APPEALABILITY IN NORTH CAROLINA: COMMON LAW DEFINITION OF THE STATUTORY SUBSTANTIAL RIGHT DOCTRINE

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I

INTRODUCTION

The editors of *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*[1] posit that "the present law [on appealability] is unnecessarily and unacceptably complex, uncertain, and sometimes even inscrutable."[2] The Restatement attempts "to restructure [that law] in a way that might admit of greater simplicity and predictability in application, and thus to suggest an approach to [its] reformation."[3]

The following effort to describe the current status of appealability under the law of North Carolina suggests a similar complexity and uncertainty in this jurisdiction and the consequent desirability of similar efforts at reform. For reasons hereinafter set forth, however, skepticism as to the prospects for significant reform is warranted.

An interlocutory order or judgment under North Carolina law is one which "does not determine the issues but directs some further proceeding preliminary to final decree. Such an order or judgment is subject to change by the court during the pendency of the action to meet the exigencies of the case."[4] As a general rule, there is no right of immediate appeal from interlocutory orders or judgments, and they may be reviewed only upon appeal from a final judgment.[5] The exceptional circumstances under which interlocutory orders are immediately appealable, as a

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1. LAW & CONTEMP. PROBS., Spring 1984, at 13.

2. *Id.* at 15.

3. *Id.* For a comparison of the federal and North Carolina approaches to interlocutory appeals, see Comment, *Interlocutory Appeals in North Carolina: The Substantial Right Doctrine,* 18 WAKE FOREST L. REV. 857 (1982).

4. Greene v. Charlotte Chem. Laboratories, Inc., 254 N.C. 680, 693, 120 S.E.2d 82, 91 (1961); *accord* Waters v. Qualified Personnel, Inc., 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978); Skidmore v. Austin, 261 N.C. 713, 715, 136 S.E.2d 99, 101 (1964).

5. *See* N.C. GEN. STAT. § 1-278 (1983) ("Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.").

A court, however, may refuse to review an interlocutory order upon appeal from final judgment. *See* Ingle v. McCurry, 243 N.C. 65, 66, 89 S.E.2d 745, 746 (1955) (on appeal from final judgment, assignment of error to interlocutory rulings "from which the plaintiffs gave notice of appeal" held premature, not affecting a substantial right, and not appealable); First Union Nat'l Bank v. Wilson, 60 N.C. App. 781, 782, 300 S.E.2d 19, 20 (1983) (entry of default not subject to review on appeal from final judgment of default).

matter of right, are determined by statute.[6]

If an attempted interlocutory appeal does not come within a statutory exception, the appellate court may dismiss the appeal on its own motion, even if neither party raises the question of appealability.[7] In extraordinary circumstances, however, the court may review the merits of the appeal despite the appeal's interlocutory nature.[8] With one exception,[9] the trial court has no authority to make an order immediately appealable when it is one from which there is no appeal of right.[10]

Appeals of right may be taken from interlocutory orders or judgments which (1) in effect determine the action and prevent a judgment from which an appeal might be taken;[11] (2) discontinue the action;[12] (3) grant or refuse a new trial;[13]

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6. N.C. GEN. STAT. §§ 1-277, 1A-1, Rule 54(b) (1983); *id.* § 7A-27 (1981). In some cases appeal of an interlocutory order is dismissed on the ground that the appellant is not a "party aggrieved." Only a party aggrieved by a judgment or order may appeal it. *Id.* § 1-271.

In Lucas v. Felder, 261 N.C. 169, 134 S.E.2d 154 (1964), the clerk ordered the sale of realty to pay the debts of an estate, but did not adjudicate the rights of the parties to the estate's property. The court dismissed the appeal, saying there could be no party aggrieved until there was an adjudication of the parties' rights. In Atkins v. Beasley, 53 N.C. App. 33, 37, 279 S.E.2d 866, 869 (1981), although the interlocutory judgment affected a substantial right and was in theory appealable, it did not order appellant to do anything. He therefore was not aggrieved thereby and could not appeal.

Other cases intertwine the definitions of "party aggrieved" and "substantial right," saying, for example, that a party aggrieved is one whose "rights are substantially affected by judicial order." Coburn v. Roanoke Lane & Timber Corp., 260 N.C. 173, 175, 132 S.E.2d 340, 341 (1963). In *Coburn* the court dismissed the appeal, concluding that "[s]ince plaintiffs are estopped to assert title to the land in controversy, it follows that an order enjoining them from cutting timber which they do not own does not affect any substantial right of theirs. They are not parties aggrieved." 260 N.C. at 177, 132 S.E.2d at 342; *see also* Wachovia Bank & Trust Co. v. Parker Motors, Inc., 13 N.C. App. 632, 634, 186 S.E.2d 675, 677 (1972) ("A party is not aggrieved unless the order complained of affects a substantial right, or in effect determines the action.") (citing N.C. GEN. STAT. § 1-277).

7. *E.g.,* Waters v. Qualified Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

8. *See, e.g.,* Edwards v. City of Raleigh, 240 N.C. 137, 139, 81 S.E.2d 273, 275 (1954) (court chose not to dismiss the appeal, holding that further hearing by the Industrial Commission would be "inconvenient, expensive and futile; and it would seem that this court, under the facts of this case . . . should not require this wholly unnecessary and circuitous course of procedure."); Shoffner Indus., Inc. v. Lloyd Constr. Co., 42 N.C. App. 259, 272, 257 S.E.2d 50, 59 (court chose to examine pleadings in support of and in opposition to motion for summary judgment even though not appealable "to avoid any confusion about the posture of the case on remand"), *discretionary review denied,* 298 N.C. 296, 259 S.E.2d 301 (1979); City of Greensboro v. Irvin, 25 N.C. App. 661, 662, 214 S.E.2d 196, 197 (1975) (court chose to treat premature appeal as a petition for writ of certiorari and reviewed on the merits).

When the court of appeals chooses to review an otherwise unappealable order, the issue of appealability is moot on certiorari review in the supreme court. Stanback v. Stanback, 287 N.C. 448, 454, 215 S.E.2d 30, 34 (1975) (review of court of appeals was pursuant to supervisory authority conferred by N.C. GEN. STAT. § 7A-32(c) (1981)).

In Waters v. Qualified Personnel, Inc., 294 N.C. 200, 202 n.2, 240 S.E.2d 338, 340 n.2 (1978), however, the court of appeals had purported to entertain the case on its merits as an appeal of right and not pursuant to § 7A-32(c). The supreme court granted discretionary review and reversed the court of appeals, holding that it should have dismissed the appeal sua sponte. 294 N.C. at 210, 240 S.E.2d at 344.

9. In a case involving multiple parties or claims, the trial court may create a right of immediate appeal from an interlocutory judgment that is final as to fewer than all of the parties or claims, by certifying that "there is no just reason for delay." N.C. GEN. STAT. § 1A-1, Rule 54(b) (1983); *see infra* text accompanying notes 36-44.

10. *E.g.,* Cox v. Cox, 246 N.C. 528, 532, 98 S.E.2d 879, 883 (1957) ("The attempted appeal was a nullity, notwithstanding the Judge signed the appeal entries appearing of record.").

11. N.C. GEN. STAT. § 1-277(a) (1983); *id.* § 7A-27(d)(2) (1981); *see* Leach v. Alford, 63 N.C. App. 118, 121, 304 S.E.2d 265, 267 (1983).

12. N.C. GEN. STAT. § 1-277(a) (1983); *id.* § 7A-27(d)(3) (1981).

13. *Id.* §§ 1-277(a), 7A-27(d)(4).

(4) adversely rule on the jurisdiction of the court over the person or property of the defendant;[14] (5) are final judgments as to fewer than all claims or parties, and in which it is determined in the judgment that there is no just reason for delay (commonly referred to as Rule 54(b) judgments);[15] or (6) affect a substantial right.[16]

The current status of appealability under each of these categories is discussed below. Some of the classifications, such as orders granting or refusing a new trial, are relatively straightforward and easy to apply. Orders affecting a substantial right, however, present a disorganized display of case law. The courts have been extremely flexible in this area, deciding on an almost ad hoc basis whether the order is appealable as one affecting a substantial right. They appear guided by a desire to reach an equitable disposition in the individual case rather than by the coherent application of consistent legal principles.

While that purpose may have merit, these inconsistencies generate large social costs through needless appeals and delays of trial in an already overtaxed court system and through the disparate treatment of similarly situated individuals or corporate entities.

Viewed in a broader context, the basic rule for guidance in North Carolina is that appeal is available whenever an interlocutory order affects a substantial right. The legislature has not limited the definition of "substantial right." All the other enumerated categories of appealable orders, except perhaps orders under Rule 54(b) (concerning complex litigation), are collapsible into the category of "affecting a substantial right." Although the statute recognizes them individually, it nonetheless leaves the field open for the judiciary to create new categories. Given the courts' high priority for reaching equitable results, even where tenuous legal foundation for appeal exists, the number of situations in which interlocutory appeals are allowed continually expands.

This detailed investigation of the North Carolina case law reveals a judiciary struggling to reach an equitable and workable definition of the substantial rights doctrine. This example of the unstructured, perhaps incomprehensible, body of decision in one state supports the proposition that law revision is worthwhile at the state as well as the federal level. As a collateral benefit, the study provides a useful resource to those interested in North Carolina practice. At this point, practitioners must depend almost exclusively on the courts' various formulations of "substantial rights" for guidance in the appealability of interlocutory orders.

II

ORDERS IN EFFECT DETERMINING THE ACTION AND PREVENTING AN APPEALABLE JUDGMENT

Sections 1-277(a) and 7A-27(d)(2) of the General Statutes grant a right of immediate appeal from any judicial order or determination "which in effect deter-

14. *Id.* § 1-277(b).

15. *Id.* § 1A-1, Rule 54(b) (1983). All references to "Rules" in the text are to the North Carolina Rules of Civil Procedure, N.C. GEN. STAT. § 1A-1 (1983).

16. *Id.* §§ 1-277(a), 7A-27(d)(1).

mines the action, and prevents a judgment from which an appeal might be taken."[17] This provision is invoked primarily to allow appeals from orders granting a motion to dismiss under Rule 12[18] and allowing summary judgment under Rule 56.[19] Thus, a litigant may seek appellate review where it might otherwise be unattainable, since there is technically no final judgment.

III

DISCONTINUATION OF ACTION

Sections 1-277(a) and 7A-27(d)(3) of the General Statutes grant a right of immediate appeal from any interlocutory order which "discontinues the action."[20] This can perhaps be viewed as a final judgment from which an appeal would ordinarily lie. Clearly, a right to appeal in this situation protects a litigant's substantial interest in obtaining access to the appeal process.

IV

NEW TRIAL

Sections 1-277(a) and 7A-27(d)(4) of the General Statutes grant a right of immediate appeal from any interlocutory order granting or refusing a new trial.[21] Although this statutory exception to the nonappealability of interlocutory orders appears absolute, it has been judicially modified by a rule that the grant of a partial new trial, limited solely to damages, is not immediately appealable.[22] It is unclear whether a ruling on a motion for a new trial on both liability and damages, but on fewer than all claims, is immediately appealable.[23]

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17. *Id.* §§ 1-277(a), 7A-27(d)(2).

18. N.C. GEN. STAT. § 1A-1, Rule 12 (1983); *see generally* North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974); Acorn v. Jones Knitting Corp., 12 N.C. App. 266, 182 S.E.2d 862, *cert. denied,* 279 N.C. 511, 183 S.E.2d 686 (1971). For a detailed discussion of cases involving motions to dismiss, see *supra* notes 103-08 and accompanying text.

19. N.C. GEN. STAT. § 1A-1, Rule 56 (1983); *see* Noxco Equip. Co. v. Mason, 291 N.C. 145, 229 S.E.2d 278 (1976).

20. N.C. GEN. STAT. § 1-277(a) (1983); *id.* § 7A-27(d)(3) (1981).

21. *Id.* §§ 1-277(a), 7A-27(d)(4).

22. *E.g.,* Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 251 S.E.2d 443 (1979) (order granting partial summary judgment on liability not appealable when issue of damages reserved for trial), *appeal dismissed,* 449 U.S. 807 (1980); Uniguard Carolina Ins. Co. v. Dickins, 41 N.C. App. 184, 254 S.E.2d 197 (1979) (expressly overruling Digsby v. Gregory, 35 N.C. App. 59, 61, 240 S.E.2d 491, 493 (1978), on this point).

23. In Grove v. Baker, 174 N.C. 745, 746, 94 S.E. 528, 529 (1917), the court held that there was a right of immediate appeal from the grant of a new trial on only one of four issues, on the ground that plaintiffs had a substantial right to a judgment on the jury's verdict. The grant of the partial new trial was expressly made "as a matter of law, and not in the exercise of any discretion." Had the grant of the new trial been discretionary, the court reasoned that the appeal would have been premature.

In Deal Constr. Co. v. Spainhour, 59 N.C. App. 537, 296 S.E.2d 822 (1982), the court dismissed an appeal from an order setting aside a jury verdict and granting a new trial. The court did not expressly consider whether a substantial right was affected.

V

JURISDICTION

Section 1-277(b) of the General Statutes grants the right of immediate appeal by "[a]ny interested party . . . from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant."[24]

The Supreme Court of North Carolina held in *Love v. Moore*[25] that section 1-277(b) grants the right of appeal from adverse rulings on motions which attack the power of the court to bring the defendant before it on minimum contacts issues. The court reasoned that the statutory reference to "property" indicates *in rem* or *quasi in rem* jurisdiction, and that "person" refers to *in personam* jurisdiction.[26] The defendant had moved to dismiss the complaint for lack of personal jurisdiction[27] on the ground that process and service of process were insufficient.[28] The court reasoned that the defendant's motion attacked the technical attempts to invoke jurisdiction by bringing the defendant before the court, rather than the court's power to invoke jurisdiction, where that power was properly applied. Thus, the "true character" of the motion was not based on lack of personal jurisdiction, and it was not appealable under section 1-277(b).[29]

Interlocutory rulings on motions to dismiss for lack of jurisdiction due to the insufficiency of process and service of process are not immediately appealable under section 1-277(b),[30] but rulings on motions to dismiss for lack of jurisdiction over person or property are immediately appealable under that section.[31] Interlocutory rulings on motions to dismiss for lack of subject matter jurisdiction,[32] however, are not immediately appealable under section 1-277(b).[33]

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24. N.C. GEN. STAT. § 1-277(b) (1983). As an alternative, "such party may preserve his exception for determination upon any subsequent appeal in the cause." *Id.*

25. 305 N.C. 575, 291 S.E.2d 141 (1982).

26. *Id.* at 580, 291 S.E.2d at 145-46.

27. *See* N.C. GEN. STAT. § 1A-1, Rule 12(b)(2) (1983).

28. *See id.* Rule 12(b)(4)-(5).

29. Prior cases in the court of appeals had allowed immediate appeal from the denial of a motion to dismiss for insufficiency of process and of service of process on the ground that the court would lack personal jurisdiction if service were insufficient. *E.g.,* Kahan v. Longiotti, 45 N.C. App. 367, 263 S.E.2d 345 (1980). *Contra* Broaddus v. Broaddus, 45 N.C. App. 666, 263 S.E.2d 842 (1980) (no appeal from denial of motion to dismiss temporary child custody order for lack of personal jurisdiction due to failure to serve with process; court of appeals reasoned that trial court never claimed to have personal jurisdiction over defendant and children were not his "property").

30. The granting of a motion to dismiss would obviously be immediately appealable as a final judgment if it in effect determined the action or discontinued it. N.C. GEN. STAT. § 1-277(a) (1983); *id.* § 7A-27(d)(2)-(3) (1981). *See infra* note 33.

31. *See* Teachy v. Coble Dairies, Inc., 306 N.C. 324, 327, 293 S.E.2d 182, 184 (1982); Southern Spindle & Flyer Co. v. Milliken & Co., 53 N.C. App. 785, 786, 281 S.E.2d 734, 735, *discretionary review denied,* 304 N.C. 729, 288 S.E.2d 381 (1981); Holt v. Holt, 41 N.C. App. 344, 346, 255 S.E.2d 407, 410 (1979); Hankins v. Somers, 39 N.C. App. 617, 618, 251 S.E.2d 640, 642, *discretionary review denied,* 297 N.C. 300, 254 S.E.2d 920 (1979).

32. *See* N.C. GEN. STAT. § 1A-1, Rule 12(b)(1) (1983).

33. Teachy v. Coble Dairies, Inc., 306 N.C. 324, 326-27, 293 S.E.2d 182, 183 (1982) (expressly overruling contrary holdings in Eller v. Coca-Cola Co., 53 N.C. App. 500, 501, 281 S.E.2d 81, 82 (1981), and Kilby v. Dowdle, 4 N.C. App. 450, 452, 166 S.E.2d 875, 877 (1969); implicitly overruling Journeys Int'l v. Corbett, 53 N.C. App. 124, 126, 280 S.E.2d 5, 7 (1981)); Shaver v. Monroe Constr. Co., 54 N.C. App. 486, 283 S.E.2d 526 (1981).

In *Teachy v. Coble Dairies, Inc.*[34] the supreme court considered whether a claim of sovereign immunity in a negligence action is a claim as to which state courts have no jurisdiction over the person of the state, or whether state courts have no jurisdiction to hear the particular subject matter of tort claims against the state. If sovereign immunity is a matter of lack of subject matter jurisdiction, a ruling on a motion to dismiss on the ground of sovereign immunity is not immediately appealable pursuant to section 1-277(b). If, however, the issue is personal jurisdiction, such a ruling is appealable under section 1-277(b). The supreme court chose not to address this issue, leaving unresolved contradictory decisions of the Court of Appeals of North Carolina,[35] and proceeded to review the merits of the appeal.

VI

RULE 54(B) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE

Rule 54(b) of the North Carolina Rules of Civil Procedure provides in pertinent part:

> (a) *Definition.* A judgment is either interlocutory or the final determination of the rights of the parties.
>
> (b) *Judgment upon multiple claims or involving multiple parties.* When more than one claim for relief is presented in an action, whether as a claim, counter-claim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.[36]

Rule 54(b) affects the appealability of interlocutory orders in two ways. First, it allows a trial judge to authorize an appeal from a judgment that is final[37] as to

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Note, however, that the *granting* of a motion to dismiss for lack of subject matter jurisdiction is immediately appealable under N.C. GEN. STAT. §§ 1-277(a) (1983) and 7A-27(d)(2)-(3) (1981), when it determines or discontinues the action. *See Teachy,* 306 N.C. at 327, 293 S.E.2d at 183. If the motion to dismiss were granted regarding fewer than all the claims or parties, appealability would be determined by whether the trial judge made a Rule 54(b) determination, or a substantial right was affected thereby. *See* Farr v. Babcock Lumber Co., 182 N.C. 725, 109 S.E. 833 (1921) (motion to dismiss for lack of subject matter jurisdiction granted regarding one of four claims and trial ordered for remaining three; appeal from dismissal of claim denied because no substantial right affected).

34. 306 N.C. 324, 293 S.E.2d 182.

35. The court of appeals held in *Teachy,* 54 N.C. App. 688, 284 S.E.2d 332 (1981), that sovereign immunity was a question of subject matter jurisdiction and dismissed the appeal, relying on Shaver v. Monroe Constr. Co., 54 N.C. App. 486, 283 S.E.2d 526 (1981). Contrary results were reached in Huyck Corp. v. Mangum, Inc., 58 N.C. App. 532, 293 S.E.2d 846 (1982); Stahl-Rider, Inc. v. State, 48 N.C. App. 380, 269 S.E.2d 217 (1980); and Sides v. Cabarrus Memorial Hosp., 22 N.C. App. 117, 205 S.E.2d 784 (1974), *modified,* 287 N.C. 14, 213 S.E.2d 297 (1975).

36. N.C. GEN. STAT. § 1A-1, Rule 54(a)-(b) (1983). (This rule is modeled on FED. R. CIV. P. 54.).

37. An otherwise effective determination of appealability by the trial judge will not entitle a party to appeal a judgment that is not final. *See* Cook v. Export Leaf Tobacco Co., 47 N.C. App. 187, 189, 266 S.E.2d 754, 756 (1980) (summary judgment requiring plaintiff to indemnify defendant for any judgments arising from incident in regard to which plaintiff's cause was filed was not final since defendant had not yet been held liable to plaintiff); *see also* Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 491, 251

fewer than all the claims or parties[38] by determining in the judgment that there is "no just reason for delay."[39] Whether the trial judge must use the precise language of the rule in identifying the judgment as immediately appealable is unclear.[40] The judge's mere signing of the appeal entry is probably not, however, a sufficient determination of appealability under Rule 54(b).[41]

Second, absent a determination of appealability by the trial judge, the rule provides for no immediate appeal from any adjudication of fewer than all the claims or the rights of fewer than all the parties, "except as expressly provided by these rules or other statutes."[42] The supreme court has held that this reference to "other statutes" refers in particular to sections 1-277 and 7A-27(d) of the General Statutes.[43] Rule 54(b) thus in no way restricts the right of appeal provided by other statutes, but actually expands it by allowing the trial judge to create an appealable interlocutory judgment in limited circumstances.[44]

VII

SUBSTANTIAL RIGHTS

Sections 1-277(a) and 7A-27(d)(1) of the General Statutes grant a right of immediate appeal from any interlocutory order which affects a substantial right.[45]

S.E.2d 443, 447 (1979) ("[A] trial judge [cannot] by denominating his decree a 'final judgment' make it immediately appealable under Rule 54(b) if it is not such a judgment.").

38. "In a case involving only two parties, . . . it is important in applying Rule 54(b) to distinguish the true multiple claim case from the case in which only a single claim based on a single factual occurrence is asserted but in which various kinds of remedies may be sought." Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 490, 251 S.E.2d 443, 447 (1979).

39. *See, e.g.,* Harris v. Jim Stacy Racing, Inc., 53 N.C. App. 597, 598, 281 S.E.2d 455, 456-57 (order provided "no just reason for delay" regarding claims of defendant against certain named parties, but denied plaintiff's motion pending final determination of plaintiff's claims and defendant's counterclaims), *discretionary review denied,* 304 N.C. 726, 287 S.E.2d 900 (1981); Wilkerson Contracting Co. v. Rowland, 29 N.C. App. 722, 724, 225 S.E.2d 840, 842 (grant of motion for judgment on the pleadings disposed of fewer than all claims, but judge stated "no just reason for delay"), *discretionary review denied,* 290 N.C. 660, 228 S.E.2d 452 (1976).

40. *See* Cook v. Export Leaf Tobacco Co., 47 N.C. App. 187, 189, 266 S.E.2d 754, 756 (1980) (dictum that trial court's finding that plaintiff "shall be entitled to appeal this judgment" might comply with Rule 54(b)).

41. *See* Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 171-72, 265 S.E.2d 240, 247 (1980). *But see* Oestreicher v. American Nat'l Stores, 290 N.C. 118, 129, 225 S.E.2d 797, 804-05 (1976) (dictum that the omission of a finding that "there is no just reason for delay" by the trial judge in the judgment "could have very well been an inadvertence," and that the judge "certainly intended that plaintiff be permitted to appeal, or otherwise he would not have entered the appeal entries on account of the language of Rule 54(b) and would have required plaintiff to seek certiorari").

42. N.C. GEN. STAT. § 1A-1, Rule 54(b) (1983).

43. Oestreicher v. American Nat'l Stores, 290 N.C. 118, 131, 225 S.E.2d 797, 805 (1976). *See supra* text accompanying notes 11-23. After the enactment of Rule 54(b), *see* Act to Amend the Laws Relating to Civil Procedure, ch. 954, sec. 1, 1967 N.C. Sess. Laws 1274, 1326-27 (codified at N.C. GEN. STAT. § 1A-1, Rule 54(b) (1983)), and before *Oestreicher,* the court of appeals had construed Rule 54(b) to allow appeals pursuant to the exceptions provided by N.C. GEN. STAT. §§ 1-277, 7A-27(d) only where the judge finds "no just reason for delay." *See* Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974) (first court of appeals case to hold § 1-277 not to be an express authorization of appeal referred to by Rule 54(b)); *see also* N.C. GEN. STAT. § 1-75.12(c) (1983) (granting right of immediate appeal from grant of stay to permit foreign trial; if stay denied, movant must seek certiorari review or waive error).

44. *See* Oestreicher v. American Nat'l Stores, 290 N.C. 118, 144, 225 S.E.2d 797, 813 (1976) (Sharp, C. J., concurring and dissenting).

45. N.C. GEN. STAT. § 1-277(a) (1983); *id.* § 7A-27(d)(1) (1981).

No other statutory ground for interlocutory appeals has been subject to such extensive judicial interpretation.

The language of section 1-277(a) has been part of the statutory law of North Carolina without amendment since 1868.[46] In 1883 the supreme court noted that "[n]o rule has yet been settled classifying [cases in which postponement of the appeal until final judgment would result in absolute loss of, or unavoidable prejudice to, the substantial right], and perhaps it would be unwise to undertake to settle a rule definitely at this time."[47] A century later, the court still has not "settle[d] a rule" for classifying substantial rights. The supreme court recently stated:

> Admittedly the "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.[48]

One consideration repeatedly emphasized by the appellate courts is that the order affecting a substantial right must be such that it will work injury to the appellant if not corrected before appeal from final judgment.[49] In addition, the right must be intrinsically substantial, irrespective of whether it will be lost or prejudiced absent immediate appeal.

Rarely have the North Carolina courts addressed this requirement expressly. Usually the courts merely state that a right is or is not substantial. The supreme court has, however, quoted with approval the following definition of a "substantial right": "a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right."[50]

Enhanced understanding of when an interlocutory order affects a substantial right requires a survey of the case law.[51] This extensive survey shows that rather

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46. Oestreicher v. American Nat'l Stores, 290 N.C. 118, 126, 225 S.E.2d 797, 803 (1976).

47. Jones v. Call, 89 N.C. 188, 190 (1883) (per curiam).

48. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978).

49. *E.g.,* Oestreicher v. American Nat'l Stores, 290 N.C. 118, 124-25, 225 S.E.2d 797, 802 (1976); Stanback v. Stanback, 287 N.C. 448, 453, 215 S.E.2d 30, 34 (1975).

50. Oestreicher v. American Nat'l Stores, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (1971)); *see also* Setzer v. Annas, 21 N.C. App. 632, 634, 205 S.E.2d 553, 555 (1974) ("substantial" means "of real worth and importance [or] of considerable value" (citing BLACK'S LAW DICTIONARY (4th ed. 1968)); "substantial" is intended "as a roadblock to trivial appeals"), *rev'd on other grounds,* 286 N.C. 534, 212 S.E.2d 154 (1974).

51. Occasionally the courts have confused the limited review of discretionary orders with the appealability of such orders. That an interlocutory order is within the discretion of the trial judge, and hence reviewable only for abuse of discretion, does not determine whether a substantial right is affected thereby; opinions which fail to distinguish these issues should be read critically. *See, e.g.,* Veazey v. City of Durham, 231 N.C. 354, 57 S.E.2d 375 (1950) (since judge had discretion whether to order compulsory reference, order refusing reference did not affect a substantial right; *see infra* note 146); Leonard v. Johns-Manville Sales Corp., 57 N.C. App. 553, 291 S.E.2d 828 (court appeared to give lack of substantial right and discretionary character of order as alternative bases for nonappealability; *see infra* note 76 and accompanying text), *discretionary review denied,* 306 N.C. 558, 294 S.E.2d 371 (1982); Henredon Furniture Indus., Inc. v. Southern Ry., 27 N.C. App. 331, 219 S.E.2d 238 (discretionary nature of order and lack of substantial right not clearly distinguished), *discretionary review denied,* 289 N.C. 298, 222 S.E.2d 697 (1975); *see also* Parrish v. Atlantic Coast Line R.R., 221 N.C. 292, 20 S.E.2d 299 (1942) (not necessary to consider whether substantial right is affected when ruling is on motion not addressed to court's discretion, since motion made as matter of right is immediately appealable). The court's reasoning in *Parrish* was akin to that used to

than uniformly applying definite rules, the courts use an elastic judicial construction to meet individual needs. For convenience of reference, the subject matter groupings of cases are set forth alphabetically, with a final category for miscellany.

A. Additional Parties

North Carolina courts generally have not allowed immediate appeal from the grant or denial of motions involving additional parties.[52]

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determine when a ruling on a motion for change of venue affects a substantial right. *See infra* notes 193-94 and accompanying text.

52. *E.g.*, Burgess v. Trevathan, 236 N.C. 157, 72 S.E.2d 231 (1952) (joinder of additional party; court recognized general rule of nonappealability, but nevertheless chose to review merits); City of Shelby v. Lackey, 235 N.C. 343, 69 S.E.2d 607 (1952) (per curiam) (when plaintiff city sued to enforce zoning ordinance and restrain defendants from continuing to use residential lot for business purposes, adjacent property owners allowed to become parties plaintiff; no substantial right of defendants' affected thereby); Raleigh v. Edwards, 234 N.C. 528, 67 S.E.2d 669 (1951) (intervention by party claiming interest in land sought to be condemned; no substantial right lost because no determination of validity of claim); Order of Masons v. Order of Masons, 225 N.C. 561, 35 S.E.2d 613 (1945) (per curiam) (order allowing additional parties plaintiff); Lane v. Richardson, 101 N.C. 181, 7 S.E. 710 (1888) (in plaintiff's action to recover balance due on note, payee on note allowed to become additional defendant and give answer supporting plaintiff; no substantial right of payor-defendant-appellant affected); Terry's Floor Fashions, Inc. v. Murray, 61 N.C. App. 569, 300 S.E.2d 888 (1983) (denial of motion to add third-party defendant as necessary defendant); Wood v. City of Fayetteville, 35 N.C. App. 738, 242 S.E.2d 640 (intervention of additional defendant; court rejected plaintiffs' contention that the order resulted in their having to defend the constitutionality of a statutory section, since the original defendants raised this issue as a defense and, in any event, no right relating thereto would be lost if not reviewed before final judgment), *discretionary review denied,* 295 N.C. 264, 245 S.E.2d 781 (1978); Guy v. Guy, 27 N.C. App. 343, 219 S.E.2d 291 (1975) (joinder of banks holding savings accounts of defendant husband in which plaintiff wife might have an interest); Henredon Furniture Indus., Inc. v. Southern Ry., 27 N.C. App. 331, 219 S.E.2d 238 (order finding insurer was proper but not necessary party and denying defendant's motion to join the insurance company; the court appeared to confuse limited review of discretionary matters with appealability, *see supra* note 51, but, in any event, concluded no substantial right was affected), *discretionary review denied,* 289 N.C. 298, 222 S.E.2d 697 (1975).

Only two decisions have allowed immediate appeal from orders involving additional parties, and neither turned upon traditional substantial rights analysis.

In Childers v. Powell, 243 N.C. 711, 92 S.E.2d 65 (1956), persons claiming a lien on land prior to plaintiff's alleged lien were allowed to intervene as parties defendant. Recognizing that this order would ordinarily not be immediately appealable absent threatened deprivation of a substantial right, the court held this general rule of interlocutory appeals had no application in this situation. It stated:

> In short, there is no controversy in which appellees may intervene. Under the circumstances disclosed, the controversy as between intervenors and plaintiff should be litigated in and determined by independent action between these parties rather than by attempting to engraft a new and live controversy on a moribund action.
>
> Here defendants failed to file answer, thus ignoring the action. There is no issue or controversy subsisting as between plaintiff and defendants. Whatever judgment may be entered will be by default, unaffected by any allegations the intervenors may make. It will be determinative only as between the plaintiff and defendants.

Id. at 713, 92 S.E.2d at 67. The intervenors were held to be proper, but not necessary, parties.

Williams v. Hooks, 200 N.C. 419, 157 S.E. 65 (1931), was an action to appoint a receiver to handle investments of the deceased, a superior court clerk. Two sureties on bonds filed by the deceased as clerk were joined as defendants for the sole purpose of providing them with notice of all orders made by the court. The sureties appealed the refusal of the court to dismiss them. The supreme court held the sureties were not proper parties since neither had any intrest in the securities which were the subject matter of the action, and thus the judgment retaining them was reviewable. *Id.* at 421, 157 S.E. at 66. The court neither discussed appealability of interlocutory orders nor mentioned substantial rights, and seemed to confuse appealability with the limited scope of review of discretionary matters.

B. Amendments to Pleadings

An order allowing a party to amend a pleading is generally held not to affect a substantial right and is thus not immediately appealable.[53]

An order denying a motion to amend an answer in order to assert additional affirmative defenses and counterclaims was held to affect a substantial right, however, where defendants were attempting to assert a compulsory counterclaim, because "failure to assert a compulsory counterclaim will ordinarily bar future action on the claim."[54] On the other hand, denials of motions to amend to assert a statute of frauds defense[55] and to allege punitive damages[56] have been held to be not immediately appealable.

C. Attachment

Refusal to dismiss a warrant of attachment has been held immediately appealable.[57] On the other hand, an order dissolving an attachment on some, but not all, property and calling for a jury to decide whether any damages resulted therefrom was held not to affect a substantial right.[58]

An order under the Uniform Commercial Code that plaintiffs have immediate possession of collateral described in previously issued orders of attachment did not affect a substantial right and was not immediately appealable.[59]

D. Condemnation

Section 136-108 of the General Statutes mandates that in highway condemnation proceedings all issues other than damages, including the question of the area to be taken, shall be determined by a judge upon motion.[60] Section 136-119 provides that either party to such actions has a right of appeal for errors of law in the same manner as in any other civil actions.[61]

In *Highway Commission v. Nuckles*[62] the supreme court concluded from these statutory sections that an order determining which tracts of land are to be condemned, prior to determination of the compensation to be awarded, necessarily involved a substantial right and was immediately appealable under section

53. *E.g.,* Order of Masons v. Order of Masons, 225 N.C. 561, 562, 35 S.E.2d 613, 613 (1945) (per curiam) (amendment of complaint); Nissen Co. v. Nissen, 198 N.C. 808, 809, 153 S.E. 450, 450 (1930) (per curiam) (in appealing order allowing amendment of complaint where no substantial right is affected, "[t]he defendant attempts to jump over the stile before he gets to it"); Clark v. Clark, 42 N.C. App. 84, 85, 255 S.E.2d 568, 568 (1979) (denial of motion to strike amended complaint on grounds that defendant had no notice of hearing on motion to amend and no chance to be heard).

54. Hudspeth v. Bunzey, 35 N.C. App. 231, 233, 241 S.E.2d 119, 121, *discretionary review denied,* 294 N.C. 736, 244 S.E.2d 154 (1978).

55. Buchanan v. Rose, 59 N.C. App. 351, 296 S.E.2d 508 (1982).

56. Lazenby v. Godwin, 49 N.C. App. 300, 271 S.E.2d 69 (1980).

57. *E.g.,* Mitchell v. Elizabeth City Lumber Co., 169 N.C. 397, 86 S.E. 343 (1915).

58. Brown & Co. v. Nimocks, 126 N.C. 808, 36 S.E. 278 (1900).

59. Citicorp Person-to-Person Fin. Center, Inc. v. Stallings 601 Sales, Inc., 49 N.C. App. 187, 270 S.E.2d 567 (1980).

60. N.C. GEN. STAT. § 136-108 (1981).

61. N.C. GEN. STAT. § 136-119 (1981).

62. 271 N.C. 1, 155 S.E.2d 772 (1967).

1-277(a).[63] The court stated:

> One of the purposes of G.S. 136-108 is to eliminate from the jury trial any question as to what land the State Highway Commission is condemning and any question as to its title. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors. G.S. 1-277.
>
> Obviously, it would be an exercise in futility, completely thwarting the purpose of G.S. 136-108, to have the jury assess damages to tracts 1, 2, 3, and 4 if plaintiff were condemning only tracts A and B, and the verdict would be set aside on appeal for errors committed by the judge in determining the "issues other than damages." As Bobbitt, J., said in *Light Company v. Creasman,* 262 N.C. 390, 397, 137 S.E.2d 497, 502, "A controversy as to what land a condemnor is seeking to condemn has no place in a condemnation proceeding."[64]

It is difficult to reconcile the appealability of an order determining only what property has been condemned, leaving the damages issues unresolved, with the general rule that a judgment on liability only, leaving damages to be determined, is not immediately appealable. It appears, however, that the state's interest in condemning property for the benefit of the public, together with the existence of a comprehensive statutory scheme controlling condemnation, has resulted in a special rule of appealability for interlocutory condemnation orders.

E. Contempt

Under current statutory law in North Carolina "[a] person found in civil contempt may appeal in the manner provided for appeals in civil actions."[65] Thus, the appealability of an interlocutory ruling finding civil contempt is governed by sections 1-277(a) and 7A-27(d).[66]

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63. N.C. GEN. STAT. § 1-277(a) (1983).

64. Highway Comm'n v. Nuckles, 271 N.C. 1, 14-15, 155 S.E.2d 772, 784 (1967).

Referring to an order determining which lands are to be condemned, the supreme court subsequently commented on its *Nuckles* decision as follows: "This . . . is a classic example of an interlocutory order which affects a substantial right and will work injury to the party aggrieved if not corrected before final judgment." Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 486, 493, 251 S.E.2d 443, 448 (1979); *see also* Moses v. State Highway Comm'n, 261 N.C. 316, 317, 134 S.E.2d 664, 665 (order directing appointment of commissioners following determination of entitlement to compensation in condemnation proceeding not appealable of right, but court exercised supervisory capacity to review because "the parties desire an answer to a question which is fundamental in determining their rights, is also of public importance, and when decided will aid State agencies in the performance of their duties"), *cert. denied,* 379 U.S. 930 (1964).

65. N.C. GEN. STAT. § 5A-24 (1981).

Under prior law, no statutes controlled the right of appeal from proceedings "as for contempt," the predecessor of what is currently called civil contempt. All existing statutory references to "as for contempt" are deemed to refer to civil contempt under Article 2 of the General Statutes. *Id.* § 5A-25.

> As a consequence, no legal impediment bar[red] a person, who [was] penalized as for contempt, from obtaining a review of the judgment entered against him in the superior court by a direct appeal to the Supreme Court. . . . [S]uch right of appeal ha[d] been exercised in proceedings as for contempt without question for upwards of a hundred years.

Luther v. Luther, 234 N.C. 429, 432, 67 S.E.2d 345, 347 (1951) (court cited long line of North Carolina precedent allowing immediate appeal from order holding plaintiff "as for contempt"; case decided before enactment of current civil contempt provisions, *see* Act of June 23, 1977, ch. 711, § 3(a), 1977 N.C. Sess. Laws 853, 894-95 (codified as amended at N.C. GEN. STAT. §§ 5A-21 to -23 (1981)).

For provisions on appeals from criminal contempt orders, see N.C. GEN. STAT. § 5A-17 (1981); *id.* §§ 15A-1441 to -1453 (1983).

66. *Id.* § 1-277(a) (1983); *id.* § 7A-27(d) (1981).

In *Willis v. Duke Power Co.*[67] the defendant was found in contempt for failure to comply with a discovery order, but the trial court provided that the defendant could purge itself by giving the plaintiff certain information within thirty days. The supreme court noted that without the purge provision the order would be immediately appealable under then extant statutory and case law regarding criminal contempt appeals. It found that a substantial right would be affected by the purge provision, which forced defendant either to risk punishment or to comply with an order it believed erroneous. The court stated:

> We hold . . . that when a civil litigant is adjudged to be in contempt for failing to comply with an earlier discovery order, the contempt proceeding is both civil and criminal in nature and the order is immediately appealable for the purpose of testing the validity both of the original discovery order and the contempt order itself where . . . the contemnor can purge himself . . . only by, in effect, complying with the discovery order of which he essentially complains.[68]

In *Clark v. Clark*[69] the trial court found the plaintiff in contempt, but withheld punishment. The supreme court held that, because the trial court retained the right to impose punishment in the future, the order holding plaintiff in contempt affected a substantial right.[70]

In *Luther v. Luther*[71] the plaintiff was found punishable "as for contempt,"[72] and was allowed the right of immediate appeal. The court stated, per Justice Ervin:

> A party to a proceeding as for contempt undoubtedly waives his right to have the judgment . . . reviewed on appeal by voluntarily paying the fine imposed upon him by the judgment. But such is not this case. . . . [P]laintiff paid the fine under protest at the precise moment she noted her appeal from the order imposing it, and . . . she took this course to avoid being committed to jail until the fine was paid. Inasmuch as the payment was the product of coercion, we hold that the plaintiff did not waive her right of appeal by making it. If the law afforded the plaintiff no way out of her dilemma except that of forfeiting her right of appeal on the one hand or going to jail on the other, she might well exclaim with the poet: "Which way I fly is Hell!"[73]

There are no statutory provisions for appeal from the refusal to find contempt, other than those applying to all interlocutory orders. In *Patterson v. Phillips*[74] the plaintiff's attorney sought to have the defendant's attorney held in criminal contempt, and the plaintiff appealed the court's finding of no contempt. The court of appeals noted that there are no statutes specifically addressing appeal from an *acquittal* of civil or criminal contempt and held that, since the contempt proceedings were held "to vindicate the dignity of the court,"[75] no substantial right of the plaintiff was affected.

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67. 291 N.C. 19, 229 S.E.2d 191 (1976).

68. *Id.* at 30, 229 S.E.2d at 198; *cf.* Midgett v. Crystal Dawn Corp., 58 N.C. App. 734, 736, 294 S.E.2d 386, 387 (1982) (citing *Willis v. Duke Power Co.* in allowing appeal from order holding sanctions appropriate for failure to comply with discovery order, but withholding sanctions pending appeal).

69. 294 N.C. 554, 243 S.E.2d 129 (1978).

70. *Id.* at 571, 243 S.E.2d at 139.

71. 234 N.C. 429, 67 S.E.2d 345 (1951).

72. *See supra* note 65.

73. *Luther,* 234 N.C. at 433, 67 S.E.2d at 348 (quoting J. MILTON, PARADISE LOST, bk. IV, line 75).

74. 56 N.C. App. 454, 289 S.E.2d 48 (1982).

75. *Id.* at 456, 289 S.E.2d at 50.

In *Piedmont Equipment Co. v. Weant*[76] a dismissal of a charge of indirect civil contempt was held to affect a substantial right because the contempt proceedings were brought as the only method of enforcing a consent judgment.

F. Counsel

In *Carrington v. Townes,*[77] the denial of a motion for court-appointed counsel in a civil paternity action was reviewed by the supreme court "pursuant to G.S. 1-277(a)."[78] Although the court did not comment further on appealability, presumably the claimed right to counsel is substantial and clearly would be lost were defendant forced to proceed pro se.

Orders regarding reasonable attorney fees and the permissive withdrawal of counsel in an action for partition by sale of property held by tenants in common have been held not immediately appealable.[79]

In *Leonard v. Johns-Manville Sales Corp.*[80] the court of appeals considered an order denying the plaintiff's motion to reconsider a prior order that denied a motion to allow an out-of-state attorney to appear for the plaintiff. In holding the order not immediately appealable, the court said:

> [W]here the court in its discretion denies a motion for admission of counsel pro hac vice . . . , such 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.[81]

G. Default

A judgment by default which determines all claims and the rights of all parties is clearly appealable as a final judgment.[82] An order setting aside an entry or judgment of default is not appealable under recent case law.[83] Although some cases had held such orders appealable of right,[84] in *Bailey v. Gooding*[85] the supreme

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76. 30 N.C. App. 191, 226 S.E.2d 688 (1976).
77. 306 N.C. 333, 293 S.E.2d 95 (1982), *cert. denied,* 459 U.S. 1113 (1983).
78. *Id.* at 335, 293 S.E.2d at 97.
79. Rogers v. Brantley, 244 N.C. 744, 94 S.E.2d 896 (1956).
80. 57 N.C. App. 553, 291 S.E.2d 828.
81. *Id.* at 555, 291 S.E.2d at 829. The court appeared to confuse the limited scope of review of discretionary orders with appealability. *See supra* note 51.

In Holley v. Burroughs Wellcome Co., 56 N.C. App. 337, 289 S.E.2d 393 (1982), the court reviewed the denial of a motion to allow an out-of-state attorney to appear for plaintiff without discussing appealability. It stated, however, that plaintiff had a fundamental right to counsel of her choice. 56 N.C. App. at 345, 289 S.E.2d at 397. The *Leonard* court held that *Holley* was not precedent for the appealability of such an order since the *Holley* court did not discuss appealability and relied on precedent that did not apply to the right to out-of-state counsel. *Leonard,* 57 N.C. App. at 555, 291 S.E.2d at 830.

82. *See, e.g.,* First Union Nat'l Bank v. Wilson, 60 N.C. App. 781, 782-83, 300 S.E.2d 19, 20 (1983).
83. *See, e.g.,* Love v. Moore, 305 N.C. 575, 291 S.E.2d 141 (1982) (denial of motion to strike order vacating default judgment is equivalent of order setting aside default and not appealable of right); Shaw v. Pedersen, 53 N.C. App. 796, 281 S.E.2d 700 (1981) (order setting aside default judgment); Metcalf v. Palmer, 46 N.C. App. 622, 265 S.E.2d 484 (1980) ("The right to avoid one trial on the disputed issues is not normally a substantial right that would allow an interlocutory appeal."); Pioneer Acoustical Co. v. Cisne & Assocs., 25 N.C. App. 114, 212 S.E.2d 402 (1975) (order setting aside entry of default).
84. Shackleford v. Taylor, 261 N.C. 640, 135 S.E.2d 667 (1964); Davis v. Mitchell, 46 N.C. App. 272, 265 S.E.2d 248 (1980) (recognizing that, although the practice has been criticized, the North Carolina

court established that no substantial right was affected by the necessity of undergoing a trial on the merits.[86]

H. Discovery

As a general rule, orders denying or allowing discovery are not immediately appealable of right. The court of appeals has stated:

> It has been held that orders denying or allowing discovery are not appealable . . . . If, however, 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 if the information desired is highly material to a determination of the critical question to be resolved in the case, an order denying such discovery does affect a substantial right and is appealable.[87]

In the following cases orders declining to compel or prohibiting discovery were held not immediately appealable:[88]

In *Dworsky v. Travelers Insurance Co.*[89] the plaintiffs sought the defendant's entire file on their claim, with limited exceptions. Because the record failed to show what material and relevant information might be in the file, the court of appeals characterized the plaintiffs' discovery request as a "fishing expedition," and concluded that "plaintiffs [had] not shown that the information sought [was] so crucial to the outcome . . . that it would deprive them of a substantial right . . . ."[90]

In *Starmount Co. v. City of Greensboro*[91] the court of appeals refused to order the plaintiff to answer certain interrogatories. It held that the information denied the defendant was not crucial to its defense, and that the defendant had received answers to other interrogatories giving detailed information regarding all transac-

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courts historically have entertained such appeals); Howard v. Williams, 40 N.C. App. 575, 253 S.E.2d 571 (1979).

85. 301 N.C. 205, 270 S.E.2d 431 (1980).

86. The court's rationale expressly followed the approach adopted in Waters v. Qualified Personnel, Inc., 294 N.C. 200, 240 S.E.2d 338 (1978). *See supra* text accompanying note 48. The court held that being forced to undergo a full trial on the merits instead of a trial solely on damages did not affect a substantial right. *Bailey,* 301 N.C. at 210, 270 S.E.2d at 434.

87. Dworsky v. Travelers Ins. Co., 49 N.C. App. 446, 447-48, 271 S.E.2d 522, 523 (1980). Under former N.C. GEN. STAT. § 1A-1, Rule 27(b) (1969), deleted by Act of June 24, 1975, ch. 762, § 2, 1975 N.C. Sess. Laws 1040, 1043-44, a potential plaintiff could petition for a deposition to obtain information to prepare a complaint. Rule 27(b) and its predecessor "generated about one half of all appeals from orders relating to discovery in North Carolina courts, most of them determined adversely to the party who initiated the procedure." N.C. GEN. STAT. § 1A-1, Rule 27(b) comment (1983); *see In re* Mark, 15 N.C. App. 574, 190 S.E.2d 381 (1972) (defendant's appeal from order granting plaintiff's Rule 27(b) petition held not appealable and not the cause of any substantial harm).

88. In addition to the cases discussed in the text, see Terry's Floor Fashions, Inc. v. Murray, 61 N.C. App. 569, 300 S.E.2d 888 (1983) (order granting third-party plaintiff's motion for summary judgment and denying third-party plaintiff's motions to compel discovery and add necessary party); First Union Nat'l Bank v. Olive, 42 N.C. App. 574, 257 S.E.2d 100 (1979) (order granting motion to strike certain interrogatories and denying defendants' motions to compel answers and to allow a response to plaintiff's request for admissions); Pack v. Jarvis, 40 N.C. App. 769, 253 S.E.2d 496 (1979) (order sustaining objections to seventeen interrogatories to defendants, where trial court expressly said plaintiff was not prohibited from further proper discovery, without limits); Lundy Packing Co. v. Amalgamated Meat Cutters, 31 N.C. App. 595, 230 S.E.2d 181 (1976) (denial of request for order requiring defendant to allow plaintiff to inspect and copy certain documents).

89. 49 N.C. App. 446, 271 S.E.2d 522 (1980).

90. *Id.* at 448, 271 S.E.2d at 524.

91. 41 N.C. App. 591, 255 S.E.2d 267, *discretionary review denied,* 298 N.C. 300, 259 S.E.2d 915 (1979).

tions by the plaintiff relevant to the subject of the controversy. The court could not say that the unanswered interrogatories would provide information the defendant did not already have.

In the following cases orders compelling discovery were held not immediately appealable:

In *Waldron Buick Co. v. General Motors Corp.*[92] the trial court denied the defendant's motion to quash a subpoena duces tecum summoning an accountant, hired by defense counsel in connection with the case, to appear and bring evidence of his analysis of the plaintiff's books and records. The appellants argued that the subpoena would force disclosure of information given in confidence by counsel for the defendant. The order specifically excluded such information, however, and the contents of the books and records were germane to issues at trial.[93] The supreme court held that no substantial right was directly and injuriously affected by the order and dismissed the appeal.[94]

In *Ward v. Martin*[95] the plaintiff filed a complaint and procured an order compelling the defendant to appear before the clerk for a pretrial examination. The defendant moved to vacate, claiming the privilege against self-incrimination. The supreme court noted prior decisions "holding that a party cannot appeal from an order to appear before the clerk to be examined under oath concerning the matters set out in the pleadings,"[96] but chose to review the merits of the appeal since the question of when a party may entirely preclude discovery by claiming the privilege against self-incrimination was a question "of first importance."[97] The court did not discuss whether the defendant's claim of the privilege was a substantial right which he might lose if forced to undergo discovery before appeal from final judgment.

In *Casey v. Grice*[98] the plaintiff sought damages for criminal conversation and alienation of affections. The defendant was ordered to answer interrogatories and submit to an oral deposition regarding his net worth. After the trial court found that the defendant had been granted valid immunity and could not invoke the privilege against self-incrimination, the court of appeals dismissed the appeal, referring to the general rule of nonappealability of discovery orders.[99] The court

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92. 251 N.C. 201, 110 S.E.2d 870 (1959).

93. In response to defendant's argument that the information sought was privileged work-product, the court said:

> A certified public accountant who has knowledge of the contents of plaintiff's books and records is not *disqualified* to give evidence in the case "with respect to facts and data obtained by him directly from the books and records of the plaintiff." Under . . . [the] order, this is all [the accountant] is required to do.

251 N.C. at 206, 110 S.E.2d at 874.

94. *Id.* at 207, 110 S.E.2d at 875; *see* Cole v. Farmers Bank & Trust Co., 221 N.C. 249, 20 S.E.2d 54 (1942) (order allowing compulsory audit of defendant at defendant's expense does not affect a substantial right and is not immediately appealable).

95. 175 N.C. 287, 95 S.E. 621 (1918).

96. *Id.* at 289, 95 S.E. at 623.

97. *Id.* at 290, 95 S.E. at 623.

98. 60 N.C. App. 273, 298 S.E.2d 744 (1983).

99. The court cited Dworsky v. Travelers Ins. Co., 49 N.C. App. 446, 447, 271 S.E.2d 522, 523 (1980). See *supra* text accompanying note 87 for the language cited by the *Casey* court.

did not discuss whether a substantial right was affected under these circumstances.

In the following cases orders affecting discovery were held appealable:

In *Tennessee-Carolina Transportation, Inc. v. Strick Corp.*[100] the trial court prohibited deposition of a metallurgist, who had tested the hardness of the metal used in allegedly defective trailers. The court based the decision on the fact that a prior order refused to grant additional discovery time; since the defendant did not know what the metallurgist's testimony would be, the requested deposition would constitute discovery. The supreme court held that the degree of hardness of the metal was a "critical question" since that was the very defect in issue. By prohibiting the deposition, the trial court had precluded the defendant from introducing the test results and therefore affected a substantial right.

In *Lockwood v. McCaskill*[101] a physician was ordered to submit to a deposition regarding his examination, diagnosis, and treatment of the plaintiff. With no express discussion of substantial rights, the supreme court said:

> Undoubtedly, . . . [the] order purports to compel [the doctor] to testify concerning matters which otherwise would be privileged. If and when [he] is required to testify concerning privileged matters at a deposition hearing, *eo instante* the privilege is destroyed. This fact precludes dismissal of the appeal as fragmentary and premature.[102]

I. Dismissal

The grant of a Rule 12(b)(6) motion to dismiss an entire complaint for failure to state a cause of action is clearly immediately appealable because it "in effect determines the action."[103]

The grant of a 12(b)(6) motion as to fewer than all claims is generally not immediately appealable.[104] It has been held, however, that an order sustaining a

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100. 291 N.C. 618, 231 S.E.2d 597 (1977). Three justices dissented, for reasons stated in an earlier opinion, 289 N.C. 587, 223 S.E.2d 346 (1976), which was withdrawn and superseded by this opinion.

101. 261 N.C. 754, 136 S.E.2d 67 (1964).

102. *Id.* at 757, 136 S.E.2d at 69; *see also* Yow v. Pittman, 241 N.C. 69, 84 S.E.2d 297 (1954) (court, without discussing appealability, reviewed merits of appeal from order refusing to permit defendants to take deposition of doctor who treated plaintiff's injuries; grounds for the court's affirmance seem to be that communications were statutorily privileged and that the judge lacked authority to enter the order since he was not the "presiding judge of a Superior Court in term" as required by applicable law).

103. N.C. GEN. STAT. § 1A-1, Rule 12(b)(6) (1983).

104. The following cases held that the partial grant of motions to dismiss therein was not immediately appealable: Teal v. Liles, 183 N.C. 678, 111 S.E. 617 (1922) (per curiam) (demurrer to counterclaim of defendant for breach of contract sustained); Bacon v. Leatherwood, 52 N.C. App. 587, 279 S.E.2d 86 (1981) (Rule 12(b)(6) dismissal of plaintiff's claim against one of two defendants for violation of a divorce judgment, leaving claim for failure to sign deed after signing sales contract and counterclaim of libel regarding other defendant; no substantial right was affected since plaintiff sought a declaratory judgment whether deed conveyed good title, and requested declaration implicated neither defendant); Harris v. DePencier, 52 N.C. App. 161, 278 S.E.2d 759 (1981) (Rule 12(b)(6) dismissal of claims against two corporate defendants, leaving only one individual defendant; possibility of separate trial on claims against corporate defendants did not affect a substantial right); Pasour v. Pierce, 46 N.C. App. 636, 265 S.E.2d 652 (1980) (claim dismissed against one of multiple defendants; of limited precedential value because the court, relying on Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974), did not consider substantial rights, *see supra* note 43); Mozingo v. North Carolina Nat'l Bank, 27 N.C. App. 196, 218 S.E.2d 506 (1974) (relying on *Arnold v. Howard*); Durham v. Creech, 25 N.C. App. 721, 214 S.E.2d 612 (1975) (relying on *Arnold*). *But see* Wright v. Fiber Indus., Inc., 60 N.C. App. 486, 299 S.E.2d 284 (1983) (review of Rule 12(b)(6) dismissal of nine of ten claims, without discussing appealability, and holding not appealable the refusal to dismiss the tenth claim).

demurrer[105] to a plea in bar is immediately appealable.[106]

Denial of a motion to dismiss on other than jurisdictional grounds generally has not been held appealable of right.[107]

When a motion to strike is directed at an entire answer or complaint, or significant portions thereof, so that a grant of the motion is, in effect, a dismissal of the action, the order granting the motion is treated as a dismissal of the entire action or as a plea in bar and is immediately appealable.[108] "The fragrance of the rose is

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105. A demurrer is the equivalent of the current Rule 12(b)(6) motion. Sutton v. Duke, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970).

106. Quick v. High Point Mem. Hosp., Inc., 269 N.C. 450, 452, 152 S.E.2d 527, 528 (1967) (order striking entire further defense equivalent to sustaining a demurrer, therefore appealable because affects a substantial right); Kleibor v. Rogers, 265 N.C. 304, 306, 144 S.E.2d 27, 29 (1965) (orders "in effect" sustained a demurrer to defendant's plea in bar, by holding that defendant's allegations, if true, were insufficient as a bar to plaintiff's action); Hardin v. American Mut. Fire Ins. Co., 261 N.C. 67, 72, 134 S.E.2d 142, 146 (1964) (judgment sustained demurrer to plea in bar to entire action, which plea, if established, would destroy the cause of action); Housing Auth. v. Wooten, 257 N.C. 358, 363, 126 S.E.2d 101, 104 (1962) (grant of motion to strike parts of a further answer and defense was in effect a demurrer to the plea in bar, hence appealable). A "plea in bar" was a pre-Rules of Civil Procedure plea which in practice completely defeated ("barred") the plaintiff's action.

107. *See* State *ex. rel.* Edmisten v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (denial of motion to dismiss, on grounds statute was unconstitutional as applied to defendants and defendants not subject to statute), *aff'd on rehearing,* 299 N.C. 731, 265 S.E.2d 387, *appeal dismissed,* 449 U.S. 807 (1980); North Carolina Consumers Power, Inc. v. Duke Power Co., 285 N.C. 434, 206 S.E.2d 178 (1974) (court nevertheless reviewed merits; no adverse jurisdictional ruling); Barrier v. Randolph, 260 N.C. 741, 133 S.E.2d 655 (1963) (denial of motion for judgment on pleadings not appealable, but court "express[es] opinion" on one issue before dismissing); Atkins v. Doub, 260 N.C. 678, 133 S.E.2d 456 (1963) (per curiam) (refusal of nonsuit); Hollingsworth GMC Trucks, Inc. v. Smith, 249 N.C. 764, 767, 107 S.E.2d 746, 749 (1959) (refusal to nonsuit counterclaim; "[a] litigant has no right to require the judge to refrain from doing that which he has a right to do."); Cox v. Cox, 246 N.C. 528, 98 S.E.2d 879 (1957) (order vacating clerk's judgment of nonsuit had same legal effect as refusal to dismiss, therefore not appealable); Johnson v. Pilot Life Ins. Co., 215 N.C. 120, 1 S.E.2d 381 (1939) (refusal to dismiss on ground of statute of limitations bar); Duffy v. Hartsfield, 180 N.C. 151, 104 S.E. 139 (1920) (dismissal of appeal from refusal of motion for judgment on the pleadings, after court proceeded to "express an opinion on the merits of the motion, as it will doubtless prevent further litigation"); Cameron v. Bennett, 110 N.C. 277, 14 S.E. 779 (1892) (refusal of plaintiff's motion for judgment on the pleadings; "The Court will not take 'two bites at a cherry.' "); Mitchell v. Kilburn, 74 N.C. 483 (1876) (refusal to dismiss on ground statute governing proceeding was unconstitutional); Raines v. Thompson, Inc., 62 N.C. App. 752, 303 S.E.2d 413 (1983) (in dismissing the appeal the court did not discuss the appealability of defendant's claim of absence of personal jurisdiction; it is not clear whether the refusal to dismiss on that ground was argued on appeal); Dorn v. Dorn, 52 N.C. App. 370, 278 S.E.2d 281 (1981) (procedural quagmire); Williams v. East Coast Sales, Inc., 50 N.C. App. 565, 274 S.E.2d 276 (1981) (denial of motion to dismiss punitive damages claim); O'Neill v. Southern Nat'l Bank, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979) (order denying Rule 12(b)(6) motion not appealable; also, findings made upon request and in support of motion were "merely gratuitous and surplusage, and [do] not afford grounds for appellate review of an interlocutory order that is otherwise not appealable"); Green v. Best, 9 N.C. App. 599, 176 S.E.2d 853 (1970). *But see* Munro v. Carolina Rubber Co., 198 N.C. 808, 153 S.E. 412 (1930) (review of order overruling demurrer to complaint without any discussion of appealability); Joyner v. Champion Fiber Co., 178 N.C. 634, 101 S.E. 373 (1919) (order overruling a demurrer that is not frivolous is appealable).

108. Davis v. North Carolina State Highway Comm'n, 271 N.C. 405, 408, 156 S.E.2d 685, 687 (1967) (motion to strike allegations that defendant "had unnecessarily and fraudulently deprived plaintiffs of their property two years before it was required for highway purposes, and that plaintiffs were entitled to compensatory and punitive damages for the loss of its use" was equivalent to a "demurrer to that purported cause of action, and the effect of [the] order allowing the motion was to sustain the demurrer"); Sharpe v. Pugh, 270 N.C. 598, 155 S.E.2d 108 (1967) (motion to strike allegations in complaint of facts showing

not destroyed by calling it a weed. Nor may what is in fact a demurrer gain strength or lose vitality by designating it as a motion to strike."[109]

J. Family Law

In *Stephenson v. Stephenson,*[110] decided in 1981, the court of appeals ruled that orders and awards pendente lite, although previously occasionally held to involve a substantial right, would no longer be appealable on that basis. It stated: "[O]rders and 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(d)."[111] The court held this change in prior practice necessary to avoid

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injury, pain and suffering was in effect a demurrer to plaintiff's cause of action for intestate's personal injuries); Etheridge v. Carolina Power & Light Co., 249 N.C. 367, 106 S.E.2d 560 (1959) (order striking portion of pleading was in effect a demurrer to the cause of action); Lexington State Bank v. Suburban Printing Co., 7 N.C. App. 359, 172 S.E.2d 274 (1970) (grant of motion to strike all of defendant's "further answers and defenses" was "in substance a demurrer"); *see also* Girard Trust Bank v. Easton, 3 N.C. App. 414, 416, 165 S.E.2d 252, 254 (1969) ("where a motion to strike allegations and a prayer for relief relating to punitive damages is granted, the order is treated as a demurrer for failure to allege facts sufficient to constitute a cause of action [for the recovery of punitive damages], and an immediate appeal is available"); King v. Insurance Co. of N. Am., 273 N.C. 396, 397, 159 S.E.2d 891, 893 (1968) (same).

Dismissal of a punitive damages claim has been held appealable under more recent cases either because it in effect determined the action, or because there was a substantial right to have the punitive damages claim tried by the same judge and jury as the remaining claims. *See* Oestreicher v. American Nat'l Stores, 290 N.C. 118, 225 S.E.2d 797 (1976).

The order, to be appealable, must strike not portions of the pleadings that are redundant, irrelevant, or otherwise improper, but portions that are allegedly legally insufficient to assert a cause of action. *King,* 273 N.C. at 397, 159 S.E.2d at 893; *see also* Peoples Oil Co. v. Richardson, 271 N.C. 696, 699-700, 157 S.E.2d 369, 372 (1967); Steele v. Moore-Flesher Hauling Co., 160 N.C. 586, 591, 133 S.E.2d 197, 201 (1963); Williams v. Hunter, 257 N.C. 754, 756, 127 S.E.2d 546, 547-48 (1962).

109. Williams v. Hunter, 257 N.C. 754, 756, 127 S.E.2d 546, 547 (1962).

110. 55 N.C. App. 250, 285 S.E.2d 281 (1981).

111. *Id.* at 252, 285 S.E.2d at 282. The court expressly overruled the following cases that had found substantial rights affected by pendente lite awards in alimony, divorce, and custody cases: Peeler v. Peeler, 7 N.C. App. 456, 459, 172 S.E.2d 915, 917 (1970) (award of alimony pendente lite and attorney fees); Kearns v. Kearns, 6 N.C. App. 319, 323, 170 S.E.2d 132, 135 (1969) (order pendente lite granting child custody, writ of possession to residence, transfer of title to car, alimony and child support, attorney fees, medical expenses, and money to furnish residence). Musten v. Musten, 36 N.C. App. 618, 244 S.E.2d 699 (1978), expressly relied on *Peeler,* and thus must be viewed as overruled by *Stephenson.*

The following pre-*Stephenson* cases analyzed particular orders pendente lite and found no substantial rights involved (although under *Stephenson* the discussions of substantial rights therein would be superfluous, they do offer further general guidance as to what the court considers substantial): Bridges v. Bridges, 29 N.C. App. 209, 223 S.E.2d 845 (1976) (order allowing plaintiff-wife to remove certain items of personal property from premises where defendant-husband resided; court found it necessary to review validity of order, however, in order to review appealable contempt order for failure to comply with order allowing removal); Guy v. Guy, 27 N.C. App. 343, 348, 219 S.E.2d 291, 295 (1975) (order enjoining withdrawal of any funds then deposited in savings account of defendant-husband in which plaintiff-wife might have interest; court acknowledged only that restraint on use of funds "invokes some discomfort" and "fair play requires that ownership of the funds be expeditiously and dispositively resolved"; court distinguished orders affecting subsistence pendente lite and temporary child custody, which before *Stephenson* could be immediately appealed); Moore v. Moore, 14 N.C. App. 165, 187 S.E.2d 371 (1972) (order relieving defendant from alimony and child support pending hearing on changed circumstances where defendant

depriving parties of the benefits of such orders and awards due to delays occasioned by immediate appeal.[112]

In *McGinnis v. McGinnis*[113] the trial court issued an order enforcing a New York decree to the extent of awarding alimony and support arrearages thereunder, and granted full faith and credit to the alimony and child support provisions of another New York decree, thus imposing a continuing support obligation on the defendant. The court of appeals found that this imposition of a continuing support obligation affected a substantial right. The order was not entered, pending final determination on the merits, but appeared to be a final adjudication of the issues of full faith and credit and arrearages. It thus seems that *Stephenson,* had it been decided prior to *McGinnis,* would not have dictated a conclusion that the *McGinnis* order could not, as a matter of law, involve a substantial right.

In *Williams v. Williams*[114] the parents and child involved in a custody suit were ordered to submit to psychiatric examinations prior to a final determination of custody. The court of appeals dismissed the mother's appeal, holding that the order was interlocutory and did not deprive the appellant of a substantial right.

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alleged that plaintiff had the child in Venezuela and refused to arrange visits between defendant and the child, even though defendant made full and prompt support payments); *see also* Smart v. Smart, 59 N.C. App. 533, 297 S.E.2d 135 (1982) (orders awarding temporary custody, restraining defendant from assaulting plaintiff, awarding exclusive use of marital home to plaintiff, requiring defendant to remove personal effects from home and to give his keys to police, were all made pending final hearing on merits and thus, under *Stephenson,* held not immediately appealable).

112. The court stated:

> It is significant that when *Peeler* was decided, along with Kearns v. Kearns, 6 N.C. App. 319, 170 S.E.2d 132 (1969), and other seminal decisions establishing the direct appeal of pendente lite awards as a matter of right, the situation was different with both the district courts and this Court. At that time there was insufficient experience with the district courts to know what might be expected. Indeed, many counties still did not have district courts since the General Court of Justice was not fully operational until 1971. Moreover, appeal of a pendente lite matter could be heard and an opinion rendered by this Court within a reasonably short period of time.
>
> Today the situation is quite different. In the majority of appeals from pendente lite awards it is obvious that a final hearing may be had in the district court and final judgment entered much more quickly than this Court can review and dispose of the pendente lite order. In this appeal, for instance, the matter could have been heard on its merits and a final order entered by the District Court in Hertford County months before the appeal reached this Court for disposition.
>
> There is an inescapable inference drawn from an overwhelming number of appeals involving pendente lite awards that the appeal too often is pursued for the purpose of delay rather than to accelerate determination of the parties' rights. The avoidance of deprivation due to delay is one of the purposes for the rule that interlocutory orders are not immediately appealable. The fact that appeals of pendente lite orders often are used as delay tactics weighs in favor of reconsidering *Peeler,* insofar as it recognized a right of immediate appeal of an order to pay alimony pendente lite and attorney fees pendente lite, and concluding that that part of the *Peeler* decision has outlived its usefulness. As stated by our Supreme Court in Veazey v. [City of] Durham, 231 N.C. 357, 57 S.E.2d 377 (1949), "[t]here 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." *Id.* at 363.

Stephenson, 55 N.C. App. at 251-52, 285 S.E.2d at 282 (1981).

113. 44 N.C. App. 381, 261 S.E.2d 491 (1980).

114. 29 N.C. App. 509, 224 S.E.2d 656, *discretionary review denied,* 290 N.C. 667, 228 S.E.2d 458 (1976).

K. Injunctions[115]

Interlocutory orders concerning injunctions have been held not appealable in the following circumstances:[116]

In *State ex rel. Edmisten v. Fayetteville Street Christian School*[117] a preliminary injunction restraining the defendants from operating day-care centers without complying with state licensing requirements did not affect a substantial right since it merely ensured the continuance of previous compliance pending final disposition on the merits. The defendants' claim that the injunction threatened them with loss of their substantial right of religious freedom did not render the injunction immediately appealable, since that was the heart of the legal issue to be decided.

In *GLYK Associates v. Winston-Salem Southbound Railway*[118] the plaintiff and its tenants were restrained from going upon certain lands to which the defendant claimed record title, but the record on appeal contained no evidence in support of the plaintiff's allegations that the injunction deprived it and its tenants of access to its building. The plaintiff thus failed to show deprivation of a substantial right. The plaintiff was, however, allowed to proceed in superior court "to protect its rights, if any, from any inequitable adverse effects of the preliminary injunction."[119]

In *Setzer v. Annas*[120] a preliminary injunction restrained the defendant from obstructing the plaintiffs' lawful right by easement to ingress and egress across the existing roadway on the defendant's property. The plaintiffs claimed that the defendant had severely hindered them in their use of the roadway by erecting two gates across it. The court of appeals dismissed for lack of a substantial right,

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115. The supreme court reviewed interlocutory orders involving injunctions without raising the issue of appealability in the following cases: North Carolina Milk Comm'n v. National Food Stores, 270 N.C. 323, 154 S.E.2d 548 (1967) (continuance of preliminary injunction enjoining defendant from selling milk "below cost" within meaning of statute); Western Conference of Original Free Will Baptists v. Creech & Teasley, 256 N.C. 128, 123 S.E.2d 619 (1962) (temporary restraining order restraining defendant Creech from holding himself out as a minister of certain church or performing any ministerial functions); First Presbyterian Church v. St. Andrews Presbyterian College, Inc., 254 N.C. 717, 119 S.E.2d 867 (1961) (order enjoining defendant from interfering with control of college pending determination of control of plaintiff church); Little Pep Delmonico Restaurant, Inc. v. City of Charlotte, 252 N.C. 324, 113 S.E.2d 422 (1960) (order prohibiting enforcement of ordinance by requiring removal of existing business signs over sidewalks); Davenport v. Board of Educ., 183 N.C. 570, 112 S.E. 246 (1922) (refusal to continue order restraining defendant from using tax monies from plaintiff's school tax district for a school in adjoining district; court cautioned against interfering with acts of local school authorities).

116. In addition to the cases discussed in the text, see Pritchard v. Baxter, 108 N.C. 129, 12 S.E. 906 (1891) (order dissolving a restraining order in pending action not appealable where subsequent to issuance of injunction final judgment on all issues had been rendered against appellant, therefore eliminating ground for injunction); Childs v. Martin, 68 N.C. 307, 308 (1873) (per curiam) (refusal to vacate order restraining defendants from further proceedings in mortgage foreclosure pending hearing not appealable because not a "determination, which affects in whole or in part the legal or actual merits of the controversy"); Smith's Cycles, Inc. v. American Honda Motor Co., 26 N.C. App. 76, 214 S.E.2d 785 (1975) (order expressing an "opinion" that defendant should be enjoined not appealable because no injunction actually ordered).

117. 299 N.C. 351, 261 S.E.2d 908, *aff'd on rehearing*, 299 N.C. 731, 265 S.E.2d 387, *appeal dismissed*, 449 U.S. 807 (1980).

118. 55 N.C. App. 165, 285 S.E.2d 277 (1981).

119. *Id.* at 171, 285 S.E.2d at 281.

120. 21 N.C. App. 632, 205 S.E.2d 553 (1974), *rev'd*, 286 N.C. 534, 212 S.E.2d 154 (1975).

saying that "under such circumstances impairment of any right of defendant must be deemed *de minimis*."[121]

The supreme court, without explicitly addressing the appealability issue, reversed, reviewed the merits, and vacated the injunction. It held, however, that the preliminary injunction was issued under a misapprehension of the applicable law, since the trial court presumed that the plaintiffs had an unqualified right to use the route across the defendant's property without obstruction by gates placed by the defendant, and without consideration of the defendant's legal right to maintain the gates. It stated:

> A preliminary injunction should not be granted if a serious question exists in respect of the defendant's right to do what the plaintiffs seek to restrain and the granting thereof would work greater injury to the defendant than is reasonably necessary for the protection *pendente lite* of the plaintiffs' rights. Where a serious question exists the hearing judge considers the relative conveniences and inconveniences of the parties in determining the propriety of a preliminary injunction and the terms thereof if granted.[122]

Presumably the defendant's legal right to erect and maintain gates which do not unreasonably interfere with the plaintiffs' right to use the existing roadway[123] constituted a substantial right which rendered the injunction appealable.

An order denying a preliminary injunction to restrain defendants from holding a meeting in violation of an open meetings law and requiring advance notice of meetings to the public and media has also been held not to affect a substantial right.[124]

Where the defendants were restrained from blocking a road on their land which the plaintiffs crossed to gain access to their own property, the court in *Pruitt v. Williams*[125] found no evidence of potential loss of a substantial right.

Finally, in *Dixon v. Dixon*[126] no substantial right was affected where the defendant was ordered to return removed property to the former marital home. Both parties were enjoined from harming, disposing of, or encumbering any personal property involved in the divorce suit, and the plaintiff, who resided in the former marital home, was required to post a security bond.

The following orders involving preliminary injunctions were held to affect a substantial right:[127] a mandatory injunction ordering the defendants to remove without delay concrete anchors on the plaintiff's submerged lands;[128] a mandatory injunction ordering the defendant to remove a roadway it had graded, allegedly

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121. *Id.* at 634, 205 S.E.2d at 555. One judge dissented, arguing that a substantial right was affected by the lengthy denial to defendant of the use of his property, without indicating any proposed use by defendant incompatible with plaintiff's easement.

122. *Setzer*, 286 N.C. at 540, 212 S.E.2d at 157-58 (citations omitted). The court remanded for a de novo hearing on the motion for preliminary injunction in light of the stated guidelines.

123. *Id.* at 539, 212 S.E.2d at 157.

124. Gunkel v. Kimbrell, 29 N.C. App. 586, 225 S.E.2d 127 (1976).

125. 288 N.C. 368, 218 S.E.2d 348 (1975).

126. 62 N.C. App. 744, 303 S.E.2d 606 (1983).

127. In addition to the cases mentioned in the text, see First Nat'l Bank v. Jenkins, 64 N.C. 719, 722 (1870) (denial of injunction appealable where trial judge said order "puts an end to the case").

128. Steel Creek Dev. Corp. v. James, 300 N.C. 631, 268 S.E.2d 205 (1980).

by trespass on the plaintiffs' lands;[129] a temporary injunction restraining defendants from using the name "Moravian" in connection with any church activity;[130] an order continuing a temporary injunction restraining the defendants from declaring an allegedly illegal election result and from levying taxes, pending determination of the cause to test the validity of an election to establish a school district;[131] an order continuing a preliminary order restraining the defendants from negotiating promissory notes held by them;[132] an order restraining the defendants—the Secretary of the Department of Transportation and the Board of Transportation—from removing the plaintiff's outdoor advertising sign for statutory violations;[133] an order enjoining the defendant from competing with the plaintiff by either engaging in the same business or providing any entity with information regarding the plaintiff's business, in accordance with the terms of a covenant not to compete;[134] an order continuing an order restraining the defendant from doing business with persons who were customers, brokers, suppliers, or sales representatives of the plaintiff before a certain date, in accordance with the terms of a covenant not to compete;[135] and an order continuing a temporary order restraining city aldermen from taking any action at any meeting upon two ordinances granting television cable franchises without considering certain factors.[136]

L. Motions to Strike

As a general rule, there is no right to appeal from the denial of a motion to strike.[137] The grant of a motion to strike, where it does not effectively determine

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129. English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, *discretionary review denied,* 297 N.C. 609, 257 S.E.2d 217 (1979).

130. Board of Provincial Elders of the Moravian Church v. Jones, 273 N.C. 174, 180-81, 159 S.E.2d 545, 550 (1968) (Plaintiff claimed use of the name by defendant pending trial would do "irreparable injury because this name is of great value to a religious body." The court, however, stated that "[t]he plaintiff is in a poor position to contend, as it does in its motion to dismiss, that a denial to the defendants of the use of this name, during this same period, is of no substantial importance to the defendants.").

131. Gill v. Board of Comm'rs, 160 N.C. 176, 76 S.E. 203 (1912) (also noting that because final relief sought was permanent injunction, court had whole issue before it for decision).

132. Warlick v. H.P. Reynolds & Co., 151 N.C. 606, 612-13, 66 S.E. 657, 660 (1910) (also noting that defendant's motion to dismiss and to dissolve the restraining order was "jurisdictional in nature," and as such its denial would ordinarily not be appealable; *see supra* text accompanying notes 24-35).

133. Freeland v. Greene, 33 N.C. App. 537, 540, 235 S.E.2d 852, 854 (1977) (continuance of injunction "adversely affect[s] important rights of [defendants] in connection with the performance by them of duties imposed" by statute).

134. Forrest Paschal Mach. Co. v. Milholen, 27 N.C. App. 678, 220 S.E.2d 190 (1975).

135. Seaboard Indus., Inc. v. Blair, 10 N.C. App. 323, 178 S.E.2d 781 (1971).

136. Cablevision of Winston-Salem, Inc. v. City of Winston-Salem, 3 N.C. App. 252, 257, 164 S.E.2d 737, 740 (1968) (where plaintiff alleged defendant city failed to consider franchisees' qualifications to construct, operate, and maintain a CATV system and whether franchise would be in public interest, "the 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.").

137. *E.g.,* Privette v. Privette, 230 N.C. 52, 51 S.E.2d 925 (1949) (motion to strike allegations in motion to vacate a decree of confirmation of sale of lands, the deed executed pursuant thereto, and several interlocutory orders; no substantial right was imperiled by denial of motion to strike).

An exception to the rule of nonappealability was noted in dictum by the *Privette* court. Citing no authority, the court stated that it had previously entertained appeals from orders denying motions to strike allegations in pleadings. It stated further that

> [t]he pleadings in a cause raise issues of fact to be decided by a jury, chart the course of the trial and, in large measure, determine the competency of evidence. They are to be read to the jury. If they

the outcome,[138] is also generally not immediately appealable.[139]

M. Partition

An order denying actual partition and ordering a sale of real property is immediately appealable, for a tenant in common has a right to actual partition unless it would injure interested parties.[140] Where the defendants' request for a sale was denied, however, an order appointing commissioners to partition the land was not immediately appealable.[141]

In *Boyce v. Boyce*[142] an action for partition of real property held as tenants in common (originally as tenants by the entirety) was dismissed. Petitioner claimed a lien on the proceeds from sale of the property due to a deed of trust placed thereon for respondent's benefit. Petitioner received none of the loan proceeds and did not intend to make a gift to the respondent. On petitioner's appeal from the dismissal, the court of appeals held that a substantial right had been affected, but stated: "[W]e do not believe it will work injury to the petitioner if this is not corrected before the final judgment."[143]

N. Prior Pending Actions

The refusal to abate an action on the ground of a prior pending action has been reviewed by the supreme court on immediate appeal without discussion of appealability.[144] A recent decision by the court of appeals, however, dismissed as interlocutory an appeal from the denial of a motion to dismiss and a plea in abatement on the ground of a prior pending action. The court did not discuss substantial rights.[145] The appealability of the denial of such motion is unclear under current law due to uncertainty as to whether the law of abatement retains its vitality following enactment of the Rules of Civil Procedure.[146]

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contain irrelevant or impertinent averments not competent to be shown in evidence, a refusal to strike might impair or imperil the rights of the adversary party.

Id. at 53, 51 S.E.2d at 926.

138. *See supra* notes 105-06 and accompanying text.

139. *E.g.*, Barnes v. Rorie, 14 N.C. App. 751, 189 S.E.2d 529 (1972) (order striking from plaintiff's replies allegations that insurance company had persuaded defendants to file counterclaims and that defendant driver had a reputation for reckless driving and a criminal record, thus suggesting the car owner was negligent in allowing the defendant to drive, did not affect a substantial right; the court also noted that no writ of certiorari had been filed pursuant to a rule of appellate practice in effect at that time).

140. *E.g.*, Horne v. Horne, 261 N.C. 688, 690, 136 S.E.2d 87, 88 (1964); Hyman v. Edwards, 217 N.C. 342, 344, 7 S.E.2d 700, 702 (1940) (dictum).

141. Albemarle Steam Navigation Co. v. Worrell, 133 N.C. 93, 45 S.E. 466 (1903).

142. 51 N.C. App. 422, 276 S.E.2d 494 (1981).

143. *Id.* at 423, 276 S.E.2d at 495. One judge dissented, stating that "[i]f Wife prevails in her claim against Husband, her judgment will be a secured lien against his undivided interest in the land. The loss of such security is a loss of a substantial right to which Wife is entitled." *Id.* at 424, 276 S.E.2d at 495 (Hill, J., dissenting) (citation omitted). He further noted that the delay in deciding the proposed distribution of the proceeds of sale, along with a subsequent appeal, would cost the parties interest plus an increase in taxes due. For these reasons, he would have reviewed the merits of the appeal. *Id.*

144. *E.g.*, Pittman v. Pittman, 248 N.C. 738, 104 S.E.2d 880 (1958); McDowell v. Blythe Bros. Co., 236 N.C. 396, 72 S.E.2d 860 (1952).

145. Myers v. Myers, 61 N.C. App. 748, 301 S.E.2d 522 (1983).

146. Although it has been suggested that N.C. GEN. STAT. § 1A-1, Rule 7(c) (1983) (abolishing "pleas") renders useless not only pleas in abatement but also the substantive law of abatement, the effect of

O. Reference

An order of compulsory reference,[147] requiring that issues be sent to a referee for examination and decision or report, which does not affect a substantial right, is not immediately appealable unless there is a plea in bar which might determine the entire action.[148] When a plea in bar is overruled or sustained by the trial court, or the compulsory reference is ordered without determination of the plea, the party then asserting the plea has the option of appealing immediately or awaiting final judgment.[149] Presumably a ruling on a plea in bar is thought to affect a substantial right.[150]

Absent a plea in bar, an order of compulsory reference is immediately appealable only when it affects a substantial right.[151]

In *Harrell v. Harrell*[152] an order of compulsory reference was held to affect a substantial right because it required the defendant to deposit two hundred dollars for the payment of expenses, and it was reasonable to assume that the cost would be much greater than two hundred dollars. The supreme court stated: "To require defendant to defer testing the validity of the order until the reference has been completed and the costs have been incurred and imposed would substantially affect his rights and leave him without remedy for recovery of the expenses neces-

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Rule 7(c) on pleas in abatement has not been decided by the North Carolina courts. *See* Gardner v. Gardner, 294 N.C. 172, 175 n.5., 240 S.E.2d 399, 402 n.5 (1978). Although the *Gardner* court expressly held that the court of appeals had not abused its discretion in refusing to grant certiorari, *id.* at 173, 240 S.E.2d at 401, thereby declining to establish a *right* of appeal, the court of appeals later relied on *Gardner* in treating an appellant's motion to dismiss on the ground of a prior pending action as a motion pursuant to N.C. GEN. STAT. § 1A-1, Rule 13(a) (1983) (compulsory counterclaims), and therefore considered the appeal. *See* Atkins v. Nash, 61 N.C. App. 488, 300 S.E.2d 880 (1983).

147. *See* N.C. GEN. STAT. § 1A-1, Rule 53(a)(2) (1983).

148. *See, e.g.,* Harrell v. Harrell, 253 N.C. 758, 761, 117 S.E.2d 728, 730-31 (1961); Gaither v. Albemarle Hosp., Inc., 235 N.C. 431, 441-42, 70 S.E.2d 680, 689 (1952); Parker v. Helms, 231 N.C. 334, 336, 56 S.E.2d 659, 661 (1949); Green Sea Lumber Co. v. Pemberton, 188 N.C. 532, 535, 125 S.E. 119, 121 (1924); Leroy v. Saliba, 182 N.C. 757, 757, 108 S.E. 303, 303 (1921) (per curiam); Royster v. Wright, 118 N.C. 152, 154-55, 24 S.E. 746, 747 (1896).

149. *E.g.,* Reynolds v. Morton, 205 N.C. 491, 493, 171 S.E. 781, 782 (1933); Green Sea Lumber Co. v. Pemberton, 188 N.C. 532, 535, 125 S.E. 119, 121 (1924); Leroy v. Saliba, 182 N.C. 757, 757, 108 S.E. 303, 303 (1921) (per curiam). In Pritchett v. Greensboro Supply Co., 153 N.C. 344, 345, 69 S.E. 249, 249 (1910), the supreme court stated that waiting until final judgment

> is a convenient practice . . . , because if . . . the party who has excepted succeeds finally, by the decision of the referee or the verdict of the jury, . . . the result shows that no appeal was really necessary to protect his right. He could appeal when the order of reference was made, but was not bound to do so at that time.

150. *See* Jones v. Sugg, 136 N.C. 143, 48 S.E. 575 (1904).

151. *See* Sutton v. Schonwald, 80 N.C. 20 (1879) (no substantial right affected by order of reference to ascertain alleged expenditure for support and maintenance of infants, from proceeds of sale of land); *see also* Parker v. Helms, 231 N.C. 334, 56 S.E.2d 659 (1949).

In Veazey v. City of Durham, 231 N.C. 354, 57 S.E.2d 375 (1950), the supreme court held that where there is no plea in bar the decision whether to compel reference is within the discretion of the trial judge; therefore, an order refusing reference does not affect a substantial right.

The fact that a ruling on a particular kind of motion is discretionary, however, is not determinative of whether a substantial right is affected by a ruling on a specific motion. If the court meant to say that when a substantial right is affected the decision whether to compel reference is necessarily determinable as a matter of law, because there can, by definition, be no discretion involved in the preservation of a substantial right, its reasoning is not objectionable—but it offers no guidance. It amounts merely to a conclusion, without discussion of the issue, that no substantial right was involved. *See supra* note 51.

152. 253 N.C. 758, 117 S.E.2d 728 (1961).

sarily involved."[153]

The court also held the order immediately appealable because compulsory reference was not proper to determine defendant-husband's approximate income in response to a motion for alimony pendente lite. The "purpose is to give [plaintiff-wife] reasonable subsistence pending trial and without delay. . . . It is not contemplated that the proceeding will be delayed by a slow and costly reference involving the examination of records in many different locations and in other States."[154]

It has been held that an order striking a valid order of reference by consent[155] is immediately appealable, because "[e]ither party has *a right* to have the order carried into effect and complied with by a full report of the referee, and further action by the court can only be had upon such report."[156]

Once reference has been ordered and all appealable objections thereto have been resolved, "it must proceed to its proper conclusion, and . . . an appeal will only lie from a final judgment or one in its nature final."[157] Thus, appeals have been dismissed from orders denying exceptions to a referee's report before judgment;[158] vacating a referee's report and ordering a new survey;[159] modifying a referee's report, making distribution of many of an insolvent corporation's assets, and then recommitting the report to the referee for additional findings;[160] partially modifying the referee's report and retaining certain issues for trial;[161] and sustaining some of the referee's findings while recommitting the report to the referee to correct other findings.[162] If a substantial right were affected in any of these situations, however, immediate appeal of right presumably would lie.

P. Specific Performance

In *Atkins v. Beasley*[163] the plaintiff sought specific performance of an agreement between two defendants for the benefit of the plaintiff, a lot owner complaining of drainage problems. The agreement stated that if lot owners complained, certain but not all defendants would pay the cost of correcting the drainage problems. Two defendants were ordered specifically to perform all acts necessary to provide proper drainage. The specific performance order was held to affect a substantial right and thus to be immediately appealable.

In *Whalehead Properties v. Coastland Corp.*[164] the defendant's counterclaim for spe-

153. *Id.* at 761-62, 117 S.E.2d at 731.
154. *Id.* at 763, 117 S.E.2d at 732. The court noted that compulsory reference to determine approximate income preparatory to awarding alimony pendente lite "is contrary to the course and practice of our courts." *Id.*
155. *See* N.C. GEN. STAT. § 1A-1, Rule 53(a)(1) (1983).
156. Stevenson v. Felton, 99 N.C. 58, 61, 5 S.E. 399, 400 (1888).
157. Pritchard v. Panacea Spring Co., 151 N.C. 249, 249-50, 65 S.E. 968, 969 (1909).
158. Bakami Constr. & Eng'g Co. v. Thomas, 230 N.C. 516, 53 S.E.2d 519 (1949) (per curiam).
159. Cox v. Shaw, 243 N.C. 191, 90 S.E.2d 327 (1955).
160. Pritchard v. Panacea Spring Co., 151 N.C. 242, 65 S.E. 968 (1909).
161. Leak v. Covington, 95 N.C. 193 (1886).
162. Jones v. Call, 89 N.C. 188 (1883).
163. 53 N.C. App. 33, 279 S.E.2d 866 (1981).
164. 299 N.C. 270, 261 S.E.2d 899 (1980).

cific performance of agreements controlling the design of certain property developments was rejected by the trial court, which established the plaintiff's breach of contract and delayed a decision on damages until a later trial. The supreme court heard defendant's appeal from the order rejecting its counterclaim, stating that by the time a trial on damages could be held and final judgment rendered on the counterclaim, the plaintiff might have been able to develop the property in violation of the agreement, and it would no longer be possible to order specific performance. The defendant then "would be forced to accept the remedy of money damages, which it argues is not an effective remedy nor the one it seeks."[165] A substantial right of the defendant was thus affected by the order denying specific performance.

Q. Summary Judgment

Summary judgment regarding all claims and parties to an action is obviously appealable as a final judgment. An order denying summary judgment or granting partial summary judgment is interlocutory, however, and is immediately appealable only in the unusual event that a substantial right is affected.[166]

North Carolina courts have found substantial rights to be affected by the grant of partial summary judgments in the following cases:[167]

In *Oestreicher v. American National Stores*[168] the plaintiff sued for fraudulent breach of contract, anticipatory breach, and punitive damages. The plaintiff appealed the summary judgment entered against him on the claims for punitive damages and anticipatory breach. The supreme court held that the plaintiff had a substantial right to have all three causes tried at the same time by the same judge and jury and that the court of appeals had erred in dismissing the appeal.[169]

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165. *Id.* at 277, 261 S.E.2d at 904; *see also* McRae v. Moore, 29 N.C. App. 507, 224 S.E.2d 696 (1976). In *McRae,* the plaintiffs' claim for specific performance of an option contract to purchase a house was rejected. Because the denial of specific performance did not adjudicate defendants' counterclaim for damages, the court of appeals held the denial of specific performance was not immediately appealable. There was no discussion of substantial rights. Because the court relied on Arnold v. Howard, 24 N.C. App. 255, 210 S.E.2d 492 (1974), *see supra* note 43, *McRae* should not be considered precedent for the nonappealability of a denial of specific performance.

166. *E.g.,* Parker Oil Co. v. Smith, 34 N.C. App. 324, 325, 237 S.E.2d 82, 83 (1977) ("Denial of a motion for summary judgment ordinarily does not affect a substantial right so that appeal may be taken from the interlocutory order.").

167. In addition to the cases discussed in the text, see Beck v. American Bankers Life Assurance Co., 36 N.C. App. 218, 220-21, 243 S.E.2d 414, 416 (1978) (aberrant decision stating that a partial summary judgment is appealable if it *either* affects a substantial right *or* is final as to matters adjudicated therein).

168. 290 N.C. 118, 225 S.E.2d 797 (1976) (two justices concurred, three concurred in the result, and one concurred in part and dissented in part).

169. In *Oestreicher* the court said:

> To require [plaintiff] possibly later to try the second cause of action for punitive damages would involve an indiscriminate use of judicial manpower and be destructive of the rights of both plaintiff and defendant. Common sense tells us that the same judge and jury that hears the claim on the alleged fraudulent breach of contract should hear the punitive damage claim based thereon. The third cause of action alleged an anticipatory breach of contract. This arose from the same lease contract that gave birth to the first and second causes. By the same token, the same judge and jury should hear the third cause along with the first and second ones, assuming the plaintiff's cause is not subject to summary judgment.

290 N.C. at 130, 225 S.E.2d at 805.

The court of appeals followed *Oestreicher* in Briggs v. Mid-State Oil Co., 53 N.C. App. 203, 280 S.E.2d

In *Nasco Equipment Co. v. Mason*[170] the plaintiff and a third-party defendant bank were competing creditors of the defendant. The trial court entered summary judgment in favor of the bank. The plaintiff had a right of immediate appeal because the order denied it a jury trial on its claim against the third-party defendant "and, in effect, determine[d] the claim in favor of the bank."[171] This was because the bank claimed a perfected security interest in property in which the plaintiff sought either possession or its value. Justice Exum later characterized the summary judgment in *Nasco* as "in effect, a final judgment ultimately disposing of all claims of any practical significance in the case."[172]

In *Wachovia Realty Investments v. Housing, Inc.*[173] the trial court entered summary judgment against the defendant for a specified sum in an action to recover the balance due on a note, but retained for hearing the determination of the defendant's claim for a setoff in the same amount. The supreme court found that, since execution had been entered on the judgment and the clerk had entered an order declaring the judgment to be a lien on certain funds owed to the defendant, entry of summary judgment affected a substantial right of the defendant. Although there were two statutory procedures for staying execution or enforcement of the judgment,[174] either procedure, even if successful, would require the defendant to incur substantial expense.[175]

In *Whalehead Properties v. Coastland Corp.*[176] summary judgment was entered for the defendants on one of the plaintiff's three claims, a request for a declaratory judgment that the plaintiff's redesign of development plats complied with agreements it had entered into with the defendants. The supreme court held that the partial summary judgment

> denies plaintiff a trial on the issue of whether plaintiff's redesign of the development of its Whalehead property complied with the agreements between plaintiff and defendants, and disposes of plaintiff's causes of action. Thus the order is a final judgment as to all of plaintiff's causes of action and affects a substantial right of plaintiff.[177]

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501 (1981), holding that plaintiff had a substantial right to have a claim for fraudulent inducements and misrepresentations concerning severance pay tried at the same time as a claim for breach of a contract to provide severance pay. Plaintiff thus had a right of immediate appeal from summary judgment against it on the fraudulent inducement claim.

170. 291 N.C. 145, 229 S.E.2d 278 (1976).

171. *Id.* at 148, 229 S.E.2d at 281.

172. Tridyn Indus., Inc. v. American Mut. Ins. Co., 296 N.C. 493, 251 S.E.2d 448 (1979).

The court of appeals followed *Nasco* in Cunningham v. Brown, 51 N.C. App. 264, 267, 276 S.E.2d 718, 722 (1981), in holding that where plaintiffs husband and wife had joined their claims for injury, and summary judgment was granted only against plaintiff-wife, "[t]he order . . . denied plaintiff-wife a jury trial on her claim against defendant and, therefore, affected a substantial right." *Cunningham* does not appear consistent with *Nasco* as interpreted by Justice Exum, since the husband's claim remains, and it is "of practical significance."

173. 292 N.C. 93, 232 S.E.2d 667 (1977).

174. *See* N.C. GEN. STAT. §§ 1-269, -289 (1983) (stay of execution upon money judgment, provided judgment debtor gives bond or makes deposit); *id.* § 1A-1, Rule 62(g) (1983) (authorizing court rendering judgment to stay enforcement pending outcome of other parts of litigation, upon conditions court deems necessary to secure benefits of judgment to judgment creditor).

175. The court of appeals followed *Wachovia Realty* in Equitable Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240 (1980), holding that a summary judgment for a monetary sum against one of two defendants affected a substantial right.

176. 299 N.C. 270, 261 S.E.2d 899 (1980).

177. *Id.* at 276, 261 S.E.2d at 903. Plaintiff's first cause of action had been settled by consent, and its

In *Bernick v. Jurden*[178] the plaintiff alleged that the conduct of four defendants caused his injuries. Summary judgment was granted in favor of two of the defendants. The supreme court held that because of the possibility of inconsistent verdicts in separate trials, the summary judgment for fewer than all of the defendants affected a substantial right of the plaintiff to have the liability of all parties tried by the same jury.[179]

The grant of a partial summary judgment was held not to affect a substantial right in the following cases:

In *Tridyn Industries Inc. v. American Mutual Insurance Co.*[180] summary judgment was granted for the plaintiff on the issue of liability, with damages reserved for subsequent trial. The supreme court found that "the most [defendant] will suffer from being denied an immediate appeal is a trial on the issue of damages"[181] and upheld dismissal of the appeal.

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second resulted in summary judgment in its favor, with no appeal taken therefrom by defendants. Thus summary judgment on the third cause in effect disposed of the entire action. The "substantial right" language in the court's holding on appealability is therefore superfluous and probably not appropriate.

178. 306 N.C. 435, 293 S.E.2d 405 (1982).

179. *Id.* at 439, 293 S.E.2d at 408. If the summary judgment were not immediately appealable, then the first jury could find the two remaining defendants not negligent, and, following reversal of the summary judgment on appeal, a second jury trying the other two defendants could find that the injuries were caused solely by the two defendants tried in the first trial. *Id.*

The court of appeals, citing *Oestreicher* and *Bernick,* held, in Swindell v. Overton, 62 N.C. App. 160, 302 S.E.2d 841 (1983), that plaintiffs had a substantial right to have their claims (1) for damages for failure of a trustee of a deed of trust on plaintiffs' property to fulfill his duties in connection with the foreclosure sale; (2) for the trustee's wrongfully paying attorney fees on behalf of two other defendants as part of the foreclosure costs; (3) for conversion of their crops by another defendant; and (4) against a third defendant for charging and collecting an unlawful rate of interest, heard by the same judge and jury.

180. 296 N.C. 486, 251 S.E.2d 443 (1979).

181. *Id.* at 491, 251 S.E.2d at 447; *see also* Goforth v. Hartford Accident & Indem. Co., 61 N.C. App. 617, 301 S.E.2d 428 (1983) (no appeal of right from summary judgment on liability issue with trial on damages to follow); Lowder v. All Star Mills, Inc., 60 N.C. App. 275, 300 S.E.2d 230 (1983) (no right of appeal from summary judgment that sale of stock be rescinded, deferring question of how much of sale price should be returned to purchaser); *cf.* Richardson v. Southern Express Co., 151 N.C. 60, 65 S.E. 616 (1909); Moore v. Rowland, 150 N.C. 261, 63 S.E. 953 (1909) (jury verdict on liability only, with determination of damages to follow, not immediately appealable).

In Nichols v. State Employees' Credit Union, 46 N.C. App. 294, 264 S.E.2d 793 (1980), the court of appeals held that no substantial right was affected by summary judgment for defendant as to some, but not all, of the forged checks it allegedly negligently paid. It stated:

> We believe that the 'substantial right' exception to Rule 54(b) certification has been limited by the Court to those situations where the substance of an appealing party's claim or defense would be reduced, or where the appealing party would incur some other direct injury, if the appeal were not heard prior to entry of a final judgment disposing of all of the claims of all of the parties.

46 N.C. App. at 296, 264 S.E.2d at 795. One judge dissented, arguing that the case should be distinguished from one in which the *whole* liability issue is determined, leaving *only* the determination of damages. He stated:

> I believe an interlocutory order or judgment which affects the merits of a case in such a way that the final judgment cannot stand if the order is wrong, affects a substantial right and will work injury to the appealing party if not corrected before an appeal from a final judgment. . . . [I]f the whole question of liability is determined adversely to defendant, the defendant can wait until final judgment before appealing. . . . In the case sub judice, if the partial summary judgment is not corrected before appeal from the final judgment and the partial summary judgment is reversed on appeal, the final judgment from which appeal is taken will not stand. I would hold that this makes the partial summary judgment appealable.

Id. at 297, 264 S.E.2d at 795-96 (Webb, J., dissenting).

In *Green v. Duke Power Co.*,[182] a negligence action, summary judgment was granted for two third-party defendants from whom the original defendant had sought contribution for their alleged joint liability. The supreme court held that the original defendant had no right of immediate appeal. Although the defendant might have to undergo a subsequent trial in his claim against third-party defendants if the summary judgments were reversed on appeal from final judgment, the court found that no substantial right was affected by that possibility. It stated:

> The possible second trial in the instant case would not involve *the same issues* and therefore would not warrant immediate appeal. Ordinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.[183]

The issue in the cause of action for contribution was whether the third-party defendants violated a duty of care to the plaintiff, whereas the issue in the principal case was whether the defendant independently violated an unrelated duty of care to the plaintiff.[184]

In *Jones v. Clark*[185] the plaintiff sued for breach of warranty in the sale of a modular home. Summary judgment was granted in favor of the third-party defendant, which had inspected and approved the home. The court of appeals reasoned that the possibility of the third-party defendant inspector's having to indemnify the defendant-appellant was remote and that if the summary judgment were upheld, the third-party defendant manufacturer would still be a party and obligated to indemnify the inspector. The court chose, nevertheless, to decide the matter on its merits.

In *Blue Ridge Sportcycle Co. v. Schroader*[186] a summary judgment for one of three defendants was held not to affect a substantial right, since the plaintiff sought recovery from that defendant only in the event it was unable to recover from the other two. Therefore, only if the court found no liability on the part of the other two defendants would the plaintiff need to appeal the summary judgment.[187]

In *Terry's Floor Fashions, Inc. v. Murray*[188] the plaintiff alleged that sums were owed it by the defendant under one contract, and the defendant alleged that a third-party defendant was responsible for any liability under a separate contract. The court held that no substantial right was affected by summary judgment for the third-party defendant, since the original defendant's liability to the plaintiff had not been determined, and there was no danger of different juries rendering inconsistent verdicts.

The denial of a motion for partial or complete summary judgment has never

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182. 305 N.C. 603, 290 S.E.2d 593 (1982).

183. *Id.* at 608, 290 S.E.2d at 596.

184. Plaintiff did not allege joint or concurrent negligence.

185. 36 N.C. App. 327, 244 S.E.2d 183 (1978).

186. 53 N.C. App. 354, 280 S.E.2d 799 (1981).

187. The court stated: "[T]hough on its face a final judgment, it is actually a conditional one that would adversely affect the plaintiffs only if and when it is determined that they cannot recover on their primary claims." *Id.* at 357, 280 S.E.2d at 801.

188. 61 N.C. App. 569, 300 S.E.2d 888 (1983).

been held to affect a substantial right in North Carolina.[189] In *Waters v. Qualified Personnel, Inc.*[190] the trial court set aside without prejudice a summary judgment entered on the ground of procedural irregularity. The supreme court held this to be the equivalent of denying a summary judgment motion and dismissed the appeal, stating:

> All defendant suffers by its inability to appeal . . . [the] order is the necessity of rehearing its motion. The avoidance of such a hearing is not a "substantial right" entitling defendant to an immediate appeal. Neither, for that matter, is the avoidance of trial which defendant might have to undergo should its motion and plaintiff's motion for summary judgment . . . both be denied.[191]

The court reasoned that the trial court and the parties could develop the facts more fully and clarify the merits of the claim by waiting to appeal from the final judgment, thus giving the appellate courts a more complete factual and legal picture.[192]

R. Venue

A ruling on a motion for change of venue as a matter of right (that is, pursuant to a statute mandating venue) is immediately appealable.[193] The denial of a change of venue for the convenience of witnesses and the ends of justice is not immediately appealable.[194]

S. Miscellaneous

Other types of interlocutory orders, not fitting within the above categories, have been held appealable of right because they affect substantial rights.

An order allowing the sheriff to open the defendant's safe and inventory its contents, with or without the defendant's cooperation, was appealable where the complaint alleged a public nuisance because materials for the manufacture of whiskey were secreted upon the defendant's premises and where sheriff's affidavits

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189. The following cases found no substantial right affected by denial of a motion for summary judgment: Shoffner Indus., Inc. v. W.B. Lloyd Constr. Co., 42 N.C. App. 259, 257 S.E.2d 50 (court chose to review merits despite nonappealability), *discretionary review denied,* 298 N.C. 296, 259 S.E.2d 301 (1979); Hill v. Smith, 38 N.C. App. 625, 248 S.E.2d 455 (1978) (denial of both parties' motions for summary judgment in action for summary ejectment of defendant, allegedly in unlawful possession of plaintiffs' real property); Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975); Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970). Dictum in *Motyka* that denial of summary judgment can be preserved for appeal from final judgment was expressly disavowed in Parker Oil Co. v. Smith, 34 N.C. App. 324, 325, 237 S.E.2d 882, 883 (1977).

190. 294 N.C. 200, 240 S.E.2d 338 (1978).

191. *Id.* at 208, 240 S.E.2d at 344.

192. *Id.* at 209, 240 S.E.2d at 344.

193. Coats v. Sampson County Mem. Hosp., 264 N.C. 332, 141 S.E.2d 490 (1965) (motion pursuant to N.C. GEN. STAT. § 1-77(2) (1983), mandating venue in action against public officer, subject to court's power to change venue); Klass v. Hayes, 29 N.C. App. 658, 225 S.E.2d 612 (1976) (motion pursuant to N.C. GEN. STAT. § 1-76(4) (1983), mandating venue for actions solely or primarily demanding recovery of personal property, subject to power of court to change venue); *cf.* State *ex. rel.* Edmisten v. Fayetteville St. Christian School, 299 N.C. 351, 261 S.E.2d 908 (*tentative* denial of change of venue not immediately appealable), *aff'd on rehearing,* 299 N.C. 731, 265 S.E.2d 387, *appeal dismissed,* 449 U.S. 807 (1980).

194. Furches v. Moore, 48 N.C. App. 430, 269 S.E.2d 635 (1980) (motion pursuant to N.C. GEN. STAT. § 1-83(2) (1983), permitting judge to change venue "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change").

indicated that no whiskey was found within the safe when it was opened during a recent prior search.[195] A substantial right was affected "in that [the order] delves into [defendant's] private property without legal process."[196]

The denial of a motion for a jury trial in an action for termination of parental rights has been held to be appealable.[197]

An order requiring petitioner to make an election of remedies, in an action to establish disputed boundary lines between adjacent lands, was held appealable where the petitioner's contentions that either (1) the boundary lines he asserted were true, or (2) another line asserted in an amendment to the complaint had become true by adverse possession, were not inconsistent remedies requiring an election.[198]

An order purporting to allow the plaintiff to reinstate a cause of action following a final judgment dismissing the action and to allow further amendment of the complaint affected a substantial right and was appealable.[199]

Finally, in *Roberts v. Heffner*[200] the trial court entered a judgment that, because the defendants had never been licensed as general contractors, they were not entitled to assert counterclaims for breach of contract relating to the construction of a dwelling. They could, however, assert such counterclaims as a setoff to the plaintiff's claim. The court of appeals held that the defendants' substantial right to recover on claims based on the contract was affected. If the defendants were not allowed an immediate appeal, they would have to undergo a full trial on the merits and, if the jury found against the plaintiffs, the defendants' counterclaims would not be reached. On the other hand, if the jury found for the plaintiffs, the defendants' setoff would be limited to the jury's award. In either case, the defendants would probably have to undergo a second full trial on the merits to recover on their contract-related claims.

Other interlocutory orders have been held not to be immediately appealable because they did not affect substantial rights. Examples include orders allowing a motion to file a reply;[201] finding the defendants entitled to have a factual issue of a boundary line's location submitted to the jury in a processioning proceeding;[202] denying collateral attack on a judgment in a prior action to set aside a deed;[203] continuing a hearing pending appellate review of a judgment entered by another judge;[204] continuing a receiver's motion that its report be considered immediately and reserving complete consideration of the report;[205] continuing a motion to amend a schedule;[206] remanding an action for a special use permit to the city

195. State *ex. rel.* Hooks v. Flowers, 247 N.C. 558, 101 S.E.2d 320 (1958).
196. *Id.* at 562, 101 S.E.2d at 323.
197. *In re* Ferguson, 50 N.C. App. 681, 274 S.E.2d 879 (1981).
198. Jenkins v. Trantham, 244 N.C. 422, 94 S.E.2d 311 (1956).
199. Mills v. Richardson, 240 N.C. 187, 81 S.E.2d 409 (1954).
200. 51 N.C. App. 646, 277 S.E.2d 446 (1981).
201. Funderburk v. Justice, 25 N.C. App. 655, 214 S.E.2d 310 (1975).
202. Martin v. Flippen, 101 N.C. 452, 8 S.E. 345 (1888).
203. Gardner v. Price, 239 N.C. 651, 80 S.E.2d 478 (1954).
204. Fryar v. Gauldin, 259 N.C. 391, 130 S.E.2d 689 (1963).
205. Corporation Comm'n v. Farmers Bank & Trust Co., 183 N.C. 170, 110 S.E. 839 (1922).
206. Brown & Co. v. Nimocks, 126 N.C. 808, 36 S.E. 278 (1900).

council for a de novo hearing;[207] affirming an order of seizure of a mobile home by the clerk in a claim and delivery proceeding ancillary to an action to recover money due on a note for the purchase price of the mobile home;[208] refusing to sign a judgment tendered by the plaintiff;[209] staying arbitration;[210] staying the collection of costs of depositions taken by defendants until the termination of a subsequent action which the plaintiffs expressed an intent to commence;[211] directing a trial by jury;[212] requiring a party to show cause why a receiver should not be appointed;[213] appointing commissioners to assess damages caused by the defendant's construction of a railroad across the plaintiff's land;[214] refusing to cancel notice of *lis pendens* regarding land which the plaintiff alleged the defendant had wrongfully refused to sell;[215] limiting the scope of *lis pendens* notices to acreage to which the plaintiffs claimed title in an action to quiet title;[216] refusing to compel restitution of sums disbursed from the defendant's property sale in execution of a prior summary judgment;[217] determining the scope of review for an administrative hearing involving a contested hazardous waste treatment facility;[218] denying a motion for nonsuit at the close of all the evidence;[219] and refusing to set aside a jury verdict, except regarding one issue.[220]

VIII

CONCLUSION

Greater certainty concerning appealability is laudable if the objective is a coherent, predictable, uniform review process. Experience indicates, however, that in North Carolina such a goal may be difficult, if not impossible, to attain.

As noted above, over one hundred years ago the supreme court observed that no rule had been settled classifying cases in terms of loss of or prejudice to a sub-

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207. Jennewein v. City Council, 46 N.C. App. 324, 264 S.E.2d 802 (1980).

208. Wachovia Bank & Trust Co. v. Smith, 24 N.C. App. 133, 210 S.E.2d 212 (1974), *cert. denied,* 286 N.C. 420, 211 S.E.2d 801 (1975). Defendants claimed their substantial right justifiably to revoke acceptance of the mobile home, and their allegedly valid security interest therein, were adversely affected. The court held that the questions raised by defendants "can be decided only when the case is heard on its merits. No substantial right of the defendants has yet been judicially determined. Furthermore, whatever interest the defendants have in the mobile home is amply protected by plaintiff's undertaking filed in the claim and delivery proceeding pursuant to G.S. 1-475." 24 N.C. App. at 135, 210 S.E.2d at 213.

209. Brown & Co. v. Nimocks, 126 N.C. 808, 36 S.E. 278 (1900).

210. Peloquin Assocs. v. Polarco, 61 N.C. App. 345, 300 S.E.2d 477 (1983).

211. Bell v. Moore, 31 N.C. App. 386, 229 S.E.2d 235 (1976).

212. Goode v. Rogers, 126 N.C. 62, 35 S.E. 185 (1900).

213. Gray v. Gaither, 71 N.C. 55 (1874).

214. Hendrick v. Carolina Cent. R.R., 98 N.C. 431, 4 S.E. 184 (1887).

215. Godley Auction Co. v. Myers, 40 N.C. App. 570, 253 S.E.2d 362 (1979) (dictum that if defendant wanted to sell land or use it as loan collateral, then he might be deprived of a substantial right by the *lis pendens*).

216. Whyburn v. Norwood, 37 N.C. App. 610, 246 S.E.2d 540 (1978).

217. Harris v. Jim Stacy Racing, Inc., 53 N.C. App. 597, 281 S.E.2d 455, *discretionary review denied,* 304 N.C. 726, 287 S.E.2d 900 (1981).

218. Blackwelder v. State Dep't of Human Resources, 60 N.C. App. 331, 299 S.E.2d 777 (1983) (due to the order, the state reversed its earlier position and refused to defend issuance of a permit to defendant; defendant claimed it had a substantial right to have the state defend issuance of the permit).

219. Cowart v. Honeycutt, 257 N.C. 136, 125 S.E.2d 381 (1962).

220. Thomas v. Carteret County, 180 N.C. 109, 104 S.E. 75 (1920).

stantial right, absent interlocutory appeal.[221] Only six years ago that court was still noting the usual necessity of considering the particular facts of each case and the procedural context of the order from which appeal is sought.[222]

In light of this history, skepticism as to prospects for substantial reform is appropriate. Regardless of statutory changes designed to promote predictability, the North Carolina appellate courts can probably be expected to gloss the reforms by interlocutory intervention in trial proceedings as they, in their discretion, deem appropriate to promote substantial justice or judicial economy. While undesirable when measured by the criterion of certainty, this relative nonsystem, which currently prevails and will likely continue, serves the countervailing value of flexible and equitable or economical disposition of individual cases.

221. Jones v. Call, 89 N.C. 188, 190 (1883) (per curiam); *see supra* text accompanying note 47.

222. Waters v. Qualified Personnel, Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978); *see supra* text accompanying note 48.