

Does Petition For Discretionary Review Divest Trial Court Of Jurisdiction?

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The place where a trial court's jurisdiction over a case on appeal meets the competing jurisdiction of the appellate court over that same case is a busy intersection. It is often hard to tell when the trial court no longer has the jurisdiction to make rulings in a case that has been appealed. That power was the issue in two rulings from Business Court Judge Robinson, one in a published Opinion, in [*SED Holdings, LLC v. 3 Star Properties, LLC*, 2016 NCBC 62](#), and the other in an [unpublished Order](#) in that case which followed several weeks later.

The General Rule And Its Exception

The "general rule", as observed by Judge Robinson, is that "an appeal divests the lower court of jurisdiction." Op. ¶33. So you would think that once an appeal is filed (and docketed) that the trial court is powerless. But, that's not so:

the lower court nonetheless retains jurisdiction to take action which aids the appeal, and to hear motions and grant orders, so long as they do not concern the subject matter of the suit and are not affected by the judgment appealed from.

Id.

In the situation before Judge Robinson last month in the *SED* case there were two separate appeals pending. Neither were appeals from rulings of the Business Court, but were from rulings of the Superior Court for Durham County, made during the extended period of time before the case was designated to the Business Court.

Appeal Number One

Appeal #1 is a long running appeal. At the time of Judge Robinson's ruling [the Court of Appeals had affirmed](#) the trial court's grant of a preliminary injunction and its denial of a Motion to Dismiss. Those appellate rulings were the subject of a PDR (a Petition for Discretionary Review) pending before the

Appeal Number Two

Appeal #2 was filed this year, and has yet to be ruled on by the COA. It is an appeal of several orders issued by the trial court holding the Defendants in civil contempt for not complying with the injunction that was the subject of Appeal #1. The Defendants are arguing that the trial court lacked jurisdiction to find them in contempt while the first appeal was pending.

Did The Business Court Still Have Jurisdiction Given The Two Appeals?

Whether the Business Court still had the authority to deal with the Plaintiff's Motion that he enter a mandatory injunction against a recently added Defendant (Charles A. Brown & Associates, PLLC) was the question faced by Judge Robinson. Did he have any jurisdiction over the case with the two pending appeals?

Appeal #2 was pretty easy to knock down as an impediment to the Business Court's jurisdiction. Judge Robinson said that:

the issues presently before it are not embraced within the issues presently before the Court of Appeals in the [Appeal #2] and, thus, do not divest this Court of subject matter jurisdiction to consider and decide the Motion relating to newly added defendant Charles A. Brown.

Op. ¶32.

The Effect of A Petition for Discretionary Review On A Trial Court's Jurisdiction

But the rulings that were the subject of Appeal #1 were fundamental to a North Carolina court having jurisdiction over the entire case, since they concerned the validity or invalidity of a forum selection clause dictating that the case be litigated in Harris County, Texas. The ruling from the Court of Appeals in Appeal #1 had affirmed the trial court's ruling that the forum selection clause was invalid.

The NC Supreme Court hadn't ruled on the PDR before Judge Robinson's first ruling.

Judge Robinson said:

with regard to Defendants' filing of the PDR, the Court concludes that, absent a motion to stay filed with and granted by the appropriate court, the filing of a petition for discretionary review with our State's highest court, by itself, does not divest the trial court of jurisdiction to consider matters after the Court of Appeals has determined a matter on appeal and has issued its mandate.

Op. ¶26. By the way, what is the "appropriate court" in which to file a Motion to Stay? [Rule 8 of the North Carolina Rules of Appellate Procedure](#), titled "Stay Pending Appeal" says that:

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 temporary stay and a writ of supersedeas in accordance with Rule 23.

Judge Robinson probably assumed that the NC Supreme Court would do the expected thing and deny the PDR. Or he might have felt bound to follow the mandate from the Court of Appeals affirming the trial court's ruling that the forum selection clause calling for litigation to take place in Texas was invalid. An "inferior court must follow the mandate of an appellate court in a case without variation or departure." *In re RAH*, 641 S.E.2d 404, 407 (2007).

But a few weeks after Judge Robinson delivered the published Opinion in 2016 NCBC 62, the NC Supreme Court did the nearly unthinkable and granted the PDR. That made all the difference to Judge Robinson. He held that the Business Court had been "divested of jurisdiction to proceed with the Injunction Hearing" because of the granting of the PDR. Order ¶10. That *sua sponte* reversal from Judge Robinson came in an [unpublished Order](#).

So what Should You Do If You Don't Want The Trial Court To Rule Because Of Your Pending PDR?

So what do these rulings mean about the vitality of an NC Superior Court's jurisdiction in a case that is the subject of a pending PDR? That if you want the Superior Court to refrain from ruling in your case in which a PDR is pending, that you should move for a stay "in the appropriate court" or argue that the PDR will be granted and that the Superior Court therefore no longer has jurisdiction and should not move forward in the case until the NC Supreme Court has made its ruling. It's probably safer to request a stay given the four leaf clover nature of the granting of PDRs.

You might be wondering whether this case has been "over-appealed." Maybe it has. In addition to the two appeals already pending, the Defendant has also appealed from Judge Robinson's ruling in 2016 NCBC 62. That's the third appeal. Even before that, it had filed a [Petition for Rehearing](#) in the COA following the Court of Appeals' decision.

But given that the successful PDR is likely to generate an opinion from the NC Supreme Court on the validity of a forum selection clause, all those appeals might be worthwhile. Maybe the Appellants will ultimately be successful.

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