

## Stays and Concurrent Litigation in Trial and Appellate Courts

October 18, 2023

Gagan Gupta

The Honorable  
Paul C. Ridgeway

Amanda S. Hawkins

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## Rule 54(b) Certification

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## Final vs. Interlocutory

- *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950)
  - **Final** = "one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court."
  - **Interlocutory** = "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."
- All final judgments are immediately appealable. N.C.G.S. § 7A-27(b).
- A judgment is final even if collateral issues remain undecided. *See, e.g., Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013) (attorneys fees).

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## Appealability of Interlocutory Orders

- Can you appeal an interlocutory order? → Sometimes!
  - Substantial Right
  - Rule 54(b)
  - Other (narrower) statutes that provide specific appealability
- Interlocutory ≠ not appealable

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## Appealability of Interlocutory Orders – *Continued*

- **N.C.G.S. § 7A-27:** Statutory authorization for appealing interlocutory orders:
  - Class certification rulings. § 7A-27(a)(4).
  - Orders granting / refusing a new trial. § 7A-27(b)(3)(d).
  - Orders granting “temporary injunctive relief restraining the State or a political subdivision of the State from enforcing the operation or execution of an act of the General Assembly” where “the State or a political subdivision of the State is a party in the civil action.” § 7A-27(b)(3)(f).
  - “From any other order or judgment of the superior court from which an appeal is authorized by statute.” § 7A-27(b)(4).
    - Example: Adverse rulings regarding personal jurisdiction. N.C.G.S. § 1-277(b).

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## Rule 54(b)

(b) Judgment upon multiple claims or involving multiple parties. – When **more than one claim** for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when **multiple parties** are involved, **the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment.** Such judgment **shall** then be subject to review by appeal or as otherwise provided by these rules or other statutes. 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. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

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### Rule 54(b) – Elements

- (1) Multiple claims or multiple parties.
- (2) The order to be appealed must enter final resolution for at least one claim against at least one party.
- (3) The order must contain a certification by the trial court that there is no just reason for delaying appeal of the order.

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### Rule 54(b) – Multiple Claims/Parties

- Text of rule: "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. . ."
- NOT multiple issues or remedies
- "[I]t is important in applying Rule 54(b) to distinguish the **true multiple claim case** from the case in which only a single claim based on a single factual occurrence is asserted but in which **various kinds of remedies may be sought**." *Tridyn*, 296 N.C. 486, 251 S.E.2d 443 (1979).

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### Rule 54(b) – Finality

- Trial court must enter an order that is *actually* final
- Jurisdictional: Finality reviewable on appeal
  - "[T]he trial court's denomination of its decree a final . . . judgment does not make it so, if it is not such a judgment." *CBP v. Mountaire*, 134 N.C. App. 169, 517 S.E.2d 151 (1999).
  - Question of law: *de novo* review

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## Rule 54(b) – Certification

- Text of rule: “[T]he 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.”
- Magic Words: “there is no just reason for delay”
- Must be “so determined in the judgment”
- Does trial court need to justify Magic Words? → Likely not

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## Rule 54(b) – Certification (Magic Words)

- Are Magic Words required to appear in the order?
- *IO Moonwalkers v. Banc of Am.*, 258 N.C. App. 618, 814 S.E.2d 583 (2018)
  - **No Magic Words**
  - Order cited Rule 54(b)
  - “[T]he trial court’s order expressly referenced Rule 54(b). And the transcript of the proceedings . . . indicate that the trial court intended to make the necessary finding concerning ‘no just reason for delay’ but inadvertently failed to do so. Accordingly, we have appellate jurisdiction to review the challenged order.”

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## Rule 54(b) – Certification (Magic Words)

- *Branch Banking v. Peacock Farm*, 241 N.C. App. 213, 772 S.E.2d 495 (2015), *aff’d*, 368 N.C. 478, 780 S.E.2d 553 (2015) (per curiam)
  - **No Magic Words**
  - Trial court entered stand-alone “certifying” order 8+ months later w/ Magic Words
  - “Neither Rule 54(b) itself nor the cases interpreting it authorize such a retroactive attempt to certify a prior order for immediate appeal in this fashion. Therefore, because Rule 54(b) cannot be used to create appellate jurisdiction based on certification language that is not contained in the body of the judgment itself from which appeal is being sought, **dismissal of Lynch’s appeal is . . . appropriate.**”

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## Rule 54(b) – Certification (Magic Words)

- Squaring *IO Moonwalkers* and *Branch Banking*
  - Rule: Trial court's intention when order entered > Form
  - *IO Moonwalkers*:
    - Order expressly cited Rule 54(b) despite not quoting Magic Words
  - *Branch Banking*:
    - Original order made no reference to Rule 54(b) or Magic Words
- Always request Rule 54(b) + Magic Words be included in the original order

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## Rule 54(b) – Certification (Magic Words)

- Can the lack of Magic Words be cured? → Yes!
- *Doe v. City of Charlotte*, 273 N.C. App. 10, 848 S.E.2d 1 (2020)
  - “[T]he trial court simply could ‘amend the initial order’ by entering a new order with the same substantive language as the initial order but with the additional Rule 54(b) certification language added. . . . Then, the aggrieved party can appeal that new order.”
- *Lannan v. Bd. of Governors of the Univ. of N.C.*, 879 S.E.2d 290 (Ct. App. 2022)
  - In an Amended Order, “the trial court included the following language . . . : ‘The Court concludes that there is no just reason to delay the appeal of the dismissal of the *Corum* claim and that Order is hereby certified for immediate appeal.’ The trial court properly certified the dismissal of the *Corum* claim, so we have jurisdiction to review [the dismissal].”

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## Rule 54(b) – Final Thoughts

- Mandatory appellate jurisdiction
  - Rule 54(b): “Such judgment **shall** then be subject to review by appeal . . . .”
  - *DKH Corp. v. Rankin-Patterson Oil Co.*, 348 N.C. 583, 500 S.E.2d 666 (1998) (“We believe this language requires the appellate court to hear the appeal.”)
- Discretion → trial court
- Trial court’s decision *not* to certify is *not* reviewable on appeal
- *Independent* basis for appeal
  - Wise to seek Rule 54(b) certification whenever possible as a safeguard

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## Functus Officio

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## Relevant Statutes

- N.C.G.S. § 1-294: When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from . . . .
- N.C.G.S. § 15A-1448: The jurisdiction of the trial court with regard to the case is divested except as to actions authorized by GS 15A-1453, when notice of appeal has been given and the period described in (1) and (2).
- Limitation on Subject Matter Jurisdiction of the trial court.
- See: Crowell, *Functus Officio*, UNC School of Govt. Admin. Of Justice Bulletin No. 2015/04 (November 2015)

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## When does the stay arise?

- “When an appeal is perfected.” N.C.G.S. § 1-294.
- Proper perfection relates back to time of giving notice of appeal. *Marshall v. Marshall*, 233 NC App. 238 (2014)(unpublished).
- “In fieri” orders and judgments
- Remain subject to further action until expiration of session of court. E.g. *Wiggins v Bunch*, 280 NC 106 (1971)
- Distinguish “session” from “term”

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### Scope of Stay

- N.C.G.S. § 1-294: “All further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein, . . .”
- “. . . unless otherwise provided by the Rules of Appellate procedure”
- “Court may proceed upon any other matter included in the action and not affected by the judgment appealed from”

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### Exceptions to Stay found in Rules of Appellate Procedure

- Rule 27(c)(1): Extending time to prepare transcript for appeal
- Rule 27(c)(1): Extending time to serve proposed record on appeal
- Rule 8: Stay of execution or enforcement upon appeal
- Rule 11: Settling the record on appeal
- Rule 25: Dismissing an appeal for failure to comply with rules of appellate procedure or court order relating to perfection of appeal (prior to “filing of an appeal”)

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### Exceptions to Stay found in the Rules of Civil Procedure

- Rule 52: Motion to Amend Findings of Fact - within 10 days of judgment
- Even if NOA has been given
- Court may also alter conclusions of law. *Spoon v Spoon*, 755 S.E.2d 66 (2014).
- Rule 50: Judgment notwithstanding verdict - RAP 3(c)(3): tolls time for giving notice of appeal, but once NOA is filed, lower court loses jurisdiction to hear Rule 50 motion
- Rule 59: Motion for new trial - 10 days for filing, but court loses jurisdiction once NOA filed, including if filed simultaneously
- Rule 60(b): Relief from judgment - lower court loses jurisdiction once NOA filed, but may be heard if filed simultaneously
- Rule 62(c): When appeal is taken from judgment granting, dissolving or denying an injunction, the court may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. *See further* 2 NC Civ. Proc. 62-3 (2022) (citing Fed. R. Civ. Pro. 62(c))

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### Exceptions found in Criminal Procedure

- Motion for Appropriate Relief
- Motions required to be filed within 10 days of judgment - may be heard even if NOA has been given (and tolls time for giving NOA until order entered). N.C.G.S. § § 15A-1414(c); 15A-1448(a)(2).
- Motions allowed beyond 10 days of judgment - lower court loses jurisdiction while appeal is pending, and motion must be made in appellate division while appeal is pending. N.C.G.S. § 15A-1418.
- Conditions of release: trial court retains authority to determine conditions of release during appeal. N.C.G.S. § 15A-1453(a).

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### Exceptions found in Court's Inherent Authority

- Court may correct court records at any time to ensure that records accurately reflect court action. *St. v. Cannon*, 244 NC 399 (1956).
- But once case docketed in appellate court, court may amend or correct record only upon directive of appellate court. *St v Dixon*, 139 NC App 332 (2000); Rule 60(a).

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### Actions not excepted

- Attorneys fees; *McClure v. Co. of Jackson*, 185 NC App. 462 (2007)
- Court cannot “reserve jurisdiction” to decide an issue once judgment has been entered (e.g., attorneys fees). *Id.*
- Contempt; *Wilson v. Wilson*, 124 NC App. 371 (1996)
- Reducing appeal bond; *Ross v. Ross*, 194 NC App. 365 (2008)

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“Matter embraced therein” & “not affected by the judgment appealed from”

- Claim of one party dismissed; Court later properly heard and dismissed claim against 2nd defendant despite appeal of the first. *Jenkins v Wheeler*, 72 NC App 363 (1985).
- Custody order on appeal did not deprive court of jurisdiction to hear child support issues *McKyer v. McKyer*, 179 N.C. App. 132 (2006)

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### Interlocutory Appeals

- Generally, order that is not a final resolution of the case, leaving other matters to be decided, cannot be appealed unless (1) affecting a substantial right, or (2) is final as to one or more party, but fewer than all, and certified for appeal by trial court
- An appeal of an interlocutory order that is not appealable does not deprive lower court of jurisdiction to proceed

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### Interlocutory Appeals

- Lower court must make its own determination of whether interlocutory order was appealable
- *T&T Development v. So. Nat. Bank*, 125 NC App 600 (1997): Plaintiff appeal granting of motion in limine, and then refused to put on evidence at trial, saying court was functus officio
- Trial court dismissed plaintiff’s claim for lack of evidence
- No error

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### Interlocutory Appeals

- If lower court is wrong in concluding that an interlocutory order is not appealable and proceeds, and the appellate court later concludes the order appealed from was in fact appealable, the proceedings below are not void for lack of jurisdiction if the lower court's determination was reasonable under the current state of the law. *RPR & Associates v. UNC*, 153 NC App 352 (2002); *Capps v. NW Sign Industries*, 185 NC App 543 (2007).
- Where party did not inform trial court that it had appealed denial of motion to dismiss on sovereign immunity grounds, and party itself then calendared motion for summary judgment, lower court proceedings were not void as *functus officio*. *Fields v. Goldsboro*, 223 NC App 210 (2012).

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### Petitions for Writs of Certiorari

- A party may petition for a writ of certiorari where, e.g., no right to appeal from an interlocutory order exists. See Appellate Procedure Rule 21(a)(1).
- Neither notice of intention to file petition for certiorari or the filing of one divests the lower court of jurisdiction to proceed.
- However, the issuance of a writ (commanding it to send up the record of a particular case for review) does. *Wheeler v. Thabit*, 261 NC App 479 (1964); *State v. Perkins*, 881 SE2d 842 (2022).

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### Abandoned Appeal

- Lower court regains jurisdiction, but only after “due notice and proper showing” to ensure abandonment *Bowen v. Hodge Motor*, 292 NC 633 (1977);
- or where further proceedings in the trial court indicate the appeal has been abandoned. *McGinnis v. McGinnis*, 44 NC App 381 (1980).

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## Stays of Execution

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### N.C. Rule of Civil Procedure 62(a)

- Automatic stay for 30 days
- Exceptions:
  - Injunctions
  - Receivership

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### N.C. Rule of Civil Procedure 62(b)

- Court may, in its discretion, stay judgment while adjudicating post-trial motions
- Court may impose conditions for security

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N.C. Rule of Civil Procedure 62(d)

- When an appeal is taken, the appellant may obtain a stay of execution, subject to the exceptions contained in section (a), by proceeding in accordance with and subject to the conditions of G.S. 1-289, G.S. 1-290, G.S. 1-291, G.S. 1-292, G.S. 1-293, G.S. 1-294, and G.S. 1-295.

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N.C. Rule of Civil Procedure 62(d)

- N.C. Gen. Stat. § 1-293 – procedure for docketing stay
- N.C. Gen. Stat. § 1-294 – scope of stay
- N.C. Gen. Stat. § 1-295 – undertaking

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N.C. Rule of Civil Procedure 62(d)

- N.C. Gen. Stat. § 1-289 – money judgments
- N.C. Gen. Stat. § 1-290 – personal property
- N.C. Gen. Stat. § 1-291 – conveyance
- N.C. Gen. Stat. § 1-292 – real property

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## N.C. Gen. Stat. § 1-289 – Money Judgments

- Automatic upon:
  - Execution of an undertaking
    - Surety bond; supersedeas bond
    - N.C. Gen. Stat. § 1-295 - sets forth specifics of bond
  - Deposit sum with officer of the court

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## N.C. Gen. Stat. § 1-289 – Money Judgments

- “Sum” determined by trial court after notice and hearing
- Factors “include”:
  - The amount of the judgment.
  - The amount of the limits of all applicable liability policies of the appellant judgment debtor.
  - The aggregate net worth of the appellant judgment debtor.
- In trial court’s discretion. *Smith v. Smith*, 247 N.C. App. 166, 171, 785 S.E.2d 434, 438 (2016).

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## Other considerations

- N.C. Gen. Stat. § 1-294 – Bond can be limited
  - When the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity.
  - An amount not more than fifty thousand dollars (\$50,000), where it would otherwise exceed that sum.
- N.C. Gen. Stat. § 1-289(b) – Judgments over \$25 million must be set at \$25 million

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N.C. Gen. Stat. § 1-290 – Personal Property

- (1) Items are brought to the court;
- (2) Items are placed in the custody of court’s appointee; or
- (3) Appellant enters into an undertaking by at least two sureties in an amount set by the court, to the effect that the appellant will obey the order of the appellate court upon the appeal.

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N.C. Gen. Stat. § 1-291 – Conveyance or Other Instrument

- The judgment is not stayed by the appeal until the instrument has been executed and deposited with the clerk with whom the judgment is entered.

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When does the stay take effect: N.C. Gen. Stat. § § 1-290 and 1-291

- Not automatic
  - “We do not read N.C.G.S. § 1–291 to require that a stay is compelled upon satisfaction of the criteria under N.C.G.S. § 1–291.” *Meares v. Town of Beaufort*, 193 N.C. App. 49, 63, 667 S.E.2d 244, 254 (2008).
  - “Although decided under G.S. § 1–291, the Court finds the Court of Appeals’ analysis in *Meares* persuasive and controlling for purposes of G.S. § 1–290 here.” *130 of Chatham, LLC v. Rutherford Elec. Membership Corp.*, No. 14 CVS 711, 2014 NCBC 14 (N.C. Super. Ct. July 31, 2014)

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N.C. Gen. Stat. § 1-292 – Real Property

- Appellant will not commit, or suffer to be committed, any waste thereon, and
- That if the judgment is affirmed, the appellant will pay the value of the use and occupation of the property.
- For mortgaged properties involving deficiency, must provide for deficiency

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N.C. R. Civ. P. 62(c) – Staying an Injunction

- Court has discretion to suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

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Appellate Rules

- N.C. R. App. P. 8(a)
  - When appeal is taken in a civil action from a judgment, order, or other determination of a trial court, stay of execution or enforcement thereof pending disposition of the appeal must **ordinarily first be sought by the deposit of security with the clerk of the superior court** in those cases for which provision is made by law for the entry of stays upon deposit of adequate security, or by application to the trial court for a stay order in all other cases.

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## Seeking a stay from the Court of Appeals

- After a stay order or entry has been denied or vacated by a trial court
- Appeal from an administrative tribunal
- Extraordinary circumstances

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## Questions?

Gagan Gupta

The Honorable  
Paul C. Ridgeway

Amanda S. Hawkins

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