



- Opposition to Motion to Intervene by the Office of the Attorney General dated March 11, 2005
- Opposition to Motion to Intervene by Civil Plaintiffs dated March 11, 2005
- Notice of Appeal of Order Allowing Intervention by the Attorney General dated March 28, 2005
- Notice of Appeal of Order Allowing Limited Intervention by Civil Plaintiffs dated March 28, 2005

This is more than a matter of secretarial inattention. The issue was raised with Advance America's counsel (Mr. Pilchen) in person on March 10, 2005, at which time the undersigned requested that Advance America please serve us with a copy of their then-imminent response to the *Kucan* plaintiffs' motion to intervene. Mr. Pilchen was noncommittal, and the Opposition To Motion To Intervene was not served on the *Kucan* plaintiffs. The issue of failure to serve papers was addressed in the *Kucan* plaintiffs' "Reply Brief In Support of *Kucan* Plaintiffs' Motion To Intervene" filed March 18, 2005, at note 1, in which we complained of Advance America's discourtesy as "pointless." Now things have gotten silly: Advance America has refused to serve a notice of appeal from the order allowing limited intervention on the *Kucan* plaintiffs themselves, the parties who were permitted to intervene and who secured the order allowing the intervention.

Advance America's appeal should be summarily dismissed by reason of failure to serve the required notice of appeal. This is the rule that governs appeals in the courts. *See Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563-64, 402 S.E.2d 407, 408 (1991) ("Under Rule 3(a) of the Rules of Appellate Procedure, a party entitled by law to appeal from a judgment of superior court rendered in a civil action may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in a timely manner. This rule is jurisdictional. Since the record does not contain a notice of appeal in

compliance with Rule 3, the Court of Appeals had no jurisdiction of the appeal. The appeal should have been dismissed.”) The Rules of Appellate Procedure do not govern appeals from the Commissioner to the Banking Commission, but the applicable rules require service. See 04 NCAC 03B.0222(2). *Also see* 04 NCAC 03B.0221 and Rule 5(a) of the North Carolina Rules of Civil Procedure; G.S. § 150B-46.

Because Advance America failed to serve the Notice of Appeal on the *Kucan* plaintiffs and because the certificate of service attached to the Notice of Appeal does not reflect service on the *Kucan* plaintiffs, the appeal should be dismissed.

## II. THE ORDER ALLOWING INTERVENTION IS NON-APPEALABLE.

More fundamentally, the purported appeal must be dismissed because the order authorizing limited intervention by the *Kucan* plaintiffs is a non-appealable interlocutory order.

Advance America seeks to justify the interlocutory appeal by citing to cases dealing with loss of a “substantial right” under G.S. § 1-277. However the law is fairly clear:

[O]rdinarily no appeal will lie from an order permitting intervention of parties unless the order adversely affects a substantial right which the appellant may lose if not granted an appeal before final judgment. . . .

The assignments and contentions the plaintiffs seek to present on interlocutory appeal will not be lost and may be thoroughly reviewed upon appeal from the final judgment if necessary. *Gammon v. Johnson*, 126 N.C. 64, 35 S.E. 185 (1900). Under the circumstances of this case, the plaintiffs have shown no prejudice which would warrant an appeal, and we order the

Appeal dismissed.

*Wood v. City of Fayetteville*, 35 N.C. App. 738, 740-41, 242 S.E.2d 640, 641-42 (1978). The North Carolina Supreme Court in 1976 cited approvingly to an earlier ruling on the appealability of an order allowing intervention:

Justice Ervin, speaking for our Court in *Raleigh v. Edwards*, 234 N.C. 528, 529, 530, 67 S.E.2d 669, 671 (1951), said this:

“Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment. To this end, the statute defining the right of appeal prescribes, in substance, that an appeal does not lie to the supreme court from an interlocutory order of the superior court, unless such interlocutory order deprives the appellant of a substantial right which he might lose if the order is not reviewed before final judgment. G.S. s 1--277; *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E.2d 377; *Emry v. Parker*, 111 N.C. 261, 16 S.E. 236.”

Our Court held in *Raleigh v. Edwards* that Trial judge Sharp (now Chief Justice) was correct in permitting a party claiming an interest in land sought to be condemned to intervene in the proceedings. The Court further held that a petitioner was not entitled to appeal from the order permitting intervention since the party can fully protect its legal rights by preserving exception to the order allowing intervention and appealing from any adverse judgment upon the merits. General Statutes 1--278. Thus, the Court concluded that this interlocutory order allowing intervention did not deprive the petitioner “of a substantial right which he may lose if the order is not reviewed before final judgment.”

*Oestreicher v. American Nat. Stores, Inc.*, 290 N.C. 118, 129-30, 225 S.E.2d 797, 805 (1976).<sup>1</sup>

So too here. What, precisely, is the prejudice that Advance America contends it will suffer that cannot be redressed on an appeal from a final order? Advance America never says.<sup>2</sup>

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<sup>1</sup> Contrary to Advance America’s assertion in its Notice of Appeal, *Oestreicher* did not “revers[e the Court of Appeals’] ruling that an order allowing intervention did not deprive petitioner of a substantial right.” See Advance America’s Notice of Appeal, p. 4, n. 2. Rather, *Oestreicher* involved the appeal of a dismissal (on summary judgment) of two of plaintiffs’ claims for relief. (Note that *Oestreicher* is no longer good law concerning the appealability of partial summary judgment orders. See discussion in *Murphy v. Coastal Physician Group, Inc.*, 139 N.C. App. 290, 296-97, 533 S.E.2d 817, 821-22 (2000)).

<sup>2</sup> In its opposition to the *Kucan* plaintiffs’ motion to be permitted to intervene, the thrust of Advance America’s argument was that allowing intervention would cause delay: “To permit plaintiffs to replay [the *Kucan*] litigation in the instant proceeding, and permit them in violation of their arbitration agreements to conduct discovery, call and examine witnesses, and present legal and factual briefs and argument to the Commissioner in derogation of Advance America-NC’s contractual rights would certainly ‘unduly delay or prejudice the adjudication of the rights of the original parties to the instant proceeding.’” Advance America Opposition To Motion To Intervene By Civil Plaintiffs dated March 11, 2005, p. 6, quoting *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 460, 515 S.E.2d 675, 683 (1999). Of course, given the limited nature of the intervention allowed, this risk of delay does not exist. And, of course, if delay is the potential source of prejudice, the thing that will cause the greatest delay (and hence the greatest prejudice) would be to allow Advance America’s interlocutory appeal.

The statute under which Advance America purports to appeal authorizes appeals to the Commission "from an order entered by the Commissioner of Banks following an administrative hearing pursuant to Article 3A of Chapter 150B of the General Statutes . . . ." G.S. § 53-92(d). The hearing referenced by the statute is the hearing described in G.S. § 150B-40, which has not yet been conducted. Put differently, G.S. § 53-92(d) does not authorize this appeal, just as it does not authorize an appeal from an order compelling discovery or an order sustaining an objection to evidence or any other interlocutory ruling that arises during the conduct of a contested case.

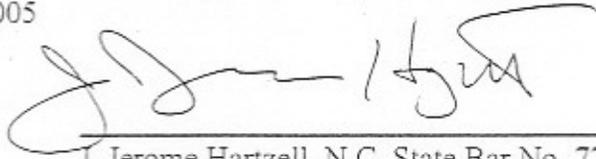
### III. THE PURPORTED APPEAL SHOULD BE IGNORED

In the judicial context, it is well settled that "an appeal from an interlocutory order not affecting a substantial right is a nullity and does not divest the trial court of jurisdiction." *Wake County ex rel. Horton v. Ryles*, 112 N.C. App. 754, 758, 437 S.E.2d 404, 406 (1993), quoting *Berger v. Berger*, 67 N.C. App. 591, 313 S.E.2d 825, *disc. review denied* 311 N.C. 303, 317 S.E.2d 678 (1984).

In the instant contested case, the purported appeal likewise should be ignored because it is not proper under G.S. § 53-92(d) or any other law. This makes sense: a party seeking to stop a proceeding in its tracks could do precisely this simply by giving notices of appeal from interlocutory rulings. The law governing contested case proceedings before the Commissioner should not be interpreted to permit such a result.

WHEREFORE, the *Kucan* plaintiffs pray that the purported appeal be dismissed.

This, the 4<sup>th</sup> day of April, 2005



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the attached "Motion to Dismiss or Ignore Appeal" was served upon all parties by U.S. mail, addressed to:

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