

Rule 59: Not for Relief from Interlocutory Orders – A New Opinion

In a prior [post](#), I discussed whether North Carolina’s [Rule of Civil Procedure 59](#)—the “new trial” rule—could be used to seek relief from final judgments *not* resulting from a jury or non-jury trial. That post focused on other types of final, appealable judgments, such as summary judgment orders and default judgments. I concluded that North Carolina case law is not crystal clear on the question, but that the recent case of [Bodie Island Beach Club Ass’n, Inc. v. Wray](#), 215 N.C. App. 283 (2011), indicates that filing Rule 59 motions for relief from these types of judgments could imperil an appeal. *Proper* Rule 59 motions toll the appeal period for the underlying judgment pending disposition of the motion. See N.C. R. App. P. 3(c)(3). If the basis for the Rule 59 motion is not proper, the appeal period will not have been tolled.

Yesterday the Court of Appeals again addressed Rule 59’s applicability to orders other than trial judgments, but this time analyzed a pretrial, *interlocutory* order. In [Tetra Tech Tesoro, Inc. v. JAAAT Tech. Services, LLC](#), a construction dispute, a subcontractor sued a contractor for unpaid work. The trial judge granted the subcontractor a preliminary injunction requiring the contractor to segregate the disputed funds pending resolution of the case on its merits. The contractor moved to modify the preliminary injunction and purported to do so pursuant to Rule 59 (and also Rule 60, which is another issue for another day). The trial court (mostly) denied the motion to modify. The contractor noticed an appeal of both the denial of the motion to modify and the underlying preliminary injunction order.

The appeal of the order on the motion to modify was filed within 30 days, so it was timely. More than 60 days, however, had passed since entry of the preliminary injunction itself. The contractor argued that the 30-day deadline for appealing that order had been tolled under Rule 3(c)(3) because the motion to modify was a Rule 59 motion. Turning to the “plain terms” and “express purpose” of Rule 59, and reaffirming *Bodie Island*, the Court of Appeals rejected this argument, holding that Rule 59(a) (and, by extension, 59(e)) do “not apply to interlocutory, pretrial orders.” So the appeal of the preliminary injunction was untimely and the Court of Appeals lacked jurisdiction to review it.

I should note that, in explaining the scope of Rule 59(a), the court stated that it appears to apply “only after a trial on the merits *or, at a minimum, a judgment ending the case on its merits.*” (emphasis added). If this last phrase is meant to indicate that Rule 59 might be used after summary judgment, 12(b)(6), default judgment, *etc.*, it would appear to be at odds with *Bodie Island* on that point. The court, however, did not need to nail down that broader question in order to determine the question before it—Rule 59’s applicability to pretrial, interlocutory orders. So for now the language might best be seen as *dicta*.

As for the timely-appealed motion to modify, the court pointed out that the contractor could have

filed the motion to modify pursuant to Rules [54\(b\)](#) or [62\(c\)](#)—even during appeal—without invoking Rule 59. The court went on to hold that, although interlocutory, the order was immediately appealable based on a substantial right. After then concluding that the trial judge had made “careful consideration” of the relevant issues, the court affirmed the denial of that motion.

The Takeaway. *Tetra Tech* makes clear that parties hoping to appeal immediately-appealable interlocutory orders—such as those involving venue, immunity, personal jurisdiction, and, as in *Tetra Tech*, some types of injunctions—should not pursue Rule 59 motions for relief from those orders. If a party does so, and the 30-day appeal period expires before the trial court rules, the appeal deadline will not have been tolled and the appellate court will not have jurisdiction over the appeal.

[For much more on Rule 59 and the other rules governing relief from final civil orders (including 50, 52, and 60), pick up a copy of our book, [Relief from Judgment in North Carolina Civil Cases](#), [here](#).]