DVPO Can Be Set Aside When Victim is No Longer Afraid

On Tuesday of this week, the Court of Appeals in Pope v. Pope upheld a decision by a trial judge to set aside a DVPO pursuant to GS 1A-1, Rule 60(b)(5). The trial court concluded, and the court of appeals agreed, that evidence showing plaintiff clearly was no longer afraid of defendant established that "it was no longer equitable for the judgment to have prospective application."

Rule 60(b)

This rule of civil procedure allows the court to "relieve a party" from a judgment or order for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

The appellate courts have held numerous times that Rule 60(b) relief is granted or denied in the discretion of the court. However, case law imposes some limits on the court's authority. For example, Rule 60(b) cannot be used to simply amend an order or judgment, *see e.g. White v. White*, 152 NC App 588 (2002), and it cannot be used as an alternative to a direct appeal of the order or judgment –meaning Rule 60(b) relief is not available to cure legal errors committed by the trial court. *See e.g., Hagwood v. Odom*, 88 NC App 513 (1988). In addition, there are time limits imposed by the Rule itself. All motions must be made within a reasonable time after the entry of the order or judgment and the grounds in sections (1) through (3) must be brought within one year of the entry of the order or judgment.

While subsection (6) often is referred to a "grand reservoir of equitable power," it also is significantly limited by case law. A trial court cannot set aside an order or judgment using Rule 60(b)(6) unless the court determines that extraordinary circumstances exist and that justice demands relief. *Thacker v. Thacker*, 107 NC App 479 (2001). In addition, at least if a party is

seeking relief from a judgment entered against him or her, the movant must establish there is a meritorious defense to the underlying action. *Sides v. Reid*, 35 NC App 235 (1978).

We have very little case law interpreting Rule 60(b)(5), the subsection used by the trial court in Pope to set aside the DVPO. The plain language of the provision seems incredibly broad in that it appears to allow a judgment to be set aside any time the court determines, in its discretion, that "it is no longer equitable that the judgment should have prospective relief." The decision in Pope tells us that this provision is as broad as it sounds.

Pope v. Pope

In 2014, husband filed a complaint seeking a DVPO against wife and obtained an ex parte order. A couple of days later, wife filed a complaint requesting a DVPO against husband and obtained an ex parte order. A hearing was scheduled for both cases on the same day. Wife failed to appear and the trial court dismissed her complaint. The court granted husband's request for a protective order after concluding wife committed acts of domestic violence against him by harassing, following and yelling at him, and causing him to fear imminent serious bodily injury and continued harassment.

Approximately 6 months after the entry of the DVPO, wife filed a motion requesting that the DVPO be set aside pursuant to Rule 60(b)(6). In support of her motion she alleged that she failed to appear for the hearing on her DVPO due to misrepresentations by husband that he planned to dismiss his complaint and not proceed with his request for a DVPO. She also alleged that the DVPO should be set aside because husband clearly was not afraid of her, as evidenced by the fact that he frequently came to her house and called her on the telephone.

The trial judge concluded that wife's motion should be granted because "it was no longer equitable that the DVPO should have future application." The court held that that because the evidence clearly established husband was no longer in fear of the wife and that the "harassment has been on both sides," there was "good reason justifying relief from the DVPO."

Judge Did Not Violate Rule Prohibiting One Judge From Overruling Another

Husband argued on appeal that the judge granting the Rule 60(b)(5) motion simply re-opened the issue of whether wife committed an act of domestic violence and impermissibly overruled the decision rendered by the judge who entered the DVPO. The court of appeals held that Rule 60(b) allows a judge to "relieve a party" from a judgment or order when one of the grounds set out in the Rule is found to exist, and the judge considering the Rule 60 motion does not need to be the judge who entered the order. When the court sets aside an order or judgment using the provisions of Rule 60(b), the judge is not overruling an earlier judge or revisiting a legal issue already resolved by the earlier judge but instead is engaging in a completely different legal analysis.

The court of appeals then stated that "Rule 60(b)(5) allows relief from a judgment when it is no

longer equitable that the judgment should have prospective application… [and] [t]hat is exactly what the trial court determined." This determination was adequately supported with findings of fact showing that husband "continued to call defendant wife, show up at her house almost every day, and require defendant-wife to meet him at gas stations to fill up her truck with gas rather than provide her with funds to do so independently." Because these findings clearly established that husband no longer had the fear that supported the entry of the DVPO, the trial court had the discretion to set the order aside.

Wife Didn't Have to Ask for Relief Pursuant to 60(b)(5)

Husband also argued on appeal that the trial court should not have considered relief pursuant to subsection 5 of the rule because wife only asked for relief pursuant to subsection 6. The court of appeals rejected this argument, holding that a party moving pursuant to Rule 60(b) does not need to state a specific subsection at all. In addition, the court pointed out that judges have the authority to consider Rule 60 relief *sua sponte*, when no party has filed a motion requesting relief.