

trial.¹ Therefore, the order is interlocutory. "An order or judgment is interlocutory if it is made during the pendency of an action and does not dispose of the case but requires further action by the trial court in order to finally determine the entire controversy." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995).

It is well settled that because the denial of a motion for partial summary judgment is an interlocutory order, there may be no immediate appeal. *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993); *Tridyn Industries, Inc. v. American Mutual Ins. Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979). A non-appealable order is a nullity and defendants' notice of appeal does not deprive the trial court of jurisdiction. *Harris v. Harris*, 58 N.C.App. 175, 177, 292 S.E.2d 775, 777 (1982) rev'd on other grounds, 307 N.C. 684, 300 S.E.2d 369 (1983).

The North Carolina Rules of Appellate Procedure severely limit the circumstances in which interlocutory orders can be appealed. The purpose of these rules is to prevent fragmentary and unnecessary appeals by permitting the trial court to dispose of a case fully before it is presented to the appellate courts. *Waters v. Personnel, Inc.*, 294 N.C. 200, 207, 240 S.E.2d 338, 343 (1978); *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E.2d 669, 671 (1951). In the landmark North Carolina case concerning interlocutory appeals, Justice Ervin wrote that "[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the

¹ The plaintiff's "Notice of Appeal" is addressed only to that portion of the order that deals with the "public concern" issue.

medium of successive appeals from intermediate orders.” *Veazey v. Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950).

B. This court has not certified the order in question for appeal pursuant to Rule 54(b), nor does the order affect a “substantial right.”

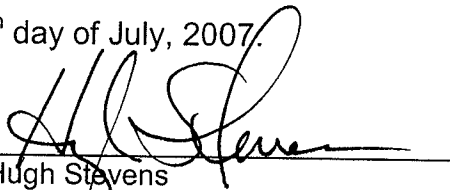
Generally, there are only two methods by which an interlocutory order may be appealed: (1) certification by the trial court pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure or (2) if the trial court’s order “affects a substantial right.” N. C. Gen. Stat. § 7A-27(d)(1). A two-part test has developed for the determination of whether a substantial right has been prejudiced: the “right itself must be substantial and the deprivation of that substantial right must potentially work injury ... if not corrected before appeal from final judgment.” *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990).

The plaintiff did not ask this court to certify its July 8 order pursuant to Rule 54(b). To the contrary, the order specifically reserves certain issues for trial. Moreover, there is no reason why the court should have certified this issue for appeal if it had been asked to do so.

Likewise, the order does not deprive the defendants of a “substantial right;” it merely establishes the “law of the case” going forward by resolving a threshold legal issue. In the only reported North Carolina case involving the application of the “public concern” issue in a defamation case – a case on which the plaintiff relied heavily in support of his motion for partial summary judgment on that issue -- the North Carolina Court of Appeals expressly held that an

interlocutory order denying a defendant's motion for summary judgment did not affect a "substantial right" and thus was not appealable. There is no reason to suggest that the analysis should or would be any different when the plaintiff's motion for partial summary judgment is denied. *Neill Grading and Const. Co., Inc. v. Lingafelt*, 168 N.C. App. 36, 606 S.E.2d 734 (2005). Accordingly, the plaintiff's "Notice of Appeal" is a nullity and should be dismissed or stricken from the record.

Respectfully submitted this the 25th day of July, 2007.



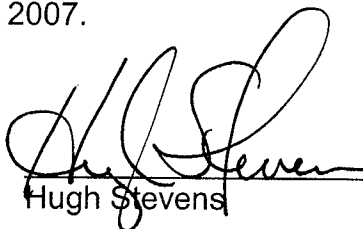
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CERTIFICATE OF SERVICE

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This the 25th day of July, 2007.


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