

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Nov 14 2023

S.C. SUPREME COURT

APPEAL FROM UNION COUNTY
Court of Common Pleas
William A. McKinnon, Circuit Court Judge

Appellate Case No. 2022-000853

Dwayne Thompson, ... Respondent,

v.

LG Chem, Ltd., LG Chem America, Inc.,
and Rolling Fog Vapor Company, LLC, ...Defendants,

Of whom, LG Chem, Ltd. and LG Chem America, Inc. are the..... Petitioners.

SUPPLEMENTAL APPENDIX

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RESPONDENT'S MOTION TO DISMISS APPEAL

Pursuant to Rule 240, SCACR, Respondent Dwayne Thompson respectfully moves this Court for an Order dismissing the above-captioned Appeal for lack of subject matter jurisdiction. For the following reasons, this Appeal must be dismissed.

FACTUAL/PROCEDURAL BACKGROUND

This Appeal arises from a products liability action in which Dwayne Thompson sustained serious burns after an e-cigarette lithium-ion rechargeable battery manufactured by Petitioners LG Chem Ltd. and LG Chem America, Inc. suddenly exploded and burst into flames while in his pocket. (App. pp. 36-44).

Thompson purchased the e-cigarette with batteries at Defendant Rolling Fog, LLC's store in Spartanburg, South Carolina. (*Id.*). Thompson filed his products liability action in the Union County Court of Common Pleas on March 4, 2019. On April 24, 2019, in lieu of answering, Petitioners filed motions to dismiss the Complaint due to a purported lack of contacts with South Carolina, despite the fact that according to customs records, since 2006 Petitioners have imported hundreds of shipments of its products into South Carolina through the Port of Charleston. (App. pp. 104-13, 286-92; 138-285). The Circuit Court predictably denied their motions in several written Orders.¹ (App. pp. 1-6). When a foreign manufacturer and distributor makes minimum contacts with South Carolina through the stream of commerce in an effort to reach the South Carolina market either directly or indirectly, it can reasonably anticipate that it might be haled into a South Carolina court when one of its products tortuously injures a South Carolina citizen within the political boundaries of South Carolina.

Petitioners filed and served a Notice of Appeal of the Orders on May 19, 2021. (App. pp. 1237-1241). Petitioners also petitioned this Court for a writ in the Court's original jurisdiction or in the alternative, to certify the appeal directly to this Court. The petition and motion were denied by the Court. (Ex. A, Court Orders). The Court of Appeals dismissed the appeal on March 10, 2022, ruling that since it was an appeal from an order denying a motion to dismiss for lack of personal jurisdiction that it was not immediately appealable. (App. p. 32). Petitioners petitioned the

¹ After jurisdictional discovery, Petitioners renewed their motions, which were subsequently denied by the Circuit Court. (App. pp. 12-28).

Court for a writ of certiorari, and certiorari was granted by the Court on March 7, 2023.

ARGUMENT

The Court should dismiss this Appeal for the simple fact that it does not have appellate jurisdiction. The Court

[I]s constituted a court for the correction of errors of law in law cases, and the only method of exercising its power of review is by appeal; hence in the exercise of that power it is obliged to exercise in a limited way its appellate jurisdiction. The Constitution provides that the correction of errors of law shall be conducted under “such regulations as the General Assembly may by law prescribe”; and the General Assembly by section 11, subd. D, of the Code 1912, has prescribed the method of appeal.

Sandel v. State, 128 S.C. 178, 122 S.E. 571 (1922).

Section 11, subd. D of the 1012 Code is currently codified at S.C. Code Ann. section 14-3-330(2) and defines the Court’s appellate jurisdiction when correcting errors of law in law cases. It proscribes the immediate appeal of interlocutory orders in a case such as this, even if the order affects a “substantial right”, when the order does not “in effect determine[] the action and prevent a judgment from which an appeal might be taken or discontinue[] the action.” Even if the Court were to buy Petitioners’ reasoning that the interlocutory Orders at issue in this case are immediately appealable solely because they impact a substantial right, it will be violating the plain text of the appellate jurisdiction statute by not immediately dismissing this Appeal, as Petitioners have wholly failed to argue that the Orders in any reasonable way determine the underlying action.

This would clearly implicate the separation of powers doctrine and infringe upon the General Assembly's constitutional duty to prescribe the appellate jurisdiction of this Court. Further, Petitioners argue directly against this Court's prior precedents, which dictate that an order denying a motion to dismiss for lack of personal jurisdiction is not immediately appealable under two subsections of the appellate jurisdiction statute. Even the cases that Petitioners superficially cite as supporting their argument that the subject Orders are immediately appealable are inapposite when read in detail.

Lastly, Petitioners' reliance on North Carolina law to support the immediate review of interlocutory orders denying a motion to dismiss for lack of personal jurisdiction is flawed because (1) North Carolina's appellate jurisdiction statute differs from South Carolina's and grants its appellate courts authority to review orders solely if they impact a substantial right, with no other requirements, and (2) it appears that North Carolina and Minnesota are the only states in the entire country that allow immediate review of such orders as a right, with the overwhelming majority of states finding that the practice is antithetical to judicial economy and the speedy resolution of cases.

I. **The Circuit Court's Orders do not in effect determine the action and prevent a judgment from which an appeal might be taken or discontinue the action.**

South Carolina courts have long recognized that for the subject orders to be immediately appealable, they must satisfy two prongs of section 14-3-330(2). While the first prong requires that an order affect a substantial right, the second prong requires that an order "in effect determines the action and prevents a judgment

from which an appeal might be taken or discontinues the action.” S.C. Code Ann. § 14-3-330(2).

To bring the case within this second subdivision of Section 11, it must appear to be an order affecting a substantial right, made in an action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken, and when such order grants or refuses a new trial. **It must therefore appear that the order in question is such as to prevent a judgment in an action.** The present order is not of that character. At most it affects the security of the plaintiff for the satisfaction of any judgment he may obtain, but does not preclude him from proceeding to judgment against the defendant.

Allen v. Partlow, 3 S.C. 417, 418 (1872) (emphasis added). “For the order to be appealable, it must not only affect a substantial right, but it must also in effect determine the action and prevent a judgment from which an appeal could be taken . . .” *Garlington v. Copeland*, 25 S.C. 41, 43 (1886). The second prong of section 14-3-330(2) is not superfluous; it is mandatory.

Here, it is clear that the subject Orders do not in any way determine Thompson’s action, discontinue it, or prevent a final judgment from which Petitioners could appeal the personal jurisdiction issue. Petitioners have not even attempted to set forth in their Final Brief how the subject Orders in effect resolve the action and prevent an appealable final judgment, because they cannot. In response to this Motion, Petitioners are likely to argue that due to the weight and significance of the due process rights implicated by personal jurisdiction, the Circuit Court’s Orders in effect eradicate their ability to seek meaningful redress by appeal. In other words, by the time this case reaches final judgment, by being forced to litigate this action in a South Carolina court Petitioners’ due process rights will

have been trampled upon to such an extent that any favorable outcome on appeal would be meaningless.

There is a certain emotional appeal to this argument, but its logic is unsound and again ignores the second prong of section 14-3-330(2). Under this rationale, virtually every interlocutory order affecting a substantial right would be immediately appealable, regardless of whether it in effect determines the action. Interlocutory discovery orders affecting trade secrets, confidential private information, confidential business information, or involving expansive, costly discovery would be subject to the same logic, as would interlocutory orders involving jurisdictional issues such as service of process and sufficiency of process, privilege, and orders granting or denying motions to change venue. By their very nature, every interlocutory order affecting a substantial right is going to lead to some infringement upon that right for the remaining duration of the litigation; this does not mean those orders in effect determine the action or foreclose the losing party from seeking redress on appeal.

Such an interpretation of the statute would render its second prong superfluous, would open virtually all Rule 12(b) motions to immediate appeal, and would constitute legal error. *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (“In that vein, we must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law.”); (Ex. B, Guide to

Appealability of Interlocutory Orders, Appellate Rules Committee p. 3) (“The substantial-right doctrine is the door through which many – if not most – interlocutory orders are appealed. Most of the appellate decisions highlighted in this Guide are based on the substantial-right doctrine”). Every time a substantial right is affected by an order, of necessity that right will be impacted throughout the duration of litigation; this does not mean that the order in effect determines the action and prevents a judgment from which the right-holder can appeal, which is the only circumstances under which such an order is immediately appealable.

Additionally, if Petitioners were to make this argument, it misrepresents the substantial right implicated by the personal jurisdiction doctrine’s due process concerns. Due process within the context of personal jurisdiction does not guarantee an individual the right to be free from litigation and its associated costs in a forum that does not have jurisdiction over him. Instead, the Due Process Clause only protects an individual’s liberty interest “in not being **subject to the binding judgments of a forum** with which he has established no meaningful ‘contacts, ties, or relations.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472, 105 S. Ct. 2174, 2181, 85 L. Ed. 2d 528 (1985) (emphasis added). If personal jurisdiction does not in fact exist over Petitioners, then their substantial right interest in not being subject to a binding judgment of the Union County Court of Common Pleas can be adequately protected by an appeal after final judgment, or even a later filed motion for summary judgment, and in fact the substantial right is not even implicated until after an adverse final judgment has been entered by the Circuit Court.

There are no mental gymnastics Petitioners can lead the Court through to somehow arrive at the conclusion that the subject Orders have effectively determined the underlying action. Instead, Petitioners solely focus on the substantial right prong, then pivot to North Carolina law in an attempt to distract the Court from the section 14-3-330(2)'s second requirement. However, North Carolina's appellate jurisdiction statute does not contain the second prong of section 14-3-330(2), and it only requires that an order affect a substantial right by causing it to be lost, prejudiced, or inadequately preserved in order for it to be immediately appealable. Thus, while North Carolina appellate courts have been granted jurisdiction to review such interlocutory orders by their legislature, South Carolina appellate courts have specifically had their jurisdiction more narrowly curtailed by our General Assembly.

II. Ignoring section 14-3-330(2)'s requirements that an interlocutory order must in effect determine the action and either prevent a judgment from which an appeal might be taken or discontinue the action would violate the separation of powers doctrine.

By having the Court essentially ignore the second prong of section 14-3-330(2), Petitioners would have this Court venture into forbidden territory. The Constitution of South Carolina describes the appellate jurisdiction of the Supreme Court over legal claims as follows: “[t]he Supreme Court shall constitute a court for the correction of errors at law **under such regulations as the General Assembly may prescribe.**” S.C. Const. Art. V § 5 (emphasis added). The General Assembly has, beyond question, the duty and authority to define the Court’s appellate jurisdiction to correct errors at law.

The General Assembly has mandated that the Court does not have appellate jurisdiction to review some interlocutory trial court rulings until the appeal of a final judgment. S.C. Code Ann. § 14-3-330 defines the appellate jurisdiction of this Court as well as the Court of Appeals, and only permits the immediate appeal of an order affecting a substantial right when the order in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, grants or refuses a new trial or strikes out an answer or any part thereof or any pleading in any action. Granting certiorari to review an interlocutory order affecting a substantial right that does not effectively determine an action and prevent a judgment would judicially expand the Court's appellate jurisdiction beyond its outer limits as defined by the General Assembly.

Article I, section 8 of the Constitution of South Carolina provides that “[i]n the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.” The separation of powers mandate encompasses Article V, which preserves for the General Assembly the power to define the Court's appellate jurisdiction in law cases. *See State ex rel. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).

One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws. History

reveals that there has been much litigation at the national level and at the state level because of conflicts which have arisen relative to the usurpation of power by one of the three branches of government.

Id. at 312-13, 295 S.E.2d at 636.

Petitioners' arguments as to why the immediate appeal of the subject Orders is permitted by section 14-3-330 are problematic because they encourage the Court to usurp the General Assembly's authority to define the Court's appellate jurisdiction. It would be one thing if Petitioners sought to convince the Court that the second prong of section 14-3-330(2) had been met, and that they have been prevented from effectively seeking an appeal of a final judgment in this case. However, Petitioners have not done so, and in fact do the opposite, suggesting to the Court that "[t]he availability of eventual appeal after trial is not dispositive of the issue of immediate appealability." To the contrary, the key issue is whether Petitioners retain the opportunity to meaningfully appeal and have their contacts with South Carolina reviewed, and binding South Carolina law instructs that when a motion to dismiss for lack of personal jurisdiction is denied by an order, the order does not in effect determine the action, prevent a final judgment from which an appeal might be taken, or discontinue the action.

III. South Carolina precedent prohibits the immediate appeal of an interlocutory order denying a motion to dismiss for lack of personal jurisdiction.

The Court should not take lightly Petitioners' suggestion that it overrule its prior decisions and hold that interlocutory orders denying a motion to dismiss for lack of personal jurisdiction are immediately appealable. Stare decisis is used to foster stability and certainty in the law, and applies "with full force with respect to

questions of statutory interpretation”. *McLeod v. Starnes*, 396 S.C. 647, 655, 723 S.E.2d 198, 203 (2012). Petitioners correctly note that the Court previously held in *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 336, 426 S.E.2d 777, 781 (1993) that “the denial of a motion to dismiss under Rule 12(b)(2), SCRPC is interlocutory and not directly appealable.” Petitioners assert that in this case, the *Mid-State Distributors* decision is not applicable because it solely focused on whether the subject order “involved the merits” under section 14-3-330(1), whereas here, Petitioners are arguing that the Circuit Court’s Orders affect a substantial right under section 14-3-330(2).

However, this Court has also previously determined that an order analogous to an order denying a motion to dismiss for lack of personal jurisdiction does not satisfy the second prong of section 14-3-330(2). In *Agnew v. Adams*, 24 S.C. 86 (1885), the appellant moved for nonsuit on the grounds that he had not “been made a party to the action in the manner prescribed by law.” *Id.* at 87-88. The Court analyzed whether such an interlocutory order was subject to immediate appeal under the predecessor to section 14-3-330(2):

The second subdivision of that section provides for an appeal from “an order affecting a substantial right made in an action, when such order, in effect, determines the action, and prevents a judgment from which an appeal might be taken, or discontinues the action, when such order grants or refuses a new trial, or when such order strikes out an answer, or any part thereof, or any pleading in an action” **It is very clear that the refusal of a motion for non-suit cannot be brought under any of the cases provided for in subdivision 2, for while it may affect a substantial right, it does not in effect determine the action, or prevent a judgment from which an appeal might be taken, nor does it discontinue the action; and it certainly does not fall under any of the other cases provided for in that subdivision.”**

Id. at 88 (emphasis added); *see also Nejman v. Charney*, 8th Dist. Cuyahoga No. 102584, 2015-Ohio-4087, 2015 WL 5781169, at *6 (Ohio Ct. App. Oct. 1, 2015) (“This court has long held that an order denying a motion to dismiss for lack of personal jurisdiction does not determine the action, does not prevent judgment, and is not a final, appealable order”). The *Agnew* Court went on to find that even though the order would not be immediately appealable under subdivision 2, it would be immediately appealable under the language of section 14-3-330(1); however, this holding was specifically overturned by *Mid-State Distributors*. (App. p. 32). Thus, while *Agnew’s* holding that the subject Orders are immediately appealable under section 14-3-330(1) has been abrogated, its holding that the subject Orders should not be immediately appealable under section 14-3-330(2) is still good law. Petitioners would argue directly against this precedent and mislead the Court into exercising appellate jurisdiction in a case where there is none.

Again, Petitioners would have the Court ignore the entire second prong of section 14-3-330(2), and Petitioners ignore that *Mid-State Distributors* provides an explanation of why the subject Orders do not in effect determine the action by preventing an appeal or discontinuing the action:

Carlton has not arrived at the end of the road. **A party who is denied a dismissal under Rule 12 has forfeited nothing, they must simply continue to trial** If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory. If a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment.

Id. at 334-35, 426 S.E.2d at 780 (citations omitted) (emphasis added). Therefore, according to this Court, the denial of Petitioners' motions did not in effect determine the action, prevent an appeal, or discontinue the action, as **Petitioners have forfeited nothing**. Petitioners cannot satisfy their burden of proving that all of the requirements of section 14-3-330(2) have been met, and consequently the Court does not have appellate jurisdiction.

Petitioners make passing reference to several South Carolina authorities in order to convince the Court that it is permissible in this instance to immediately review the Circuit Court's Orders. Petitioners rely primarily on *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005). Petitioners urge the Court to ignore section 14-3-330(2)'s second prong and point to *Hagood* as an instance in which the Court supposedly ignored this requirement to find that an interlocutory order was immediately appealable solely because it affected a substantial right. The Court did no such thing.

In *Hagood*, the Court held that an order disqualifying a party's counsel of choice was an immediately appealable order. The Court found that such an order affected a substantial right, satisfying the first prong of section 14-3-330(2). *Id.* at 197, 607 S.E.2d at 710. The Court then found that such an order also satisfied the second prong of the statute, stating that an appeal after final judgment following an order disqualifying a party's counsel of choice would not adequately protect a party's interests because it would be "impossible" for an appellate court to ascertain whether prejudice resulted from the lack of a preferred attorney, thus it was one of

the “rare” orders which in effect could determine the action and prevent a judgment from which an appeal might be taken or could discontinue the action, due to the impact on the attorney-client relationship. *Id.* at 197-98, 607 S.E.2d at 710. In other words, such an order would have a determinative impact on the outcome of the litigation that could never be effectively appealed by the litigant.

In their Final Brief, Petitioners provide no explanation for how an order denying a motion to dismiss for lack of personal jurisdiction effectively determines the action or creates a result that would be impossible for an appellate court to resolve, because they cannot. *Mid-State Distributors* adequately explains why Petitioners cannot offer any explanation for how the Circuit Court’s Orders have effectively ended the action: because Petitioners have “forfeited nothing”, they have not lost the action and they have not lost the ability to have the Orders effectively reviewed. In fact, the entire thrust of Petitioners’ argument is that under *Hagood*, Petitioners and the Court can choose to ignore the second prong of section 14-3-330(2) and solely focus on the “substantial right” prong. *Hagood* is unavailing to Petitioners’ arguments. It would not be “impossible” for the Court of Appeals to resolve whether Petitioners have sufficient minimum contacts with South Carolina after final judgment; therefore, *Hagood* is inapposite and unpersuasive.

Petitioner also cites to *Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004) to support its argument that an order may be immediately appealable if it solely affects a substantial right. In *Bateman*, the court found that an order denying a request for a jury trial involved the mode of trial and was

immediately appealable. First, the court found that the order affected a substantial right. *Id.* at 674, 596 S.E.2d at 390. Then, relying on *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997), the court found that an order denying a request for a jury trial involved the mode of trial and was immediately appealable. The court did not examine the second prong of section 14-3-330(2) or conduct a further analysis of its appellate jurisdiction.

In turn, *Lester* leads back to a line of cases holding that an order denying a request for a particular mode of trial is immediately appealable. This line of cases stretches back to *Alston v. Limehouse*, 61 S.C. 1, 39 S.E. 192 (1901). None of the cases purport to analyze the proposition that an order involving the mode of trial is immediately appealable under section 14-3-330(2) or any of its predecessors. Instead, they all make a blanket assertion that orders involving the mode of trial are immediately appealable as a matter of course. However, 1902 Code of Civil Procedure of South Carolina, Title II, section 11 indicates that *Bateman's* presumption that an appeal from an order involving the mode of trial is permitted by section 14-3-330(2), based on the line of historical cases back to *Alston*, is incorrect.

The 1902 Code sets forth examples of immediately appealable interlocutory orders “involving the merits” under section 14-3-330(1), and lists orders affecting the mode of trial as an example of an order involving the merits under the predecessor of section 14-3-330(1).² (Ex. C, 1902 Code of Civil Procedure, Title II, Section 11). Thus, the historical reasoning embraced by *Bateman* is not even

² The language of the 1902 code section is identical to the statute's current language.

applicable in this case, as the subject order in *Bateman* was immediately appealable under section 14-3-330(1), and not section 14-3-330(2). The *Bateman* court's reasoning that the order was immediately appealable under section 14-3-330(2) was flawed, based on an erroneous assumption that prior precedents had historically analyzed the subject order under section 14-3-330(2), and failed to conduct its own analysis of the second prong of section 14-3-330(2). *Bateman* is unpersuasive.

In *McLaughlin v. Strickland*, 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1983), the Court of Appeals found that a family court order denying a request for leave to file a late answer and permission to withdraw a signed consent to adoption affected a substantial right and foreclosed the litigant's ability to contest the case on the merits and was therefore immediately appealable, citing section 14-3-330 and *Ayer v. Chassereau*, 18 S.C. 597 (1882), without further explanation. *McLaughlin*, 279 S.C. at 516, 309 S.E.2d at 790. *Ayer* held that an order denying a motion for leave to file a late answer and granting default judgment is appealable. *Ayer*, 18 S.C. at 597. Therefore, both decisions stand for the proposition that an order which effectively prevents a defendant from contesting the merits determines or discontinues the action, and if a substantial right is also affected, then the order is immediately appealable. *But see Palmetto Constr. Grp., LLC v. Restoration Specialists, LLC*, 432 S.C. 633, 636, 856 S.E.2d 150, 151 (noting that an order denying a motion to set aside an entry of default is not immediately appealable). *McLaughlin* and *Ayer* are easily distinguishable from this case because nothing about the subject Orders prevent Petitioners from contesting the merits of Thompson's claims.

Lastly, Petitioners rely on *Keller v. Keller*, 296 S.C. 411, 373 S.E.2d 692 (Ct. App. 1988), a case in which the Court of Appeals reviewed a family court order denying the appellant's motion to dismiss for lack of personal jurisdiction. First, it is not entirely clear from the text of *Keller* if the order was immediately appealed or if it was appealed after a final judgment. The decision does not address the issue of immediate appealability of interlocutory orders and does not even refer to section 14-3-330, leaving one to assume that the order was not appealed until after a final order was entered by the family court, which would explain why it was not specifically overruled by *Mid-State Distributors*. *Keller* is essentially irrelevant to Petitioners' current Appeal and is unhelpful in determining whether the subject Orders are immediately appealable because of the missing details concerning the procedural posture of the case. Petitioners' reliance on *Keller* is misplaced.

When read in detail, it becomes apparent that none of the authorities cited by Petitioners in support of their arguments in any way set forth that the second prong of section 14-3-330(2) can be ignored, that the only important factor supporting immediate appealability is the presence of a substantial right, or that this Court's prior precedents stretching back over 100 years, including *Mid-State Distributors* and *Agnew*, should be overruled. Permitting the immediate appeal of orders denying motions to dismiss for lack of personal jurisdiction is not permitted by section 14-3-330 or this Court's precedents, and would open the floodgates to the immediate appeal of a large variety of interlocutory orders.

IV. North Carolina's practice of permitting such appeals represents an extreme minority approach that is only advocated by two states, and unlike here, does not run afoul of its appellate jurisdiction statute.

Petitioners' reliance on North Carolina law to support that the appellate courts of this State should entertain immediate appeals from all orders affecting a substantial right, without further requirements, is misguided and encourages the Court to overstep its constitutional constraints. N.C. Gen. Stat. Ann. section 7A-27(b)(3) provides that a litigant may appeal any interlocutory that does **any** of the following: "a. Affects a substantial right. b. In effect determines the action and prevents a judgment from which an appeal might be taken. c. Discontinues the action. d. Grants or refuses a new trial." While South Carolina's General Assembly has required that an interlocutory order satisfy both (a.) **and** one of either (b.) or (c.) to be immediately appealable, North Carolina's legislature has permitted the immediate appeal of interlocutory orders that only satisfy (a.). Petitioner's argument for following North Carolina's model is fatally flawed in that it ignores this key distinction between the boundaries of appellate jurisdiction in North Carolina and appellate jurisdiction in South Carolina.

North Carolina's model of permitting appeals from interlocutory orders such as the subject Orders also appears to be an extreme minority position on the issue. To the undersigned's best knowledge, North Carolina and Minnesota are the only states that permit the immediate appeal of interlocutory orders denying a motion to dismiss for lack of personal jurisdiction as a right without some sort of interlocutory certification or application procedure. And contrary to Petitioners' assertions, the

allowance of the immediate appeal of interlocutory orders affecting a substantial right has opened the floodgates in North Carolina to interlocutory appeal, leading the North Carolina Bar Association's Appellate Rules Committee to observe that the majority of appeals from interlocutory orders in North Carolina result from the substantial right doctrine, which arguably encompasses orders based on sovereign immunity, legislative or quasi-judicial immunity, the public-duty doctrine, absolute privilege, and a range of other issues. (Ex. B).

Contrary to Petitioners' arguments, there is not a dearth of case law describing South Carolina's personal jurisdiction doctrine or the contours of what is sufficient to meet the constitutional requirement of sufficient minimum contacts. The requirement of sufficient minimum contacts has been addressed so thoroughly by both South Carolina and federal courts that it is unnecessary to provide a lengthy citation to all of the relevant case law. Needless to say, the burden on the Court of Appeals to review the denials of countless motions to dismiss for lack of personal jurisdiction that would surely result from Petitioners' proposed system outweighs any supposed benefit that could be derived from having more reported decisions drilling further down into the minutiae of minimum contacts, a concept that has been present in our State and federal jurisprudence for at least 80 years. *See generally International Shoe Co. v. Washington*, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945).

In fact, the United States Supreme Court has published a doctrinal specific personal jurisdiction decision as recently as 2021. In *Ford Motor Co. v. Mont.*

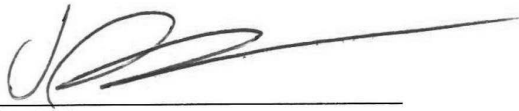
Eighth Jud. Dist. Ct., ---- U.S. ----, 141 S. Ct. 1017, 209 L. Ed. 2d 225 (2021), the Court further defined what constitutes a “connection” between a plaintiff’s suit and a defendant’s forum contacts. This followed numerous recent decisions from the Supreme Court of the United States further defining the personal jurisdiction requirements, including minimum contacts as drawn from *International Shoe*, and are binding decisions for the purposes of the specific personal jurisdiction analysis. Petitioners’ argument that there are not enough appeals of personal jurisdiction issue to create sufficient law is not based in reality. In his concurrence in *Ford Motor Co.*, Justice Gorsuch encouraged litigants and the lower courts to help the Court in the future to determine a modern analysis of personal jurisdiction in light of the changing economy and the historical nature of the Constitution. *Id.* at 1039 (Gorsuch, J., concurring). He did not express a concern that not enough cases were being appealed to create such law. *Id.* There is no valid reason to open the floodgates within this State to interlocutory appeals outside of Petitioners’ own self-serving interests.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court dismiss this Appeal.

[SIGNATURE PAGE TO FOLLOW]

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The Supreme Court of South Carolina

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Dwayne Thompson, Respondent,

v.

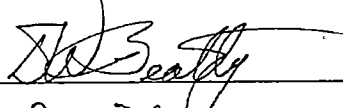
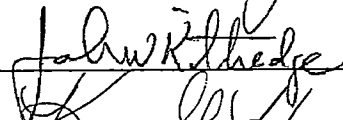
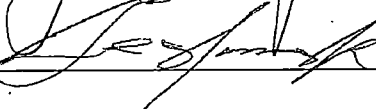
LG Chem, Ltd., LG Chem America, Inc., and Rolling
Fog Vapor Company, LLC, Defendants,

Of which LG Chem, Ltd. and LG Chem America, Inc.,
are the Petitioners.

Appellate Case No. 2021-000548

ORDER

Petitioners ask this Court to entertain this matter in our original jurisdiction. The petition for original jurisdiction is denied.

	C.J.
	J.
	J.
	J.
	J.

Columbia, South Carolina
July 6, 2021

cc: C. Mitchell Brown, Esquire
Rachel Atkin Hedley, Esquire
Allen Mattison Bogan, Esquire
Alexander Page Lewis, Esquire
William Blake Cummings, Esquire
Ronnie Lanier Crosby, Esquire
William Franklin Barnes, III, Esquire
Austin Howell Crosby, Esquire
Ms. Gina Marie Surace

The Supreme Court of South Carolina

Dwayne Thompson, Respondent,

v.

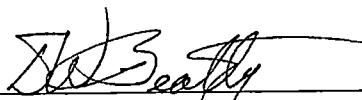
LG Chem, Ltd.; LG Chem America, Inc.; and Running
Fog Vapor Company, LLC, Defendants,

Of which LG Chem, Ltd. and LG Chem America, Inc.,
are the Appellants.

Appellate Case No. 2021-000543

ORDER

Appellants move to certify the appeal in Appellate Case No. 2021-000557 to this Court pursuant to Rule 204(b), SCACR. The motion is denied.



FOR THE COURT

C.J.

Columbia, South Carolina
July 06, 2021

cc: C. Mitchell Brown, Esquire
Rachel Atkin Hedley, Esquire
Allen Mattison Bogan, Esquire
Alexander Page Lewis, Esquire
William Blake Cummings, Esquire
Ronnie Lanier Crosby, Esquire
Austin Howell Crosby, Esquire

William Franklin Barnes, III, Esquire
The Honorable Jenny Abbott Kitchings

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Guide to Appealability of Interlocutory Orders

Appellate Rules Committee

Latest revision date: May 13, 2022

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STATEMENT OF PURPOSE

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

This Guide was prepared as a condensed primer on appeals from interlocutory orders in North Carolina. It is not meant to be a scholarly effort. It is not meant to address every issue pertaining to appeals of interlocutory orders. It is not meant to address the appealability of every type of interlocutory order. While this Guide attempts to illustrate the appealability of many practical examples of interlocutory orders, it is often difficult to predict with certainty whether an interlocutory order is immediately appealable in a particular case. The appealability of interlocutory orders is often dictated by a fact-intensive, case-by-case analysis. Thus, different facts may warrant different results from those set forth herein.

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

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

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I. INTRODUCTION

A. What Is an Interlocutory Order?

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

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

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

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

There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, i.e., to administer "right and justice . . . without sale, denial, or delay."

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

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

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

B. Terminology

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

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

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

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

C. Types of Immediately Appealable Interlocutory Orders

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

upon the court’s jurisdiction over the appellant’s person or property adversely to the appellant. See N.C. Gen. Stat. § 1-277; *id.* § 7A-27(a)(3), (b)(3); *id.* § 1A-1, Rule 54(b).¹

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

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

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

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

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

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

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

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

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes.

N.C. Gen. Stat. § 1A-1, Rule 54(b).

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

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

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

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

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

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

The trial court’s Rule 54(b) certification must be “contained in the body of the judgment itself from which appeal is being sought.” *Branch Banking & Tr. Co. v. Peacock Farm, Inc.*, 241 N.C. App. 213, 219, 772 S.E.2d 495, 500, *aff’d per curiam*, 368 N.C. 478, 780 S.E.2d 553 (2015). The trial court may not “retroactive[ly] attempt to certify a prior order for immediate appeal.” *Id.* (emphasis omitted).

3. Other statutory grounds for immediately appealing interlocutory orders

The remaining categories of appeals from interlocutory orders set forth in N.C. Gen. Stat. §§ 1-277 and 7A-27 are appeals from interlocutory orders that in effect determine the action and prevent a judgment from which appeal might be taken, orders that discontinue the action, orders that grant or refuse a new trial, orders that determine a claim prosecuted under N.C. Gen. Stat. § 50-19.1, orders that grant temporary injunctive relief that restrains the State or a political subdivision from enforcing an act of the General Assembly, and orders that rule upon the court’s jurisdiction over the appellant’s person or property adversely to the appellant. *See* N.C. Gen. Stat. §§ 1-277(b), 7A-27(a)(3)(b) to (d), (b)(3)(b) to (f).

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

II. GENERAL PRINCIPLES

A. Burden Is on the Appellant

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

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

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

. . . .

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

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

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

B. Denials of Dispositive Motions Generally

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

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

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

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

C. When to Appeal

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

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

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

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

However, there is case law that brings this rule into question. Those cases state that if an appellant wishes to challenge an earlier-entered interlocutory order, the appellant must designate both the final judgment and the interlocutory order in the notice of appeal. *See, e.g., Manley v. Maple Grove Nursing Home*, 267 N.C. App. 37, 41, 831 S.E.2d 902, 904 (2019) (explaining that “in order to properly appeal an interlocutory order, an appellant must designate both the interlocutory order and the final judgment rendering the interlocutory order reviewable in its notice of appeal”).

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

D. How to Appeal

When the trial court issues an order, appeal from that order must be taken within 30 days or the party will forfeit the right to appeal. N.C. Gen. Stat. § 1-279.1;

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

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

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

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

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

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

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

A. Orders Affecting Jurisdiction or Similar Defenses

1. Subject-matter jurisdiction

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

2. Personal jurisdiction

Orders denying motions to dismiss based on constitutional objections to personal jurisdiction are immediately appealable. *See* N.C. Gen. Stat. § 1-277(b) (“Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant”); *see also, e.g., A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257-58, 625 S.E.2d 894, 898 (2006) (“[M]otions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable.” (citing N.C. Gen. Stat. § 1-277(b))); *Smith Architectural Metals, LLC v. Am. Railing Sys., Inc.*, 207 N.C. App. 151, 153, 698 S.E.2d 752, 754 (2010). The right to immediate appeal, however, “is limited to rulings on ‘minimum contacts’ questions.” *Credit Union Auto Buying Serv., Inc. v. Burkshire Props. Grp. Corp.*, 243 N.C. App. 12, 14, 776 S.E.2d 737, 739 (2015) (quoting *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982)); *Crite v. Bussey*, 239 N.C. App. 19, 21, 767 S.E.2d 434, 436 (2015) (holding that there is no right to immediate appeal from a motion to dismiss that, “though couched in terms of lack of jurisdiction under Rule 12(b)(2), actually raises a question of sufficiency of service or process” (quoting *Berger v. Berger*, 67 N.C. App. 591, 595, 313 S.E.2d 825, 829 (1984))).

3. Sufficiency of service or process

Orders denying motions to dismiss for improper service or insufficient process are not immediately appealable. *See K2 Asia Ventures v. Trota*, 209 N.C. App. 716, 719, 708 S.E.2d 106, 109 (2011) (citing *Love v. Moore*, 305 N.C. 575, 580, 291 S.E.2d 141, 145 (1982) (holding that an “appellant [is] not entitled to immediate appeal of [a] trial court’s adverse ruling on motions to dismiss based on insufficiency of service and insufficiency of process”)); *Autec, Inc. v. Southlake Holdings, LLC*, 171 N.C. App. 147, 149, 613 S.E.2d 727, 729 (2005) (“[S]ection 1-277(b) does not apply to challenges to sufficiency of service of process.”).

4. Improper venue

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

Orders denying motions to change venue for the convenience of the witnesses under section 1-83(2), however, are not immediately appealable. N.C. Gen. Stat. § 1-83(2); *see Stokes v. Stokes*, 371 N.C. 770, 774, 821 S.E.2d 161, 164 (2018) (“While a party has a right to a legally proper venue, a party does not have a right to a preferred venue.”).

5. Improper venue based on forum-selection clause

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

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

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

7. Improper division

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

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

8. Challenges to Business Court designation orders

The North Carolina Supreme Court has held that North Carolina Business Court orders denying or overruling opposition to a lawsuit’s designation as a mandatory complex business case are not immediately appealable, absent a showing that the order affects a substantial right. *Hanesbrands Inc. v. Fowler*, 369 N.C. 216, 220, 794 S.E.2d 497, 500 (2016).

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

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

9. Failure to join necessary parties

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

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

B. Orders Implicating Traditional Affirmative Defenses

1. Statute of limitations

Orders denying dispositive motions based on the expiration of the statute of limitations are not immediately appealable. *Nello L. Teer Co. v. N.C. Dep't of Transp.*, 175 N.C. App. 705, 711, 625 S.E.2d 135, 139 (2006) (“Orders denying motions to dismiss based upon the statute of limitations are interlocutory and not immediately appealable.” (citing *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 120-21, 535 S.E.2d 397, 401 (2000))). This rule also applies to contractual time limitations. *Giusto v. Robertson Ventures, Inc.*, No. COA17-1205, 2018 N.C. App. LEXIS 597, at *8, 2018 WL 3029019, at *3 (N.C. Ct. App. June 19, 2018) (unpublished) (“For purposes of appellate review of an interlocutory order, there is no practical difference between a defense based on a statutory time limitation and a defense based on a contractual time limitation.”).

2. Res judicata

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

Under the doctrine of *res judicata*, a final judgment on the merits in a prior action in a court of competent jurisdiction precludes a second suit involving the same claim between the same parties or those in privity with them. Thus, a motion for summary judgment based on *res judicata* is directed at preventing the possibility that a successful defendant, or one in privity with that defendant, will twice have to defend against the same claim by the same plaintiff, or one in privity with that plaintiff. Denial of the motion could lead to a second trial in frustration of the underlying principles of the doctrine of *res judicata*.

Id. (quoting *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161). Thus, the Court held, “the denial of a motion for summary judgment based upon the defense of *res judicata* may involve a substantial right so as to permit immediate appeal only where a possibility

of inconsistent verdicts exists if the case proceeds to trial.” *Id.* (emphasis omitted) (quoting *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, 219 N.C. App. 623, 627, 727 S.E.2d 311, 314 (2012)); see also *Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 19, 824 S.E.2d 436, 439 (2019) (noting that “an appellant seeking to appeal an interlocutory order involving res judicata must include in the statement of the grounds for appellate review an explanation of how the challenged order would create a risk of inconsistent verdicts or otherwise affect a substantial right based on the particular facts of that case”).

3. Collateral estoppel

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

4. Standing

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

5. Justiciability

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

C. Orders of a Purely Procedural Nature

1. Amendments to pleadings

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

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

2. Amendments to compulsory counterclaims

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

3. Punitive damages

Orders denying motions to dismiss punitive damages claims are not immediately appealable. *Travco Hotels, Inc. v. Piedmont Nat. Gas Co.*, 102 N.C. App. 659, 661, 403 S.E.2d 593, 594 (1991) (“[A]n order denying a defendant’s motion to

dismiss a plaintiff's claim for punitive damages does not affect a substantial right, and the party appealing is not injured if it cannot appeal until after the final judgment.” (citing *Williams v. E. Coast Sales, Inc.*, 50 N.C. App. 565, 566, 274 S.E.2d 276, 277 (1981)), *aff'd*, 332 N.C. 288, 420 S.E.2d 426 (1992).

4. Finding of liability but damages not adjudicated

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

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

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

5. Arbitration

Under N.C. Gen. Stat. § 1-569.28 (Revised Uniform Arbitration Act) and § 1-567.67 (International Commercial Arbitration and Conciliation), orders denying motions to compel arbitration are immediately appealable. N.C. Gen. Stat. § 1-569.28(a)(1) (“An appeal may be taken from . . . [a]n order denying a motion to compel arbitration”); *id.* § 1-567.67(a)(1) (“An appeal may be taken from . . . [a]n order denying an application to compel arbitration”); *see also Pineville Forest Homeowners Ass’n v. Portrait Homes Constr. Co.*, 175 N.C. App. 380, 385, 623 S.E.2d 620, 624 (2006) (“It is well established that because “[t]he right to arbitrate a claim is a substantial right which may be lost if review is delayed . . . an order denying arbitration is . . . immediately appealable.” (alteration in original) (quoting *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 118, 516 S.E.2d 879, 881 (1999))).

In some circumstances, the decision to forego an immediate appeal from an order denying a motion to compel arbitration may result in waiver of the right to appeal at the conclusion of the case. *See Gemini Drilling & Found., LLC v. Nat’l Fire Ins. Co.*, 192 N.C. App. 376, 381, 665 S.E.2d 505, 509 (2008) (holding that, by failing to pursue an immediate appeal from an order denying a motion to compel arbitration and, instead, engaging in protracted litigation—including a full bench trial—an appellant waived its right to appeal the arbitration order at the conclusion of the case).

Orders denying motions to stay proceedings so that a dispute can be arbitrated are immediately appealable. *See* N.C. Gen. Stat. §§ 1-569.28(a)(2), -567.67(a)(2); *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 78, 721 S.E.2d 712, 715-16 (2012).

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

Other immediately appealable orders under North Carolina’s arbitration acts include orders confirming or denying confirmation of an award (N.C. Gen. Stat. §§ 1-569.28(a)(3), -567.67(a)(3)), orders modifying or correcting an award (*id.* §§ 1-569.28(a)(4), -567.67(a)(4)), or orders vacating an award without directing a rehearing (*id.* §§ 1-569.28(a)(5), -567.67(a)(5)).

6. Denial of indemnity claim

While there are some orders denying indemnity claims that are final and therefore immediately appealable, interlocutory orders dismissing claims for indemnity that do not resolve liability are not immediately appealable. *Telerent Leasing Corp. v. Barbee*, 102 N.C. App. 129, 130, 401 S.E.2d 122, 123 (1991) (“Since the appellants’ liability to the plaintiff has not been established, they have no need of the appellees’ indemnity now and may never need it. The time to pursue their appeal from the order denying their claim for indemnity is not now, but after the need for such indemnity has been established.”); *Cook v. Exp. Leaf Tobacco Co.*, 47 N.C. App. 187, 189, 266 S.E.2d 754, 756 (1980) (“Until the amount for which [third-party defendant] must pay on the indemnity contract has been determined, the partial summary judgment will not be a final judgment When the liability of [third-party defendant] to [third-party plaintiff] on the indemnity agreement has been determined, [third-party plaintiff] may appeal.”).

7. Directed verdicts following mistrial

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

8. Entry of default

Entries of default are not immediately appealable. *See Autec, Inc. v. Southlake Holdings, LLC*, 171 N.C. App. 147, 149, 613 S.E.2d 727, 729 (2005) (“The entry of

default is interlocutory in nature and is not a final judicial action.”); *see also* *Looper v. Looper*, 51 N.C. App. 569, 570, 277 S.E.2d 78, 79 (1981) (“The entry of default by the clerk is not a final judgment and is not appealable. It is an interlocutory act looking toward the subsequent entry of a final judgment by default.” (citations omitted)).

9. Orders setting aside entry of default

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

10. Orders setting aside default judgment

Orders setting aside default judgments are not immediately appealable. *See Gibson v. Mena*, 144 N.C. App. 125, 127, 548 S.E.2d 745, 746 (2001) (“[O]rders setting aside default judgments are interlocutory and ordinarily not appealable.”); *see also Bailey v. Gooding*, 301 N.C. 205, 209, 270 S.E.2d 431, 434 (1980) (“Unquestionably, [an] order . . . setting aside [a] default judgment is interlocutory; it does not finally dispose of the case and requires further action by the trial court.”).

11. Orders vacating a notice of voluntary dismissal

Orders vacating a notice of voluntary dismissal may be immediately appealable. *See Mkt. Am., Inc. v. Lee*, 257 N.C. App. 98, 102, 809 S.E.2d 32, 36 (2017) (“[A] substantial right is affected with respect to the trial court’s order vacating [the plaintiffs] voluntary dismissal.”).

12. Orders granting a partial new trial

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

13. Orders declaring a mistrial

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

14. Injunctions

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

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

Additionally, notable exceptions to this rule may exist in cases involving noncompete agreements or trade secrets. *See infra* pp. 37, 40.

D. Orders Concerning Counsel

1. Attorney disqualification

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

[A]n order granting a motion to disqualify counsel affects a substantial right because it “has immediate and irreparable consequences for both the disqualified attorney

and the individual who hired the attorney. The attorney is irreparably deprived of exercising his right to represent a client. The client, likewise, is irreparably deprived of exercising the right to be represented by counsel of the client's choice. Neither deprivation can be adequately redressed by a later appeal of a final judgment adverse to the client."

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

2. Sanctions against counsel

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

3. Pro hac vice motions

Orders denying motions for admission of counsel pro hac vice are not immediately appealable. *Dance v. Manning*, 207 N.C. App. 520, 523, 700 S.E.2d 145, 147 (2010) ("[S]uch order does not involve a substantial right and is not appealable as a matter of right. This is so because parties do not have a right to be represented in the courts of North Carolina by counsel who are not duly licensed to practice in this state. Admission of counsel in North Carolina pro hac vice is not a right but a discretionary privilege. It is permissive and subject to the sound discretion of the Court." (quoting *Leonard v. Johns-Manville Sales Corp.*, 57 N.C. App. 553, 555, 291 S.E.2d 828, 829 (1982))).

4. Injunctions against the State Bar

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

E. Orders Affecting Immunities

1. Sovereign immunity

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

The confusion appears related to the fact that orders denying motions to dismiss for lack of personal jurisdiction are generally immediately appealable, but orders denying motions to dismiss for lack of subject-matter jurisdiction are generally not immediately appealable. *See Atl. Coast Conference v. Univ. of Md., Coll. Park*, 230 N.C. App. 429, 436, 751 S.E.2d 612, 617 (2013) (“[B]ecause our case law remains ambiguous as to the type of jurisdictional challenge presented by a sovereign immunity defense, the ability of a litigant raising the defense to immediately appeal may vary, to some extent, based on the manner in which the motion is styled.”); *see also Lake v. State Health Plan for Tchrs. & State Emps.*, 234 N.C. App. 368, 371 n.3, 760 S.E.2d 268, 271 n.3 (2014) (noting this inconsistency).

For example, in *Sandhill Amusements, Inc. v. Sheriff of Onslow County*, the Court of Appeals permitted an immediate appeal from orders denying motions to dismiss under Rule 12(b)(1), 12(b)(2), and 12(b)(6) based on sovereign immunity. 236 N.C. App. 340, 347, 762 S.E.2d 666, 672 (2014) (“[T]he denial of [appellant’s] 12(b)(1), (2), and (6) motions to dismiss based on sovereign immunity affects a substantial right.”), *rev’d per curiam on other grounds sub nom. Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91, 773 S.E.2d 55 (2015); *accord Viking Utils. Corp. v. Onslow Water & Sewer Auth.*, 232 N.C. App. 684, 686, 755 S.E.2d 62, 64 (2014); *Bell v. City of New Bern*, No. COA13-817, 2014 N.C. App. LEXIS 461, at *8-9, 2014 WL 1795136, at *3-4 (N.C. Ct. App. May 6, 2014) (unpublished).

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

2. Legislative or quasi-judicial immunity

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

3. Public-duty doctrine

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

4. Absolute privilege (immunity from suit)

Orders denying dispositive motions in which a defense of absolute privilege was asserted are immediately appealable. *Topping v. Meyers*, 270 N.C. App. 613, 617, 842 S.E.2d 95, 99 (2020) (“If an absolute bar to suit extends and applies to Defendants’ actions, the trial court’s failure to dismiss Plaintiff’s claims deprives Defendants of immunity from suit. . . . [This] is a substantial right for Defendants, which would be lost, absent interlocutory review.”), *disc. rev. denied*, 854 S.E.2d 800 (N.C. 2021); *see also Bouvier v. Porter*, 279 N.C. App. 528, 2021-NCCOA-522, ¶¶ 19-21 (conducting an analysis of the merits of the absolute-privilege defense to determine whether the order on appeal affected a substantial right).

5. Statutory immunity

Orders denying dispositive motions in which a claim of statutory immunity was asserted are immediately appealable if the party claiming the immunity satisfies the requirements of the underlying statute. *Stahl v. Bowden*, 274 N.C. App. 26, 28, 850 S.E.2d 588, 590 (2020) (“[A] party claiming the protection of statutory immunity must satisfy ‘all of the requirements’ of the statute granting the claimed immunity in order to establish a substantial right entitling him to an immediate appeal.” (quoting *Wallace v. Jarvis*, 119 N.C. App. 582, 585, 459 S.E.2d 44, 46 (1995))).

F. Discovery Orders

1. Motions to compel discovery

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

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

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

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

In addition, orders denying motions to compel based on the nonmovant’s assertion of privilege are generally not immediately appealable. *James v. Bledsoe*,

198 N.C. App. 339, 344, 679 S.E.2d 494, 498 (2009). Orders denying motions to compel discovery affect a substantial right when (1) “a party asserts a statutory privilege which directly relates to the matter to be disclosed under an interlocutory discovery order, and the assertion of such privilege is not otherwise frivolous or insubstantial,” or (2) “the desired discovery would not have delayed trial or have caused the opposing party any unreasonable annoyance, embarrassment, oppression or undue burden or expense, and the information desired is highly material to a determination of the critical question to be resolved in the case.” *Id.* at 345, 679 S.E.2d at 498 (quoting *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 447-48, 271 S.E.2d 522, 523 (1980)).

2. Orders compelling deposition attendance

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

G. Privileges Generally

1. Physician-patient

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

2. HIPAA

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

3. Medical peer review

Orders requiring disclosure of information protected by medical peer-review privilege are immediately appealable. *Woods v. Moses Cone Health Sys.*, 198 N.C. App. 120, 124, 678 S.E.2d 787, 791 (2009); *Hayes v. Premier Living, Inc.*, 181 N.C.

App. 747, 751, 641 S.E.2d 316, 318 (2007) (holding that the protections set forth in N.C. Gen. Stat. § 131E-107, commonly known as the peer-review privilege, includes medical peer review, and orders compelling the production of reports under this section affect a substantial right and are immediately appealable).

4. First Amendment

Orders that affect a litigant's First Amendment rights and "threaten" or "impair" those First Amendment rights are immediately appealable. *Hammer Publ'ns v. Knights Party*, 196 N.C. App. 342, 346, 674 S.E.2d 720, 723 (2009) ("[F]or immediate appeal to be proper, we must conclude that either or both the order and injunction (1) affect defendant's First Amendment rights and (2) 'threaten[] or impair[]' defendant's First Amendment rights." (second and third alterations in original) (quoting *Harris v. Matthews*, 361 N.C. 265, 270, 643 S.E.2d 566, 570 (2007))); see also *Boyce & Isley, PLLC v. Cooper*, 211 N.C. App. 469, 474, 710 S.E.2d 309, 314 (2011) ("Our Courts have recognized that because a misapplication of the actual malice standard when considering a motion for summary judgment 'would have a chilling effect' on a defendant's right to free speech, a substantial right is implicated." (quoting *Priest v. Sobeck*, 153 N.C. App. 662, 670, 571 S.E.2d 75, 81 (2002) (Greene, J., dissenting), *rev'd per curiam*, 357 N.C. 159, 579 S.E.2d 250 (2003) (adopting the dissenting opinion of the Court of Appeals))).

5. Judicial entanglement in religious matters

Orders denying motions to dismiss on First Amendment ecclesiastical-entanglement grounds are immediately appealable. See *Doe 200 v. Diocese of Raleigh*, 242 N.C. App. 42, 45, 776 S.E.2d 29, 33 (2015). "The dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine." *Davis v. Williams*, 242 N.C. App. 262, 264, 774 S.E.2d 889, 892 (2015) (quoting *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398 (1998)).

6. Fifth Amendment privilege against self-incrimination

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

H. Family Law

1. N.C. Gen. Stat. § 50-19.1

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

Notwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for absolute divorce, divorce from bed and board, the validity of a premarital agreement as defined by G.S. 52B-2(1), child custody, child support, alimony, or equitable distribution if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action. A party does not forfeit the right to appeal under this section if the party fails to immediately appeal from an order or judgment described in this section. An appeal from an order or judgment under this section shall not deprive the trial court of jurisdiction over any other claims pending in the same action.

Id. § 50-19.1.

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

2. Orders terminating parental rights

Effective January 1, 2019, any order that terminates parental rights or denies a petition or motion to terminate parental rights is immediately appealable to the North Carolina Supreme Court. N.C. Gen. Stat. §§ 7A-27(a)(5), 7B-1001(a1)(1).

3. Postseparation support

Orders awarding postseparation support, prior to a final determination regarding an award of alimony, are not immediately appealable. *Rowe v. Rowe*, 131 N.C. App. 409, 411, 507 S.E.2d 317, 319 (1998) (“[S]ince a postseparation support

order is a temporary measure, it is interlocutory, it does not affect a substantial right, and it is not appealable.”).

4. Alienation of affection and criminal conversation

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

5. Orders setting aside a separation agreement

Interlocutory orders setting aside separation agreements are not immediately appealable. *See Johnson v. Johnson*, 208 N.C. App. 118, 122-23, 701 S.E.2d 722, 726 (2010) (“The Order granting Defendant’s motion to set aside the Agreement is properly viewed as a judgment on Plaintiff’s plea in bar. As such, the Order is not immediately appealable because an order disposing of a plea in bar is not a final judgment on a claim for relief under Rule 54(b).”). *But see Johnson v. Johnson*, 259 N.C. App. 823, 826, 817 S.E.2d 466, 470 (2018) (holding that denial of a motion to set aside a separation agreement is immediately appealable because it “directly impacts” a substantial right).

6. Orders determining date of separation

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

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

7. Orders on abuse, neglect, and dependency matters under chapter 7B

Section 7B-1001(a) specifies that an appeal under the abuse, neglect, and dependency subchapter of the Juvenile Code may be taken only from a final court order in a juvenile matter. N.C. Gen. Stat. § 7B-1001(a)(1) to (5), (a1)(1) to (2). Section 7B-1001(a) was amended significantly in 2005 to limit the categories of appealable orders. Case law has refined the scope of categories under the statute to

distinguish between interlocutory orders that are not appealable under the statute and final orders that are appealable under the statute. But few cases have challenged the right to appeal interlocutory orders on the basis that an order affects a substantial right.

Interlocutory orders that are *not* immediately appealable include (1) nonsecure custody orders, *In re A.T.*, 191 N.C. App. 372, 375, 662 S.E.2d 917, 918-19 (2008), and (2) initial adjudication orders appealed only with a temporary disposition order, *In re P.S.*, 242 N.C. App. 430, 432, 775 S.E.2d 370, 372 (2015).

Ordinarily, any order that changes legal custody of the child, other than a nonsecure custody order, is immediately appealable under section 7B-1001(a)(4). N.C. Gen. Stat. § 7B-1001(a)(4); *In re J.V.*, 198 N.C. App. 108, 111, 679 S.E.2d 843, 844-45 (2009). This includes orders that impose new restrictions on a parent's decision-making responsibilities. *In re M.M.*, 249 N.C. App. 58, 61-62, 795 S.E.2d 222, 224 (2016). However, the Court of Appeals dismissed an appeal of a temporary disposition order under section 7B-1001(a)(4) where the child was placed in the temporary custody of DSS. *In re P.S.*, 242 N.C. App. at 432, 775 S.E.2d at 372. The court reasoned that a temporary custody order is analogous to a nonsecure custody order and was not contemplated as a permissibly appealable order under the statute. *See id.*

When an abuse, neglect, or dependency case under chapter 7B is consolidated with a private custody case under chapter 50 at the trial level, the order must be both appealable under section 7B-1001(a) *and* a final child-custody order as defined by cases addressing appealability of child-custody orders. *See In re N.T.S.*, 209 N.C. App. 731, 734-36, 707 S.E.2d 651, 654-55 (2011). Since the statute defines appealable orders as “final orders,” a showing that the order affects a substantial right should not be required. However, a temporary disposition order could be considered a nonsecure custody order, or analogous to a nonsecure custody order, which is not appealable under any provision of the statute.

A finding that a parent has acted in a manner inconsistent with his or her constitutionally protected status, even if made in an order that is not appealable under section 7B-1001(a), may nonetheless be appealable with a later appealable order under section 1-278. *See* N.C. Gen. Stat. § 1-278; *Tinajero v. Balfour Beatty Infrastructure, Inc.*, 233 N.C. App. 748, 757, 758 S.E.2d 169, 175 (2014); *see also In re H.S.*, No. COA16-749, 2017 N.C. App. LEXIS 85, at *8-9, 2017 WL 490497, at *3 (N.C. Ct. App. Feb. 7, 2017) (unpublished).

Effective January 1, 2019, a parent who has given proper notice of the intent to appeal an order eliminating reunification as a permanent plan under section 7B-906.2(b) can proceed with a direct appeal to the Court of Appeals on that order alone if a termination-of-parental-rights (TPR) petition or motion has not been filed

within 65 days after entry of the 906.2(b) order. N.C. Gen. Stat. § 7B-1001(a)(5). If a TPR petition or motion has been filed within the 65-day period, the appeal of the 906.2(b) order is delayed until the TPR motion is heard or granted. Under this scenario, the 906.2(b) order and TPR order, together, are immediately appealable to the North Carolina Supreme Court. *Id.* § 7B-1001(a1)(2).

A trial court order that addresses DSS's right to choose how to dispose of funds that it received as a representative payee for a child's social-security benefits affects a substantial right and is immediately appealable. *In re J.G.*, 186 N.C. App. 496, 502, 652 S.E.2d 266, 270 (2007). Likewise, an appeal from an order denying a motion to set aside a relinquishment of parental rights affects a substantial right and is immediately appealable. *In re L.E.*, No. COA14-1105, 2015 N.C. App. LEXIS 176, at *5, 2015 WL 1201277, at *2 (N.C. Ct. App. Mar. 17, 2015) (unpublished); *In re Adoption of Baby Boy*, 233 N.C. App. 493, 498, 757 S.E.2d 343, 346 (2014).

8. Temporary child-custody, visitation, and child-support orders

Temporary custody, visitation, and support orders are not immediately appealable. *Sood v. Sood*, 222 N.C. App. 807, 809, 732 S.E.2d 603, 606 (2012) ("A temporary child custody order is normally 'interlocutory and does not affect any substantial right which cannot be protected by timely appeal from the trial court's ultimate disposition on the merits.'" (quoting *Brewer v. Brewer*, 139 N.C. App. 222, 227, 533 S.E.2d 541, 546 (2000))); *see also Gray v. Peele*, 235 N.C. App. 554, 561, 761 S.E.2d 739, 744 (2014) (dismissing an interlocutory appeal from a temporary child-support order). An order requiring that a grandparent have certain visitation rights, however, can affect a substantial right. *McCall v. Million*, No. COA17-403, 2018 N.C. App. LEXIS 247, at *18, 2018 WL 1162740810, at *6 (N.C. Ct. App. Mar. 6, 2018) (unpublished) ("[A]ccess to and visitation with the child affected Defendants' fundamental right to make decisions concerning the care, custody, and control of the child, including the child's association with third parties. . . . The trial court's order granting visitation to Plaintiff therefore affected a substantial right.").

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

The Court of Appeals has carved out an exception for the appealability of temporary orders under the Uniform Deployed Parents Custody and Visitation Act. *See Roybal v. Raulli*, 266 N.C. App. 318, 832 S.E.2d 202 (2019). In *Roybal*, the Court held that a custodial-responsibility order under the Uniform Deployed Parents Custody and Visitation Act is immediately appealable under N.C. Gen. Stat. § 50-19.1 because, while the order “is technically a ‘temporary’ order . . . [such orders] would be essentially non-appealable if we treated them like temporary custody orders under Chapter 50.” *Id.* at 327-28, 832 S.E.2d at 208. Likewise, a trial court’s failure to recognize the automatic temporary stay provided by the Servicemembers Civil Relief Act (50 U.S.C. § 3932) in a child-custody proceeding is immediately appealable. *See Davidson v. Laws*, No. COA18-780, 2020 N.C. App. LEXIS 94, at *7, 2020 WL 549448, at *3 (N.C. Ct. App. Feb. 4, 2020).

9. Orders determining whether a putative parent’s consent is necessary for adoption

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

10. Orders effectively nullifying a mother’s consent to adoption

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

11. Orders setting aside a divorce judgment

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

12. Orders denying attorney’s fees

An order denying attorney’s fees for family law claims that have been fully litigated and decided is immediately appealable, even when claims unrelated to those fees remain pending before the trial court. *Beasley v. Beasley*, 259 N.C. App. 735, 742, 816 S.E.2d 866, 872 (2018) (“[W]e determine that the traditional ‘substantial right’ exception may also apply to other interlocutory orders entered in a family law

case—such as the one here for attorney’s fees—but that do not appear listed in section 50-19.1.”).

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

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

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

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

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

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

J. Miscellaneous Orders Concerning the Rights of Litigants

1. Possibility of inconsistent verdicts in multiple trials

Orders that result in the possibility of inconsistent verdicts in two or more trials are immediately appealable if the same factual issues would be present in both trials. *See Callanan v. Walsh*, 228 N.C. App. 18, 21, 743 S.E.2d 686, 689 (2013) (quoting *Est. of Harvey v. Kore-Kut, Inc.*, 180 N.C. App. 195, 198, 636 S.E.2d 210, 212 (2006) (“Where the dismissal of an appeal as interlocutory could result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right is prejudiced and therefore such dismissal is immediately appealable.”)). Those factual issues, however, must derive from the same act or omission. *See Amelio v. Real Est. by Design, LLC*, No. COA17-724, 2018 N.C. App.

LEXIS 605, at *10, 2018 WL 3029014, at *4 (N.C. Ct. App. June 19, 2018) (unpublished) (noting that the inconsistent-verdict theory does not apply when identical claims are based on “separate and distinct allegations of misconduct”).

2. Attorney’s fees sanctions

Orders sanctioning a party with an award of attorney’s fees ordinarily are not immediately appealable. *Long v. Joyner*, 155 N.C. App. 129, 134, 574 S.E.2d 171, 175 (2002) (“Certain sanctions have been deemed immediately appealable because they affect a substantial right However, an order to pay attorney’s fees as a sanction does not affect a substantial right.” (citations omitted)); *see also Cochran v. Cochran*, 93 N.C. App. 574, 577, 378 S.E.2d 580, 582 (1989) (“The order granting attorney[’s] fees is interlocutory, as it does not finally determine the action nor affect a substantial right which might be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order.”).

Attorney-fee sanctions that require a party to immediately pay a significant sum of money, however, may be immediately appealable. *Compare Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc.*, 276 N.C. App. 95, 2021-NCCOA-41, ¶ 23 (holding that an order requiring a party to immediately pay \$48,000 in attorney-fee sanctions affected a substantial right), *with IzMaCo Invs., LLC v. Royal Roofing & Restoration, LLC*, 2021-NCCOA-601, ¶ 6 (concluding that an attorney-fee award of \$1,129.99 did not affect a substantial right).

3. Orders resulting in expensive trial proceedings

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

4. Specific performance concerning real estate

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

However, interlocutory orders granting specific performance and requiring conveyance of property are immediately appealable. *Phoenix Ltd. P'ship of Raleigh v. Simpson*, 201 N.C. App. 493, 499, 688 S.E.2d 717, 721 (2009) (“[W]e agree with defendants that the order of the trial court granting specific performance to plaintiff and requiring defendants to convey the . . . property to plaintiff affects a substantial right.”); *see also Wells Fargo Bank, N.A. v. Stocks*, 266 N.C. App. 228, 231, 831 S.E.2d 378, 381 (2019) (holding that a summary-judgment order directing the sale of a homeowner’s primary residence affected a substantial right where the homeowner stood to “lose her home permanently prior to any appeal from final judgment” if the appeal were not heard and the foreclosure moved forward), *rev’d on other grounds*, 378 N.C. 342, 2021-NCSC-90.

5. Appointment of receiver

Orders denying appointment of a receiver are immediately appealable. *Barnes v. Kochhar*, 178 N.C. App. 489, 498-99, 633 S.E.2d 474, 480 (2006) (“[Shareholders’] right to preservation of what they allege are [the corporation’s] assets and corporate opportunities has been substantially affected by the trial court’s denial of the appointment of a receiver. . . . [A]bsent immediate appellate review . . . these substantial rights will be ‘lost, prejudiced or be less than adequately protected.’ . . . [T]he trial court’s denial of an appointment of a receiver can be immediately appealed on these facts” (quoting *Schout v. Schout*, 140 N.C. App. 722, 725, 538 S.E.2d 213, 215 (2000))).

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

6. Intervention

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

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

7. Motions for jury trial

Orders denying a motion for jury trial are immediately appealable. *See In re Foreclosure of Elkins*, 193 N.C. App. 226, 227, 667 S.E.2d 259, 227 (2008) (“[A]n order denying a motion for jury trial is immediately appealable because it affects a substantial right.” (citing *In re McCarroll*, 313 N.C. 315, 316, 327 S.E.2d 880, 881 (1985) (per curiam))). “By the same token, a court order that effectively denies a party’s constitutional and statutory right to a jury trial is [immediately] appealable.” *Woody v. Vickrey*, 276 N.C. App. 427, 2021-NCCOA-105, ¶ 29.

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

8. Motions to strike

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

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

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

9. Motions to recuse

A ruling on a motion to recuse a trial judge is not immediately appealable. *Lowder v. All Star Mills, Inc.*, 60 N.C. App. 699, 702, 300 S.E.2d 241, 243 (1983) (noting this rule but electing “to treat the case as though a petition for certiorari had been allowed and to proceed to the merits,” since “an accusation about a judge’s partiality goes to the fundamental issue of maintaining confidence in our court system”).

K. Other Miscellaneous Orders

1. Certification of class actions

Effective April 26, 2017, a trial court's decision on class-action certification under Rule 23 is immediately appealable to the North Carolina Supreme Court. N.C. Gen. Stat. § 7A-27(a)(4); *see McMillan v. Blue Ridge Cos.*, 379 N.C. 488, 2021-NCSC-160.

2. Discontinuance of class representative in potentially meritorious suit

Orders allowing a class representative's discontinuance in a potentially meritorious suit are immediately appealable. *See Perry v. Cullipher*, 69 N.C. App. 761, 762, 318 S.E.2d 354, 356 (1984) ("Because [Rule 23] provides for members of a class to be represented by one of the class, we believe their right to this representation makes a consideration of their rights necessary when considering whether an order refusing to certify the class may be appealed. . . . We hold that the order is appealable.").

3. Contempt

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

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

Orders "concerning title or area taken" of a common area subject to condemnation are "vital preliminary issues" that *must be immediately appealed*. *N.C. Dep't of Transp. v. Stagecoach Vill.*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005) (first citing *Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999); then citing *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967)). Recently, the Court of Appeals held in an unpublished opinion that an appellant must notice an appeal of the *first order* in a case that may be deemed to address the scope of the taking. *See Town of Cary v. Southerland*, No. COA15-740, 2016 N.C. App. LEXIS 550, at *15, 2016 WL 2865096, at *6 (N.C. Ct. App. May 17,

2016) (unpublished) (dismissing the defendant’s appeal for lack of jurisdiction where the notice of appeal designated the trial court’s second order addressing the scope of the taking rather than the earlier-entered order).

Condemnors should note, however, that interlocutory orders of this kind are appealable only by “one who holds an interest in the subject property of the eminent domain proceeding, if title to the interest is contested, or to a party who contends that the area taken is different from that identified by the condemnor on the map or plat of the land taken filed by the condemnor pursuant to Article 9 of Chapter 136.” *Beroth Oil Co. v. N.C. Dep’t of Transp.*, 256 N.C. App. 401, 412, 808 S.E.2d 488, 497 (2017). Therefore, “the government authority effectuating the taking has no substantial right justifying interlocutory review of an order concerning title or area taken unless and until that condemnor has filed a map or plat pursuant to Article 9 identifying the property subject to eminent domain proceedings and condemnation.” *Id.* (dismissing appeal).

Orders determining what constitutes an entire tract—i.e., unification orders—may be immediately appealable, depending on the particular facts of the case. *See Dep’t of Transp. v. Airlie Park, Inc.*, 156 N.C. App. 63, 65-66, 576 S.E.2d 341, 343 (2003) (concluding that the issue of lot unification addressed in the pretrial order was a “vital preliminary issue”); *see also Dep’t of Transp. v. Riddle*, No. COA16-445, 2017 N.C. App. LEXIS 276, at *6-7, 2017 WL 8727189, at *3 (N.C. Ct. App. Apr. 18, 2017) (holding that the issue of lot unification was a “vital preliminary issue,” but noting that “*Rowe* could be construed as definitively holding that an interlocutory order which merely defines the boundaries of the ‘entire tract’ does not affect a substantial right” (citing *Rowe*, 351 N.C. at 176-77, 521 S.E.2d at 709-10)).

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

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

6. Orders prohibiting the right to use and control assets

Orders prohibiting the right to use and control assets during the pendency of litigation are immediately appealable. *See SED Holdings, LLC v. 3 Star Props., LLC*, 246 N.C. App. 632, 635, 784 S.E.2d 627, 630 (2016); *see also Scottish Re Life Corp. v. Transamerica Occidental Life Ins. Co.*, 184 N.C. App. 292, 294-95, 647 S.E.2d 102, 104 (2007) (holding that an order requiring posting of bonds affected a substantial right, “[g]iven the large amount of money at issue, . . . the fact that the trial court impinged appellant’s right to . . . assets, and the unavoidable and lengthy delays”);

Schout v. Schout, 140 N.C. App. 722, 726, 538 S.E.2d 213, 216 (2000) (holding that the trial court’s order “directing Wachovia to deliver the corpus of the [brokerage] account to plaintiff jeopardize[d] defendant’s right to maintain the assets for plaintiff’s educational needs” and affected a substantial right).

7. Covenants not to compete

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

8. Right to earn a living

Orders that affect parties’ “right to earn a living and practice [their] livelihood” are immediately appealable. *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 635, 568 S.E.2d 267, 271 (2002) (“[The preliminary injunction’s] restriction effectively prohibits defendant from earning a living and practicing his livelihood in North Carolina and South Carolina. . . . [A] substantial right of defendant, the right to earn a living and practice his livelihood, will be adversely affected if the instant preliminary injunction escapes immediate appellate review.”); *see also Emp. Staffing Grp., Inc. v. Little*, 243 N.C. App. 266, 269, 777 S.E.2d 309, 312 (2015) (“Because this case presents a time-sensitive issue as to both Plaintiff’s and Defendant’s rights under the Employment Agreement and has a substantial effect on their livelihoods, we address the merits of Defendant’s appeal.”); *Masterclean of N.C., Inc. v. Guy*, 82 N.C. App. 45, 47, 345 S.E.2d 692, 694 (1986) (“We hold that defendant would be deprived of a substantial right, absent a review prior to a final determination, to wit: the right to work and earn a living in the states of North Carolina, South Carolina, Virginia, Georgia and Alabama.”).

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

However, there are decisions to the contrary. The Court of Appeals has held that a preliminary injunction enforcing a non-compete covenant was not immediately appealable because it did not completely “prevent or ‘destroy’ [the appellant’s] ability to earn a living or sustain a livelihood,” even though the preliminary injunction restricted the appellant from soliciting or accepting business from 300 of his clients. *SIA Grp., Inc. v. Patterson*, 254 N.C. App. 85, 89, 801 S.E.2d 707, 710 (2017). In another decision, the Court of Appeals dismissed an appeal from a preliminary injunction that prevented the plaintiff from selling assets that it allegedly purchased. *Coca-Cola Bottling Co. Consol. v. Durham Coca-Cola Bottling Co.*, 141 N.C. App. 569, 582, 541 S.E.2d 157, 166 (2000).

9. Orders remanding to a municipal body

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

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

10. Paternity blood-grouping tests

Orders requiring submission to paternity blood-grouping tests are not immediately appealable. *See Davie Cnty. Dep’t of Soc. Servs. ex rel. Brown v. Jones*, 62 N.C. App. 142, 142, 301 S.E.2d 926, 927 (1983) (“An order to submit a blood grouping test pursuant to G.S. 8-50.1 is interlocutory. . . . An order to submit to a blood grouping test does not, in this case, affect a substantial right.”); *see also Heavner v. Heavner*, 73 N.C. App. 331, 333, 326 S.E.2d 78, 80 (1985).

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

11. Orders denying the release of funds held in escrow

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

12. Payments pendente lite

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

13. Payments during pending workers’ compensation litigation

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

14. Attachment

Orders pursuant to the UCC determining that a party is entitled to immediate possession of collateral are not immediately appealable. *Citicorp Person-To-Person Fin. Ctr., Inc. v. Stallings 601 Sales, Inc.*, 49 N.C. App. 187, 189, 270 S.E.2d 567, 569 (1980) (“The interlocutory order giving immediate possession of the collateral to plaintiffs has affected no substantial right of defendant.”).

15. Stay of proceedings

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

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

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

17. Orders requiring immediate payment of substantial amounts of money

There is some authority suggesting that interlocutory orders “requiring the immediate payment of a significant amount of money” may be immediately appealable. *Est. of Redden ex rel. Morley v. Redden*, 179 N.C. App. 113, 116-17, 632 S.E.2d 794, 798 (2006) (“The Order appealed affects a substantial right of Defendant . . . by ordering her to make immediate payment of a significant amount of money . . .”), *remanded on other grounds*, 361 N.C. 352, 649 S.E.2d 638 (2007); *see also In re Fifth Third Bank, Nat’l Ass’n—Vill. of Penland Litig.*, 217 N.C. App. 199, 205, 719 S.E.2d 171, 175-76 (2011) (same); *Porters Neck Ltd., LLC v. Porters Neck Country Club, Inc.*, 276 N.C. App. 95, 2021-NCCOA-41, ¶ 23 (holding that an order requiring a party to immediately pay \$48,000 in attorney-fee sanctions affected a substantial right).

18. Orders denying enforcement of a franchise agreement

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

19. Trade secrets

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

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

20. Injunctive relief to prohibit contracts with third parties

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

21. Restraint on local-government legislative functions

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

22. Lis pendens

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

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

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

23. Bonds

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

24. Public access to court documents and proceedings

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

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

Orders either granting or denying motions to assert a right of access to civil proceedings or judicial records in civil proceedings under N.C. Gen. Stat. § 1-72.1 are immediately appealable by the movant or any party to the proceeding. See N.C. Gen. Stat. § 1-72.1(e). Note that the deadline to serve a notice of appeal from this type of order is ten days after the court’s ruling. *Id.*

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

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

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

trial court found that respondent was improperly interpreting statutes it is responsible for enforcing. Thus, we conclude that respondent suffers the risk of injury if we do not consider the merits of this interlocutory appeal. Therefore, we deny petitioner’s motion to dismiss.”); *see also LeTendre v. Currituck Cnty.*, 259 N.C. App. 512, 525, 817 S.E.2d 73, 84 (2018) (quoting *Sandhill Amusements, Inc. v. Sheriff of Onslow Cnty.*, 236 N.C. App. 340, 762 S.E.2d 666 (2014) (Ervin, J., dissenting) (“[E]ntry of a preliminary injunction precluding a state or local agency from enforcing the law affects a substantial right and is immediately appealable.”), *rev’d per curiam sub nom. Sandhill Amusements, Inc. v. Miller*, 368 N.C. 91, 773 S.E.2d 55 (2015) (adopting Judge Ervin’s dissenting opinion)).

26. Insurer’s duty to defend

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

However, no substantial right exists from an appeal of an interlocutory order brought by an underinsured-motorist insurer claiming a duty to defend in the underlying action, because “[a]n underinsured motorist insurer ‘may elect, *but may not be compelled*, to appear in the action in its own name.’” *Peterson v. Dillman*, 245 N.C. App. 239, 245, 782 S.E.2d 362, 367 (2016) (quoting N.C. Gen. Stat. § 20-279.21(b)(4)); *see also id.* (rejecting the notion that an underinsured-motorist insurer’s “*choice* to enter the action is tantamount to a *duty* to defend an insured”).

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

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

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

While there is no substantial-right doctrine under N.C. Gen. Stat. § 7A-29, Rule 21(a) of the North Carolina Rules of Appellate Procedure provides that a “writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals . . . when no right of appeal from an interlocutory order exists.” N.C. R. App. P. 21(a)(1).

28. Public-purpose issue in takings cases

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

29. Involuntary-commitment orders

An order of involuntary commitment is immediately appealable under N.C. Gen. Stat. § 122C-272. *See, e.g., In re Shackelford*, 248 N.C. App. 357, 360, 789 S.E.2d 15, 17-18 (2016).

30. Orders denying motions to enforce a settlement agreement

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

31. Right to vote

Orders that materially affect an individual’s right to vote are immediately appealable. *Holmes v. Moore*, 270 N.C. App. 7, 13, 840 S.E.2d 244, 252 (2020) (concluding that “the right to vote on equal terms and free from intentional discrimination” is a substantial right).

IV. INTERLOCUTORY APPEALS IN CRIMINAL CASES

A. Generally

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

N.C. Gen. Stat. § 15A-1444 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. § 15A-1432(d).

B. “Substantial Right” Analysis in Criminal Cases

In *State v. Joseph*, the Court of Appeals held that a “substantial right” analysis had no place in criminal cases. *State v. Joseph*, 92 N.C. App. 203, 206, 374 S.E.2d

132, 134 (1988). The *Joseph* Court held that N.C. Gen. Stat. § 15A-1444 effectively precluded any substantial-right analysis under N.C. Gen. Stat. § 1-277 and therefore eliminated any statutory basis for engaging in a substantial-right analysis in criminal cases. *Id.* at 206-07, 374 S.E.2d at 134-35.

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

In 1995, the Court of Appeals in *State v. Shoff* noted the seemingly conflicting decisions in *Joseph* and *Johnson* and reaffirmed the holding in *Joseph* that there could be no immediate appeals of interlocutory orders based on a “substantial rights analysis.” *State v. Shoff*, 118 N.C. App. 724, 726-27, 456 S.E.2d 875, 877-78 (1995), *aff’d per curiam*, 342 N.C. 638, 466 S.E.2d 277 (1996). The Court in *Shoff* did so because it reasoned that engaging in a “substantial rights” analysis “appears contrary to the plain and unambiguous language of the statutes governing criminal appeals.” *Id.* In its per curiam decision, the Supreme Court in *Shoff* cited one of its earlier decisions, *State v. Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986) (per curiam). *See Shoff*, 342 N.C. at 638, 466 S.E.2d at 277. The Supreme Court in *Henry* held that “[t]here is no provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case.” *Henry*, 318 N.C. at 409, 348 S.E.2d at 593.

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

V. ADDITIONAL ISSUES FOR CONSIDERATION

A. Trial Court Jurisdiction after the Notice of Appeal

Once a notice of appeal from an interlocutory order has been filed, “[t]he general rule is that an appeal takes the case out of the jurisdiction of the trial court.” *Estrada v. Jaques*, 70 N.C. App. 627, 637, 321 S.E.2d 240, 247 (1984); *see also, e.g., Wiggins v. Bunch*, 280 N.C. 106, 108, 184 S.E.2d 879, 880 (1971) (“For many years it has been recognized that as a general rule an appeal takes the case out of the jurisdiction of the trial court.”).

The stay of further trial court proceedings after the notice of appeal is automatic. N.C. Gen. Stat. § 1-294 (providing that an appeal “stays all further

proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein”).

However, there are limited instances in which the trial court has jurisdiction during the period of time between the notice of appeal and the docketing of the appeal. These include:

- ruling on a motion to dismiss the appeal for violations of the Rules of Appellate Procedure or violations of court orders requiring action to perfect the appeal. *See Estrada*, 70 N.C. App. at 639, 321 S.E.2d at 248 (citing N.C. R. App. P. 25(a)); *see also In re Investigation of Duke Energy Corp.*, 234 N.C. App. 20, 26, 760 S.E.2d 740, 744 (2014).
- settling the record on appeal. *See* N.C. R. App. P. 11(c).
- correcting “clerical mistakes in judgments, orders, or other parts of the record at any time.” N.C. Gen. Stat. § 1A-1, Rule 60(a); *see also, e.g., State v. Dixon*, 139 N.C. App. 332, 337, 533 S.E.2d 297, 301 (2000).
- ruling on a motion to amend findings of fact or make additional findings of fact. N.C. Gen. Stat. § 1A-1, Rule 52(b); *see also Parrish v. Cole*, 38 N.C. App. 691, 695, 248 S.E.2d 878, 880 (1978).
- Rule 60(b) motions, under the procedure set forth in *Bell v. Martin*, 43 N.C. App. 134, 258 S.E.2d 403 (1979), *rev’d on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980).
- “proceed[ing] upon any other matter included in the action and not affected by the judgment appealed from”—in other words, those matters not covered by the automatic stay. N.C. Gen. Stat. § 1-294.

B. Trial Court Jurisdiction to Decide Questions of Appealability

Frequently, trial courts are asked to rule on a motion to dismiss an appeal on the grounds that the interlocutory order appealed from is not immediately appealable.

The Court of Appeals has held that trial courts lack jurisdiction to rule on motions of this kind, and that these motions should be presented to the appellate court after the appeal is docketed. *Estrada*, 70 N.C. App. at 639, 321 S.E.2d at 248; *see also, e.g., Giles v. First Va. Credit Servs., Inc.*, 149 N.C. App. 89, 95, 560 S.E.2d 557, 561 (2002); *Williams v. Lincoln Cnty. Emergency Med. Servs.*, Nos. COA11-212, COA11-213, 2011 N.C. App. LEXIS 2272, at *5-6, 2011 WL 4917028, at *2 (N.C. Ct. App. Oct. 18, 2011) (unpublished) (holding that under *Estrada*, “the trial court lacked

the authority to dismiss [the appellant’s] appeal,” even though the appeal was “[u]nquestionably” interlocutory).

These decisions are consistent with the automatic stay described above. *See* N.C. Gen. Stat. § 1-294.

C. Trial Court Proceedings after—and Despite—the Automatic Stay

(Note for practitioners: The following issue remains an evolving area of the law. Practitioners are advised to conduct independent research on the latest developments in this area, and to watch for potential amendments to the appellate rules.²)

In some instances, a trial court might perceive that the interlocutory order appealed from is not immediately appealable, and it might disregard the automatic stay and continue with further trial court proceedings. There is split authority on whether those proceedings (and any orders emanating from them) must later be vacated for lack of jurisdiction if the appellate court ultimately determines that the appellant did, in fact, have a right to immediately appeal the interlocutory order.

In *RPR & Associates, Inc. v. University of North Carolina—Chapel Hill*, the Court of Appeals held that the trial court has authority to make a preliminary determination on the appealability of an interlocutory order when it decides whether to disregard the automatic stay and continue with further trial court proceedings. 153 N.C. App. 342, 348, 570 S.E.2d 510, 514 (2002) (“The trial court has the authority . . . to determine whether or not its order affects a substantial right of the parties or is otherwise immediately appealable.”).

In 2016, the Court of Appeals in *SED Holdings, LLC v. 3 Star Properties, LLC* held that the trial court had the authority to determine “that its [preliminary] injunction did not affect a substantial right and thus was not immediately appealable,” and therefore properly “retained jurisdiction to hold contempt proceedings and enforce its injunction order.” 250 N.C. App. 215, 221, 791 S.E.2d 914, 920 (2016) (limiting decision to the “particular facts at issue and the procedural context in which the contempt orders were entered”). The Court explained its prior decision in *RPR* as follows:

² In 2015, N.C. Gen. Stat. § 1-294 was amended to add the following underlined provision: “When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.” N.C. Gen. Stat. § 1-294.

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

Id. at 222, 791 S.E.2d at 920.

Later in 2016, however, the Court of Appeals held that a trial court was divested of jurisdiction to issue contempt and sanctions orders after the appellant filed its notice of appeal. *See Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, 250 N.C. App. 791, 801 n.3, 794 S.E.2d 535, 541 n.3 (2016). In *Tetra Tech*, the Court distinguished its earlier decision in *SED Holdings*, and did not use a “reasonableness” analysis to determine whether the trial court had jurisdiction to issue the orders after the notice of appeal. *Id.* Instead, the Court relied on the automatic stay in N.C. Gen. Stat. § 1-294, holding that after the notice of appeal, “the trial court was divested of jurisdiction over the order from which it appealed and all matters ‘embraced therein.’” *Id.* at 793, 794 S.E.2d at 536 (quoting N.C. Gen. Stat. § 1-294). Thus, the Court concluded that “the appeal prevented the trial court from conducting a contempt proceeding or imposing sanctions for violation of the injunction.” *Id.* (citing *Joyner v. Joyner*, 256 N.C. 588, 591, 124 S.E.2d 724, 726-27 (1962)).

In 2017, however, the Court of Appeals reaffirmed its decision in *SED Holdings* and distinguished *Tetra Tech* on its facts. *See Plasman v. Decca Furniture (USA), Inc.*, 253 N.C. App. 484, 497, 800 S.E.2d 761, 770 (2017). In *Plasman*, the Court held that the trial court’s “decision to proceed with the case was proper and reasonable,” and “[s]o too was [the trial court’s] determination that the . . . pending interlocutory appeal did not deprive [the trial court] of jurisdiction to enforce [a prior order].” *Id.*

D. Pendent Appellate Jurisdiction (“Bootstrapping”)

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

While the North Carolina Court of Appeals has not explicitly addressed whether pendent appellate jurisdiction is a viable theory in North Carolina—or even

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

Other cases signal that the Court of Appeals may wish to avoid attempts to immediately appeal issues through pendent appellate jurisdiction.

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

Similarly, in *Bynum v. Wilson County*, the Court of Appeals held that portions of an order denying a motion to dismiss on governmental-immunity grounds were immediately appealable, but other issues were not. *Bynum v. Wilson Cnty.*, 228 N.C. App. 1, 5-7, 746 S.E.2d 296, 300-01 (2013), *rev’d in part on other grounds*, 367 N.C. 355, 758 S.E.2d 643 (2014). In *Bynum*, the defendants attempted to persuade the Court to reach the merits of the non-immunity-related issues by pointing to prior decisions in which the Court of Appeals allowed parties to bootstrap non-immunity-related issues to an immediately appealable order on immunity. *Id.* at 6, 746 S.E.2d at 300 (discussing *RPR & Assocs. v. State*, 139 N.C. App. 525, 530-32, 534 S.E.2d 247, 251-53 (2000) (addressing a service-of-process issue in an immunity-related appeal), *aff’d*, 353 N.C. 362, 543 S.E.2d 480 (2001) and *Colombo v. Dorrity*, 115 N.C. App. 81, 84, 86, 443 S.E.2d 752, 755, 756 (1994) (addressing a statute-of-limitations issue in an immunity-related appeal)).

The Court of Appeals was not persuaded. Instead, it noted that *RPR* and *Colombo* are not the rule, but the exception:

Although we held in these two instances that, given the specific factual and procedural contexts from which these cases arose, it would promote judicial economy to resolve these relatively clear-cut non-immunity-related issues in the same opinion in which we addressed the defendants’ immunity-related arguments, we did not hold in either case that non-immunity-related issues would always be

considered on the merits in the course of deciding an immunity-related interlocutory appeal or recognize the existence of a substantial right to have multiple issues addressed in the course of an immunity-related appeal.

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

Following *Bynum*, the Court of Appeals again declined to exercise pendent appellate jurisdiction in *Hammond v. Saini*, 229 N.C. App. 359, 748 S.E.2d 585 (2013), *aff'd*, 367 N.C. 607, 766 S.E.2d 590 (2014). In *Hammond*, the trial court issued an order compelling discovery, which the defendants appealed on the grounds of medical-review privilege, work-product doctrine, attorney-client privilege, relevancy, and overbreadth. *Id.* at 361-62, 748 S.E.2d at 587. The Court of Appeals held that it would review only the portion of the trial court's order pertaining to immediately appealable privilege issues. *Id.* at 363, 748 S.E.2d at 588. The Court declined to exercise pendent appellate jurisdiction over the remaining, non-immediately-appealable issues. *Id.*

Two months after *Hammond* was decided, however, the Court issued an opinion that seemed more amenable to the doctrine of pendent appellate jurisdiction. In *Washington v. Cline*, the plaintiffs properly appealed pursuant to Rule 54(b) from a final judgment dismissing nine of twelve defendants. *Washington v. Cline*, 230 N.C. App. 396, 401, 750 S.E.2d 843, 847 (2013), *rev'd on reh'g on other grounds*, 233 N.C. App. 412, 761 S.E.2d 650 (2014). One of the three defendants who was not dismissed also appealed from an order denying his motion to dismiss for insufficient service of process. *Id.* The defendant who appealed acknowledged that his appeal was not taken from a final judgment or an order affecting a substantial right but nevertheless urged the Court to consider his appeal on the grounds that it would avoid fragmentary appeals. *Id.* The Court allowed the defendant's appeal, noting that it "involves the application of the same rules to the same facts and circumstances as plaintiffs' appeal, which is properly before us." *Id.* Therefore, the Court reasoned, "in order to prevent fragmentary appeals, we find that [the defendant's] appeal is also proper at this time." *Id.*

In 2017, the Court of Appeals followed the *Church*, *Colombo*, and *RPR* line of cases to exercise pendent appellate jurisdiction over orders denying a motion to dismiss based on Rule 12(b)(6), allowing a motion to amend a complaint, and granting a preliminary injunction. *Providence Volunteer Fire Dep't v. Town of Weddington*, 253 N.C. App. 126, 132, 800 S.E.2d 425, 430-31 (2017). The Court acknowledged that this portion of the appeal raised issues "that generally are not subject to interlocutory review," but chose to review the issues at the same time it reviewed the immunity-related issues "to avoid 'fragmentary appeals.'" *Id.* at 132, 800 S.E.2d at 430 (quoting *RPR*, 139 N.C. App. at 531, 534 S.E.2d at 252).

In sum, it remains questionable whether North Carolina’s appellate courts will exercise pendent appellate jurisdiction for appellants looking to “bootstrap” additional issues onto an immediately appealable issue. As described above, some recent decisions seem to suggest that the Court of Appeals may be willing to review otherwise non-appealable issues as if, in essence, those issues had been presented in a certiorari petition. For that reason, practitioners seeking pendent appellate jurisdiction of otherwise non-appealable issues may wish to consider filing a certiorari petition as to those additional issues.

E. Accelerated Review of Interlocutory Orders By Writ of Certiorari

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

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

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

Recently, the Supreme Court allowed a certiorari petition that sought accelerated review of an outcome-determinative interlocutory order from the North Carolina Business Court. *See Kornegay Fam. Farms, LLC v. Cross Creek Seed, Inc.*, 370 N.C. 23, 803 S.E.2d 377 (2017). Notably, in that case, the Business Court’s order and opinion denying partial summary judgment had urged the Supreme Court to allow immediate appellate review because the issue was “significant to North Carolina’s jurisprudence . . . and its system of commerce generally.” *Kornegay Fam. Farms, LLC v. Cross Creek Seed, Inc.*, No. 15 CVS 1646, 2016 NCBC LEXIS 30, at *22, 2016 WL 1618272, at *9 (N.C. Super. Ct. Apr. 20, 2016), *aff’d*, 370 N.C. 23, 803 S.E.2d 377.

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

F. Writs of Mandamus

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

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

G. Ethical Issues Concerning Meritless Interlocutory Appeals

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

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

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

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

VI. ADDITIONAL RESOURCES

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

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

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

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

May 22 2023

SUPREME COURT.

S.C. SUPREME COURT

SEC.

11. Its jurisdiction.
12. Power of Court.
13. Terms. Preference of causes.

SEC.

14. Judgment; rehearing. Opinions.
15. Sheriffs to provide rooms, &c.
16. Courts, where held. Adjournment.

Jurisdiction
of the Su-
preme Court.

1896, XXII.,
§ 1.

Section 11. (A) The Supreme Court shall have power to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus and other remedial and original writs: each of the Justices of the Supreme Court shall have the same power at chambers to administer oaths, issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition and interlocutory writs or orders of injunction as when in open Court: *Provided*, An appeal shall be allowed from his decision to the Supreme Court.

Where issues
of fact arise.

Ib.

(B) Whenever in the course of any such action or proceeding in the Supreme Court, arising in the exercise of the original jurisdiction conferred upon the Court by the Constitution and laws of the State, an issue of fact shall arise upon the pleadings, or when an issue of fact shall arise upon a traverse to return in mandamus, prohibition, certiorari, or whenever the determination of any question of fact shall be necessary to the exercise of the jurisdiction conferred upon the Supreme Court, the said Court shall have power to frame an issue therein and certify the same to the Circuit Court for the County wherein the cause shall have originated, or in case of original jurisdiction to the Circuit Court of the County in which the cause of Action shall have arisen. The Supreme Court shall also have the same powers as are now possessed by the Circuit Court of the State for the appointment of Referees to take testimony and report thereon, under such instructions as may be prescribed by said Court, in any cases arising in the Supreme Court wherein issues of fact shall arise.

Appellant
jurisdiction in
chancery.

Ib.

(C) The Supreme Court shall have appellate jurisdiction only in cases of chancery, and in such appeals they shall review the findings of fact as well as the law, except in chancery cases when the facts are settled by a jury and the verdict not set aside.

In law cases.

Ib.

(D) The Supreme Court shall have appellate jurisdiction

1. Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the Court of Common Pleas and General Sessions, brought there by original process, or removed there from any inferior Court or jurisdiction, and final judgments in such actions: *Provided*, If no appeal be taken until final judgment is entered, the Court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from.

An order to involve the merits must finally determine some substantial right in the case.—Henderson v. Hyatt, 8 S. C., 112; Blakely v. Frazier, 11 S. C., 122.

The terms "Involving the merits" and "necessarily affecting the judgment" are equivalent.—Blakely v. Frazier, 11 S. C., 122.

What orders involve the merits and are so reviewable before judgment:—

An order setting aside verdict for plaintiff without notice to him.—Williams v. Charleston, 7 S. C., 71.

An order refusing to change place of trial to County where defendant resides.—Blakely v. Frazier, 11 S. C., 122.

An order refusing an oral demurrer.—Elliott v. Pullitzer, 24 S. C., 86; McCown v. McSween, 29 S. C., 131; 7 S. E., 140.

An order refusing to allow amendment, upon legal grounds.—Sibley v. Young, 26 S. C., 415; 2 S. E., 314.

An appeal from an order of reference on jurisdictional grounds.—Simms v. Phillips, 46 S. C., 149; 24 S. E., 99.

An order of reference that deprives party of mode of trial which the law allows him.—Ferguson v. Harrison, 34 S. C., 169; 13 S. E., 332; McLaurin v. Hodges, 43 S. C., 187; 20 S. E., 991; Alston v. Limehouse, 61 S. C., 1; 39 S. E., 192.

Orders that are based upon error in law and will prejudice trial.—Bank v. Stelling, 32 S. C., 102; 10 S. E., 766; Sease v. Dobson, 34 S. C., 345; 13 S. E., 530; Capell v. Moses, 36 S. C., 559; 15 S. E., 711.

An appeal from an intermediate order, leaving unaffected a former order, is conclusive of appeal from former order.—Pringle v. Sizer, 7 S. C., 131.

What orders do not involve the merits and are not so reviewable before judgment:

Orders refusing motions to make pleadings more definite and certain.—Fladger v. Beckman, 42 S. C., 547; 20 S. E., 790; Hawkins v. Wood, 60 S. C., 521; 38 S. E., 9.

An order requiring security for costs or nonsuit, and an order discharging Clerk on rule for refusing to enter judgment, and reinstating the case.—McMillan v. McCall, 2 S. C., 390.

Orders on motions to dissolve attachment.—Allen v. Patton, 3 S. C., 418; Clausen v. Easterling, 19 S. C., 519.

An order of Circuit Court allowing appeal, which had been denied by Probate Court, as it merely affects form of procedure.—Henderson v. Hyatt, 8 S. C., 112.

An order refusing nonsuit.—Agnew v. Adams, 24 S. C., 86.

Orders as to recommitting case to referee being discretionary.—Westfield v. Westfield, 13 S. C., 482; Watkins v. Lang, 17 S. C., 13; Symmes v. Symmes, 18 S. C., 601; Lowndes v. Miller, 25 S. C., 119; Smith v. Thomason, 26 S. C., 607; 12 S. E., 96; Hubbard v. Camperdown, 26 S. C., 581; 2 S. E., 576.

An interlocutory order of injunction, "without prejudice."—Garlington v. Copeland, 25 S. C., 41.

Orders on motions for continuance.—State v. Dodson, 16 S. C., 459; Crawford v. Schmidt, 16 S. C., 634; Symmes v. Symmes, 18 S. C., 601; Garvin v. Garvin, 21 S. C., 92; Douthitt v. Westfield, 22 S. C., 588; Sawyer v. Senn, 27 S. C., 251; 3 S. E., 298; State v. Atkinson, 33 S. C., 100; 11 S. E., 693. State v. Wise, 33 S. C., 582; 12 S. E., 556; Latimer v. Latimer, 42 S. C., 205; 20 S. C., 159.

An order referring it to Master to take testimony as to claims in case.—Palmetto Co. v. Risley, 23 S. C., 309; Jones v. Trumbo, 29 S. C., 26; 6 S. E., 887.

An order refusing a reference to take testimony in a chancery case.—Farmers'

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

Jun 09 2023

APPEAL FROM UNION COUNTY
Court of Common Pleas
William A. McKinnon, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2022-000853

Dwayne Thompson, ... Respondent,

v.

Rolling Fog Vapor Company, LLC,

Of whom LG Chem, Ltd. and LG Chem America, Inc. are
the..... Petitioners.

**PETITIONERS LG CHEM, LTD. AND LG CHEM AMERICA, INC.'S
RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL**

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INTRODUCTION

The Court has subject-matter jurisdiction over this appeal. Respondent ignores that this Court is considering the issues in this appeal after granting a petition for writ of certiorari to determine the meaning and application of § 14-3-330. Under Respondent’s argument, this Court would lack subject-matter jurisdiction to review its own prior precedents interpreting the very statute on which this appeal is based. Indeed, this Court has previously recognized that “by its nature, the question of whether an order is immediately appealable is determined on a case by case basis.” *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (2019).

Contrary to Respondent’s argument, statutory interpretation is the very province of this Court, which is called upon now to determine whether Petitioners are correct that immediate appeal of an order denying a motion to dismiss for lack of personal jurisdiction should be allowed under §14-3-330 when the absence of constitutionally sufficient minimum contacts is at issue. Here, the lack of appellate guidance led two circuit court judges to reach inconsistent conclusions on the issue of personal jurisdiction when confronted with the exact same facts. This case demonstrates exactly why appellate review is appropriate and necessary.

I. This Court’s grant of certiorari to interpret South Carolina law does not violate the separation of powers doctrine.

The parties agree that under South Carolina’s governmental system, “the judicial department interprets and declares the laws.” (See Resp’t’s Mot. to Dismiss Appeal, at 4 (quoting *State ex re. McLeod v. McInnis*, 278 S.C. 307, 312, 295 S.E.2d 633, 636 (1982).) Here, Petitioners asked this Court to interpret South Carolina Code Section 14-3-330 and to consider whether its prior decisions—such as *Mid-State Distributors, Inc. v. Century Importers*, 310 S.C. 330, 426 S.E.2d 777 (1993))—allows immediate appeal pursuant to § 14-3-330 in these circumstances or should be overruled if it does not. This Court then properly granted certiorari to do just that.

Respondent did not cite one single case to support an argument that this Court lacks subject-matter jurisdiction to interpret § 14-3-330 and decide if its own precedent supports immediate appealability or if precedent should be changed. In fact, South Carolina appellate courts have done just that in numerous cases cited by both parties. *See, e.g., Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005); *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240 (1997); *Mid-State Distributors*, 310 S.C. 330, 426 S.E.2d 777 (1993); *Bateman v. Rouse*, 358 S.C. 667, 596 S.E.2d 386 (Ct. App. 2004). For this reason alone, Respondent’s Motion to Dismiss should be denied.

To the extent Respondent argues that this Court is bound by controlling precedent, citing *Mid-State Distributors*, he inexplicably relies on an Ohio Court of Appeals case; ancient cases such as *Agnew v. Adams*, 24 S.C. 86 (1885) (which has not been cited by any appellate court for any proposition since being overturned by *Mid-State Distributors*); and a list of cases following the 1902 predecessor statute to § 14-3-330—which are not part of the Code but are merely lists of cases citing the statute and do not change the decisions from more current cases finding that cases involving substantial rights are immediately appealable.

II. The underlying orders are immediately appealable under South Carolina Code § 14-3-330.

Section 14-3-330(2) provides that “[a]n order affecting a substantial right” is immediately appealable if it “in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action.”

A. Respondent does not dispute that the order at issue implicates a substantial right.

As to the first issue, South Carolina appellate courts have previously recognized that an order implicating a party’s constitutional rights is immediately appealable because it concerns a substantial right. *See, e.g., Bateman v. Rouse*, 358 S.C. 667, 675, 596 S.E.2d 386, 390 (Ct. App. 2004). Respondent does not argue otherwise in response to Petitioners’ arguments on this point in

their Final Brief and has waived any further argument on this point.¹ Instead, Respondent argues only that the second prong is not satisfied, although the only cases Respondent cites in support of that point are from 1872 and 1886 and neither supports Respondent’s argument that this Court lacks subject matter jurisdiction to hear this appeal.

B. Under this Court’s prior precedents, § 14-3-330 allows an interlocutory appeal when appeal after judgment would effectively prevent the appellate court from correcting the error, as is the case here.

As to the second issue, Respondent incorrectly asserts that Petitioners’ do not address this aspect of 14-3-330 in their Final Brief. And yet Respondent then attempts to distinguish the cases cited by Petitioners on this point.

In *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005), for example, the Court found that an order disqualifying a party’s counsel of his choice was an immediately appealable order despite the plaintiff-respondent’s argument that any error could be corrected on appeal after final judgment. Indeed, Respondent concedes that this Court has previously interpreted § 14-3-330 to be subject to exceptions when appeal after final judgment would effectively prevent the appellate court from correcting the error on appeal, as is the case here.

Here, requiring a foreign defendant to suffer through a trial and final judgment in a court that lacks power over it violates constitutional due process, an error that cannot be adequately remedied by reversal on appeal. Contrary to Respondent’s argument that due process in the context of personal jurisdiction only guarantees protection against “judgments,” due process protects a foreign defendant from the burden of defending itself in a court that lacks power over it, and once

¹ Respondent has arguably waived his right to file any brief on the merits of this appeal, having failed to file his Respondent’s brief after requesting an extension of time to do so by May 22, 2022. Petitioners ask that this Court deny Respondent’s Motion to Dismiss, require Respondent to file his brief within 10 days of that denial, and find any failure to do so a clear waiver of Respondent’s right to file a merits brief.

deprived, those constitutional rights cannot be restored by simply reversing a judgment on appeal. This alone warrants a finding of finality and allows immediate appealability, as courts in other jurisdictions have recognized in this context. *See, e.g., Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209, 212 (1942) (“In other words, a final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the Court making the order to place the parties in their original condition after the expiration of the term.”); *see also Scott v. Kemp*, 460 P.3d 1264, 1269 (Ariz. Ct. App. 2020) (Arizona Court of Appeals recognizing that “when the motion to dismiss is based on an absence of jurisdiction, . . . an appeal inadequately remedies a trial court's improperly requiring a defense in a matter where it has no jurisdiction”); *Fulbright & Jaworski v. Eighth Jud. Dist. Ct.*, 342 P.3d 997, 1001 (Nev. 2015) (“While an appeal is generally considered to be an adequate legal remedy precluding writ relief, the right to appeal is inadequate to correct an invalid exercise of personal jurisdiction over a defendant.”); *Viega GmbH v. Eighth Jud. Dist. Ct.*, 328 P.3d 1152, 1156 (Nev. 2014) (“As no adequate and speedy legal remedy typically exists to correct an invalid exercise of personal jurisdiction, a writ of prohibition is an appropriate method for challenging district court orders when it is alleged that the district court has exceeded its jurisdiction.”). And Respondent does not, and cannot, explain how the rights to choice of counsel or mode of trial outweighs the constitutional due process rights at stake in this appeal.

III. South Carolina courts have properly looked to North Carolina cases when addressing cases on immediately appealability as the Court should do here.

While arguing that this Court should not look to North Carolina decisions (as South Carolina appellate courts have frequently done²), Respondent instead urges the Court to rely on an

² *See, e.g., Salmonsens v. CGD, Inc.*, 377 S.C. 442, 451, 661 S.E.2d 81, 86-87 (2008); *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005); *Shields v. Martin Marietta Corp.*,

unpublished decision by the Ohio Court of Appeals that South Carolina courts have never cited for any reason (and neither has the Ohio Supreme Court).

North Carolina's appealability statute is similar to South Carolina's and likewise permits interlocutory appeals of orders "affecting a substantial right." See N.C. Gen. Stat. Ann. § 7A-27(b)(3). Although Respondent is correct that the North Carolina statute allows interlocutory appeals without a specific showing that the order "in effect determines the action and prevents a judgment from which an appeal might be taken," Respondent is incorrect in asserting that North Carolina and Minnesota are the only states that permit immediate appeal of interlocutory orders as a right without requiring a certification or application procedure. Texas, Florida, and New York all permit immediate appeals as a matter of right,³ in addition to the numerous states that allow discretionary appeals of interlocutory orders deciding jurisdictional issues upon application for certification or motion for leave to appeal.⁴

As the North Carolina Court of Appeals explained in *Hardee ex rel. White v. Lowe's Companies, Inc.*, 640 S.E.2d 445 (N.C. Ct. App. 2007) (table), immediate appeal is permitted when the interlocutory order denying a motion to dismiss for lack of personal jurisdiction "raises questions concerning due process and minimum contacts." *Id.* at *2. This ensures that parties who have less than minimum contacts with the state "will never be forced to trial against their wishes," "promotes judicial economy[,] and protects the constitutional rights of foreign defendants." *Love v. Moore*, 291 S.E.2d 141, 146 (N.C. 1982); see also *Bartlett v. Estate of Burke*, 877 S.E.2d 432

303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991); *Pocisk v. Sea Coast Constr. of Beaufort*, 380 S.C. 584, 589, 671 S.E.2d 98, 101 (Ct. App. 2008) (all looking to North Carolina case law on immediate appeal questions).

³ See Tex. Civ. Prac. & Rem. Code § 51.014(a)(7); Fla. R. App. P. 9.130(a)(3)(C)(i); N.Y. C.P.L.R. 5701(a)(2)(v).

⁴ See, e.g., O.C.G.A. § 5-6-34(b) (Georgia); IL R S CT Rule 306(a)(3) (Illinois); N.J. Ct. R. 2:2-4 (New Jersey).

(N.C. Ct. App. 2022) (finding in a products liability case that denial of a motion to dismiss for lack of personal jurisdiction affected a substantial right and was immediately appealable as it involved a question of minimum contacts). The same concerns and points support appealability under South Carolina’s appealability statute.

Therefore, in light of the foregoing authorities and the requirement that appealability must be determined on a case-by-case basis, immediate appeal is proper in this narrow circumstance in which the question of constitutional minimum contacts is at issue, and especially when, as here, one circuit judge ruled that Respondent’s showing ***was not*** enough to determine whether minimum contacts existed and a second circuit judge then decided the ***same*** showing ***was*** enough.

IV. Allowing immediate appeals of orders denying a motion to dismiss for lack of personal jurisdiction based on issues of minimum contacts will protect important constitutional rights without opening “the floodgates” of immediate appeals.

Respondent contends that allowing immediate appeals of interlocutory orders affecting a substantial right has opened the floodgates in North Carolina to interlocutory appeals. (See Resp’t’s Br. at 19 & Ex. B (*Guide to Appealability of Interlocutory Orders*, Appellate Rules Committee, North Carolina Bar Ass’n publication (May 13, 2022).) Respondent makes the leap of logic that if the majority of appeals in North Carolina result from the substantial right doctrine, that North Carolina appellate courts have been flooded with interlocutory appeals based on its appealability statute. The North Carolina Bar Appellate Committee’s Guide says no such thing, and Respondent has provided no facts to back up such an argument. In fact, as the Guide notes, the right to immediate appeal of an order denying a motion to dismiss based on lack of personal jurisdiction “is limited to rulings on ‘minimum contacts issues.’” See *Guide to Appealability of Interlocutory Orders*, III. (A)(2), at pg. 10) (citing *Credit Union Auto Buying Serv. , Inc. v.*

Burkshire Props. Grp. Corp., 776 S.E.2d 737, 739 (2015) and *Love v. Moore*, 291 S.E.2d 141, 146 (1982).)

Moreover, numerous other state court jurisdictions have allowed interlocutory appeals of denials of motions to dismiss for lack of personal jurisdiction, recognizing the importance of the constitutional rights at stake and the inadequacy of appeal after forcing a foreign defendant to defend itself through a trial in a jurisdiction that has no authority over it: **Alabama:** *Ex parte U.S. Bank Nat. Ass’n*, 148 So. 3d 1060, 1064–65 (Ala. 2014) (stating that the use of a discretionary writ of mandamus to appeal an interlocutory order has been limited to “well recognized” situations where there is a clear right in the petitioner to the order sought, including personal jurisdiction); **Alaska:** *Mod. Trailer Sales, Inc. v. Traweck*, 561 P.2d 1192, 1194 (Alaska 1977) (granting discretionary review of a denial of a motion to dismiss for lack of personal jurisdiction because to postpone review until a final judgment would “result in unnecessary delay and expense”); **Arizona:** *Scott v. Kemp*, 460 P.3d 1264, 1269 (Ariz. Ct. App. 2020) (holding that in contrast to the general rule that interlocutory appeals are not allowed for denials of motions to dismiss, special action jurisdiction may be granted for a motion to dismiss for a lack of jurisdiction because an appeal after final judgment would improperly require an individual to defend a suit in a matter where the court does not have jurisdiction); **Delaware:** *Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016) (finding on an interlocutory appeal that a foreign corporation’s compliance with statutory registration does not constitute implied jurisdiction and reversing a district court decision conferring personal jurisdiction on corporation); **Hawaii:** *In re Guardianship of Carlsmith*, 113 Haw. 211, 222 (Haw. 2007) (recognizing that a lower court may certify for appeal its order denying personal jurisdiction); **Idaho:** *Mann v. High Country Meats, Inc.*, 870 P.2d 1316 (Idaho 1994) (Quoting Idaho Appellate Rule 17(e)(1)(A), and determining “[t]hus this Court can review all

orders entered by the district court prior to entry of the final judgment which involve issues on appeal.”); **Indiana:** *Avery v. Purdue University-IPFW*, 49 N.E.3d 195 (Ind. Ct. App. 2016) (unpublished) (accepting an appeal of an interlocutory order regarding a motion to dismiss for lack of personal jurisdiction following a trial court’s certification); **Iowa:** *Sioux Pharm, Inc. v. Summit Nutritionals Int’l, Inc.*, 859 N.W.2d 182, 188 (Iowa 2015) (reviewing an interlocutory appeal of an order denying a motion to dismiss for lack of personal jurisdiction after a party timely filed an application under state rules); **Kansas:** *Aeroflex Wichita, Inc. v. Filardo*, 275 P.3d 869 (Kan. 2012) (hearing interlocutory appeal of a trial court’s order granting a motion to dismiss for lack of personal jurisdiction upon proper application under appellate rules); **Louisiana:** *Henry v. Ocean Harbor Cas. Ins. Co.*, 2002-1325 (La. App. 4 Cir. 9/18/02); 828 So. 2d 663, 666 (granting defendant’s application for a supervisory writ and overturning lower court’s denial of the motion to dismiss for lack of personal jurisdiction); **Massachusetts:** *Carlson Corp. v. Univ. of Vermont*, 402 N.E.2d 483, 483 (Mass. 1980) (accepting appeal of an order denying motion to dismiss for lack of personal jurisdiction after petition to the appellate court judge); **Michigan:** *Comm’r of Ins. v. Albino*, 225 Mich. App. 547, 551, 572 N.W.2d 21, 23 (Ct. App. 1997) (noting that as an appeal court, it may grant defendant’s interlocutory application for leave to appeal); **Minnesota:** *McGowan v. Our Savior’s Lutheran Church*, 527 N.W.2d 830, 832–33 (Minn. 1995) (describing the rationale for why “a motion to dismiss for lack of personal jurisdiction [is] immediately appealable” as it is “more realistic to view such an order not merely as a retention of an action for trial, but as a determination of right, for a defendant is compelled thereby to take up the burden of litigation in this state that might otherwise be avoided.”) (quoting *Hunt v. Nevada State Bank*, 285 Minn. 77, 89, 172 N.W.2d 292, 300 (1969)); **Mississippi:** *Webster v. Fanning*, 311 So. 3d 1157, 1159 (Miss. 2021) (stating the defendant “sought and received permission from [the] Court to file

an interlocutory appeal” of the lower court's denial of the motion to dismiss for lack of personal jurisdiction); **Montana:** *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 443 P.3d 407, 411, *aff'd*, 141 S. Ct. 1017 (2021) (Montana Supreme Court granting writ of supervisory control to review lower court’s denial of Ford’s motion to dismiss for lack of personal jurisdiction) (“We may exercise supervisory control when “urgency .. . mak[es] the normal appeal process inadequate,” “the case involves purely legal questions,” and “[c]onstitutional issues of state-wide importance are involved.” Mont. R. App. P. 14(3)(b).); **Nevada:** *Levin v. Second Jud. Dist. Ct. in & for Cnty. of Washoe*, 133 Nev. 1043, 403 P.3d 685 (2017) (unpublished decision) (on an interlocutory appeal to the Nevada Supreme Court, affirming the trial court’s decision that it did not have personal jurisdiction over appellant); **New Hampshire:** *Mosier v. Kinley*, 702 A.2d 803, 809 (N.H. 1997) (holding that appeals from denial of a motion to dismiss for lack of personal jurisdiction are governed by a New Hampshire Supreme Court Rule, while retaining discretion to decline appeal); **New Jersey:** *Crespi v. Zeppy*, No. A-2044-20, 2022 WL 815429 (N.J. Super. Ct. App. Div. Mar. 18, 2022) (with leave granted, reviewing interlocutory appeal of an order denying foreign defendant’s motion to dismiss for insufficient service of process and lack of personal jurisdiction); **New Mexico:** *Chavez v. Bridgestone Americas Tire Operations, LLC*, 2022-NMSC-006, ¶ 9, 503 P.3d 332, 338 (reversing lower court denials to challenges of personal jurisdiction when the lower court certified the issues for interlocutory appeal); **New York:** *OneWest Bank FSB v. Perla*, 161 N.Y.S.3d 193 (N.Y. App. Div. 2021) (“Rather, our jurisdiction is premised upon CPLR 5501(c), which directs that this Court ‘shall review questions of law and questions of fact on an appeal from a[n] ... order of a court of original instance,’ as well as the consistent line of cases from this Court holding that an appeal from an order granting a motion to dismiss based upon lack of personal jurisdiction—issued after a hearing—also brings up for review the issue of

whether a hearing was necessary to determine the motion.”); **Oregon:** *North Pacific S.S. Co. v. Guarisco*, 647 P.2d 920, 924 n.3 (Or. 1982) (“Where a trial court holds that it has personal jurisdiction over a defendant, we have permitted the defendant to challenge such a ruling either through petition for mandamus or through appeal.”); **Pennsylvania:** *Merino v. Repak, B.V.*, 286 A.3d 1249, 1255 (Pa. Super. Ct. 2022) (citing Pa. R. App. P. 311(b) and concluding that appeal from interlocutory order overruling defendant’s preliminary objections to personal jurisdiction was proper) (quoting Rule 311(b)(2) of Pennsylvania Rules of Appellate Procedure); **South Dakota:** *Kustom Cycles, Inc. v. Bowyer*, 857 N.W.2d 401, 405 (S.D. 2014) (granting discretionary appeal of a circuit court’s denial of motion to dismiss for personal jurisdiction and reversing the lower court’s denial); **Tennessee:** *Davis Kidd Booksellers, Inc. v. Day-Impex, Ltd.*, 832 S.W.2d 572, 574 (Tenn. Ct. App. 1992) (finding that interlocutory appeal is warranted and reversing trial court’s order denying two foreign defendants’ motion to dismiss for personal jurisdiction in products liability matter); **Utah:** *Starways Inc., v. Curry*, 980 P.2d 204 (Utah 1999) (affirming Court of Appeals’ decision that upheld district court’s denial of defendant’s motion to dismiss for personal jurisdiction heard on interlocutory appeal) (Rule 5 of the Utah Appellate Court Rules); **Vermont:** *State v. Atl. Richfield Co.*, 142 A.3d 215 (Vt. 2016) (affirming superior court’s decision on an interlocutory appeal by defendant for decision to deny motion to dismiss for lack of personal jurisdiction); **Washington:** *Downing v. Losvar*, 507 P.3d 894 (Wash. Ct. App. 2022) (granting discretionary review over appeal of trial court decision to deny defendant’s motion to dismiss for lack of personal jurisdiction); **West Virginia:** *State ex rel. Health Plans v. Nines*, 852 S.E.2d 251, 258 (W.Va. Sup. Ct. App. 2020) (“Where a court lacks jurisdiction over a nonresident defendant, [writ of] prohibition is the appropriate remedy to prevent further prosecution of the suit.”); **Wisconsin:** *Paula M.S. v. Neal A.R. (In re Carlin L.S.)*, 593 N.W.2d 486 (Wis. Ct. App. 1999)

(granting leave to appeal from a non-final order of the circuit court denying motion to dismiss action for lack of personal jurisdiction, reversing and remanding); **Wyoming:** *Hopeful v. Etchepare*, LLC, 528 P.3d 414 (Wyo. 2023) (granting defendant's Writ of Review seeking interlocutory review of the district court's orders denying their motion to dismiss for lack of personal jurisdiction, subject matter jurisdiction, and motion to set aside default).

V. The lack of appellate remedies has led to a dearth of precedent to South Carolina lower courts on minimum contacts issues in this lawsuit.

Although Respondent correctly notes that there are many cases involving minimum contacts in general, there has not been another South Carolina appellate decision that addressed the stream-of-commerce doctrine as applied to minimum contacts since *State v. NV Sumatra Tobacco Trading Co.*, 379 S.C. 81, 666, S.E.2d 218 (2008) was decided fifteen years ago. Since *Sumatra* was decided, this one issue has been the basis of six separate lawsuits in South Carolina against LG Chem defendants alone,⁵ and has been given significant attention from the United States Supreme Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873 (2011); *Daimler AG v. Bauman*, 571 U.S. 117 (2014), and numerous other state and federal courts' decisions. The South Carolina Supreme Court, however, has not had the opportunity to weigh in on this critical issue involving significant due process rights since 2008, leaving the lower courts without guidance.

CONCLUSION

⁵ See *Reid Fleming v. LG Chem, Ltd.*, Appellate Case No. 2022-000346); *Joshua Holtzendorff v. LG Chem, Ltd et al.*, Case No. 2018-CP-0201518 (Ct. Comm. Pleas, Aiken Cnty, 2020); *Moore v. Planet Vapor, Inc. et al.*, No. 2018-CP-02884 (Ct. Comm. Pleas, Florence Cnty, 2019); *Nicholas Keith Roberts v. LG Chem, Ltd. et al.*, Case No. Civil Action No. 2020-CP-100912 (Ct. Comm. Pleas, Charleston Cnty, 2020); *Williamson v. Pirates Cove Vapor Lounge, LLC, et al.*, Case No. 2019-CP-07-02270 (Ct. Comm. Pleas, Beaufort Cnty, 2019).

For the foregoing reasons, this Court should deny Respondent's Motion to Dismiss, order Respondent to file his response brief on the merits within 10 days of the denial of the motion, reverse the Court of Appeals' orders dismissing Petitioner LG Chem's and Petitioner LGCAI's appeal based on lack of immediate appealability, and remand for an order dismissing the claims against both Petitioners based on lack of service (as to Petitioner LG Chem only) and lack of personal jurisdiction (as to both Petitioners).

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Columbia, SC

June 9, 2023

State of South Carolina
Office of the Secretary of State
The Honorable Mark Hammond

1205 PENDLETON STREET, SUITE 525
COLUMBIA, SC 29201



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March 25, 2019

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LG Chem, Ltd.
LG Twin Towers 128 Yeoui-daero
Yeongdeungpo-gu, Seoul 07336
Korea
RE: LG Chem, Ltd., 2019-CP-44-00054

Dear Madam/Sir:

In accordance with South Carolina Code § 15-9-245, we are enclosing herewith a copy of the Summons and Complaint in the above-entitled case. Service was accepted on March, 22 2019 and a copy has been duly filed in our office as of this date. The fee of \$10.00 has been paid

Yours very truly,

Allyson Green
South Carolina Secretary of State's Office

Enclosures

cc: Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A.
Austin H. Crosby
P.O. Box 457
Hampton, SC 29924

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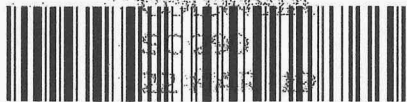
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