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# Functus Officio: Authority of the Trial Court after Notice of Appeal

Thomas L. Fowler

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# FUNCTUS OFFICIO: AUTHORITY OF THE TRIAL COURT AFTER NOTICE OF APPEAL

THOMAS L. FOWLER

*Effective appellate review generally requires that the status quo between the parties to the litigation be maintained during the pendency of the appeal. In support of this requirement of effective appellate review, a rule has developed that the trial court becomes functus officio, i.e., deprived of jurisdiction to take any further action in the matter, upon a party's filing of notice of appeal. This rule is not, however, as absolute as its language suggests. The rule is subject to numerous exceptions and qualifications which arise because of the needs of an efficient judicial process, and the need, in some cases, of ongoing trial level supervision of the parties' relationship during the time the appeals process is running its course. This Article reviews the rule, its exceptions and qualifications, and their justifications, and concludes that this is an area where the law is still evolving.*

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\* Associate Counsel, North Carolina Administrative Office of the Courts, Raleigh, North Carolina. B.A., 1975, University of North Carolina at Chapel Hill; J.D., 1980, University of North Carolina at Chapel Hill. The author's e-mail address is tom.fowler@nccourts.org. The opinions expressed in this Article are solely those of the author and do not represent any position or policy of the Administrative Office of the Courts.

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## INTRODUCTION

[U]pon filing of a notice of appeal, a trial court in North Carolina is divested of jurisdiction with regard to all matters embraced within or affected by the judgment which is the subject of the appeal.<sup>1</sup>

The long-standing, oft-cited general rule is that the trial court is divested of jurisdiction when a party gives notice of appeal and, pending the appeal, the trial judge is *functus officio*.<sup>2</sup> The rule has been applied to hold that after a party has given notice of appeal of the trial court's judgment, the trial court is without jurisdiction to

1. *Brooks v. Giesey*, 106 N.C. App. 586, 590-91, 418 S.E.2d 236, 238 (1992).

2. *Lowder v. Mills, Inc.*, 301 N.C. 561, 580, 273 S.E.2d 247, 258 (1981) ("The well-established rule of law is that 'an appeal from a judgment rendered in the Superior Court suspends all further proceedings in the cause in that court, pending the appeal.' ") (citing *Harris v. Fairly*, 232 N.C. 555, 556, 61 S.E.2d 619, 620 (1950)); *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748, 749 (1977); *Sink v. Easter*, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975); *Hoke v. Atl. Greyhound Corp.*, 227 N.C. 374, 375, 42 S.E.2d 407, 408 (1947). *Functus officio* means "a task performed." BLACK'S LAW DICTIONARY 802 (7th ed. 1999).

consider the prevailing party's motion for attorney fees.<sup>3</sup> Similarly, after appeal from a judgment, the trial court has been held without jurisdiction, pending the appeal, to hold a party in contempt for failing to comply with the judgment.<sup>4</sup> And, clearly, if a party appeals an immediately appealable interlocutory order, the trial court does not have authority, pending the appeal, to proceed with the trial of the matter.<sup>5</sup>

Nevertheless, the general rule, as stated, is somewhat misleading. For instance, there are many exceptions to this rule, where even after notice of appeal is given, the trial court retains authority to make rulings in the matter. Also, in the case of most appeals, i.e., appeals from final judgments, the trial court is arguably *functus officio* not so much because of the notice of appeal but because, having rendered its final judgment,<sup>6</sup> the trial court has completed all of its duties vis-à-vis the matter before it.<sup>7</sup> The rule can also be misleading when the decision being appealed is an interlocutory order.<sup>8</sup> In some cases, appeal of an interlocutory order has been held to void the subsequent trial that proceeded despite the pending appeal—but in other cases the subsequent trial that proceeded during the pending appeal was upheld. Contrary to the general rule, then, mere notice of appeal<sup>9</sup>

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3. *Gibbons v. Cole*, 132 N.C. App. 777, 782, 513 S.E.2d 834, 837 (1999).

4. *Webb v. Webb*, 50 N.C. App. 677, 678, 274 S.E.2d 888, 889 (1981); *Beall v. Beall*, 290 N.C. 669, 680, 228 S.E.2d 407, 413 (1976); *see also* *Wilson v. Wilson*, 124 N.C. App. 371, 376, 477 S.E.2d 254, 256 (1996) (holding that after notice of appeal, the trial court lacked jurisdiction to enter a contempt order based upon the appealed order).

5. *See* *Carpenter v. Carpenter*, 25 N.C. App. 307, 308, 212 S.E.2d 915, 916 (1975) (holding the trial court to be *functus officio* after an appeal from an interlocutory order); *Patrick v. Hurdle*, 7 N.C. App. 44, 45, 171 S.E.2d 58, 59 (1969) (stating that because an appeal from an appealable interlocutory order stays all further proceedings in the trial court, the trial court was *functus officio* to try the case, and it follows that the trial, the verdict, and the judgment are nullities).

6. A final judgment "disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381 (1950).

7. *See* *State v. Alphin*, 81 N.C. 566, 566–567 (1879) (finding the trial court to be *functus officio* after the term expired in which the final judgment had been entered—not because notice of appeal had been filed); *Bible Soc'y v. Hollister*, 54 N.C. (1 Jones Eq.) 10, 19 (1853) (stating that where a case has been "heard and determined," the supreme court becomes "*functus officio* as to the case itself, and all its incidents").

8. An interlocutory order is any order or judgment made during the pendency of an action that is not a final judgment. It "does not dispose of the case, but leaves it for further action." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381.

9. It is actually the perfection of an appeal that serves to divest the trial court of jurisdiction, rather than the notice of appeal. However, although an appeal is not "perfected" until duly docketed in the appellate court, such perfection relates back to the time notice of appeal was given, so that in cases where the appeal is perfected, it is the notice of appeal that effectively terminates the trial court's jurisdiction. *See* *Lowder v.*

will not always render the trial court *functus officio*.

The *functus officio* rule and its exceptions are best considered in the context of the demands of an effective appellate procedure.<sup>10</sup> The *functus officio* rule exists to provide the legal framework necessary to protect the right of appeal and to effectuate the appeals process itself. In this context, the rule and its exceptions often make sense. Section I of this Article reviews the appeals process and summarizes the *functus officio* rule in that context. Section II reviews the various exceptions to the rule and their development in recent case law and statutes. For the most part, these exceptions represent compromises between the clear needs of the North Carolina appeals process and the equally clear concerns with the injustice and inefficiency that often accompany the unavoidable delay occasioned by appellate review.<sup>11</sup>

### I. THE RIGHT TO APPEAL

The purpose of mandating a right of appeal is to provide a litigant with an opportunity to correct prejudicial errors that occurred at trial.<sup>12</sup> The value to a litigant of this right of appeal might be

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Mills, Inc., 301 N.C. 561, 581, 273 S.E.2d 247, 259 (1981).

10. "Back of every legal principle lies the reason that gave it birth. Hence, a rule of law can best be interpreted and applied if due heed is paid to the reason which called it into being." *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382.

11. Generally, two courts should not have jurisdiction of the same case at the same time. *See Childs v. Martin*, 69 N.C. 126, 126-27 (1873) (explaining that when two courts have concurrent jurisdiction of a case, the court in which suit is first brought acquires jurisdiction and excludes the jurisdiction of the other court); *State v. Reid*, 18 N.C. (3 & 4 Dev. & Bat.) 377, 379 (1835).

12. *See A.B.A. JUDICIAL ADMIN. DIV., STANDARDS RELATING TO APPELLATE COURTS* § 3.00 cmt., at 5 (1994) (defining the two basic functions of appellate courts as (1) error correction: reviewing trial court proceedings to determine whether they have been conducted according to law and applicable procedure, and (2) law development: developing the rules of law that are within the competence of the judicial branch to announce and interpret). The importance of the error correction function has been explained as follows:

[A]ppellate courts serve as the instrument of accountability for those who make the basic decisions in trial courts and administrative agencies. . . . The availability of the appellate process assures the decision-makers at the first level that their correct judgments will not be, or appear to be, the unconnected actions of isolated individuals, but will have the concerted support of the legal system; and it assures litigants that the decision in their case is not prey to the failings of whichever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented by its legal system. Thus, the review for correctness serves to reinforce the dignity, authority, and acceptability of the trial, and to control the adverse effects of any personal shortcomings of the basic decisionmakers.

PAUL D. CARRINGTON, JUSTICE ON APPEAL 2 (1976); *see also* *State v. Colson*, 274 N.C.

significantly reduced if the opposing party were allowed, pending the appeal, to proceed in the trial court to enforce or otherwise use, directly or indirectly, the allegedly improper ruling of the trial court. Appellate review takes time, and the situation of the parties should be maintained during the time the appellate court is determining whether the trial court's actions were correct.<sup>13</sup> Additionally, the legal issues to be appealed must be documented and finalized. Continued activity in the case by the trial court during the pendency of the appeal could result in a series of efforts by the parties to amend the record on appeal, to add or alter assignments of error,<sup>14</sup> or even to raise mootness<sup>15</sup> as a basis for dismissing the appeal. An effective appellate procedure thus requires a stable case—that is, the appellate record and the parties' relative legal positions must be fixed during the pendency of the appeal. As a general rule this is accomplished by limiting the activity in the trial court.

Limiting the activity in the trial court during the appeal could be accomplished in several ways: (1) the appeal could operate to vacate the trial court's order or judgment that is being appealed, subject to reinstatement if the appellate court denies the appeal;<sup>16</sup> (2) the appeal

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295, 304, 163 S.E.2d 376, 382 (1968) (noting the basic principle that there should be one trial on the merits and one appeal on the law, as of right, in every case).

13. "[T]he law's delay has been a chronic lament among men for centuries . . ." *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382 (1950). The Supreme Court of North Carolina has acknowledged that "[w]here time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute." *A.E.P. Indus. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983).

14. "A trial court's order settling the record on appeal is final and will not be reviewed on appeal." *Penland v. Harris*, 135 N.C. App. 359, 363, 520 S.E.2d 105, 108 (1999). Furthermore, " '[r]eview of an order settling the record on appeal is available, if at all, only by way of *certiorari*.' " *Bledsole v. Johnson*, 150 N.C. App. 619, 623, 564 S.E.2d 902, 905 (2002) (quoting *Penland*, 135 N.C. App. at 363, 520 S.E.2d at 108).

15. Failure to preserve the status quo can render moot the issues raised on appeal and so requires dismissal of the appeal. See *In re Hatley*, 291 N.C. 693, 694, 231 S.E.2d 633, 634 (1977) ("When events occur during the pendency of an appeal which cause the underlying controversy to cease to exist, the appellate court properly refuses to entertain the cause merely to adjudicate abstract propositions of law."); *Estates, Inc. v. Town of Chapel Hill*, 130 N.C. App. 664, 666, 504 S.E.2d 296, 298 (1998); *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711 (1989) ("If no genuine present controversy exists between the parties, a case which was once alive becomes moot.").

16. This appears to have been the approach followed by the courts in the first half of the 19th century. See *Bond v. Wool*, 113 N.C. 20, 21, 18 S.E. 77 (1893) (noting that when based on new statutes, the judgment of the superior court was not vacated by the appeal but "merely suspended," and the suspension ended with the affirmation of the judgment by the supreme court); ATWELL MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE IN CIVIL CASES § 650 (1929); cf. *State v. Applewhite*, 75 N.C. 229, 230 (1876) (holding that a criminal defendant's appeal vacated the judgment and sentence). This approach was expressly disavowed by a statute adopted in 1868 which is currently codified

could operate to stay all proceedings in the trial court pending the appeal;<sup>17</sup> or (3) the appeal could operate to divest the trial court of jurisdiction over the matter pending the appeal. The *functus officio* rule purports to follow the latter approach.<sup>18</sup>

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as section 1-296 of the General Statutes of North Carolina. N.C. GEN. STAT. § 1-296 (2001) ("The stay of proceedings provided for in this Article shall not be construed to vacate the judgment appealed from, but in all cases such judgment remains in full force and effect . . .").

17. The acts of the legislature now codified as sections 1-285, 1-289, 1-290, 1-291, 1-292, and 1-294 of the General Statutes of North Carolina, which provide for appeal bonds and procedures for staying execution of certain judgments, were originally passed in 1868. See N.C. CODE OF CIVIL PROCEDURE tit. 13, § 303, 312 (1868) (current version at N.C. GEN. STAT. § 1-285 (2001)); tit. 13, § 304, 311 (current version at N.C. GEN. STAT. § 1-289); tit. 13, § 305 (current version at N.C. GEN. STAT. § 1-290); tit. 13, § 306 (current version at N.C. GEN. STAT. § 1-291); tit. 13, § 307 (current version at N.C. GEN. STAT. § 1-292); tit. 13, § 308 (current version at N.C. GEN. STAT. § 1-294). Section 1-294 provides that if the procedures specified in these statutes are followed, then "all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein" are stayed. N.C. GEN. STAT. § 1-294 (2001). If these provisions are not followed, the result is simply that the execution of the judgment is not stayed pending appeal—but the appeal can still proceed. See *Bledsoe v. Nixon*, 69 N.C. 81, 84–85 (1873); N.C. R. CIV. P. 62.

18. Some cases blur the distinction between the *functus officio* rule and the stay provision of section 1-294. The supreme court cases that cite the "longstanding general rule," i.e., the *functus officio* rule, do not cite section 1-294 or its precursors as authority for the rule. *Hoke v. Atl. Greyhound Corp.*, 227 N.C. 374, 375, 42 S.E.2d 407, 408 (1947) ("An appeal from a judgment rendered in the Superior Court takes the case out of the jurisdiction of the Superior Court. Thereafter, pending the appeal, the judge is *functus officio*."). *Hoke* cites eight cases, none of which mention the statute. See *id.* Three of the cases cited are: *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748, 749 (1977); *Wiggins v. Bunch*, 280 N.C. 106, 108, 184 S.E.2d 879, 880 (1971); and *Machine Co. v. Dixon*, 260 N.C. 732, 735–36, 133 S.E.2d 659, 662 (1963). In *Bowen*, the supreme court stated:

[O]ur longstanding general rule that an appeal removes a case from the jurisdiction of the trial court and, pending the appeal, the trial judge is *functus officio*. 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) 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.

*Bowen*, 292 N.C. at 635, 234 S.E.2d at 749 (quoting *Machine Co.*, 260 N.C. at 735–36, 133 S.E.2d at 662). These cases also state that the *functus officio* rule renders the lower court without jurisdiction to enter orders—rather than explaining that the appellate courts or the statutes have "stayed" lower court activity. *Id.*; *Wiggins*, 280 N.C. at 108, 184 S.E.2d at 880; *Machine Co.*, 260 N.C. at 735–36, 133 S.E.2d at 662. The *Hoke* court stated that its decision was based "squarely on the want of jurisdiction in the court below" after notice of appeal was given. *Hoke*, 227 N.C. at 376, 42 S.E.2d at 408. Yet some court of appeals cases appear to find the basis for the *functus officio* rule in the stay language of section 1-294. In *Curry v. First Federal Savings & Loan Ass'n.*, the court of appeals misleadingly paraphrased section 1-294 as follows: "[w]hen an appeal is perfected . . . it stays all further

A. *Appealability: Final Judgments Versus Interlocutory Orders*

In general, North Carolina's appellate procedure is designed to eliminate the unnecessary delay and the expense associated with repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment.<sup>19</sup> A final judgment disposes of all issues as to all parties leaving nothing to be judicially determined by the trial court.<sup>20</sup> Final judgments are always appealable.<sup>21</sup> All other judgments or orders of the court are interlocutory.<sup>22</sup> An appeal of an interlocutory order usually must be accomplished as a part of the appeal from the final judgment.<sup>23</sup> Immediate appeal of an interlocutory order is allowed, however, in two instances: (1) when the challenged order affects a substantial right pursuant to sections 1-277 and 7A-27(d) of the General Statutes of North Carolina,<sup>24</sup> and (2) when the order is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to Civil Rule 54(b)<sup>25</sup> by finding that there is no just reason for delay.<sup>26</sup> Attempted appeals of non-immediately

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proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein . . . ." 125 N.C. App. 108, 112, 479 S.E.2d 286, 288 (1997). It then cited both section 1-294 and the *functus officio* rules as the basis for its conclusion that the trial court was ousted of jurisdiction by notice of appeal. *Id.*; cf. Woodard v. Local Gov't Employee Ret. Sys., 110 N.C. App. 83, 85, 428 S.E.2d 849, 850 (1993) (citing both section 1-294 and case law for *functus officio* rule); Corbett v. Corbett, 67 N.C. App. 754, 756, 313 S.E.2d 888, 889 (1984) (paraphrasing section 1-294 as providing that an appeal "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"). Section 1-294 actually provides that it applies only "[w]hen an appeal is perfected as provided by this Article." N.C. GEN. STAT. § 1-294 (2001) (emphasis added). This arguably applies only to the procedures for automatic stays for certain kinds of judgments as specified in the article in sections 1-289, 1-290, 1-291, and 1-292. *But see* Beau Rivage Plantation v. Melex USA, Inc., 112 N.C. App. 446, 452, 436 S.E.2d 152, 155 (1993) (declining to apply "a literal reading of section 1-294," which if "considered alone," would have "appear[ed] to support plaintiff's position").

19. Raleigh v. Edwards, 234 N.C. 528, 529-30, 67 S.E.2d 669, 671 (1951).

20. Veazey v. Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950).

21. Embler v. Embler, 143 N.C. App. 162, 164, 545 S.E.2d 259, 261 (2001).

22. *See* Veazey, 231 N.C. at 361-62, 57 S.E.2d at 381.

23. Morris Communications Corp. v. City of Asheville, 145 N.C. App. 597, 603, 551 S.E.2d 508, 513 (2001) ("As a general rule, a party has no right to immediate appellate review of an interlocutory order."), *rev'd on other grounds*, 356 N.C. 103, 565 S.E.2d 70 (2002); *see also* N.C. GEN. STAT. § 1-278 (2001) ("[U]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.").

24. §§ 1-227, 7A-27(d).

25. N.C. R. Civ. P. 54(b).

26. Prior to 1868, interlocutory orders were immediately appealable in the discretion of the trial court. *See* Goodbread v. Wells, 20 N.C. (3 & 4 Dev. & Bat.) 324, 325 (1839)



appealable determinations of the trial court do not implicate the *functus officio* rule, and the trial court is not thereby divested of jurisdiction to proceed with the case.<sup>27</sup>

Sometimes when a party appeals from a purported final judgment, the appellate court will determine that the judgment is not actually final and so there is no right of appeal based on its finality.<sup>28</sup> If not final, the court's determination is interlocutory and any right of appeal must be based on whether the order affects a substantial right or has been properly certified pursuant to Civil Rule 54(b). Although the consequences, being jurisdictional, are extreme, the determination of the immediate appealability of an interlocutory order is not always easily made.

### B. *Interlocutory Orders That Affect a Substantial Right*

#### 1. Appeal of an Immediately Appealable Interlocutory Order

Filing notice of appeal of an interlocutory order that affects a substantial right, i.e., an immediately appealable interlocutory order, renders the trial court *functus officio* to proceed with the trial. For instance, in *Patrick v. Hurdle*,<sup>29</sup> the plaintiff's motion for a change of venue was granted and the matter was calendared for trial in the new county.<sup>30</sup> Defendant, however, filed a timely notice of appeal of the order granting the change of venue.<sup>31</sup> The appeal was properly perfected and the court of appeals ultimately reversed the order granting the venue change.<sup>32</sup> In the interim, however, the trial judge proceeded with the trial of the matter and reached a final judgment.<sup>33</sup> The court of appeals vacated this final judgment, noting:

An appeal from an *appealable* interlocutory order carries

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(holding that the trial court has discretion to allow appeal of interlocutory order); MCINTOSH, *supra* note 16, § 21 (“[I]t was within the discretion of the superior court to allow an appeal from an interlocutory order.”).

27. See *State v. Triplett*, 10 N.C. App. 165, 167, 178 S.E.2d 38, 39 (1970) (“[N]otice of appeal from a void order does not deprive the trial court of jurisdiction to enter subsequent orders in the cause.”).

28. See, e.g., *Kirby Bldg. Sys. v. McNiel*, 327 N.C. 234, 242, 393 S.E.2d 827, 831 (1990) (stating that there can be no appeal where there is no judgment); see also *Beau Rivage Plantation v. Melex USA, Inc.*, 112 N.C. App. 446, 452, 436 S.E.2d 152, 155 (1993) (“[T]he threshold and dispositive question is whether the trial court's order . . . had the requisite finality to make it subject to immediate appeal.”).

29. 7 N.C. App. 44, 171 S.E.2d 58 (1969).

30. *Id.* at 45, 171 S.E.2d at 59.

31. *Id.*

32. *Id.*

33. *Id.*

the interlocutory order and all questions incident to and necessarily involved therein to the appellate division. And the appeal stays all further proceedings in the trial court upon the order appealed from, or upon the matters embraced therein. The very question sought to be determined by the former appeal was the right of the Superior Court of Currituck County to transfer this case to the Superior Court of Pasquotank County for trial; therefore, the Superior Court of Pasquotank County was without jurisdiction to try the case pending the appeal.

Since the Superior Court of Pasquotank County was *functus officio* to try the case, it follows that the trial, the verdict and the judgment are nullities.<sup>34</sup>

## 2. Appeal of an Interlocutory Order That Is Not Immediately Appealable

Filing notice of appeal of an interlocutory order that does not affect a substantial right, i.e., a non-immediately appealable interlocutory order, does not render the trial court *functus officio* to proceed with the trial. For instance, in *T&T Development Co., Inc. v. Southern National Bank*,<sup>35</sup> the trial court granted the defendant's motion in limine to exclude certain evidence at the trial.<sup>36</sup> The plaintiffs immediately gave notice of appeal of this order and, when the trial court called the case for trial, the plaintiffs refused to offer any evidence on the ground that the trial court was *functus officio*.<sup>37</sup> The trial court then granted the defendant's motion to dismiss plaintiffs' claims.<sup>38</sup> On appeal, the court of appeals held that because the plaintiffs had no right to appeal the granting of the motion in limine, the trial court was not deprived of jurisdiction and did not err

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34. *Id.* at 45-46, 171 S.E.2d at 59 (emphasis added) (citations omitted); *see also* *Carpenter v. Carpenter*, 25 N.C. App. 307, 308, 212 S.E.2d 915, 916 (1975) (deciding that the district court was without jurisdiction to enter further orders while an appeal was pending). *But cf.* *Providian Nat'l Bank v. Bryant*, No. COA01-1546, 2003 WL 138928, at \*3 (N.C. App. Jan. 21, 2003) (acknowledging that an interlocutory order for sanctions was immediately appealable pursuant to section 1-277 of the General Statutes of North Carolina, but deciding that the trial judge had discretion to proceed with the trial de novo while the appeal was pending). The decision in *Providian National Bank* may have been based on the conclusion that the trial on the merits was not incident to and necessarily involved with the sanctions matter being appealed. *See id.*

35. 125 N.C. App. 600, 481 S.E.2d 347 (1997).

36. *Id.* at 601, 481 S.E.2d at 348.

37. *Id.* at 602, 481 S.E.2d at 348.

38. *Id.*

in calling the case for trial and dismissing it when plaintiffs failed to offer any evidence.<sup>39</sup> The court stated: "Although an appeal generally divests the trial court of jurisdiction, an appeal from a non-immediately appealable order does not deprive the trial court of jurisdiction to try and determine a case on its merits."<sup>40</sup>

Thus the case law is clear that a trial judge has the authority to decide whether the attempted appeal is of a nonappealable interlocutory order. If so, the *functus officio* rule does not apply. The trial court is not required to await the appellate court's decision whether the attempted appeal is, indeed, of a nonappealable interlocutory order.<sup>41</sup> If the trial court reaches this conclusion, it can proceed with the matter, and if it is correct in its conclusion, it is not *functus officio*.

What if the trial court reasonably concludes that the interlocutory order being appealed does not affect a substantial right and proceeds with the trial to final judgment, but the appellate court later concludes that the interlocutory order was immediately appealable? The rule would seem to be clear that, in this case, the trial court was *functus officio* and lacked jurisdiction to proceed—and that the reasonableness of the trial judge's conclusion that the interlocutory order did not affect a substantial right has no legal significance. Nevertheless, a recent case held differently.

### 3. Appeal of an Interlocutory Order That Is Unexpectedly Found to Be Immediately Appealable

In *RPR & Associates, Inc. v. University of North Carolina-Chapel Hill*,<sup>42</sup> the trial court denied defendant's Rule 12(b)<sup>43</sup> motions to

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39. *Id.* at 603, 481 S.E.2d at 349.

40. *Id.* at 605, 481 S.E.2d at 349; *see also* *Velez v. Dick Keffer Pontiac-GMC Truck*, 144 N.C. App. 589, 591, 551 S.E.2d 873, 875 (2001) (holding that the trial court had jurisdiction to enter an order compelling discovery against defendant-bank, even though defendant-dealer's appeal of an order compelling discovery against it was then pending, where the order against the dealer was interlocutory and not immediately appealable); *Harris v. Harris*, 58 N.C. App. 175, 177, 292 S.E.2d 775, 777 (1982) (explaining that an attempted appeal from a non-appealable order is a nullity and does not deprive the tribunal from which the appeal is taken of jurisdiction), *rev'd on other grounds*, 307 N.C. 684, 300 S.E.2d 369 (1983).

41. *See supra* note 40 and accompanying text; *see also* *RPR & Assocs. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 349, 570 S.E.2d 510, 517 (2002) ("[T]he trial court had the authority to determine whether its order affected defendant's substantial rights or was otherwise immediately appealable . . ."). *But see* *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 246 (1984) ("[R]uling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court.").

42. 153 N.C. App. 342, 570 S.E.2d 510 (2002).

43. N.C. R. Civ. P. 12(b).

dismiss, and the defendant filed notice of appeal.<sup>44</sup> The plaintiff continued to pursue its claims in superior court, and the defendant sought a stay from the trial judge, contending that its notice of appeal removed jurisdiction from the trial court pending resolution of the appeal.<sup>45</sup> The plaintiff responded that the order denying the 12(b) motions was interlocutory and nonappealable, so that notice of appeal did not deprive the trial court of jurisdiction to proceed with the case.<sup>46</sup> The trial court denied the defendant's motion to stay the proceedings, and the defendant thereafter filed a petition for writs of certiorari and supersedeas<sup>47</sup> with the court of appeals and moved for a stay of the trial court proceedings.<sup>48</sup> The court of appeals initially granted the defendant's motion for a stay but later dissolved the stay and denied the writs.<sup>49</sup> The defendant renewed its motion for a stay in the trial court and it was again denied.<sup>50</sup> The trial court proceeded with the matter, heard the evidence, and reached a final decision on the merits prior to the court of appeals' resolution of the defendant's appeal.<sup>51</sup>

On appeal, the court of appeals concluded that because the motion to dismiss was based in part on the doctrine of sovereign immunity, the denial of such motion affected a substantial right, thus rendering the decision of the trial court immediately appealable.<sup>52</sup> However, the court then concluded that the trial court had properly denied defendant's motions to dismiss.<sup>53</sup> Nevertheless, the defendant argued to the court<sup>54</sup> that the final judgment of the trial court had to be a nullity because, even if the trial court's denials of the Rule 12(b) motions was technically correct, the immediate appeal of the denials rendered the trial court *functus officio* to proceed with the merits of the case.<sup>55</sup> Surprisingly, the court of appeals overruled this

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44. *RPR & Assocs.*, 153 N.C. App. at 344, 570 S.E.2d at 512.

45. *Id.*

46. *Id.* at 344–45, 570 S.E.2d at 512.

47. "After a stay order or entry has been denied or vacated by a trial court, an appellant may apply to the appropriate appellate court for a writ of supersedeas in accordance with Rule 23." N.C. R. APP. P. 8(a); *see also* N.C. R. APP. P. 23 (describing how to seek a writ of supersedeas).

48. *RPR & Assocs.*, 153 N.C. App. at 345, 570 S.E.2d at 512.

49. *Id.*

50. *Id.*

51. *Id.* at 346, 570 S.E.2d at 513.

52. *Id.* at 348–49, 570 S.E.2d at 514–15.

53. *Id.*

54. This was the second time the case was appealed to the court of appeals. *See RPR & Assocs. v. State*, 139 N.C. App. 525, 525, 534 S.E.2d 247, 247 (2000); *RPR & Assocs.*, 153 N.C. App. at 342, 570 S.E.2d at 510.

55. *RPR & Assocs.*, 153 N.C. App. at 348, 570 S.E.2d at 514.

assignment of error.<sup>56</sup>

The court acknowledged the general *functus officio* rule, but then focused on the “reasonableness of the trial court’s decision” to proceed with trial on its belief that the orders were not immediately appealable—“underscored by the fact” that the appellate courts had “repeatedly rejected defendant’s attempts to stay the lower court proceedings or otherwise remove jurisdiction from the trial court.”<sup>57</sup> The court concluded:

Because the trial court had the authority to determine whether its order affected defendant’s substantial rights or was otherwise immediately appealable, the trial court did not err in continuing to exercise jurisdiction over this case after defendant filed its notice of appeal. The trial court’s determination that the order was nonappealable was reasonable in light of established precedent and the repeated denials by the appellate courts of this State to stay proceedings. Although this Court ultimately held that defendant’s appeal affected a substantial right, it also held that defendant was not immune to suit. Defendant states no grounds, nor has it produced any evidence to demonstrate how it was prejudiced by the trial court’s exercise of jurisdiction over this case.<sup>58</sup>

#### 4. The Rule Applied in *RPR & Associates, Inc.*: Misguided Because the *Functus Officio* Rule Is Jurisdictional and Not Discretionary

The test for determining when an interlocutory order affects a substantial right and is immediately appealable has never been an easy one to apply. The Supreme Court of North Carolina has stated:

Admittedly the “substantial right” test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.<sup>59</sup>

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56. *Id.* at 349, 570 S.E.2d at 515.

57. *Id.* at 348, 570 S.E.2d at 514–15.

58. *Id.* at 349, 570 S.E.2d at 515.

59. *Waters v. Pers. Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978); *see also* *Cagle v. Teachy*, 111 N.C. App. 244, 245, 431 S.E.2d 801, 802 (1993) (“[N]o hard and fast rules exist for determining which appeals affect a substantial right.”). *See generally* J. Brad Donovan, *The Substantial Right Doctrine and Interlocutory Appeals*, 17 CAMPBELL L. REV. 71 (1995) (summarizing the North Carolina cases applying the substantial right test); Willis Whichard, *Appealability in North Carolina: Common Law Definitions of the Statutory*

It is clear, however, that the matter is properly considered by the trial court when an interlocutory order is appealed before or during trial, and that if it is a close call the trial court or the appellate court can grant a stay of the trial proceedings pending the appellate court's resolution of the matter.<sup>60</sup> This seems a reasonable remedy for those situations where the substantial right question is legitimate and the appellant is not simply attempting improperly to stall the proceedings.<sup>61</sup>

The new rule applied in *RPR & Associates, Inc. v. University of North Carolina-Chapel Hill*,<sup>62</sup> seems both unnecessary and inconsistent with the basic *functus officio* rule. If jurisdiction is removed from the trial court when a party seeks to appeal an order that North Carolina laws stipulate is immediately appealable, then the appellate system is undermined by allowing the trial proceedings effectively to continue while the appeal is unresolved. Importantly, the jurisdiction of a court is that court's only legitimacy—it is the only basis for that court's power authoritatively to address an issue.<sup>63</sup> North Carolina case law is clear that subject matter jurisdiction is not conferred upon a court by consent, waiver, or estoppel.<sup>64</sup> If the trial court in *RPR & Associates* lacked jurisdiction to proceed with the trial, as the *functus officio* rule seems to clearly state,<sup>65</sup> it is difficult to understand how it is relevant that the defendant “state[d] no grounds, nor . . . produced any evidence to demonstrate how it was prejudiced

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*Substantial Rights Doctrine*, 47 LAW & CONTEMP. PROBS. 123 (1984) (explaining the test for determining a substantial right).

60. See N.C. R. APP. P. 8 (stating that a party may apply to the appellate courts for a stay when the trial court opts to proceed with the matter).

61. See *Velez v. Dick Keffer Pontiac-GMC Truck*, 144 N.C. App. 589, 591, 551 S.E.2d 873, 875 (2001) (“[A] litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a non-appealable interlocutory order of the trial court.”).

62. 153 N.C. App. 342, 570 S.E.2d 510 (2002).

63. Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987).

64. See, e.g., *Miller v. Roberts*, 212 N.C. 126, 129, 193 S.E. 286, 288 (1937) (stating that a party may not waive jurisdiction); *Deep River Citizens v. N.C. Dept. of Env't.*, 119 N.C. App. 232, 235, 457 S.E.2d 772, 774 (1995) (stating that jurisdiction can not be conferred upon a court by consent, waiver, or estoppel); *State v. Earley*, 24 N.C. App. 387, 389, 210 S.E.2d 541, 543 (1975) (same).

65. In *Hoke v. Atl. Greyhound Corp.*, the court stated that its decision was based “squarely on the want of jurisdiction in the court below” after notice of appeal was given. 227 N.C. 374, 376, 42 S.E.2d 407, 409 (1947). Additionally, the case law consistently describes a lower court order that violates the *functus officio* rule as a “nullity”—a judgment by a court without jurisdiction is a void judgment and a void judgment is a nullity. See MCINTOSH, *supra* note 16, § 651.

by the trial court's exercise of jurisdiction over this case," as the court of appeals stated.<sup>66</sup>

In *Patrick v. Hurdle*,<sup>67</sup> discussed above, the defendant properly appealed an immediately appealable interlocutory order and declined to participate in the trial of the matter that the trial judge improperly refused to stay.<sup>68</sup> Although this fact was noted in the court of appeals' opinion,<sup>69</sup> it did not appear to be in any way a part of the court's analysis or holding. In *RPR & Associates*, it does appear that the similarly situated defendant may have participated in the trial of the matter—even while arguing that the superior court judge had no jurisdiction to conduct the trial. Although the *RPR & Associates* court does not expressly state that this "two bites at the apple" strategy on the part of the defendant is the basis for its decision, one wonders if it was a significant factor. Nevertheless, like the "reasonableness" of the trial court's conclusion that the Rule 12(b) denials did not affect a substantial right, the actions of the appellant in participating in the allegedly improper trial should have no impact on the re-creation of trial court jurisdiction that was properly ousted pursuant to the long-established *functus officio* rule.<sup>70</sup>

*C. Interlocutory Orders That Do Not Affect a Substantial Right but Are Somewhat Final: Certification of Appeal by Trial Court Pursuant to Civil Rule 54(b)*

Immediate appeal of an interlocutory order is also allowed if the order is final as to some but not all of the claims or parties, and the

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66. *RPR & Assocs.*, 153 N.C. App. at 349, 570 S.E.2d at 515; *cf.* *Vance Constr. Co. v. Duane White Land Corp.*, 127 N.C. App. 493, 494, 490 S.E.2d 588, 589 (1997) (vacating the trial court's order based on the trial court's lack of jurisdiction to consider the matter before it, without any mention or consideration of whether any party had shown prejudice, and expressly denying the relevance of both parties' willingness and consent for the trial court to rule on the matter).

67. 7 N.C. App. 44, 171 S.E.2d 58 (1969).

68. *Id.* at 45, 171 S.E.2d at 59.

69. *Id.*

70. "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." N.C. R. CIV. P. 12(h). The appellate court can dismiss for lack of jurisdiction on its own motion even if the parties did not object at trial or attempt to appeal the issue. *Vance Constr. Co.*, 127 N.C. App. at 494, 490 S.E.2d at 590; *Ramsey v. Interstate Insurors, Inc.*, 89 N.C. App. 98, 102, 365 S.E.2d 172, 175 (1988) (noting an appellate court may raise the question of subject matter jurisdiction on its own motion, even if the question of jurisdiction were not argued by the parties in their briefs); *see also* Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants of an Opportunity To Be Heard*, 39 SAN DIEGO L. REV. 1253, 1280 (2002) (observing that it is widely accepted for appellate courts to resolve cases on jurisdictional grounds even if the parties did not raise the issue).

trial court certifies the case for appeal pursuant to Civil Rule 54(b) by finding that there is no just reason for delay. Thus, Rule 54(b) can apply when more than one claim for relief is presented or when multiple parties are involved, and the trial court enters a “final” order as to one or more but fewer than all of the claims or parties. Although still interlocutory, this “final” interlocutory order is immediately appealable based on the trial court’s certification and finding.<sup>71</sup> The following cases make it clear that only certain kinds of interlocutory orders can be classified as “final” and so be eligible for Rule 54(b) certification.<sup>72</sup>

In *Anglin-Stone v. Curtis*,<sup>73</sup> the trial court allowed plaintiff’s Rule 60(b) motion and granted relief from its earlier judgment dismissing plaintiff’s case.<sup>74</sup> Because further proceedings in the case then became necessary, the order was interlocutory and was not final as to any claim—despite the trial court’s certification under Rule 54(b).<sup>75</sup> Similarly, in *Cagle v. Teachy*,<sup>76</sup> the court of appeals found that the denial of a motion for summary judgment was not a final judgment and so would not be immediately appealable even if the trial court attempted to certify it for appeal under Rule 54(b).<sup>77</sup>

In *Tridyn Industries, Inc. v. American Mutual Insurance Co.*,<sup>78</sup> the trial court granted partial summary judgment on the issue of liability alone, leaving a genuine issue as to damages.<sup>79</sup> The supreme court held that even if the case were considered a “multiple claim lawsuit” within the meaning of Rule 54(b), the partial summary judgment was

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71. *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 490, 251 S.E.2d 443, 446 (1979). In *Tridyn*, the court stated:

Rule 54(b) modifies the traditional notion that a case could not be appealed until the trial court had finally and entirely disposed of it all. . . . The rule should be seen as a companion to other rules of procedure which permit liberal joinder of claims and parties. . . . In multiple claim or multiple party cases the trial court may enter a judgment which is final and which fully terminates fewer than all the claims or claims as to fewer than all the parties.

*Id.* at 490, 251 S.E.2d at 446–47.

72. See also *Eastover Ridge v. Metric Constructors*, 139 N.C. App. 360, 363–64, 533 S.E.2d 827, 829 (2000) (granting the defendant’s partial summary judgment motion on the plaintiff’s unfair and deceptive trade practice claim). The court of appeals held that because this interlocutory order was “dispositive of that claim,” and because the trial court certified that there was no just reason for delaying the appeal, the appeal was proper pursuant to Rule 54(b).

73. 146 N.C. App. 608, 553 S.E.2d 244 (2001).

74. *Id.* at 609, 553 S.E.2d at 244.

75. *Id.* at 609–10, 553 S.E.2d at 244–45.

76. 111 N.C. App. 244, 431 S.E.2d 801 (1993).

77. *Id.* at 247, 251 S.E.2d at 803.

78. 296 N.C. 486, 251 S.E.2d 443 (1979).

79. *Id.* at 490, 251 S.E.2d at 447.



not “final” as to either possible claim—despite the trial court’s declaration to the contrary.<sup>80</sup> Again, the court stated that the trial judge could not “by denominating his decree a ‘final judgment’ make it immediately appealable under Rule 54(b) if it is not such a judgment.”<sup>81</sup>

When individual claims in a multiple claim lawsuit are finally and completely resolved, a Rule 54(b) certification is effective. For instance in *Creech v. Ranmar Properties*,<sup>82</sup> the trial court’s order denied the plaintiff recovery on several causes of action, holding that “this is a final judgment as to the Plaintiff’s First, Third, Fifth and Sixth Causes of Action and there is no just reason for delay in entering this order pursuant to N.C. R. Civ. P. 54(b).”<sup>83</sup> The court of appeals held that although this was an interlocutory order, as the trial court’s judgment failed to resolve the plaintiff’s second and fourth causes of action, and the defendants’ counterclaim, “the trial court’s judgment operates as a final judgment as to plaintiff’s first, third, fifth and sixth causes of action, and it contains the trial court’s certification pursuant to Rule 54(b). Therefore, plaintiff’s appeal is properly before us.”<sup>84</sup>

Even if the order is a proper “final” interlocutory order, it is not clear whether the trial court’s Rule 54(b) certification is reviewable by the court of appeals. In *DKH Corp. v. Rankin-Patterson Oil Co., Inc.*,<sup>85</sup> the trial court granted the defendant partial summary judgment dismissing the plaintiff’s unfair practice claim and certified that there was no just reason for delay under Rule 54(b).<sup>86</sup> The court of appeals dismissed the appeal but the supreme court reversed, holding that it was a final interlocutory order and that the court of appeals was required to hear the appeal.<sup>87</sup> It remains uncertain whether a trial court’s Rule 54(b) certification is reviewable by the court of appeals. Yet, the court of appeals has stated that the trial court’s certification of no just reason to delay the appeal does not bind the appellate

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80. *Id.* at 491, 251 S.E.2d at 447.

81. *Id.* Just as the trial court’s designation of an interlocutory order as “final” does not control its certifiability under Rule 54(b), Rule 54(b) certification also does not *require* the trial court to certify that the order or judgment is a “final judgment.” *Guthrie v. Conroy*, 152 N.C. App. 15, 18, 567 S.E.2d 403, 406–07 (2002).

82. 146 N.C. App. 97, 551 S.E.2d 224 (2001).

83. *Id.* at 99, 551 S.E.2d at 227.

84. *Id.* at 99–100, 551 S.E.2d at 227.

85. 348 N.C. 583, 500 S.E.2d 666 (1998).

86. *Id.* at 584, 500 S.E.2d at 667.

87. *Id.* at 584, 585, 500 S.E.2d at 667, 668.

court.<sup>88</sup> It is assumed that if the attempted appeal is improper under Rule 54(b), as in the case when the attempted appeal is improper under section 1-277(a) of the General Statutes of North Carolina, the *functus officio* rule does not apply and the trial court is not thereby deprived of jurisdiction to proceed with the case.<sup>89</sup>

## II. THE TRIAL COURT'S AUTHORITY PENDING APPEAL

### A. *The Trial Court Retains Basic Authority over Its Judgments and Records*

North Carolina case law establishes that trial judges have the authority to modify any order or final judgment during the session<sup>90</sup> in which the order or judgment was rendered. Until the session ends, the judgment or order remains *in fieri*.<sup>91</sup> Additionally, even after the session expires, the trial court retains the authority to make ministerial corrections to its orders or judgments.<sup>92</sup> This power arises from the trial court's inherent power and duty to make its records speak the truth.<sup>93</sup> This power is never constricted or limited by mere passage of time.<sup>94</sup> The authority to correct its records does not allow

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88. See *Laws v. Horizon Hous., Inc.*, 137 N.C. App. 770, 770–71, 529 S.E.2d 695, 696 (2000).

89. There would seem to be no reason to treat improper appeals under Rule 54(b) and section 1-277(a) of the General Statutes of North Carolina differently with regard to the *functus officio* rule—although as a practical matter, if the trial court approved of the immediate appeal by issuing the Rule 54(b) certification, then that trial court may be unlikely to proceed with the litigation pending the appeal process.

90. “[A]lthough the words are frequently used interchangeably, ‘term’ in this jurisdiction generally refers to the typical six-month assignment of superior court judges to a judicial district, while ‘session’ designates the typical one-week assignment to a particular location during the term.” *State v. Smith*, 138 N.C. App. 605, 607–08, 532 S.E.2d 235, 237 (2000), *review denied*, 353 N.C. 355, 543 S.E.2d 477 (2001).

91. See *State v. McLamb*, 208 N.C. 378, 384, 180 S.E. 586, 589–90 (1935) (“The proceedings of a court are *in fieri* until the close of a term, and the judge may modify or vacate any order made during the term, and his action is not reviewable unless it appears that he has grossly abused his power, resulting in oppression.”); *Bowen v. Hodge Motor Co.*, 29 N.C. App. 463, 464, 224 S.E.2d 699, 701 (1976) (“All proceedings of a court of record *in fieri* are under the absolute control of the trial judge, subject to be amended, modified or annulled at any time before the expiration of the term in which they are done.”), *rev’d on other grounds*, 292 N.C. 633, 234 S.E.2d 748 (1977).

92. See *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956) (quoting *Walton v. Pearson*, 85 N.C. 34, 48 (1881)) (“It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance . . . .”); see also N.C. R. Civ. P. 60(a) (“Clerical mistakes in judgments, orders or other parts of the record . . . may be corrected by the judge at any time on his own initiative or on the motion of any party . . . .”).

93. *Cannon*, 244 N.C. at 403, 94 S.E.2d at 342.

94. *Id.*

the trial court to reconsider any issues or modify any substantive ruling.<sup>95</sup> It permits the trial court only to amend the records to reflect accurately the proceedings that actually took place, i.e., any corrected order or judgment is a *nunc pro tunc* entry and relates back to the date the original order or judgment was entered. Both the authority to modify judgments *in fieri* and the authority to correct court records survive the *functus officio* rule.

For instance, in *In re Tuttle*<sup>96</sup> the trial judge announced the judgment and sentence of the criminal defendant in open court.<sup>97</sup> The defendant immediately gave oral notice of appeal.<sup>98</sup> Soon afterward, during the same day and the same session of court, the trial court made the additional finding that the defendant was not sentenced as a committed youthful offender, and the judge ordered this finding attached to the written judgment.<sup>99</sup> The defendant filed a petition for writ of habeas corpus, arguing that he had been sentenced to prison without the statutorily-required finding that he would not derive benefit from being sentenced as a committed youthful offender.<sup>100</sup> The defendant argued that the judge's subsequent finding was a nullity because the judge had no power to make any finding after notice of appeal had been given.<sup>101</sup> The court of appeals rejected defendant's argument.<sup>102</sup> It cited the basic rule that until the expiration of the term, orders and judgments of the court are *in fieri*.<sup>103</sup> The court also held that the judge has the discretionary power to make such changes and modifications in them as appropriate, stating that "[t]his is true notwithstanding that notice of appeal has been given."<sup>104</sup>

The authority to correct the court record can be more complicated. For example, in *State v. Dixon*,<sup>105</sup> the defendant

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95. See *Pratt v. Staton*, 147 N.C. App. 771, 774–75, 556 S.E.2d 621, 624 (2001) (concluding that the trial court's amended order "altered the substantive rights of the parties" by adding a Rule 54(b) certification and therefore was not an appropriate correction of a clerical error pursuant to Rule 60(a) of the Rules of Civil Procedure); *S.C. Dep't of Soc. Servs. v. Hamlett*, 142 N.C. App. 501, 504, 543 S.E.2d 189, 191 (2001) ("This Court has consistently held that Rule 60(a) applies to clerical omissions or errors only, and may not be used to change the substantive rights of the parties.").

96. 36 N.C. App. 222, 243 S.E.2d 434 (1978).

97. *Id.* at 222, 243 S.E.2d at 434.

98. *Id.*

99. *Id.* at 222–23, 243 S.E.2d at 435.

100. *Id.* at 223, 243 S.E.2d at 435.

101. *Id.*

102. *Id.* at 225, 243 S.E.2d at 436.

103. *Id.*

104. *Id.*

105. 139 N.C. App. 332, 533 S.E.2d 297 (2000).

appealed a judgment revoking his probation.<sup>106</sup> The appellate record was settled and the appeal docketed.<sup>107</sup> The State then moved for the trial court to correct the written judgment, alleging that it contained a clerical error and did not accurately reflect what the judge found in open court.<sup>108</sup> The trial judge granted the motion and entered a corrected judgment.<sup>109</sup> The State moved for the court of appeals to amend the appellate record to include the amended judgment and the motion was granted.<sup>110</sup> On appeal, the defendant conceded that the original written judgment did not accurately reflect the judgment of the trial court as rendered in open court, but argued that the trial court lacked jurisdiction to correct the judgment after the defendant had given notice of appeal and the record on appeal had been filed with the court of appeals.<sup>111</sup> The court of appeals agreed with the defendant.<sup>112</sup> The court acknowledged the “universally recognized” inherent power and duty of a court of record to make its records speak the truth, and that no lapse of time deprived the trial court of this authority over its own records.<sup>113</sup> *Dixon*, however, cited North Carolina Rule of Appellate Procedure 9(b)(5), and held that once a case has been docketed in the appellate court, the appellate court acquires jurisdiction over the record, so that after the record on appeal has been filed with the appellate court, the trial court may amend or correct the record only upon a directive from the appellate court.<sup>114</sup> Thus, a motion to correct or amend a judgment in order to make it speak the truth “is properly made to the appellate court rather than the trial court once the record on appeal has been filed with the appellate court.”<sup>115</sup>

A related issue concerns the authority of the trial court to

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106. *Id.* at 335, 533 S.E.2d at 301.

107. *Id.*

108. *Id.* at 336, 533 S.E.2d at 301.

109. *Id.*

110. *Id.* at 337, 533 S.E.2d at 301.

111. *Id.*

112. *Id.*

113. *Id.* at 337, 533 S.E.2d at 302.

114. *Id.* at 338, 533 S.E.2d at 302. Rule 9(b)(5) states:

On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content.

Prior to the filing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

N.C. R. APP. P. 9(b)(5). Compare North Carolina Rule of Civil Procedure 60(a), which states: “[D]uring the pendency of an appeal, such [clerical] mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.” N.C. R. CIV. P. 60(a).

115. *Dixon*, 139 N.C. App. at 338, 533 S.E.2d at 302.

consider a motion to amend its findings or make additional findings of fact pursuant to Rule 52(b) of the Rules of Civil Procedure. Rule 52(b) allows such a motion if made within ten days of entry of judgment.<sup>116</sup> In *Parrish v. Cole*,<sup>117</sup> the plaintiff made such a motion and the trial court granted it despite defendant's having given notice of appeal of the original judgment prior to the motion.<sup>118</sup> On appeal, defendant contended that the notice of appeal barred a subsequent but timely motion to amend the findings of fact pursuant to Rule 52(b).<sup>119</sup> *Parrish* acknowledged the general rule that a timely notice of appeal removes jurisdiction from the trial court and places it in the appellate court, but the court stated: "[W]e feel that the best result is reached by holding that a notice of appeal will not bar a party from making a timely motion pursuant to Rule 52(b)."<sup>120</sup> The court explained:

"[T]he primary purpose of Rule 52(b) is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court." If a trial court has omitted certain essential findings of fact, a timely motion under Rule 52(b) can correct this oversight and avoid remand by the appellate court for further findings and, perhaps, avoid multiple appeals. Furthermore, a Rule 52(b) motion must be made within ten days, a period which cannot be expanded by the trial judge. Thus, a party must make a motion under Rule 52(b) within ten days or his motion will be barred. This ten day grace period is unlikely to disrupt the appellate process. A complete record on appeal, resulting from a Rule 52(b) motion, will provide the appellate court with a better understanding of the trial court's decision, thus promoting the judicial process.<sup>121</sup>

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116. Rule 52(b) states that "[u]pon motion of a party made not later than 10 days after entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59." N.C. R. Civ. P. 52(b).

117. 38 N.C. App. 691, 248 S.E.2d 878 (1978).

118. *Id.* at 692, 248 S.E.2d at 879.

119. *Id.*

120. *Id.* at 693, 248 S.E.2d at 879.

121. *Id.* at 694, 248 S.E.2d at 879-80 (citations omitted). See *York v. Taylor*, 79 N.C. App. 653, 654-55, 339 S.E.2d 830, 831 (1986) (stating that the "trial court is not divested of jurisdiction to hear and rule on a Rule 52(b) motion even though notice of appeal has been given"); see also *Hightower v. Hightower*, 85 N.C. App. 333, 336, 354 S.E.2d 743, 745 (1987) (holding that pursuant to the provisions of Rule 58 of the North Carolina Rules of Civil Procedure, the trial court retained the authority to approve and sign a judgment after a defendant gives notice of appeal); cf. *State v. Palmer*, 334 N.C. 104, 108, 431 S.E.2d 172, 174 (1993) (finding that a written order that "appeared out of nowhere" in the court file fifty-seven days after notice of appeal was part of the record on appeal despite the

*B. Trial Court Retains Authority to Act in Aid of Appeal*

Not surprisingly, the *functus officio* rule does not deprive the trial court of jurisdiction to take actions that aid the appellate court in processing the appeal.<sup>122</sup> Statutes and rules have developed to define this authority. For instance, section 1-283 of the General Statutes of North Carolina and North Carolina Rule of Appellate Procedure 11 provide for the judge's role in settling the record on appeal. The statute expressly provides that the trial judge retains the power to settle the record "notwithstanding he has resigned or retired or his term of office has expired without reappointment or reelection since entry of the judgment or order."<sup>123</sup> The power of retired or resigned judges to settle the record on appeal is unique—the general rule is that retired or resigned judges have no continuing authority to enter orders in any case.<sup>124</sup> Pursuant to Rule 27(c) the trial court also retains some authority to extend the time for service of the proposed record on appeal or to extend the time to produce the transcript, but this authority is limited.<sup>125</sup>

In *Strauss v. Hunt*,<sup>126</sup> the appellee failed to respond timely to the appellant's service of the proposed record on appeal.<sup>127</sup> The trial court found that circumstances tolled the applicable time limit so that the appellee was allowed to respond.<sup>128</sup> The court of appeals denied this authority to the trial court.<sup>129</sup> Emphasizing that the time schedules set out in the Appellate Rules were designed to keep the process of perfecting an appeal to the appellate division "flowing in an orderly manner,"<sup>130</sup> the court held that:

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defendant's arguments that the order was invalid because the trial court was *functus officio*).

122. *Hoke v. Atl. Greyhound Corp.*, 227 N.C. 374, 376, 42 S.E.2d 407, 408 (1947) (describing the duty of the trial judge to settle the record on appeal and resolve certain service issues).

123. N.C. GEN. STAT. § 1-283 (2001). Rule 36 of the North Carolina Rules of Appellate Procedure addresses the situation if the trial judge is no longer available to settle the record. See N.C. R. APP. P. 36.

124. *In re Pittman*, 151 N.C. App. 112, 116, 564 S.E.2d 899, 901-02 (2002); see also Thomas L. Fowler, *Retired Judges, Substitute Judges, and Civil Rule 63*, N.C. ST. B.J., Winter 2002, at 24, 24-26 (discussing *In re Pittman* and Rule 63 of the revised North Carolina Rules of Civil Procedure).

125. N.C. R. APP. P. 27.

126. 140 N.C. App. 345, 536 S.E.2d 636 (2000).

127. *Id.* at 347, 536 S.E.2d at 638.

128. *Id.* at 347-48, 536 S.E.2d at 638.

129. *Id.*

130. *Id.* at 349, 536 S.E.2d at 639 (quoting *State v. Gillespie*, 31 N.C. App. 520, 521, 230 S.E.2d 154, 155 (1976)).

Our trial judges may not toll the time periods for serving and settling the record on appeal contained in the Rules. Trial judges may only grant extensions of time for good cause shown to allow a court reporter an additional thirty days to produce the transcript or to allow the appellant to "extend once for no more than 30 days the time permitted by Rule 11 . . . for the service of the proposed record on appeal." Further deviations or extensions of time under the Rules can only be granted by the appellate division.<sup>131</sup>

Thus, all motions made to extend time, except for motions to extend the time for service of the proposed record on appeal, and motions to extend the time to produce the transcript, must be made to the appellate courts.

The trial court also retains authority to dismiss the appeal, pursuant to Rule 25, for failure to perfect the appeal.<sup>132</sup> For instance, in *Farm Credit Bank of Columbia v. Edwards*,<sup>133</sup> the plaintiff's motion to dismiss the defendants' appeal was properly made in the trial court rather than in the court of appeals because although the defendants had filed notice of appeal, the appeal had not yet been filed and docketed in the court of appeals.<sup>134</sup>

The failure to perfect an appeal addressed by Rule 25 is one way to abandon an appeal.<sup>135</sup> North Carolina cases establish that the trial court retains authority to determine other ways in which the appellant has "abandoned" its appeal so that the trial court's jurisdiction to proceed with the case is regained.<sup>136</sup> There has been some

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131. 140 N.C. App. at 349, 536 S.E.2d at 639 (citations omitted); see N.C. R. APP. P. 27(c)(2).

132. Rule 25 provides: "Prior to the filing of an appeal in an appellate court motions to dismiss are made to the court, commission, or commissioner from which appeal has been taken; after an appeal has been filed in an appellate court motions to dismiss are made to that court." N.C. R. APP. P. 25.

133. 121 N.C. App. 72, 464 S.E.2d 305 (1995).

134. *Id.* at 75, 464 S.E.2d at 306.

135. See *Whitfield v. Todd*, 116 N.C. App. 335, 337, 447 S.E.2d 796, 798 (1994) ("The qualification that an appeal may be dismissed when adjudged abandoned has been further codified by N.C. R. App. P. 25(a)."); *McGinnis v. McGinnis*, 44 N.C. App. 381, 385, 261 S.E.2d 491, 494 (1980) (holding that the defendant's notice of appeal from the trial court's order did not prevent the trial court from entering further orders in the cause, since the defendant's failure to perfect his appeal by the time such orders were entered almost three months later constituted an abandonment that reinvested the court with jurisdiction to render further orders in the cause).

136. See generally Suzanne Morgan Leary, Note, *Civil Procedure—Bowen v. Hodge Motor Co.: Abandonment of Appeal in North Carolina*, 56 N.C. L. REV. 573, 575 (1978) (exploring abandoned appeals). Leary notes:

Historically, the qualification that a trial judge can, upon a proper showing, judge an appeal abandoned applied principally to situations in which an appellant

uncertainty, however, as to what action by the appellant can be legitimately construed as an abandonment.

In *Bowen v. Hodge Motor Co.*,<sup>137</sup> the judge granted a directed verdict for the defendant and the plaintiff gave notice of appeal.<sup>138</sup> Subsequently, the plaintiff made a Rule 41(a)(2) motion for voluntary dismissal without prejudice, which was granted by the trial judge.<sup>139</sup> The court of appeals, relying on the supreme court's opinion in *Sink v. Easter*,<sup>140</sup> held that the plaintiff's motion to dismiss voluntarily his action without prejudice and the subsequent appearance of the parties at the hearing thereon constituted an abandonment of the plaintiff's appeal from the directed verdict for the defendant.<sup>141</sup> The supreme court reversed the court of appeals noting that the court of appeals' reliance on *Sink* was misplaced:

This case should not be interpreted as holding that the mere filing of a motion directed to an order or judgment from which an appeal has previously been taken and the appearance at a hearing thereon constitutes an abandonment of the prior appeal, nothing else appearing.

....

... On this record there is neither notice nor proper showing by the plaintiffs that they abandoned their appeal nor any judgment by the trial court to that effect. The appeal, then, was still pending when plaintiffs filed their Rule 41(a)(2) motion and when it was heard and ruled on by the trial court.<sup>142</sup>

*Bowen*, then, appeared to reject the possibility, seemingly adopted by *Sink*, that the trial court may find an implied abandonment of the appeal. Indeed, this seems to be the rule now followed by North Carolina courts. For instance, a 1991 case, *Kirby*

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failed to prosecute his appeal.... The rationale [for the rule] was that an appellee should have the fruit of his judgment promptly and thus is entitled to have an appeal that was taken but not prosecuted dismissed.

*Id.* at 575-76.

137. 29 N.C. App. 463, 224 S.E.2d 699 (1976), *rev'd*, 292 N.C. 633, 234 S.E.2d 748 (1977).

138. *Id.* at 463, 224 S.E.2d at 698.

139. *Id.* at 464, 224 S.E.2d at 700.

140. 288 N.C. 183, 198, 217 S.E.2d 532, 542 (1975) (stating that "the general rule that an appeal divests the trial court of jurisdiction becomes inoperative when the trial judge, after due notice and on a proper showing, adjudges that the appeal has been abandoned").

141. 29 N.C. App. at 466, 224 S.E.2d at 701.

142. *Bowen v. Hodge Motor Co.*, 292 N.C. 633, 636, 234 S.E.2d 748, 748, 751 (1977).



*Building Systems v. McNiel*,<sup>143</sup> cites *Bowen* for the proposition that “[a]bandonment of an appeal exists only where there is express notice, showing, and judgment of abandonment of appeal. Only then does the appeal cease to be pending.”<sup>144</sup>

C. *Trial Court Retains Authority to Act on Unrelated Matters After Notice of Appeal*

1. Jurisdiction to Hear Collateral Matters: Different Parties or Separable Issues

There is authority for the proposition that the trial court also retains power to consider matters unaffected by the order or judgment being appealed.<sup>145</sup> For instance, when there are multiple parties involved in the proceeding but only one party is appealing and the matter being appealed is insular, appellate courts have allowed the trial court to proceed with matters affecting only the nonappealing parties. In *Jenkins v. Wheeler*,<sup>146</sup> the trial court granted one defendant’s motion to dismiss and the plaintiff gave notice of appeal.<sup>147</sup> Subsequently, a co-defendant moved to dismiss for failure to state a claim, and the trial court granted that motion.<sup>148</sup> The plaintiff argued that because of the pending appeal the trial judge lacked authority to hear the second defendant’s motion.<sup>149</sup> The court of appeals disagreed, finding that the first order of dismissal in favor of the first defendant, from which the plaintiff had appealed, “did not touch upon or affect the subject matter” of the second order of dismissal in favor of the second defendant.<sup>150</sup> Since the second motion was not a matter embraced within or affected by the appeal, the trial court was not deprived of jurisdiction to consider and rule on the matter.<sup>151</sup>

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143. 327 N.C. 234, 393 S.E.2d 827 (1990).

144. *Id.* at 240, 393 S.E.2d at 831.

145. “[U]pon filing of a notice of appeal, a trial court in North Carolina is divested of jurisdiction *with regard to all matters embraced within or affected by the judgment* which is the subject of the appeal.” *Brooks v. Giesey*, 106 N.C. App. 586, 590–91, 418 S.E.2d 236, 238 (1992) (emphasis added); *see also* N.C. GEN. STAT. § 1-294 (2001) (addressing stays of proceedings).

146. 72 N.C. App. 363, 325 S.E.2d 4 (1985).

147. *Id.* at 364, 325 S.E.2d at 5.

148. *Id.* at 364–65, 325 S.E.2d at 5.

149. *Id.* at 365, 325 S.E.2d at 5.

150. *Id.*

151. This was also the result in *Bullock v. Newman*, in which the North Carolina Court of Appeals stated that “[t]he court retained jurisdiction to hear defendant hospital’s motion after plaintiff had taken the appeal from the order granting defendant Newman’s

This exception can also apply when the parties are the same but the subject matter of the motion is sufficiently separable from the matter being appealed. In *Cox v. Dine-a-Mate, Inc.*,<sup>152</sup> the court of appeals reviewed the substantive matters pending on appeal and concluded that those issues were not involved in the plaintiff's motion to enjoin the defendants from proceeding with a separate action in another state.<sup>153</sup> The propriety of the action in another state "was not a question involved in the then-pending appeal of the North Carolina Action."<sup>154</sup> Similarly, in *High Point Bank & Trust Co. v. Morgan-Schultheiss*,<sup>155</sup> the trial court granted the defendant's motion for summary judgment as to plaintiff's claim and plaintiff filed notice of appeal.<sup>156</sup> The defendant subsequently moved for and was granted default judgment against the plaintiff on the defendant's counterclaims.<sup>157</sup> On appeal, the plaintiff argued that the appeal of the summary judgment divested the trial court of jurisdiction to enter the default judgments.<sup>158</sup> The court of appeals disagreed, finding the principal action and the counterclaims sufficiently separable.<sup>159</sup>

## 2. Jurisdiction to Hear the Prevailing Party's Claim for Attorney Fees

Pursuant to this analysis, should a trial court have the authority to consider a party's motion for attorney fees—arguably a collateral matter—while the judgment on which the attorney fees claim is based is on appeal? The issue is complicated and is one with which other jurisdictions have wrestled. In the federal courts the question initially arose as whether a final decision on the merits was a final judgment for appellate purposes even if the attorney fee matters remained to be determined.<sup>160</sup> It is, of course, arguable that a purported "final" judgment on the merits that leaves attorney fees questions undetermined, is, nevertheless, in actuality an interlocutory order, as it does not finally dispose of the case but requires further action. If so, appealing such an order, at least based on its being a final

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motion for summary judgment as it was 'not affected by the judgment appealed from.' " 93 N.C. App. 545, 551, 378 S.E.2d 562, 565 (1989) (quoting section 1-294 of the General Statutes of North Carolina).

152. 131 N.C. App. 542, 508 S.E.2d 6 (1998).

153. *Id.* at 545, 508 S.E.2d at 8.

154. *Id.*

155. 33 N.C. App. 406, 235 S.E.2d 693 (1977).

156. *Id.* at 431, 235 S.E.2d at 707.

157. *Id.* at 411-12, 235 S.E.2d at 697.

158. *Id.* at 431, 235 S.E.2d at 707.

159. *Id.*

160. *See infra* notes 161-73 and accompanying text.

judgment, would have to await the court's decision on any claim for attorney fees.

In *White v. New Hampshire Department of Employment Security*,<sup>161</sup> months after securing a judgment on the merits, the plaintiff moved for attorney fees as authorized by statute.<sup>162</sup> Because the plaintiff had not included any request for attorney fees in his complaint, the court of appeals held that the motion for attorney fees was a motion to alter or amend the final judgment under Rule 59(e), and that, as such, it was untimely.<sup>163</sup> The United States Supreme Court reversed, holding that the attorney fee issue was "uniquely separable" from the final judgment on the merits, so that its resolution did not require an amendment of the otherwise final judgment pursuant to Rule 59.<sup>164</sup> Although *White* did not directly address appealability issues, several circuits concluded that *White* established that a judgment on the merits was final for appeal purposes, even if it did not include a final determination of attorney fees.<sup>165</sup>

The United States Supreme Court confirmed this interpretation in 1988 in *Budinich v. Becton Dickinson & Co.*<sup>166</sup> In *Budinich*, the defendant won a judgment on the merits and the trial court denied the plaintiff's timely motion for a new trial.<sup>167</sup> Two and a half months later the trial court entered its final order regarding attorney fees, and, at that time, the plaintiff filed notice of appeal.<sup>168</sup> The Court of Appeals for the Tenth Circuit held that this notice of appeal was not timely, i.e., it was not effective to appeal the judgment on the merits because that judgment was "final" for appellate purposes on the date the motion for a new trial was denied.<sup>169</sup> Thus, the time to appeal that "final" judgment had run long before the decision resolving attorney

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161. 455 U.S. 445 (1982).

162. *Id.* at 447-48.

163. *White v. N.H. Dep't of Employment Sec.*, 629 F.2d 697 (1st Cir. 1980), *rev'd*, 455 U.S. 445 (1982).

164. *White*, 455 U.S. at 452.

165. Other circuits rejected this clear rule and "persevered in drawing distinctions between attorney fee theories collateral to the merits and those integral to the merits, reasoning that the statutory theory involved in the *White* case was collateral to the merits." 15B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3915.6, at 329 (2d ed. 1991).

166. 486 U.S. 196 (1988).

167. *Id.* at 197-98.

168. *Id.* at 198.

169. *See Budinich v. Becton Dickinson & Co.* 807 F.2d 155, 159 (10th Cir. 1986), *aff'd*, 486 U.S. 196 (1988).

fees was filed.<sup>170</sup> The Supreme Court agreed and adopted the bright-line rule that “a decision on the merits is a ‘final decision’ . . . whether or not there remains for adjudication a request for attorney’s fees attributable to the case.”<sup>171</sup>

One consequence of the rule adopted in *Budinich* for the federal courts is that the trial court has authority to consider and resolve a party’s motion for attorney fees even after the final judgment on the merits has been appealed and the appeal is pending.<sup>172</sup> At least in the federal courts, notice of appeal does not render the trial court *functus officio* with regard to the attorney fee issue. The order awarding attorney fees, entered during the pendency of the appeal, is separately appealable and requires its own notice of appeal.<sup>173</sup>

It appears that North Carolina follows part, but not all, of the rules outlined in *Budinich*. In *Gibbons v. Cole*,<sup>174</sup> the trial court granted the defendants’ motion for judgment on the pleadings, and the plaintiff filed notice of appeal.<sup>175</sup> Several weeks later the trial court held a hearing on the defendants’ motion for attorney fees, and several weeks after that the trial court entered a “final order” granting the defendants’ attorney fees motion.<sup>176</sup> The plaintiffs then gave notice of appeal from the trial court’s award of attorney fees to the defendants.<sup>177</sup> On appeal, the plaintiffs contended that the trial court was without jurisdiction to proceed on the attorney fee motion after appellants filed the appeal of the judgment on the pleadings.<sup>178</sup> The court of appeals agreed, citing section 1-294 of the General Statutes of North Carolina and stating:

The trial court’s decision to award attorneys fees was clearly affected by the outcome of the judgment from which plaintiffs appealed. Accordingly, the appeal by plaintiffs from the judgment on the pleadings deprived the superior court of the authority to make further rulings in the case until it returns

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170. *See id.*

171. *Budinich*, 486 U.S. 196, 202–03 (1988).

172. *See* WRIGHT ET AL., *supra* note 165, at 338–44.

173. *See* discussion and cases cited, WRIGHT ET AL., *supra* note 165, at 340–44. In cases where the attorney fee award is not appealed but the judgment on the merits is reversed on appeal, a party may seek relief from the attorney fee award pursuant to Rule of Civil Procedure 60(b)(5). *Id.* at 344.

174. 132 N.C. App. 777, 513 S.E.2d 834 (1999).

175. *Id.* at 778–79, 513 S.E.2d at 835.

176. *Id.* at 779, 513 S.E.2d at 835.

177. *Id.*

178. *Id.* at 782, 513 S.E.2d at 837.

from this Court.<sup>179</sup>

Thus, *Gibbons* seems to indicate that a judgment on the merits is final for appellate purposes even if it does not resolve the attorney fee question, and the attorney fee decision is separately appealable requiring its own notice of appeal. This interpretation is supported by the case of *Okwara v. Dillard Department Stores, Inc.*,<sup>180</sup> where the plaintiff argued that the defendants' motions for attorney fees should be time-barred because the motions were made two years after the trial court's initial resolution of the case.<sup>181</sup> The court of appeals noted that "[t]he usual practice in awarding attorneys' fees is to make the award at the end of the litigation 'when all the work has been done and all the results are known.'"<sup>182</sup> In *Okwara*, although the trial court's ruling was two years in the past, the litigation had not actually ended until July of 1998, when the plaintiff's petition for discretionary review of the judgment on the merits was denied by the Supreme Court of North Carolina.<sup>183</sup> The attorney fee motions were filed in August and September of 1998, and the court found this to be "within a reasonable time after the 'results were known,' " and therefore not time-barred.<sup>184</sup>

Unlike the federal courts, which follow the rule of *Budinich*,<sup>185</sup> the North Carolina trial courts do not appear to have jurisdiction, pending the appeal of the final judgment on the merits, to hear and resolve the attorney fee question.<sup>186</sup> The apparent holding of *Gibbons* that the trial court lacks authority to enter an order awarding attorney fees after notice of appeal of an appealable order<sup>187</sup> finds support in several other cases.<sup>188</sup> But in *Overcash v. Blue Cross*

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179. *Id.*

180. 136 N.C. App. 587, 525 S.E.2d 481 (2000).

181. *Id.* at 592, 525 S.E.2d at 485.

182. *Id.* (quoting *Baxter v. Jones*, 283 N.C. 327, 331, 196 S.E.2d 193, 196 (1973)).

183. *Id.*

184. *Id.* But cf. *Rice v. Danas, Inc.*, 132 N.C. App. 736, 739-41, 514 S.E.2d 97, 99-100 (1999) (holding that a motion for Rule 11 sanctions, filed almost seven months after the judgment had been entered on the jury verdict, was not filed within a reasonable time of detecting the alleged improprieties).

185. See *supra* note 171 and accompanying text.

186. But see *Whiteco Indus., Inc. v. Harrelson*, 111 N.C. App. 815, 818, 434 S.E.2d 229 (1993) (noting that "judicial economy favors the hearing of petitioner's motion for attorney's fees only after the judgment has become final, thereby avoiding piecemeal litigation of the issue"); *First Union Nat'l Bank v. Richards*, 90 N.C. App. 650, 652, 369 S.E.2d 620, 621 (1988) (stating that the trial court "reserved ruling on defendants' request for attorneys' fees until final disposition of this appeal").

187. See *supra* note 179 and accompanying text.

188. See, e.g., *Lowder v. Mills, Inc.*, 301 N.C. 561, 579-81, 273 S.E.2d 247, 258 (1981) (citing the "well-established" rule of law that an appeal from a judgment suspends further

*ND & Blue Shield*,<sup>189</sup> the court of appeals stated, somewhat inconsistently, that the filing of notice of appeal “did not automatically deprive the court of jurisdiction to impose sanctions [in the form of attorneys’ fees] pursuant to Rule 11,” citing as authority the provision in section 1-294 of the General Statutes of North Carolina that “an appeal does not bar the trial court from proceeding ‘upon any other matter included in the action and not affected by the judgment appealed from.’ ”<sup>190</sup> And in *Nohejl v. First Homes of Craven County, Inc.*,<sup>191</sup> the court found that notice of appeal did not deprive the trial court of jurisdiction over the issue of attorney fees.<sup>192</sup>

On January 28, 1994, the *Nohejl* court found the defendant in civil contempt.<sup>193</sup> On February 23, 1994, the defendant filed notice of appeal from the contempt order.<sup>194</sup> The contempt order was filed with the clerk of court on July 14, 1994.<sup>195</sup> The plaintiffs then made a motion for attorney fees on July 26, 1994.<sup>196</sup> The trial court held a hearing on August 15, 1994.<sup>197</sup> The court ruled that because defendant had previously filed notice of appeal, it did not have jurisdiction to enter an order regarding attorney fees.<sup>198</sup> The court noted it would have awarded attorney fees of \$5,280.00 to the plaintiffs’ attorney if it had jurisdiction over the matter.<sup>199</sup> On August

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proceedings); *Oshita v. Hill*, 65 N.C. App. 326, 330, 308 S.E.2d 923, 926–27 (1983) (holding that the supplemental judgment entered by the trial court was a nullity because the appeal of the defendants from the original judgment “deprived the trial court of the authority to make further rulings in the case”); *Condie v. Condie*, 51 N.C. App. 522, 529, 277 S.E.2d 122, 125–26 (1981) (holding that the trial judge did not have authority to enter an order requiring plaintiff to pay an attorney fee, since no mention of an attorney fee was made in the final judgment, and the trial judge could not enter an order in the cause since the matter was on appeal pursuant to the notice of appeal).

189. 94 N.C. App. 602, 381 S.E.2d 330 (1989).

190. *Id.* at 617, 381 S.E.2d at 340 (citing N.C. GEN. STAT. § 1-294 (2001)). *Overcash* also cites two federal cases that held that neither the termination of the action nor the defendant’s filing of notice of appeal automatically deprived the trial court of jurisdiction to impose sanctions pursuant to Rule 11. *Id.* (citing *Langham-Hill Petroleum, Inc. v. S. Fuels Co.*, 813 F.2d 1327 (4th Cir. 1987), and *Orange Production Credit Ass’n v. Frontline Ventures Ltd.*, 792 F.2d 797 (9th Cir. 1986)). *But cf.* *Johnson v. Harris*, 149 N.C. App. 928, 932, 563 S.E.2d 224, 226 (2002) (holding that “the termination of an action by means of a Rule 41 dismissal does not deprive either the trial court, or the appellate court, of jurisdiction to consider collateral issues such as sanctions”).

191. 120 N.C. App. 188, 461 S.E.2d 10 (1995).

192. *Id.* at 191, 461 S.E.2d at 12.

193. *Id.* at 190, 461 S.E.2d at 11.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

29, 1994, the plaintiffs filed notice of appeal from this order.<sup>200</sup> Without elaboration, the court of appeals stated: “[W]e find the trial court maintained jurisdiction over the issue of attorney fees . . . .”<sup>201</sup>

Additional questions are raised by the case of the *Surles v. Surles*,<sup>202</sup> where ten weeks after the final judgment on the merits was entered and plaintiff filed notice of appeal, the trial court conducted the hearing on the defendant’s motion for attorney fees.<sup>203</sup> The court awarded attorney fees, and the plaintiff filed a separate notice of appeal of this order.<sup>204</sup> On appeal, the plaintiff argued that the trial court was without jurisdiction to allow the defendant’s motion for attorney fees once notice of appeal of the final judgment on the merits had been given by the plaintiff.<sup>205</sup> The court of appeals disagreed, because at the time it rendered judgment on the merits, the trial court had expressly reserved for itself the issue of attorney fees, and accordingly, “it retained the authority to consider the issue since attorney’s fees were within the court’s ‘oral announcements.’”<sup>206</sup>

### 3. Jurisdiction to Hear a Civil Rule 59 or 60 Motion

Another question that regularly arises in the *functus officio* context is whether the trial court can hear and decide a Civil Rule 59 or 60 motion after notice of appeal.<sup>207</sup> For instance, the issues raised by a proper Rule 60(b) motion<sup>208</sup> are arguably collateral to any issue

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200. *Id.*

201. *But cf. In re Will of Dunn*, 129 N.C. App. 321, 329–30, 500 S.E.2d 99, 104–05 (1998) (holding that the trial court did not err in a caveat proceeding by ruling upon petitions for costs and attorney fees after filing of notice of appeal because the decision to award costs and attorney fees was not affected by the outcome of the judgment from which caveator appealed).

202. 113 N.C. App. 32, 437 S.E.2d 661 (1993).

203. *Id.* at 42–43, 437 S.E.2d at 666–67.

204. *Id.* at 43, 437 S.E.2d at 667.

205. *Id.* at 42, 437 S.E.2d at 666.

206. *Id.* at 43, 437 S.E.2d at 667.

207. *See Wiggins v. Bunch*, 280 N.C. 106, 111, 184 S.E.2d 879, 881–882 (1971) (stating that the general rule is not changed by Civil Rules 59 and 60); *York v. Taylor*, 79 N.C. App. 653, 654, 339 S.E.2d 830, 831 (1986) (stating that a “trial court does not have jurisdiction . . . to rule on motions pursuant to Rule 60(b) where such motion is made after the notice of appeal has been given”). *But see Talbert v. Mauney*, 80 N.C. App. 477, 478–79, 343 S.E.2d 5, 7 (1986) (stating that the “trial court retains limited jurisdiction to hear and consider a Rule 60(b) motion to indicate what action it would be inclined to take were an appeal not pending”).

208. An improper Rule 60(b) motion would be one used as a substitute for appeal. *Nations v. Nations*, 111 N.C. App. 211, 215, 431 S.E.2d 852, 855 (1993) (stating that Rule 60(b) cannot be used as a substitute for appeal). Another improper Rule 60(b) motion would be to give relief from an interlocutory order. *See Pratt v. Staton*, 147 N.C. App. 771, 775, 556 S.E.2d 621, 624 (2001) (“By its express terms, Rule 60(b) only applies to final

that could be the proper subject of an appeal; the case law has long established that a Rule 60(b) motion cannot be used as a substitute for appellate review.<sup>209</sup> A Rule 60(b) motion addresses issues outside of the record.<sup>210</sup> It does not overrule a prior judgment but simply relieves the parties from the effect of that judgment.<sup>211</sup> Thus, in theory, the trial court might retain jurisdiction to hear a Rule 60(b) motion after notice of appeal.<sup>212</sup>

This question was the precise issue in *Wiggins v. Bunch*,<sup>213</sup> and the supreme court held, as an issue of first impression, that the general rule that notice of appeal divests the trial court of jurisdiction was not changed by the adoption of Civil Rules 59 and 60.<sup>214</sup> Thus, there was no authority for the trial judge to consider and decide the plaintiff's Rule 59<sup>215</sup> and Rule 60<sup>216</sup> motions after the plaintiff's notice

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judgments, orders, or proceedings; it has no application to interlocutory orders.”).

209. “[E]rroneous judgments may be corrected only by appeal and Rule 60(b) motions cannot be used as a substitute for appeal.” *Burton v. Blanton*, 107 N.C. App. 615, 617, 421 S.E.2d 381, 383 (1992); *see also In re Brown*, 23 N.C. App. 109, 110, 208 S.E.2d 282, 283 (1974) (holding that a 60(b) motion, used as a substitute for appeal, was properly denied by the trial court and that a 60(b) appeal does not subject the judgment from which relief is sought to appellate review).

210. Rule 60(b) serves as “a grand reservoir of equitable power to do justice in a particular case.” *Branch Banking & Trust Co. v. Tucker*, 131 N.C. App. 132, 137, 505 S.E.2d 179, 182 (1998) (citing *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709, 712, 222 S.E.2d 706, 708 (1976)). The decision to grant relief under Rule 60(b) is a matter of trial court discretion. *Chandak v. Elec. Interconnect Corp.*, 144 N.C. App. 258, 262, 550 S.E.2d 25, 28 (2001). Grounds for a Rule 60(b) motion include mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, and “any other reason justifying relief from the operation of the judgment.” N.C. R. Civ. P. 60(b).

211. *See Charns v. Brown*, 129 N.C. App. 635, 639, 502 S.E.2d 7, 10 (1998).

212. Similarly, Rule 59 contains some grounds for a new trial that are outside of the record and so might be considered collateral. *See* N.C. R. Civ. P. 59. On the other hand, Rule 59(a)(8) also provides a remedy for correcting an erroneous judgment and therefore can function as a substitute for direct appeal. *See Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988) (stating that the “appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under” Rule 59). Such a motion, however, must be made within ten days of the entry of judgment. *See* N.C. R. Civ. P. 59(b).

213. 280 N.C. 106, 184 S.E.2d 879 (1971).

214. *See id.* at 111, 184 S.E.2d at 881–82.

215. *See Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 410–11, 363 S.E.2d 643, 649 (1988) (stating that the “trial court correctly held that it had no jurisdiction to grant a new trial when notices of appeal were filed the same day”); *Jim Walter Homes, Inc. v. Peartree*, 24 N.C. App. 579, 580, 211 S.E.2d 457, 458 (1975) (holding that notice of appeal filed the same day as a motion for a new trial removed the case from the jurisdiction of the trial court).

216. One case may establish a very limited exception to this rule. In *York v. Taylor*, the court of appeals held that the trial court had jurisdiction to rule on a Rule 60(b) motion that is “filed contemporaneously with the notice of appeal” because “[i]t would be incongruous for us to say that the trial court had jurisdiction to rule on a Rule 52(b)



of appeal. After notice of appeal, the plaintiff should make any Rule 60(b) motion in the court of appeals, which can remand such motion to the trial court if necessary.<sup>217</sup> This appears to be the rule followed by a majority of the state courts,<sup>218</sup> although the federal courts sometimes allow the trial courts to consider such post-judgment motions.<sup>219</sup>

Although arguably inconsistent with the holding in *Wiggins v. Bunch*,<sup>220</sup> there is a line of cases from the court of appeals which allows a trial court, even after notice of appeal, to render an advisory decision on a Rule 60(b) motion to indicate how the trial court would be disposed to rule if it had jurisdiction to rule. For instance, in *Talbert v. Mauney*,<sup>221</sup> the court of appeals stated that a trial court retains limited jurisdiction pending an appeal "to hear and consider a Rule 60(b) motion to indicate what action it would be inclined to take were an appeal not pending."<sup>222</sup>

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motion but was divested of jurisdiction to hear a Rule 60(b) motion filed at the same time." 79 N.C. App. 653, 655, 339 S.E.2d 830, 831 (1986).

217. See *id.*; see also *Swygert v. Swygert*, 46 N.C. App. 173, 181-82, 264 S.E.2d 902, 907-08 (1980) (finding that because the case was pending on appeal, the plaintiff's Rule 60(b) motion was properly filed with the court of appeals, but remanding the case to the trial court, which was in a "far better position to pass upon" the motion).

218. See George Blum, Annotation, *Filing of Notice of Appeal As Affecting Jurisdiction of State Trial Court to Consider Motion to Vacate Judgment*, 5 A.L.R. 5th 422 (1992) ("the majority of state courts take the view that, once an appeal is filed, the lower tribunal is divested of jurisdiction to hear or rule upon a motion which attempts to vacate the very order appealed from").

219. The federal courts are not settled on this question. Some cases hold that jurisdiction continues despite notice of appeal, some hold that jurisdiction continues but only to deny the Rule 60(b) motion, some hold that jurisdiction continues if the 60(b) motion was filed but not heard before the notice of appeal, and some hold that notice of appeal divests the district court of jurisdiction to consider the 60(b) motion. See Annotation, *Effect of Filing Notice of Appeal on Motion to Vacate Judgment Under Rule 60(b) of Federal Rules of Civil Procedure*, 62 A.L.R. Fed 165 (1983).

220. See *supra* note 214 and accompanying text.

221. 80 N.C. App. 477, 343 S.E.2d 5 (1986).

222. *Id.* at 478-79, 343 S.E.2d at 7; see also *Bell v. Martin*, 43 N.C. App. 134, 140-42, 258 S.E.2d 403, 408-09 (1979) (stating that the "better practice is to allow the trial court to consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending"), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1979); *Pheasant v. McKibben*, 100 N.C. App. 379, 385, 396 S.E.2d 333, 337 (1990) ("A trial court may consider a Rule 60(b) motion which is filed though an appeal is pending in order to indicate how it would rule on the motion were the appeal not pending."); *Hagwood v. Odom*, 88 N.C. App. 513, 518, 364 S.E.2d 190, 193 (1988) (citing *Talbert and Bell*). But see *Swygert v. Swygert*, 46 N.C. App. 173, 181-82, 264 S.E.2d 902, 907-08 (1980) (remanding the case to the trial court for a Rule 60(b) determination).

*D. Management of Cases Pending the Appeal: Some Statutory Exceptions to the Functus Officio Rule*

Certain cases sometimes require attention and management during the appellate review process. Denying the trial court any authority to address ongoing issues in the case during the pendency of the appeal can result in injustice—particularly in cases involving children, families, and criminal defendants. The courts and the legislatures have wrestled with balancing the needs of the appellate process to maintain the status quo and the need for some trial court oversight during the pendency of the appeal.

For instance, in *Joyner v. Joyner*,<sup>223</sup> the plaintiff-wife was awarded custody of the minor child and the defendant-husband gave notice of appeal.<sup>224</sup> Several weeks later the wife filed an affidavit claiming that the husband violated the custody order by forcibly taking the child from her.<sup>225</sup> The trial court issued a show cause order and held a contempt hearing.<sup>226</sup> In its order, the trial court concluded that the husband was in willful contempt but also noted the husband's contention that the trial court was "functus officio and . . . without authority to make any further orders in the . . . action pending the . . . appeal."<sup>227</sup> The court then dismissed the show cause proceeding.<sup>228</sup> The supreme court affirmed the conclusion of the trial judge: "The appeal stays contempt proceedings until the validity of the judgment is determined."<sup>229</sup> The court also observed that the appeal did not authorize any violation of the judgment or order being appealed.<sup>230</sup> If the judgment or order is upheld on appeal, upon remand to the trial court, the trial court can proceed with any appropriate contempt inquiries arising from a party's disobedience of court direction during the pendency of the appeal.<sup>231</sup>

The *Joyner* rule proved unpopular, particularly in domestic cases. For instance, in *Quick v. Quick*,<sup>232</sup> the defendant-husband appealed an award of alimony and the plaintiff-wife, acknowledging that the district court was without jurisdiction to hear any contempt matter by

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223. 256 N.C. 588, 124 S.E.2d 724 (1962).

224. *Id.* at 589, 124 S.E.2d at 725.

225. *Id.*

226. *Id.*

227. *Id.* (emphasis omitted).

228. *Id.* at 589–90, 124 S.E.2d at 725.

229. *Id.* at 591, 124 S.E.2d at 727.

230. *Id.* at 591, 124 S.E.2d at 726.

231. *Id.*

232. 305 N.C. 446, 290 S.E.2d 653 (1982).

virtue of the appeal, asked the supreme court to hold the defendant in contempt for refusing to pay alimony pursuant to the trial court's order.<sup>233</sup> The court declined to hear the contempt issue, stating that the supreme court does not hear matters requiring factual findings.<sup>234</sup> But, it was sympathetic to the plaintiff-wife's plight. The court noted:

On oral argument, counsel for plaintiff urged this Court to devise a means to resolve this impasse because it occurs frequently to the detriment of dependent spouses. Counsel correctly argued that supporting spouses have a lengthy period of virtual immunity from support obligations while cases work their way through the appellate process. . . .

. . . .

We agree with counsel for plaintiff that a more satisfactory answer should be found, but that answer can come only from the Legislature.<sup>235</sup>

The answer ultimately came from the legislature in a series of new statutes and amendments. The statute providing for enforcement of custody orders was amended to provide:

Notwithstanding the provisions of G.S. 1-294, an order pertaining to child custody which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt *during the pendency of the appeal*. 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 child custody until the appeal is decided, if justice requires.<sup>236</sup>

The statute providing for enforcement of actions for support of minor children<sup>237</sup> and the statute for enforcement of alimony and post-

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233. *Id.* at 461-62, 290 S.E.2d at 663.

234. *Id.*

235. *Id.* at 461-62, 290 S.E.2d at 663-64.

236. Act of June 15, 1983, ch. 530, sec. 2, 1983 N.C. Sess. Laws 450 (codified at N.C. GEN. STAT. § 50-13.3(a) (2001)). This language was added in 1983. *See id.*

237. The statute was amended to provide:

*Notwithstanding the provisions of G.S. 1-294, an order for the payment of child support which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. 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 child support until the appeal is decided, if justice requires.*

*See* 1983 N.C. Sess. Laws 450 (emphasis added). This language was added in 1983. *See id.*

separation support<sup>238</sup> were similarly amended.

The authority to enforce orders pending appeal did not necessarily reinvest the trial court with full pre-appeal authority. For instance, in *Hackworth v. Hackworth*,<sup>239</sup> in a March 1986 order arising out of a custody hearing, the trial court determined that substantial evidence presented at the hearing justified a significant expansion of the plaintiff-father's visitation rights with the child.<sup>240</sup> The defendant-mother appealed this decision.<sup>241</sup> The plaintiff-father filed a second motion in the cause requesting primary custody of the child while the defendant-mother's appeal of the visitation order was pending.<sup>242</sup> The trial court concluded that the defendant-mother had been a fit and proper parent, but the relationship between the plaintiff-father and the child had strengthened significantly, and that an award of primary custody to the plaintiff-father was in the child's best interest.<sup>243</sup> The trial court awarded primary custody to the plaintiff-father in an October 1986 court order, but the defendant-mother prevented the transfer of custody to the plaintiff-father, and she was subsequently found in contempt of court on November 3, 1986.<sup>244</sup> The defendant appealed both the October 1986 order awarding plaintiff primary custody and the November 1986 order finding the defendant in contempt of court, arguing that defendant's appeal of the March 1986 order removed from the district court jurisdiction to hear and to issue orders pertaining to the plaintiff's later motions for custody of the minor child.<sup>245</sup> The court of appeals held that the district court lacked the authority to issue the October and November orders.<sup>246</sup> The court cited both section 1-294 of the General Statutes of North Carolina and *Joyner v. Joyner*<sup>247</sup> to conclude that "under both statute and case

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238. The statute was amended to provide:

*Notwithstanding the provisions of G.S. 1-294 or G.S. 1-289, an order for the periodic payment of alimony that has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. 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 until the appeal is decided if justice requires.*

*See* Act of June 27, 1985, ch. 482, sec.1, 1985 N.C. Sess. Laws 537 (codified at N.C. GEN. STAT. § 50-16.7(j) (2001)) (emphasis added). This language was added in 1985. *See id.*

239. 87 N.C. App. 284, 360 S.E.2d 472 (1987).

240. *Id.* at 285, 360 S.E.2d at 472.

241. *Id.*

242. *Id.*

243. *Id.* at 285-86, 360 S.E.2d at 472.

244. *Id.* at 286, 360 S.E.2d at 472.

245. *Id.*

246. *Id.* at 287, 360 S.E.2d at 473.

247. For a discussion of *Joyner*, see *supra* notes 223-31 and accompanying text.

law the district court lost jurisdiction over all custody matters in the present case when defendant appealed the 5 March 1986 visitation order.”<sup>248</sup>

In *Cox v. Cox*,<sup>249</sup> on the other hand, the defendant was ordered to show cause as to why he should not be held in contempt for his failure to comply with a previous court order directing him to pay alimony to the plaintiff.<sup>250</sup> The defendant properly appealed the alimony order and thus argued that under section 1-294 of the General Statutes of North Carolina and case law, he could not be held in contempt by the trial court pending appeal of the underlying order.<sup>251</sup> The court of appeals found that a new statute, section 50-16.7(j) of the General Statutes of North Carolina, modified the applicability of both section 1-294 and the *Joyner* rule,<sup>252</sup> and left the trial court “*not without jurisdiction*” to issue the show cause order and subsequent contempt order, pending the appeal.<sup>253</sup>

This timid endorsement of the impact of the new statutes finds some support in a 1999 case, *Burnett v. Wheeler*.<sup>254</sup> In *Burnett*, the defendant appealed a child support order and did not make the payments as ordered.<sup>255</sup> After the court of appeals remanded the case to the trial court for additional findings of fact, the plaintiff moved the trial court to hold the defendant in contempt for failure to make the support payments.<sup>256</sup> The trial court found the defendant in contempt.<sup>257</sup> On appeal of this contempt order, the court of appeals cited “the current version” of section 50-13.4(f)(9) of the General Statutes of North Carolina, and described it as “granting the trial court continuing jurisdiction to hear contempt proceedings even while an appeal is pending.”<sup>258</sup> The court then stated: “Having never lost jurisdiction over this issue, the district court could hold a contempt hearing at any time.”<sup>259</sup> Maybe *Burnett* overstates the impact of the amendment to section 50-13.4(f)(9) of the General Statutes of North Carolina, but maybe not.

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248. 87 N.C. App. at 287, 360 S.E.2d at 473.

249. 92 N.C. App. 702, 376 S.E.2d 13 (1989).

250. *Id.* at 703, 376 S.E.2d at 14.

251. *Id.* at 703, 376 S.E.2d at 15.

252. See *supra* notes 229–31 and accompanying text.

253. *Cox*, 92 N.C. App. at 704, 376 S.E.2d at 15.

254. 133 N.C. App. 316, 515 S.E.2d 480 (1999).

255. *Id.* at 317, 515 S.E.2d at 481.

256. *Id.* at 318, 515 S.E.2d at 482.

257. *Id.*

258. *Id.* at 319, 515 S.E.2d at 483.

259. *Id.*

A recent case, *Rosero v. Blake*,<sup>260</sup> either clarifies or confuses the relationship of *Joyner*, section 1-294 of the General Statutes of North Carolina, and the statutes that allow limited trial court jurisdiction pending appeal for actions involving child custody and support. In *Rosero*, the defendant-mother appealed from an order granting primary legal custody of the minor child to the plaintiff-father, and from an order dismissing her motion for a protective order.<sup>261</sup> She made a motion in the trial court for the protective order approximately one week after she filed her notice of appeal from the custody order.<sup>262</sup> Her motion for a protective order was based on her allegation that the plaintiff-father had abducted the child from her custody.<sup>263</sup> She requested the trial court both to “issue an injunction protecting the child by prohibiting the plaintiff from taking her from the defendant’s physical custody at any time unless agreed upon by the parties in advance or ordered by” the trial court and to order that the plaintiff “return the child to the defendant’s home immediately.”<sup>264</sup> The trial court dismissed the motion, stating that because the custody order was on appeal, the trial court was without jurisdiction to grant the relief defendant requested.<sup>265</sup> The defendant also petitioned the court of appeals for a writ of supersedeas.<sup>266</sup> The court denied defendant’s petition, but the court’s order stated that the trial court retained jurisdiction to entertain motions based on defendant’s allegations so that it might “enter any interlocutory orders needed to enforce the custody order or to protect the interests of the parties and the welfare of the child pending the outcome of the appeal.”<sup>267</sup>

In resolving this matter, the *Rosero* court cited both section 1-294 of the General Statutes of North Carolina and *Joyner* for the proposition that an appeal of a custody order leaves the trial court *functus officio* as to all custody matters until the case is remanded.<sup>268</sup> Nevertheless, the court cited section 50-13.3(a) of the General Statutes of North Carolina as supporting the conflicting propositions that the trial court’s duty to protect the minor child’s welfare

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260. 150 N.C. App. 250, 563 S.E.2d 248 (2002), *rev’d on other grounds*, 357 N.C. 193, 581 S.E.2d 41 (2003).

261. *Id.* at 250–51, 563 S.E.2d at 249–50.

262. *Id.* at 251, 563 S.E.2d at 250.

263. *Id.* at 252, 563 S.E.2d at 250.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* (quoting the order).

268. *Id.* at 252–53, 563 S.E.2d at 250–51.

continues pending the outcome of the appeal, and that, as stated in the order denying the writ of supersedeas, the trial court retained jurisdiction "to entertain any motions . . . to protect the interests of the parties and the welfare of the child pending the outcome of the appeal."<sup>269</sup> But neither the basis for these propositions, nor the application of these propositions to the court's resolution of the matter before it, were adequately explained by the court.

Instead, the court observed that "the relief sought by defendant appears to be directed toward staying the custody order pending appeal" and concluded:

Both statutory and case law direct that the trial court lost jurisdiction over all matters dealing specifically with custody in this case when defendant appealed the custody order of the trial court. Accordingly, we conclude the trial court properly determined that it was without jurisdiction to grant defendant's motion, which was directly related to and would have affected the custody order that was on appeal.<sup>270</sup>

Other statutes create limited exceptions to the *functus officio* rule in the area of criminal law,<sup>271</sup> and much broader exceptions for juvenile law, including delinquency,<sup>272</sup> abuse and neglect,<sup>273</sup> and termination of

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269. *Id.* at 253, 563 S.E.2d at 251 (quoting the order).

270. *Id.* at 253-54, 563 S.E.2d at 251.

271. *See, e.g.*, N.C. GEN. STAT. § 15A-1451 (2001) (providing that when a criminal defendant gives notice of appeal, payment of costs and fines is stayed, and probation is stayed, but confinement is stayed only when defendant has been released on bail); *id.* § 15A-1453(a) (providing that a court in which a criminal defendant was convicted retains authority to act with respect to the defendant's release on bail); *id.* § 15A-1448(3) (providing generally that the jurisdiction of the trial court is divested upon notice of appeal except for certain ancillary actions during appeal); *id.* § 15A-1414(c) (providing that a motion for appropriate relief, filed within ten days of judgment, may be made in the trial court regardless of whether notice of appeal has been given); *see also id.* § 15A-1418 (describing motion for appropriate relief in the appellate division).

272. Section 7B-2605 of the General Statutes of North Carolina provides:

Pending disposition of an appeal, the release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

§ 7B-2605.

273. Section 7B-1003 of the General Statutes of North Carolina provides:

Pending disposition of an appeal, the return of the juvenile to the custody of the parent or guardian of the juvenile, with or without conditions, may issue unless the court orders otherwise. When the court has found that a juvenile has suffered physical abuse and that the individual responsible for the abuse has a history of violent behavior, the court shall consider the opinion of the mental health professional who performed the evaluation under G.S. 7B-503(b) before

parental rights.<sup>274</sup>

### CONCLUSION

Some of the *functus officio* rule's exceptions make sense in the context of protecting and effectuating the right of appeal. Denying an unprincipled party the power to postpone litigation by filing notice of appeal of a non-immediately appealable interlocutory order is logical and fair, even if it can lead to some confusing situations—as was the case in *Patrick v. Hurdle*<sup>275</sup> and *RPR & Associates, Inc. v. University of North Carolina-Chapel Hill*.<sup>276</sup> Permitting a trial court to correct its own errors in a timely fashion, through the *in fieri* rule, Civil Rules 52 and 59, and the motion for appropriate relief statute for criminal cases, is more efficient than a literal application of the *functus officio* rule. The trial court also has a clear, if limited, role in supervising the transformation of the litigation into the manageable documentation that will serve as the basis for the appeal, i.e., the appellate record. But the justifications for some of the other exceptions to the *functus officio* rule are not as compelling.

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returning the juvenile to the custody of that individual. For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State. The provisions of subsections (b), (c), and (d) of G.S. 7B-905 shall apply to any order entered under this section which provides for the placement or continued placement of a juvenile in foster care.

§ 7B-1003.

274. Section 7B-1113 of the General Statutes of North Carolina provides:

Any juvenile, juvenile acting through the juvenile's guardian ad litem if one is appointed, parent, guardian, custodian, or agency who is a party to a proceeding under this Article may appeal from an adjudication or any order of disposition to the Court of Appeals, provided that notice of appeal is given in writing within 10 days after entry of the order. Entry of an order shall be treated in the same manner as entry of a judgment under G.S. 1A-1, Rule 58 of the North Carolina Rules of Civil Procedure. Pending disposition of an appeal, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the best interests of the State. Upon the affirmation of the order of adjudication or disposition of the court in a juvenile case by the Court of Appeals, or by the Supreme Court in the event of an appeal, the court shall have authority to modify or alter its original order of adjudication or disposition as the court finds to be in the best interests of the juvenile to reflect any adjustment made by the juvenile or change in circumstances during the period of time the case on appeal was pending, provided that if the modifying order be entered ex parte, the court shall give notice to interested parties to show cause, if any there be, within 10 days thereafter, as to why the modifying order should be vacated or altered.

§ 7B-1113.

275. See *supra* notes 29–34, 67–69 and accompanying text.

276. See *supra* notes 42–58 and accompanying text.



Other jurisdictions have allowed trial court consideration of attorney fees claims and post-judgment matters as are allowed under Civil Rule 60(b) pending appeal. The best approach for handling these issues may not be to allow the trial court complete freedom to consider these matters pending the appeal, but the North Carolina cases do not seem to have fully explored the possibilities or to have fully explained the reasons for the existing rules. The case law could also be clearer in delineating the difference between the *functus officio* rule's jurisdictional limitations and the stay provisions of statutes like section 1-294 of the General Statutes of North Carolina—i.e., whether their impact is identical and redundant so that they overlap perfectly, or whether they are distinguishable and address at least some different issues. Finally, in the difficult areas of domestic and juvenile law, the case law still may leave the trial courts guessing as to their proper role in managing the troubled parties and the sometimes volatile situations that develop while the appellate courts process an appeal.

Some of the compromises that have been reached between the clear needs of our appeals process and the equally clear concerns with the injustice and inefficiency that can accompany the unavoidable delay occasioned by appellate review would benefit from further consideration and explication by our appellate courts.