Finality and Clarity Regarding Pending Claims for Attorney’s Fees: Duncan and the Superfluous 54(b) Certification

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**INTRODUCTION**¹

When a trial is over, and if permitted by statute, the winning party will often ask the court to grant attorney’s fees. Likely, the judge will not decide the claim for attorney’s fees at that time, but instead, will enter an order deciding only the merits of the substantive claims. This leaves the issue of attorney’s fees undecided and reserved for a later decision. What should the losing party do? Can the losing party immediately appeal the decision on the merits? Or must the losing party wait to appeal until the judge decides the pending attorney’s fees claim? Historically, North Carolina case law in this area has been unclear at best. Recently, however, the Supreme Court of North Carolina has taken great strides to clarify the law determining when a judgment is final. Recent decisions have brought clarity to the law, allowing practitioners to file timely appeals and enabling judges to issue more uniform decisions regarding the appealability of pending claims for attorney’s fees.

Generally, the right to appeal from the ruling of a trial court is granted only by statute.² The North Carolina General Statutes specify, with a few exceptions, that a party has the right to appeal from the final judgment of a trial court directly to the Court of Appeals of North Carolina.³ If no right of appeal is present in the statutes, the appellate court, on its own motion, must dismiss the appeal, even if a party has not raised the question of appealability.⁴ Although the basics of appellate civil procedure are sufficiently spelled out in the statutes and explained in case law, the ambiguity regarding terms such as “final” and “interlocutory” make it difficult to ensure that a judgment is actually

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¹ The Author would like to thank Professor Matthew W. Sawchak for recommending the topic of this Comment and for inspiring dedication to writing it. His thoughtful advice and support were invaluable during the writing process.


“final” before filing an appeal. This is even more evident when a judge has issued an order on the merits that resolves all of the substantive issues of the claim, but leaves a claim for attorney’s fees pending.

This Comment focuses on the jurisprudence surrounding the finality and appealability of an order that determines the merits of a claim but leaves a claim for attorney’s fees unresolved. The legal landscape surrounding this issue in North Carolina has recently undergone drastic changes to resolve much of the confusion and contradiction.

Part I begins with an introduction to general appellate procedure and explains what makes an appeal untimely or interlocutory. Part II describes the two major ideological approaches in reaching such determinations and shows how other jurisdictions decide whether a merits order is final, and therefore, immediately appealable when an unresolved claim for attorney’s fees remains. Part III traces the modern changes to the landscape of that same question in North Carolina. Finally, Part IV analyzes the recent Supreme Court of North Carolina decision in Duncan v. Duncan, which has entirely changed the analysis for unresolved claims regarding attorney’s fees in North Carolina. The final Part of this Comment identifies some of the questions and issues that remain after the Duncan decision.

I. GENERAL APPELLATE PROCEDURE

An order from a trial court is considered either “final” or “interlocutory.” A final order “disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.” A final order is, therefore, immediately appealable to the Court of Appeals of North Carolina. An interlocutory order, on the other hand, “is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” There is no general right in the North Carolina General Statutes to immediately appeal an interlocutory order. The rationale for the rule against interlocutory appeals is to “prevent fragmentary, premature and

6. Veazey, 57 S.E.2d at 381.
7. Id. (citing Sanders v. May, 91 S.E. 526, 527 (N.C. 1917)).
8. Id.
9. Id. (citing Johnson v. Roberson, 88 S.E. 231, 231–32 (N.C. 1916)).
unnecessary appeals[.]"¹¹ By dismissing fragmented interlocutory appeals, the whole case will be presented to the appellate court in a single appeal from a final determination by the trial court.¹²

There are, however, limited circumstances when parties can immediately appeal from an interlocutory order.¹³ The two most common exceptions to the rule against interlocutory appeals are the substantial right doctrine and the Rule 54(b) certification for immediate appeal.¹⁴ First, the North Carolina General Statutes grant the right to appeal directly to the court of appeals when an interlocutory order:

1. affects a substantial right;
2. effectually determines the action and prevents a later judgment from which an appeal may be taken;
3. discontinues the action; or
4. grants or refuses a new trial for a party.¹⁵

Second, Rule 54(b) of the North Carolina Rules of Civil Procedure allows a trial court to certify as “final” a “judgment as to one or more but fewer than all of the claims or parties” in an action for immediate appeal “only if there is no just reason for delay.”¹⁶

A. The Substantial Right Doctrine

Although the substantial right doctrine is not the subject of this Comment, a brief explanation may be helpful to understand one way to appeal from an interlocutory order of a trial court. The Supreme Court of North Carolina describes the substantial right test as “more easily stated than applied.”¹⁷ The particular facts of each case and the procedural history must be analyzed to determine if a party’s substantial right has been affected, allowing for an immediate appeal.¹⁸ The party appealing must show: “(1) the judgment affects a right that is substantial; and (2) the deprivation of that substantial right will potentially” injure the party if not corrected before an appeal from the

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¹² Id. (quoting Raleigh v. Edwards, 67 S.E.2d 669, 671 (N.C. 1951)).
¹³ N.C. GEN. STAT. § 7A-27(b)(3).
¹⁵ N.C. GEN. STAT. § 7A-27(b)(3); see also id. § 1-277.
¹⁶ N.C. R. CIV. P. 54(b) (turning an interlocutory order that is not immediately appealable into a final order that is immediately appealable).
¹⁷ Waters, 240 S.E.2d at 343.
¹⁸ Id.
final judgment. The right to immediate appeal is reserved for those cases in which the normal course of procedure is inadequate to protect the substantial right affected by the judgment.

The North Carolina General Assembly did not define the phrase “substantial right” in the statute that creates the right to appeal; instead, the courts must attempt to interpret this important phrase. Because there is no precise definition, the determination of whether a right is substantial involves both a case-specific and a fact-specific inquiry. The Supreme Court of North Carolina has defined “substantial right” as a “legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.” Some rights, or denials of rights, such as orders denying arbitration and orders disqualifying counsel, almost always affect a substantial right, and thus are immediately appealable.

B. Rule 54(b) Certification

The second most common exception to the rule precluding an immediate appeal from an interlocutory order is a certification of the merits order under Rule 54(b) of the North Carolina Rules of Civil Procedure. Rule 54(b) states:

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

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23. Id. (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY at 2280 (G. & C. Merriam Co. 1971)).
provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes.  

The designation that the judgment is final and that there is no just reason for delay is referred to as a “54(b) certification.” The certified judgment is then immediately appealable to the intermediate appellate court, even if there are still claims that require judicial determination by the trial court and is, by definition, interlocutory. This exception applies only to cases involving multiple parties or cases where one or more claim is presented, because only in those cases can claims still be pending after a judgment on the merits is ordered.

The Rule 54(b) certification exception does not abrogate the other exceptions allowed by statute for interlocutory appeals. Instead, it gives parties an additional channel to pursue an immediate appeal from an order that does not adjudicate all of the claims in the action. The other exceptions identified in the North Carolina General Statutes sections 7A-27(d) and 1-277, mentioned above, still apply if all of the requirements of a Rule 54(b) certification are not met.

Thus, the appeal permitted by Rule 54(b) is proper only if: (1) there are multiple parties or claims for relief in the action; (2) the trial court decides that there is no just reason for delaying an appeal; and (3) that determination is evidenced in the judgment. A trial court cannot simply decree its judgment a “final judgment” and make it immediately appealable under the rule. The judgment must in fact be “final” for a Rule 54(b) certification to apply, and appellate courts have the ability to review whether the certified judgment is indeed final.

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29. Id.
31. Id. (holding that the Rule 54(b) reference to “other statutes” specifically means sections 1-277 and 7A-27(d)).
32. See N.C. R. Civ. P. 54(b).
34. Id.
At first glance, it appears easy to determine if a judgment is certified as final with the designation of no just reason for delaying an appeal. As case law indicates, however, each word of the statute must be properly interpreted and followed for an interlocutory appeal to be proper. Questions often arise as to whether a judgment can be appealed from when all of the substantive claims in the action have been adjudicated, but a non-substantive claim, such as attorney’s fees, has been reserved for later adjudication. The recent North Carolina appellate court decisions that trace this particular issue are the focus of the following Part. These decisions shed light on when a party can appeal from a judgment if a pending claim for attorney’s fees remains.

II. IDEOLOGIES COLLIDE: BRIGHT-LINE RULE VERSUS CASE-BY-CASE APPROACH

Courts sometimes look to other jurisdictions in deciding which ideological approach to follow when determining whether a reserved claim for attorney’s fees makes an appeal interlocutory. Generally, there are two major ideological approaches: a bright-line rule or a case-by-case determination.

A. The Bright-Line Rule Approach

In the federal system, the Supreme Court of the United States adopted a bright-line rule regarding pending statutory claims for attorney’s fees in *Budinich v. Becton Dickinson & Co.* The Court created a “uniform rule that an unresolved issue of attorney’s fees for the litigation in question does not prevent judgment on the merits from being final.” It stated that the strict rule was the most practical approach because it emphasized the importance of the “preservation of operational consistency and predictability in the overall application of [the federal appeal statutes].” The Court desired a system that required fewer questions regarding whether a pending claim for attorney’s fees was an issue of “merits” or “non-merits” and wanted attorneys and judges

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37. *Id.*

38. *Id.* at 202.
to be able to adequately understand and consistently apply appellate rights. 39

In Ray Haluch Gravel Co., the Court recently decided the question of whether the bright-line rule of Budinich applies to contractual attorney’s fees as well as statutory contract fees. 40 The two cases had “instructive similarities” because in both cases a trial court issued a merits order and left an outstanding claim for attorney’s fees. 41 Unlike in Budinich, however, the attorney’s fees in Ray Haluch Gravel Co. were based on a contractual agreement, not a statute. 42 Despite this difference, the Court held that attorney’s fees based on both statutory and contractual authority are the same and that neither precludes a merits order from being considered final. 43 Keeping the continuity of the precedent established in Budinich was a major factor for the Court and there was “no reason to depart from [its] sound reasoning.” 44 The “operational consistency and predictability stressed in Budinich” kept the federal landscape of final judgments clear and easy for both judges and practitioners to understand. 45

Although the bright-line rule is definitive and easy to understand, the result is that cases are more likely to be appealed twice: first on the merits order and then again on the order regarding the attorney’s fees claim. The potential for multiple, piecemeal appeals is in tension with the judicial policy of efficiency, which entails only hearing one appeal per case. Further, multiple appeals can make the finality of a case uncertain, not only for the court, but also for the parties involved.

Many jurisdictions, including North Carolina, 46 have followed this bright-line rule. 47 Other states have decided that a different approach—

39. Id. at 202–03.
41. Id. at 780.
42. Id.
43. Id. “Whether the claim for attorney’s fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal.” Id. at 777.
44. Id. at 780.
46. See Duncan II, 742 S.E.2d 799, 801 (N.C. 2013) (holding that an unresolved claim for attorney’s fees does not prevent the merits order—the judgment resolving all substantive issues of a claim—from being final, and therefore immediately appealable under the statutes).
47. Bumpers II, 695 S.E.2d 442, 446 (N.C. 2010) (citing multiple cases from Alabama, Arkansas, Connecticut, Florida, Kansas, Maryland, South Dakota, and
the case-by-case approach, discussed below—is best and have concluded that “a judgment on the merits is not final when an unresolved request for attorney's fees” is still pending.48

B. The Case-By-Case Approach

A case-by-case approach is the second major ideological approach used to determine if a reserved claim for attorney's fees prevents a judgment from being final, and thus, immediately appealable.49 This approach requires a court to analyze whether the pending attorney's fees request is closer to an “element of the substantive claim or merely an item of costs that is contingent upon the resolution of the substantive claim.”50 “If the claim for attorney's fees is deemed an item of damages or an element of the substantive claim,” then the merits judgment is not considered final and, therefore, is not appealable until the pending claim for attorney's fees is resolved.51 In contrast, if the claim for attorney's fees is an item of costs or contingent upon prevailing on the merits of the substantive claim, the merits judgment is immediately appealable notwithstanding the pending claim for attorney's fees.52 A minority of jurisdictions—including North Carolina prior to Duncan53—follow this case-by-case approach.54

Although the case-by-case approach is not as definitive as the bright-line rule, it has its benefits. The case-by-case approach allows judges to research and discern the relationship between governing common law or the relevant statute and the appeal for attorney's fees. By understanding this relationship in cases where judges conclude that

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48. Id. (citing cases from Nebraska, Ohio, and Utah that have held that a judgment on the merits is not final if there is still a pending claim for attorney's fees).
49. Id.
50. Id.
51. Id. at 447.
52. Id.
54. Bumpers II, 695 S.E.2d at 447 (citing multiple cases from Colorado, Wisconsin, and North Carolina that concluded whether the merits judgment was final was based on the relatedness of the claim for attorney's fees to the substantive claim). Although North Carolina had not explicitly stated that it followed a case-by-case approach, the Supreme Court of North Carolina stated, “our Court of Appeals has engaged in a de facto case-by-case approach [by] sometimes dismissing appeals having unresolved fee issues and sometimes hearing such appeals.” Id.
attorney’s fees are an element of the substantive claim, they may properly resolve the case with only a single appeal. This approach can, therefore, lower the number of multiple appeals within a single case because if the claim for attorney’s fees is so related that it should be litigated prior to appeal, then the parties are limited to a single appeal. This approach promotes the traditional goal of efficiency in appellate procedure.

III. UNDERSTANDING THE LANDSCAPE IN NORTH CAROLINA: FROM BUMPERS TO HAUSLE

After all of the substantive claims of an action have been decided and a party has won, the prevailing party will often move for payment of attorney’s fees from the losing party. The losing party, however, may have filed a notice of appeal from the judgment on the merits before the judge reached the issue of attorney’s fees. Is an appeal in this context proper? Is the order adjudicating only the merits a “final order,” allowing for the possibility of a Rule 54(b) certification? If so, what does that mean for the claim for attorneys’ fees?

The answers to these questions have not always been consistent in North Carolina. Recently, however, the North Carolina appellate courts have taken strides to clarify some of the confusion and to establish a test for attorneys and judges alike to determine if an appeal is appropriate when a claim for attorney’s fees is pending.

A. Bumpers v. Community Bank of Northern Virginia

The issue of whether an appeal is appropriate when a claim for attorney’s fees is pending came to the modern forefront in North Carolina in Bumpers v. Community Bank of Northern Virginia (Bumpers II). There, the plaintiff (Bumpers) filed a lawsuit alleging that the defendant (Community Bank) was liable under section 75-1.1 of the

55. See id.

56. The enactment of section 6-21.6 of the North Carolina General Statutes will only increase the frequency with which a party will move for attorney’s fees. N. C. GEN. STAT. § 6-21.6 (2013). This enactment involves reciprocal attorney’s fees in business contracts and allows parties to agree to shift the responsibility for attorney’s fees by contract instead of relying on the “evidence of indebtedness” of section 6-21.2. Id. § 6-21.2; see also Beth Scherer, U.S. Supreme Court: Undecided Contract-Based Attorneys’ Fees Motion Does Not Toll Deadline For Filing Notice of Appeal, N.C. APP. PRAC. BLOG (Jan. 20, 2014), http://www.ncapb.com/2014/01/20/u-s-supreme-court-undecided-contractually-based-attorneys-fees-motion-does-not-toll-deadline-for-filing-notice-of-appeal/.

57. Bumpers II, 695 S.E.2d at 443.
North Carolina General Statutes for violating North Carolina’s Unfair and Deceptive Trade Practices Act (UDTP). Bumpers alleged that after responding to an advertisement for a second mortgage from Community Bank, Community Bank charged “duplicative closing fees for overlapping services” and other unreasonable and unnecessary fees in violation of the statute. Bumpers also requested attorney’s fees in relation to the UDTP violation, pursuant to section 75-16.1.

The trial court granted partial summary judgment in favor of Bumpers and found Community Bank liable on two of his section 75-1.1 claims for “systematic overcharging” and duplicative “origination fees.” Upon Bumpers’ request, the trial court certified the order under Rule 54(b), specifically noting that “it had not considered an application for attorney fees under [section] 75-16.1, but nonetheless determine[d] that there is no just cause for delay and that the judgment resulting from this order should be entered as a final judgment.” The order further stated that the issue of attorney’s fees would be considered “separately.”

On appeal, the court of appeals relied on Tridyn Industries v. American Mutual Insurance Co. in holding that the attorney’s fees of a UDTP claim are considered part of the court costs and are ancillary to the section 75-1.1 claim. Therefore, the court concluded that “[i]t was improper for the trial court to certify its order as final as to a claim without first assessing attorney’s fees and other costs.”

When Bumpers II reached the Supreme Court of North Carolina, the court distinguished the facts from those in Tridyn Industries. It stated that here, as opposed to the partial summary judgment order in Tridyn Industries, all of the substantive issues of the UDTP claim had been adjudicated, “leaving only the issue of attorney’s fees.” The supreme court created a “bright-line rule that an unresolved claim for attorney

58. Id. (citing N.C. GEN. STAT. § 75-1.1 (2009)).
59. Id.
60. Id. at 443–44; see also N.C. GEN. STAT. § 75-16.1.
61. Bumpers II, 695 S.E.2d at 444.
62. Id.
63. Id.
64. Tridyn Indus. v. Am. Mut. Ins. Co., 251 S.E.2d 443, 444 (N.C. 1979) (holding that a partial summary judgment on the issue of liability that leaves the issue of damages to be determined later is not immediately appealable).
66. Id.
67. Bumpers II, 695 S.E.2d at 446 (citing Tridyn Indus., 251 S.E.2d at 448).
68. Id.
fees under section 75-16.1 does not preclude finality of a judgment resolving all substantive issues of a claim under section 75-1.1.” 69 In sum, Bumpers II stands for the proposition that a ruling on all substantive claims under the UDTP statute is a “final judgment” that can be certified and, therefore, immediately appealed from under Rule 54(b), even if the issue of attorney’s fees remains unresolved. 70

The court adopted a bright-line rule because it believed such a rule would most effectively “promote judicial efficiency [and] foster meaningful appellate review,” while avoiding “waiver of appellate rights.” 71 Before reaching this succinct rule, however, the court analyzed the case-by-case approach, which requires a court to determine if the attorney’s fees are best “characterized as an element of the substantive claim or merely an item of costs that is contingent” upon the requesting party prevailing on the substantive claim. 72

In this case-by-case approach, “if the claim for attorney’s fees is deemed an item of damages or an element of the substantive claim, the judgment on the merits is not final and appealable until the attorney fees request is resolved.” 73 But, if the attorney’s fees claim is simply an item of costs, like that of section 75-16.1, or is contingent upon the requesting party prevailing on the merits of the substantive claim, then “a final judgment on the substantive claim is independently appealable,” even if the attorney’s fees claim has not been resolved. 74 This analysis was important because, even though the court declared a bright-line rule for section 75-1.1 violations and the pursuant attorney’s fees claim, the court also used a case-by-case approach to determine that attorney’s fees are not part of the substantive claim. 75

69. Id. at 448.
70. Id.
71. Id.
72. Id. at 446.
73. Id. at 447 (citing In re Marriage of Hill, 166 P.3d 269, 271–72 (Colo. App. 2007) (holding that “final orders in a divorce proceeding that resolved property division and awarded spousal and child support but failed to resolve a statutory attorney fee claim were not appealable because the fee claim was ‘inextricably intertwined’ with other issues in the case}).
74. Id. (citing Ferrell v. Glenwood Brokers, Ltd., 848 P.2d 936, 941–42 (Colo. 1993)).
75. Id. at 448 (“[W]e briefly examine [section] 75–16.1 to determine how it interrelates with a judgment on the merits of a claim under [section] 75–1.1 for purposes of appeal.”).

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Therefore, the court held that the merits order was independently appealable because it was properly certified under Rule 54(b). 76 This approach, though clear for the section 75-1.1 category of cases, left courts with little guidance as to how to proceed when other types of claims were presented. Was the substantive order resolving the merits of the claim appealable because it was final, or because the order in the case had in fact been certified under Rule 54(b)? 77 In other words, the court failed to resolve whether an order resolving the substantive claims but leaving the issue of “non-substantive” attorney’s fees had to be certified under Rule 54(b) to be appealed from. That question would arise in future cases, beginning with Lucas v. Lucas. 78

B. Lucas v. Lucas

In Lucas v. Lucas, the Court of Appeals of North Carolina applied a Bumpers II-style case-by-case determination, but skirted the issue of whether certification under Rule 54(b) was required to perform that analysis. 79 The Lucas case involved claims for divorce from bed and board, post-separation support, alimony, equitable distribution, and attorney’s fees. 80 The trial court resolved the substantive claims for alimony and equitable distribution, but left unresolved the claim for attorney’s fees. 81 The order stated that it “[w]as certified as a final judgment pursuant to [R]ule 54(b).” 82

On appeal, the court held that when there is no specific finding in the merits order that “there is no just reason for delay,” as required by Rule 54(b), the appellate court “does not have jurisdiction to hear an interlocutory appeal under Rule 54(b).” 83 The court concluded that the Rule 54(b) certification was defective because the order did not specifically state that “there is no just reason for delay” of the appeal. 84 Therefore, some other basis for appellate jurisdiction must exist in order

76. Id. at 448–49.
77. Id. at 448 (“[W]e hold that an order or judgment ruling on all substantive issues of a claim under section 75-1.1 is a final judgment that may be certified and appealed pursuant to Rule 54(b), notwithstanding any unresolved issue of attorney fees under section 75-16.1.”).
79. See id. at 274.
80. Id. at 272.
81. Id. at 273.
82. Id.
83. Id.
84. Id.
for the court to hear the appeal. Instead of looking into whether another basis for jurisdiction—i.e., exception to the prohibition of interlocutory appeals—was present in this case, the court relied on *Bumpers II* to conclude that appellate jurisdiction existed.

The court interpreted the holding in *Bumpers II* to mean that the court “adopted a new rule for determining whether an appeal may proceed when the only remaining claim is one for attorneys’ fees.” This contradicted the precedent that “an appeal from an alimony order must be dismissed as interlocutory” when an attorney’s fees claim is still pending. The court stated that the supreme court in *Bumpers II* “specifically rejected the case-by-case approach in favor of a ‘bright-line rule’” where the finality of the order was determined by whether the attorney’s fees claim is a substantive issue as part of the merits. Under this interpretation of *Bumpers II*, the court concluded that a claim for attorney’s fees under the statute governing alimony “is contingent upon the claimant prevailing on [the merits of] the alimony claim,” thus, attorney’s fees are “not a substantive issue, or in any way part of the merits of [an alimony] claim.” Therefore, the court held that an unresolved claim for attorney’s fees under section 50-16.4 of the North Carolina General Statues did not preclude the trial court from determining that the merits order was final and that the appeal was properly before the court.

The court in *Lucas*, however, misinterpreted the “bright-line rule” of *Bumpers II*. The *Bumpers II* bright-line rule dealt with an unresolved claim for attorney’s fees under a UDTP claim. The rule emerged after the court determined that the claim for attorney’s fees was ancillary to the UDTP claim. The rule, as stated in *Bumpers II*, was simply a case-by-case determination of whether attorney’s fees are ancillary to the

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85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* (citing *Webb v. Webb*, 677 S.E.2d 462, 465 (N.C. Ct. App. 2009) (holding that an appeal from an alimony order must be dismissed as interlocutory when there is still an unresolved claim for attorney’s fees)).
89. *Id.*
90. *Id.* at 274 (citing N.C. GEN. STAT. § 50–16.3A (2009); *Bumpers II*, 695 S.E.2d 442, 448 (N.C. 2010), abrogated by *Duncan II*, 742 S.E.2d 799 (N.C. 2013)).
91. *Id.*
92. See *Bumpers II*, 695 S.E.2d at 444; see also supra notes 57–66 and accompanying text.
93. See *Bumpers II*, 695 S.E.2d at 446–48.
it was not an all-encompassing bright-line rule as the Lucas court stated. Along with the misinterpretation of the Bumpers II rule, the Lucas court also found that appellate review was proper. The court decided the merits of the appeal without first finding that appellate jurisdiction existed by a proper certification under Rule 54(b) or that the order affected a substantial right of the party.

Although the Lucas court relied on Bumpers II to create a new path to determine how a claim for attorney’s fees affects the finality of a judgment, Bumpers II did not provide that separate channel to obtain appellate jurisdiction. In Hausle v. Hausle, the court of appeals later described the Lucas court’s analysis as “circumvent[ing] the general rule prohibiting an appeal of an interlocutory judgment, unless the judgment is certified or affects a substantial right, so as to reach the merits by applying the Bumpers analysis to determine whether a claim for attorney fees precluded finality of the judgment.”

C. Duncan v. Duncan

Case law regarding appellate review of an order reserving a pending claim for attorney’s fees continued to develop following Bumpers II and Lucas. Although the focus of the next Part is the decision of the Supreme Court of North Carolina in Duncan v. Duncan (Duncan II), a brief overview of the case as decided by the court of appeals (Duncan I) is discussed first.

The merits order in Duncan I involved equitable distribution and alimony. The trial court entered an order requiring the defendant to pay alimony to the plaintiff, but it did not resolve the claim for attorney’s fees, which was reserved for another hearing. The trial court did not certify the merits order that resolved the substantive issues under Rule 54(b) for immediate appeal. On appeal, the court of appeals stated that in previous decisions there had been “uncertainty concerning the

94. See id.
95. Lucas, 706 S.E.2d at 273.
96. Id. at 274.
97. Id. at 273–74.
99. Id.
100. Duncan II, 742 S.E.2d 799 (N.C. 2013).
102. Id. at 391.
103. Id.
104. Id. at 392.
scope of the holding in Bumpers II.”105 It also specifically noted that the “bright-line rule” from Bumpers II applied only to violations of the UDTP statute.106 The court held that although the analysis from Bumpers II (regarding whether the claim for attorney’s fees was a substantive claim) may apply beyond the scope of UDTP claims, “we need not address the full applicability of Bumpers II to the facts in the present case because the trial court [here] did not certify the order for immediate appeal, as required by Bumpers II.”107

The court in Duncan I attempted to clarify what was left to be determined after Bumpers II and further confused by Lucas. The court clarified that in Bumpers II, the supreme court held, “the appeal before it was interlocutory but that the appeal was proper because the trial court had certified the order for immediate appeal.”108 The certification under Rule 54(b) was dispositive in determining if the appeal was appropriate.109 The court in Duncan I all but explicitly stated that the Lucas court misinterpreted the holding in Bumpers II.110

The North Carolina appellate courts were beginning to clarify the issues regarding final judgments and pending claims for attorney’s fees. While the courts answered some of the questions created by Bumpers II, this area of appellate jurisdiction was about to get even more muddled with the holding in Hausle v. Hausle.111

D. Hausle v. Hausle

In Hausle v. Hausle, the trial court entered an order denying the plaintiff’s motion to modify the custody order, but it reserved its decision on the issues of modification of child support, contempt, and attorney’s fees for a future proceeding.112 Notably, it did not certify its order for immediate appeal pursuant to Rule 54(b).113

105. Id.
106. Id.
107. Id.
108. Id.
110. See Duncan I, 732 S.E.2d at 392 (emphasizing that the court has faced uncertainty regarding the scope of the holding in Bumpers II).
111. See Hausle, 739 S.E.2d at 208 (acknowledging that the law is unclear “regarding the finality of an order or judgment which preserves an issue of attorney fees”).
112. Id. at 205.
113. Id. at 206.
The court of appeals attempted to clarify when an appeal from a merits order is appropriate if a claim for attorney’s fees is still pending. First, the court reviewed past cases discussing whether an appeal from a child custody order that affects a substantial right is properly before the appellate court. After analyzing the substantial right issues for child custody, the court determined that the plaintiff failed to make the initial showing that a substantial right had in fact been affected. The court further stated that although the substantial right “analysis would ordinarily suffice to determine that the appeal is interlocutory[,]” and thus improper, “because recent case law has complicated the issue, further discussion is necessary.” Accordingly, the court discussed the cases analyzed above, attempting to synthesize the decisions.

The court admitted that the law regarding the finality of an order that has an unresolved claim for attorney’s fees is “not a model of clarity” and that it was “difficult to reconcile Lucas with the general prohibition against the immediate appeal of interlocutory appeals.” Following the holding in Duncan I, the court dismissed the appeal as interlocutory because the merits order was not certified pursuant to Rule 54(b). The court determined that the holding in Duncan I, which followed the rule of Bumpers II, was more consistent with established case law regarding interlocutory appeals.

Although the Hausle opinion itself was no “model of clarity,” it appeared to establish that a proper Rule 54(b) certification is required when a trial court issues an order deciding the merits of a case but reserving the issue of attorney’s fees for a future hearing. Thus, under Hausle, an order is immediately appealable and properly before the court of appeals if:

1. the order fully resolved the merits of the claim, leaving only attorney’s fees to be determined;
2. the claim for attorney’s fees depended on the party prevailing on the merits and was not an element of the substantive claim; and
3. the trial court properly certified the order under Rule 54(b).

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114. Id.
115. Id.
116. Id.
117. Id.
118. See id. at 206–08.
119. Id. at 208.
120. Id.
121. Id.
122. Id.
The *Hausle* opinion was a way for the court to clarify the conflicting decisions and finally affirm that in order to appeal from a merits order, the order must be properly certified under Rule 54(b). But, just as that step in the test was finalized, the requirements set forth in *Hausle* were jeopardized when the Supreme Court of North Carolina granted certiorari in *Duncan II*, discussed next.

**IV. FINALITY IN DUNCAN II: THE SUPERFLUOUS 54(B) CERTIFICATION**

The supreme court’s opinion in *Duncan II* swiftly changed the rules regarding the finality of judgment orders. The opinion opened with a strong statement of purpose: “Today, we clarify the effect of an unresolved request for attorney’s fees on an appeal from an order that otherwise fully determines the action.”

The court of appeals had already concluded in *Duncan I* and *Hausle* that certification was required for an appeal to be proper, however, the defendant in *Duncan II* argued for a change in this rule. In his brief, the Defendant argued that the confusion surrounding the issue of the finality and appealability of an order when there is a pending claim for attorney’s fees should be resolved by a clear rule in order to reduce jurisdictional consequences, such as waiver of rights. The Defendant contended that North Carolina should follow the majority of other jurisdictions that have tracked the decision of the Supreme Court of the United States by providing a bright-line rule regarding the appealability of pending attorney’s fees. The Defendant urged the Supreme Court of North Carolina to conclude that an unresolved claim for attorney’s fees should not change the finality of a merits order that would hinder immediate appealability.

The court agreed with the Defendant, succinctly holding that an unresolved request for attorney’s fees does not prevent a judgment on the merits from being considered final for the purposes of an appeal.

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124. Id.
127. Id. at *15–16 (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199–203 (1988) (“Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a ‘final decision’ for purposes of [section] 1291 whether or not there remains for adjudication a request for attorney’s fees attributable to the case.”)).
128. Id. at *1–6.
following the lead of the Supreme Court of the United States in *Budinich*.129 “Because attorney’s fees and costs are collateral to a final judgment on the merits, an unresolved request for attorney’s fees and costs does not render interlocutory an appeal” from the merits order.130 “Once the trial court enters an order that decides all substantive claims, the right to appeal commences.”131 This rule is truly a “bright-line rule,” similar to the one the court attempted to adopt in *Bumpers II*.132

The court decided that “[b]ecause an order resolving all substantive claims is a final judgment, Rule 54(b) certification is superfluous, and such a final order is immediately appealable as of right.”133 Therefore, when a trial court order adjudicates all of the substantive claims, leaving only the issue of attorney’s fees for a later proceeding, the party wishing to appeal does not have to seek a Rule 54(b) certification in order to immediately appeal because the order is considered final.134 As discussed in the first Part, a final order from a trial court is immediately appealable as a matter of right.135

The court cleared up the confusion from the previous cases by holding that the bright-line rule applies to every case where a trial court enters a judgment on the merits but an unresolved issue of attorney’s fees remains.136 It also stated: “To promote clarity and uniformity, we disavow any language in [Bumpers II] that may be read to conflict with our holding in the case at hand.”137 In other words, there is no longer any reason for a court to determine whether the claim for attorney’s fees is contingent upon a party prevailing on the merits in order to decide if the pending claim for attorney’s fees is immediately appealable.138 The test from *Bumpers II* regarding whether the attorney’s fees claim is an

129. *Duncan II*, 742 S.E.2d at 800; see also *Budinich*, 486 U.S. at 199.
130. *Duncan II*, 742 S.E.2d at 800.
131. Id.
132. Id.; see also *Bumpers II*, 695 S.E.2d 442, 448 (N.C. 2010), abrogated by *Duncan II*, 742 S.E.2d 799, 800 (N.C. 2013).
133. *Duncan II*, 742 S.E.2d at 800 (emphasis added) (citing N.C. Gen. Stat. §§ 1–277(a), 7A–27(c) (2011)).
134. Id.
136. *Duncan II*, 742 S.E.2d at 800–01.
137. Id. at 801.
138. Id.; see also Matt Leerberg, *Attorneys’ Fees are Ancillary, and That’s Final*, N.C. APP. PRAC. BLOG (June 13, 2013), http://www.ncapb.com/2013/06/13/attorneys-fees-are-ancillary-and-thats-final/. Leerberg summarizes: “This ‘bright-line rule’ goes a long way to cut through the confusion on this issue. Note what is missing from the analysis: you do NOT have to analyze whether the attorneys’ fees issue is dependent on or ancillary to the final merits order.” Leerberg, supra.
element of the substantive claim or simply a cost added by the court is no longer necessary, according to Duncan II.  

The Duncan II opinion was invaluable and arguably the best decision for the court to make, especially considering the confusing landscape of the previous case law and the trend by other jurisdictions to follow the bright-line rule. This bright-line rule provides the easiest test for both practitioners and judges to understand and apply. Practitioners and judges no longer have to examine the controlling statute and the trial court order to determine if the attorney's fees are an element of the substantive claim before knowing whether the appeal is immediately available. The risk of filing an untimely appeal is substantially lessened. Attorneys no longer face the possibility of their untimely appeals being summarily dismissed and then being embarrassed in front of the judiciary, the bar, or their clients.

Despite the growing clarity, Duncan II still leaves some problems and unanswered questions. For example, now that an order resolving all claims is final and an immediate appeal is a right of the party, there is a chance that a case may have multiple appeals. An aggrieved party will likely file for an appeal following the merits order because it will not want to risk waiving its appellate rights by waiting too long. The merits order would be considered final and could be appealed from under Duncan II. If there is an unresolved claim for attorney's fees, however, the party may have to appeal again following the resolution of the attorney's fees claim. Longstanding case law has sought to limit fragmented or partial appeals, yet, this new bright-line rule easily opens the door for a case to be appealed multiple times.

A simple answer to this problem may be to ask the judge to delay entering a merits order until the attorney's fees claim is decided. Thus, only one order would be entered in each case and only one appeal would be needed to decide both the substantive claims and the attorney's fees claim, eliminating the risk of fragmented or piecemeal appeals. However, with crowded dockets, the claim for attorney's fees may not be decided for months, leaving parties in a limbo state of no judgment at

139. Duncan II, 742 S.E.2d at 801; see also Bumpers II, 695 S.E.2d 442, 448 (N.C. 2010), abrogated by Duncan II, 742 S.E.2d 799, 800 (N.C. 2013).
141. See Duncan II, 742 S.E.2d at 801.
142. See supra notes 9–12 and accompanying text.
143. See Leerberg, supra note 138.
144. See id.
all. This may be especially problematic for family law issues where remedies may not be money damages, but instead parental rights.

The circumstances under which a trial court can hear a motion for attorney’s fees after a party has filed a notice of appeal remain unclear under Duncan II. A question arises from the language of North Carolina General Statutes section 1-294, which states “[w]hen an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.” This leaves judges and practitioners to wonder if the analysis from Bumpers II and Hausle regarding the relationship between the judgment appealed from and the pending claim for attorney’s fees may still need to be considered in the appealability analysis.

CONCLUSION

After years of confusing and contradictory rulings, Duncan II followed the lead of the federal courts and many other jurisdictions by creating a bright-line rule to determine the effect of an appeal when an unresolved claim for attorney’s fees remains. Now, it is established that attorney’s fees are ancillary to an order that adjudicates all other claims, and thus, a merits order is immediately appealable. This change in the legal landscape, although still leaving some questions to be answered, not only cleared up the confusion from previous cases, but it also provided clear instructions regarding what is necessary to determine if an appeal is appropriate. Because of this new clarity, practitioners and judges no longer need to spend time determining if a claim for attorney’s fees is ancillary to the substantive claims. Instead, North Carolina now follows the majority of jurisdictions that apply the bright-line rule of Budinich.

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145. See id.
147. See Leerberg, supra note 138 (analyzing section 1-294 and stating that “the Hausle court’s inquiry into the relatedness of the merits order and the attorney’s fee motion may be alive and well”).