



FILED

Hugh Stevens
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August 20, 2007

Via Hand Delivery

Hon. Donald Stephens
Senior Resident Judge
Wake County Courthouse
Tenth Floor
316 Fayetteville Street
Raleigh, NC 27601

Re: *Monce v. Deas* (Superior Court of Wake County No. 05 CVS 4005)

Dear Judge Stephens:

On July 25, 2007 we filed and served a Motion to Dismiss and Strike Plaintiff's Notice of Appeal from a portion of the order that you entered in the above-titled case on June 8, 2007. At the time we wrote to you, saying:

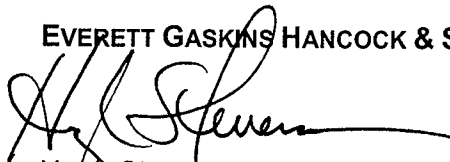
Because you entered the order from which the plaintiff purports to appeal, we believe it would be appropriate for you to resolve the enclosed motion after plaintiff's counsel has had an opportunity to respond to it. We are not requesting a hearing but will be happy to participate in one if you determine that a hearing is appropriate.

We now enclose (1) a copy of the plaintiff's response to our motion; (2) our reply to the plaintiff's response; and (3) a proposed order allowing the motion.

As you will see, we believe that the outcome of our motion is controlled by the Court of Appeal's decision in *RPR & Associates, Inc. v. University of North Carolina-Chapel Hill*, 153 N.C. App. 342, 570 S.E. 2d 510 (2002), *disc. review denied*, 357 N.C. 166, 579 S.E.2d 882 (2003).

Very truly yours,

EVERETT GASKINS HANCOCK & STEVENS, LLP



Hugh Stevens

Enclosures

c: Kenneth A. Soo, Esq. (by hand)

NORTH CAROLINA

WAKE COUNTY

KEVIN A. MONCE,

Plaintiff,

vs.

NANCY G. DEAS and EDNA E. DEAS,

Defendants.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 4005

2007 AUG 16 P 3:40

WAKE COUNTY, CSC

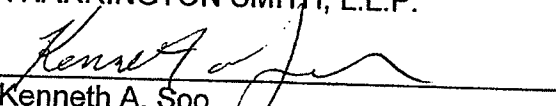
PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION TO
DISMISS APPEAL

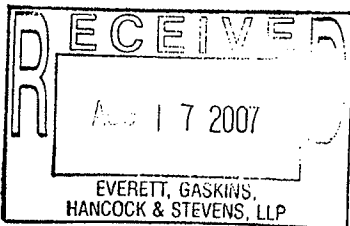
On June 8, 2007, the Court entered partial summary judgment for defendants Nancy and Edna Deas. On July 9, 2007, plaintiff Kevin A. Monce filed notice of appeal to the Court of Appeals of the partial summary judgment in favor of the Deas that their speech is about a matter of public concern. On July 25, 2007, the Deas filed Defendants' Motion to Dismiss and Strike Plaintiff's 'Notice of Appeal.'" The motion asserts that the appeal is interlocutory.

The superior court is without jurisdiction to dismiss the appeal. Only the Court of Appeals may decide whether the appeal is interlocutory. *Estrada v. Jaques*, 70 N.C. App. 627 (1984).

RESPECTFULLY SUBMITTED, this 16th day of August 2007.

THARRINGTON SMITH, L.L.P.


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Attorneys for the plaintiff

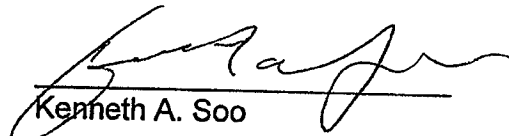


CERTIFICATE OF SERVICE

I certify that a copy of Plaintiff's **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS APPEAL** was served by United States mail, addressed as follows:

Hugh Stevens
Everett, Gaskins, Hancock & Stevens
Post Office Box 911
Raleigh, North Carolina 27602

This 16th day of August 2007.


Kenneth A. Soo

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CvS 4005

KEVIN A. MONCE,)
)
 Plaintiff,)
)
 vs.)
)
 NANCY G. DEAS and EDNA E. DEAS,)
)
 Defendants.)

**Defendants' Reply to Plaintiff's Response to
Motion to Strike or Dismiss Plaintiff's Notice of Appeal**

Plaintiff's sole response to the defendants' Motion to Strike or Dismiss Plaintiff's Notice of Appeal is to cite one case – *Estrada v. Jacques*, 70 N.C. App. 627 (1984) -- and blithely assert that "[o]nly the Court of Appeals may decide whether the appeal is interlocutory."

As explained below, *Estrada* is not the law, and plaintiff's assertion is incorrect.

A. The plaintiff's filing of a notice of appeal did not deprive this court of jurisdiction to dismiss the appeal and proceed with the case.

Plaintiff's response appears to rest on the proposition that by filing of a Notice of Appeal plaintiff's counsel rendered this court *functus officio*¹ and ousted it of any jurisdiction to determine whether the order in question is immediately appealable. That is not the law. In *Lowder v. Mills*, 301 N.C. 561, 273 S.E.2d 247 (1981), the North Carolina Supreme Court held that it is the perfecting of an appeal that terminates the trial

¹ *Functus officio*, which translates from Latin as "having performed his or her office," is defined as being "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." *RPR & Associates, Inc. v. University of North Carolina – Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 513 (2002) (citation omitted) The principle of *functus officio* stems from the general rule that two courts cannot ordinarily have jurisdiction of the same case at the same time. *Id.*

court's authority, not the mere giving of a notice of appeal. *Id.* at 580-81, 273 S.E.2d at 258-59.

Moreover, North Carolina's appellate courts recently have made it clear, in a case originally decided by this court, "that a trial judge has the authority to decide whether the attempted appeal is of a nonappealable interlocutory order. If so, the *functus officio* rule does not apply. The trial court is not required to await the appellate court's decision whether the attempted appeal is, indeed, of a nonappealable interlocutory order. If the trial court reaches this conclusion, it can proceed with the matter, and if it is correct in its conclusion, it is not *functus officio*." Thomas L. Fowler, Functus Officio: Authority of the Trial Court after Notice of Appeal, 81 N.C. L. Rev. 2331, 2340 (2003).

The principles applicable to the plaintiff's purported appeal from this court's entry of partial summary judgment in favor of the defendants are spelled out in *RPR & Associates, Inc. v. University of North Carolina-Chapel Hill*, 153 N.C. App. 342, 570 S.E. 2d 510 (2002), *disc. review denied*, 357 N.C. 166, 579 S.E.2d 882 (2003). In that case the Court of Appeals squarely held that (1) a party's attempt to appeal from an order that is not immediately appealable does not deprive the trial court of jurisdiction, and the trial court may proceed with the case on its merits and (2) that a trial court has the authority to determine whether the order in question affects a substantial right or is otherwise immediately appealable. *Id.*, 153 N.C. App. at 347-48, 570 S.E.2d at 514-15.² See also,

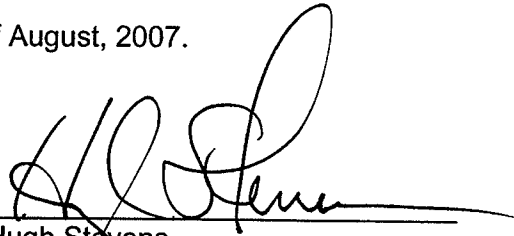
² The 1984 Court of Appeals decision cited by the plaintiff's response, *Estrada v. Jacques*, appears to be inconsistent or in conflict with the holding in *RPR & Associates, supra*, and with the substantial body of case law cited therein. Insofar as counsel can determine, the *Estrada* decision is an anomaly that has neither been overruled nor followed by the Court of Appeals or the Supreme Court of North Carolina. Therefore, defendants respectfully submit that this court should be guided by the more recent and more thorough analysis of the *functus officio* doctrine set out in *RPR & Associates*. The doctrine of *functus officio* and the body of North Carolina case law interpreting and applying it are analyzed at length in Thomas L. Fowler, Functus Officio: Authority of the Trial Court after Notice of Appeal, 81 N.C. L. Rev. 2331, 2340 (2003).

T&T Development Co., Inc. v. Southern National Bank, 125 N.C. App. 600, 481 S.E.2d 347 (1997) (plaintiff's notice of appeal from an order granting defendant's motion *in limine* that was not immediately appealable did not deprive trial court of jurisdiction to determine the case on its merits).

B. The plaintiff has not asked this court to certify the order in question for appeal pursuant to Rule 54 (b) or to rule that it affects a substantial right.

As pointed out in the defendants' Motion, 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). The plaintiff has neither asked this court to certify the order for appeal pursuant to Rule 54(b), nor argued that the order affects a substantial right. Therefore, the defendants' motion should be allowed.

Respectfully submitted this 20th day of August, 2007.



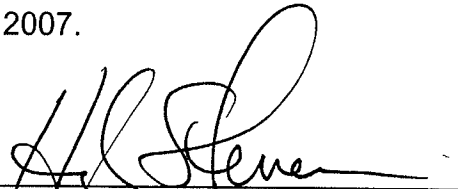
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Defendants' Reply to Plaintiff's Response to Motion to Dismiss and Strike Plaintiff's "Notice of Appeal" was served on counsel of record by hand delivery to:

Kenneth A. Soo, Esq.
Tharrington Smith, LLP
209 Fayetteville Street
Raleigh, NC 27602-1151

This the 20th day of August, 2007.



Hugh Stevens