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THE SUBSTANTIAL RIGHT DOCTRINE AND INTERLOCUTORY APPEALS*

J. BRAD DONOVAN**

One does not have the right to appeal from an interlocutory order except in certain circumstances. In this Article, Mr. Donovan focuses on the right to appeal based on the substantial right doctrine. This subject was addressed by Justice Willis P. Whichard in an article published in 1984, and Mr. Donovan continues the work in this area with a study of the subsequent case law. The Article carries forward the format used by Justice Whichard—presenting the law according to the subject area of the law. The twenty-four subject areas are organized alphabetically to facilitate the use of the Article as a reference guide.

I. INTRODUCTION

The judgment of a trial court is either final in its disposition of all the claims of all the parties to an action, or it is interlocutory in nature.¹ An order is interlocutory if it is made during the pendency of an action and it does not dispose of the case but requires further action by the trial court in order to finally determine the rights of all the parties involved in the controversy.² Generally, there is no right to appeal from an interlocutory order.³

There are, however, a few instances in which an interlocutory order may warrant immediate appellate review. Under section 1A-1, Rule 54(b), of the General Statutes of North Carolina, where multiple parties are involved in an action and the trial court enters final judgment as to fewer than all the parties, the trial court may certify that there is no just reason for delay, thereby submitting the interlocutory order for appellate review. Similarly, where more than one claim for relief is presented in an action and the court enters a final judgment as to one or more, but fewer than

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* This paper has been updated to include cases published through 30 August 1994.
** Central Staff, North Carolina Court of Appeals.
1. N.C. GEN. STAT. § 1A-1, Rule 54(a) (1990).
3. Id.
all of the claims, the judgment may be subject to review upon certification by the trial court.

However, even if no appeal of an interlocutory order is permitted under Rule 54(b) due to the trial court's failure to provide certification, an appellant may qualify for immediate appellate review pursuant to the pertinent provisions of sections 1-277 and 7A-27(d)(1) of the General Statutes of North Carolina. 4

Section 7A-27(d) provides as follows:

(d) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which
(1) Affects a substantial right, or
(2) In effect determines the action and prevents a judgment from which appeal might be taken, or
(3) Discontinues the action, or
(4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals. 5

Section 1-277(a) provides as follows:

(a) An appeal may be taken from every judicial order or determination of a judge of a superior of district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial. 6

This paper focuses on the determination of what constitutes a "substantial right" under the above statutes, thereby warranting immediate appellate review. Generally, a two part test is applied to determine whether a substantial right has been affected to an extent necessary to apply the doctrine. First, the right in question must qualify as being "substantial." 7 This determination alone has produced a varied and sometimes conflicting accumulation of precedent. Second, absent immediate appeal, the right so affected must be "lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." 8 These requirements have evolved through the application of the doctrine, and it

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is apparent through case law study that there remains some disagreement as to whether the substantial right in issue must be "lost," or may be in some lesser way prejudiced or inadequately protected in order to invoke the doctrine.9

As Chief Justice Exum stated in an oft quoted text:

Admittedly, the "substantial right" test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.10

It is the necessity of applying the doctrine on a case by case basis which provides the framework for this paper. As the volume of case law consideration of interlocutory appeals has increased, there have been established a number of rules pertinent to various areas of the law concerning the issue of substantial rights. This area of law is constantly being reevaluated as a means to control the ever expanding number of appeals that enter the system. Recently, two opinions published by the court of appeals will undoubtedly, pending review by the supreme court, have a far-reaching effect on the application of the doctrine.

In Moose v. Nissan of Statesville, Inc.,11 the court ended decades of conflicting case law by finally establishing specific criteria for applying the doctrine.12 In so doing, the Moose court overruled a series of cases which had held that the loss of a punitive damages claim abridged a substantial right.13 If this case passes

9. Id.
12. The court held that in order to apply the doctrine based on the plaintiff's substantial right to have all claims against the same defendant(s) heard by the same jury, the appellant must satisfy a two part test: first, the appellant must show that "the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials," and (2) that the second trial would create "the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issues." Id. at 426, 444 S.E.2d at 697. This holding effectively overrules those cases relying on Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976), which held that a plaintiff need only show that two trials on the same issues would occur absent an immediate ruling.
13. In Oestreicher v. American Nat'l Stores, Inc., 290 N.C. 118, 225 S.E.2d 797 (1976), it was held that an order granting the defendant summary judgment as to a claim for punitive damages affected a substantial right of the plaintiff based on his right to have all issues against the defendant heard by the same
supreme court scrutiny, the underlying principles may be applied to other areas of the law wherein the loss of a substantial right has been routinely found and the doctrine applied accordingly.

Perhaps a greater change in the practical application of the doctrine is ultimately possible as a result of the holding in *Jeffreys v. Raleigh Oaks Joint Venture*. It has long been the practice of the appellate courts to address the interlocutory nature of an appeal regardless of whether the parties themselves have raised the issue. Necessarily, it was then determined sua sponte whether the doctrine should be applied. In *Jeffreys*, however, the court of appeals held that it is not the responsibility of the appellate courts to supply arguments for appellants, and absent the presentation of an appropriate argument in support of application of the doctrine, none will be found. It appears, therefore, that any appeal found so lacking will be dismissed as interlocutory, without any discussion of applicable case law precedent regarding substantial rights. This could understandably have a great effect on those practicing appellate law with little understanding of the rules surrounding interlocutory appeals. Again, it remains to be seen whether the supreme court grants discretionary review of this case.

In 1984, Justice Willis P. Whichard (then a Judge on the North Carolina Court of Appeals) published an article categorizing the case law according to subject matter and explaining the current rulings regarding the substantial right doctrine. However, as demonstrated by the two cases discussed above, since 1984 a great deal of additional rulings have been entered which have explained, expanded upon, altered or overruled many of the
decisions discussed in Justice Whichard's article. For this reason, this paper attempts to continue the study in this field as it has progressed since that time. Little is discussed herein regarding cases prior to 1984 (except as necessary to explain the establishment of a rule or trend, or a change in a line of holdings), as the above mentioned article has addressed those cases succinctly and completely. The format established by Justice Whichard, that of categorizing the case law according to subject area of the law, lends itself particularly well to the case by case analysis required here, and has been continued.

The following is primarily intended as a reference guide, allowing the reader to apply recent rulings or trends to facts which may appear in cases being considered for appeal. The subject areas of the law have been presented alphabetically in order to facilitate its use. There is some overlapping of categories, and cases which may contain rulings in more than one area of the law are mentioned in each applicable section. In addition, currently complete citations have been given each time a case is mentioned, so that the reader is not required to refer to another portion of the text in order to obtain this information.

II. SUBJECT AREAS OF THE LAW

A. Amendments to Pleadings

An order allowing a motion to amend a pleading does not affect a substantial right.17 This position has been recently reaffirmed in *Hoots v. Pryor.*18 Similarly, the denial of a motion to amend pleadings is interlocutory and generally not immediately appealable.19 However, where the denial of a motion to amend involves a party's request to add a compulsory counterclaim which would otherwise be lost, a substantial right has been held to be affected.20 The theory of protecting claims which, absent an amendment to the pleadings, would be lost has also been held to

encompass motions to amend a pleading to include a claim for equitable distribution.\textsuperscript{21}

In some instances, despite the interlocutory nature of an appeal and the absence of the involvement of a substantial right, the court of appeals has held that review of a ruling on a motion to amend was necessary.\textsuperscript{22} The issue has arisen where the denial of the motion to amend was appealed along with other issues in which a substantial right was affected, and review of the denial of the motion was necessary in order to address the issues properly before the court of appeals.\textsuperscript{23}

B. Arbitration

An order compelling arbitration is interlocutory and does not affect a substantial right.\textsuperscript{24} The basis for this holding is found in section 1-567.18 of the General Statutes of North Carolina, which provides the instances in which an appeal will lie from an arbitration ruling. As the court of appeals has held, an order compelling arbitration is "noticeably absent" from the list.\textsuperscript{25} Conversely, an order denying an application to compel arbitration does affect a substantial right and thus is an appealable interlocutory order.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{23}In Hoots, the claims against two of the three defendants were dismissed pursuant to section 1A-1, Rule 12(b)(6) of the General Statutes of North Carolina. Hoots, 106 N.C. App. at 399, 417 S.E.2d at 271. The dismissals were appealed along with the denial of plaintiff's motion to amend. Id. at 400, 417 S.E.2d at 271. The court of appeals held that the order dismissing two of the defendants, while interlocutory, affected a substantial right of the plaintiff based on the possibility of later inconsistent verdicts. Id. at 402, 417 S.E.2d at 273. See infra notes 126-29 and accompanying text. Thereafter, it was determined that review of the order denying the motion to amend was necessary prior to addressing the Rule 12(b)(6) dismissals. Hoots, 106 N.C. App. at 403, 417 S.E.2d at 273. For this reason, the appeal was treated as a petition for writ of certiorari. Id.
\item \textsuperscript{25}The Bluffs, Inc., 68 N.C. App. at 285, 314 S.E.2d at 293.
The reasoning behind this is that the right to settle a dispute by arbitration is a substantial right which would be lost if the appeal was delayed until after final judgment.\(^{27}\)

C. Attorneys

1. Fees

The interlocutory nature of the denial of a motion for attorney's fees was recently addressed by the court of appeals in *Howell v. Howell*.\(^{28}\) In *Howell*, at the time the request for fees was made there had been no final determination regarding the appellant's client's case, therefore the appellant was not yet entitled to fees.\(^{29}\) The court of appeals held that the denial of the motion could be appealed following final judgment, or the appellant could file a separate action for fees, thus no substantial right was affected by the holding of the trial court.\(^{30}\)

The court of appeals has also held that an order granting attorney's fees pursuant to section 1A-1, Rule 37(a)(4), of the General Statutes of North Carolina does not finally determine the action nor does it affect a substantial right which may be lost, prejudiced or less than adequately protected absent immediate appellate review.\(^{31}\) However, in *K & K Development Corp. v. Columbia Banking Federal Savings & Loan Ass'n*,\(^{32}\) the court of appeals held that an order of summary judgment which also awards attorney's fees affects a substantial right and is immediately appealable.

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\(^{27}\) Sims, 62 N.C. App. at 53, 302 S.E.2d at 294.


\(^{29}\) Id. at 117, 365 S.E.2d at 182.

\(^{30}\) Id. The same grounds were used to dismiss the appellant's appeal of the trial court's denial of his request for a charging lien. *Id.* at 117, 365 S.E.2d at 183. A charging lien is not available until a final judgment has been entered and the trial court held that the appellant's request was premature. *Id.* Again, the court of appeals found no substantial rights were affected as the appellant could appeal the denial of the motion or bring a separate action to recover. *Id.* at 117-18, 365 S.E.2d at 183.


2. Attorney Disqualification

The court of appeals held in Lowder v. All-Star Mills, Inc.,\(^3\) that the denial of a motion to disqualify an attorney affects a substantial right, rendering the issue immediately appealable.\(^4\) In Travco Hotels, Inc. v. Piedmont Natural Gas, Co.,\(^5\) however, the court of appeals found the denial of a motion to disqualify counsel did not result in an appealable issue. Distinguishing its facts from Lowder, the court held that while recognizing that the moving party had a substantial right to prevent the use of confidential information from a prior representation against a client in subsequent litigation, the deprivation of this right would not injure the moving party if not corrected before a final judgment was entered.\(^6\)

3. Right to Counsel

In Leonard v. Johns-Manville Corp.\(^7\) the court of appeals held that a party did not have a substantial right to be represented by counsel who is not licensed to practice in this state. It was determined that such admission to practice was not a right but a discretionary privilege.\(^8\) The issue was raised again in Goldston v. American Motors Corp.,\(^9\) where the attorney in question had been admitted pro hac vice some time earlier and had been involved in the lawsuit for several years. The supreme court held that once an attorney had been admitted to practice pro hac vice, his client had a substantial right to continuation of that representation, "just as with any other attorney duly admitted to practice law in the State of North Carolina."\(^10\) Based on this statement, it appears that an order dismissing a party's chosen


\(^{34}\) In Lowder, defendant's motion to disqualify plaintiff's attorney was based on the allegation of a conflict of interest. Id. at 279, 300 S.E.2d at 232-33. Without discussion, the court of appeals held the denial of the motion affected a substantial right of defendants. Id. at 278-79, 300 S.E.2d at 232.


\(^{36}\) Id. at 662-63, 403 S.E.2d at 595.

\(^{37}\) 57 N.C. App. 553, 291 S.E.2d 828, discretionary review denied, 306 N.C. 558, 294 S.E.2d 371 (1982). In Leonard, the appeal was from an order denying a motion for admission of counsel pro hac vice. Id. at 553, 291 S.E.2d at 828-29.

\(^{38}\) Id. at 555, 291 S.E.2d at 829.


\(^{40}\) Id. at 727, 392 S.E.2d at 737.
counsel affects a substantial right and is immediately appealable, so long as that counsel is licensed to practice in North Carolina.

D. Bonds

An order requiring each party to post a bond in an amount reasonably approximating the value of assets held by each does not affect a substantial right, rather it simply preserves the status quo pending the outcome of litigation.\(^{41}\)

E. Class Actions

The appealability of an order denying certification of a class action was first addressed in *Perry v. Cullipher*.\(^{42}\) In examining the possible outcomes resulting from the denial of certification of a class, the court of appeals reasoned that if the trial court erred in denying the certification, the plaintiff could still get a judgment on his own, without the other members of the class.\(^{43}\) The court noted, however, that in cases where a single member recovers following a denial of class certification, the other members could be precluded from recovery and so sustain injury which could not be corrected absent appeal prior to final judgment.\(^{44}\) On this basis, it was held that the denial of class certification affects a substantial right from which immediate appeal lies.\(^{45}\)

Where the appealability of an award of certification of a class was raised, the court of appeals found that no substantial right of the non-moving party was affected by the ruling.\(^{46}\)

F. Condemnation

In *City of Winston-Salem v. Ferrell*,\(^{47}\) the court of appeals held that although defendants’ damages had yet to be assessed, the plaintiff city could appeal the determination of liability for

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43. Id. at 762, 318 S.E.2d at 356.
44. Id.
46. Faulkenbury v. Teachers’ & State Employees’ Retirement Sys., 108 N.C. App. 357, 424 S.E.2d 420, aff’d, 335 N.C. 158, 436 S.E.2d 821 (1993). Despite the lack of appealability under the substantial right doctrine, the court of appeals chose to treat the appeal as a petition for writ of certiorari and grant review. Id. at 375, S.E.2d at 429.
47. 79 N.C. App. 103, 338 S.E.2d 794 (1986).
inverse condemnation, as the order affected a substantial right of the city. 48

G. Contempt

Under section 5A-17 of the General Statutes of North Carolina a person convicted of criminal contempt may appeal in a manner prescribed for criminal appeals. 49 Those convicted of civil contempt may appeal pursuant to those rules governing civil appeals. 50 As criminal appeals are statutorily limited to final judgments, 51 it would appear that there is no appeal from an interlocutory order finding a party in criminal contempt. Conversely, where a party is found in contempt in a civil action for noncompliance with an order of the trial court, the action is immediately appealable under sections 1-277 and 7A-27 of the General Statutes of North Carolina as a substantial right has been affected by the imposition of sanctions. 52

In State v. Mauney, 53 an action for child support, the defendant was held in criminal contempt for refusing to submit to a court-ordered blood test. The court of appeals determined that the order finding defendant in contempt was civil in nature, and therefore appealability rested on an analysis based on the combined statutory requirements of sections 1-277 and 7A-27 as applied in various civil precedents. 54 The contempt order was held to be immediately appealable because "[i]f defendant refuses to comply, he risks a fine or imprisonment; if he complies, his challenge to the blood test may become moot." 55

48. Id. at 107, 338 S.E.2d at 797. The plaintiff instituted a declaration of taking against portions of land owned by defendant. Id. at 106, 338 S.E.2d at 797. Defendants counterclaimed for damages incurred by the use of property inversely condemned by the city and not included in the declaration. Id. The trial court entered a partial verdict in favor of the defendants' counterclaim, finding the land in question had been inversely condemned by the plaintiff. Id. See also North Carolina State Highway Comm'n v. Nuckles, 271 N.C. 1, 13-14, 155 S.E.2d 772, 783 (1967).

49. N.C. GEN. STAT. § 5A-17 (1986).


51. N.C. GEN. STAT. § 15A-1444(d) (1988); see infra notes 56-78 and accompanying text.


54. Id. at 30, 415 S.E.2d at 210.

55. Id. at 31, 415 S.E.2d at 210. See also Benfield v. Benfield, 89 N.C. App. 415, 366 S.E.2d 500 (1988) (court of appeals finding that an order compelling
H. Criminal Cases

Ordinarily, there is no right to appeal in a criminal case except from a judgment on conviction or upon a plea of guilty. The right of appeal in criminal cases is purely statutory. What statutes apply, however, has been a source of some confusion.

It has long been held that sections 7A-27 and 1-277 of the General Statutes of North Carolina provided a right to appeal from an interlocutory order in a criminal proceeding if the order deprived the appellant of a substantial right which would be lost absent immediate review. In a line of criminal cases beginning with State v. Jones, the above statutes were relied on to address the issue of whether an appeal from an order denying a defense motion to dismiss on grounds that to subject the defendant to a second trial would violate his constitutional right against double jeopardy. The court of appeals held that while the above statutes were applicable, no substantial right was affected because "the avoidance of a rehearing or trial is not considered to be such a substantial right." Likewise, in State v. Gurganus, the next case following Jones to address this issue, the court of appeals again held there was no right to appeal from the denial of a motion to dismiss grounded in a double jeopardy claim. However, in State v. Montalbano, the court of appeals relied on the above statutes in assessing the defendant's right to appeal and, citing Jones, held that the issue of whether a defendant will be subjected to double jeopardy did affect a substantial right and so was immediately appealable. The discrepancy between these cases was addressed in State v. Major, where it was determined discovery in which a finding of contempt had been entered affected a substantial right and so was immediately appealable).

60. Id. at 416, 313 S.E.2d at 266.
62. Id. at 100, 321 S.E.2d at 926.
64. Id. at 260, 326 S.E.2d at 635.
that, pursuant to *State v. Bryant*, the substantial rights criteria in the above statutes applied, and the issue of double jeopardy did affect a substantial right of an appellant.

With the enactment in 1977 of section 15A-1444(d) of the General Statutes of North Carolina, the applicability in criminal appeals of the substantial right exception contained in section 1-277 came into question. Section 15A-1444(d) limited criminal appeals to the procedures enumerated in section 15A-1441 et seq., Chapter 7A of the General Statutes of North Carolina, and the Rules of Appellate Procedure. With few exceptions, these procedures limit appellate review in criminal proceedings to final judgments. There are no provisions for making a determination regarding whether a substantial right of an appellant would be affected absent immediate review pursuant to section 1-277. This issue was examined in *State v. Joseph*, another case wherein defendant appealed the denial of a motion to dismiss based on allegations of double jeopardy. The court of appeals determined that the defendant had no right of appeal under section 15A-1444(d). The issue of whether a claim of double jeopardy affected a substantial right was not addressed, as it was decided that there was no basis for review pursuant to a substantial right analysis. Thus, it would appear that a section 1-277 analysis is no longer applicable in criminal proceedings and that no right to appeal an interlocutory order in a criminal appeal exists based on the abridgment of a substantial right.

The section 1-277 analysis was again applied to an interlocutory appeal in a criminal proceeding in *State v. Johnson*. There it was determined that the appeal was not interlocutory as a final judgment had been entered. In establishing the statutory basis for appellate review of a final judgment, however, the court of appeals relied on section 1-277 as opposed to those procedures.

67. *Major*, 84 N.C. App. at 422-23, 352 S.E.2d at 863.
69. *Id*.
71. *Id.* at 205, 374 S.E.2d at 134.
72. *Id.* at 206, 374 S.E.2d at 134-35.
73. *Id*.
75. *Id.* at 758, 383 S.E.2d at 693.
listed in section 15A-1444(d). In addition, the Johnson court referenced the defendant’s substantial right to due process and the possibility that the defendant could be subjected to double jeopardy. Therefore, under the Johnson analysis, a substantial right issue would result in an immediate appealability pursuant to section 1-277. However, a statutory analysis clearly supports the contrary holding found in Joseph.

I. Default

A judgment by default is the equivalent of a final judgment. As such, it is immediately appealable. An order setting aside a default judgment is interlocutory and is not immediately appealable.

An Entry of Default, leaving for determination money and property taken, and damages caused, is interlocutory and not subject to appellate review.

J. Directed Verdict

In LaFalce v. Wolcott, the court of appeals held that while the appeal was interlocutory because final judgment had not been

76. Id.

77. Id.


80. Horne v. Nobility Homes, Inc., 88 N.C. App. 476, 363 S.E.2d 642 (1988). In Horne, the court of appeals determined that the plaintiff’s objection to the order setting aside the default judgment was protected by its exception to the order. Id. at 478, 363 S.E.2d at 643. Requiring the plaintiff to proceed with trial did not affect a substantial right warranting immediate appeal. Id. In Kimzay Winston-Salem, Inc., v. Jester, 103 N.C. App. 77, 404 S.E.2d 176, discretionary review denied, 329 N.C. 497, 407 S.E.2d 534 (1991), the plaintiff moved under N.C. GEN. STAT. § 1A-1, Rule 60(b)(1) for the setting aside of a default judgment entered in its favor because the judgment awarded inadvertently omitted damages to which plaintiff alleged it was entitled to. Id. at 78, 404 S.E.2d at 177. The trial court allowed the motion, reopening the case for hearings to redetermine damages. Id. at 79, 404 S.E.2d at 177. Although the court of appeals deemed the appeal to be interlocutory without any substantial right of defendant affected by the underlying order, review by certiorari was granted. Id.


82. 76 N.C. App. 565, 334 S.E.2d 236 (1985). The trial court entered a directed verdict against the plaintiffs' claims, denied plaintiffs' motion for a new trial, and granted defendant's motion for a new trial on his counterclaim. Id. at 567, 334 S.E.2d at 237. Plaintiffs had already completed one trial on their claims. Id. at 569, 334 S.E.2d at 239. The court of appeals recognized that the
entered in all the claims, requiring the plaintiffs to undergo two full trials on the merits affected a substantial right. 83

In T. H. Blake Contracting Co. v. Sorrells, 84 the trial court granted directed verdicts in favor of the two defendants. 85 The parties then agreed to settle the case, including defendants’ counterclaims which remained to be heard. 86 Prior to entry of final judgment in the case, however, plaintiff withdrew from the settlement agreement and filed notice of appeal from the directed verdicts. 87 The court of appeals held that the appeal was interlocutory as the counterclaims remained, and no substantial right of plaintiff’s would be lost absent immediate appeal. 88 In dismissing the appeal, the court of appeals noted that plaintiff “precipitated the events and circumstances which prevented entry of final judgment as to all claims in this action.” 89

K. Discovery

In general, orders either denying or compelling discovery are not immediately appealable absent a showing that a substantial right would be lost if the ruling was not reviewed prior to final judgment. 90 The most common instance in which a substantial right has been deemed so affected occurs upon a showing that the discovery sought (1) would not delay the trial or cause the opposing party unreasonable annoyance, embarrassment, oppression or undue burden or expense; and (2) if the information sought is highly relevant to the critical question at issue in the action. 91

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83. Id. at 570, 334 S.E.2d at 239.
85. Id. at 121, 426 S.E.2d at 87.
86. Id.
87. Id.
88. Id. at 122, 426 S.E.2d at 87.
89. Id. at 122, 426 S.E.2d at 87-88.
1. Orders Denying Motions to Compel Discovery

In Brown v. Brown,92 the plaintiff sought equitable distribution pursuant to the divorce from her husband. Plaintiff successfully added her brother-in-law and his ex-wife as defendants, and claimed that certain real property, purchased by her husband and thereby subject to equitable distribution, had been deeded in the names of the other defendants in order to shield it from division.93 Maintaining that these acts subjected the other defendants to equitable distribution, plaintiff filed a motion for production of documents.94 The trial court found that property owned by the other defendants was not marital property and was not subject to equitable distribution and entered an order limiting the scope of discovery.95 The court of appeals held that the trial court’s ruling on the motion to produce documents did not affect a substantial right.96 Similarly, in Hale v. Leisure,97 the court of appeals refused to grant certiorari to review several issues pertaining to discovery, citing a lack of substantial right infringement and the need to discourage fragmentary appeals.98

In North Carolina Farm Bureau Mutual Insurance Co. v. Wingler,99 the defendants filed interrogatories and a request for production of documents seeking the names of all persons having any knowledge of the allegations contained in the complaint.100 The defendants later requested additional documentation in possession of the plaintiff or any of the plaintiff’s agents relating to the allegations.101 The plaintiff objected to most of the information sought on grounds that it had been prepared in anticipation of litigation.102 The trial court ordered production of most of the information, with the exception of specific reports designated as work product.103 The court of appeals held that while the Win-

93. Id. at 206, 334 S.E.2d at 507.
94. Id.
95. Id. at 207, 334 S.E.2d at 507.
96. Id. at 208, 334 S.E.2d at 508.
98. Id. at 167, 394 S.E.2d at 667-68.
100. Id. at 400, 429 S.E.2d at 761.
101. Id.
102. Id.
103. Id.
glers had met the first part of the \textit{Dworsky}\textsuperscript{104} test in that the discovery would not have caused any delay, undue burden, annoyance or oppression to the Farm Bureau, they had failed to show that the documents were so important to the outcome of the matter as to amount to a substantial right.\textsuperscript{105} On that basis, the assignment of error was dismissed.\textsuperscript{106}

2. Orders Compelling Discovery

In \textit{Shaw v. Williamson},\textsuperscript{107} the court of appeals held that an order requiring the defendant to answer certain interrogatories affected a substantial right of the defendant's in light of his contention that to do so would cause him to violate his constitutional right against self-incrimination.\textsuperscript{108}

In \textit{Walker v. Liberty Mutual Insurance Co.},\textsuperscript{109} the court of appeals held that an order compelling discovery was not a final judgment, and therefore was interlocutory and did not affect a substantial right.\textsuperscript{110} However, citing \textit{Midgett v. Crystal Dawn Corp.},\textsuperscript{111} the court of appeals recognized that when the order was enforced by means of sanctions pursuant to section 1A-1, Rule 37(b), of the General Statutes of North Carolina, a right of review arose.\textsuperscript{112}

In \textit{Benfield v. Benfield},\textsuperscript{113} defendant's first appeal from an order compelling discovery was held not to affect a substantial right because defendant was ordered only to answer certain questions by a certain date.\textsuperscript{114} No other sanctions were imposed.\textsuperscript{115} In defendant's second appeal, however, he had been found in contempt by the trial court for failure to comply with the order compelling discovery.\textsuperscript{116} The court of appeals found that an order

\textsuperscript{104} See supra note 91 and accompanying text.
\textsuperscript{105} Id. at 401, 429 S.E.2d at 762.
\textsuperscript{106} Id. at 401-02, 429 S.E.2d at 762.
\textsuperscript{107} 75 N.C. App. 604, 331 S.E.2d 203, discretionary review denied, 314 N.C. 669, 335 S.E.2d 496 (1985).
\textsuperscript{108} Id. at 606-07, 331 S.E.2d at 204.
\textsuperscript{109} 84 N.C. App. 552, 353 S.E.2d 425 (1987).
\textsuperscript{110} Id. at 554, 353 S.E.2d at 426. See also Dunlap v. Dunlap, 81 N.C. App. 675, 344 S.E.2d 806, discretionary review denied, 318 N.C. 505, 349 S.E.2d 859 (1986).
\textsuperscript{111} 58 N.C. App. 734, 294 S.E.2d 386 (1982).
\textsuperscript{112} Walker, 84 N.C. App. at 554-55, 353 S.E.2d at 426.
\textsuperscript{113} 89 N.C. App. 415, 366 S.E.2d 500 (1988).
\textsuperscript{114} Id. at 419, 366 S.E.2d at 502-03.
\textsuperscript{115} Id. at 419, 366 S.E.2d at 502.
\textsuperscript{116} Id. at 417-18, 366 S.E.2d at 502.
compelling discovery in which a finding of contempt had been entered affected a substantial right and so was immediately appealable. The issue of sanctions used to enforce an order compelling discovery was again raised in Mack v. Moore, and Cochran v. Cochran. In both cases the orders appealed from were found to contain no enforcement sanctions and so were deemed non-appealable. However, in both cases the court of appeals determined to treat the appeals as petitions for writ of certiorari and addressed the merits of each.

L. Dismissal Pursuant to N.C. Gen. Stat. § 1A-1, Rule 12

1. Denial of a Motion to Dismiss

Generally, the denial of a motion to dismiss is not immediately appealable. However, the denial of a Rule 12(b) motion to

117. Id. at 420, 366 S.E.2d at 503.
118. Id.
121. Mack, 91 N.C. App. at 480, 372 S.E.2d at 316; Cochran, 93 N.C. App. at 577, 378 S.E.2d at 582.
122. Mack, 91 N.C. App. at 480, 372 S.E.2d at 316; Cochran, 93 N.C. App. at 577, 378 S.E.2d at 582.
123. See e.g., Travco Hotels v. Piedmont Natural Gas Co., 102 N.C. App. 659, 403 S.E.2d 593 (1991), aff’d and remanded, 332 N.C. 288, 420 S.E.2d 426 (1992) (order denying defendant’s motion to dismiss claim for punitive damages does not affect a substantial right); CFA Medical, Inc., v. Burkhalter, 95 N.C. App. 391, 383 S.E.2d 214 (1989) (denial of motion to dismiss for insufficiency of process); State v. Joseph, 92 N.C. App. 203, 374 S.E.2d 132 (1988), cert. denied, 324 N.C. 115, 377 S.E.2d 241 (1989) (court of appeals holding that the enactment of N.C. Gen. Stat. § 15A-1444(d) establishes the only instances in which immediate review of interlocutory appeals are permitted in criminal cases, eliminating the application of N.C. Gen. Stat. § 1-277(a) and substantial rights analysis in criminal appeals); Southern Uniform Rentals v. Iowa Nat’l Mut. Ins. Co., 90 N.C. App. 738, 370 S.E.2d 76 (1988) (denial of a motion to dismiss for failure to state a claim upon which relief could be granted does not affect a substantial right); Burlington Industries v. Richmond County, 90 N.C. App. 577, 369 S.E.2d 119 (1988) (holding that denial of motion to dismiss for lack of subject matter jurisdiction does not affect a substantial right; holding that denial of motion to dismiss for failure to state a claim upon which relief could be granted does not affect a substantial right; finding that denial of motion to dismiss based on sovereign immunity is a question of procedural irregularity rather than immunity from prosecution, therefore no substantial right affected); Poret v.
dismiss has been held to affect a substantial right when the motion was based on the defenses of qualified immunity and sovereign immunity.\textsuperscript{124} It has also been held that the denial of a Rule 12(b) motion to dismiss may be subject to immediate review “where a decision of the principal question presented would expedite the administration of justice, or where the case involves a legal issue of public importance,” such that it is appropriate for an appellate court to exercise its discretion to determine the appeal on its merits.\textsuperscript{125}

2. Partial Dismissal as to the Parties

An order dismissing less than all the parties to an action is interlocutory and will only affect a substantial right where the dismissals involve issues which overlap those addressed in the action against the remaining parties.\textsuperscript{126} So long as the dismissal of less than all of the parties does not involve an overlapping of issues, no substantial right is affected.\textsuperscript{127}


\textsuperscript{125} Bardolph v. Arnold, 112 N.C. App. 190, 193, 435 S.E.2d 109, 112, discretionary review denied, 335 N.C. 552, 439 S.E.2d 141 (1993) (whether county commissioners may be held liable for expenditures of county funds used to produce and distribute information concerning referenda before the commission); see also Flaherty v. Hunt, 82 N.C. App. 112, 113, 345 S.E.2d 426, 427, discretionary review denied, 318 N.C. 505, 349 S.E.2d 859 (1986) (citizens and taxpayers seek to recover monetary damages from the governor of North Carolina for misuse of state property while in office).


\textsuperscript{127} Id. at 314, 423 S.E.2d at 529-30. In Plummer, the theory of liability against those defendants who were dismissed differed from the issue of compensability against the defendant who remained a party to the action. \textit{Id.} at 314, 423 S.E.2d at 529. Therefore, even if the appellant prevailed on his appeal of the dismissals, there was no possibility of inconsistent verdicts upon remand. \textit{Id.} at 314, 423 S.E.2d at 529-30.
The opposite result was reached in *Jenkins v. Wheeler*. The court of appeals held that where "multiple trials against different members of the same allegedly collusive group could result from dismissal of this appeal," a substantial right of the plaintiff was affected.

3. **Partial Dismissal as to Claims**

Generally, the dismissal of fewer than all the claims against a party or parties will affect a substantial right of a plaintiff. The basis for so determining lies in the following: where common fact issues exist between those claims which have been dismissed and those which remain, delay of the appeal creates the possibility that a second trial upon the same facts will be required as the result of a successful appeal of the dismissals. This scenario creates the possibility of inconsistent verdicts, thereby affecting a substantial right of the plaintiff. The primary instance where


129. Id. at 142, 316 S.E.2d at 356 (plaintiff brought suit against the named defendant, her attorney, and Nationwide Insurance Co., alleging the three conspired to deny plaintiff's recovery under a Nationwide policy, thereby breaching various fiduciary duties; the attorney's motion to dismiss was granted). See also *Hoots v. Pryor*, 106 N.C. App. 397, 417 S.E.2d 269, discretionary review denied, 332 N.C. 345, 421 S.E.2d 148 (1992) (Despite the difference in claims against co-defendants—a claim of negligence against defendant Pryor and a claim based on interest in land and corresponding duty against defendant Gas Company—the defense of contributory negligence could be raised by both defendants. The resulting possibility of inconsistent verdicts regarding contributory negligence affected a substantial right of plaintiff.).


131. Id. at 25, 376 S.E.2d at 491.

132. Id. See also *Fox v. Wilson*, 85 N.C. App. 292, 354 S.E.2d 737 (1987) (dismissal of a claim against a professional corporation affected the plaintiff's substantial right to have determined in a single proceeding whether the plaintiff had been damaged by the actions of one, some, or all of the defendants; the court of appeals noting that all the claims arose out of the same series of transactions); *Small v. Small*, 93 N.C. App. 614, 379 S.E.2d 273, discretionary review denied, 325 N.C. 273, 384 S.E.2d 519 (1989) (contract claims remaining contained issues which overlapped the dismissed counterclaim for equitable distribution); *Hare v. Butler*, 99 N.C. App. 693, 394 S.E.2d 231, discretionary review denied, 327 N.C. 634, 399 S.E.2d 121 (1990) (dismissal of various claims brought against multiple governmental agencies; the dismissal of less than all the claims against less than all parties affected a substantial right); *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519, 430 S.E.2d 476 (1993) (dismissal of claims against Cessna while retaining claims against Burlington Aviation affected the plaintiff's substantial
the issue of partial dismissal of claims arises and a substantial right has been consistently held to be affected is in cases where a claim for punitive damages has been dismissed, as in the case of Oestreicher v. American National Stores, Inc., and its progeny. However, in Moose v. Nissan of Statesville, Inc., the court of appeals expressly overturned Oestreicher, and therefore its progeny, finding that there is no danger of inconsistent verdicts involved in such cases, and therefore no substantial right is affected.

4. Miscellaneous

In Thomson v. Newman, the court of appeals held that where the entire claim of plaintiff #1 was dismissed and the claim of punitive damages brought by plaintiff #2 was dismissed, leaving only the claim for compensatory damages brought by plaintiff #2, the appeal of the dismissals was interlocutory, not affecting a substantial right of either plaintiff.

In Garris v. Garris, the trial court's dismissal of the defendant's plea in bar to the plaintiff's claims for equitable distribution and alimony was not immediately appealable, as the court's ruling was analogous to denying a motion to dismiss the plaintiff's claims despite the assertion of some affirmative defense.

right to have determined in a single action whether one, some, or all of the defendants were liable for damages arising upon the same series of transactions).

133. 290 N.C. 118, 225 S.E.2d 797 (1976).
135. Id. at 427-28, 444 S.E.2d at 697-98. For a more detailed explanation of the reasoning in Moose and its relationship to the line of cases beginning with Oestreicher, see infra notes 311-24 and accompanying text. Because Moose may well be reviewed by the supreme court, the following cases are included herein as they are controlling pending the outcome of that review: Huff v. Chrismon, 68 N.C. App. 525, 315 S.E.2d 711, discretionary review denied, 311 N.C. 756, 321 S.E.2d 134 (1984) (dismissal of punitive damages claim); Jenkins v. Wheeler, 81 N.C. App. 512, 344 S.E.2d 371 (1986) (same); Greer v. Parsons, 103 N.C. App. 463, 405 S.E.2d 921 (1991), aff'd, 331 N.C. 368, 416 S.E.2d 174 (1992) (dismissal of claims for punitive damages and for loss of companionship and services in wrongful death action, retaining the claim for pain and suffering).
137. Id. at 598, 328 S.E.2d at 597.
139. Id. at 470, 374 S.E.2d at 640.
M. Family Law

1. Alimony

The issue of alimony as it relates to the question of interlocutory appeals arises in pendente lite awards. The court of appeals has recognized that appeals from this type of award are often "pursued for the purpose of delay rather than to accelerate determination of the parties' rights," and for that reason has decided that in the interests of public policy pendente lite awards will be deemed not to affect a substantial right. 140

In Rehm v. Rehm, 141 the court of appeals held that an order terminating a party's obligation to pay alimony affected a substantial right of the dependent spouse and was therefore immediately appealable. 142 The ruling was based on Piedmont Equipment Co. v. Weant, 143 in which a substantial right was deemed affected because the order dismissing a charge of indirect civil contempt left no other proceeding by which the plaintiff could enforce its rights. 144

2. Custody

An order for temporary child custody is interlocutory and does not affect a substantial right which cannot be protected by appeal

140. Berger v. Berger, 67 N.C. App. 591, 597, 313 S.E.2d 825, 830, discretionary review denied, 311 N.C. 303, 317 S.E.2d 678 (1984) (quoting Stephenson v. Stephenson, 55 N.C. App. 250, 251-52, 285 S.E.2d 281, 282 (1981)). See also Prevatte v. Prevatte, 104 N.C. App. 777, 411 S.E.2d 386 (1991) (appeal of the denial of a motion to terminate alimony dismissed as interlocutory where the subject alimony is a pendente lite award); Browne v. Browne, 101 N.C. App. 617, 400 S.E.2d 736 (1991); Wilson v. Wilson, 90 N.C. App. 144, 367 S.E.2d 363 (1988); Berry v. Berry, 87 N.C. App. 624, 361 S.E.2d 771 (1987) (court of appeals determining that the language of the trial court imposing alimony "pending further Orders of the Court" demonstrates the non-final character of the order). In Berger, the defendant's third appeal from the pendente lite award was accompanied by a contempt order for failure to comply with the requirements of the award. Since a contempt order affects a substantial right, in this instance the merits of the appeal were addressed. See supra notes 49-55 and accompanying text.

142. Id. at 494, 409 S.E.2d at 725.
144. Rehm, 104 N.C. App. at 494, 409 S.E.2d at 725.
from the final judgment. An order continuing in effect a temporary child custody order is likewise non-appealable.

3. Child Support

In Appert v. Appert, the trial court entered an order in which the defendant father was permitted to place his child support payments into an escrow account to ensure that his visitation rights as bargained for in a separation agreement were complied with. The order was deemed to affect a substantial right of the plaintiff to receive support on behalf of her minor children as needed and in the amount deemed by the trial court to be reasonably necessary.

In keeping with the philosophy espoused in Berger v. Berger, regarding the public policy against appealing awards of alimony pendente lite, orders for child support entered in conjunction with alimony pendente lite awards are not appealable until a final judgment is entered for permanent alimony.

4. Paternity-Blood Grouping Tests

An order requiring parties and their minor child to submit to a blood grouping test in order to establish paternity is interlocutory and does not affect a substantial right. However, because the public interest is best served by an expedited decision in cases involving paternity, the trend in the court of appeals is to address the merits of these cases regardless of their interlocutory status.

147. Id. at 28, 341 S.E.2d at 342.
148. Id. at 33, 341 S.E.2d at 345.
150. See supra notes 140-44 and accompanying text.
5. Guardian Ad Litem

In *Culton v. Culton*, the plaintiff appealed from an order granting the defendant’s motions for the appointment of a guardian ad litem. The court found that the order was not a final judgment, and that no substantial right of the plaintiff was affected.

N. Indemnity

An appeal from an order which denies a claim for indemnity is premature in that the liability of the movant has not yet been established, therefore neither has the need for indemnification. For this reason, no substantial right of the appellant has been affected by the ruling.

O. Injunctions

By its very nature, a preliminary injunction is interlocutory. It is imposed in order to preserve the status quo pending a final determination on the merits of a case. As such, the appealability of either the denial or imposition of a temporary injunction requires a showing that the appellant will be deprived of a substantial right absent immediate review.

1. Substantial Right Affected

a. Covenants not to Compete

The most common challenge to a trial court’s ruling on a preliminary injunction on appeal is where the grounds for the injunction involve a covenant not to compete. For the most part, covenants which restrict a party’s ability to operate a business or

156. *Id.* at 625, 398 S.E.2d at 324.
157. *Id.* at 626, 398 S.E.2d at 325. It is noted that the *Culton* court also determined that the plaintiff did not have standing to challenge the appointment as he was not an aggrieved party. *Id.* It is not clear in the opinion to what extent the plaintiff’s lack of standing formed the basis of the dismissal of the appeal, and whether a party with standing might have a better chance at establishing the abridgment of a substantial right.
159. *Id.*
161. *Id.*
practice their livelihood are found to affect a substantial right. Where the injunction has been denied, the fact that the duration of the non-competing covenant will run prior to final judgment and appellate review, rendering the issue moot, has been held to affect a substantial right. The following cases are illustrative of injunctions concerning covenants not to compete.

In Robins & Weill, Inc. v. Mason, the court of appeals held that because the terms of the covenant forbade the defendants from “engaging in the general insurance business” for a period of three years, a substantial right of the defendants' was affected. The court of appeals noted that the “trial court's enforcement of the covenant has effectively closed the defendants out of the insurance business in the territory where they have recently begun an insurance agency of their own.” Similarly, in Triangle Leasing Co. v. McMahon, the court of appeals found a substantial right was affected when the covenant not to compete prohibited the defendants from practicing their livelihood in North Carolina after they had opened a business to do so shortly before the plaintiff filed suit. The ability to do business, particularly a seasonal business, was held to be a substantial right affected by the imposition of a preliminary injunction enforcing a covenant not to compete against the defendant air-conditioning installation business in Milner Airco, Inc. v. Morris. Additionally, the right to work and earn a living in North Carolina, South Carolina, Virginia, Georgia, and Alabama was held to be a substantial right affected by the injunction entered in Masterclean of North Carolina, Inc. v. Guy.

The denial of an injunction to enforce a covenant not to compete was held to affect a substantial right of the plaintiff where, at the time of the appeal, more than one-third of the period in which the covenant was to run had elapsed. The issue of the running time of a covenant was raised again in Electrical South, Inc., v.
Lewis. The court of appeals found a substantial right of the plaintiff was affected because absent immediate appellate review the two year limitation of the covenant would expire prior to a final judgment on the merits.

b. Others

In Town of Knightdale v. Vaughn, an injunction was entered pursuant to zoning regulations prohibiting the defendant from operating a used car sales lot. In reasoning similar to that in the above cases, the court of appeals determined that the right of the defendant to operate his business until the merits of the case were adjudicated was substantial. Similarly, an injunction granting possession of church property to the plaintiffs and ordering the eviction of the pastor was held to affect a substantial right of the defendants.

In North Carolina Electric Membership Corp. v. North Carolina Department of Economic & Community Development, the injunction appealed from required the North Carolina Rural Electrification Authority to release documents to Duke Power Company, whose right to those documents formed the subject of the underlying case. The court of appeals held that because compliance with the injunction would render the underlying case moot, a substantial right was affected which the appellant would lose if review was not immediate.

The rights and freedoms safeguarded by the First Amendment were held to be substantial in Kaplan v. Prolife Action League. In Kaplan, the injunction appealed from prohibited anti-abortionist defendants, who had targeted abortion-performing Dr. Kaplan, from picketing, parading, marching or demonstrating within a specified distance from the plaintiffs' home, and

171. Id. at 165, 385 S.E.2d at 355.
173. Id. at 650, 383 S.E.2d at 461.
174. Id. at 651, 383 S.E.2d at 461.
177. Id. at 715, 425 S.E.2d at 443.
178. Id. at 716, 425 S.E.2d at 443.
from confronting or threatening the plaintiffs at their home or elsewhere.\(^\text{180}\)

2. **No Substantial Right Affected**

In *Yandle v. Mecklenburg County*,\(^\text{181}\) the Yandles sought to have the Town of Matthews annex a piece of their property to prevent the County of Mecklenburg from condemning the land for a landfill.\(^\text{182}\) The trial court entered a preliminary injunction prohibiting Matthews from annexing the property, and prohibiting the county from condemning the property.\(^\text{183}\) The injunction was found not to affect a substantial right of either the county or the town as neither would be irrevocably harmed by the maintenance of the status quo.\(^\text{184}\)

In *Carefree Carolina Communities, Inc. v. Cilley*,\(^\text{185}\) plaintiff's motion for a preliminary injunction stopping foreclosure against the plaintiff was denied.\(^\text{186}\) The court of appeals did not determine that a substantial right of the plaintiff's was affected by the denial of the motion, but instead decided to expedite the decision in the public interest by suspending the rules regarding interlocutory appeals.\(^\text{187}\)

E & J Investments, Inc., was prevented by a preliminary injunction from offering topless dancing at their lounge.\(^\text{188}\) The court of appeals noted that no substantial right of the defendant was affected, since there was no injunction preventing the defendant from operating the lounge business, serving alcohol, or having

\(^{180}\). *Id.* at 10, 431 S.E.2d at 831-32.

\(^{181}\). 77 N.C. App. 660, 335 S.E.2d 915 (1985).

\(^{182}\). *Id.* at 661, 335 S.E.2d at 915.

\(^{183}\). *Id.* at 661, 335 S.E.2d at 916.

\(^{184}\). *Id.* at 662, 335 S.E.2d at 916. It is noted that the trial court's injunction prohibiting the Yandles from conveying the property during the pendency of the action was vacated by the court of appeals. *Id.* No substantial right was found affected, but it was held that the trial court had no authority to enter the injunction as it was not reasonably necessary to protect any of the parties' rights. *Id.*


\(^{186}\). *Id.* at 743, 340 S.E.2d at 530.

\(^{187}\). *Id.* at 744, 340 S.E.2d at 530.

dancing (albeit non-topless).\textsuperscript{189} Since the injunction was so limited, no irreparable harm to the defendant was foreseen.\textsuperscript{190}

A preliminary injunction restraining the defendant bank from selling shares of stock it controlled as executor of an estate did not affect a substantial right of the bank.\textsuperscript{191} The injunction was deemed temporary, enjoining the sale only until the trial court could determine whether the bank was required to sell the shares to the plaintiff as he alleged.\textsuperscript{192}

The sole example found where a covenant not to compete was deemed not to affect a substantial right is \textit{Automated Data Systems v. Meyers}.\textsuperscript{193} The court of appeals found that under the facts of the case an injunction barred the defendant from competing with the plaintiff in several counties, none of which corresponded with the operational territory of the defendant’s new place of employment.\textsuperscript{194} Since the injunction had no affect on the defendant’s employment and the defendant was not enjoined from any activity in which he was engaged prior to the entry of the injunction, no substantial right was affected.\textsuperscript{195}

In \textit{Clark v. Craven Regional Medical Authority},\textsuperscript{196} the supreme court held that an injunction restraining the plaintiffs from enforcing stop work orders where the defendants’ counter-claim for damages resulting from the negligent issuance of the plaintiffs’ orders had not been decided did not affect a substantial right of the plaintiffs.\textsuperscript{197} Further, the court noted that the plaintiffs failed to argue that they would be deprived of any substantial right absent immediate review.\textsuperscript{198}

\textbf{P. Intervention}

In \textit{Howell v. Howell},\textsuperscript{199} the court of appeals determined that the denial of a motion for permissive intervention under section

\begin{itemize}
  \item \textsuperscript{189} \textit{Id.} at 270, 368 S.E.2d at 21.
  \item \textsuperscript{190} \textit{Id.}
  \item \textsuperscript{191} \textit{Shuping v. NCNB}, 93 N.C. App. 338, 377 S.E.2d 802 (1989).
  \item \textsuperscript{192} \textit{Id.} at 340, 377 S.E.2d at 803.
  \item \textsuperscript{193} 96 N.C. App. 624, 386 S.E.2d 432 (1989).
  \item \textsuperscript{194} \textit{Id.} at 626, 386 S.E.2d at 434.
  \item \textsuperscript{195} \textit{Id.} at 627, 386 S.E.2d at 434.
  \item \textsuperscript{196} 326 N.C. 15, 387 S.E.2d 168 (1990).
  \item \textsuperscript{197} \textit{Id.} at 23, 387 S.E.2d at 173.
  \item \textsuperscript{198} \textit{Id.}
  \item \textsuperscript{199} 89 N.C. App. 115, 365 S.E.2d 181 (1988).
\end{itemize}
1A-1, Rule 24(b), of the General Statutes of North Carolina did not affect a substantial right.\textsuperscript{200}

Q. Jurisdiction

1. Personal Jurisdiction

Section 1-277(b) of the General Statutes of North Carolina provides that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause."\textsuperscript{201} This provision recognizes that the issue raised in a motion to dismiss on these grounds applies to the authority of the state to bring the defendant into its courts.\textsuperscript{202} The right to an immediate appeal under this section is limited to the issue of whether the defendant has the "minimum contacts" necessary to establish jurisdiction over the person.\textsuperscript{203} Further, this right extends to a denial of a motion for summary judgment, otherwise not immediately appealable.\textsuperscript{204} It is important to note, however, that the right to immediate appeal of this issue is not automatic, and requires more than simply making the motion.\textsuperscript{205}

\begin{itemize}
    \item 200. Id. at 118, 365 S.E.2d at 183. In the underlying case, counsel for the defendant filed a motion for summary judgment on the issue of alimony pendente lite. \textit{Id.} at 116, 365 S.E.2d at 182. A few days later, the defendant discharged her counsel. \textit{Id.} At that time, counsel made a motion to intervene for the purpose of securing attorney's fees incurred in the preparation of the motion for summary judgment. \textit{Id.} At the time the motion to intervene was filed, however, the summary judgment issue had not yet been addressed by the trial court. \textit{Id.} The trial court, noting that until the alimony question was answered counsel was not entitled to any fees, denied the motion. \textit{Id.} It was noted that the appellant could bring either a separate action for fees or appeal from a final order in the underlying case. \textit{Id.} at 117, 365 S.E.2d at 182.
\end{itemize}
The substance of the motion rather than the form controls the interlocutory nature of the appeal.\textsuperscript{206}

In \textit{Berger v. Berger},\textsuperscript{207} the court of appeals focused on the right to immediate appeal based on section 1-277(b). It was held that in applying the statute to determine the defendant's right to appeal the denial of his motion to dismiss for lack of personal jurisdiction, it was necessary to examine the underlying motion:

If defendant's motion raises a due process question of whether his contacts within the forum state were sufficient to justify the court's jurisdictional power over him, then the order denying such motion is immediately appealable under G.S. 1-277(b). If, on the other hand, defendant's motion, though couched in terms of lack of jurisdiction under Rule 12(b)(2), actually raises a question of sufficiency of service or process, then the order denying such motion is interlocutory and does not fall within the ambit of G.S. 1-277(b).\textsuperscript{208}

The question of whether a court of another state has personal jurisdiction over a defendant has been found not to affect a substantial right.\textsuperscript{209} In \textit{Automotive Restyling Concepts, Inc. v. Central Service Lincoln Mercury}, the defendant appealed the denial of a motion to dismiss for lack of personal jurisdiction, claiming that a Virginia judgment against it which the plaintiff sought to enforce was void in North Carolina because Virginia lacked personal jurisdiction over the defendant.\textsuperscript{210} The court of appeals stated that there was no question regarding this state's jurisdiction over the defendant, therefore, no substantial right was affected by the denial of the motion to dismiss.\textsuperscript{211}

\textbf{2. Subject Matter Jurisdiction}

The denial of a motion to dismiss for lack of subject matter jurisdiction under section 1A-1, Rule 12(b)(1), of the General Statutes of North Carolina is interlocutory and does not affect a substantial right, and therefore is not immediately appealable.\textsuperscript{212}

\textsuperscript{206.} \textit{Id.}
\textsuperscript{208.} \textit{Id.} at 595, 313 S.E.2d at 828-29.
\textsuperscript{210.} \textit{Id.}
\textsuperscript{211.} \textit{Id.} at 173-74, 360 S.E.2d at 142.
Under section 1-277(a) of the General Statutes of North Carolina, however, an order finding a lack of subject matter jurisdiction is immediately appealable because it determines or discontinues the action.213

R. Jury Trials

It is well established that an order denying jury trial affects a substantial right and is, therefore, immediately appealable.214 In *Faircloth v. Beard*,215 the supreme court extended that holding, finding that if an order denying a jury trial warranted immediate review, an order requiring a jury trial should have the same affect.216

S. Partial Verdict

An order containing a partial verdict—a verdict adjudicating less than all of the claims or all the rights and liabilities of all the parties to an action—is interlocutory and requires a finding that absent immediate appellate review a substantial right of the appellant will be affected.217

1. Substantial Right Affected

In *City of Winston-Salem v. Ferrell*,218 the plaintiff filed a Declaration of Taking describing permanent and construction easements across certain property owned by defendants.219 The

Walleshauser, 100 N.C. App. 594, 397 S.E.2d 371 (1990) (an order retaining jurisdiction over a child custody issue does not affect a substantial right and is not immediately appealable).

213. Batten v. North Carolina Dep't of Correction, 326 N.C. 338, 389 S.E.2d 35 (1990). It is noted that if a motion to dismiss for lack of subject matter jurisdiction is granted to fewer than all the claims or parties, the appealability will turn on whether there is a substantial right affected in each case. *Id.* at 342, 389 S.E.2d at 38. See Willis P. Whichard, *Appealability in North Carolina: Common Law Definition of the Statutory Substantial Right Doctrine*, 47 LAW & CONTEMP. PROBS. 123, 127-28, n. 33 (1984).


218. 79 N.C. App. 103, 338 S.E.2d 794 (1986).

219. *Id.* at 106, 338 S.E.2d at 797.
defendants counterclaimed, seeking damages for inverse condemnation which occurred on property not included in the Declaration of Taking but which had been trespassed upon by the contractor hired by the city.220 The city then filed a third-party action seeking indemnification by the contractor for any liability established in favor of the defendants.221 The trial court entered a partial verdict in favor of the defendants’ counterclaim, establishing the city’s liability but not determining damages.222 Both the city and the contractor appealed.223 The court of appeals found a substantial right of the city was affected based on the allegation of inverse condemnation.224 In ruling on the appealability of the issues raised by the third-party defendant contractor, the court of appeals held that when “a third-party defendant has an opportunity to participate fully in the determination of third-party plaintiff’s liability, it is bound by a judgment in favor of the original plaintiff (here, the defendants by counterclaim).”225 For this reason, the court of appeals held that the order determining the liability of the city affected a substantial right of the contractor.226

A partial verdict which leaves overlapping issues between the claim decided and the claim remaining affects a substantial right of the appellant because common allegations present common factual issues which should be determined by the same jury.227

2. No Substantial Right Affected

In Donnelly v. Guilford County,228 the plaintiff employee filed suit against the county for his employment termination, alleging violations of his state and federal constitutional rights, and praying for relief in the form of a preliminary injunction, reinstatement, promotion, compensatory pay, compensatory and punitive damages, and attorney’s fees.229 The jury returned verdicts regarding only two issues: (1) whether the plaintiff had waived

220. Id.
221. Id.
222. Id.
223. Id.
224. Id. at 107, 338 S.E.2d at 797. See supra notes 47-48 and accompanying text.
225. City of Winston-Salem, 79 N.C. App. at 107, 338 S.E.2d at 797.
226. Id.
229. Id. at 290, 419 S.E.2d at 366.
his right to a post-termination hearing, and (2) the amount recoverable in money damages by the plaintiff. The jury awarded the plaintiff nominal damages of one dollar. The defendants appealed from the award of one dollar and from the denial of their motion for judgment notwithstanding the verdict. The court of appeals determined that payment of one dollar would not work such hardship against the defendants as to affect a substantial right. Further, since the judgment appealed from did not resolve all of the claims against the defendants, the order denying the defendants' motion was interlocutory and not immediately appealable.

A partial verdict resulting in a judgment which determines the issue of liability but does not resolve the issue of damages is interlocutory and does not affect a substantial right.

T. Plea Bargains

A defendant has a substantial due process right not to have the state withdraw from a plea arrangement once the bargain has been accepted by the trial court. For that reason, an order which grants the state's motion to do so is immediately appealable.

U. Release of Funds

In State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau, the court of appeals held that no substantial right was affected where the order complained of denied the Rate Bureau's motion to release funds held in escrow. The denial was held to be temporary, and the order did not purport to determine who was entitled to the funds, only that they were not to be released at that time. Under these facts, the Rate Bureau
failed to show that any right regarded as substantial would be lost prior to final judgment.\textsuperscript{241}

V. Setting Aside Judgment

A plaintiff’s appeal from an order setting aside a judgment which had been based on a purported confession of judgment is interlocutory, and does not affect a substantial right where the result of the order is only that the plaintiff must establish the defendants’ liability and the resultant damages by proper evidence.\textsuperscript{242}

W. Summary Judgment

The question of the appealability of an interlocutory order, based on the order affecting a substantial right, arises most frequently in cases involving orders of summary judgment. As stated earlier, an appeal from a grant of summary judgment which disposes of fewer than all the parties or less than all the claims is immediately appealable upon certification by the trial court that there is no just reason for delay.\textsuperscript{243} It should be noted, however, that under Rule 54(b) certification by the trial court does not require appellate review from orders denying a motion for summary judgment.\textsuperscript{244} The denial of a motion for summary judgment, as well as a partial summary judgment order which is not certified by the trial court pursuant to Rule 54(b), is appealable only upon showing that a substantial right has been affected.\textsuperscript{245}

It is important to note that under the statutes, the burden of showing that a substantial right of the appellant is affected falls on the appellant. This may seem obvious, but often an appellant will not address the interlocutory nature of his case in the brief. In the past the appellate courts have addressed the issue on their own, absent any argument presented by either side, and determined whether there is a substantial right affected under case law prior to reviewing the issues raised on appeal. This trend recently

\textsuperscript{241} Id.


\textsuperscript{243} N.C. GEN. STAT. § 1A-1, Rule 54(b) (1990).


came under scrutiny in *Jeffreys v. Raleigh Oaks Joint Venture*, where the court of appeals held that it is not the duty of the appellate courts to construct arguments on behalf of an appellant. Therefore, the appellant's failure to present an argument in support of the abridgment of a substantial right is fatal to his appeal.

In organizing the cases involving orders of summary judgment, there is necessarily some overlapping with other sections of this paper. For purposes of clarity, this section is divided into four sub-sections: denial of summary judgment, substantial right not affected; denial of summary judgment, substantial right affected; partial summary judgment, substantial right not affected; partial summary judgment, substantial right affected. Where applicable, cases are grouped within each section according to subject matter.

1. Denial of Summary Judgment: Substantial Right Not Affected

In *Fraser v. Di Santi*, an action in which the defendants were accused of committing professional malpractice, the court of appeals noted that the denial of the defendants' summary judgment motion was not a final determination of the defendants' rights. It was further determined that no substantial rights of the defendants were affected by the decision of the trial court. Accordingly, the appeal was dismissed pursuant to section 7A-27 of the General Statutes of North Carolina, despite the trial court having stated that "there is no just reason to delay the appeal." A similar dismissal of appeal occurred in *Henderson v. LeBauer*, where the court of appeals held that the denial of the defendant hospital's motion for summary judgment did not affect

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247. *Id.* The court did not reach the issue of whether the order granting summary judgment would result in prejudice to a substantial right of the appellant. *Id.* at 379, 444 S.E.2d at 253. The fact that no substantial rights argument was raised ended appellate review of the appeal which was summarily dismissed. *Id.* *Jeffreys* was filed on 23 August 1994 and so has not been subject to review by the supreme court at the time of this writing.
249. *Id.* at 655, 331 S.E.2d at 218.
250. *Id.*
251. *Id.*
a substantial right and was not immediately appealable, despite the trial court’s certification for appeal under section 1A-1, Rule 54(b), of the General Statutes of North Carolina.253

In Cagle v. Teachy,254 the plaintiff’s insurer, an unnamed party under section 20-279.21 of the General Statutes of North Carolina, attempted to appeal the denial of its motion for summary judgment made on the grounds that the plaintiff’s uninsured motorist coverage had been exhausted.255 The court of appeals found that no substantial right of the appellant was affected by the order, as options other than immediate appeal (bifurcation of the trial or severability of the issues, e.g.) were available to protect it against any prejudice which might result from having the issue of insurance coverage decided by a jury also weighing the issue of liability.256

The denial of a motion for summary judgment appeared as an argument on cross-appeal in Dublin v. UCR, Inc.257 The court of appeals held that the order appealed from was interlocutory and did not affect a substantial right.258

2. Denial of Summary Judgment: Substantial Right Affected

The primary area wherein the denial of a summary judgment motion has been held to affect a substantial right is where the moving party claims sovereign, absolute or qualified immunity from suit. Initially, the basis for this conclusion was grounded in the reasoning that the doctrine of sovereign immunity presented a question of personal jurisdiction, immediately appealable under section 1-277(b) of the General Statutes of North Carolina.259 The United States Supreme Court addressed the substantial right aspect of the denial of a motion for summary judgment based on a claim of immunity in Mitchell v. Forsyth.260 In Mitchell, the Court held that “denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute

253. Id. at 264, 399 S.E.2d at 147.
255. Id. at 245, 431 S.E.2d at 802.
256. Id. at 246, 431 S.E.2d at 802-03.
258. Id. at 224, 444 S.E.2d at 464.
immunity is its possessor’s entitlement not to have to answer for his conduct in a civil damages action. The Court went on to conclude that a claim of qualified immunity, to the extent that it is based on legal questions of whether a violation of “clearly established law” occurred, is also immediately appealable as it is “an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

The denial of a motion for summary judgment has also been held to affect a substantial right where the doctrine of res judicata is applicable. This holding is based on the established right of a party to avoid the possibility of two trials on the same issues. Accordingly, the denial of a motion for summary judgment based on the defense of res judicata has been held to affect a substantial right in Bockweg v. Anderson, and Northwestern Financial Group, Inc. v. County of Gaston.

The final area wherein the denial of a motion for summary judgment has been held to affect a substantial right warranting immediate appeal is where the order denying the plaintiff’s motion for summary judgment denied the plaintiff a jury trial and

261. Id. at 525.

"effectively determined the action" in favor of the defendant.\textsuperscript{266} This case involves the issue of the priority of claims between two creditors.\textsuperscript{267} By denying the summary judgment motion of one creditor, the court, in effect, granted priority in the claim of the other creditor.\textsuperscript{268}


In the following cases, a party appealed from an order granting partial summary judgment and, upon review, the court of appeals determined that no substantial right of the appealing party was affected by the order.

In \textit{Brown v. Brown},\textsuperscript{269} the plaintiff contended that the order granting summary judgment exempting portions of the defendant's property from her equitable distribution claims denied her the substantial right to title in the property.\textsuperscript{270} The court of appeals held that the possibility of waste or encumbrance during the pendency of trial did not establish the loss of a substantial right.\textsuperscript{271}

In \textit{Beam v Morrow},\textsuperscript{272} a summary judgment order granted against the commissioners and a real estate broker rendered certain deeds null and void.\textsuperscript{273} Remaining for later determination were the recovery of monies paid for the property and questions of accounting for expenditures by the commissioners.\textsuperscript{274} The court of appeals held that the commissioners and the broker would suffer no irreparable harm by waiting to appeal the summary judgment after the trial on the remaining issues.\textsuperscript{275}

In \textit{Tai Co. v. Market Square Ltd. Partnership},\textsuperscript{276} summary judgment was granted in favor of the defendant against the plain-

\textsuperscript{267} Id. at 764, 407 S.E.2d at 252.
\textsuperscript{268} Id.
\textsuperscript{270} Id. at 208, 334 S.E.2d at 508.
\textsuperscript{271} Id.
\textsuperscript{273} Id. at 802, 336 S.E.2d at 107.
\textsuperscript{274} Id. at 803, 336 S.E.2d at 108.
\textsuperscript{275} Id.
\textsuperscript{276} 92 N.C. App. 234, 373 S.E.2d 885 (1988).
tiff's claim for breach of contract. Remaining for trial was the defendant's counterclaim for attorney's fees and which alleged the plaintiff's suit to be frivolous, malicious and without merit. The court of appeals held that no substantial right of the plaintiff would be affected prior to the trial on the defendant's counterclaim.

In *Myers v. Barringer*, the plaintiffs claimed that they had a substantial right to have a single jury decide whether the conduct of one, some, or all of the defendants caused injury to them following partial summary judgment as to some of the defendants. The court of appeals determined that the basis for liability of each defendant was separate and based on a different duty owed to the plaintiffs pursuant to the independent contractor status of each defendant.

In *Miller v. Swann Plantation Development Co.*, an order granting summary judgment for the plaintiff allowed him to use an easement across the defendants' property. The court of appeals held that the order did not affect a substantial right of the defendant which would be lost absent immediate review.

In *Leonard v. North Carolina Farm Bureau Mutual Insurance Co.*, an order granting partial summary judgment regarding the plaintiff's insurance coverage did not affect a substantial right of the defendant company when the liability of the tortfeasor and the plaintiff's damages remained to be determined.

In *McNeil v. Hicks*, an order granting partial summary judgment establishing the plaintiff's right to her uninsured motorist coverage did not affect a substantial right of the defendant.

277. Id. at 235, 373 S.E.2d at 886.
278. Id.
279. Id. at 236-37, 373 S.E.2d at 887.
281. Id. at 173, 398 S.E.2d at 618.
282. Id.
284. Id. at 394, 399 S.E.2d at 138.
285. Id. at 396, 399 S.E.2d at 139.
287. Id. at 668, 411 S.E.2d at 179-80.
Substantial Right Doctrine

4. Partial Summary Judgment: Substantial Right Affected

a. As to Parties

Ordinarily, where the resolution of claims against several parties depends on the determination of factual issues common to all defendants, the dismissal of the claims as to some of the defendants will be held to affect a substantial right. The basis for this holding is the plaintiff’s substantial right to have one jury decide whether one, some, none, or all of the defendants are liable for the plaintiff’s injuries. In the following instances, the summary judgment affecting fewer than all the parties was held to affect a substantial right.

Federal Land Bank v. Lieben involved the respective liabilities of various sureties, guarantors, the indemnitor, and the payee on a loan. Summary judgment was granted in favor of the plaintiff bank as to some of the defendants. Remaining to be decided were the bank’s claim against the remaining defendants and various counterclaims, cross claims, and third party claims. The court of appeals held that due to “the complexity of the facts and the possibility of inconsistent verdicts in separate trials, the order allowing summary judgment as to fewer than all defendants affects a substantial right.” Similarly, in Hooper v. C. M. Steel, Inc., the plaintiffs, who were in an auto accident involving a driver for the defendant company, brought an action in negligence against both the driver and the employer. Summary judgment was entered in favor of the employer. The court of appeals held that the plaintiffs had a substantial right to have the liability of both defendants determined in the same trial in order to avoid the possibility of inconsistent verdicts.

289. Id. at 264, 431 S.E.2d at 869.
291. Id. at 246, 409 S.E.2d at 111.
293. Id. at 343, 357 S.E.2d at 701.
294. Id. at 343, 357 S.E.2d at 702.
295. Id. at 344, 357 S.E.2d at 702.
296. Id.
298. Id. at 568, 380 S.E.2d at 594.
299. Id.
300. Id. at 568-69, 380 S.E.2d at 594.
In *DeHaven v. Hoskins*, summary judgment granted in favor of one defendant in a negligence action was immediately appealable because the plaintiff had the right to have determined by a single jury whether she was injured by the acts of one, both, or neither of the defendants. In *Thrift v. Food Lion, Inc.*, the plaintiff brought an action against Food Lion and Triangle Ice alleging joint and concurrent negligence which proximately caused her injuries in a slip and fall. Food Lion cross-claimed against Triangle Ice. Summary judgment was granted as to Triangle Ice, and both Food Lion and the plaintiff appealed. Because the plaintiff’s allegations of negligence against both the defendants arose from the same set of circumstances, the court of appeals held that the plaintiff had a substantial right to have the liability of both the defendants decided by the same jury. In addition, both the defendants alleged contributory negligence as a defense, providing a second issue which could have resulted in inconsistent verdicts if not heard by the same jury.

The tenants of an apartment building brought suit against several parties, individual and corporate, for breach of implied warranty of habitability, the covenant of quiet enjoyment, unfair and deceptive trade practices, unfair debt collection, trespass, etc., in *Baker v. Rushing*. The court of appeals held that because the claims against all the defendants stemmed from the same allegations of fact, the plaintiffs had a substantial right to have the liability of all the defendants determined by the same jury.

b. As to Claims

In determining whether a substantial right was affected by a partial summary judgment as to fewer than all the claims in a single action, two lines of cases have developed. In *Oestreicher v. American National Stores, Inc.*, and its progeny, it was deter-

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302. *Id.* at 399, 382 S.E.2d at 858.
304. *Id.* at 760, 433 S.E.2d at 483.
305. *Id.*
306. *Id.*
307. *Id.* at 761, 433 S.E.2d at 483-84.
308. *Id.* at 761, 433 S.E.2d at 484.
310. *Id.* at 245-46, 409 S.E.2d at 111.
minder that regardless of the nature of the issues involved, a plaintiff had a substantial right to have all his causes against the same defendant(s) tried at the same time by the same judge and jury. The North Carolina Supreme Court later interpreted sections 1-277 and 7A-27(d)(1) of the General Statutes of North Carolina to require that the affected party's ability to enforce the substantial right absent immediate appeal must be lost before the doctrine could be applied. In *Green v. Duke Power Co.*, the supreme court held that generally the right to avoid a trial is not a substantial right, but avoiding two trials on the same issues may be. The court then created what appears to be a two-part test by stating that "the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issues." The cases which rely on *Oestreicher* have found substantial rights to be affected merely on the grounds of a party's right to have all claims or causes determined in one proceeding. Subsequent cases relying on *Green* require the appellant to demonstrate the possibility of inconsistent verdicts resulting from separate trials on the same factual issues. These discrepancies were addressed by the court of appeals in detail in *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.* In *Slurry*, while not expressly overruling the *Oestreicher* line of cases, the court of appeals indicated its support for the *Green* line of cases requiring a showing that separate trials would result in the possibility of inconsistent verdicts, thereby prejudicing the substantial right in question, in order to warrant application of the substantial right exception.


314. 305 N.C. 603, 290 S.E.2d 593 (1982).

315. Id. at 606, 290 S.E.2d at 595.

316. Id. at 608, 290 S.E.2d at 596.


318. Id. at 9, 362 S.E.2d at 817.
An examination of the cases decided after *Slurry* tends to show that this is the current path most often followed.319

In several recent cases, a substantial right has been found based on a party’s right to have all claims heard by the same judge and jury.320 In so holding, these cases do not specifically require a showing of possible inconsistent verdicts, and seem to rely on the more general requirements of the *Oestreicher* line of cases. An examination of the facts of these cases, however, indicates that there exists in each a clear commonality of issues between the

319. See Davidson v. Knauff Ins. Agency, 93 N.C. App. 20, 376 S.E.2d 488, discretionary review denied, 324 N.C. 577, 381 S.E.2d 772 (1989) (discussion of *Slurry* and the right to avoid two trials on overlapping issues), and following cases: Taylor v. Brinkman, 108 N.C. App. 767, 425 S.E.2d 429, discretionary review denied, 333 N.C. 795, 431 S.E.2d 30 (1993) (The plaintiff alleged negligence against the driver of an automobile, and imputed negligence against the owner of the car the defendant was driving. Summary judgment was granted as to the claim against the driver. As the remaining claim against the owner of the car relied on a showing of the negligence of the driver, the possibility of inconsistent verdicts upon a successful appeal of the summary judgment order arose.); Lamb v. Lamb, 92 N.C. App. 680, 375 S.E.2d 685 (1989) (Because factual issues central to the plaintiff’s claim were also central to one of the defendant’s dismissed counterclaims, the possibility of inconsistent verdicts arose, affecting a substantial right of the defendant.); Vaughan v. Moore, 89 N.C. App. 566, 366 S.E.2d 518 (1988) (Personal injury action where two of the plaintiff’s three claims were decided by summary judgment in favor of the defendant; held that the plaintiff had a substantial right to have all of her damage claims arising out of the same accident tried before the same trier of fact.); Whitehurst v. Corey, 88 N.C. App. 746, 364 S.E.2d 728 (1988) (A summary judgment on the plaintiff’s claims left the defendants’ counterclaims to be decided. As the counterclaims were grounded in the same legal issues raised by the plaintiff in the complaint, the defendants had a substantial right to avoid separate trials of the same issues.).

320. Watson Elec. Constr. Co. v. City of Winston Salem, 109 N.C. App. 194, 426 S.E.2d 420, discretionary review denied, 334 N.C. 167, 432 S.E.2d 369 (1993) (Plaintiff sued the city and a contractor for breach of contract. The contractor cross-claimed against the city for indemnification. Summary judgment was granted in favor of city as to all claims. All claims and cross-claims arose out of the same contractual obligations, thereby raising the possibility of inconsistent verdicts.); Bowlin v. Duke University, 108 N.C. App. 145, 423 S.E.2d 320 (1992), discretionary review denied, 333 N.C. 461, 427 S.E.2d 618 (1993) (Multiple claims grounded in medical malpractice were dismissed as to all the defendants leaving only the claims of ordinary negligence. All the claims arose out of the same factual occurrences.); You v. Roe, 97 N.C. App. 1, 387 S.E.2d 188 (1990) (Summary judgment was granted for all the defendants from all the claims of the plaintiff except for three claims remaining against one defendant. All the claims arose out of the plaintiff’s discharge and subsequent involuntary commitment, thereby relying on the same factual occurrences.).
claims dismissed and those remaining for trial. Therefore, despite the reliance on the generalities of the language used in Oestreicher, these recent cases are not in conflict with the more stringent requirements of Green and its line of cases.

The issue of what is required to qualify for immediate appellate review in these cases may have finally been put to rest in Moose v. Nissan of Statesville, Inc.\(^\text{321}\) In Moose, the court of appeals firmly established the requirements contained in Green as controlling.\(^\text{322}\) In order to establish the abridgement of a substantial right, it is necessary to demonstrate the possibility of inconsistent verdicts resulting from separate trials on the same factual issues.\(^\text{323}\) Applying this holding to Oestreicher, the court of appeals determined that in cases where partial summary judgment has been granted denying a claim for punitive damages, no substantial right is affected, as there is no possibility of inconsistent verdicts in such instances.\(^\text{324}\)

5. Miscellaneous

In K & K Development Corp. v. Columbia Banking Federal Savings & Loan Ass'n,\(^\text{325}\) the court of appeals held that an order of summary judgment which also awarded attorney's fees affected a substantial right and was immediately appealable.\(^\text{326}\)

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322. Id. at 427, 444 S.E.2d at 697.
323. Id.
324. Id. See supra notes 130-35 and accompanying text. It should be noted that Moose was filed within a week prior to the distribution of this paper, and it may well be brought before the supreme court on discretionary review. For that reason, take special care before citing this holding. Further, because until that review is had or denied, appeals involving summary judgment of punitive damages claims may still be held to affect a substantial right, the following cases citing Oestreicher, etc. are included herein: Butt v. Goforth Properties, Inc., 95 N.C. App. 615, 383 S.E.2d 387 (1989) (Trial court dismissing the punitive damages claim, leaving the underlying liability issue. Both claims relied on the same factual occurrences.); Nance v. Robertson, 91 N.C. App. 121, 370 S.E.2d 283, discretionary review denied, 323 N.C. 477, 373 S.E.2d 865 (1988) (A claim for punitive damages dismissed by an order of summary judgment affected a substantial right since the punitive claim and the remaining liability claim depended on the same evidence. The plaintiffs had a substantial right to try both claims before the same jury and to avoid the possibility of inconsistent verdicts.).
326. Id. at 477, 386 S.E.2d at 228. See supra notes 28-32 and accompanying text.
X. Venue

The right to venue is established by statute and constitutes a substantial right. The decision of the trial court is immediately appealable whether the motion asserting a statutory right to venue is granted or denied. However, the denial of a motion for a change of venue for the convenience of witnesses and the ends of justice is discretionary with the trial court and does not affect a substantial right of the parties.

III. Conclusion

As is readily apparent in most of the above sections, there is little to be gained by an attempt to divine the directions a substantial right analysis will take. The application of such a general rule to so many specific areas of the law, each with their own unique procedural requirements, clearly leaves any uniform process of review beyond our reach. As a result, there seems to be no better method than the case by case review which is currently in use. Periodic review of the ever increasing accumulation of case law on the subject, therefore, appears necessary to provide whatever continuity in the application of the substantial right doctrine may be available and maintained. It is hoped that this paper has assisted in that endeavor.

328. Id. at 319, 392 S.E.2d at 768. See also Neil Realty Co. v. Medical Care, Inc., 110 N.C. App. 776, 431 S.E.2d 225 (1993).