Compensation Act .....	11
7. Improper division .....	12
8. Challenges to Business Court designation orders.....	12
9. Failure to join necessary parties.....	12

<b>B.</b>	<b>Orders Implicating Traditional Affirmative Defenses .....</b>	<b>13</b>
1.	Statute of limitations .....	13
2.	Res judicata.....	13
3.	Collateral estoppel.....	14
4.	Standing .....	14
5.	Justiciability .....	14
<b>C.</b>	<b>Orders of a Purely Procedural Nature .....</b>	<b>15</b>
1.	Amendments to pleadings.....	15
2.	Amendments to compulsory counterclaims.....	15
3.	Punitive damages.....	15
4.	Finding of liability but damages not adjudicated .....	16
5.	Arbitration.....	16
6.	Denial of indemnity claim.....	16
7.	Directed verdicts following mistrial.....	17
8.	Entry of default .....	17
9.	Orders setting aside entry of default .....	17
10.	Orders setting aside default judgment .....	17
11.	Orders granting a partial new trial.....	18
12.	Orders declaring a mistrial .....	18
13.	Injunctions.....	18
<b>D.</b>	<b>Orders Concerning Counsel .....</b>	<b>19</b>
1.	Attorney disqualification .....	19
2.	Sanctions against counsel.....	19
3.	Pro hac vice motions .....	19
4.	Injunctions against the State Bar .....	20
<b>E.</b>	<b>Orders Affecting Immunities .....</b>	<b>20</b>
1.	Sovereign immunity .....	20
2.	Legislative or quasi-judicial immunity.....	21
3.	Public-duty doctrine .....	21
<b>F.</b>	<b>Discovery Orders .....</b>	<b>21</b>
1.	Motions to compel discovery .....	21
2.	Orders compelling deposition attendance .....	23
<b>G.</b>	<b>Privileges Generally.....</b>	<b>23</b>
1.	Physician-patient.....	23
2.	HIPAA .....	23

3.	Medical peer review .....	23
4.	First Amendment .....	23
5.	Judicial entanglement in religious matters.....	24
6.	Fifth Amendment privilege against self-incrimination .....	24
<b>H.</b>	<b>Family Law.....</b>	<b>24</b>
1.	N.C. Gen. Stat. § 50-19.1 .....	24
2.	Postseparation support .....	25
3.	Alienation of affection and criminal conversation .....	25
4.	Orders setting aside a separation agreement .....	25
5.	Orders determining date of separation .....	26
6.	Permanency-planning orders.....	26
7.	Temporary child-custody, visitation, and child-support orders .....	27
8.	Orders determining whether a putative parent's consent is necessary for adoption .....	27
9.	Orders effectively nullifying a mother's consent to adoption .....	27
10.	Orders setting aside a divorce judgment .....	27
<b>I.</b>	<b>Orders Deciding the Merits but Reserving the Issue of Attorney's Fees and Costs for Later Determination .....</b>	<b>28</b>
<b>J.</b>	<b>Miscellaneous Orders Concerning the Rights of Litigants .....</b>	<b>28</b>
1.	Possibility of inconsistent verdicts in multiple trials .....	28
2.	Attorney's fees sanctions.....	28
3.	Orders resulting in expensive trial proceedings .....	29
4.	Specific performance concerning real estate .....	29
5.	Appointment of receiver.....	29
6.	Intervention .....	30
7.	Motions for jury trial.....	30
8.	Motions to strike .....	30
<b>K.</b>	<b>Other Miscellaneous Orders.....</b>	<b>31</b>
1.	Certification of class actions .....	31
2.	Discontinuance of class representative in potentially meritorious suit.....	31
3.	Contempt.....	32
4.	Orders affecting title to a common area subject to condemnation .....	32

5.	Orders finding the DOT liable to pay just compensation for inverse condemnation .....	32
6.	Orders prohibiting the right to use and control assets.....	33
7.	Covenants not to compete.....	33
8.	Right to earn a living .....	33
9.	Orders remanding to a municipal body .....	34
10.	Paternity blood-grouping tests.....	34
11.	Orders denying the release of funds held in escrow.....	35
12.	Payments pendente lite .....	35
13.	Payments during pending workers' compensation litigation.....	35
14.	Attachment .....	35
15.	Stay of proceedings .....	36
16.	Orders entering summary judgment for a monetary sum against one of multiple defendants.....	36
17.	Orders requiring immediate payment of substantial amounts of money .....	36
18.	Orders denying enforcement of a franchise agreement .....	36
19.	Trade secrets.....	37
20.	Injunctive relief to prohibit contracts with third parties.....	37
21.	Restraint on local-government legislative functions.....	37
22.	Lis pendens.....	37
23.	Bonds .....	38
24.	Public access to court documents and proceedings .....	38
25.	Orders granting temporary injunctive relief restraining the enforcement of an act of the General Assembly.....	38
26.	Insurer's duty to defend .....	39
27.	Interlocutory orders of certain State agencies and officials under N.C. Gen. Stat. § 7A-29 .....	39
28.	Public-purpose issue in takings cases.....	40
29.	Involuntary-commitment orders .....	40
30.	Orders denying motions to enforce a settlement agreement .....	40

<b>IV.</b>	<b>INTERLOCUTORY APPEALS IN CRIMINAL CASES.....</b>	<b>40</b>
<b>A.</b>	<b>Generally .....</b>	<b>40</b>
<b>B.</b>	<b>“Substantial Right” Analysis in Criminal Cases.....</b>	<b>42</b>
<b>V.</b>	<b>ADDITIONAL ISSUES FOR CONSIDERATION.....</b>	<b>43</b>
<b>A.</b>	<b>Which Court Decides a Motion to Dismiss an Appeal?.....</b>	<b>43</b>
<b>B.</b>	<b>Pendent Appellate Jurisdiction (“Bootstrapping”) .....</b>	<b>45</b>
<b>C.</b>	<b>Accelerated Review of Interlocutory Orders By Writ of     Certiorari.....</b>	<b>47</b>
<b>D.</b>	<b>Writs of Mandamus.....</b>	<b>48</b>
<b>E.</b>	<b>Ethical Issues Concerning Meritless Interlocutory     Appeals.....</b>	<b>48</b>
<b>VI.</b>	<b>ADDITIONAL RESOURCES .....</b>	<b>49</b>

## I. INTRODUCTION

### A. What Is an Interlocutory Order?

A trial court makes a ruling in your case that you believe causes such prejudice to your client that you must try to obtain an immediate reversal of that order. Regardless of how you feel about the lower court's ruling, however, you may not be able to immediately appeal the order.

If the order does not dispose of all claims and defendants, it is known as an "interlocutory order." See N.C. Gen. Stat. § 1A-1, Rule 54(a) (2015) ("A judgment is either interlocutory or the final determination of the rights of the parties."); *Pratt v. Staton*, 147 N.C. App. 771, 773, 556 S.E.2d 621, 623 (2001) ("An order . . . granting a motion to dismiss certain claims in an action, while leaving other claims in the action to go forward, is plainly an interlocutory order.").

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Rather, the party wishing to appeal the interlocutory order must wait until there has been a final judgment in the case before the interlocutory order may be appealed. *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

The reason for this rule was articulated by the Supreme Court of North Carolina in *Veazey*:

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, and to enable courts to perform their real function, i.e., to administer "right and justice . . . without sale, denial, or delay."

*Id.* at 363-64, 57 S.E.2d at 382 (quoting N.C. Const. of 1868, art. I, § 35).

Premature appeals from interlocutory orders delay the final resolution of litigation and impose a substantial financial burden upon all the litigants involved. *Id.* at 363-64, 57 S.E.2d at 382-83. Accordingly, the courts have long guarded against such burdens unnecessarily. See *id.*; see also, e.g., *Royster v. Wright*, 118 N.C. 152, 154, 24 S.E. 746, 747 (1896).



There are, however, a number of exceptions to this general rule. The focus of this Guide is to highlight those exceptions and provide North Carolina practitioners with a starting point for determining whether certain interlocutory orders affecting their clients will be immediately appealable.

## **B. Terminology**

This Guide avoids using the term “interlocutory appeal,” which is susceptible to different meanings.

On the one hand, some North Carolina appellate decisions and the North Carolina Rules of Appellate Procedure use the term “interlocutory” to mean either (1) a properly taken appeal from an interlocutory order, *see* N.C. R. App. P. 28(b)(4) (“When an appeal is interlocutory . . .”), or (2) an impermissible appeal, *see, e.g., Alexander Hamilton Life Ins. Co. of Am. v. J & H Marsh & McClennan, Inc.*, 142 N.C. App. 699, 702, 543 S.E.2d 898, 900 (2001) (“We hold that plaintiff’s appeal is interlocutory and must be dismissed.”). To limit confusion, this Guide uses the term “interlocutory” to describe the interlocutory order itself, rather than the appeal from that interlocutory order.

Furthermore, as an alternative to discussing appeals in the context of whether they are “interlocutory or not,” this Guide will focus on the “appealability” of interlocutory orders—that is, whether they are immediately appealable. To illustrate the difference, a partial final judgment that is certified in a procedurally and substantively correct manner is “interlocutory” but also “appealable.”

Accordingly, this Guide uses “appealable” to describe the ultimate issue: whether the North Carolina appellate courts will hear an appeal on its merits at the time it is presented. This terminology comports with North Carolina appellate decisions. *See Davis v. Davis*, 360 N.C. 518, 525, 631 S.E.2d 114, 119 (2006) (using the term “appealability” when analyzing whether an interlocutory order was immediately appealable (quoting *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978))).

## **C. Types of Immediately Appealable Interlocutory Orders**

An interlocutory order is immediately appealable if it falls in one of the following general categories: (1) the order affects a substantial right; (2) the order is final as to some but not all of the parties or claims, and the trial court certifies that there is no just reason to delay the appeal; (3) the order in effect determines the action and prevents a judgment from which appeal might be taken; (4) the order discontinues the action; (5) the order grants or refuses a new trial; (6) the order rules upon the court’s jurisdiction over the appellant’s person or property adversely to the

appellant. See N.C. Gen. Stat. § 1-277 (2015); *id.* § 7A-27(a)(3), (b)(3); *id.* § 1A-1, Rule 54(b).<sup>1</sup>

### 1. Appeals of interlocutory orders “affecting a substantial right”

The substantial-right doctrine is the door through which many—if not most—interlocutory orders are appealed. Most of the appellate decisions highlighted in this Guide are based on the substantial-right doctrine.

For that reason, it is often difficult to predict with certainty whether a party may immediately appeal an interlocutory order. As the Supreme Court of North Carolina has observed, “the ‘substantial right’ test for appealability of interlocutory orders is more easily stated than applied.” *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). Put simply, “[n]o hard and fast rules exist for determining” whether an interlocutory order affects a substantial right. *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984) (citing *Waters*, 294 N.C. at 208, 240 S.E.2d at 343).

Rather, North Carolina’s appellate courts have explained that whether an interlocutory order affects a substantial right “is determined on a case by case basis.” *Hausle v. Hausle*, 226 N.C. App. 241, 244, 739 S.E.2d 203, 206 (2013) (quoting *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002)). The appellant must make a sufficient showing that the interlocutory order affects a substantial right or the appellate court will dismiss the appeal. See *id.* (observing that “appellants must present more than a bare assertion that the order affects a substantial right; they must demonstrate *why* the order affects a substantial right” (quoting *Hoke Cty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277-78, 679 S.E.2d 512, 516 (2009))).

Ordinarily, parties that wish to appeal must also demonstrate that the right will be lost, prejudiced, or inadequately preserved without an immediate appeal. See *Clements v. Clements ex rel. Craige*, 219 N.C. App. 581, 584, 725 S.E.2d 373, 376 (2012); see also, e.g., *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 194, 540 S.E.2d 324, 328 (2000) (“If appellant’s rights would be fully and adequately protected by an exception to the order that could then be assigned as error on appeal after final judgment, there is no right to an immediate appeal.” (quoting *Howell v. Howell*, 89 N.C. App. 115, 116, 365 S.E.2d 181, 182 (1988))).

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<sup>1</sup> Other statutory grounds for immediate appeal, such as statutes permitting immediate appeals from certain arbitration orders and statutes permitting immediate appeals from orders in the family-law context, are discussed *infra*.

## 2. Appeals of interlocutory orders pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure

Rule 54(b) of the North Carolina Rules of Civil Procedure (“Judgment upon multiple claims or involving multiple parties”) provides, in relevant part:

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.

N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015).

Thus, when the trial court enters a “judgment which is final and which fully terminates fewer than all the claims or [fully terminates all] claims as to fewer than all the parties,” Rule 54(b) permits the trial court to make that judgment immediately appealable by indicating that “there is no just reason for delay.” *Id.*; *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 490, 251 S.E.2d 443, 447 (1979).

“Certification under Rule 54(b) permits an interlocutory appeal from orders that are final as to a specific portion of the case, but which do not dispose of all claims as to all parties.” *Duncan v. Duncan*, 366 N.C. 544, 545, 742 S.E.2d 799, 801 (2013). In cases involving multiple claims or multiple parties, “Rule 54(b) modifies the traditional notion that a case could not be appealed until the trial court had finally and entirely disposed of it all.” *Tridyn Indus., Inc.*, 296 N.C. at 490, 251 S.E.2d at 446 (citing *Oestreicher v. Am. Nat’l Stores, Inc.*, 290 N.C. 118, 126, 225 S.E.2d 797, 803 (1976)). Rule 54(b) applies only to final judgments as to claims or parties, not issues. *E.g.*, *Roberts v. Thompson*, No. COA15-704, 2016 N.C. App. LEXIS 322, at \*8, 2016 WL 1336873, at \*3 (N.C. Ct. App. Apr. 5, 2016) (unpublished).

If the trial court does not issue a Rule 54(b) certification, then the appellant may nevertheless search for an alternative basis for immediately appealing the interlocutory order—for example, through the substantial-right doctrine.

If the trial court does issue a Rule 54(b) certification, then the appellate court must still analyze the interlocutory order to determine whether it is final “as to one or more but fewer than all of the claims or parties” under Rule 54(b). N.C. Gen. Stat. § 1A-1, Rule 54(b); *see also Tridyn Indus., Inc.*, 296 N.C. at 491, 251 S.E.2d at 447 (“That the trial court declared [an order] to be a final [order under Rule 54(b)] does not make it so.”); *Anderson v. Atl. Cas. Ins. Co.*, 134 N.C. App. 724, 726, 518 S.E.2d

786, 788 (1999) (“[T]he trial court’s attempt at Rule 54(b) certification was ineffective because it cannot by certification make its decree ‘immediately appealable [if] it is not a final judgment.’” (alteration in original) (quoting *Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983))).

However, if an order is properly certified under Rule 54(b), then appellate review is mandatory. *Etheridge v. Cty. of Currituck*, 235 N.C. App. 469, 471, 762 S.E.2d 289, 292 (2014).

The trial court’s Rule 54(b) certification must be “contained in the body of the judgment itself from which appeal is being sought.” *Branch Banking & Tr. Co. v. Peacock Farm, Inc.*, 772 S.E.2d 495, 500 (N.C. Ct. App.), *aff’d per curiam*, 368 N.C. 478, 780 S.E.2d 553 (2015). The trial court may not “retroactive[ly] attempt to certify a prior order for immediate appeal.” *Id.* (emphasis omitted).

### **3. Other statutory grounds for immediately appealing interlocutory orders**

The remaining categories of appeals from interlocutory orders set forth in N.C. Gen. Stat. §§ 1-277 and 7A-27 are appeals from interlocutory orders that in effect determine the action and prevent a judgment from which appeal might be taken, orders that discontinue the action, orders that grant or refuse a new trial, *see* N.C. Gen. Stat. § 7A-27(a)(3)(b) to (d), (b)(3)(b) to (d) (2015), and orders that rule upon the court’s jurisdiction over the appellant’s person or property adversely to the appellant, *id.* § 1-277(b).

These statutory grounds are invoked less frequently than the substantial-right doctrine but have been cited in support of many of the decisions below in which an interlocutory order in a particular case has been held to be immediately appealable. Specific instances are addressed below in Section III.

## **II. GENERAL PRINCIPLES**

### **A. Burden Is on the Appellant**

The burden is on the appellant to establish the basis for an interlocutory appeal. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994). It is not the responsibility of the appellate courts to research and create arguments to support an appellant’s right to appeal from an interlocutory order. *Id.* at 380, 444 S.E.2d at 254. The opposing party’s consent to have an interlocutory order reviewed is also ineffective. *See Thomas v. Contract Core Drilling & Sawing*, 209 N.C. App. 198, 201, 703 S.E.2d 862, 864-65 (2011); *Plummer v. Kearney*, 108 N.C. App. 310, 313, 423 S.E.2d 526, 529 (1992).

Rule 28(b) of the North Carolina Rules of Appellate Procedure contains a specific provision directed at the appellant's burden in appeals from interlocutory orders:

**(b) Content of Appellant's Brief.** An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules . . . :

. . . .

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. . . . When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

N.C. R. App. P. 28(b)(4). Therefore, to immediately appeal an interlocutory order, appellants must be able to clearly articulate in their brief why the order is immediately appealable.

If the appellant believes that there are sufficient grounds for seeking immediate appeal of an interlocutory order but recognizes that these grounds may appear questionable, the appellant may wish to file a petition for writ of certiorari with the appropriate appellate court (in addition to filing a notice of appeal) to provide an alternative means of exercising jurisdiction in addition to the notice of appeal. Pursuant to Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure, "[t]he 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 no right of appeal from an interlocutory order exists." N.C. R. App. P. 21(a)(1).

## **B. Denials of Dispositive Motions Generally**

As a general rule, orders denying dispositive motions are interlocutory orders that are not immediately appealable.

Thus, "ordinarily the denial of a motion to dismiss is an interlocutory order from which there may not be an immediate appeal." *Multiple Claimants v. N.C. Dep't of Health & Human Servs.*, 176 N.C. App. 278, 282, 626 S.E.2d 666, 669 (2006) (citing *Block v. Cty. of Person*, 141 N.C. App. 273, 276, 540 S.E.2d 415, 418 (2000)), *aff'd as modified*, 361 N.C. 372, 646 S.E.2d 356 (2007). The mere fact that the order "allows an action to proceed" is not sufficient to render the order immediately appealable. *Carsanaro v. Colvin*, 215 N.C. App. 455, 458, 716 S.E.2d 40, 44 (2011) (quoting *Baker v. Lanier Marine Liquidators, Inc.*, 187 N.C. App. 711, 717, 654 S.E.2d 41, 46 (2007)).

Similarly, the “[d]enial of summary judgment is interlocutory because it is not a judgment that ‘disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.’” *Snyder v. Learning Servs. Corp.*, 187 N.C. App. 480, 482, 653 S.E.2d 548, 550 (2007) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950)). Thus, “[g]enerally, there is no right of immediate appeal from [a denial of summary judgment]’ unless a substantial right is affected.” *Van Dyke v. CMI Terex Corp.*, 201 N.C. App. 437, 439, 689 S.E.2d 459, 460 (2009) (quoting *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)). Likewise, “[a] grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal.” *D.G. II, LLC v. Nix*, 213 N.C. App. 220, 227-28, 713 S.E.2d 140, 146 (2011) (quoting *Liggett Grp., Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993)). *But see* N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015).

These rules hold true even when the denial of a motion for summary judgment results in the movant’s exposure to an expensive and burdensome trial on the merits. It is a common misconception that avoiding the burden of a time-consuming and expensive trial is a substantial right that should justify an immediate appeal of an interlocutory order denying summary judgment. Avoiding this burden, by itself, does not render the denial of a motion for summary judgment immediately appealable. *See Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 38 (2001) (“[A]voiding the time and expense of trial is not a substantial right justifying immediate appeal.”); *see also Ward v. Wake Cty. Bd. of Educ.*, 166 N.C. App. 726, 732, 603 S.E.2d 896, 901 (2004) (rejecting appellants’ argument that a substantial right existed because “if their appeal [wa]s dismissed, they [would] ‘be required to incur significant litigation costs’”).

### **C. When to Appeal**

Interlocutory orders *may* be immediately appealed, but the decision to forego an immediate appeal from an interlocutory order generally does not result in waiver of the right to appeal that interlocutory order at the conclusion of the case. *Dep’t of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999) (“The language of N.C.G.S. § 1-277 is permissive not mandatory. Thus, 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.”). Rather, upon a final order in the case, all prior interlocutory orders may be appealed, along with the final order. *Id.* at 176-77, 521 S.E.2d at 710.

In the appeal from the final judgment, the appellant may also appeal all prior interlocutory orders issued by the trial court, provided that the appellant specifically designates those prior orders in the notice of appeal. N.C. R. App. P. 3(d) (providing that the notice of appeal “shall designate the judgment or order from which appeal is taken”); *Fairfield Harbour Prop. Owners Ass’n v. Midsouth Golf, LLC*, 215 N.C. App. 66, 70, 715 S.E.2d 273, 279 (2011) (holding that, pursuant to Rule 3(d), “appellate courts only have jurisdiction to hear appeals from those orders specifically designated

in the notice of appeal” (citing *Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994))). Thus, upon appeal from a final judgment, appellants need only designate in the notice of appeal the prior interlocutory orders from which they wish to appeal, and those interlocutory orders will be properly before the appellate court.

If a prior interlocutory order is not designated in the notice of appeal as required by Rule 3(d), the appellate court may nevertheless review it if “(1) the appellant . . . timely objected to the [interlocutory] order; (2) the order . . . [was] not immediately appealable; and (3) the order . . . involved the merits and necessarily affected the judgment.” *Fairfield Harbour Prop. Owners Ass’n*, 215 N.C. App. at 71, 715 S.E.2d at 279 (quoting *Dixon v. Hill*, 174 N.C. App. 252, 257, 620 S.E.2d 715, 718 (2005)); *id.* (“Notwithstanding the jurisdictional requirements in Rule 3(d), our Court has recognized that even if an appellant omits a certain order from the notice of appeal, our Court may still obtain jurisdiction to review the order pursuant to N.C. Gen. Stat. § 1-278.” (quoting *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 348, 666 S.E.2d 127, 133 (2008))); *see also* N.C. Gen. Stat. § 1-278 (2015) (“Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.”).

However, there is case law that brings this rule into question. Those cases state that if an appellant wishes to challenge an earlier-entered interlocutory order, the appellant must designate both the final judgment and the interlocutory order in the notice of appeal. *See, e.g., Majerske v. Majerske*, No. COA15-839, 2016 N.C. App. LEXIS 410, at \*7, 2016 WL 1566167, at \*3 (N.C. Ct. App. Apr. 19, 2016) (unpublished) (dismissing an appeal where the plaintiff designated an earlier-entered interlocutory order in her notice of appeal but failed to specifically indicate that she was appealing from a final judgment).

Condemnation cases present additional exceptions to this rule. In condemnation cases, after a hearing pursuant to N.C. Gen. Stat. § 136-108, appeal of an issue affecting title to land or the size of the land taken is mandatory and the interlocutory appeal must be taken immediately. N.C. Gen. Stat. § 136-108 (2015); *N.C. Dep’t of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) (holding that orders “concerning title or area taken” of a common area subject to condemnation are immediately appealable and must be immediately appealed (citing *Dep’t of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999))). *But see Town of Cary v. Southerland*, No. COA15-740, 2016 N.C. App. LEXIS 550, at \*15, 2016 WL 2865096, at \*6 (N.C. Ct. App. May 17, 2016) (unpublished) (dismissing the defendant’s appeal for lack of jurisdiction in a condemnation action where the notice of appeal designated the trial court’s second order addressing the scope of the taking rather than the earlier-entered order).

## **D. How to Appeal**

When the trial court issues an order, appeal from that order must be taken within 30 days or the party will forfeit the right to appeal. N.C. Gen. Stat. § 1-279.1 (2015); N.C. R. App. P. 3(c); *see also Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013) (“Failure to file a timely notice of appeal from the final judgment waives the right to appeal.” (citing N.C. Gen. Stat. § 1-279.1)). However, there may be statutory exceptions to this 30-day period for certain types of orders. *See, e.g.*, N.C. Gen. Stat. § 115C-431(d) (2015) (providing a 10-day period for appealing orders that resolve certain appropriations disputes between boards of education and boards of county commissioners).

To appeal an interlocutory order prior to final judgment, the appellant files a notice of appeal in the trial tribunal in which the case is pending. The notice of appeal is not filed in the appellate court. The appellate court is not notified that an appeal has been filed until the appellant files the record on appeal, *see* N.C. R. App. P. 9, or unless a motion or petition is filed with the Court, such as a motion for stay, if the trial court did not already issue a stay, *see* N.C. R. App. P. 8. The notice of appeal must designate the order from which appeal is taken, the party taking the appeal, and the appellate court to which the appellant is appealing. N.C. R. App. P. 3(d).

Practitioners appealing from the North Carolina Business Court should note that as a result of a 2014 amendment, certain interlocutory orders are immediately appealable to the North Carolina Supreme Court instead of to the Court of Appeals. *See* N.C. Gen. Stat. § 7A-27(a)(3) (2015). These interlocutory orders include most of the same types of orders that are immediately appealable under subsection 7A-27(b)(3), including those that “[a]ffect[ ] a substantial right.” *Id.* § 7A-27(a)(3)(a), (b)(3)(a).

## **III. APPEALABILITY OF CERTAIN INTERLOCUTORY ORDERS IN CIVIL CASES: PRACTICAL EXAMPLES**

The following are a number of practical examples of certain orders that have been found to be immediately appealable, despite being interlocutory (or in a few instances, appearing as though they could be interlocutory). The vast majority of the categories of orders discussed below have been held to be appealable under the substantial-right doctrine.

The general legal propositions drawn from these examples assume that no Rule 54(b) certification has been issued. Indeed, some of the examples below of interlocutory orders that were held not to be immediately appealable under the substantial-right doctrine might have been immediately appealable if a Rule 54(b) certification had been issued.



For additional observations about the difficulty of predicting with certainty whether an interlocutory order in a particular case will be immediately appealable under the authorities below, see Statement of Purpose, *supra* p. 1.

## **A. Orders Affecting Jurisdiction or Similar Defenses**

### **1. Subject-matter jurisdiction**

Orders denying motions to dismiss for lack of subject-matter jurisdiction are generally not immediately appealable. *See, e.g., Burton v. Phoenix Fabricators & Erectors, Inc.*, 185 N.C. App. 303, 305, 648 S.E.2d 235, 237 (2007) (“It is well established in North Carolina that ‘[a] trial judge’s order denying a motion to dismiss for lack of subject matter jurisdiction is interlocutory and not immediately appealable.’” (quoting *Shaver v. N.C. Monroe Constr. Co.*, 54 N.C. App. 486, 487, 283 S.E.2d 526, 527 (1981))).

### **2. Personal jurisdiction**

Orders denying motions to dismiss based on constitutional objections to personal jurisdiction are immediately appealable. *See* N.C. Gen. Stat. § 1-277(b) (2015) (“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 . . . .”); *see also, e.g., A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257-58, 625 S.E.2d 894, 898 (2006) (“[M]otions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable.” (citing N.C. Gen. Stat. § 1-277(b))); *Smith Architectural Metals, LLC v. Am. Railing Sys., Inc.*, 207 N.C. App. 151, 153, 698 S.E.2d 752, 754 (2010). The right to immediate appeal, however, “is limited to rulings on ‘minimum contacts’ questions.” *Credit Union Auto Buying Serv., Inc. v. Berkshire Props. Grp. Corp.*, 776 S.E.2d 737, 739 (N.C. Ct. App. 2015) (quoting *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982)); *Crite v. Bussey*, 239 N.C. App. 19, 21, 767 S.E.2d 434, 436 (2015) (holding that there is no right to immediate appeal from a motion to dismiss that, “though couched in terms of lack of jurisdiction under Rule 12(b)(2), actually raises a question of sufficiency of service or process” (quoting *Berger v. Berger*, 67 N.C. App. 591, 595, 313 S.E.2d 825, 829 (1984))).

### **3. Sufficiency of service or process**

Orders denying motions to dismiss for improper service or insufficient process are not immediately appealable. *See K2 Asia Ventures v. Trota*, 209 N.C. App. 716, 719, 708 S.E.2d 106, 109 (2011) (citing *Love v. Moore*, 305 N.C. 575, 580, 291 S.E.2d 141, 145 (1982) (holding that an “appellant [is] not entitled to immediate appeal of [a] trial court’s adverse ruling on motions to dismiss based on insufficiency of service and insufficiency of process”)); *Autec, Inc. v. Southlake Holdings, LLC*, 171 N.C. App.

147, 149, 613 S.E.2d 727, 729 (2005) (“[S]ection 1-277(b) does not apply to challenges to sufficiency of service of process.”).

#### **4. Improper venue**

Orders denying motions to dismiss for improper venue are immediately appealable. *See Caldwell v. Smith*, 203 N.C. App. 725, 727, 692 S.E.2d 483, 484 (2010) (“The denial of a motion for change of venue, though interlocutory, affects a substantial right and is immediately appealable where the county designated in the complaint is not proper.”); *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121-22, 535 S.E.2d 397, 401 (2000) (“[A]n order denying a motion for change of venue affects a substantial right because it ‘would work an injury to the aggrieved party which could not be corrected if no appeal was allowed before the final judgment.’” (quoting *DesMarais v. Dimmette*, 70 N.C. App. 134, 136, 318 S.E.2d 887, 889 (1984))).

#### **5. Improper venue based on forum-selection clause**

Orders denying motions to dismiss for improper venue on the basis of a forum-selection clause are immediately appealable. *See Cable Tel Servs., Inc. v. Overland Contracting, Inc.*, 154 N.C. App. 639, 641, 574 S.E.2d 31, 33 (2002) (“North Carolina ‘case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost.” (quoting *Mark Grp. Int’l, Inc. v. Still*, 151 N.C. App. 565, 566 n.1, 566 S.E.2d 160, 161 n.1 (2002))).

#### **6. Challenges to subject-matter jurisdiction under the exclusivity provision of the North Carolina Workers’ Compensation Act**

The “exclusivity provision” of the North Carolina Workers’ Compensation Act provides that the remedies of the Act generally will “exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.” N.C. Gen. Stat. § 97-10.1 (2015). When a motion to dismiss is made pursuant to the exclusivity provision of the Act and is brought under either Rule 12(b)(1) or Rule 12(b)(6), a denial of the motion is immediately appealable to the extent that the motion is asserted under the exclusivity provision. *Estate of Vaughn v. Pike Elec., LLC*, 230 N.C. App. 485, 491-92, 751 S.E.2d 227, 231-32 (2013); *see also Burton v. Phoenix Fabricators & Erectors, Inc.*, 362 N.C. 352, 352, 661 S.E.2d 242, 242-43 (2008) (remanding to the Court of Appeals for consideration of the merits of an appeal that was brought on the denial of the defendant’s Rule 12(b)(1) motion to dismiss the plaintiff’s negligence action under the exclusivity provision of the Indiana workers’ compensation statute).

## **7. Improper division**

Orders denying motions to transfer from one trial division to another are not immediately appealable. N.C. Gen. Stat. § 7A-260 (2015) (“Orders transferring or refusing to transfer are not immediately appealable . . . . Such orders are reviewable only by the appellate division on appeal from a final judgment.”); *Bryant v. Kelly*, 279 N.C. 123, 131-32, 181 S.E.2d 438, 443 (1971).

Likewise, orders granting motions to transfer from one trial division to another are not immediately appealable. N.C. Gen. Stat. § 7A-260; *Bryant*, 279 N.C. at 131-32, 181 S.E.2d at 443.

## **8. Challenges to Business Court designation orders**

The North Carolina Supreme Court has held that North Carolina Business Court orders denying or overruling opposition to a lawsuit’s designation as a mandatory complex business case are not immediately appealable, absent a showing that the order affects a substantial right. *Hanesbrands Inc. v. Fowler*, 794 S.E.2d 497, 499-500 (N.C. 2016).

In *Hanesbrands*, the Supreme Court dismissed a defendant’s appeal of the Business Court’s order denying the defendant’s opposition to the case being designated as a mandatory complex business case under N.C. Gen. Stat § 7A-45.4 (2015). The Supreme Court held that the defendant’s suggestion “that she may suffer some unspecified prejudice from [her] case being tried in Business Court” did not affect a substantial right, because the defendant failed to “identif[y] a specific ‘material right’ that she would lose if the order [was] not reviewed before final judgment” or “explain[ ] how the order in question would ‘work injury’ to her if not immediately reviewed.” *Hanesbrands*, 794 S.E.2d at 500; *see also id.* (“Merely asserting a preference for a forum other than the Business Court absent a specific, legal entitlement to an exclusion from designation is insufficient to support defendant’s contention that this matter was analogous to a venue change and is therefore immediately appealable.”).

Practitioners should be aware that, under the Business Court Modernization Act, appeals from orders denying or overruling challenges to Business Court designation must be appealed directly to the Supreme Court. *See* N.C. Gen. Stat. § 7A-27(a)(3) (2015).

## **9. Failure to join necessary parties**

The “denial of motions predicated on a plaintiff’s failure to join allegedly necessary parties does not affect a substantial right and is not immediately appealable.” *Smith v. Lake Bay E., LLC*, 228 N.C. App. 72, 75, 743 S.E.2d 684, 686 (2013) (first citing *Builders Mut. Ins. Co. v. Meeting Street Builders, LLC*, 222 N.C.

App. 647, 652, 736 S.E.2d 197, 201 (2012); then citing *Auction Co. v. Myers*, 40 N.C. App. 570, 573, 253 S.E.2d 362, 364 (1979)).

## **B. Orders Implicating Traditional Affirmative Defenses**

### **1. Statute of limitations**

Orders denying dispositive motions based on the expiration of the statute of limitations are not immediately appealable. *Nello L. Teer Co. v. N.C. Dep't of Transp.*, 175 N.C. App. 705, 711, 625 S.E.2d 135, 139 (2006) (“Orders denying motions to dismiss based upon the statute of limitations are interlocutory and not immediately appealable.” (citing *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 120-21, 535 S.E.2d 397, 401 (2000))).

### **2. Res judicata**

Orders denying dispositive motions based on the defense of res judicata are immediately appealable if a possibility of inconsistent verdicts exists if the case proceeds to trial. *See Cameron Hosp., Inc. v. Cline Design Assocs., PA*, 223 N.C. App. 223, 225, 735 S.E.2d 348, 350 (2012) (“In some cases, ‘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.’” (quoting *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993))). Quoting the Supreme Court’s ruling in *Bockweg*, the Court of Appeals in *Cameron Hospitality* explained that:

Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them. Thus, a motion for summary judgment based on *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, or one in privity with that plaintiff. Denial of the motion could lead to a second trial in frustration of the underlying principles of the doctrine of *res judicata*.

*Id.* (quoting *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161). Thus, the Court held, “the denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal only where a possibility of inconsistent verdicts exists if the case proceeds to trial.” *Id.* (emphasis omitted) (quoting *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 627, 727 S.E.2d 311, 314 (2012)).

### 3. Collateral estoppel

Orders denying dispositive motions based on the defense of collateral estoppel may be immediately appealable. *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558, 681 S.E.2d 770, 773 (2009) (“[T]he denial of a motion to dismiss a claim for relief affects a substantial right when the motion to dismiss makes a colorable assertion that the claim is barred under the doctrine of collateral estoppel.’ . . . The doctrine is designed to prevent repetitious lawsuits, and parties have a substantial right to avoid litigating issues that have already been determined by a final judgment.” (quoting *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973))); *Barfield v. N.C. Dep’t of Crime Control & Pub. Safety*, 202 N.C. App. 114, 118, 688 S.E.2d 467, 470 (2010) (“The denial of summary judgment based on collateral estoppel . . . may expose a successful defendant to repetitious and unnecessary lawsuits. Accordingly . . . the denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right . . . [such that the appeal] is properly before us.” (alteration in original) (quoting *McCallum v. N.C. Coop. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001))); *Hillsboro Partners, LLC v. City of Fayetteville*, 226 N.C. App. 30, 35, 738 S.E.2d 819, 823 (2013) (“[W]e hold that the trial court’s order denying defendant’s motion for summary judgment on the ground of collateral estoppel affects a substantial right and is properly before this Court.”).

### 4. Standing

Orders denying motions to dismiss for lack of standing are not immediately appealable. *See, e.g., Richmond Cty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586, 739 S.E.2d 566, 568-69 (2013) (“A motion to dismiss a party’s claim for lack of standing is tantamount to a motion to dismiss for failure to state a claim upon which relief can be granted according to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.’ ‘A trial court’s denial of a Rule 12(b)(6) motion to dismiss generally does not affect a substantial right.” (first quoting *Pineville Forest Homeowners Ass’n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 383, 623 S.E.2d 620, 623 (2006); then quoting *Carl v. State*, 192 N.C. App. 544, 550, 665 S.E.2d 787, 793 (2008))).

### 5. Justiciability

Orders denying motions to dismiss for lack of a justiciable controversy are not immediately appealable. *See Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208-09, 240 S.E.2d 338, 344 (1978) (citing *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 436, 206 S.E.2d 178, 180 (1974)).

## **C. Orders of a Purely Procedural Nature**

### **1. Amendments to pleadings**

Orders denying motions to amend pleadings are not immediately appealable. *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 27-28, 598 S.E.2d 570, 588 (2004) (“An order denying a motion to amend the pleadings is interlocutory and not immediately appealable.” (citing *Buchanan v. Rose*, 59 N.C. App. 351, 352, 296 S.E.2d 508, 509 (1982))).

Likewise, orders allowing motions to amend pleadings are not immediately appealable. *See LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 407, 747 S.E.2d 292 (2013) (“[W]e do not have jurisdiction to review the Business Court’s decision granting [plaintiff’s] motion to amend its complaint since that decision does not affect a substantial right.” (first citing *Howard v. Ocean Trail Convalescent Ctr.*, 68 N.C. App. 494, 496, 315 S.E.2d 97, 99 (1984); then citing *Funderburk v. Justice*, 25 N.C. App. 655, 656-57, 214 S.E.2d 310, 311 (1975))); *see also Nello L. Teer Co. v. N.C. Dep’t of Transp.*, 175 N.C. App. 705, 711, 625 S.E.2d 135, 139 (2006) (“[A]ppeals from orders allowing motions to amend are interlocutory and subject to dismissal.” (citing *Howard*, 68 N.C. App. at 496, 315 S.E.2d at 99)).

### **2. Amendments to compulsory counterclaims**

Orders denying motions to amend a party’s compulsory counterclaim are immediately appealable. *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 28, 598 S.E.2d 570, 588 (2004) (“[W]hen a motion to amend a party’s compulsory counterclaim is denied, the order is immediately appealable because it affects a substantial right.” (citing *Hudspeth v. Bunzey*, 35 N.C. App. 231, 234, 241 S.E.2d 119, 121 (1978))); *Hoots v. Pryor*, 106 N.C. App. 397, 403, 417 S.E.2d 269, 273 (1992) (citing *Goodwin v. Zeydel*, 96 N.C. App. 670, 672, 387 S.E.2d 57, 58 (1990) (holding that where the denial of a motion to amend would effectively bar forever a claim for equitable distribution, it affects a substantial right and is appealable)).

### **3. Punitive damages**

Orders denying motions to dismiss punitive damages claims are not immediately appealable. *Travco Hotels, Inc. v. Piedmont Nat. Gas Co.*, 102 N.C. App. 659, 661, 403 S.E.2d 593, 594 (1991) (“[A]n order denying a defendant’s motion to dismiss a plaintiff’s claim for punitive damages does not affect a substantial right, and the party appealing is not injured if it cannot appeal until after the final judgment.” (citing *Williams v. E. Coast Sales, Inc.*, 50 N.C. App. 565, 566, 274 S.E.2d 276, 277 (1981))), *aff’d*, 332 N.C. 288, 420 S.E.2d 426 (1992).

#### **4. Finding of liability but damages not adjudicated**

Orders determining liability only, where damages have yet to be adjudicated, are not immediately appealable. *Land v. Land*, 201 N.C. App. 672, 677, 687 S.E.2d 511, 516 (2010).

Likewise, orders denying a motion for a new trial on liability only, where damages have not yet been adjudicated, are not immediately appealable. *Id.*

In addition, orders granting a motion for a new trial on liability only, where damages have not yet been adjudicated, are not immediately appealable. *Id.*

#### **5. Arbitration**

Under N.C. Gen. Stat. § 1-567.67, orders denying motions to compel arbitration are immediately appealable. N.C. Gen. Stat. § 1-567.67(a)(1) (2015) (“An appeal may be taken from . . . [a]n order denying an application to compel arbitration . . . .”); see also *Pineville Forest Homeowners Ass’n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 385, 623 S.E.2d 620, 624 (2006) (“It is well established that because ‘[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed . . . an order denying arbitration is . . . immediately appealable.’” (alteration in original) (quoting *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881 (1999))).

Likewise, orders denying motions to stay proceedings so that a dispute can be arbitrated are immediately appealable. See *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 78, 721 S.E.2d 712, 715-16 (2012).

Orders granting motions to compel arbitration, however, are not immediately appealable. *Laws v. Horizon Hous., Inc.*, 137 N.C. App. 770, 771, 529 S.E.2d 695, 696 (2000) (“[T]his Court has expressly held ‘that there is no immediate right of appeal from an order compelling arbitration.’” (quoting *Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 286, 314 S.E.2d 291, 293 (1984))); *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 801, 526 S.E.2d 494, 496-97 (2000) (“An order compelling arbitration is not a final judgment, as by its terms it ‘fails to resolve all issues between all parties’ . . . .” (quoting *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 246, 507 S.E.2d 56, 60 (1998))).

#### **6. Denial of indemnity claim**

While there are some orders denying indemnity claims that are final and therefore immediately appealable, interlocutory orders dismissing claims for indemnity that do not resolve liability are not immediately appealable. *Telerent Leasing Corp. v. Barbee*, 102 N.C. App. 129, 130, 401 S.E.2d 122, 123 (1991) (“Since the appellants’ liability to the plaintiff has not been established, they have no need of

the appellees' indemnity now and may never need it. The time to pursue their appeal from the order denying their claim for indemnity is not now, but after the need for such indemnity has been established."); *Cook v. Exp. Leaf Tobacco Co.*, 47 N.C. App. 187, 189, 266 S.E.2d 754, 756 (1980) ("Until the amount for which [third-party defendant] must pay on the indemnity contract has been determined, the partial summary judgment will not be a final judgment . . . . When the liability of [third-party defendant] to [third-party plaintiff] on the indemnity agreement has been determined, [third-party plaintiff] may appeal.").

## **7. Directed verdicts following mistrial**

Orders denying motions for directed verdicts following a mistrial are generally not appealable. *Samia v. Ballard*, 25 N.C. App. 601, 603, 214 S.E.2d 222, 223 (1975) ("[A]n order denying motion for directed verdict following a mistrial . . . is not appealable and . . . is therefore subject to dismissal. . . . [This is] primarily based on the reasoning that such orders are interlocutory and do not affect a substantial right of the movant.").

## **8. Entry of default**

Entries of default are not immediately appealable. *See Autec, Inc. v. Southlake Holdings, LLC*, 171 N.C. App. 147, 149, 613 S.E.2d 727, 729 (2005) ("The entry of default is interlocutory in nature and is not a final judicial action."); *see also Looper v. Looper*, 51 N.C. App. 569, 570, 277 S.E.2d 78, 79 (1981) ("The entry of default by the clerk is not a final judgment and is not appealable. It is an interlocutory act looking toward the subsequent entry of a final judgment by default." (citations omitted)).

## **9. Orders setting aside entry of default**

Orders setting aside an entry of default are not immediately appealable. *See First Am. Sav. & Loan Ass'n v. Satterfield*, 87 N.C. App. 160, 163, 359 S.E.2d 812, 814 (1987) ("[I]t has been held that an order setting aside an entry of default . . . did not affect a substantial right and was not appealable."); *see also Pioneer Acoustical Co. v. Cisne & Assocs., Inc.*, 25 N.C. App. 114, 114, 212 S.E.2d 402, 403 (1975) (holding that an order setting aside an entry by default is interlocutory, and an appeal is therefore premature).

## **10. Orders setting aside default judgment**

Orders setting aside default judgments are not immediately appealable. *See Gibson v. Mena*, 144 N.C. App. 125, 127, 548 S.E.2d 745, 746 (2001) ("[O]rders setting aside default judgments are interlocutory and ordinarily not appealable."); *see also Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980) ("Unquestionably,



[an] order . . . setting aside [a] default judgment is interlocutory; it does not finally dispose of the case and requires further action by the trial court.”).

### **11. Orders granting a partial new trial**

Orders granting a partial new trial are not immediately appealable. *Land v. Land*, 201 N.C. App. 672, 677, 687 S.E.2d 511, 516 (2010) (“[T]he language contained in N.C. Gen. Stat. § 1-277(a) pertaining to the immediate appealability of an order granting or denying a new trial, ‘does not apply to an order which grants only a partial new trial.’” (quoting *Unigard Carolina Ins. Co. v. Dickens*, 41 N.C. App. 184, 187, 254 S.E.2d 197, 198 (1979))); *Johnson v. Garwood*, 49 N.C. App. 462, 463, 271 S.E.2d 544, 544-45 (1980) (“[A]n order granting a new trial solely as to the issues of damages. . . . is interlocutory and there is no immediate right of appeal. . . . [A]n order granting only a partial new trial is not subject to immediate appellate review.” (citations omitted)).

### **12. Orders declaring a mistrial**

Orders declaring a mistrial are not immediately appealable. *Burchette v. Lynch*, 139 N.C. App. 756, 760-61, 535 S.E.2d 77, 80 (2000) (“[A] ‘mistrial results in nullification of a pending jury trial.’ . . . In short, ‘[d]efendant, in respect to the denial of his motion for [judgment notwithstanding the verdict], has nothing to appeal from, for the very simple reason that in this respect there is neither a final judgment nor any interlocutory order of the superior court affecting his rights.’” (second alteration in original) (first quoting 75B Am. Jur. 2d *Trial* § 1713 (1992); then quoting *Goldston v. Wright*, 257 N.C. 279, 280, 125 S.E.2d 462, 463 (1962))).

### **13. Injunctions**

Orders issuing or denying preliminary injunctions are generally not immediately appealable, absent a showing that the order affects a substantial right. *See Bessemer City Express, Inc. v. City of Kings Mountain*, 155 N.C. App. 637, 640, 573 S.E.2d 712, 714 (2002) (holding that an order denying a preliminary injunction was not immediately appealable where the ordinance at issue did not restrict the plaintiffs from operating their business as a whole); *Little v. Stogner*, 140 N.C. App. 380, 383, 536 S.E.2d 334, 336 (2000) (“For a defendant ‘to have a right of appeal from a mandatory preliminary injunction, “substantial rights” of the appellant must be adversely affected.’” (quoting *Dixon v. Dixon*, 62 N.C. App. 744, 744, 303 S.E.2d 606, 607 (1983))).

Orders denying motions to set aside preliminary injunctions on the basis of lack of notice of the injunction hearing affect a substantial right and thus are immediately appealable. *See Perry v. Baxley Dev., Inc.*, 188 N.C. App. 158, 161, 655 S.E.2d 460, 463 (2008).

Additionally, notable exceptions to this rule may exist in cases involving noncompete agreements or trade secrets. *See infra* pp. 32, 36.

## **D. Orders Concerning Counsel**

### **1. Attorney disqualification**

Orders granting a motion to disqualify counsel are immediately appealable. *See Ferguson v. DDP Pharm., Inc.*, 174 N.C. App. 532, 535, 621 S.E.2d 323, 326 (2005) (“[A]n order granting a motion to disqualify counsel is immediately appealable.” (citing *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990))). In *Braun v. Trust Development Group, LLC*, the Court explained:

[A]n order granting a motion to disqualify counsel affects a substantial right because it “has immediate and irreparable consequences for both the disqualified attorney and the individual who hired the attorney. The attorney is irreparably deprived of exercising his right to represent a client. The client, likewise, is irreparably deprived of exercising the right to be represented by counsel of the client’s choice. Neither deprivation can be adequately redressed by a later appeal of a final judgment adverse to the client.”

213 N.C. App. 606, 609, 713 S.E.2d 528, 530 (2011) (quoting *Travco Hotels, Inc. v. Piedmont Nat. Gas Co.*, 332 N.C. 288, 293, 420 S.E.2d 426, 429 (1992)).

### **2. Sanctions against counsel**

Orders imposing sanctions on counsel are immediately appealable. *See Hummer v. Pulley, Watson, King & Lischer, P.A.*, 140 N.C. App. 270, 277, 536 S.E.2d 349, 353 (2000) (“[A]n order imposing sanctions on counsel . . . may immediately be appealed as a final order.” (quoting *Mack v. Moore*, 107 N.C. App. 87, 90, 418 S.E.2d 685, 687 (1992))).

### **3. Pro hac vice motions**

Orders denying motions for admission of counsel pro hac vice are not immediately appealable. *Dance v. Manning*, 207 N.C. App. 520, 523, 700 S.E.2d 145, 147 (2010) (“[S]uch order does not involve a substantial right and is not appealable as a matter of right. This is so because parties do not have a right to be represented in the courts of North Carolina by counsel who are not duly licensed to practice in this state. Admission of counsel in North Carolina pro hac vice is not a right but a discretionary privilege. It is permissive and subject to the sound discretion of the

Court.” (quoting *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 555, 291 S.E.2d 828, 829 (1982))).

#### **4. Injunctions against the State Bar**

Orders enjoining the State Bar from investigating or prosecuting alleged attorney misconduct are immediately appealable. *Gilbert v. N.C. State Bar*, 363 N.C. 70, 76-77, 678 S.E.2d 602, 606 (2009) (“[The State Bar’s] right to investigate and prosecute allegations of attorney misconduct is substantial. . . . [B]ecause the trial court’s permanent injunction may prevent defendant from executing its statutory duties while plaintiff pursues an improperly pleaded action, an injury arises.” (citing *Freeland v. Greene*, 33 N.C. App. 537, 540, 235 S.E.2d 852, 854 (1977))).

#### **E. Orders Affecting Immunities**

##### **1. Sovereign immunity**

Whether an order denying a motion to dismiss based on sovereign immunity is immediately appealable may depend on whether the motion is brought under Rule 12(b)(1), 12(b)(2), or 12(b)(6) of the North Carolina Rules of Civil Procedure. The law in North Carolina is unsettled on this issue.

The confusion appears related to the fact that orders denying motions to dismiss for lack of personal jurisdiction are generally immediately appealable, but orders denying motions to dismiss for lack of subject-matter jurisdiction are generally not immediately appealable. *See Sandhill Amusements, Inc. v. Sheriff of Onslow Cty.*, 236 N.C. App. 340, 348, 762 S.E.2d 666, 673 (2014) (“[B]ecause 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.” (alteration in original) (quoting *Atl. Coast Conference v. Univ. of Md., Coll. Park*, 230 N.C. App. 429, 436, 751 S.E.2d 612, 617 (2013))), *rev’d per curiam on other grounds*, 368 N.C. 91, 773 S.E.2d 55 (2015); *see also Lake v. State Health Plan for Teachers & State Emps.*, 234 N.C. App. 368, 371 n.3, 760 S.E.2d 268, 271 n.3 (2014) (noting this inconsistency).

For example, in *Sandhill Amusements*, the Court of Appeals permitted an immediate appeal from orders denying motions to dismiss under Rule 12(b)(1), 12(b)(2), and 12(b)(6) based on sovereign immunity. *See Sandhill Amusements*, 236 N.C. App. at 347, 762 S.E.2d at 672 (“[T]he denial of [appellant’s] 12(b)(1), (2), and (6) motions to dismiss based on sovereign immunity affects a substantial right.”); *accord Viking Utils. Corp. v. Onslow Water & Sewer Auth.*, 232 N.C. App. 684, 686, 755 S.E.2d 62, 64 (2014); *Bell v. City of New Bern*, No. COA13-817, 2014 N.C. App. LEXIS 461, at \*8-9, 2014 WL 1795136, at \*3-4 (N.C. Ct. App. May 6, 2014) (unpublished).

However, in *Can Am South, LLC v. State*, the Court of Appeals permitted an immediate appeal from an order denying a Rule 12(b)(2) motion to dismiss based on sovereign immunity but dismissed the defendants' immediate appeal from an order denying a Rule 12(b)(1) motion based on the defense of sovereign immunity. *Can Am S., LLC v. State*, 234 N.C. App. 119, 124, 759 S.E.2d 304, 308 (2014). The Court in *Can Am South* noted that if defendants had moved to dismiss based on the defense of sovereign immunity pursuant to Rule 12(b)(6), the court would have been "bound by the longstanding rule that the denial of such a motion affects a substantial right and is immediately appealable under section 1-277(a)." *Id.* at 122, 759 S.E.2d at 307 (citing *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010)); *accord Lake*, 234 N.C. App. at 371 n.3, 760 S.E.2d at 271 n.3.

## **2. Legislative or quasi-judicial immunity**

Orders involving claims of legislative or quasi-judicial immunity are immediately appealable. *Royal Oak Concerned Citizens Ass'n v. Brunswick Cty.*, 233 N.C. App. 145, 149, 756 S.E.2d 833, 836 (2014) ("[C]laims of immunity, including claims of legislative and quasi-judicial immunity, affect a substantial right for purposes of appellate review.").

## **3. Public-duty doctrine**

Orders denying dispositive motions based on the public-duty doctrine are immediately appealable. *See Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283 (1996) (holding that "[t]he substantial right exception has been specifically applied to the assertion of the public duty doctrine as an affirmative defense" (citing *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 403, 442 S.E.2d 75, 77 (1994))); *Blaylock v. N.C. Dep't of Corr.—Div. of Cmty. Corr.*, 200 N.C. App. 541, 543, 685 S.E.2d 140, 142 (2009) ("This Court has held that the defense of governmental immunity through the public duty doctrine affects a substantial right and is, therefore, immediately appealable." (citing *Clark*, 114 N.C. App. at 403, 442 S.E.2d at 77)).

## **F. Discovery Orders**

### **1. Motions to compel discovery**

Orders granting motions to compel discovery are generally not immediately appealable. *Sharpe v. Worland*, 351 N.C. 159, 163, 522 S.E.2d 577, 579 (1999) ("An order compelling discovery is generally not immediately appealable because it is interlocutory and does not affect a substantial right that would be lost if the ruling were not reviewed before final judgment." (citations omitted)); *Arnold v. City of Asheville*, 169 N.C. App. 451, 453, 610 S.E.2d 280, 282 (2005). However, some of these orders are immediately appealable.

Orders compelling discovery that impose sanctions on the party contesting the discovery may be immediately appealable. *See In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 262, 618 S.E.2d 796, 802 (2005) (“[W]hen [a discovery] order is enforced by sanctions pursuant to . . . Rule 37(b), the order is appealable,’ and the appeal tests the validity of both the discovery order and the sanctions imposed.” (second alteration in original) (first quoting *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554-55, 353 S.E.2d 425, 426 (1987); then citing *Benfield v. Benfield*, 89 N.C. App. 415, 420, 366 S.E.2d 500, 503 (1988))). However, there are decisions to the contrary. *See, e.g., Myers v. Mutton*, 155 N.C. App. 213, 213, 574 S.E.2d 73, 74 (2002) (“Plaintiff appeals from an order sanctioning him for failure to comply with a discovery order. We dismiss plaintiff’s appeal as interlocutory.”).

Orders compelling discovery that require the production of materials protected by a recognized privilege may be immediately appealable. *In re Ernst & Young, LLP*, 191 N.C. App. 668, 673, 663 S.E.2d 921, 925 (2008) (“[E]ven if the appeal was not from a final judgment, appeals of discovery orders asserting a statutory or a common-law privilege affect a substantial right.” (citing *Evans v. United Servs. Auto. Ass’n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786 (2001))), *aff’d in part, modified in part*, 363 N.C. 612, 684 S.E.2d 151 (2009); *Isom v. Bank of Am., N.A.*, 177 N.C. App. 406, 415, 628 S.E.2d 458, 464 (2006) (holding that a discovery order requiring the bank to disclose documents concerning its dispute with a check vendor was immediately appealable because it affected a substantial right, despite the bank’s assertion that the documents were protected by the attorney-client privilege or the work-product doctrine).

However, mere “blanket general objections purporting to assert attorney-client privilege or work product immunity to all of the opposing parties’ discovery requests are inadequate to effect their intended purpose and do not establish a substantial right to an immediate appeal.” *K2 Asia Ventures v. Trota*, 215 N.C. App. 443, 447, 717 S.E.2d 1, 4-5 (2011).

In addition, orders denying motions to compel based on the nonmovant’s assertion of privilege are generally not immediately appealable. *James v. Bledsoe*, 198 N.C. App. 339, 344, 679 S.E.2d 494, 498 (2009). Orders denying motions to compel discovery affect a substantial right when (1) “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,” or (2) “the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and the information desired is highly material to a determination of the critical question to be resolved in the case.” *Id.* at 345, 679 S.E.2d at 498 (quoting *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 447-48, 271 S.E.2d 522, 523 (1980)).

## **2. Orders compelling deposition attendance**

Orders compelling deposition attendance are not immediately appealable. *K2 Asia Ventures v. Trota*, 209 N.C. App. 716, 724, 708 S.E.2d 106, 112 (2011) (“[T]he Order’s requirement that Appellants appear for depositions during jurisdictional discovery does not burden Appellants’ substantial right to due process and does not warrant immediate appeal.”).

### **G. Privileges Generally**

#### **1. Physician-patient**

Orders requiring disclosure of information claimed to be protected by the physician-patient privilege are immediately appealable. *See Midkiff v. Compton*, 204 N.C. App. 21, 24, 693 S.E.2d 172, 174 (2010) (“Because the trial court in the present case ordered Plaintiff to disclose matters she had asserted were protected by the physician-patient privilege, the trial court’s order is immediately appealable and is properly before us.” (citing *Mims v. Wright*, 157 N.C. App. 339, 341, 578 S.E.2d 606, 608 (2003))).

#### **2. HIPAA**

Orders requiring disclosure of information claimed to be protected by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 29 and 42 U.S.C.), are immediately appealable. *See N.C. State Bd. of Dental Exam’rs v. Woods*, 202 N.C. App. 89, 90, 688 S.E.2d 84, 86 (2010) (“Appellant’s assertion of privilege pursuant to HIPAA does affect a substantial right and is subject to immediate appellate review.”).

#### **3. Medical peer review**

Orders requiring disclosure of information protected by medical peer-review privilege are immediately appealable. *Woods v. Moses Cone Health Sys.*, 198 N.C. App. 120, 124, 678 S.E.2d 787, 791 (2009); *Hayes v. Premier Living, Inc.*, 181 N.C. App. 747, 751, 641 S.E.2d 316, 318 (2007) (holding that the protections set forth in N.C. Gen. Stat. § 131E-107, commonly known as the peer-review privilege, includes medical peer review, and orders compelling the production of reports under this section affect a substantial right and are immediately appealable).

#### **4. First Amendment**

Orders that affect a litigant’s First Amendment rights and “threaten” or “impair” those First Amendment rights are immediately appealable. *Hammer Publ’ns v. Knights Party*, 196 N.C. App. 342, 346, 674 S.E.2d 720, 723 (2009) (“[F]or immediate appeal to be proper, we must conclude that either or both the order and injunction (1) affect defendant’s First Amendment rights and (2) ‘threaten[ ] or

impair[ ]’ defendant’s First Amendment rights.” (second and third alterations in original) (quoting *Harris v. Matthews*, 361 N.C. 265, 270, 643 S.E.2d 566, 570 (2007)); see also *Boyce & Isley, PLLC v. Cooper*, 211 N.C. App. 469, 474, 710 S.E.2d 309, 314 (2011) (“Our Courts have recognized that because a misapplication of the actual malice standard when considering a motion for summary judgment ‘would have a chilling effect’ on a defendant’s right to free speech, a substantial right is implicated.” (quoting *Priest v. Sobeck*, 153 N.C. App. 662, 670, 571 S.E.2d 75, 81 (2002) (Greene, J., dissenting), *rev’d per curiam*, 357 N.C. 159, 579 S.E.2d 250 (2003) (adopting the dissenting opinion of the Court of Appeals))).

## **5. Judicial entanglement in religious matters**

Orders denying motions to dismiss on First Amendment ecclesiastical entanglement grounds are immediately appealable. See *Doe 200 v. Diocese of Raleigh*, 776 S.E.2d 29, 33 (N.C. Ct. App. 2015). “The dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine.” *Davis v. Williams*, 774 S.E.2d 889, 892 (N.C. Ct. App. 2015) (quoting *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398 (1998)).

## **6. Fifth Amendment privilege against self-incrimination**

Orders in civil cases affecting a litigant’s Fifth Amendment privilege against self-incrimination are immediately appealable. See *Fields v. McMahan*, 218 N.C. App. 417, 419, 722 S.E.2d 793, 794 (2012) (holding that orders compelling discovery that could implicate a party’s Fifth Amendment rights are immediately appealable); see also *Roadway Express, Inc. v. Hayes*, 178 N.C. App. 165, 168, 631 S.E.2d 41, 44 (2006) (“[A] trial judge’s ruling requiring a party to provide evidence over a Fifth Amendment objection is . . . immediately appealable.” (citing *Staton v. Brame*, 136 N.C. App. 170, 176, 523 S.E.2d 424, 428 (1999))).

## **H. Family Law**

### **1. N.C. Gen. Stat. § 50-19.1**

In 2013, the General Assembly amended N.C. Gen. Stat. § 7A-27 and enacted a new statute, N.C. Gen. Stat. § 50-19.1, which pertains to the appealability of certain orders in the family-law context. As amended, N.C. Gen. Stat. § 7A-27 provides that orders set forth in N.C. Gen. Stat. § 50-19.1 are immediately appealable. N.C. Gen. Stat. § 7A-27(b)(3)(e) (2015). In turn, N.C. Gen. Stat. § 50-19.1 (“Maintenance of certain appeals allowed”) provides:

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.

*Id.* § 50-19.1.

This statute abrogates a number of appellate decisions in which appeals were dismissed under a strict reading of Rule 54(b) when the judgment on one claim was deemed not “final” because other claims in the same action were still pending. *See, e.g., Evans v. Evans*, 158 N.C. App. 533, 536, 581 S.E.2d 464, 466 (2003); *Embler v. Embler*, 143 N.C. App. 162, 167, 545 S.E.2d 259, 263 (2001).

## **2. Postseparation support**

Orders awarding postseparation support, prior to a final determination regarding an award of alimony, are not immediately appealable. *Rowe v. Rowe*, 131 N.C. App. 409, 411, 507 S.E.2d 317, 319 (1998) (“[S]ince a postseparation support order is a temporary measure, it is interlocutory, it does not affect a substantial right, and it is not appealable.”).

## **3. Alienation of affection and criminal conversation**

Orders dismissing claims for alienation of affection but leaving claims of criminal conversation pending may be immediately appealable. *McCutchen v. McCutchen*, 360 N.C. 280, 282, 624 S.E.2d 620, 623 (2006) (holding that such claims “are so connected and intertwined, only one issue of . . . damages should [be] submitted to the jury” (alteration in original) (quoting *Sebastian v. Kluttz*, 6 N.C. App. 201, 220, 170 S.E.2d 104, 116 (1969))).

## **4. Orders setting aside a separation agreement**

Interlocutory orders setting aside separation agreements are not immediately appealable. *See Johnson v. Johnson*, 208 N.C. App. 118, 122-23, 701 S.E.2d 722, 726 (2010) (“The Order granting Defendant’s motion to set aside the Agreement is properly viewed as a judgment on Plaintiff’s plea in bar. As such, the Order is not immediately appealable because an order disposing of a plea in bar is not a final judgment on a claim for relief under Rule 54(b).”).



## 5. Orders determining date of separation

Interlocutory orders determining the date of separation for purposes of divorce are not immediately appealable. *Stafford v. Stafford*, 133 N.C. App. 163, 165, 515 S.E.2d 43, 45 (holding that while the date of separation “may have an impact on the unresolved issue of equitable distribution, the same factual issues are not involved”), *aff’d per curiam*, 351 N.C. 94, 520 S.E.2d 785 (1999).

However, “that rule does not apply where the dependent spouse’s request for post-separation support was *denied* by the trial court.” *Sorey v. Sorey*, 233 N.C. App. 682, 684, 757 S.E.2d 518, 519 (2014) (citing *Mayer v. Mayer*, 66 N.C. App. 522, 525, 311 S.E.2d 659, 662 (1984)).

## 6. Permanency-planning orders

Permanency-planning orders pertaining to the adoption of a child adjudicated neglected may not be immediately appealable. *In re B.N.H.*, 170 N.C. App. 157, 162, 611 S.E.2d 888, 891 (2005) (dismissing appeal of a permanency-planning order because “the order on appeal [wa]s not a final order under G.S. § 7B-1001”). In *In re B.N.H.*, the Court limited the holding in *In re Weiler*, in which the Court of Appeals held that a “permanency planning order’ was a species of a ‘dispositional order’ subject to immediate appeal.” *Id.* at 159, 611 S.E.2d at 889 (quoting *In re Weiler*, 158 N.C. App. 473, 477, 581 S.E.2d 134, 137 (2003)). The Court of Appeals in *In re B.N.H.* stated:

In *Weiler*, the permanency planning order on appeal changed the plan from reunification to adoption. The order on appeal here is not such an order, not only because it was an initial permanency planning order but also because it repeats the previous directives of the court that reunification be ceased. We therefore limit the holding of *Weiler* to the specific facts of that case, and decline to extend its reasoning further.

*Id.* at 161-62, 611 S.E.2d at 891.

In *In re E.G.M.*, however, the Court of Appeals held that a permanency-planning order that changed legal custody of a child from the respondent mother to DSS was immediately appealable. *In re E.G.M.*, 230 N.C. App. 196, 208, 750 S.E.2d 857, 865 (2013).

## **7. Temporary child-custody, visitation, and child-support orders**

Temporary custody, visitation, and support orders are not immediately appealable. *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606 (2012) (“A temporary child custody order is normally ‘interlocutory and does not affect any substantial right which cannot be protected by timely appeal from the trial court’s ultimate disposition on the merits.’” (quoting *Brewer v. Brewer*, 139 N.C. App. 222, 227, 533 S.E.2d 541, 546 (2000))); *see also Gray v. Peele*, 235 N.C. App. 554, 561, 761 S.E.2d 739, 744 (2014) (dismissing an interlocutory appeal from a temporary child-support order).

However, a trial court’s label of a custody, visitation, or support order as “temporary” is not dispositive. *Woodring v. Woodring*, 227 N.C. App. 638, 643, 745 S.E.2d 13, 18 (2013) (“A trial court’s designation of an order as ‘temporary’ or ‘permanent’ is neither dispositive nor binding on an appellate court.” (citing *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009))); *see also Lamond v. Mahoney*, 159 N.C. App. 400, 403, 583 S.E.2d 656, 659 (2003) (“This Court has addressed the question whether a custody order is temporary or permanent when determining if an appeal from the order is interlocutory. Generally, a party is not entitled to appeal from a temporary custody order.”).

## **8. Orders determining whether a putative parent’s consent is necessary for adoption**

Interlocutory orders determining whether a putative parent’s consent was necessary for the granting of an adoption petition are immediately appealable. *In re Adoption of S.K.N.*, 224 N.C. App. 41, 45, 735 S.E.2d 382, 386 (2012) (“[W]here a trial court has determined whether a putative father’s consent was necessary for the granting of an adoption petition the trial court’s order affects a substantial right and is immediately appealable.” (citing *In re Adoption of Shuler*, 162 N.C. App. 328, 330, 590 S.E.2d 458, 460 (2004))).

## **9. Orders effectively nullifying a mother’s consent to adoption**

An interlocutory order voiding a parent’s relinquishment, which effectively nullifies the parent’s purported consent to adoption, is immediately appealable. *In re Adoption of Baby Boy*, 233 N.C. App. 493, 498, 757 S.E.2d 343, 346 (2014).

## **10. Orders setting aside a divorce judgment**

An order setting aside an absolute divorce judgment is generally not immediately appealable. *Campbell v. Campbell*, 237 N.C. App. 1, 2, 764 S.E.2d 630, 631 (2014).

## **I. Orders Deciding the Merits but Reserving the Issue of Attorney’s Fees and Costs for Later Determination**

Orders that completely decide the merits of an action but reserve for later determination the issue of attorney’s fees and costs are immediately appealable. *See Duncan v. Duncan*, 366 N.C. 544, 546, 742 S.E.2d 799, 800 (2013).

In *Duncan*, the Supreme Court of North Carolina provided clarity amidst a series of appellate decisions addressing the appealability of merits orders that reserved the question of attorney’s fees. There, the Court explained:

Today we clarify the effect of an unresolved request for attorney’s fees on an appeal from an order that otherwise fully determines the action. Once the trial court enters an order that decides all substantive claims, the right to appeal commences. Failure to appeal from that order forfeits the right. Because attorney’s fees and costs are collateral to a final judgment on the merits, an unresolved request for attorney’s fees and costs does not render interlocutory an appeal from the trial court’s order.

*Id.* at 545, 742 S.E.2d at 800.

Thus, after *Duncan*, the appellant need not seek a Rule 54(b) certification, because the order resolving the merits is a final, appealable order that must be appealed. *Id.* at 546, 742 S.E.2d at 801 (“Because an order resolving all substantive claims is a final judgment, Rule 54(b) certification is superfluous, and such a final order is immediately appealable as of right.”).

## **J. Miscellaneous Orders Concerning the Rights of Litigants**

### **1. Possibility of inconsistent verdicts in multiple trials**

Orders that result in the possibility of inconsistent verdicts in two or more trials are immediately appealable if the same factual issues would be present in both trials. *See Callanan v. Walsh*, 228 N.C. App. 18, 21, 743 S.E.2d 686, 689 (2013) (quoting *Estate of Harvey v. Kore-Kut, Inc.*, 180 N.C. App. 195, 198, 636 S.E.2d 210, 212 (2006) (“Where the dismissal of an appeal as interlocutory could result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right is prejudiced and therefore such dismissal is immediately appealable.”)).

### **2. Attorney’s fees sanctions**

Orders sanctioning a party with an award of attorney’s fees may not be immediately appealable. *Long v. Joyner*, 155 N.C. App. 129, 134, 574 S.E.2d 171, 175

(2002) (“Certain sanctions have been deemed immediately appealable because they affect a substantial right . . . . However, an order to pay attorney’s fees as a sanction does not affect a substantial right.” (citations omitted)); *see also Cochran v. Cochran*, 93 N.C. App. 574, 577, 378 S.E.2d 580, 582 (1989) (“The order granting attorney[’s] fees is interlocutory, as it does not finally determine the action nor affect a substantial right which might be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order.”).

### **3. Orders resulting in expensive trial proceedings**

Orders resulting in the possibility of a lengthy or expensive trial are not immediately appealable on those grounds alone. *Filipowski v. Oliver*, 219 N.C. App. 398, 399, 723 S.E.2d 789, 790 (2012) (“[Defendant] argues only that the denial of her motion subjects her to the possibility of a lengthy and expensive trial. Our courts have held many times that avoidance of the time and expense of a trial is not a substantial right justifying immediate appellate review of an interlocutory order.”); *K2 Asia Ventures v. Trota*, 209 N.C. App. 716, 719, 708 S.E.2d 106, 109 (2011) (“[A]voiding the expenditure of time and money is not a substantial right justifying immediate appeal.”).

### **4. Specific performance concerning real estate**

Interlocutory orders affecting title to land are not, on these grounds alone, immediately appealable. *See Stanford v. Paris*, 364 N.C. 306, 312, 698 S.E.2d 37, 41 (2010) (holding that appeal of an interlocutory order affecting title to land and area taken is mandatory in the context of condemnation cases, but not from orders otherwise affecting title to land).

However, interlocutory orders granting specific performance and requiring conveyance of property are immediately appealable. *Phoenix Ltd. P’ship of Raleigh v. Simpson*, 201 N.C. App. 493, 499, 688 S.E.2d 717, 721 (2009) (“[W]e agree with defendants that the order of the trial court granting specific performance to plaintiff and requiring defendants to convey the . . . property to plaintiff affects a substantial right.”).

### **5. Appointment of receiver**

Orders denying appointment of a receiver are immediately appealable. *Barnes v. Kochhar*, 178 N.C. App. 489, 498-99, 633 S.E.2d 474, 480 (2006) (“[Shareholders’] right to preservation of what they allege are [the corporation’s] assets and corporate opportunities has been substantially affected by the trial court’s denial of the appointment of a receiver. . . . [A]bsent immediate appellate review . . . these substantial rights will be ‘lost, prejudiced or be less than adequately protected.’ . . . [T]he trial court’s denial of an appointment of a receiver can be

immediately appealed on these facts . . . .” (quoting *Schout v. Schout*, 140 N.C. App. 722, 725, 538 S.E.2d 213, 215 (2000))).

Orders appointing a receiver may be immediately appealable, depending on whether the order stops the day-to-day operation of the business and whether the appointment is made prior to entry of judgment. See *Batesville Casket Co. v. Wings Aviation, Inc.*, 214 N.C. App. 447, 454, 716 S.E.2d 13, 18 (2011) (collecting cases and holding that a particular order appointing a receiver did not involve a substantial right).

## **6. Intervention**

Orders denying motions to intervene are immediately appealable. See *Alford v. Davis*, 131 N.C. App. 214, 216-17, 505 S.E.2d 917, 919 (1998) (“We believe appellants’ motion to intervene claims substantial rights which might be lost if the order is not reviewed prior to final judgment; therefore we consider their appeal.”); see also *United Servs. Auto. Ass’n v. Simpson*, 126 N.C. App. 393, 395, 485 S.E.2d 337, 339 (1997) (holding that appeal of an order denying a Rule 24 motion to intervene affected movant’s substantial rights and was immediately appealable).

However, orders granting motions to intervene are not immediately appealable. *City of Raleigh v. Edwards*, 234 N.C. 528, 530, 67 S.E.2d 669, 671 (1951) (“[A]n order granting a motion to intervene is not appealable.”).

## **7. Motions for jury trial**

Orders denying a motion for jury trial are immediately appealable. See *In re Foreclosure of Elkins*, 193 N.C. App. 226, 227, 667 S.E.2d 259, 227 (2008) (“[A]n order denying a motion for jury trial is immediately appealable because it affects a substantial right.” (citing *In re McCarroll*, 313 N.C. 315, 316, 327 S.E.2d 880, 881 (1985) (per curiam))).

Likewise, orders granting a motion for jury trial are immediately appealable. See *McCall v. McCall*, 138 N.C. App. 706, 707, 531 S.E.2d 894, 895 (2000) (“Our courts have long held that orders either denying or granting a party’s motion for a jury trial do affect a substantial right and are thus immediately appealable.”).

## **8. Motions to strike**

Orders denying motions to strike are not immediately appealable. *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 248, 507 S.E.2d 56, 61 (1998) (“[W]e perceive no right, and certainly no ‘substantial’ right, of defendants subject to being lost absent immediate appeal of denial of their motion to strike.” (citation omitted)); *Faulconer v. Wysong & Miles Co.*, 155 N.C. App. 598, 600, 574 S.E.2d 688, 690-91 (2002) (same).

Likewise, orders granting motions to strike certain allegations are not immediately appealable. *Barnes v. Rorie*, 14 N.C. App. 751, 754, 189 S.E.2d 529, 531 (1972).

However, orders granting motions to strike an entire answer or defense are immediately appealable. *Faulconer*, 155 N.C. App. at 600, 574 S.E.2d at 691 (“[W]hen a motion to strike an *entire* further answer or defense is granted, an immediate appeal is available since such motion is in substance a demurrer.” (quoting *Girard Tr. Bank v. Easton*, 3 N.C. App. 414, 416, 165 S.E.2d 252, 254 (1969))).

## **K. Other Miscellaneous Orders**

### **1. Certification of class actions**

Orders denying certification of class actions are generally immediately appealable. See *Hamilton v. Mortg. Info. Servs., Inc.*, 212 N.C. App. 73, 85, 711 S.E.2d 185, 193 (2011) (“Generally speaking, an interlocutory order denying a request for class certification is immediately appealable on the theory that it affects a substantial right.”). However, orders *partially* denying certification of class actions are generally not immediately appealable. See *id.* at 85, 711 S.E.2d at 194 (“[A]n order partially denying class certification does not affect a substantial right to the same extent and in the same manner that an order refusing to certify any issue for consideration on a class-wide basis does.”).

Orders *allowing* certification of class actions are generally not immediately appealable. See *Stetser v. TAP Pharm. Prods., Inc.*, 165 N.C. App. 1, 11, 598 S.E.2d 570, 578 (2004) (“Conversely, ‘no order allowing class certification has been held to similarly affect a substantial right such that interlocutory appeal would be permitted.’” (quoting *Frost v. Mazda Motor of Am., Inc.*, 353 N.C. 188, 193, 540 S.E.2d 324, 328 (2000))).

Recently, however, the North Carolina Supreme Court issued a reminder that immediate appellate review of interlocutory orders allowing class certification may be appropriate when “the subject matter of [the] case implicates the public interest to such a degree” that it warrants invoking the Court’s supervisory authority under N.C. Gen. Stat. § 7A-32(b). *Fisher v. Flue-Cured Tobacco Coop. Stabilization Corp.*, 794 S.E.2d 699, 705 (N.C. 2016); see also *Frost*, 353 N.C. at 193, 540 S.E.2d at 328.

### **2. Discontinuance of class representative in potentially meritorious suit**

Orders allowing a class representative’s discontinuance in a potentially meritorious suit are immediately appealable. See *Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 356 (1984) (“Because [Rule 23] provides for members of a class to be represented by one of the class, we believe their right to this representation

makes a consideration of their rights necessary when considering whether an order refusing to certify the class may be appealed. . . . We hold that the order is appealable.”).

### **3. Contempt**

Many orders that include a finding of contempt are immediately appealable. See *Stevenson ex rel. Long v. Joyner*, 148 N.C. App. 261, 263, 558 S.E.2d 215, 217 (2002) (“[O]ur Courts have recognized a narrow exception to [the rule that discovery orders are interlocutory and not immediately appealable] when a discovery order includes a finding of contempt or other sanctions.” (citing *Romig v. Jefferson-Pilot Life Ins. Co.*, 132 N.C. App. 682, 685, 513 S.E.2d 598, 600 (1999))); see also *Thompson v. Thompson*, 223 N.C. App. 515, 517, 735 S.E.2d 214, 216 (2012) (“The appeal of any contempt order . . . affects a substantial right and is therefore immediately appealable.” (quoting *Guerrier v. Guerrier*, 155 N.C. App. 154, 158, 574 S.E.2d 69, 71 (2002))).

### **4. Orders affecting title to a common area subject to condemnation**

Orders “concerning title or area taken” of a common area subject to condemnation are immediately appealable *and must be immediately appealed*. *N.C. Dep’t of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) (citing *Dep’t of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999)).

Recently, the Court of Appeals held in an unpublished opinion that an appellant must notice an appeal of the *first order* in a case that may be deemed to address the scope of the taking. See *Town of Cary v. Southerland*, No. COA15-740, 2016 N.C. App. LEXIS 550, at \*15, 2016 WL 2865096, at \*6 (N.C. Ct. App. May 17, 2016) (unpublished) (dismissing the defendant’s appeal for lack of jurisdiction where the notice of appeal designated the trial court’s second order addressing the scope of the taking rather than the earlier-entered order).

### **5. Orders finding the DOT liable to pay just compensation for inverse condemnation**

“[A]n order granting partial summary judgment on the issue of NCDOT’s liability to pay just compensation for a claim for inverse condemnation is an immediately appealable interlocutory order affecting a substantial right . . . .” *Kirby v. N.C. Dep’t of Transp.*, 239 N.C. App. 345, 354, 769 S.E.2d 218, 227 (2015), *aff’d*, 368 N.C. 847, 786 S.E.2d 919 (2016).

## 6. Orders prohibiting the right to use and control assets

Orders prohibiting the right to use and control assets during the pendency of litigation are immediately appealable. See *SED Holdings, LLC v. 3 Star Props., LLC*, 784 S.E.2d 627, 630 (N.C. Ct. App.), *petition for disc. rev. allowed*, 793 S.E.2d 219 (N.C. 2016); see also *Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 184 N.C. App. 292, 294-95, 647 S.E.2d 102, 104 (2007) (holding that an order requiring posting of bonds affected a substantial right, “[g]iven the large amount of money at issue, . . . the fact that the trial court impinged appellant’s right to . . . assets, and the unavoidable and lengthy delays”); *Schout v. Schout*, 140 N.C. App. 722, 726, 538 S.E.2d 213, 216 (2000) (holding that the trial court’s order “directing Wachovia to deliver the corpus of the [brokerage] account to plaintiff jeopardize[d] defendant’s right to maintain the assets for plaintiff’s educational needs” and affected a substantial right).

## 7. Covenants not to compete

Orders denying or granting preliminary injunctions in “cases involving an alleged breach of a non-competition agreement and an agreement prohibiting disclosure of confidential information” are immediately appealable where a substantial right is affected. *QSP, Inc. v. Hair*, 152 N.C. App. 174, 175, 566 S.E.2d 851, 852 (2002); see also, e.g., *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 410, 302 S.E.2d 754, 764 (1983); *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 776, 501 S.E.2d 353, 355 (1998).

## 8. Right to earn a living

Orders that affect parties’ “right to earn a living and practice [their] livelihood” are immediately appealable. *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 635, 568 S.E.2d 267, 271 (2002) (“[The preliminary injunction’s] restriction effectively prohibits defendant from earning a living and practicing his livelihood in North Carolina and South Carolina. . . . [A] substantial right of defendant, the right to earn a living and practice his livelihood, will be adversely affected if the instant preliminary injunction escapes immediate appellate review.”); see also *Emp’t Staffing Grp., Inc. v. Little*, 777 S.E.2d 309, 312 (N.C. Ct. App. 2015) (“Because this case presents a time-sensitive issue as to both Plaintiff’s and Defendant’s rights under the Employment Agreement and has a substantial effect on their livelihoods, we address the merits of Defendant’s appeal.”); *Masterclean of N.C., Inc. v. Guy*, 82 N.C. App. 45, 47, 345 S.E.2d 692, 694 (1986) (“We hold that defendant would be deprived of a substantial right, absent a review prior to a final determination, to wit: the right to work and earn a living in the states of North Carolina, South Carolina, Virginia, Georgia and Alabama.”).

Similarly, interlocutory orders depriving an appellant of “the right to operate his business” have been held to be immediately appealable. *Town of Knightdale v.*



*Vaughn*, 95 N.C. App. 649, 651, 383 S.E.2d 460, 461 (1989) (“[A]lthough defendant’s appeal is from an interlocutory order [issuing a preliminary injunction enjoining defendant from operating a used-car lot], defendant would be deprived of a substantial right—the right to operate his business—absent a review prior to determination on the merits.”); *see also Rockford-Cohen Grp., LLC v. N.C. Dep’t of Ins.*, 230 N.C. App. 317, 320, 749 S.E.2d 469, 472 (2013) (stating that a substantial right was affected where a “motion for a preliminary injunction required Defendant to ‘give up’ the right to do business as the exclusive provider of creditable bail bondsmen training and to receive remuneration for providing such education”).

However, there are decisions to the contrary. *See Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 582, 541 S.E.2d 157, 166 (2000) (holding that plaintiff could not immediately appeal an injunction that prevented it from selling assets that it allegedly purchased).

## **9. Orders remanding to a municipal body**

Orders by a superior court sitting in an appellate capacity that remand to a municipal body for additional proceedings are not immediately appealable. *See High Rock Lake Partners, LLC v. N.C. Dep’t of Transp.*, 204 N.C. App. 55, 60-61, 693 S.E.2d 361, 366 (2010); *Heritage Pointe Builders, Inc. v. N.C. Licensing Bd. of Gen. Contractors*, 120 N.C. App. 502, 504, 462 S.E.2d 696, 698 (1995) (holding that a superior court order remanding to a licensing board for rehearing was not immediately appealable); *Jennewein v. City Council*, 46 N.C. App. 324, 326, 264 S.E.2d 802, 803 (1980) (holding that a superior court order remanding to the city council for hearing was not immediately appealable).

However, in the land-use context, where the decision of the municipal body is reviewed by the superior court, the superior court has the option of remanding with instructions for a permit to issue. *See* N.C. Gen. Stat. § 160A-393(d)(3)(a) (2015) (providing that the court “may remand the case with an order that directs the decision-making board to take whatever action should have been taken had the error not been committed or to take such other action as is necessary to correct the error,” and that “the court may remand with instructions that the permit be issued, subject to reasonable and appropriate conditions”). In this circumstance, the order of the superior court is interlocutory, but there is authority implicitly recognizing that this type of order may be immediately appealable. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm’rs*, 299 N.C. 620, 626-27, 265 S.E.2d 379, 383 (1980).

## **10. Paternity blood-grouping tests**

Orders requiring submission to paternity blood-grouping tests are not immediately appealable. *See Davie Cty. Dep’t of Soc. Servs. ex rel. Brown v. Jones*, 62 N.C. App. 142, 142, 301 S.E.2d 926, 927 (1983) (“An order to submit a blood grouping test pursuant to G.S. 8-50.1 is interlocutory. . . . An order to submit to a blood

grouping test does not, in this case, affect a substantial right.”); *see also Heavner v. Heavner*, 73 N.C. App. 331, 333, 326 S.E.2d 78, 80 (1985).

However, the North Carolina Court of Appeals in *State ex rel. Hill v. Manning* exercised its discretion to address the merits of an order requiring submission to a paternity blood-grouping test, notwithstanding the absence of grounds for appealing the interlocutory order. *See State ex rel. Hill v. Manning*, 110 N.C. App. 770, 772, 431 S.E.2d 207, 208 (1993).

#### **11. Orders denying the release of funds held in escrow**

Orders denying the release of funds held in escrow in an insurance rate filing are not immediately appealable. *State ex rel. Comm’r of Ins. v. N.C. Rate Bureau*, 102 N.C. App. 809, 811, 403 S.E.2d 597, 599 (1991) (“[T]he effect of the order denying the release of the funds is temporary and not permanent. The Commissioner’s order only determines that the funds are not to be released now. It does not purport to determine who is entitled to the money. For these reasons . . . the appeal is interlocutory.”).

#### **12. Payments pendente lite**

Orders requiring parties to make payments pendente lite are not immediately appealable. *Browne v. Browne*, 101 N.C. App. 617, 626, 400 S.E.2d 736, 742 (1991) (“Awards *pendente lite* are interlocutory decrees which necessarily do not affect a substantial right from which lies an immediate appeal pursuant to G.S. 7A-27[ ].” (quoting *Stephenson v. Stephenson*, 55 N.C. App. 250, 252, 285 S.E.2d 281, 282 (1981))).

#### **13. Payments during pending workers’ compensation litigation**

Orders requiring payments during pending workers’ compensation litigation are not immediately appealable. *Perry v. N.C. Dep’t of Corr.*, 176 N.C. App. 123, 130, 625 S.E.2d 790, 794-95 (2006) (“To allow a defendant to take an interlocutory appeal from any requirement that it continue to pay benefits pending Commission proceedings would result in precisely the ‘yo-yo procedure, up and down, up and down,’ which this Court has held ‘works to defeat the very purpose of the Workers’ Compensation Act.’” (quoting *Hardin v. Venture Constr. Co.*, 107 N.C. App. 758, 761, 421 S.E.2d 601, 602-03 (1992))).

#### **14. Attachment**

Orders pursuant to the UCC determining that a party is entitled to immediate possession of collateral are not immediately appealable. *Citicorp Person-To-Person Fin. Ctr., Inc. v. Stallings 601 Sales, Inc.*, 49 N.C. App. 187, 189, 270 S.E.2d 567, 569

(1980) (“The interlocutory order giving immediate possession of the collateral to plaintiffs has affected no substantial right of defendant.”).

### **15. Stay of proceedings**

Orders denying a stay are generally not immediately appealable. *Perry v. N.C. Dep’t of Corr.*, 176 N.C. App. 123, 129, 625 S.E.2d 790, 794 (2006) (“Our Court has already held that an order denying a stay is an interlocutory order not subject to immediate appeal . . . .” (quoting *Howerton v. Grace Hosp., Inc.*, 124 N.C. App. 199, 201, 476 S.E.2d 440, 442-43 (1996))). Instead, the proper procedure for challenging the denial of a stay is a petition for writ of supersedeas. N.C. R. App. P. 23.

### **16. Orders entering summary judgment for a monetary sum against one of multiple defendants**

Orders granting summary judgment for a monetary sum against one of multiple defendants are immediately appealable if they would require the defendant, even if successful, to incur a substantial expense in order to stay execution upon the money judgment. *Brown v. Cavit Scis., Inc.*, 230 N.C. App. 460, 463, 749 S.E.2d 904, 907 (2013) (citing *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 172, 265 S.E.2d 240, 247 (1980)).

### **17. Orders requiring immediate payment of substantial amounts of money**

There is some authority suggesting that interlocutory orders “requiring the immediate payment of a significant amount of money” may be immediately appealable. *Estate of Redden ex rel. Morley v. Redden*, 179 N.C. App. 113, 116-17, 632 S.E.2d 794, 798 (2006) (“The Order appealed affects a substantial right of Defendant . . . by ordering her to make immediate payment of a significant amount of money . . . .”), *remanded on other grounds*, 361 N.C. 352, 649 S.E.2d 638 (2007); *see also In re Fifth Third Bank, Nat’l Ass’n—Vill. of Penland Litig.*, 217 N.C. App. 199, 205, 719 S.E.2d 171, 175-76 (2011) (same).

### **18. Orders denying enforcement of a franchise agreement**

Orders denying enforcement of a franchise agreement are not immediately appealable. *Live, Inc. v. Domino’s Pizza, LLC*, No. COA12-930, 2013 N.C. App. LEXIS 84, at \*5, 2013 WL 152431, at \*2 (N.C. Ct. App. Jan. 15, 2013) (unpublished) (“There is no case law in this State suggesting that a party’s desire to enforce the terms of a common business contract such as the franchise agreement between the parties here rises to the level of an immediately appealable substantial right.”).

## **19. Trade secrets**

Orders denying motions for preliminary injunctions to prevent misappropriation of trade secrets are immediately appealable. *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 361 (2004) (“An appeal may be proper . . . in cases . . . involving trade secrets . . . where the denial of the injunction ‘deprives the appellant of a substantial right which he would lose absent review prior to final determination.’” (quoting *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983))); *see also N.C. Farm P’ship v. Pig Improvement Co.*, 163 N.C. App. 318, 321, 593 S.E.2d 126, 129 (2004).

This rule applies to the denial of a motion for preliminary injunction that seeks to enjoin an employee from disclosing an employer’s alleged trade secrets. *Horner Int’l Co. v. McKoy*, 232 N.C. App. 559, 562, 754 S.E.2d 852, 855 (2014).

## **20. Injunctive relief to prohibit contracts with third parties**

Orders granting injunctive relief to prohibit a party from contracting with competing third parties are not immediately appealable. *CB&I Constructors, Inc. v. Town of Wake Forest*, 157 N.C. App. 545, 547-48, 550, 579 S.E.2d 502, 503, 505 (2003) (“[The court] entered a temporary restraining order prohibiting [defendant] from executing a contract with [co-defendant] or any other contractor other than [plaintiff] for the . . . construction project. . . . [T]he preliminary injunction maintains the *status quo*, and . . . [n]o substantial right has been shown to be implicated; therefore, the order of the trial court issuing a preliminary injunction is interlocutory . . .”).

## **21. Restraint on local-government legislative functions**

Orders restraining local governments from exercising their legislative functions are immediately appealable. *Cablevision of Winston-Salem, Inc. v. City of Winston-Salem*, 3 N.C. App. 252, 257, 164 S.E.2d 737, 740 (1968) (“[T]he order appealed from restrained the governing body of the City of Winston-Salem from exercising its legislative function in dealing with a matter of large public interest to the citizens of that City. A substantial right of appellant City has been adversely affected. Appeal from the order is, therefore, not premature.”).

## **22. Lis pendens**

Orders striking a lis pendens against property are not immediately appealable. *See Ford v. Mann*, 201 N.C. App. 714, 719, 690 S.E.2d 281, 285 (2010) (“Plaintiffs have failed to demonstrate a substantial right supporting the immediate appealability of the trial court’s order [striking plaintiffs’ lis pendens].”).

Similarly, a trial court’s refusal to cancel a notice of lis pendens is not immediately appealable unless the appellant otherwise shows that a substantial

right has been impaired. *Godley Auction Co. v. Myers*, 40 N.C. App. 570, 574, 253 S.E.2d 362, 365 (1979)).

### **23. Bonds**

Orders requiring parties to post a bond in an amount reasonably approximating the value of assets held are not immediately appealable. *Stancil v. Stancil*, 94 N.C. App. 760, 764, 381 S.E.2d 720, 723 (1989) (“[N]o substantial right . . . can possibly be affected to the slightest extent if the validity of the order is not determined until after a final judgment is entered in the case.” (quoting *Rivenbark v. Southmark Corp.*, 77 N.C. App. 225, 227, 334 S.E.2d 451, 452 (1985))); see also *Collins v. Talley*, 135 N.C. App. 758, 760-61, 522 S.E.2d 794, 797 (1999).

### **24. Public access to court documents and proceedings**

Orders denying motions to seal documents and determining that proposed sealed documents should be publicly accessible are immediately appealable. *France v. France*, 209 N.C. App. 406, 411, 705 S.E.2d 399, 405 (2011) (“Absent immediate review, documents that have been ordered sealed will be unsealed, and proceedings will be held open to the public. Because the only manner in which Plaintiff may prevent this from happening is through immediate appellate review, we hold that a substantial right of Plaintiff[s] is affected . . . .” (citing *Evans v. United Servs. Auto. Ass’n*, 142 N.C. App. 18, 23-24, 541 S.E.2d 782, 786 (2001))).

Likewise, orders denying motions to close proceedings to the public are immediately appealable. *Id.*

Orders either granting or denying motions to assert a right of access to civil proceedings or judicial records in civil proceedings under N.C. Gen. Stat. § 1-72.1 are immediately appealable by the movant or any party to the proceeding. See N.C. Gen. Stat. § 1-72.1(e) (2015).

### **25. Orders granting temporary injunctive relief restraining the enforcement of an act of the General Assembly**

As a result of a 2016 statutory amendment, an interlocutory order that “[g]rants temporary injunctive relief restraining the State or a political subdivision of the State from enforcing the operation or execution of an act of the General Assembly” is immediately appealable to the Court of Appeals. N.C. Gen. Stat. § 7A-27(b)(3)(f) (2015).

In addition, even when constitutional claims are not at issue, there is authority for the proposition that a substantial right is affected when the trial court’s order prohibits the State or its agencies from enforcing laws entrusted to it. *Beason v. N.C. Dep’t of the Sec’y of State*, 226 N.C. App. 222, 227, 743 S.E.2d 41, 45 (2013) (“[T]he

trial court found that respondent was improperly interpreting statutes it is responsible for enforcing. Thus, we conclude that respondent suffers the risk of injury if we do not consider the merits of this interlocutory appeal. Therefore, we deny petitioner’s motion to dismiss.”).

## **26. Insurer’s duty to defend**

“Where there is a pending suit or claim, an interlocutory order concerning the issue of whether an insurer has a duty to defend in the underlying action ‘affects a substantial right that might be lost absent immediate appeal.’” *Cinoman v. Univ. of N.C.*, 234 N.C. App. 481, 483, 764 S.E.2d 619, 621-22 (2014) (quoting *Lambe Realty Inv., Inc. v. Allstate Ins. Co.*, 137 N.C. App. 1, 4, 527 S.E.2d 328, 331 (2000)).

However, no substantial right exists from an appeal of an interlocutory order brought by an underinsured-motorist insurer claiming a duty to defend in the underlying action, because “[a]n underinsured motorist insurer ‘may elect, *but may not be compelled*, to appear in the action in its own name.” *Peterson v. Dillman*, 782 S.E.2d 362, 367 (N.C. Ct. App. 2016) (quoting N.C. Gen. Stat. § 20-279.21(b)(4) (2015)); *see also id.* (rejecting the notion that an underinsured-motorist insurer’s “*choice* to enter the action is tantamount to a *duty* to defend an insured”).

## **27. Interlocutory orders of certain State agencies and officials under N.C. Gen. Stat. § 7A-29**

There is no substantial-right doctrine for interlocutory orders of certain State agencies and officials falling within N.C. Gen. Stat. § 7A-29. This statute “expressly limits the right of appeal to appeals from a ‘final order or decision’. . . [and] does not make an exception for interlocutory orders in which a substantial right of the appellant is in jeopardy.” *In re Appeal of Becky King Props., LLC*, 234 N.C. App. 699, 703, 760 S.E.2d 292, 293 (2014) (holding that interlocutory orders of the Property Tax Commission “are not subject to a ‘substantial right’ exception” for this reason).

N.C. Gen. Stat. § 7A-29 applies to certain orders of the Utilities Commission, the Department of Health and Human Services, the Industrial Commission, the State Bar, the Property Tax Commission, the Commissioner of Insurance, the State Board of Elections, the Office of Administrative Hearings, and the Secretary of Environmental Quality. N.C. Gen. Stat. § 7A-29(a) (2015).

While there is no substantial-right doctrine under N.C. Gen. Stat. § 7A-29, Rule 21(a) of the North Carolina Rules of Appellate Procedure provides that a “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 no right of appeal from an interlocutory order exists.” N.C. R. App. P. 21(a)(1).

## **28. Public-purpose issue in takings cases**

Orders determining whether a taking is for a public purpose in a condemnation case are immediately appealable. *Town of Apex v. Whitehurst*, 213 N.C. App. 579, 584-85, 712 S.E.2d 898, 902 (2011) (“[T]he determination of whether a taking is for a public purpose is an inquiry of vital importance in condemnation cases, [and thus,] such questions affect a substantial right and are immediately appealable.” (citing *Progress Energy Carolinas, Inc. v. Strickland*, 181 N.C. App. 610, 612-13, 640 S.E.2d 856, 858 (2007))).

## **29. Involuntary-commitment orders**

An order of involuntary commitment is immediately appealable under N.C. Gen. Stat. § 122C-272. *See, e.g., In re Shackelford*, 789 S.E.2d 15, 17-18 (N.C. Ct. App. 2016).

## **30. Orders denying motions to enforce a settlement agreement**

Orders denying motions to enforce settlement agreements are not immediately appealable. *Milton v. Thompson*, 170 N.C. App. 176, 176, 611 S.E.2d 474, 475 (2005); *Ledford v. Asheville Hous. Auth.*, 125 N.C. App. 597, 600, 482 S.E.2d 544, 546 (1997).

# **IV. INTERLOCUTORY APPEALS IN CRIMINAL CASES**

## **A. Generally**

N.C. Gen. Stat. § 15A-1444 (2015) (“When defendant may appeal; certiorari”) generally governs the appealability of interlocutory orders in criminal cases.

N.C. Gen. Stat. § 15A-1444 provides:

(a) A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.

(a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant’s prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the

appellate division for review of this issue by writ of certiorari.

(a2) A defendant who has entered a plea of guilty or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:

(1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;

(2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or

(3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

(b) Procedures for appeal from the magistrate to the district court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.

(c) Procedures for appeal from the district court to the superior court are as provided in Article 90, Appeals from Magistrates and from District Court Judges.

(d) Procedures for appeal to the appellate division are as provided in this Article, the rules of the appellate division, and Chapter 7A of the General Statutes. The appeal must be perfected and conducted in accordance with the requirements of those provisions.

(e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court



judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.

(f) The ruling of the court upon a motion for appropriate relief is subject to review upon appeal or by writ of certiorari as provided in G.S. 15A-1422.

(g) Review by writ of certiorari is available when provided for by this Chapter, by other rules of law, or by rule of the appellate division.

In addition to this statute, N.C. Gen. Stat. § 15A-1432(d) provides:

If the superior court finds that a judgment, ruling, or order dismissing criminal charges in the district court was in error . . . [t]he defendant may appeal this order to the appellate division . . . by an interlocutory appeal if the defendant, or his attorney, certifies to the superior court judge who entered the order that the appeal is not taken for the purpose of delay and if the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter.

*Id.* § 15A-1432(d).

## **B. “Substantial Right” Analysis in Criminal Cases**

In *State v. Joseph*, the Court of Appeals held that a “substantial right” analysis had no place in criminal cases. *State v. Joseph*, 92 N.C. App. 203, 206, 374 S.E.2d 132, 134 (1988). The *Joseph* Court held that N.C. Gen. Stat. § 15A-1444 effectively precluded any substantial-right analysis under N.C. Gen. Stat. § 1-277 and therefore eliminated any statutory basis for engaging in a substantial-right analysis in criminal cases. *Id.* at 206-07, 374 S.E.2d at 134-35.

The following year in *State v. Johnson*, however, the Court of Appeals nevertheless applied a substantial-right analysis to an appeal in a criminal proceeding. *See State v. Johnson*, 95 N.C. App. 757, 758, 383 S.E.2d 692, 693 (1989).

In 1995, the Court of Appeals in *State v. Shoff* noted the seemingly conflicting decisions in *Joseph* and *Johnson* and reaffirmed the holding in *Joseph* that there could be no immediate appeals of interlocutory orders based on a “substantial rights analysis.” *State v. Shoff*, 118 N.C. App. 724, 726-27, 456 S.E.2d 875, 877-78 (1995), *aff’d per curiam*, 342 N.C. 638, 466 S.E.2d 277 (1996). The Court in *Shoff* did so because it reasoned that engaging in a “substantial rights” analysis “appears contrary

to the plain and unambiguous language of the statutes governing criminal appeals.” *Id.* In its per curiam decision, the Supreme Court in *Shoff* cited one of its earlier decisions, *State v. Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986) (per curiam). *See Shoff*, 342 N.C. at 638, 466 S.E.2d at 277. The Supreme Court in *Henry* held that “[t]here is no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case.” *Henry*, 318 N.C. at 409, 348 S.E.2d at 593.

It is worth noting, however, that in *State v. McKenzie*, the Court of Appeals held that a criminal defendant’s immediate appeal of an interlocutory order was proper because the order affected the defendant’s substantial rights. *See State v. McKenzie*, 225 N.C. App. 208, 211, 736 S.E.2d 591, 594 (citing *Johnson*, but not *Joseph*, and stating that, “[a]lthough the present appeal is interlocutory, it is reviewable under N.C. Gen. Stat. § 7A-27[ ] because it affects ‘substantial rights’”), *rev’d on other grounds*, 367 N.C. 112, 750 S.E.2d 521 (2013).

## V. ADDITIONAL ISSUES FOR CONSIDERATION

### A. Which Court Decides a Motion to Dismiss an Appeal?

Once a notice of appeal has been filed, the trial tribunal loses jurisdiction except to aid in the process of settling the record on appeal. *See* N.C. Gen. Stat. § 1-294 (2015) (providing that an appeal “stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein”);<sup>2</sup> *see also, e.g., Wiggins v. Bunch*, 280 N.C. 106, 108, 184 S.E.2d 879, 880 (1971) (“For many years it has been recognized that as a general rule an appeal takes the case out of the jurisdiction of the trial court. . . .”); *id.* at 111, 184 S.E.2d at 881 (“[W]hen an appeal is taken . . . the [trial] court is divested of jurisdiction, except to take action in aid of the appeal, until the case is remanded to it by the appellate court.” (quoting 7 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 60:30(2) (2d ed. 1970))); *Faulkenbury v. Teachers’ & State Emps.’ Ret. Sys.*, 108 N.C. App. 357, 364, 424 S.E.2d 420, 422 (1993) (“[T]he general rule is that once an appeal is perfected, the lower court is divested of jurisdiction, [although] the lower court nonetheless retains jurisdiction to take action which aids the appeal. . . .” (citations omitted)).

For this reason, the North Carolina Court of Appeals has held that the trial court lacks jurisdiction to dismiss appeals unless the dismissal is for (1) violations of the Rules of Appellate Procedure committed in the process of settling the record, or

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<sup>2</sup> In 2015, this statute was amended to add the following underlined provision: “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, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.” N.C. Gen. Stat. § 1-294 (2015).

(2) violations of prior trial court orders directing the appellant to take some action to settle the record. *Estrada v. Jaques*, 70 N.C. App. 627, 639, 321 S.E.2d 240, 248 (1984) (holding that under N.C. R. App. P. 25(a), the trial tribunal may only dismiss an appeal when the appellant “fail[s] within the times allowed by these rules or by order of court to take any action required to present the appeal for decision” (quoting N.C. R. App. P. 25(a))); *see also, e.g., Williams v. Lincoln Cty. Emergency Med. Servs.*, Nos. COA11-212, COA11-213, 2011 N.C. App. LEXIS 2272, at \*5-6, 2011 WL 4917028, at \*2 (N.C. Ct. App. Oct. 18, 2011) (unpublished) (holding that under *Estrada*, “the trial court lacked the authority to dismiss [the appellant’s] appeal,” even though the appeal was “[u]nquestionably” interlocutory); *Giles v. First Va. Credit Servs., Inc.*, 149 N.C. App. 89, 95, 560 S.E.2d 557, 561 (2002). Accordingly, there is authority for the proposition that a motion to dismiss an appeal on the grounds that it is an impermissible immediate appeal from an interlocutory order should be made in the appellate court to which the appeal is taken, after the record has been filed and docketed.

However, in *RPR & Associates, Inc. v. University of North Carolina—Chapel Hill*, the Court of Appeals held that the trial court does not have authority to dismiss an appeal on this basis, the trial court does have the authority to make a preliminary determination on the appealability of an interlocutory order when it decides whether to stay proceedings during the pendency of an interlocutory appeal. 153 N.C. App. 342, 348, 570 S.E.2d 510, 514 (2002) (“The trial court has the authority . . . to determine whether or not its order affects a substantial right of the parties or is otherwise immediately appealable.”); *see also Fields v. City of Goldsboro*, No. COA12-402, 2012 N.C. App. LEXIS 1189, at \*4, 2012 WL 4881479, at \*2 (N.C. Ct. App. Oct. 16, 2012) (unpublished).

In 2016, moreover, the Court of Appeals in *SED Holdings, LLC v. 3 Star Properties, LLC* held that the trial court had the authority to determine “that its [preliminary] injunction did not affect a substantial right and thus was not immediately appealable” and therefore properly “retained jurisdiction to hold contempt proceedings and enforce its injunction order.” 791 S.E.2d 914, 920 (N.C. Ct. App. 2016) (limiting decision to the “particular facts at issue and the procedural context in which the contempt orders were entered”). The Court explained its prior decision in *RPR* as follows:

At the very least, *RPR & Assocs.* stands for two general propositions: (1) a trial court properly retains jurisdiction over a case if it acts reasonably in determining that an interlocutory order is not immediately appealable, and (2) that determination may be considered reasonable even if the appellate court ultimately holds that the challenged order is subject to immediate review.

*Id.*

## B. Pendent Appellate Jurisdiction (“Bootstrapping”)

Pendent appellate jurisdiction is the notion that appellate courts may “resolve those questions that are ‘inextricably intertwined’ with the issue over which their appellate jurisdiction directly extends.” Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 Green Bag 2D 199, 205 (2013). Also known as “bootstrapping,” the doctrine comes into play when an interlocutory order contains two or more issues, one of which is immediately appealable and the remaining issues are not. In those instances in which a party appeals the immediately appealable issue, there is a question whether the appellate court should exercise jurisdiction (“pendent appellate jurisdiction”) over the issues that are not immediately appealable.

While the North Carolina Court of Appeals has not explicitly addressed whether pendent appellate jurisdiction is a viable theory in North Carolina or used the term “pendent appellate jurisdiction,” it has allowed parties to immediately appeal an order deciding issues of subject-matter jurisdiction—even though such issues would ordinarily not be immediately appealable—when the same order was otherwise immediately appealable on other grounds. *E.g.*, *Church v. Carter*, 94 N.C. App. 286, 288, 380 S.E.2d 167, 168 (1989).

More recently, however, the Court of Appeals has signaled that it may wish to avoid attempts to immediately appeal issues through pendent appellate jurisdiction. In *Richmond County Board of Education v. Cowell*, the Court of Appeals declined to review two issues raised by an interlocutory order where only one of the issues affected a substantial right. *See Richmond Cty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 586, 739 S.E.2d 566, 569 (2013). There, the defendants moved to dismiss the action on the grounds of sovereign immunity and standing. *Id.* at 585, 739 S.E.2d at 568. The trial court denied the motion on both grounds. *Id.* The defendants then appealed on the basis of the immediately appealable issue of sovereign immunity. *Id.* After considering the issue of sovereign immunity, the Court of Appeals held that the defendants’ appeal of the issue of standing was impermissible because no immediate right of appeal existed from that portion of the interlocutory order. *Id.* at 586, 739 S.E.2d at 569.

In another decision, the Court of Appeals in *Bynum v. Wilson County* once again confronted the issue of pendent appellate jurisdiction without explicitly mentioning the doctrine by name. *Bynum v. Wilson Cty.*, 228 N.C. App. 1, 5-7, 746 S.E.2d 296, 300-01 (2013), *rev’d in part on other grounds*, 367 N.C. 355, 758 S.E.2d 643 (2014). In *Bynum*, the Court of Appeals held that portions of an order denying a motion to dismiss on governmental immunity grounds were immediately appealable, but other issues unrelated to the immunity issue were not immediately appealable and therefore were not before the Court. *Id.* at 7, 746 S.E.2d at 301.

The defendants attempted to persuade the Court to reach the merits of the non-immunity-related issues contained in the trial court’s order and cited prior

decisions in which the Court of Appeals addressed additional non-immunity-related issues raised in appeals from trial court decisions concerning immunity. *Id.* at 6, 746 S.E.2d at 300 (“For example, Defendants cite *RPR & Assocs. v. State*, in which we addressed a service of process argument, and *Colombo v. Dorrity*, in which we addressed a statute of limitations issue.” (first citing *RPR & Assocs. v. State*, 139 N.C. App. 525, 530-32, 534 S.E.2d 247, 251-53 (2000), *aff’d*, 353 N.C. 362, 543 S.E.2d 480 (2001); then citing *Colombo v. Dorrity*, 115 N.C. App. 81, 84, 86, 443 S.E.2d 752, 755, 756 (1994))). The Court of Appeals was not persuaded; it clarified that those cases were not the rule, but the exception:

Although we held in these two instances that, given the specific factual and procedural contexts from which these cases arose, it would promote judicial economy to resolve these relatively clear-cut non-immunity-related issues in the same opinion in which we addressed the defendants’ immunity-related arguments, we did not hold in either case that non-immunity-related issues would always be considered on the merits in the course of deciding an immunity-related interlocutory appeal or recognize the existence of a substantial right to have multiple issues addressed in the course of an immunity-related appeal.

*Id.* at 6-7, 746 S.E.2d at 300.

Following *Bynum*, the Court of Appeals again declined to exercise pendent appellate jurisdiction in *Hammond v. Saini*, 229 N.C. App. 359, 748 S.E.2d 585 (2013), *aff’d*, 367 N.C. 607, 766 S.E.2d 590 (2014). In *Hammond*, the trial court issued an order compelling discovery, which the defendants appealed on the grounds of medical-review privilege, work-product doctrine, attorney-client privilege, relevancy, and overbreadth. *Id.* at 361-62, 748 S.E.2d at 587. The Court of Appeals held that it would review only the portion of the trial court’s order pertaining to privilege issues, which were immediately appealable. *Id.* at 363, 748 S.E.2d at 588. The Court declined to exercise pendent appellate jurisdiction over the remaining issues, which did not affect a substantial right and were not immediately appealable. *Id.*

Two months after *Hammond* was decided, however, the Court issued an opinion that seemed more amenable to the doctrine of pendent appellate jurisdiction. In *Washington v. Cline*, the plaintiffs properly appealed pursuant to Rule 54(b) from a final judgment dismissing nine of twelve defendants. *Washington v. Cline*, 230 N.C. App. 396, 401, 750 S.E.2d 843, 847 (2013), *rev’d on reh’g on other grounds*, 233 N.C. App. 412, 761 S.E.2d 650 (2014). One of the three defendants who was not dismissed also appealed from an order denying his motion to dismiss for insufficient service of process. *Id.* The defendant who appealed acknowledged that his appeal was not taken from a final judgment or an order affecting a substantial right but nevertheless urged the Court to consider his appeal on the grounds that it would avoid

fragmentary appeals. *Id.* The Court allowed the defendant’s appeal, noting that it “involves the application of the same rules to the same facts and circumstances as plaintiffs’ appeal, which is properly before us.” *Id.* Therefore, the Court reasoned, “in order to prevent fragmentary appeals, we find that [the defendant’s] appeal is also proper at this time.” *Id.*

In light of these decisions, it seems questionable at present whether North Carolina’s appellate courts will demonstrate a willingness to exercise pendent appellate jurisdiction for appellants looking to “bootstrap” additional issues onto an immediately appealable issue.

### **C. Accelerated Review of Interlocutory Orders By Writ of Certiorari**

Immediate appeals of interlocutory orders under the substantial-right doctrine are common. There are instances, however, when an interlocutory does not involve a substantial right, yet is outcome-determinative. Rather than simply proceed to trial, practitioners should consider whether the interlocutory order is a candidate for a certiorari petition.

Under Rule 21 of the North Carolina Rules of Appellate Procedure, “[t]he writ of certiorari may be issued in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals . . . when no right of appeal from an interlocutory order exists.” N.C. R. App. P. 21(a)(1). Thus, in appropriate circumstances, a petition for certiorari can serve as an accelerator for appellate review. The writ allows parties to immediately appeal an interlocutory order before a final judgment when the order is not otherwise immediately appealable by other means—for example, when the order is not otherwise appealable under the substantial-right doctrine or through a Rule 54(b) certification.

Historically, both the Supreme Court and the Court of Appeals have shown a willingness to grant certiorari petitions of this kind, especially if the petition seeks to promote judicial economy by asking the appellate court to resolve a threshold, outcome-determinative question of law. *See, e.g., Lamb v. Wedgewood S. Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 872 (1983) (granting accelerated review by certiorari to resolve a threshold issue that was “strictly a legal one” and “not dependent on further factual development”); *NRC Golf Course, LLC v. JMR Golf, LLC*, 222 N.C. App. 492, 497, 731 S.E.2d 474, 477 (2012) (granting accelerated review by certiorari because “judicial economy will be served by reviewing the interlocutory order” (quoting *Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 389 (1981))); *Harco Nat’l Ins. Co. v. Grant Thornton LLP*, 206 N.C. App. 687, 691, 698 S.E.2d 719, 722 (2010) (“Given the complexities of the instant case and the importance of determining the choice of law to resolve the issues involved, ‘the administration of justice will best be served by granting defendant’s [certiorari] petition.’” (quoting *Reid v. Cole*, 187 N.C. App. 261, 264, 652 S.E.2d 718, 720 (2007))).

Recently, the Supreme Court granted a certiorari petition that sought accelerated review of an outcome-determinative interlocutory order from the North Carolina Business Court. See *Kornegay Family Farms, LLC v. Cross Creek Seed, Inc.*, 793 S.E.2d 217 (N.C. 2016) (mem.). Notably, in that case, the Business Court’s order and opinion denying partial summary judgment had urged the Supreme Court to allow immediate appellate review because the issue was “significant to North Carolina’s jurisprudence . . . and its system of commerce generally.” *Kornegay Family Farms, LLC v. Cross Creek Seed, Inc.*, No. 15 CVS 1646, 2016 NCBC LEXIS 30, at \*22, 2016 WL 1618272, at \*9 (N.C. Super. Ct. Apr. 20, 2016), *petition for cert. allowed*, 793 S.E.2d 217 (N.C. 2016).

While not every case will present such a strong candidate for certiorari, the only substantive criteria for the petition is wide-open: the petitioner need only demonstrate “appropriate circumstances.” N.C. R. App. P. 21(a)(1). Particularly in high-stakes litigation matters, litigants should consider whether an interlocutory, outcome-determinative order meets that standard for accelerated appellate review.

#### **D. Writs of Mandamus**

“A writ of mandamus is an extraordinary court order to ‘a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law.’” *In re T.H.T.*, 362 N.C. 446, 454, 665 S.E.2d 54, 60 (2008) (quoting *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971)). North Carolina’s “appellate courts may issue writs of mandamus ‘to supervise and control the proceedings’ of the lower courts.” *Id.* (quoting N.C. Gen. Stat. § 7A-32(b), (c)).

Some may be tempted to use this extraordinary writ as a means to immediately appeal an interlocutory order that is not immediately appealable. However, North Carolina law does not support this notion. “An action for mandamus may not be used as a substitute for an appeal.” *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570, 160 S.E.2d 719, 727 (1968). A writ of mandamus is to be issued only where there is no other legal remedy. See *Young v. Roberts*, 252 N.C. 9, 17, 112 S.E.2d 758, 765 (1960); see also *Rogers v. Smithson*, No. COA12-1374, 2013 N.C. App. LEXIS 641, at \*4, 2013 WL 3049187, at \*2 (N.C. Ct. App. June 18, 2013) (unpublished) (“[T]he writ of mandamus is not to be used as a remedy of first resort . . .”).

#### **E. Ethical Issues Concerning Meritless Interlocutory Appeals**

The filing of frivolous immediate appeals from interlocutory orders as a delay tactic is a problem in North Carolina. This may be fueled in part by the doctrine of *functus officio*, which dictates that the trial court loses jurisdiction—except to take actions that aid the appellate court in processing the appeal—once a notice of appeal is filed. See generally Thomas L. Fowler, *Functus Officio: Authority of the Trial Court After Notice of Appeal*, 81 N.C. L. Rev. 2331 (2003). Thus, an immediate appeal from

an interlocutory order has the practical effect of “stopping the clock.” Some litigants see this as an advantage in and of itself.

Practitioners should take note that Rule 34(a)(2) of the North Carolina Rules of Appellate Procedure provides for sanctions when “the appeal was taken or continued for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” N.C. R. App. P. 34(a)(2). In addition, lawyers should be mindful of Rules 3.1 and 3.2 of the North Carolina Rules of Professional Conduct. Rule 3.1 provides that “[a] lawyer shall not bring . . . a proceeding, or assert . . . an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” N.C. R. Prof'l Conduct 3.1. Rule 3.2 provides that “[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” N.C. R. Prof'l Conduct 3.2.

Lawyers who appear before North Carolina’s appellate courts should be mindful of these ethical parameters when pursuing immediate appeals from interlocutory orders.

## VI. ADDITIONAL RESOURCES

J. Brad Donovan, *The Substantial Right Doctrine and Interlocutory Appeals*, 17 Campbell L. Rev. 71 (1995).

The Committee would like to acknowledge this outstanding law review article authored 20 years ago by now-Deputy Commissioner J. Brad Donovan of the North Carolina Industrial Commission. Written at a time when analyzing the appealability of interlocutory orders was even more challenging than today, the article provides an excellent analysis of the “substantial right” doctrine as applied by North Carolina’s appellate courts through 1994. *See id.* at 71 n.\* (noting that the article includes cases published through August 30, 1994). Similarities between the organization of portions of this Guide and Deputy Commissioner Donovan’s scholarly work appear with his kind permission.

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

The Committee highly recommends this article, which provides an excellent analysis of the *functus officio* principle as applied by North Carolina’s appellate courts.