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Functus Officio

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General rule

Functus officio is the rule that once an appeal has been filed the trial court no longer has jurisdiction over the case, at least as to the issues being appealed, and may not enter any further orders as to those matters.

"As a general rule, once a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio*. [citations omitted] *Functus officio*, which translates from the 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.' *Black's Law Dictionary* 682 (7th ed. 1999)." RPR Assocs. v. Univ. of N.C.-Chapel Hill, 153 N.C. App. 342, 346–47 (2002).

The rule also is codified in 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; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from."

When trial court jurisdiction ends

As provided in G.S. 1-294, the trial court's jurisdiction ends when the appeal is perfected. An appeal is perfected when it is actually docketed in the appellate court. Under Rule 12 of the Rules of Appellate Procedure, an appeal is docketed when the record on appeal is filed and the docket fee paid.

Once an appeal is perfected, however, G.S. 1-294 and the rule of *functus officio* date back to the time of the notice of appeal. "While an appeal is not perfected until it is actually docketed

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in the appellate division, a proper perfection relates back to the time of the giving of the notice of appeal, rendering any later orders or proceedings upon the judgment appealed from void for want of jurisdiction." Swilling v. Swilling, 329 N.C. 219, 225 (1991). "[F]or purposes of the stay imposed by G.S. § 1-294, the proper perfection of the appeal relates back to the time notice of the appeal was given." Reid v. Town of Madison, 145 N.C. App. 146, 149 (2001).

Accordingly, an order entered by the trial court after the notice of appeal is given, but before the appeal is perfected, becomes void once the appeal is perfected. For an example of the application of this rule, see *Marshall v. Marshall*, ___ N.C. App. ___, 757 S.E.2d 319 (2014).

Continuing jurisdiction until expiration of the session

Even if notice of appeal has been given, orders and judgments of a trial court remain *in fieri* and subject to further action until the expiration of the session of court. "It has long been settled law in this State that '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 wise and appropriate for the administration of justice.' [quoting *State v. Hill*, 294 N.C. 320, 329 (1978)] This is true notwithstanding notice of appeal has been given." *In re* Tuttle, 36 N.C. App. 222, 225 (1978).

Although the cases speak of orders and judgments remaining *in fieri* until expiration of the "term" of court, the facts and context establish that the appellate courts really are referring to the "session" of court rather than the "term." For superior court, the "term" of court is commonly understood to meet the typical six-month rotation assignment and "session" is understood as the typical one-week assignment within the term to a particular county. State v. Trent, 359 N.C. 583 (2005).

For examples of the recitation and application of this exception to the *functus officio* rule, see *Sink v. Easter*, 288 N.C. 183 (1975), and *State v. Grundler*, 251 N.C. 177 (1959).

Hearing matters unrelated to the appeal

As stated in G.S. 1-294, after an appeal has been filed the trial court still "may proceed upon any other matter included in the action and not affected by the judgment appealed from." Two examples:

Jenkins v. Wheeler, 72 N.C. App. 363 (1985)—In an action by the plaintiff against several defendants for conspiracy in denying insurance coverage the trial court dismissed the claim against the defendant lawyer. The plaintiff appealed the decision. While that appeal was pending, the trial court heard and granted a motion to dismiss the claim against the insurance company for failure to state a claim. That was a separate issue from dismissal of the claim against the lawyer and thus was within the trial court's jurisdiction while the appeal was pending.

McKyer v. McKyer, 179 N.C. App. 132 (2006)—The father's appeal of a child custody order did not deprive the trial court of jurisdiction to consider and enter orders related to child support as those were separate issues.

Actions authorized by the Rules of Appellate Procedure

The Rules of Appellate Procedure authorize the trial court to take certain actions concerning the perfection of the appeal. These include:

Settling the record on appeal—Under Rule 11 of the Rules of Appellate Procedure the judge whose order or judgment is being appealed resolves issues about the record on appeal when the parties are unable to agree.

Extending the time for preparing the transcript for appeal—Under Rule 7(b)(1) of the Rules of Appellate Procedure the trial court may extend for good cause for one time, for thirty days, the time in which the trial transcript must be produced. The trial court may not extend the time in death penalty cases, however; such motions must be made to the supreme court.

Extending the time for serving the proposed record on appeal—Under Rule 27(c)(1) of the Rules of Appellate Procedure a trial judge may extend for one time, for not more than thirty days, the time for the appellant to serve the proposed record on appeal. The judge granting the extension need not be the judge who heard the case.

Dismissing an appeal for failure to comply with the rules—Under Rule 25 of the Rules of Appellate Procedure the trial court may dismiss an appeal after notice of appeal has been given but before the appeal is filed in the appellate court. Farm Credit Bank of Columbia v. Edwards, 121 N.C. App. 72 (1995). The judge granting the motion to dismiss the appeal need not be the judge who heard the case. The trial court may dismiss the appeal only for failure to comply with the Rules of Appellate Procedure or court orders relating to perfection of the appeal. Estrada v. Jaques, 70 N.C. App. 627 (1984).

Post-judgment motions in the trial court

Several statutes specifically provide for different kinds of post-judgment motions to be filed with the trial court. In some instances a notice of appeal will deprive the trial court of authority to proceed on the motion, but in other situations the court may move ahead regardless of the appeal. These motions include:

Rule 50 motion for judgment notwithstanding the verdict—Under Rule 50 of the Rules of Civil Procedure a motion for judgment notwithstanding the verdict may be made within ten days of the entry of judgment. The filing of such a motion tolls the time for filing the notice of appeal under Rule 3(c)(3) of the Rules of Appellate Procedure. Once notice of appeal is filed, however, the trial court loses jurisdiction to hear the motion under Rule 50. American Aluminum Prods., Inc. v. Pollard, 97 N.C. App. 541 (1990) (citing Wiggins v. Bunch, 280 N.C. 106 (1971)). To allow the trial court to hear the motion for judgment notwithstanding the verdict the party should first file that motion and wait for it to be decided before filing the notice of appeal.

Rule 52 motion to amend findings of fact—Under Rule 52(b) of the Rules of Civil Procedure a motion to amend the court's findings of fact or to make additional findings may be made within ten days of the entry of judgment. The trial court may hear such a motion even if notice of appeal has been given. Parrish v. Cole, 38 N.C. App. 691 (1978). And pursuant to

the same rule the trial court may alter its conclusions of law as well as the findings of fact. Spoon v. Spoon, ___ N.C. App. ___, 755 S.E.2d 66 (2014).

Rule 59 motion for a new trial—Under Rule 59 of the Rules of Civil Procedure notice of a motion for a new trial may be made if served within ten days of the entry of judgment. Notice of appeal removes from the trial court jurisdiction to hear such a motion, however. Am. Aluminum Prods., Inc. v. Pollard, 97 N.C. App. 541 (1990) (citing Wiggins v. Bunch, 280 N.C. 106 (1971)). The trial court loses jurisdiction even if the Rule 59 motion is filed simultaneously with the notice of appeal. Seafare Corp. v. Trenor Corp., 88 N.C. App. 404 (1988).

As with a Rule 50 motion for judgment notwithstanding the verdict, Rule 3(c)(3) of the Rules of Appellate Procedure provides that the time for filing a notice of appeal is tolled if a Rule 59 motion is filed. To allow the trial court to hear the motion for a new trial, therefore, the party should first file that motion and wait for it to be decided before filing the notice of appeal.

Rule 60(b) motion for relief from the judgment—Notice of appeal removes from the trial court jurisdiction to hear a motion for relief from the judgment under Rule 60(b) of the Rules of Civil Procedure. Wiggins v. Bunch, 280 N.C. 106 (1971). If a Rule 60(b) motion is filed simultaneously with the notice of appeal, however, it may be heard by the trial court. York v. Taylor, 79 N.C. App. 653 (1986).

Although a notice of appeal generally removes the case from the trial court's jurisdiction and from deciding a Rule 60(b) motion, the trial court may hear and consider the Rule 60(b) motion to indicate what action it would be inclined to take if it had jurisdiction. The party moving for relief should notify the appellate court so that it may delay consideration of the appeal until the trial court has issued its advisory opinion. If the trial court indicates it would be inclined to grant the motion, the party then may move for the appellate court to remand the case for judgment on the motion. Bell v. Martin, 43 N.C. App. 134 (1979), *rev'd on other grounds*, 299 N.C. 715 (1980). This procedure recognizes that the decision on a Rule 60(b) motion usually will require resolution of contested facts which the trial court is in a better position to assess. Swygert v. Swygert, 46 N.C. App. 173 (1980).

Motion for appropriate relief (MAR)—Under G.S. 15A-1414(c) a motion for appropriate relief that is required to be made within ten days of entry of judgment may be heard in the trial division, even if notice of appeal has been given. A separate statute, G.S. 15A-1448(a)(2), provides that when such a motion has been filed appropriately in the trial court, the deadline for giving notice of appeal does not start to run until the MAR is decided. A motion for appropriate relief made by a defendant pursuant to G.S. 15A-1415 more than ten days after judgment may be heard in the trial court as provided in G.S. 15A-1413 if there is no appeal pending, but G.S. 15A-1418(a) requires that such a motion be made in the appellate court "[w]hen the case is in the appellate division for review"—presumably meaning that the appeal has been perfected. The appellate court then decides whether to remand the MAR to the trial court.

Determining conditions of release—Under G.S. 15A-1453(a) the trial court in which the defendant was convicted retains authority to determine conditions of release during the appeal.

Correcting court records

Generally a court has the inherent authority and duty to correct its records, at any time, to assure that they accurately reflect the court's actions. State v. Cannon, 244 N.C. 399 (1956). The authority to correct records is also codified as Rule 60(a) of the Rules of Civil Procedure. The authority to correct records does not authorize a trial court to make substantive changes in an order after notice of appeal has been given. *In re* C.N.C.B., 197 N.C. App. 553 (2009).

Moreover, once a case has been docketed in an appellate court that court has jurisdiction over the record and the trial court may amend or correct the record only upon a directive from the appellate court. State v. Dixon, 139 N.C. App. 332 (2000); G.S. 1A-1, Rule 60(a).

Deciding whether the appeal has been abandoned

The trial court may determine whether an appeal has been abandoned and, if it has, resume jurisdiction of the case. Before making such a determination the trial court must give notice and conduct a hearing. Sink v. Easter, 288 N.C. 183 (1975). Abandonment of the appeal is not established merely by the party filing a motion for voluntary dismissal of the case, however. A trial court may not declare an appeal abandoned and resume jurisdiction based on that fact alone. Bowen v. Hodge Motor Co., 292 N.C. 633 (1977). The trial court did properly determine that the appeal had been abandoned and that it still had jurisdiction when the appealing party did nothing to perfect the appeal for nearly ninety days and during that time requested and participated in an evidentiary hearing in the trial court. McGinnis v. McGinnis, 44 N.C. App. 381 (1980).

The trial court cannot extend its jurisdiction by reserving decision

The trial court may not grant jurisdiction to itself by stating that it "reserves jurisdiction" to decide an issue; the notice of appeal ends the trial court's jurisdiction regardless of what it has said about reserving jurisdiction. McClure v. Cnty. of Jackson, 185 N.C. App. 462 (2007). The result is the same if the trial court says it is "deferring" an issue. *In re* Johnson, 212 N.C. App. 535 (2011). Nor does backdating orders *nunc pro tunc* to a date before the appeal make them valid. If the order was actually entered after appeal was taken, the court was without jurisdiction, regardless of its use of *nunc pro tunc*. McKyer v. McKyer, 223 N.C. App. 210, (2012) (unpublished). A *nunc pro tunc* order is supposed to be a correcting order only; it is to be used only to correct the record to reflect that a ruling was made earlier but defectively recorded. Rockingham Cnty. DSS *ex rel*. Walker v. Tate, 202 N.C. App. 747 (2010).

Examples of the application of *functus officio*

A sampling of cases applying the rule of *functus officio* includes:

> **Holding a trial**—Once the defendant had appealed to the state supreme court the trial court's refusal to remove the case to federal court, the trial court could not proceed to trial. The trial was void. Pruett v. Charlotte Power Co., 167 N.C. 598 (1914). Once the defendant had appealed the trial court's decision to move the trial to a different county,

the court could not proceed to holding the trial in the new county. The trial court had no jurisdiction once the appeal was filed, and the trial was a nullity. Patrick v. Hurdle, 7 N.C. App. 44 (1969).

Awarding attorney fees—Once the notice of appeal had been entered the trial court had no jurisdiction to consider an award of attorney fees. A trial court should delay the entry of judgment when it anticipates a motion for attorney fees, so that all matters can be addressed while the trial court still has jurisdiction. The trial court's order "reserving jurisdiction" to decide attorney fees was ineffective; a court cannot give itself jurisdiction. McClure v. Cnty. of Jackson, 185 N.C. App. 462 (2007).

The fact that the trial court has reserved for later determination a motion for attorney fees and costs does not make the appeal on the substantive issues in the case interlocutory. While further proceedings may be needed in the trial court on the attorney fees issue, the judgment on the merits of the case is considered final. Once the appellate court has decided the substantive appeal the case may be remanded to the trial court to resolve the outstanding fees question. Duncan v. Duncan, 366 N.C. 544 (2013).

Holding a party in contempt—Once a witness had appealed the trial court's order to appear for a deposition the trial court no longer had jurisdiction and could not hold that person in contempt for failing to comply with the order. Wilson v. Wilson, 124 N.C. App. 371 (1996).

Note, however, that statutes specify that appeal does not stop the trial court's use of contempt to enforce orders in cases of child support (G.S. 50-13.4(f)(9)), child custody (G.S. 50-13.3), and alimony (G.S. 50-16.7(j)).

Although an appeal stays contempt proceedings—except in those domestic cases just noted—it does not authorize a violation of the trial court order. If the order is upheld on appeal, upon remand the trial court may consider contempt for the violation that occurred during the appeal. Upton v. Upton, 14 N.C. App. 107 (1972).

Reducing an appeal bond—At the direction of the Court of Appeals the trial court set a $250,000 supersedeas bond for the husband's appeal of a divorce judgment. Once the husband appealed the amount of the bond the trial court had no jurisdiction to reconsider and reduce the bond to $25,000. Ross v. Ross, 194 N.C. App. 365 (2008).

Determining the amount due under a distributive order—Once notice of appeal was given the trial court had no jurisdiction to determine the amount due under an equitable distribution order providing for payments to be made over time. Romulus v. Romulus, 216 N.C. App. 28 (2011).

Deciding a motion to intervene—Once the defendant gave notice of appeal of the trial court's decision to not certify as a final judgment its order dismissing the plaintiffs for lack of standing, the court could not then consider the same parties' motion to intervene. An appellate decision on the appeal could have affected the trial court's decision on intervention; thus it was not a separate matter from the subject of the appeal. Bruggeman v. Meditrust Co., LLC, 165 N.C. App. 790 (2004).

Dismissing a petition for adoption—The trial court had no jurisdiction to dismiss an adoption petition after the petitioners appealed the court's decision that the father's consent was required. The error was harmless, however, because the Court of Appeals upheld the

decision that consent was required which had the same effect as dismissing the petition. *In re* Adoption of K.A.R., 205 N.C. App. 611 (2010).

Hearing a second bond forfeiture—Once the school board appealed the trial court's order denying forfeiture of the surety's bond the court had no jurisdiction to order forfeiture again after defendant was again called and failed to appear. Although the second forfeiture was for a new failure to appear, the forfeiture was for the same bond, the surety had posted only the single bond, and the issue of that bond was before the appellate court. State v. Cortez, 215 N.C. App. 576 (2011).

Enjoining enforcement of the order being appealed—Once the defendant appealed the trial court's decision to award custody to the plaintiff the court was without jurisdiction to issue an injunction requiring the custody to remain unchanged pending appeal. Although the statutes allow a trial court to use contempt to enforce a child custody order during appeal, the court could not enjoin the plaintiff from taking custody and leaving the child with the defendant during the appeal. The essence of the injunction was to alter the custody order, and the trial court had no jurisdiction to enter an order addressing the issue that was on appeal. Rosero v. Blake, 150 N.C. App. 250 (2002).

Effect of interlocutory appeals

Generally a party may appeal only a final order or judgment of the trial court, and may not appeal an interlocutory order. An interlocutory order is one that is not a final resolution of the case, leaving other matters still to be decided. Interlocutory orders that affect a substantial right may be appealed immediately, however. For example, a trial court's order resolving a discovery dispute is interlocutory and usually may not be appealed immediately because it does not affect a substantial right. The dissatisfied party must wait until final judgment in the case and then raise that discovery question on appeal along with other issues. On the other hand, the trial court's decision to not dismiss a case based on immunity usually is immediately appealable. The invocation of immunity is a substantial right, and the party is entitled to appeal if it is not recognized.

Trial court determination of whether the order is appealable—In applying the rule of *functus officio* the trial court sometimes will have to determine whether the appealing party actually has a right to appeal an interlocutory order and thereby take jurisdiction from the trial court. Although the appellate court may dismiss the appeal eventually, the trial court needs to make its own determination so it can decide whether to proceed during the unwarranted appeal. If the trial court determines that the appeal is of an interlocutory order which does not affect a substantial right, and therefore is not immediately appealable, the trial court may disregard the appeal and proceed to try the case while the interlocutory appeal is pending. Otherwise a party could paralyze the proceedings indefinitely by appealing orders that are not appealable. Veazey v. City of Durham, 231 N.C. 357 (1950).

Trial court error on whether a substantial right is affected—In some circumstances the trial court continues to have jurisdiction even if it has decided incorrectly that the appeal is interlocutory and does not affect a substantial right. If case law is not clear that the issue

on appeal affects a substantial right, and the trial court's determination that it does not affect a substantial right is reasonable under the current state of the law, the trial court's continued exercise of jurisdiction is valid even though its decision on the interlocutory appeal ultimately turns out to be wrong. RPR & Assocs. v. Univ. of N.C.-Chapel Hill, 153 N.C. App. 342 (2002).

In *RPR Associates* the defendant university moved to dismiss the case based on sovereign immunity. The trial court denied the motion and the university appealed but the trial court proceeded to trial after deciding that its decision on immunity was not immediately appealable. Although the appellate court held that the trial court was incorrect and that the denial of immunity was subject to immediate appeal, the trial court's decision was reasonable under the case law at the time and, consequently, the trial court had jurisdiction to try the case while the appeal was pending.

Recent decisions on interlocutory appeals—The most recent appellate decisions concerning this issue are almost all unpublished opinions, including:

1. *North Carolina State Bar v. Gilbert*, 176 N.C. App. 408 (2006) (unpublished)—The defendant in a State Bar disciplinary proceeding deliberately attempted to avoid a trial court decision by appealing a series of interlocutory orders. The trial court properly proceeded to trial after determining that the appeals were interlocutory and not immediately appealable.
2. *Capps v. NW Sign Industries of North Carolina, Inc.*, 185 N.C. App. 543 (2007) (unpublished)—The trial court retained jurisdiction upon determining that its decision to deny dismissal on the basis of a forum-selection clause was not immediately appealable. Although the supreme court eventually held that the forum-selection clause issue was appealable, that holding was not a foregone conclusion and the trial court retained jurisdiction to proceed with the case.
3. *In re Fifth Third Bank*, 213 N.C. App. 423 (2011) (unpublished)—The trial court's order allowing a deposition was a non-appealable interlocutory order concerning discovery and, therefore, the trial court retained jurisdiction to proceed in the case despite the appeal of that order.
4. *Fields v. City of Goldsboro*, 223 N.C. App. 210, (2012) (unpublished)—The trial court had jurisdiction to continue to trial after the defendant city appealed the denial of its motion to dismiss based on sovereign immunity. Although the law was well established that the plaintiff's failure to allege a waiver of immunity was fatal to the claim, and that thus the city was entitled to an interlocutory appeal of a decision affecting a substantial right, the city never perfected its appeal and did not seek a stay from the appellate court. Additionally, the city moved for summary judgment in the trial court and requested the case be calendared and failed to mention its appeal at the summary judgment hearing.