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Functus Officio: Authority of the Trial Court After Notice of Appeal

As a general rule, the trial court is divested of jurisdiction when a party gives notice of appeal, and pending the appeal, the trial judge is *functus officio*.[1] *Functus officio* means "a task performed,"[2]--that is the trial court has completed its duties pending the decision of the appellate court. This follows from the basic rule that two courts cannot have jurisdiction of the same case at the same time, so that upon perfecting[3] of appeal the lower court is ousted of its jurisdiction.[4]

Thus, our appellate courts have held that after a party has given notice of appeal of the trial court's judgment, the trial court is without jurisdiction to consider the prevailing party's motion for attorneys fees.[5] Similarly, after appeal of a judgment, the trial court is without jurisdiction, pending the appeal, to hold a party in contempt for failing to comply with the judgment appealed from.[6] And, clearly, if a party appeals an immediately appealable interlocutory order, the trial court does not have authority, pending the appeal, to proceed with the trial of the matter.[7]

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[1] Bowen v. Motor Co., 292 N.C. 633, 635, 234 S.E.2d 748 (1977); Sink v. Easter, 288 N.C. 183, 197, 217 S.E.2d 532 (1975).

[2] Black's Law Dictionary, (West 1968) at 802.

[3] Although an appeal is not "perfected" until duly docketed in the appellate court, such perfection relates back to the time notice of appeal was given so that it is the notice of appeal that effectively terminates the trial court's jurisdiction. Lowder v. Mills, Inc., 301 N.C. 561, 581, 273 S.E.2d 247 (1981).

[4] *See* Wiggins v. Bunch, 280 N.C. 106, 110, 184 S.E.2d 879 (1971).

[5] Gibbons v. Cole, 132 N.C. App. 777, 782, 513 S.E.2d 834 (1999)(also citing G.S. 1-294); *see also* Lowder v. Mills, Inc., 301 N.C. 561, 579-81, 273 S.E.2d 247 (1981); Condie v. Condie, 51 N.C. App. 522, 529, 277 S.E.2d 122 (1981); *but see* Overcash v. Blue Cross ND Blue Shield, 94 N.C. App. 602, 617, 381 S.E.2d 330 (1989)(Defendant's filing of notice of appeal did not automatically deprive the court of jurisdiction to impose sanctions pursuant to Rule 11).

[6] Beall v. Beall, 290 N.C. 669, 680, 228 S.E.2d 407 (1976); Webb v. Webb, 50 N.C. App. 677, 678, 274 S.E.2d 888 (1981); *see also* Wilson v. Wilson, 124 N.C. App. 371, 376, 477 S.E.2d 254 (1996)(After notice of appeal, the trial court lacked jurisdiction to enter a contempt order based upon the appealed order).

[7] Patrick v. Hurdle, 7 N.C. App. 44, 171 S.E.2d 58 (1969)(appeal from an appealable interlocutory order stays all further proceedings in the trial court so therefore, the trial court was functus officio to try the case, and it follows that the trial, the verdict and the judgment are nullities); *see also* Carpenter v. Carpenter, 25 N.C. App. 307, 308, 212 S.E.2d 915 (1975).

Although generally the trial court becomes *functus officio* once notice of appeal has been given, the trial court does retain jurisdiction to do certain things, *e.g.*:

a) to modify the order or judgment during the session in which the order or judgment was rendered (and the judgment or order remains *in fieri*);[8]
b) to make ministerial corrections to the order or judgment under Civil Rule 60(a);[9]
c) to hear a motion under Civil Rule 52(b);[10]
d) to settle the record on appeal, Appellate Rule 11;
e) to extend the time for service of the proposed record on appeal, or to extend the time to produce the transcript, Appellate Rule 27(c);[11]
f) to dismiss the appeal, in certain instances, for failure to perfect under Appellate Rule 25,[12] *see also* Rule 36;
g) to determine that the appellant has "abandoned" the appeal so that the trial court's jurisdiction to proceed with the case is regained;[13]
h) to act with regard to defendant's bail, G.S. 15A-1453(a);
i) to hear certain Motions for Appropriate Relief, G.S. 15A-1414(c);

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[8] *In Re Tuttle*, 36 N.C. App. 222, 225, 243 S.E.2d 434 (1978)(until the expiration of the term the orders and judgments of the court are in fieri, and the judge has the power, in his discretion, to make such changes and modifications in them as he may deem appropriate. "This is true notwithstanding notice of appeal has been given.").

[9] *State v. Dixon*, 139 N.C. App. 332, 337, 533 S.E.2d 297 (2000)(A court of record has the inherent power and duty to make its records speak the truth, to amend its records, correct the mistakes of its clerk or other officers of the court, or to supply defects or omissions in the record. No lapse of time will divest the trial court of the power to make its record speak the truth, and it may amend its record for this purpose either in or out of term. When a court amends its records to accurately reflect the proceedings, the amended record stands as if it had never been defective, or as if the entry had been made at the proper time. In other words, the amended order is a nunc pro tunc entry. However, once the case has been docketed in the appellate court, the appellate court acquires jurisdiction over the record. Therefore, a motion to correct or amend a judgment in order to make it speak the truth is properly made to the appellate court rather than the trial court once the record on appeal has been filed with the appellate court.).

[10] *Parrish v. Cole*, 38 N.C. App. 691, 248 S.E.2d 878 (1978)(A notice of appeal does not bar a subsequent timely motion to amend the court's findings of fact pursuant to G.S. 1A-1, Rule 52 (b)).

[11] *Strauss v. Hunt*, 140 N.C. App. 345, 536 S.E.2d 636 (2000)(all motions made to extend time, except for motions to extend the time for service of the proposed record on appeal, and motions to extend the time to produce the transcript, must be made to the court to which appeal has been taken).

[12] *Farm Credit Bank v. Edwards*, 121 N.C. App. 72, 464 S.E.2d 305 (1995)(Plaintiff's motion to dismiss defendant's appeal was properly made in the trial court rather than in the Court of Appeals where defendants had filed notice of appeal but the appeal had not yet been filed and docketed in the Court of Appeals).

[13] *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532 (1975)(the general rule that an appeal divests the trial court of jurisdiction becomes inoperative when the trial judge, after due notice and on a proper showing, adjudges that the appeal has been abandoned); *Kirby Building Systems v. McNiel*, 327 N.C. 234, 240 (1990), *reh'g denied*, 328 N.C. 275 (1991)(Abandonment of an appeal exists only where there is express notice, showing, and judgment of abandonment of appeal); *McGinnis v. McGinnis*, 44 N.C. App. 381, 260 S.E.2d 491 (1980)(Defendant's notice of appeal from the trial court's order did not divest the trial court of jurisdiction to enter further orders in the cause, since defendant's failure to perfect his appeal by the time judgment was entered almost three months later constituted an abandonment which reinvested the court with jurisdiction to render further orders in the cause).

Selected Issues Regarding The Trial Court's Authority Pending Appeal

- ***Jurisdiction To Hear A Civil Rule 60(b) Motion After Notice Of Appeal***

Can the trial court hear and decide a Civil Rule 60(b) motion after notice of appeal?[14] This was the precise issue in *Wiggins v. Bunch*,[15] and the Supreme Court held, as an issue of first impression, that the general rule that notice of appeal divests the trial court of jurisdiction was not changed by Civil Rules 59 and 60. Thus there was no authority for the trial judge to consider and decide plaintiff's Rule 59[16] and Rule 60 motions after plaintiff's notice of appeal. After notice of appeal, plaintiff should make any Rule 60(b) motion in the Court of Appeals which can remand such motion to the trial court if necessary.[17] Although arguably inconsistent with the holding in *Wiggins v. Bunch*, there is a line of cases from the Court of Appeals which allows the trial court, even after notice of appeal, to render an advisory decision on a Rule 60(b) motion--to indicate how the trial court would be disposed to rule if it had jurisdiction to rule.[18]

- ***Jurisdiction After Appeal Of Non-Appealable Interlocutory Order***

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[14] Wiggins v. Bunch, 280 N.C. 106, 111, 184 S.E.2d 879 (1971)(the general rule is not changed by Civil Rules 59 and 60); *see* York v. Taylor, 79 N.C. App. 653, 654, 339 S.E.2d 830 (1986)(stating: "The trial court does not have jurisdiction ... to rule on motions pursuant to Rule 60 (b) where such motion is made after the notice of appeal has been given. Wiggins v. Bunch, 280 N.C. 106, 184 S.E.2d 879 (1971)"); *but see* Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986)(The trial court retains limited jurisdiction pending an appeal to hear and consider a Rule 60 (b) motion to indicate what action it would be inclined to take were an appeal not pending).

[15] 280 N.C. 106, 184 S.E.2d 879 (1971).

[16] *See also* Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 410-11, 363 S.E.2d 643, *disc. rev. denied*, 322 N.C. 113, 367 S.E.2d 917 (1988)(trial court correctly held that it had no jurisdiction to grant a new trial when notices of appeal were filed the same day); Homes, Inc. v. Peartree, 24 N.C. App. 579, 211 S.E.2d 457, *cert. denied*, 286 N.C. 722, 213 S.E.2d 722 (1975).

[17] Swygert v. Swygert, 46 N.C. App. 173, 181-82, 264 S.E.2d 902 (1980)("Since at the time plaintiff's Rule 60 (b) motion was filed the case was pending on appeal in this Court, the motion was properly filed in this Court. [cites omitted]. Since, however, the determination of plaintiff's motion will require the resolution of controverted questions of fact which the trial court is in a far better position to pass upon than is this Court, see Bell v. Martin, 43 N.C. App. 134, 258 S.E.2d 403 (1979), reversed on other grounds, 299 N.C. 715, 264 S.E.2d 101 (1980), we now remand this case to the District Court in Carteret County for the purpose of hearing and passing upon all questions and issues raised by plaintiff's motion filed in this Court for relief from the judgment under Rule 60 (b).").

[18] Talbert v. Mauney, 80 N.C. App. 477, 478, 343 S.E.2d 5, 7 (1986); Bell v. Martin, 43 N.C. App. 134, 140-42, 258 S.E.2d 403, 408-09, *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980)("It appears to us that the better practice is to allow the trial court to consider a Rule 60 (b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending."); Pheasant v. McKibben, 100 N.C. App. 379, 385, 396 S.E.2d 333 (1990), *disc. rev. denied*, 328 N.C. 92, 402 S.E.2d 417 (1991)("A trial court may consider a Rule 60 (b) motion which is filed though an appeal is pending in order to indicate how it would rule on the motion were the appeal not pending."). *Compare* Swygert v. Swygert, 46 N.C. App. 173, 181-82, 264 S.E.2d 902 (1980).

The general rule that the trial court becomes *functus officio* once notice of appeal has been given, applies to final judgments, interlocutory orders that affect a substantial right, and certain "final" interlocutory orders that are certified by the trial judge as immediately appealable under Civil Rule 54(b)--but it does *not* apply to *non-appealable interlocutory orders*. When a party files notice of appeal of a non-appealable interlocutory order, the trial court is *not* deprived of jurisdiction and may proceed with the case.[19] "[A] litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a non-appealable interlocutory order of the trial court."[20] The application of the test for when an interlocutory order is immediately appealable (i.e., when it affects a "substantial right" under G.S. 1-277 and G.S. 7A-27(d)) is, however, not always clear.[21] But the trial court has authority to make this determination.[22] Pursuant to Appellate Rule 8, a party may apply to the appellate courts for a stay when the trial court opts to proceed with the matter.

- ***Certification Of Appeal By Trial Court Pursuant To Civil Rule 54(b)***

A final judgment disposes of all issues as to all parties leaving nothing to be judicially determined by the trial court.[23] Final judgments are always appealable.[24] All other judgments or orders of the court are interlocutory. Appeal of interlocutory orders must

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[19] *Veazey v. Durham*, 231 N.C. 357, 364, 57 S.E.2d 377 (1950); *T & T Development Co. v. Southern Nat. Bank*, 125 N.C. App. 600, 603, 481 S.E.2d 347 (1997), *disc. rev. denied*, 346 N.C. 185 (1997)(An appeal from a nonappealable order does not deprive the trial court of jurisdiction to try and determine a case on its merits. In this case because plaintiffs had no right to appeal the granting of the motion in limine, the trial court was not deprived of jurisdiction and did not err in calling the case for trial and dismissing it when plaintiffs failed to offer any evidence.); *Harris v. Harris*, 58 N.C. App. 175, 177, 292 S.E.2d 775 (1982)(an attempted appeal from a non-appealable order is a nullity and does not deprive the tribunal from which the appeal is taken of jurisdiction).

[20] *Velez v. Dick Keffer Pontiac-GMC Truck*, 144 N.C. App. 589, 591, 551 S.E.2d 873 (2001).

[21] *Waters v. Personnel, Inc*., 294 N.C. 200, 208, 240 S.E.2d 338 (1978)("Admittedly the 'substantial right' test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered."); *Cagle v. Teachy*, 111 N.C. App. 244, 245, 431 S.E.2d 801 (1993)(a right is substantial when it will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment; "no hard and fast rules exist for determining which appeals affect a substantial right").

[22] *Veazey v. Durham*, *supra; Utilities Comm. v. Edmisten, Attorney General*, 291 N.C. 361, 365, 230 S.E.2d 671 (1976); *T & T Development Co. v. Southern Nat. Bank*, *supra*; *Benfield v. Benfield*, 89 N.C. App. 415, 419, 366 S.E.2d 500 (1988)(As the order from which defendant first appealed was not properly appealable, the attempted appeal was a nullity, notwithstanding that the judge signed the appeal entries. Accordingly, the attempted appeal did not divest the trial court of jurisdiction to subsequently enter sanctions against defendant.). *But see Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240 (1984)("[R]uling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.").

[23] *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950): "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . An interlocutory order 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."

[24] *Embler v. Embler*, 143 N.C. App. 162, 671, 545 S.E.2d 259 (4-17-2001).

usually be accomplished as a part of the appeal from the final judgment.[25] Immediate appeal of an interlocutory order is allowed, however, in two instances: (a) when the challenged order affects a substantial right pursuant to G.S. 1-277 and G.S. 7A-27(d); and (b) if the order is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to Civil Rule 54(b) by finding that there is no just reason for delay. Thus, Civil Rule 54(b) can apply when more than one claim for relief is presented or when multiple parties are involved, and the trial court enters a "final" order as to one or more but fewer than all of the claims or parties. Although still interlocutory, this "final" interlocutory order is immediately appealable based on the trial court's certification and finding.[26] Rule 54(b) does not allow the trial court to make any interlocutory order immediately appealable upon a finding that there is no just reason for delay--only "final" interlocutory orders. The following cases[27] address the issue:

Industries, Inc. v. Insurance Co., 296 N.C. 486, 490, 251 S.E.2d 443 (1979): The trial court's order granted partial summary judgment on the issue of liability alone, leaving a genuine issue as to damages. The Supreme Court held that even if considered a "multiple claim lawsuit" within the meaning of Rule 54(b), the partial summary judgment was not "final" as to either possible claim--despite the trial court's declaration that it was "final." The trial judge cannot "by denominating his decree a 'final judgment' make it immediately appealable under Rule 54(b) if it is not such a judgment."

DKH Corp. v. Rankin-Patterson Oil Co., 348 N.C. 583, 500 S.E.2d 666 (1998): The trial court granted defendant partial summary judgment dismissing the plaintiff's unfair practice claim. The trial court certified that there was no just reason for delay under Rule 54(b). The Court of Appeals dismissed the appeal and the Supreme Court reversed

[25] *Morris Comm. Corp. v. City of Asheville*, 145 N.C. App. 597, 551 S.E.2d 508 (8-21-2001)(As a general rule, a party has no right to immediate appellate review of an interlocutory order).

[26] *Industries, Inc. v. Insurances Co.*, 296 N.C. 486, 490, 251 S.E.2d 443 (1979)("Rule 54(b) modifies the traditional notion that a case could not be appealed until the trial court had finally and entirely disposed of it all. ... The rule should be seen as a companion to other rules of procedure which permit liberal joinder of claims and parties. ... In multiple claim or multiple party cases the trial court may enter a judgment which is final and which fully terminates fewer than all the claims or claims as to fewer than all the parties.").

[27] *See also Eastover Ridge v. Metric Constructors*, 139 N.C. App. 360, 363-64, 533 S.E.2d 827, *disc. rev. denied*, 353 N.C. 262, 546 S.E.2d 93 (2000): The trial court granted defendant partial summary judgment on plaintiff's unfair and deceptive trade practice claim. The Court of Appeals held that because this interlocutory order was "dispositive of that claim," and because the trial court certified that there was no just reason for delaying the appeal, the appeal was proper pursuant to Rule 54(b); *Morris Comm. Corp. v. City of Asheville*, 145 N.C. App. 597, 551 S.E.2d 508 (8-21-2001): The trial court's order granted partial summary judgment for plaintiff and denied defendant's motion for partial summary judgment. The trial court certified the order for immediate appeal pursuant to Rule 54(b). The Court of Appeals held that the trial court's order failed to fully resolve any of the parties' claims, and, therefore, could not be a "final judgment" under Rule 54(b) despite the trial court's certification. "[A] trial court cannot make its decree immediately appealable under Rule 54(b) by simply denominating it a final judgment if it is not such a judgment."

holding that it was a final interlocutory order and that the Court of Appeals was required to hear the appeal.[28]

Anglin-Stone v. Curtis, 146 N.C.App. 608, 553 S.E.2d 244 (N.C. App. 10-16-2001): The trial court's order granted plaintiff's Rule 60(b) motion and relief from an earlier judgment dismissing the case. Thus the order was interlocutory and not final as to any claim--despite the trial court's certification under Rule 54(b).

Cagle v. Teachey, 111 N.C. App. 244, 431 S.E.2d 801 (1993): The denial of a motion for summary judgment is not a final judgment and is generally not immediately appealable even if the trial court has attempted to certify it for appeal under Rule 54(b).

Creech v. Ranmar Properties, 146 N.C. App. 97, 551 S.E.2d 224 (9-4-2001): The trial court's order provided that plaintiff recover nothing on his first, third, fifth and sixth causes of action, and that "this is a final judgment as to the Plaintiff's First, Third, Fifth and Sixth Causes of Action and there is no just reason for delay in entering this order" pursuant to N.C. R. Civ. P. 54(b). The Court of Appeals held that although this was an interlocutory order, as the trial court's judgment fails to resolve plaintiff's second and fourth causes of action, and defendants' counterclaim, "the trial court's judgment operates as a final judgment as to plaintiff's first, third, fifth and sixth causes of action, and it contains the trial court's certification pursuant to Rule 54(b) ..., [t]herefore, plaintiff's appeal is properly before us."

[28] It is not clear whether a trial court's Rule 54(b) certification is reviewable by the Court of Appeals. See *Laws v. Horizon Housing, Inc.*, 137 N.C. App. 770, 529 S.E.2d 695 (2000)(a trial court's certification of no just reason to delay the appeal does not bind the appellate court).