# Superior Court Authority After Appeal

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## Chapter 6. Stays on Appeal

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## § 6.01 The Many Types of Appellate Stays

The simplicity of the word "stay" belies the complexity of the concept. There are a number of nuances that have to be carefully considered and precisely explained when discussing the types of stays that can arise during the course of an appeal.

To begin, there are two very different meanings of the word "stay." First, there is the stay of further proceedings of the trial tribunal during the pendency of an appeal. Second, there is the stay of the operation of an order or judgment during the pendency of an appeal. The first type of stay relates to the power of the trial tribunal to continue to manage the litigation during the appeal. The second type of stay relates to the continued validity and enforceability of the orders and judgment entered by the trial tribunal during the appeal.

The two types of "stays" can be interrelated. For example, questions regarding the circumstances in which a trial tribunal has the authority to conduct additional proceedings regarding the enforcement or execution of the order or judgment being appealed can relate to both types of stays. Nevertheless, it is useful to analyze each type of stay separately.[2]

In discussing the continued validity and enforceability of trial tribunal orders and judgments during the pendency of an appeal, the statutes and rules often use two different terms with related, but distinct, meanings: (1) "enforcement" of an order or judgment and (2) "execution" on a judgment.[3] As

[2] *See* § 6.02 [Stays of Further Proceedings of the Trial Tribunal During the Appeal]; § 6.03 [Staying Operation of an Order or Judgment During Appeal].

[3] *See, e.g.*, N.C. R. Civ. P. 62(a) ("no *execution* shall issue upon a judgment nor shall proceedings be taken for its *enforcement*" during the 30-day automatic stay (emphasis added)); N.C. R. Civ. P. 62(b) (imposing a similar stay during the pendency of certain post-trial motions); N.C. R. Civ. P. 62(d) (allowing a stay of *execution* if the appellant complies with the applicable statute in Article 27 of Chapter 1 of the General

a general matter, the "enforcement" of an order or judgment takes the form of proceedings for contempt[4] or for injunctive relief,[5] while "execution" on a judgment indicates the set of post-judgment procedures that can be undertaken to collect on a money judgment or obtain the delivery of real or personal property as provided in a judgment.[6]

As more fully explored throughout this Chapter 6, there are a number of issues that can arise in pinpointing the stay or stays applicable in a given appeal.

## § 6.02 Stays of Further Proceedings of the Trial Tribunal During the Appeal

### [1] Jurisdiction, the *Functus Officio* Doctrine, and Section 1-294

#### [a] Generally

When an appeal is taken, the trial tribunal is generally *functus officio*, or without power, to conduct "further proceedings . . . upon the judgment [or order] appealed from, or upon the matter embraced therein."[7] In other words, an appeal divests the trial tribunal of jurisdiction over any matter related to the issues on appeal.

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Statutes); N.C. R. Civ. P. 62(g) (allowing a stay of enforcement of a Rule 54(b) certified judgment).

[4] *See, e.g.*, N.C. R. Civ. P. 37(b).

[5] *See, e.g.*, N.C. R. Civ. P. 65.

[6] N.C. Gen. Stat. Chapter 1, Article 28 [Execution].

[7] N.C. Gen. Stat. § 1-294.

*Functus officio* means "having performed his or her office."[8] A court that is *functus officio* lacks "further authority or legal competence because the duties and functions of the original commission have been fully accomplished."[9] "[W]hen a court is *functus officio*, it has completed its duties pending the decision of the appellate court."[10] The doctrine is based on the notion "that two courts cannot [ordinarily] have jurisdiction of the same case at the same time."[11] The rule also allows a party to obtain certain limited immediate relief—divestment of jurisdiction—from a trial tribunal in which the party believes it is being subjected to prejudicial orders based on errors of law.

The principle that an appeal divests the trial tribunal of jurisdiction over matters related to the issues on appeal is well-settled. The codification of that principle is found at section 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.[12]

The common law doctrine of *functus officio* appears to be co-extensive with the principle codified in section 1-294. Issues relating to the continued

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[8] FUNCTUS OFFICIO, Black's Law Dictionary (10th ed. 2014).

[9] RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill, 153 N.C. App. 342, 347, 570 S.E.2d 510, 513 (2002).

[10] RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill, 153 N.C. App. 342, 347, 570 S.E.2d 510, 513 (2002).

[11] Wiggins v. Bunch, 280 N.C. 106, 110, 184 S.E.2d 879, 881 (1971).

[12] N.C. Gen. Stat. § 1-294.

power of the trial tribunal to consider matters notwithstanding the pendency of the appeal begin with application of section 1-294, not the common law.

On its face, section 1-294 might appear to apply only when appeal is taken from a "judgment."[13] As is often true when the word "judgment" appears in statutes and rules relating to appeals,[14] however, the courts have consistently applied the statute to interlocutory orders as well.[15]

In fact, the effect of the section 1-294 stay is more significant when appeal is taken from an interlocutory order. After all, in many appeals from final judgments, a trial tribunal has nothing further to do anyway, making the section 1-294 stay superfluous. In an appeal from an interlocutory order, however, the scope of the stay can be quite significant, halting proceedings or even a trial that would otherwise have taken place in the absence of an appeal.[16]

### [b] Perfection of Appeal and Relation Back

[13] N.C. Gen. Stat. § 1-294.

[14] *See, e.g.*, § 5.04[2][b] [Determining When Judgment is "Entered"] (the appeal period applicable to "judgments" under Appellate Rule 3 applies equally to orders); § 3.03[3] [Final Judgments and Orders] (whether a particular written ruling is a "final judgment" under Civil Rule 58 does not depend on whether the ruling is titled "Judgment" or "Order").

[15] *See, e.g.*, Lowder v. All Star Mills, Inc., 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981) (applying section 1-294 stay to interlocutory orders); Quevedo-Woolf v. Overholser, No. COA17-1344, -- N.C. App. --, -- S.E.2d --, 2018 N.C. App. LEXIS (Sept. 18, 2018) (publication forthcoming) (same); Jenkins v. Wheeler, 72 N.C. App. 363, 365, 325 S.E.2d 4, 5 (1985) (interpolating the word "order" when quoting the statute).

[16] For a discussion regarding the scope of the section 1-294 stay, see § 6.02[3] [Trial Tribunal's Authority to Proceed Upon Matters Not Affected by the Judgment on Appeal].

On the face of section 1-294, the stay of further proceedings appears to take effect "[w]hen an appeal is perfected."[17] An appeal is not perfected until it is docketed—that is, entered on the docket of the appellate court.[18] An appeal is docketed when the record on appeal is filed and any required docketing fee is paid.[19] Thus, section 1-294 appears at first glance not to impose a stay of further proceedings until the record on appeal is filed—which often occurs several months after the filing of the notice of appeal.

However, the North Carolina Supreme Court has long held that the timely perfection of the appeal *relates back* to the filing of the notice of appeal.[20] In practice, the appellate courts routinely enforce a stay of further proceedings in the trial tribunal from the time of filing of a proper notice of appeal.[21]

### [c] Effect of Section 1-294 Stay

Unless an exception applies,[22] the section 1-294 stay deprives the trial tribunal of the power to conduct further proceedings or issue further orders related to any matter on appeal.

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[17] N.C. Gen. Stat. § 1-294.

[18] Pruett v. Charlotte Power Co., 167 N.C. 598, 599, 83 S.E. 830, 831 (1914).

[19] N.C. R. App. P. 12(b); Watson v. Watson, 118 N.C. App. 534, 539, 455 S.E.2d 866, 869 (1995). For more information on docketing an appeal, see § 9.01[4] [Docketing Fee and Appeal Bond; Docketing of Appeal].

[20] Lowder v. All Star Mills, Inc., 301 N.C. 561, 580–81, 273 S.E.2d 247, 258–59 (1981); Pruett v. Charlotte Power Co., 167 N.C. 598, 600, 83 S.E. 830, 831 (1914). .

[21] *See, e.g.*, Ferguson v. Ferguson, 238 N.C. App. 257, 267, 768 S.E.2d 30, 38 (2014); Romulus v. Romulus, 216 N.C. App. 28, 33, 715 S.E.2d 889, 892 (2011).

[22] *See* § 6.02[2][Exceptions to the *Functus Officio* Doctrine].

The stay also binds the parties, to the extent they might seek to engage in such "further proceedings."[23]

#### [d] Dissolution of Section 1-294 Stay

In general, the section 1-294 stay remains in effect until the case is returned to the trial tribunal by issuance of the mandate of the appellate court.[24]

### [2] Exceptions to the *Functus Officio* Doctrine

#### [a] Generally

The case law contains an oft-repeated summary of the circumstances in which the *functus officio* doctrine does not apply:

> The rule is subject to two exceptions and one qualification. The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1)

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[23] The term "further proceedings" is not defined in the statute or the case law. It remains an open question whether the parties could move forward with, say, a deposition relating to an issue on appeal. Regardless, if a party refuses to participate in the deposition or relevant portion of the deposition, the other party cannot seek to compel compliance. After all, any involvement by the trial tribunal in that dispute would constitute "further proceedings," which are stayed.

[24] *See* Joyner v. Joyner, 256 N.C. 588, 591, 124 S.E.2d 724, 726 (1962); *In re* J.F., 237 N.C. App. 218, 227, 766 S.E.2d 341, 348 (2014); Woodard v. N. C. Local Governmental Emp.'s Ret. Sys., 110 N.C. App. 83, 85, 428 S.E.2d 849, 850 (1993) ("An appeal removes a case from the trial court which is thereafter without jurisdiction to proceed on the matter until the case is returned by mandate of the appellate court."); Upton v. Upton, 14 N.C. App. 107, 109, 187 S.E.2d 387, 388 (1972).

Although there does not appear to be a case holding as much, the timely filing of a notice of appeal to the Supreme Court from a decision of the Court of Appeals—even if the notice of appeal is filed after the mandate issues from the Court of Appeals—probably acts to extend the section 1-294 stay until the appeal is concluded.

> during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned and thereby regain jurisdiction of the cause.[25]

This summary is no longer complete in modern appellate practice, however. There are many other exceptions and qualifications to the *functus officio* doctrine than those quoted. This chapter explores the many circumstances in which the trial tribunal retains authority to act during the pendency of an appeal.

> **Warning:** Slavish reliance on the well-worn "two exceptions and one qualification" summary of the *functus officio* doctrine should be avoided, as the doctrine is far more subtle than that maxim suggests.

### [b] Express Exceptions in the Appellate Rules

#### [i] Generally

The section 1-294 stay applies "unless otherwise provided by the Rules of Appellate Procedure."[26] This phrase was added to section 1-294 in 2015,[27] in anticipation of new provisions in the Appellate Rules that would clarify the ability of a trial tribunal to consider certain matters—like post-trial motions—after the filing of a notice of appeal.[28]

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[25] Bowen v. Hodge Motor Co., 292 N.C. 633, 635–36, 234 S.E.2d 748, 749 (1977) (internal quotations omitted).

[26] N.C. Gen. Stat. § 1-294.

[27] N.C. Sess. Law 2015-25 at § 2.

[28] N.C. Sess. Law 2015-25 [An Act . . . Clarifying the Scope of Stay on Proceedings When a Case Is on Appeal].

Even before the statute was revised, the Appellate Rules allowed the trial tribunal to perform certain discrete functions during the pendency of an appeal. Arguably, each of these functions is more ministerial in nature, and therefore did not qualify as "proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein."[29] In any event, the question is now academic with the addition of a clause expressly delegating to the Supreme Court the ability to define by Appellate Rule the trial tribunal's power during the pendency of an appeal.

#### [ii] Trial Tribunal's Authority to Dismiss Appeal for Failure of the Appellant to Take Timely Action

Appellate Rule 25(a) allows the trial tribunal, at any time "[p]rior to the filing of an appeal in an appellate court," to dismiss an appeal on motion of a party "[i]f after giving notice of appeal from any court, commission, or commissioner the appellant shall fail within the times allowed by these rules or by order of court to take any action required to present the appeal for decision."[30] For example, the trial tribunal may dismiss an appeal if the appellant fails to timely serve a proposed record on appeal[31] or fails to timely file a settled record on appeal.[32]

The trial tribunal's power to dismiss an appeal for failure to timely prosecute well-predates the Appellate Rules, and is often framed in terms of

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[29] N.C. Gen. Stat. § 1-294.

[30] N.C. R. App. P. 25(a).

[31] Brooks v. Jones, 121 N.C. App. 529, 530, 466 S.E.2d 344, 345 (1996).

[32] Cadle Co. v. Buyna, 185 N.C. App. 148, 152, 647 S.E.2d 461, 464 (2007); White v. Carver, 175 N.C. App. 136, 143, 622 S.E.2d 718, 723 (2005).

the lower court's authority to adjudge that the appellant has "abandoned" its appeal.[33] Appellate Rule 25(a) codifies that historical feature.[34]

On its face, Appellate Rule 25(a) appears only to empower a trial tribunal to dismiss an appeal if the appellant fails to take timely action *after* giving notice of appeal. The appellate courts, however, have repeatedly affirmed orders of trial tribunals dismissing appeals when the appellant fails to timely file *the notice of appeal itself*.[35]

For a full discussion regarding dismissal of an appeal by a trial tribunal under Appellate Rule 25, see § 28.05[3] [Limitations on the Scope of Trial Tribunal's Authority to Dismiss Appeal or Award Other Types of Sanctions].

#### [iii] Trial Tribunal's Authority to Consider Certain Motions for Extension of Time

The Appellate Rules enumerate two distinct situations in which the trial tribunal has the authority to extend the time to take an action in connection with the perfection of an appeal. First, the trial tribunal may extend the time for the person designated to prepare the transcript to produce such transcript.[36] Second, the trial tribunal may extend the time for service of the

[33] Avery v. Pritchard, 93 N.C. 266, 267 (1885).

[34] N.C. R. App. P. 25(a).

[35] E. Brooks Wilkins Family Med., P.A. v. WakeMed, 244 N.C. App. 567, 575, 784 S.E.2d 178, 184 (2016), *review denied,* 369 N.C. 524, 797 S.E.2d 18 (2017); Farm Credit Bank of Columbia v. Edwards, 121 N.C. App. 72, 75–76, 464 S.E.2d 305, 306–07 (1995) (mem. order); Herring v. Branch Banking & Trust Co., 108 N.C. App. 780, 782, 424 S.E.2d 925, 926 (1993); Saieed v. Bradshaw, 110 N.C. App. 855, 861, 431 S.E.2d 233, 236 (1993).

[36] N.C. R. App. P. 27(c)(1).

proposed record on appeal.[37] All other motions for extension must be directed to the appellate court to which appeal has been taken.[38]

For either motion, the trial tribunal may extend the time only *once*, and then, for no more than 30 days.[39] The motion may be made orally or in writing, may be made *ex parte*, and may be entered anywhere in the state.[40] The appellant must show good cause for the extension.[41]

For further discussion regarding extensions of time during the appellate process, see § 24.03 [Extending Time for Filing or Service].

#### [iv] Trial Tribunal's Authority to Settle the Record on Appeal

Parties to an appeal should cooperate in settling the record on appeal for presentation to the appellate court. Disputes over relevance or form do not require judicial intervention. Instead, the Appellate Rules largely take an "everything in" approach, deferring questions of relevance to be debated in the parties' respective appellate briefs.

However, certain disputes require the trial tribunal to find as a fact whether a particular document was actually part of the case below. In those situations, the trial tribunal retains the ability to determine that an item proposed for inclusion in the record should be excluded because it was never "filed, served, submitted for consideration, admitted, or made the subject of an

[37] N.C. R. App. P. 27(c)(1).

[38] N.C. R. App. P. 27(c)(2).

[39] N.C. R. App. P. 27(c)(1).

[40] N.C. R. App. P. 27(c)(1).

[41] N.C. R. App. P. 27(c)(1).

offer of proof, or that a statement or narration permitted by" the Appellate Rules "is not factually accurate."[42]

A full discussion of this process—called "judicial settlement of the record"—is set forth in § 8.08 [Settlement of Record on Appeal by Judicial Settlement Order].

#### [v] Trial Tribunal's Authority to Modify the Service Requirements of Appellate Rule 26

In cases with unusually large numbers of appellees or appellants proceeding separately, the trial tribunal has the authority to designate a subset of those parties as able to accept service for all parties. Further discussion of this process is set forth in § 24.02[1][c] [Service on Representative Parties When Ordered by Trial Tribunal].

### [c] Trial Tribunal's Authority to Enter a Written Order or Judgment After Order or Judgment Rendered Orally

The trial tribunal retains the authority to enter a *written* order or judgment after the order or judgment was rendered *orally*, notwithstanding the filing of a notice of appeal on the order or judgment rendered.[43]

### [d] Trial Tribunal's Limited Authority to Enforce Its Own Orders During Appeal

The trial tribunal generally does *not* have the authority to enforce its own orders during the pendency of a proper appeal from those orders, because

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[42] N.C. R. App. P. 11(c); N.C. R. App. P. 18(d)(3).

[43] Wolgin v. Wolgin, 217 N.C. App. 278, 281, 719 S.E.2d 196, 198 (2011); Hightower v. Hightower, 85 N.C. App. 333, 337, 354 S.E.2d 743, 745 (1987); Parrish v. Cole, 38 N.C. App. 691, 694, 248 S.E.2d 878, 880 (1978). For a discussion of the effectiveness of a notice of appeal filed after an order or judgment is rendered but before it is entered, see § 5.04[2][c] [Effect of Noticing Appeal Before Entry of Judgment].

such enforcement proceedings fall squarely within the meaning of "further proceedings in the court below upon the judgment appealed from."[44]

Thus, the filing of a notice of appeal stays contempt proceedings on an order or judgment until the validity of the order or judgment is determined by the appellate court.[45]

This rule may seem to allow an appellant to violate a trial tribunal's orders with impunity. But, as the Supreme Court has warned, "[o]ne who wilfully [sic] violates an order does so at his peril. If the order is upheld by the appellate court, the violation may be inquired into when the case is remanded to the superior court."[46] Moreover, a party can seek injunctive relief from the appropriate appellate court to bind an appellant who disregards an order on appeal. In practice, however, the appellate courts are not likely to issue such extraordinary relief in the course of an ordinary appeal.

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[44] N.C. Gen. Stat. § 1-294.

[45] *See* Joyner v. Joyner, 256 N.C. 588, 591, 124 S.E.2d 724, 727 (1962); Marshall v. Marshall, 233 N.C. App. 238, 757 S.E.2d 319, 2014 N.C. App. LEXIS 352 (2014) (unpublished); *see also* Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC, -- N.C. App.--, 794 S.E.2d 535, 541 (. 2016) (holding that this result is still good law notwithstanding the intervening enactment of the North Carolina Rules of Civil Procedure). *But see* SED Holdings, LLC v. 3 Star Props., LLC, -- N.C. App.--, 791 S.E.2d 914, 921 (2016) (suggesting in dicta that a trial tribunal that reasonably believes it has jurisdiction may conduct contempt proceedings and enter an order finding appellant in contempt for violating an injunction, even though the appellant had noticed appeal from the injunction); Plasman v. Decca Furniture (USA), Inc., -- N.C. App. --. 800 S.E.2d 761, 767–69 (2017) (similar), *review denied*, 812 S.E. 2d 849, 2018 N.C. LEXIS 342 (2018) (unpublished), *and cert. denied*, 813 S.E.2d 245, 2018 N.C. LEXIS 400 (2018) (unpublished).

[46] Joyner v. Joyner, 256 N.C. 588, 591, 124 S.E.2d 724, 727 (1962).

Other statutes override the section 1-294 stay and give the trial tribunal the power to enforce certain classes of orders on appeal.[47] For example, the trial tribunal maintains the authority to "suspend, modify, restore, or grant an *injunction* during the pendency of the appeal."[48] Likewise, an order for the periodic payment of alimony, for payment of child support, or pertaining to child custody "is enforceable in the trial court by proceedings for civil contempt" while the order is on appeal.[49] In addition, a "disposition order" entered in a juvenile action may be enforced during an appeal from the order.[50]

These statutory exceptions—allowing the trial tribunal to pursue contempt or other enforcement proceedings while an order is being challenged on appeal—represent a significant threat to the interests of appellants. After all, obtaining appellate relief from an erroneous order may take months or even years.

To counterbalance that risk, some of the statutes setting forth exceptions to section 1-294 expressly reiterate the power of the appellate court to issue a

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[47] *In re* R.T.W., 359 N.C. 539, 550, 614 S.E.2d 489, 496 (2005) (specific statutes addressing a trial tribunal's authority during the pendency of an appeal take precedence over the general stay provisions of section 1-294).

[48] N.C. R. Civ. P. 62(c) (emphasis added); *see also* § 6.02[2][j] [Trial Tribunal's Authority to Suspend, Modify, Restore, or Grant an Injunction].

[49] N.C. Gen. Stat. § 50-13.3(a); N.C. Gen. Stat. § 50-13.4(f)(9); N.C. Gen. Stat. § 50-16.7(j); *see also* Ruth v. Ruth, 158 N.C. App. 123, 126, 579 S.E.2d 909, 912 (2003); Guerrier v. Guerrier, 155 N.C. App. 154, 159, 574 S.E.2d 69, 72 (2002).

[50] N.C. Gen. Stat. § 7B-1003(a); *see also In re* K.L., 196 N.C. App. 272, 275-280, 280, 674 S.E.2d 789, 791-95 (2009).

stay of such further proceedings.[51] Of course, the appellate courts already have the power to stay such contempt proceedings by writ.[52]

### [e] Trial Tribunal's Authority to Correct Judgments *In Fieri*

A trial tribunal retains full authority to amend or set aside an order or judgment during the session in which the order or judgment was entered.[53] During the session, the order or judgment is said to be "*in fieri*," meaning that the legal proceeding resulting in the entry of the order or judgment "is pending or in the course of being completed."[54] The trial tribunal may hear further evidence in open court in the course of revisiting its order or judgment during the session.[55]

The filing of a notice of appeal from the order or judgment *does not* deprive the trial tribunal of its authority to modify or set aside the order or judgment.[56]

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[51] *See* N.C. Gen. Stat. § 50-13.3 to § 50-13.4; N.C. Gen. Stat. § 50-16.7 ("Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil contempt entered for [alimony, child support, or child custody] until the appeal is decided, if justice requires."); N.C. Gen. Stat. § 7B-1003(a) ("[T]he trial court may enforce the [juvenile disposition] order unless the trial court or an appellate court orders a stay.").

[52] *See* N.C. CONST. art. IV, § 12(1); N.C. Gen. Stat. § 7A-32(c); N.C. R. App. P. 23; Chapter 23 [Writs of Supersedeas].

[53] See Hopkins v. Hopkins, 268 N.C. 575, 576, 151 S.E.2d 11, 11–12 (1966) ("During a term of court a judgment is said to be within the breast of the court, and it may be changed at any time. It has been the settled rule for some time that any order or decree made was, during the term, *in fieri*, and that the court during the term could vacate or modify the same." (citation omitted)).

[54] *In fieri*, Black's Law Dictionary (10th ed. 2014).

[55] *E.g.*, State v. Godwin, 210 N.C. 447, 449, 187 S.E. 560, 561 (1936).

[56] State v. Davis, 58 N.C. App. 330, 332-33, 293 S.E.2d 658, 660 (1982).

The authority to amend a judgment *in fieri* extends only as long as the court remains in the same session. A session ends when court is adjourned *sine die*,[57] meaning "[w]ith no day being assigned (as for resumption of a meeting or hearing)."[58] In practice, North Carolina courts typically sit for business in one-week-long assignments.[59]

### [f] Trial Tribunal's Authority to Consider Civil Rule 52(b) Motions

A trial tribunal retains the authority to consider and rule upon a motion to amend findings, make additional findings, and amend the judgment accordingly under Civil Rule 52(b), notwithstanding the filing of a notice of appeal.[60] This exception to the *functus officio* rule is based on three considerations. First, a timely Rule 52(b) motion allows the trial tribunal to ensure that the factual issues are adequately presented to the appellate court, avoiding a possible remand for further findings.[61] Second, a Rule 52(b) motion must be made within 10 days of entry of judgment, mitigating any delay to the appellate process.[62] Third, this exception is recognized in the federal courts, which allow a similar motion under Rule 52(b) of the Federal Rules of Civil Procedure.[63]

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[57] State v. Jones, 27 N.C. App. 636, 639, 219 S.E.2d 793, 795 (1975).

[58] *Sine die*, Black's Law Dictionary (10th ed. 2014).

[59] State v. Sammartino, 120 N.C. App. 597, 599, 463 S.E.2d 307, 309 (1995).

[60] York v. Taylor, 79 N.C. App. 653, 654–55, 339 S.E.2d 830, 831 (1986); Parrish v. Cole, 38 N.C. App. 691, 693, 248 S.E.2d 878, 879 (1978).

[61] Parrish v. Cole, 38 N.C. App. 691, 694, 248 S.E.2d 878, 879 (1978).

[62] Parrish v. Cole, 38 N.C. App. 691, 694, 248 S.E.2d 878, 879 (1978).

[63] Fed. R. Civ. P. 52(b); *see also* Parrish v. Cole, 38 N.C. App. 691, 693–94, 248 S.E.2d 878, 879 (1978).

### [g] Trial Tribunal's Authority to Consider Civil Rule 59 Motions

A trial tribunal *may not* rule on a Civil Rule 59 motion filed on the same day as the notice of appeal or any time thereafter.[64] Nor may the trial tribunal rule on a Civil Rule 59 motion filed *before* the notice of appeal.[65]

In contrast, the federal system *does* allow a federal district court to consider a pending motion under Rule 59 of the Federal Rules of Civil Procedure even after a notice of appeal is filed.[66]

> **Warning**: Proposals to grant certain authority to the trial tribunal to rule on Civil Rule 59 motions during an appeal have been submitted to the Supreme Court for consideration. Practitioners should therefore monitor this area closely for future developments.
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> **Strategic Point**: In many circumstances, it would be beneficial for the trial tribunal to rule on a pending Civil Rule 59 motion notwithstanding the pendency of an appeal. Unless the Appellate Rules are amended to provide a different procedure, parties should consider utilizing the "indicative ruling" procedures originally applied in the context of pending Civil Rule 60(b) motions.[67] ].

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[64] Am. Aluminum Prods., Inc. v. Pollard, 97 N.C. App. 541, 545, 389 S.E.2d 589, 592 (1990) (trial tribunal without authority to consider motion for new trial filed after the notice of appeal); Seafare Corp. v. Trenor Corp., 88 N.C. App. 404, 411, 363 S.E.2d 643, 649 (1988) (trial tribunal without authority to consider motion for new trial filed on the same day as the notice of appeal), *writ denied*, 321 N.C. 745, 366 S.E.2d 871 (1988).

[65] Lovallo v. Sabato, 216 N.C. App. 281, 285, 715 S.E.2d 909, 912 (2011).

[66] Fed. R. Civ. P. 59; Fed. R. App. P. 4(a)(4)(B).

[67] *See, e.g.*, Order in *Masuki v. Roanoke Rapids City Council*, No. P15-992 (N.C. Ct. App. Jan. 6, 2016) (https://appellate.nccourts.org/orders.php?t=&court=2&id=312454&pdf=1&a=0&docket=1&dev=1); Order in *King v. Huizar*, No. P18-662 (N.C. Ct. App. Sept. 26, 2018)

### [h] Trial Tribunal's Authority to Correct Clerical Mistakes Under Civil Rule 60(a)

The trial tribunal retains the authority to consider and rule upon a motion to correct a clerical mistake under Civil Rule 60(a), notwithstanding the filing of a notice of appeal, at any time before the appeal is docketed.[68]

### [i] Trial Tribunal's Authority to Consider Civil Rule 60(b) Motions for Relief From Judgment

The trial tribunal retains the authority to consider and rule upon a motion for relief from a judgment or order under Civil Rule 60(b) filed *before* or *contemporaneously with* the filing of a notice of appeal.[69] However, the trial tribunal does *not* have jurisdiction to rule on a motion filed under Civil Rule 60(b) *after* the filing of the notice of appeal.[70]

This rule can pose obstacles to the effectiveness of the appeal. If, for example a party discovers new evidence,[71] the trial tribunal should be permitted to consider whether that new evidence merits relief from the

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(https://appellate.nccourts.org/orders.php?t=&court=2&id=352002&pdf=1&a=0&docket=1&dev=1). For a full discussion of those procedures, see § 3.03[14][e][ii] [Orders on Motion for Relief from a Final Judgment (Civil Rule 60(b)) and *Bell v. Martin*].

[68] Sink v. Easter, 288 N.C. 183, 199, 217 S.E.2d 532, 542 (1975).

[69] Town of Leland v. HWW, LLC, 725 S.E.2d 1, 4 (N.C. Ct. App. 2010) (holding that the trial tribunal was able to consider—and should have considered—a Civil Rule 60(b) motion filed *before* the notice of appeal); York v. Taylor, 79 N.C. App. 653, 655, 339 S.E.2d 830, 831 (1986) (holding that the trial tribunal was able to consider a Civil Rule 60(b) motion filed *contemporaneously* with the notice of appeal).

[70] York v. Taylor, 79 N.C. App. 653, 655, 339 S.E.2d 830, 831 (1986) (holding, however, that the trial tribunal was able to consider a Civil Rule 60(b) motion filed *contemporaneously* with the notice of appeal).

[71] N.C. R. Civ. P. 60(b)(2).

judgment in the first instance—not the appellate court. Likewise, it would be wasteful for the parties to be required to wait until the first appeal runs its course before the new evidence can be presented to the trial tribunal as part of a Rule 60(b) motion.

To remedy this problem, the trial tribunal *does* retain the authority—when authorized by an appellate court—to issue an "indicative ruling" as to how it would have disposed of a Civil Rule 60(b) motion for relief from a judgment absent a pending appeal.[72] A full discussion of the procedures for consideration of Rule 60(b) motions filed during the pendency of an appeal are set forth in § 3.03[14][e][ii] [Orders on Motion for Relief from a Final Judgment (Civil Rule 60(b)) and *Bell v. Martin*].

> **Warning**: Proposals to grant certain authority to the trial tribunal to rule on Civil Rule 60(b) motions during an appeal have been submitted to the Supreme Court for consideration. Practitioners should therefore monitor this area closely for future developments.

### [j] Trial Tribunal's Authority to Suspend, Modify, Restore, or Grant an Injunction

Under Civil Rule 62(c), the trial tribunal retains plenary injunctive authority notwithstanding an appeal from an order relating to an earlier-entered injunction:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such

[72] Bell v. Martin, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980).

> terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.[73]

Civil Rule 62(c) *does not* give the trial tribunal the authority to *enforce* an injunction with contempt proceedings.[74] The powerlessness of a trial tribunal to enforce its own injunctions is somewhat controversial within the bench and bar.[75] Indeed, the potential for abuse that divestment creates likely has been responsible for judicial efforts to chip away at the doctrine. For example, there has been a resurgence of the "reasonableness" doctrine that was initially set forth in *RPR & Associates*.[76] Under *RPR & Associates*, a trial tribunal may enforce its own orders notwithstanding the section 1-294 stay as long as the trial judge reasonably believes that the appeal was taken from a non-appealable interlocutory order.[77] In at least two recent decisions, the Court of Appeals has held that a trial tribunal acted properly by enforcing its own injunctions in such a context.[78]

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[73] N.C. R. Civ. P. 62(c); *see also* Songwooyarn Trading Co. v. Sox Eleven, Inc., 219 N.C. App. 213, 217, 723 S.E.2d 569, 572 (2012).

[74] Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC, -- N.C. App. --. 794 S.E.2d 535, 536 (2016); *see* § 6.02[2][d] [Trial Tribunal's Authority to Enforce Its Own Orders During Appeal].

[75] State ex rel. Jacobs v. Sherard, 39 N.C. App. 464, 466–67, 250 S.E.2d 923, 925 (1979) ("If the defendants' contentions are correct, a preliminary injunction would be a worthless and useless document. Once granted, the party or parties against whom it was directed could give notice of appeal and continue with the proscribed conduct. This is not our law.").

[76] RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill, 153 N.C. App. 342, 347, 570 S.E.2d 510, 513 (2002).

[77] *See* § 6.02[4][b] [Effect of Reasonable, but Erroneous, Decision by Trial Tribunal to Disregard Notice of Appeal—*RPR & Associates*].

[78] *But see* SED Holdings, LLC v. 3 Star Props., LLC, -- N.C. App. -- 791 S.E.2d 914, 921 (2016) (suggesting in dicta that a trial tribunal that reasonably believes it has jurisdiction may conduct contempt proceedings and enter an order finding appellant in contempt for violating an injunction, even though the appellant had noticed appeal from the injunction); Plasman v. Decca Furniture (USA), Inc., -- N.C. App. --, 800

In short, it is fair to say that the stay of enforcement of injunctions is often narrowly construed.[79]

### [3] Trial Tribunal's Authority to Proceed Upon Matters Not Affected by the Judgment on Appeal

Under section 1-294, the trial tribunal retains the authority to "proceed upon any other matter included in the action and not affected by the judgment appealed from."[80] That is, the trial tribunal may consider a matter that does not concern the same subject matter as an issue on appeal, and that would be unaffected by the outcome of the appeal.[81]

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S.E.2d 761, 767–69 (2017) (similar), *review denied*, 812 S.E. 2d 849, 2018 N.C. LEXIS 342 (2018) (unpublished), *and cert. denied*, 813 S.E.2d 245, 2018 N.C. LEXIS 400 (2018) (unpublished).

[79] The section 1-294 stay only bars proceedings on the order appealed from and any matter embraced therein. N.C. Gen. Stat. § 1-294. Thus, if a party does not appeal from an injunction, the injunction is not stayed. For example, when a preliminary injunction was entered and, later, an appeal was taken from a subsequent interlocutory order, the trial tribunal retained the authority to enforce its injunction with contempt proceedings notwithstanding the pendency of the appeal. State ex rel. Jacobs v. Sherard, 39 N.C. App. 464, 466–67, 250 S.E.2d 923, 925 (1979); *see* § 6.02[3] [Trial Tribunal's Authority to Proceed Upon Matters Not Affected by the Judgment on Appeal].

[80] N.C. Gen. Stat. § 1-294.

[81] Morgan v. Nash Cty., 224 N.C. App. 60, 76–77, 735 S.E.2d 615, 626 (2012) ("Once plaintiffs gave notice of appeal from the 30 June 2011 order, the trial court was divested of jurisdiction over all matters included in the action [except those] that were 'not affected by the judgment appealed from.'" (alteration to correct typographical error)); *see also* Lowder v. Mills, Inc., 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981) ("It is also well settled that an appeal, even of an interlocutory order, 'operates as a stay of all proceedings in the [lower court] relating to issues included therein until the matters are determined in the [appellate court].'" (quoting Veazey v. City of Durham, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950))).

**Examples:**

- In will-caveat proceedings, the trial court may enter an award of costs or attorney's fees after the filing of notice of appeal because the award is not contingent on which party prevails on the underlying substantive order on appeal.[82]
- The Industrial Commission retained jurisdiction to enforce a mediated settlement agreement resolving a dispute that was then on appeal to the Court of Appeals.[83]
- In the family-law context, an immediate appeal from an order finally adjudicating a claim for absolute divorce, divorce from bed and board, child custody, child support, alimony, or equitable distribution does not deprive the trial tribunal of jurisdiction over any other claims pending in the same action.[84]
- A trial tribunal may proceed with trial during the pendency of an appeal of an order sanctioning the attorney for one of the parties.[85]

On the other hand, the courts will closely examine whether any further proceedings before the trial tribunal would touch upon the issues being presented by the appeal. Thus, for example, while an appeal from an order denying a motion to dismiss was pending, the trial tribunal could not consider

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[82] *In re* Will of Dunn, 129 N.C. App. 321, 329, 500 S.E.2d 99, 104–05 (1998). *Contrast with* Swink v. Weintraub, 195 N.C. App. 133, 159–60, 672 S.E.2d 53, 70 (2009) (collecting cases holding that the trial tribunal does not have the authority to issue an award of attorney's fees based on who was the "prevailing party" on the merits, while merits decision is on appeal).

[83] Shepherd v. Nat'l Fed'n, 210 N.C. App. 733, 739, 709 S.E.2d 397, 401 (2011).

[84] N.C. Gen. Stat. § 50-19.1; *see also* McKyer v. McKyer, 179 N.C. App. 132, 140, 632 S.E.2d 828, 833 (2006).

[85] Providian Nat. Bank v. Bryant, 155 N.C. App. 777, 574 S.E.2d 715, Lexis (2003) (unpublished).

a party's motion for summary judgment raising the same underlying legal issues.[86]

There is relatively little case law exploring the proper *scope* of the section 1-294 stay. It may be helpful to classify section 1-294 stays as falling generally into four categories:

1. **Stay of all proceedings.** Many appealable interlocutory orders address issues so fundamental that all further proceedings will normally be stayed while such an order is being appealed.[87]

2. **Stay of all proceedings except those related to collateral issues unresolved by the final judgment.** A final judgment, by definition, resolves all claims against all parties.[88] Still, even a final judgment sometimes leaves certain "collateral issues" unresolved.[89] An appeal from such a final judgment "embraces" the entire case other than those collateral issues. Likewise, appeals from some interlocutory orders are nearly as sweeping in scope.[90] In both instances, all further proceedings must be stayed

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[86] Woodard v. N. Carolina Local Governmental Employees' Ret. Sys., 110 N.C. App. 83, 86, 428 S.E.2d 849, 851 (1993).

[87] For example, an order denying a motion to dismiss for lack of personal jurisdiction due to the absence of constitutionally required "minimum contacts" is immediately appealable. A.R. Haire, Inc. v. St. Denis, 176 N.C. App. 255, 257-58, 625 S.E.2d 894, 898 (2006); N.C. Gen. Stat. § 1-277(b); *see* § 3.03[9] [Adverse Rulings Regarding Jurisdiction Over Person]. Because the appellant's argument on appeal is that the trial tribunal has no authority to proceed against that appellant, *any* further proceedings by the trial tribunal would implicate the very issue on appeal. Thus, all proceedings as to the appellant should normally be stayed during such an appeal.

[88] Duncan v. Duncan, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013).

[89] Duncan v. Duncan, 366 N.C. 544, 546, 742 S.E.2d 799, 801 (2013); *see* § 3.03[3] [Final Judgments and Orders].

[90] For example, an interlocutory order that resolves all claims against *some* parties might be immediately appealable because it creates the possibility of inconsistent verdicts in two or more trials. *See, e.g.*, Callanan v. Walsh, 228 N.C. App. 18, 21, 743 S.E.2d 686, 689 (2013); Bernick v. Jurden, 306 N.C. 435, 439, 293 S.E.2d 405, 408

except proceedings on any collateral issue involving questions not "embraced within" the appeal.[91]

3. **Stay of some proceedings**. Some interlocutory orders affect a right substantial enough to warrant an immediate appeal, but not so fundamental that it challenges the trial tribunal's ability to proceed with other aspects of the litigation. In such situations, the scope of the stay may be limited to preventing further litigation relating to the narrow issue on appeal.[92]

4. **Stay only of enforcement of the order on appeal.** A narrow class of interlocutory orders concern issues that are completely ancillary to the main litigation. For example, an appeal from an order imposing sanctions on counsel would probably not stay *any*

(1982). The very basis of such an immediate appeal is that there should only be one trial; thus, further proceedings in the trial court on the remaining claim(s) should be stayed.

[91] *Compare* Ponder v. Ponder, 247 N.C. App. 301, 308-09, 786 S.E.2d 44, 49-50 (2016) (trial tribunal *may not* consider motion for attorneys' fees because the award depended on whether the appellee's status as a prevailing party on the merits was upheld on appeal) *with In re* Will of Dunn, 129 N.C. App. 321, 329, 500 S.E.2d 99, 104–05 (1998) (trial tribunal *may* consider motion for attorneys' fees because the awarded did not depend on the outcome of the appeal on the merits).

[92] For example, an interlocutory order requiring the disclosure of a document that may be protected by the attorney-client privilege may be immediately appealable. *See, e.g.*, *In re* Ernst & Young, LLP, 191 N.C. App. 668, 673, 663 S.E.2d 921, 925 (2008). During the pendency of such an appeal, the trial tribunal could probably move forward with any portion of the litigation in which the allegedly privileged information is not critical. On the other hand, the trial tribunal could not hold a party in contempt for failing to comply with the disclosure order on appeal, nor would it be appropriate for the appellee to simply seek disclosure of the privileged information during a deposition.

> other proceedings in the trial tribunal other than further efforts to enforce the sanctions order itself.[93]

From time to time, a trial tribunal may be required to determine the proper scope of a section 1-294 stay. For example, a party may attempt to take further action in the litigation over the objection of another party who contends that the action falls within the section 1-294 stay. In such an instance, one party might file a motion to compel while another might file a "motion to recognize the automatic stay under section 1-294."[94] In ruling on either motion, the trial tribunal would necessarily decide the scope of the stay.

It is unclear which party bears the burden of persuasion when the trial tribunal considers the scope of the section 1-294 stay. In other areas of the law, the general rule is that a party seeking to take advantage of a statutory *exception* bears the burden of proving that such exception applies.[95] By that logic, whenever a stay under section 1-294 attaches, the party seeking to "proceed upon any other matter included in the action" should bear the burden of showing that such action is "not affected by the judgment appealed from."[96]

Finally, a party aggrieved by a trial tribunal's *failure to recognize* the stay in whole or in part may seek relief by filing a petition for writ of supersedeas with the appropriate appellate court.[97] Conversely, it is less clear whether a party aggrieved by a trial tribunal's *recognition* of a stay in whole or

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[93] Hummer v. Pulley, Watson, King & Lischer, P.A., 140 N.C. App. 270, 277, 536 S.E.2d 349, 353 (2000).

[94] *See* § 6.02[5][a] [Asking the Trial Tribunal to Recognize a Mandatory Stay of Further Proceedings].

[95] Mallard v. F.M. Bohannon, Inc., 220 N.C. 536, ___, 18 S.E.2d 189, 193 (1942).

[96] N.C. Gen. Stat. § 1-294.

[97] *See* N.C. R. App. P. 23; § 6.02[5][c] [Asking the Appellate Court to Stay Further Proceedings by Filing a Petition for Writ of Supersedeas]; Chapter 23.

in part can seek appellate relief, especially when the trial tribunal may have exercised its discretion in awarding the stay.[98]

### [4] Trial Tribunal's Authority to Disregard Improper Notice of Appeal

#### [a] Generally

The trial tribunal *does not* have the authority to *dismiss* a pending appeal on the ground that the appeal was taken from an interlocutory order not subject to immediate appellate review.[99] For example, a trial tribunal may not dismiss an interlocutory appeal even when it is clear that the order for which review is sought does not affect a substantial right.[100]

On the other hand, the trial tribunal *does* have the power to *disregard* a notice of appeal that the trial tribunal deems to have been improperly filed to seek review of an interlocutory order not subject to immediate appeal.[101] A litigant cannot deprive the trial tribunal of jurisdiction to proceed with a case by filing a notice of appeal from a nonappealable interlocutory order.[102]

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[98] See § 6.03[5] [Trial Tribunal's Authority to Issue Discretionary Stay].

[99] Estrada v. Jaques, 70 N.C. App. 627, 639–40, 321 S.E.2d 240, 248–49 (1984); *see also* Veazey v. City of Durham, 231 N.C. 357, 365, 57 S.E.2d 377, 384 (1950) ("[A] Superior Court judge can neither allow nor refuse an appeal.").

[100] Estrada v. Jaques, 70 N.C. App. 627, 639–40, 321 S.E.2d 240, 248–49 (1984).

[101] Veazey v. City of Durham, 231 N.C. 357, 364, 57 S.E.2d 377, 382–83 (1950); *see also* Carleton v. Byers, 71 N.C. 331, 335 (1874) ("[W]hen an appeal is taken as in this case, from an interlocutory order from which no appeal is allowed by the Code, which is not upon any matter of law, and which affects no substantial right of the parties, it is the duty of the Judge to proceed as if no such appeal had been taken.").

[102] Veazey v. City of Durham, 231 N.C. 357, 364, 57 S.E.2d 377, 382–83 (1950) (noting that a contrary rule would allow a party to "paralyze the administration of justice . . . by the simple expedient of doing what the law does not allow him to do, i.e., taking an appeal from an order which is not appealable").

Instead, a notice of appeal filed from a nonappealable interlocutory order is a legal nullity.[103]

If an appellee contends that an appeal was improperly taken, the appellee may attempt to move forward with proceedings in the trial tribunal. If those attempts are met with opposition, the appellee could seek relief in the trial tribunal in the form of a motion to compel, or a motion to disregard appeal, or some similar motion.

### [b] Effect of Reasonable, but Erroneous, Decision by Trial Tribunal to Disregard Notice of Appeal—*RPR & Associates*

The longstanding principle that a trial tribunal may disregard an improper notice of appeal necessarily allows *trial* tribunals to analyze the underlying questions of *appellate* jurisdiction. This tension is exacerbated by the case-by-case nature of North Carolina's substantial-right jurisprudence.[104]

Thus, it is not surprising that a trial tribunal on occasion will (1) disregard a notice of appeal, believing it to be improper, (2) continue with further proceedings, and (3) have the appellate court later find that the interlocutory appeal was, in fact, properly taken.

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[103] Veazey v. City of Durham, 231 N.C. 357, 365, 57 S.E.2d 377, 384 (1950).

[104] *See* Waters v. Qualified Pers., Inc., 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978) (noting that "[i]t is usually necessary to resolve the [substantial-right] 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"); *id.* ("[T]he 'substantial right' test . . . is more easily stated than applied."); Estrada v. Jaques, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984) *(*"No hard and fast rules exist for determining which appeals affect a substantial right."); *see also* § 3.03[6] [Orders Affecting a Substantial Right].

The question then arises: what is the validity of those further proceedings in the trial tribunal? That is, what effect should be given to any trial tribunal orders entered after the notice of appeal was filed?

If section 1-294 and the *functus officio* doctrine are matters of *jurisdiction*, the answer should be simple: all such further proceedings and orders are *void ab initio* because the trial court conducted and entered them without jurisdiction. After all, "[i]t is fundamental that a court cannot create jurisdiction where none exists."[105]

Perhaps surprisingly, this is not the prevailing rule. Instead, the Court of Appeals has developed a "reasonableness" test, most notably in *RPR & Associates, Inc. v. University of North Carolina-Chapel Hill*, 153 N.C. App. 342, 570 S.E.2d 510 (2002).

Under *RPR & Associates and its progeny*, when a trial tribunal reasonably concludes that a notice of appeal was improperly filed from an interlocutory order not subject to immediate appeal, the trial tribunal does not err by continuing to exercise jurisdiction over the case[106]. Instead, any further proceedings or orders entered are valid even if the appellate court ultimately holds that the interlocutory order is subject to immediate review.[107]

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[105] Balawejder v. Balawejder, 216 N.C. App. 301, 320, 721 S.E.2d 679, 690 (2011).

[106] RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill, 153 N.C. App. 342, 348–49, 570 S.E.2d 510, 514–15 (2002).

[107] Plasman v. Decca Furniture (USA), Inc., -- N.C. App. --, 800 S.E.2d 761, 768–69 (2017), *review denied*, 812 S.E. 2d 849, 2018 N.C. LEXIS 342 (2018) (unpublished), *and cert. denied*, 813 S.E.2d 245, 2018 N.C. LEXIS 400 (2018) (unpublished); SED Holdings, LLC v. 3 Star Props., LLC, -- N.C. App. --, 791 S.E.2d 914, 920 (2016); RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill, 153 N.C. App. 342, 348–49, 570 S.E.2d 510, 514–15 (2002). *But see* Rutherford Plantation, LLC v. Challenge Golf Grp. of the Carolinas, LLC, 233 N.C. App. 239, 758 S.E.2d 707, 2014 N.C. App. LEXIS 341 (2014) (unpublished) (Table) (vacating orders entered after notice of appeal was taken from appealable orders, without conducting a reasonableness analysis or citing to *RPR* or its progeny).

In assessing whether a trial tribunal's decision was "reasonable," the appellate courts examine whether the law was unsettled regarding the right to immediately appeal the order in question;[108] whether the appellate courts denied an appellant's petition for writ of supersedeas seeking a stay of proceedings in the trial tribunal;[109] and whether the appellant was prejudiced by the continued litigation during the pendency of the appeal.[110]

Litigants have struggled to reconcile the *RPR & Associates* line of cases with the doctrine of *functus officio* and section 1-294. One potential harmonizing theory is that section 1-294 is not a *jurisdictional* statute, but is rather a *gatekeeper* statute. Indeed, section 1-294 does not speak of trial tribunal *jurisdiction* during an appeal, but rather which matters in the trial tribunal are *stayed* and which are not during an appeal. In other words, section 1-294 could be read as providing direction as to which court—trial or appellate—should proceed with a given matter during the pendency of an appeal *as a prudential matter*. If the statute serves only as a gatekeeper or traffic direction function, a reasonable error by the trial tribunal in considering

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[108] *See* Plasman v. Decca Furniture (USA), Inc., -- N.C. App. --, 800 S.E.2d 761, xx (2017), *review denied*, 812 S.E. 2d 849, 2018 N.C. LEXIS 342 (2018) (unpublished), *and cert. denied*, 813 S.E.2d 245, 2018 N.C. LEXIS 400 (2018) (unpublished); SED Holdings, LLC v. 3 Star Props., LLC, -- N.C. App. --, 791 S.E.2d 914, 920 (2016); RPR & Assocs., Inc. v. Univ. of N. C.-Chapel Hill, 153 N.C. App. 342, 348–49, 570 S.E.2d 510, 514–15 (2002).

[109] RPR & Assocs., Inc. v. Univ. of N. C.-Chapel Hill, 153 N.C. App. 342, 348, 570 S.E.2d 510, 514 (2002).

[110] Plasman v. Decca Furniture (USA), Inc., xx N.C. App. xx, 800 S.E.2d 761, 768–69 (2017), *review denied*, 812 S.E. 2d 849, 2018 N.C. LEXIS 342 (2018) (unpublished), *and cert. denied*, 813 S.E.2d 245, 2018 N.C. LEXIS 400 (2018) (unpublished); SED Holdings, LLC v. 3 Star Props, LLC, -- N.C. App. --, 791 S.E.2d 914, 920–21 (2016); RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill, 153 N.C. App. 342, 348–49, 570 S.E.2d 510, 514–15 (2002).

a matter that should have been considered at the appellate level is not a mistake of jurisdictional provenance.[111]

> **Strategic Point:** If an appellee believes an appeal has been improperly taken from an interlocutory order that clearly is not immediately appealable, the appellee should consider asking the trial tribunal to move forward with the proceedings as though no appeal had been taken. On the other hand, when the right to appellate review is reasonably clear or debatable, a party should carefully consider the potential waste of resources that might arise if the trial tribunal does move forward, only to later be found to have been unreasonably incorrect.

### [5] Entry of Stay of Further Proceedings

#### [a] Asking the Trial Tribunal to Recognize a Mandatory Stay of Further Proceedings

A section 1-294 stay is self-executing. When an appeal has been properly taken from an appealable order, further proceedings upon the order appealed from or the matter embraced therein are automatically stayed.

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[111] To be sure, the case law often speaks of section 1-294 in jurisdictional terms. *See, e.g.*, In re M.I.W., 365 N.C. 374, 377, 722 S.E.2d 469, 472 (2012) (referring to statutes like section 1-294 as placing limits "on the possession and exercise of jurisdiction by the trial court while an appeal is pending"). In most Supreme Court cases on point, though, the word "jurisdiction" can be read as meaning "forum" or "docket," as opposed to meaning "subject-matter jurisdiction"—the fundamental authority to consider the matter. *See, e.g.*, State ex rel. Utilities Comm'n v. Edmisten, 291 N.C. 361, 365, 230 S.E.2d 671, 674 (1976) ("[A]n appeal takes the case out of the jurisdiction of the tribunal from which the appeal is taken and this tribunal is, pending appeal, Functus officio."); Wiggins v. Bunch, 280 N.C. 106, 108, 184 S.E.2d 879, 880 (1971) ("For many years it has been recognized that as a general rule an appeal takes the case out of the jurisdiction of the trial court.").

From time to time, however, an appellee will attempt to proceed with the litigation in the trial tribunal based on a lack of familiarity with section 1-294, a reasonable belief that the order was not subject to immediate appeal, or a contention that further litigation is not affected by the order from which appeal has been taken. In those situations, an appellant may ask the trial tribunal to enter an order recognizing the stay. To do so, the appellant might file a "motion to recognize automatic stay under section 1-294" with the trial tribunal.

> **Strategic Point:** Because further appellate review may eventually be sought in the Supreme Court, consider requesting that the trial tribunal order state that the stay will remain in effect until all avenues of appellate review have been exhausted.

### [b] Asking the Trial Tribunal to Issue a Discretionary Stay of Further Proceedings

The trial tribunal has the authority to issue an order staying some or all aspects of the trial-tribunal litigation during the pendency of an appeal.[112] If such a stay order is appealable under the circumstances of a particular case, it is reviewed on appeal under an abuse-of-discretion standard.[113]

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[112] The source of this power is unclear. None of the rules and statutes relating to stays explicitly give a trial tribunal discretionary authority to stay further proceedings. *See, e.g.*, N.C. R. Civ. P. 62(d) (allowing the trial tribunal to recognize a stay of *execution on a judgment* under certain statutes); N.C. R. App. P. 8(a) (allowing the trial tribunal to stay *execution or enforcement of an order or judgment* under certain circumstances); *see also* § 6.02[3] [Trial Tribunal's Authority to Proceed Upon Matters Not Affected by the Judgment on Appeal] (classifying stays into four categories, ranging from a mere stay of enforcement of an order or judgment to a complete stay of all proceedings). Nonetheless, discretionary stays are common and are probably stem from the idea that a trial tribunal has inherent authority to manage its own docket.

[113] Cinoman v. Univ. of N.C., 234 N.C. App. 481, 484, 764 S.E.2d 619, 622 (2014).

**Strategic Point:** An appellant filing a motion to recognize the automatic stay under section 1-294 should consider including an alternative motion to stay proceedings in the discretion of the trial-tribunal.

#### [c] Asking the Appellate Court to Stay Further Proceedings by Filing a Petition for Writ of Supersedeas

When a trial tribunal has refused to recognize a section 1-294 automatic stay or declined to stay further proceedings in its discretion, a party may ask the appropriate appellate court to stay further proceedings by filing a petition for writ of supersedeas and motion for temporary stay under Appellate Rule 23.[114] Although Appellate Rule 23 expressly focuses on the availability of a writ of supersedeas "to stay the execution or enforcement"[115] of an order or judgment, the appellate courts also have the authority to issue the writ to stay any other further proceedings.[116]

## § 6.03 Staying Operation of an Order or Judgment During Appeal

### [1] Order on Appeal Remains in Effect During Appeal

#### [a] In Most Instances, Noticing an Appeal Will Not Stay the Effect of the Order or Judgment During the Appeal

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[114] N.C. R. App. P. 23.

[115] N.C. R. App. P. 23(a)(1).

[116] *See* N.C. CONST. art. IV, §§ 12(1)–12(2); N.C. Gen. Stat. § 7A-32(c); N.C. R. Civ. P. 62(f); Ponder v. Joslin, 262 N.C. 496, 499, 138 S.E.2d 143, 146 (1964) (granting petition for writ of supersedeas and staying all further proceedings in the trial tribunal); § 3.01[1] [Constitutional Basis] & Chapter 23.

The filing of a notice of appeal generally *does not* automatically stay the effect of the order or judgment that is the subject of the appeal.[117] To be sure, *enforcement* proceedings in the trial tribunal—such as proceedings for contempt—are typically stayed by a proper appeal,[118] but that is not to say that the order is of no effect or is vacated by the appeal.

Instead, the order generally can be *executed* on until stayed.[119] Moreover even when *enforcement* proceedings are delayed until after the appeal has run its course, an enforcement stay is often only temporary.[120]

> **Exceptions**: There are certain statutory exceptions. An administrative judgment affirming the award of a certificate of need is automatically stayed by the filing of a notice of appeal, and remains stayed until the appeal is finally concluded.[121]

### [b] Effect of the Order on Appeal Is Temporarily Stayed During the Time for a Party to Notice Appeal

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[117] *See* N.C. R. App. P. 8(a) (detailing procedures for seeking stay of execution or enforcement of order or judgment on appeal); Green v. Griffin, 95 N.C. 50, 53 (1886) (filing of appeal leaves injunctive order in force).

[118] *See* § 6.02[1][c] [Effect of Section 1-294 Stay]. Nonetheless exceptions to this general rule exist. *See, e.g.*, N.C. Gen. Stat. § 50–16.7 (alimony enforceable by contempt pending appeal); N.C. Gen. Stat. § 50–13.3 (child custody enforceable by contempt pending appeal); N.C. Gen. Stat. § 50–13.4(f)(9) (child support enforceable by contempt pending appeal).

[119] For a discussion of the distinction between enforcement and execution, *see* § 6.01 [Two Types of Appellate Stays: Stays of Further Proceedings and Stays of Operation of an Order or Judgment]. Execution on a judgment, as opposed to enforcement, is only stayed upon deposit of adequate security. See § 6.03[4] [Procedures for Seeking Stay of Execution or Enforcement in the Trial Tribunal].

[120] *See* Joyner v. Joyner, 256 N.C. 588, 591, 124 S.E.2d 724, 727 (1962) ("One who wilfully violates an order does so at his peril. If the order is upheld by the appellate court, the violation may be inquired into when the case is remanded to the superior court.").

[121] N.C. Gen. Stat. § 131E-187(c)(5).

No execution may issue upon a judgment, nor may proceedings be taken for its enforcement, until the expiration of the period in which a party may give notice of appeal from the judgment.[122] In most cases, then, a party has 30 days to consider whether to appeal a judgment and whether to take steps to stay execution during the appeal. The pendency of a post-trial motion under Civil Rule 50, 52, 59, or 60 does not extend the duration of the automatic stay, unless otherwise ordered by the court.[123]

The automatic stay *does not* apply to an interlocutory or final judgment in an action for an injunction or in a receivership action, unless otherwise ordered by the court.[124] The trial tribunal retains the authority 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."[125]

### [2] Party Generally May Appeal Without Attempting to Stay Execution or Enforcement

Although the Civil Rules, Appellate Rules, and relevant statutes set forth a system that allows a party to stay execution and enforcement of an order or judgment on appeal, it is not *required* that an appellant seek to do so. That is, an appellant is generally entitled to proceed with an appeal without taking *any* steps to stay execution or enforcement of the order or judgment on appeal.[126]

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[122] N.C. R. Civ. P. 62(a).

[123] N.C. R. Civ. P. 62(b).

[124] N.C. R. Civ. P. 62(a).

[125] N.C. R. Civ. P. 62(c).

[126] Most appellants must post an undertaking or bond for $250 as security for any costs assessed by the appellate court, but this bond is not for the purpose of staying execution or enforcement. *See* N.C. Gen. Stat. § 1-285 to § 1-286.

There are at least two exceptions to this general rule. First, a petitioner or appellant in a case involving a challenge to the issuance of a certificate of need must post a bond equal to five percent of the cost of the proposed new institutional health service in question, which amount may not be less than $5,000 or greater than $50,000.[127] Second, a party seeking to challenge an order of the Utilities Commission that awards a certificate for the construction of an electricity-generating facility must file a bond in an amount sufficient to compensate the appellee for damages that would be incurred if the appeal does not succeed.[128]

In each such exception, the certificate in question does not issue during the pendency of the appeal. As such, the payment of the bond is intended to offset any damages the appellee will incur if the appeal is unsuccessful. In this sense, the theory underlying both exceptions fits with the notion that a court should not issue a restraining order or injunction without the giving of adequate security by the applicant.[129]

### [3] Trial Tribunal's Authority to Conduct Proceedings in Aid of Execution

Unless execution is stayed, the trial tribunal has the authority to conduct proceedings in aid of execution during the pendency of an appeal.[130]

For example, if a judgment is rendered in open court, the trial tribunal retains the authority to prepare and enter a written judgment even if a notice

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[127] N.C. Gen. Stat. § 131E-188(a1); N.C. Gen Stat. § 131E-188(b1).

[128] N.C. Gen. Stat. § 62-82(b).

[129] *See* N.C. R. Civ. P. 62(c); N.C. R. Civ. P. 65(c).

[130] N.C. R. Civ. P. 62(d); N.C. R. App. P. 8; Songwooyarn Trading Co. v. Sox Eleven, Inc., 219 N.C. App. 213, 217, 723 S.E.2d 569, 572 (2012).

of appeal has already been filed.[131] Moreover, unless and until the trial tribunal issues a stay, the trial tribunal may conduct execution proceedings in accordance with Article 28 of Chapter 1 of the General Statutes on any judgment that requires the payment of money or the delivery of real or personal property.[132] This authority includes the power to conduct proceedings and enter orders intended to aid in the security of an appellant's rights during the pendency of the appeal.[133]

### [4] Procedures for Seeking Stay of Execution or Enforcement in the Trial Tribunal

#### [a] Generally

When an appeal is taken, the appellant may obtain a stay of execution by complying with the procedures set forth in the applicable statute[134]: section 1-289 (money judgment); section 1-290 (judgment for personal property); section 1-291 (judgment directing conveyance); section 1-292 (judgment for real property).

Each of these statutes requires that the appellant provide some security to ensure the continued value of the judgment for the appellee should the appeal be unsuccessful. However, governmental entities often do not have to

[131] Hightower v. Hightower, 85 N.C. App. 333, 337, 354 S.E.2d 743, 745 (1987).

[132] N.C. Gen. Stat. § 1-289 (money judgment); N.C. Gen Stat. § 1-290 (personal property); N.C. Gen. Stat. § 1-292 (real property); N.C. Gen. Stat. § 1-302.

[133] Songwooyarn Trading Co. v. Sox Eleven, Inc., 219 N.C. App. 213, 217, 723 S.E.2d 569, 572 (2012).

[134] N.C. R. Civ. P. 62(d).

post any such security in order to stay operation or enforcement of a judgment during the pendency of an appeal.[135]

In general, the stay of execution does not take effect until deposit of adequate security,[136] but is automatic upon such deposit.[137]

### [b] Stay of Execution on Money Judgment: Section 1-289

When an appeal is taken from a judgment directing the payment of money, the appeal does not stay the execution of the judgment unless the appellant provides sufficient security for the appellee.[138] This rule allows an appellant to proceed with its appeal without the threat of execution, a cumbersome process that often involves additional court proceedings, discovery, and visits from the sheriff.[139] At the same time, the rule protects

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[135] N.C. R. Civ. P. 62(e) (exception for the State of North Carolina, a city or a county of the state, a local board of education, or an officer in his or her official capacity or agency).

[136] N.C. Gen. Stat. § 1-269 ("the supersedeas, to suspend execution, shall not issue until an undertaking is filed or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where execution is stayed"); N.C. R. Civ. P. 62(d) (if the stay is obtained "by giving supersedeas bond, the bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal as the case may be, and stay is then effective when the supersedeas bond is approved by the court").

[137] *See* N.C. R. App. P. 8(a). *But see* N.C. Gen. Stat. § 1-291 (Judgment directing "the execution of a conveyance or other instrument . . . is not stayed by the appeal until the instrument has been executed and deposited with the clerks."); § 6.03[4][d] [Stay of Judgment Directing Execution of a Conveyance or Other Instrument: Section 1-291] (discussion of *Meares*).

[138] N.C. Gen. Stat. § 1-289.

[139] N.C. Gen. Stat. § 1-302 to § 324.7.

the appellee by providing a source of funds to be applied to the satisfaction of the judgment if the appeal is not successful.[140]

The section 1-289 stay is automatic upon the filing of an adequate undertaking or deposit of adequate security.[141] The amount of the undertaking or deposit is established by the trial tribunal upon motion of the appellant and after notice and hearing.[142] Until the undertaking or deposit is filed in the amount established by the court, the stay does not take effect.[143]

Section 1-289 applies only to *judgments* directing the payment of money. An order requiring a party to take a specified action within a certain period of time is not a money judgment subject to execution. As such, it can be enforced only through contempt proceedings.

#### [i] The Security Requirement: Undertaking, Bond, or Deposit

To obtain a stay of execution on a money judgment, an appellant must either (1) submit a written undertaking and bond executed by one or more sureties, or (2) deposit money with an officer of the court or with the court.[144]

A written undertaking typically takes the form of a surety bond, also called a performance bond or supersedeas bond. Normally issued by a bank or insurance company,[145] the surety bond must contain an irrevocable promise that if the judgment appealed from, or any part of it, is affirmed or the appeal

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[140] Barrett v. Barrett, 122 N.C. App. 185, 187, 468 S.E.2d 264, 266 (1996).

[141] N.C. Gen. Stat. § 1-289; N.C. R. Civ. P. 62(d).

[142] N.C. Gen. Stat. § 1-289(a1) to § 1-289(a2).

[143] Babb v. Graham, 190 N.C. App. 463, 485–86, 660 S.E.2d 626, 640–41 (2008).

[144] N.C. Gen. Stat. § 1-289(a1).

[145] *Performance Bond*, Black's Law Dictionary (10th ed. 2014).

is dismissed, the appellant will pay the amount directed to be paid by the judgment and any damages awarded against the appellant in the course of the appeal, as guaranteed by the surety.[146] In this way, if the appellant cannot satisfy the judgment after an unsuccessful appeal, the surety is obligated to make good on the promise set forth in its bond.

The appellant may, at its option, use multiple undertakings to provide adequate security.[147]

Any undertaking or bond must include the names and addresses of the surety and must be served on the appellee.[148]

If the surety itself becomes insolvent during the course of an appeal, the appellant can be ordered to execute, file, and serve a new undertaking.[149]

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[146] N.C. Gen. Stat. § 1-289(a1).

[147] N.C. Gen. Stat. § 1-295.

[148] N.C. Gen. Stat. § 1-295. Section 1-295 states that the undertaking "must be served on the adverse party, with the notice of appeal, unless the required deposit is made and notice thereof given." On its face, this appears to require that an undertaking be filed contemporaneously with the notice of appeal. However, Section 1-295 predates the North Carolina Rules of Civil Procedure, which allow for an automatic stay during the appeal period. *See* N.C. R. Civ. P. 62(a). Under current practice, there is no deadline by which an appellant must file an undertaking or make a deposit, but execution is not permanently stayed until it is so filed.

[149] N.C. Gen. Stat. § 1-289(a1). If the appellant fails to file a replacement bond within 20 days after being ordered to do so, its appeal may be dismissed with costs on motion of a party. *Id.* This potential for dismissal is incongruous with the general principle that an appellant need not try to stay execution in order to have the right to appeal. *See* § 6.03[2] [Party Generally May Appeal Without Attempting to Stay Execution or Enforcement]. A more sensible rule would instead simply lift the stay if an appellant is not able to post a bond with a solvent surety, thus allowing the appeal and execution to proceed simultaneously as though no stay had been entered in the first place. Regardless, the trial tribunal does *not* have the authority to dismiss an appeal based on an appellant's decision not to file an undertaking at all. Faught v. Faught, 50 N.C. App. 635, 640, 274 S.E.2d 883, 887 (1981).

Alternatively, an appellant may deposit money with an officer of the court or the court itself.[150] In practice, such a deposit is usually made with the clerk of the superior court in the county in which the case arose. The deposit may then be placed into an interest-bearing bank account, retained by the court, or disposed of in another manner that maintains its security.[151]

#### [ii] Setting the Amount of the Undertaking or Deposit

The trial tribunal may establish the amount of the undertaking and deposit after notice and hearing.[152] Typically, the process is initiated by an appellant filing a "motion to set amount of undertaking" or the like.

At the hearing, the trial tribunal must select an amount that is proper and reasonable for the security of the rights of the adverse party, considering relevant factors, including:

(1) The amount of the judgment;

(2) The amount of the limits of all applicable liability policies of the appellant judgment debtor; and

(3) The aggregate net worth of the appellant judgment debtor.[153]

[150] N.C. Gen. Stat. § 1-289(a1).

[151] N.C. Gen. Stat. § 1-289(a1).

[152] N.C. Gen. Stat. § 1-289(a2).

[153] N.C. Gen. Stat. § 1-289(a2).

These three factors were added to the statute in 2011.[154] At present, no appellate court cases have provided insight on how these new factors should be applied. In practice, the amount of the judgment is the starting point for the amount of the undertaking. How the second and third factors are to be applied is unclear. For example, an appellant with adequate insurance coverage and high net worth could argue that its solvency makes a large undertaking unnecessary to ensure security for the appellee. The counter-argument is that such an appellant could easily bear a large undertaking.

One practical approach to setting the amount of security is to calculate the amount of the judgment plus the post-judgment interest[155] that will accrue during the likely duration of the appeal. For example, on a judgment of $100,000, the trial tribunal might set the amount of security at $112,000—the principal amount of the judgment plus the interest that would accrue during an 18-month appeal.

Regardless, the trial tribunal has discretion to set the amount of undertaking necessary to stay execution.[156] The trial tribunal may also dispense with or limit the security required when the appellant is acting in a fiduciary capacity.[157] The trial tribunal *may* limit the security to an amount not more than $50,000 if it would otherwise exceed that sum.[158] For judgments in excess of $25 million however, the trial tribunal must set the amount of security at $25 million, provided that the appellant seeks a stay during the appeal period.[159]

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[154] N.C. Sess. Law 2011-400 at § 1.

[155] N.C. Gen. Stat. § 24-1.

[156] Smith v. Smith, -- N.C. App. --, 785 S.E.2d 434, 438 (2016).

[157] N.C. Gen. Stat. § 1-294 (listing examples of fiduciaries, including executors, administrators, and trustees).

[158] N.C. Gen. Stat. § 1-294.

[159] N.C. Gen. Stat. § 1-289(b).

In most cases, the parties to an appeal negotiate and agree on an amount of adequate security, obviating the need for a hearing before the trial tribunal.[160]

### [iii] Obtaining a Surety Bond

A party has several options in attempting to obtain a surety bond. First, financial institutions may offer a surety bond or irrevocable letter of credit, secured by funds already on deposit by a party. Second, most large insurance companies offer supersedeas bonds to their insureds, usually at a fee of less than 5 percent of the face value of the bond. Third, a party taking appeal from a large judgment may use a surety bond broker to obtain the most competitive price for the bond.

### [iv] Docket Entry of Stay

An appellant who obtains a stay of execution on a money judgment in accordance with section 1-289 may have notice of the stay placed upon the judgment docket (sometimes called the judgment roll) upon motion filed with the trial tribunal.[161] The notice may dictate that no execution can issue upon the judgment during the pendency of the appeal.[162]

The docket entry of the stay prevents an appellee from proceeding with execution, and the attendant inconvenience it causes, if the appellant has properly stayed execution.

In practice, an appellant may request the docket entry of stay in the same motion as that asking the trial tribunal to set the amount of adequate security.

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[160] Depending on local practice, the parties may, simply submit a "consent order setting amount of security" for consideration by the trial tribunal.

[161] N.C. Gen. Stat. § 1-293.

[162] N.C. Gen. Stat. § 1-293.

### [v] Disposition of Security After Appeal

If the appellant's appeal is successful, there is no longer a need for the security. A written undertaking or bond will usually expire on its own terms. A cash deposit can be refunded to the appellant upon request.

If the appellant's appeal is not successful, the appellee may make a demand on the appellant and its surety for payment on the judgment. The appellee need not begin execution proceedings, but may treat the surety bond as an enforceable contract requiring the surety to pay the amount specified in the bond. In the rare case in which the surety fails to meet its obligation under the bond, the appellee's remedy is to initiate a separate breach-of-contract action against the surety. Alternatively, any money deposited with an officer or with the court may be disbursed to the appellee to satisfy the judgment.

### [c] Stay of Judgment Directing Assignment or Delivery of Personal Property: Section 1-290

When a judgment directs the assignment or delivery of documents or personal property, execution on the judgment is not stayed by appeal unless the appellant takes one of two actions: (1) deposits the things required to be assigned or delivered with the court or its designee; or (2) files 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 at the conclusion of the appeal.[163]

For example, when the trial court ordered disclosure of certain documents held by an appellant pursuant to public-records laws, the trial court

[163] N.C. Gen. Stat. § 1-290.

could stay its disclosure order during the pendency of the appeal in accordance with section 1-290.[164]

Neither the statute nor the case law provide any additional guidance regarding the amount of the undertaking that a court can require before a judgment can be stayed.

An appellant is not required to seek a stay under section 1-290 as a condition to its right to appeal.[165]

### [d] Stay of Judgment Directing Execution of a Conveyance or Other Instrument: Section 1-291

When a judgment directs the execution of a conveyance or other instrument, execution on the judgment is not stayed by appeal until the instrument has been executed and deposited with the clerk of court.[166]

On its face, section 1-291 appears to allow an automatic stay to issue upon the appellant's deposit of the executed instrument with the clerk of court. However, in *Meares v. Town of Beaufort*, the Court of Appeals held that the trial tribunal retains discretion whether to issue a stay, even after an appellant has deposited the executed instrument.[167] Indeed, the *Meares* trial tribunal released the executed instrument to the appellee after the appellant filed it

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[164] Wilmington Star-News, Inc. v. New Hanover Reg'l Med. Ctr., Inc., 125 N.C. App. 174, 183, 480 S.E.2d 53, 58 (1997).

[165] Faught v. Faught, 50 N.C. App. 635, 641, 274 S.E.2d 883, 887 (1981).

[166] N.C. Gen. Stat. § 1-291.

[167] Meares v. Town of Beaufort, 193 N.C. App. 49, 63, 667 S.E.2d 244, 254 (2008). *But see* N.C. R. App. P. 8(a) (stay of execution or enforcement may be had by either depositing adequate security *or* by application to the trial court for a stay order *in all other cases*).

with the clerk, which was upheld on appeal.[168] After *Meares*, the best practice for a party seeking to challenge a judgment directing execution of a conveyance or other instrument is for the appellant to file a motion seeking a stay upon deposit of an executed instrument, but not to deposit the instrument until such time as the court orders that it will be effective to create a stay.

Notably, section 1-291 *does not* provide a procedure for obtaining a stay by filing an undertaking or making a deposit of money with the court.

### [e] Stay of Judgment Directing Sale or Delivery of Real Property: Section 1-292

When a judgment directs the sale or delivery of possession of real property, execution on the judgment is not stayed unless the appellant files an adequate surety bond.[169] The surety bond must state that the appellant (1) will not commit or suffer to be committed any waste on the property; and (2) will pay the value of the use and occupation of the property during the pendency of the appeal in an amount set by the trial tribunal by the time the bond is filed.[170] When the judgment requires specific performance *and* the associated payment of money, the undertaking must provide for satisfaction of both obligations.[171] For example, for a judgment directing the sale of mortgaged property and payment of a deficiency arising upon it, the undertaking must also provide for the payment of the deficiency.[172]

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[168] Meares v. Town of Beaufort, 193 N.C. App. 49, 63, 667 S.E.2d 244, 254 (2008).

[169] N.C. Gen. Stat. § 1-292.

[170] N.C. Gen. Stat. § 1-292; *see also In re* Simon, 36 N.C. App. 51, 58, 243 S.E.2d 163, 167 (1978) (holding that a bond should be set at an amount equal to "waste plus the value of the use and occupation of the property").

[171] N.C. Gen. Stat. § 1-292.

[172] N.C. Gen. Stat. § 1-292.

The trial tribunal, in its discretion, may set the amount of the bond, provided there is competent evidence to support its decision.[173]

An appellant is not required to seek a stay under section 1-292 as a condition to its right to appeal.[174]

#### [f] Stay of Civil Rule 54(b) Judgment

A final judgment as to one or more, but fewer than all, of the claims or parties is subject to execution if it directs the payment of money. Consequently, such a judgment is also able to be stayed in accordance with Sections 1-289 through 1-295.[175]

### [5] Trial Tribunal's Authority to Issue Discretionary Stay

#### [a] Generally

Under Appellate Rule 8, a stay of execution or enforcement of an order or judgment *must ordinarily first be sought* by deposit of security with the trial tribunal in 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."[176] This appears to limit the trial tribunal's ability to issue a discretionary stay when an appellant could have, but did not, deposit adequate security.

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[173] Currituck Assocs. Residential P'ship v. Hollowell, 170 N.C. App. 399, 402, 612 S.E.2d 386, 388 (2005).

[174] Faught v. Faught, 50 N.C. App. 635, 641, 274 S.E.2d 883, 887 (1981).

[175] *See, e.g.*, Wachovia Realty Invs. v. Housing, Inc., 292 N.C. 93, 232 S.E.2d 667 (1977).

[176] N.C. R. App. P. 8(a).

The decision to issue or deny a discretionary stay is reviewed for abuse of discretion.[177]

### [b] Discretionary Stay Upon Certain Post-Judgment Motions

The trial tribunal may, in its discretion and on such conditions for the security of the appellee as are proper, stay the execution on a judgment or enforcement of an order pending disposition of a post-trial motion under Civil Rule 50, 52(b), 59, or 60.[178]

### [c] Trial Tribunal's Authority to Suspend Injunction

When the order on appeal is an injunction, the trial tribunal has the express authority to, in its discretion, suspend (that is, stay) the injunction during the pendency of the appeal.[179]

## [6] Seeking Stay of Enforcement by Petition for Writ of Supersedeas

After a stay order or entry has been denied or vacated by a trial tribunal, an appellant may apply to the appropriate appellate court for a temporary stay and a writ of supersedeas in accordance with Appellate Rule 23.[180] Ordinarily, the appellant must first seek relief in the trial tribunal before requesting a temporary stay and writ of supersedeas.[181]

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[177] Meares v. Town of Beaufort, 193 N.C. App. 49, 64, 667 S.E.2d 244, 254 (2008); Abbott v. Highlands, 52 N.C. App. 69, 79, 277 S.E.2d 820, 827 (1981).

[178] N.C. R. Civ. P. 62(b).

[179] N.C. R. Civ. P. 62(c).

[180] N.C. R. App. P. 8(a).

[181] N.C. R. App. P. 8(a).

**Exceptions:** There are two notable exceptions. Application for a temporary stay and writ of supersedeas may be made in the first instance in the appellate court (1) in an appeal directly from an agency to the appellate division,[182] or (2) "when extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial [tribunal] for a stay order."[183]

## § 6.04 Stay Pending Supreme Court Review of Court of Appeals Decision

Just as a party may ask the appellate court to stay execution or enforcement of a judgment or order of a trial tribunal during the pendency of an appeal, an appellant may likewise ask the Supreme Court to stay execution or enforcement of a decision of the Court of Appeals when seeking review of the decision in the Supreme Court.[184]

## § 6.05 Termination of Stay

Any stay issued during the pendency of an appeal will typically expire on its own terms upon issuance of the mandate from the appropriate appellate court.[185]

[182] N.C. R. App. 8(a); *see also* N.C. R. App. P. 18.

[183] N.C. R. App. P. 8(a).

[184] N.C. R. App. P. 23(b).

[185] N.C. R. App. P. 32.