Only "Proper" Rule 59 Motions Will Toll the Appeal Deadline: New Cases

To end the week, I'll point out three recent Court of Appeals opinions that remind us that a Rule 59 ("new trial") motion will not toll an appeal period if the motion does not actually seek proper Rule 59 relief. If, for example, the motion does not provide proper notice of the grounds for relief, or if it is being used merely as a general "motion for reconsideration," it may not be considered "proper." As I've discussed in previous posts (here and here), North Carolina Rule of Civil Procedure 59 permits a trial judge to order a new trial (or, through Rule 59(e), amendment of judgment) for a number of reasons, including prejudicial irregularity, jury misconduct, newly-discovered evidence, insufficient evidence to justify the verdict, prejudicial error of law, and other bases. A proper Rule 59 motion tolls the period for appeal of the underlying judgment. N.C. R. App. P. 3(c)(3); G.S. 1-279.1. But if a court determines that Rule 59 was *not* the appropriate vehicle for remedy sought, the appeal period will *not have been tolled*. These three recent published opinions are our newest examples of this outcome:

- **Rule 59 is not to be used for a "second bite at the apple."** Town of Apex v. Rubin, _ S.E.2d _ (Oct. 16, 2018).

The Town of Apex filed a condemnation action to acquire an easement across Ms. Rubin's property so it could run utilities to an adjacent property for development of a subdivision. Prior to trial, the trial court held a "108 hearing" to determine whether the taking was for a public or private benefit. The judge concluded as a matter of law that the taking was for a private benefit and entered judgment to that effect on October 18, 2016. Ten days later, on October 28, the Town filed a motion under Rule 59, which was denied on January 24, 2017. The Town then appealed the 108 Judgment and the denial of the Rule 59 motion. The Court of Appeals dismissed the appeal of the 108 Judgment as untimely because it had been filed outside the 30-day appeal period. Although the Town's Rule 59 motion purported to seek consideration of new evidence, the record showed that the evidence "was admittedly available at the time of the hearing" and that the Town just had not anticipated that it would be necessary at the hearing. The Court of Appeals noted that,

Even assuming plaintiff did not reasonably anticipate the evidence needed at the Section 108 hearing, a Rule 59 motion is not intended to be a second bite at the apple where the evidence was in plaintiff's possession or existed at the time of hearing and plaintiff was afforded "every opportunity to argue all relevant issues in a single…hearing."

Because the motion was not, therefore, a proper Rule 59 motion in substance, it did not toll the 30-day appeal period, and the appeal was dismissed.

- **The motion must provide more than bare assertions without supporting allegations.** Quevedo-Woolf v. Overholser, _ S.E.2d _ (Sept. 18, 2018).

After a lengthy custody battle between a child's mother and grandmother, the district court entered an order denying custody to Plaintiff, the mother. The Custody Order was entered on May 16, 2016. Plaintiff filed a new trial motion under Rule 59 on May 23, 2016. From there the procedural gets more complicated, but, in short, Plaintiff's motion was granted on November 17, 2016 by a different judge. In December, Defendant then appealed that order, and Plaintiff in turn appealed the underlying 2016 Custody Order, *seven months after it was entered*. The Court of Appeals concluded that Plaintiff's Rule 59 motion had not operated to toll the 30-day appeal period. While the motion did invoke certain provisions of the Rule, because it "simply recit[ed] statutory language, [and] included nothing more than bald allegations that certain statutory grounds existed," it was insufficient to qualify as a proper Rule 59 motion "within the meaning of Rule 3 of the Rules of Appellate Procedure." [It should be noted that the court also reversed the Rule 59 order in this case because it had been entered by a different judge than the judge who presided over the custody hearings. I discuss this issue in this earlier blog post.]

- **Rule 59 is not for interlocutory orders and not to merely rehash arguments.** Davis v. Rizzo, _ S.E.2d _ (Aug. 21, 2018).

Two beneficiaries of the revocable trust of 99-year-old Ms. Davis brought an action against Ms. Davis's daughter and one of Ms. Davis's estate planning attorneys. The case centered on allegations that Defendants had exerted undue influence over Ms. Davis, which they believed would render certain of Ms. Davis's decisions about her property invalid. On the day before a hearing on Defendants' motions to dismiss, Plaintiffs moved for a continuance or to stay the proceedings to allow time to make further determinations of Ms. Davis's capacity and to appoint a guardian *ad litem*. The trial court denied the motion to continue/stay and granted the dismissal motions. Within 10 days after entry of that order, Plaintiffs moved to "amend" the order pursuant to Rules 59(e) and 60(b). The trial court denied the post-judgment motion without a hearing. Plaintiffs appealed the stay and dismissal order and the post-judgment order. The Court of Appeals dismissed the appeal of the underlying orders. The court concluded that the purported Rule 59 motion was not a proper Rule 59(e) motion because (1) it sought relief from an *interlocutory* order rather than a judgment or other final order; and (2) merely "attempt[ed] to reargue matters already decided by the trial court." Thus it did not toll the running of the appeal period for the underlying orders, and because the appeal was noticed more than 30 days after those orders, the appeal was untimely. [For further discussion of *Rizzo* and some helpful practice pointers, see appellate attorney Beth Scherer's post here.]

Of course, when these tolling defects occur, the Court of Appeals may exercise its authority to grant *certiorari* over the issue. But it is never a good idea to count on *certiorari* as a fallback. Of the three cases discussed above, the court only opted to grant a writ of *certiorari* over the *Overholser* case (it did, after all, involve child custody).