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Divested of Jurisdiction? The Effect of Filing a Notice of Appeal While a Posttrial Tolling Motion Is Pending Before the Trial Court

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ABSTRACT

What happens when there is a tolling motion under Rule 3 of the North Carolina Rules of Appellate Procedure pending before a trial court and a subsequent notice of appeal is filed? As the case law currently stands, depending on which of three tolling motions is pending, the trial court may be divested of jurisdiction to rule on the motion—a divestiture that could lead the appellate court to dismiss the appeal as untimely. This Article argues that the North Carolina courts have drawn arbitrary distinctions between the different tolling motions to determine whether a trial court is divested of jurisdiction. Instead, the North Carolina Rules of Appellate Procedure should be amended to conform with the approach laid out in the Federal Rules of Appellate Procedure, in which a trial court retains jurisdiction over a tolling motion even after a notice of appeal is filed and the notice of appeal does not become effective until there is an order disposing of the tolling motion.

INTRODUCTION

Under the North Carolina Rules of Appellate Procedure, a party seeking to appeal a judgment or order in a civil case has thirty days after the entry of judgment to file a notice of appeal.¹ However, certain posttrial motions will toll this thirty-day time period until the trial court rules on these “tolling motions.” The parties then have thirty days after the resolution of the tolling motion to file a timely notice of appeal.² These

* Law Clerk to the Honorable Robert B. Jones, Jr., Magistrate Judge for the U.S. District Court for the Eastern District of North Carolina. Many thanks to all who offered insight and suggestions throughout the development of this Article.

1. N.C. R. APP. P. 3(c)(1) (“In civil actions and special proceedings, a party must file and serve a notice of appeal . . . within thirty days after entry of judgment . . .”).

2. *Id.* R. 3(c)(3) (“[I]f a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is

three tolling motions are motions for relief under (1) Rule 50(b) of the North Carolina Rules of Civil Procedure for judgment notwithstanding the verdict (JNOV),³ (2) Rule 52(b) for amendment of the judgment,⁴ or (3) Rule 59 for a new trial.⁵

Problems arise when there is a tolling motion pending before a trial court and a party files a notice of appeal before the trial court has ruled on the tolling motion. This may occur when one party strategically files a notice of appeal while a tolling motion is pending to deprive the other party of a ruling on that motion, perhaps aiming to make the other party's position more difficult on appeal. If a subsequent notice of appeal is filed while a tolling motion is pending, the trial court may be divested of jurisdiction to rule on the tolling motion. Generally, filing a notice of appeal divests a trial court of jurisdiction over a case.⁶ Throughout the pendency of an appeal, the trial court has a very limited role—the trial judge is *functus officio*.⁷ When the court becomes *functus officio*, it is without further authority and “has completed its duties pending the decision of the appellate court.”⁸ Filing a notice of appeal while there is a pending tolling motion may divest the trial court of jurisdiction, leaving it

toll as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order . . .”). *But see* Estate of Hurst *ex rel.* Cherry v. Moorehead I, LLC, 748 S.E.2d 568, 572 n.2 (N.C. Ct. App. 2013) (holding in a case involving multiple defendants, where only one defendant filed a tolling motion, that the notice of appeal as to the other defendants was dismissed as untimely where it was filed more than thirty days after the entry of judgment).

3. N.C. GEN. STAT. § 1A-1, Rule 50(b) (2013).

4. *Id.* § 1A-1, Rule 52(b).

5. *Id.* § 1A-1, Rule 59; N.C. R. APP. P. 3(c)(3). Note, however, that the North Carolina Court of Appeals has held in an unpublished opinion that an improper Rule 59 motion failed to toll the thirty-day time period for filing a notice of appeal. Diversified Fin. Servs., LLC v. F&F Excavating & Paving, Inc., No. COA11-292, 2011 N.C. App. LEXIS 2306, at *6–11 (N.C. Ct. App. Nov. 1, 2011) (dismissing an appeal as untimely where appellants relied on a Rule 59 motion to toll the time period for filing a notice of appeal but failed to include in their motion one of the nine enumerated grounds for which a new trial may be granted under Rule 59).

6. Wiggins v. Bunch, 184 S.E.2d 879, 880 (N.C. 1971) (“As a general rule an appeal takes the case out of the jurisdiction of the trial court.” (quoting *Am. Floor Mach. Co. v. Dixon*, 133 S.E.2d 659, 662 (N.C. 1963))).

7. Bowen v. Hodge Motor Co., 234 S.E.2d 748, 749 (N.C. 1977) (“[A]n appeal removes a case from the jurisdiction of the trial court and, pending the appeal, the trial judge is *functus officio*.”). *Black’s Law Dictionary* defines *functus officio* as an officer or official body “without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.” *Functus officio*, BLACK’S LAW DICTIONARY (10th ed. 2014).

8. RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill, 570 S.E.2d 510, 513 (N.C. Ct. App. 2002).

functus officio. This potential divestiture of jurisdiction creates problems for parties who wish to file a notice of appeal but are otherwise outside of the thirty-day period following the entry of judgment.

Whether a notice of appeal divests the trial court of jurisdiction depends on which of the three tolling motions was pending when the notice of appeal was filed. The North Carolina appellate courts have held that a notice of appeal filed while a Rule 59 motion is pending divests the trial court of jurisdiction over the Rule 59 motion.⁹ If a Rule 52(b) motion is pending before the trial court, however, the North Carolina appellate courts have held that the trial court retains jurisdiction to consider that motion, even after the notice of appeal is filed.¹⁰ This distinction among the tolling motions is arbitrary, and North Carolina courts should instead retain jurisdiction to rule on tolling motions even after a notice of appeal is filed.

Part I of this Article explains the general rule regarding divestiture of jurisdiction and its consequences. Part II discusses the effect of filing a notice of appeal while a tolling motion under Rule 3(c) of the North Carolina Rules of Appellate Procedure is pending before the trial court. Part III concludes by recommending that the North Carolina Rules of Appellate Procedure be amended to conform to the approach laid out in the Federal Rules of Appellate Procedure, whereby trial courts retain jurisdiction over pending tolling motions even after a notice of appeal has been filed.

I. DIVESTITURE OF JURISDICTION AND ITS CONSEQUENCES

This Part discusses the general mechanics of divestiture of jurisdiction and its consequences. Generally, filing a notice of appeal takes a case out of the trial court's jurisdiction.¹¹ Throughout the pendency of the appeal, the trial court is *functus officio*.¹² *Functus officio* means "having performed his or her office,"¹³ and refers to the "trial court hav[ing] completed all of its duties vis-à-vis the matter before it."¹⁴ The Supreme Court of North Carolina has vacated orders issued by a trial court after a notice of appeal

9. *Lovallo v. Sabato*, 715 S.E.2d 909, 912 (N.C. Ct. App. 2011) (citing *Sink v. Easter*, 217 S.E.2d 532, 541 (N.C. 1975)).

10. *Id.* (citing *York v. Taylor*, 339 S.E.2d 830, 831 (N.C. Ct. App. 1986)).

11. *Wiggins*, 184 S.E.2d at 880.

12. *Bowen*, 234 S.E.2d at 749.

13. *Functus officio*, BLACK'S LAW DICTIONARY (10th ed. 2014).

14. Thomas L. Fowler, *Functus Officio: Authority of the Trial Court After Notice of Appeal*, 81 N.C. L. REV. 2331, 2333 (2003).

was filed, noting that these orders are “void for want of jurisdiction.”¹⁵

North Carolina courts have recognized that this general rule regarding divestiture of jurisdiction is “subject to two exceptions and one qualification.”¹⁶ While an appeal is pending, the trial court judge still has jurisdiction over the case during the session in which the judgment at issue was announced and also for the purpose of settling the record on appeal.¹⁷ Additionally, “the trial judge, after notice and on proper showing, may adjudge that the appeal has been abandoned’ and thereby regain jurisdiction of the cause.”¹⁸ In keeping with this understanding of the trial court’s authority after a notice of appeal has been filed, the Supreme Court of North Carolina held in *American Floor Machine Co. v. Dixon*¹⁹ that a notice of appeal divested a trial court (the equivalent of a North Carolina district court) of jurisdiction over the case and “removed the case to the Superior Court for all purposes except the certification of a correct record.”²⁰

Determining whether a trial court has been divested of jurisdiction where parties are relying on tolling motions to file a timely appeal is critical, because Rule 3’s requirements are jurisdictional.²¹ Failure to comply with Rule 3’s requirements will result in dismissal of an appeal, because jurisdiction over the case will not vest in the appellate court.²² Parties cannot stipulate that the requirements of Rule 3 have been met in an effort to create jurisdiction.²³ The North Carolina Court of Appeals has explicitly stated that jurisdiction “cannot be conferred by consent, waiver

15. *Lowder v. All Star Mills, Inc.*, 273 S.E.2d 247, 259 (N.C. 1981) (vacating the trial court’s orders approving the payment of fees and expenses entered after a notice of appeal had been filed).

16. *Bowen*, 234 S.E.2d at 749.

17. *Id.*

18. *Id.* (quoting *Am. Floor Mach. Co. v. Dixon*, 133 S.E.2d 659, 662 (N.C. 1963)).

19. *Am. Floor Mach. Co.*, 133 S.E.2d 659.

20. *Id.* at 662.

21. *In re Harts*, 664 S.E.2d 411, 413–14 (N.C. Ct. App. 2008) (dismissing a notice of appeal from a judgment as untimely where the notice of appeal was filed within thirty days of an award of attorney’s fees but more than thirty days after the entry of judgment (citing *Henlajon, Inc. v. Branch Highways, Inc.*, 560 S.E.2d 598, 600–01 (N.C. Ct. App. 2002))).

22. *Mason v. Dwinnell*, 660 S.E.2d 58, 63 (N.C. Ct. App. 2008) (“Without proper notice of appeal, the appellate court acquires no jurisdiction and neither the court nor the parties may waive the jurisdictional requirements” (quoting *Bromhal v. Stott*, 447 S.E.2d 481, 483 (N.C. Ct. App. 1994), *aff’d in part*, 462 S.E.2d 219 (N.C. 1995))).

23. *Von Ramm v. Von Ramm*, 392 S.E.2d 422, 425 (N.C. Ct. App. 1990) (holding that the court did not have jurisdiction over an appeal seeking review of two judgments where the appellant referred to only one judgment in the notice of appeal, even though the parties stipulated in the record on appeal that notice of appeal was timely given as to both judgments).

or estoppel[;] . . . [j]urisdiction rests upon the law and the law alone. *It is never dependent on the conduct of the parties.*”²⁴ Because the requirements of Rule 3 are jurisdictional, courts may not extend the time for filing a notice of appeal.²⁵ Further, Rule 2 of the North Carolina Rules of Appellate Procedure may not be invoked to save an appeal that suffers from a jurisdictional defect.²⁶ Even so, North Carolina appellate courts may still be able to consider the merits of an appeal if a party files a petition for writ of certiorari, even if that party failed to file a timely notice of appeal.²⁷

The mere filing of a notice of appeal, however, does not divest the trial court of jurisdiction over a case.²⁸ Perfection of an appeal is the action that actually divests the trial court of jurisdiction.²⁹ An appeal is perfected when it is docketed in the appropriate appellate court.³⁰ Once an appeal is perfected, the date for the appeal relates back to the date of filing of the notice of appeal.³¹ One commentator has stated that, “in cases where the appeal is perfected, it is the notice of appeal that effectively terminates the trial court’s jurisdiction.”³²

Section 1-294 of the North Carolina General Statutes provides that, once an appeal is perfected by being docketed in the appellate court, that

24. *Id.* (emphasis added) (quoting *Feldman v. Feldman*, 73 S.E.2d 865, 867 (N.C. 1953)).

25. N.C. R. APP. P. 27(c); *Copper ex rel. Copper v. Denlinger*, 667 S.E.2d 470, 479 (N.C. Ct. App. 2008) (“[T]he deadline for filing a notice of appeal in a civil case under Rule 3 cannot be extended by any North Carolina court as the rule is jurisdictional.”), *rev’d in part on other grounds*, 688 S.E.2d 426 (N.C. 2010).

26. *Copper*, 667 S.E.2d at 479. Rule 2 provides:

To prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, *except as otherwise expressly provided by these rules*, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. APP. P. 2 (emphasis added).

27. *Anderson v. Hollifield*, 480 S.E.2d 661, 663 (N.C. 1997) (“Construing [Rule 3(a), Rule 27(c), and Rule 21(a)(1)] together, we conclude that Rule 21(a)(1) gives an appellate court the authority to review the merits of an appeal by certiorari *even if the party has failed to file notice of appeal in a timely manner.*”) (emphasis added). Rule 21(a)(1) governs the writ-of-certiorari process. See N.C. R. APP. P. 21(a)(1).

28. *Lowder v. All Star Mills, Inc.*, 273 S.E.2d 247, 258 (N.C. 1981) (holding that perfection of an appeal divests the trial court of jurisdiction, and that perfection “means more than merely giving notice of appeal”).

29. *Id.*

30. Fowler, *supra* note 14, at 2333–34 n.9 (citing *Lowder*, 273 S.E.2d at 259).

31. *Id.*

32. *Id.*; see also *Lowder*, 273 S.E.2d at 258–59.

perfection “stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein.”³³ Despite this statutory language and the general *functus officio* principle, the North Carolina Court of Appeals held in *RPR & Associates, Inc. v. University of North Carolina-Chapel Hill*³⁴ that when a party files a notice of appeal from a nonappealable interlocutory order, the notice of appeal does not divest the trial court of jurisdiction over the case.³⁵ Thus, when a party files a notice of appeal from an interlocutory order, “[t]he trial court has the authority . . . to determine whether or not its order affects a substantial right of the parties or is otherwise immediately appealable.”³⁶ If, however, a trial court determines that an interlocutory order is nonappealable, the trial court does not have the authority to dismiss the appeal.³⁷

The interplay between section 1-294 and *RPR* was highlighted in a 2014 North Carolina Business Court order.³⁸ In *Union Corrugating Co. v. Viechnicki*,³⁹ the defendant filed a notice of appeal after the business court granted a preliminary injunction.⁴⁰ Even though the court was unable to dismiss the appeal as interlocutory, it noted that the order granting the preliminary injunction was likely unappealable because it did not affect a substantial right.⁴¹ Citing *RPR*, the court refused to stay discovery proceedings and ordered that the case should proceed.⁴² Because the trial court was unable to dismiss the appeal, the case would have to continue on appeal for the appellate court to dismiss the appeal as interlocutory. Even though the case was essentially proceeding on appeal, the trial court denied

33. N.C. GEN. STAT. § 1-294 (amended 2015). Section 1-294 was recently amended to include the following italicized language: “When an appeal is perfected as provided by this Article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; *unless otherwise provided by the Rules of Appellate Procedure*; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.” *Id.* (amended by Act of May 21, 2015, ch. 25, sec. 2, 2015 N.C. Sess. Laws 93, 93) (emphasis added).

34. *RPR & Assocs., Inc. v. Univ. of N.C.-Chapel Hill*, 570 S.E.2d 510 (N.C. Ct. App. 2002).

35. *Id.* at 514. A party may immediately appeal from an interlocutory order if the trial court, in its discretion, decides that the order affects a substantial right of the party. *Id.* (citing N.C. GEN. STAT. §§ 1-277(a), 7A-27(d) (2013)).

36. *Id.* (citations omitted).

37. *Estrada v. Jaques*, 321 S.E.2d 240, 248 (N.C. Ct. App. 1984).

38. *Union Corrugating Co. v. Viechnicki*, No. 14CVS6240 (N.C. Super. Ct. Oct. 31, 2014), <http://www.ncbusinesscourt.net/TCDDotNetPublic/default.aspx?CID=3&caseNumber=14CVS6240> (order denying motion to dismiss appeal and motion to stay the case).

39. *Id.*

40. *Id.* at 3.

41. *Id.* at 7–8.

42. *Id.* at 8.

the defendant's motion for a stay under section 1-294 because the court had determined that the order was likely unappealable. *Union Corrugating* highlights the tension between *RPR*'s directive that trial courts determine whether orders are interlocutory and the inability of trial courts to dismiss interlocutory appeals, in addition to the tension between *RPR* and the language of section 1-294.

II. THE EFFECT OF A SUBSEQUENT NOTICE OF APPEAL ON PENDING TOLLING MOTIONS

As the case law currently stands, a trial court may be divested of jurisdiction over a pending tolling motion after a notice of appeal is filed. Whether a trial court is divested of jurisdiction depends on which tolling motion was pending when the notice of appeal was filed. The North Carolina appellate courts have held that filing a notice of appeal when a Rule 59 motion is pending divests the trial court of jurisdiction over the Rule 59 motion.⁴³ The North Carolina appellate courts have held, however, that filing a notice of appeal while a Rule 52(b) motion is pending before a trial court does not divest the trial court of jurisdiction over that motion.⁴⁴ The case law is unclear as to whether a trial court would be divested of jurisdiction over a pending motion under Rule 50(b) when a notice of appeal is later filed. Further, the North Carolina Court of Appeals has held that trial courts are divested of jurisdiction when notices of appeal and posttrial motions are filed contemporaneously, stating that “[e]ven where notices of appeal are filed on the same day as the motion for a new trial, the trial court is without jurisdiction to rule on the motion.”⁴⁵

The North Carolina appellate courts have drawn arbitrary distinctions between the tolling motions to determine whether a trial court is divested of jurisdiction after a notice of appeal is filed. In *Parrish v. Cole*,⁴⁶ the North Carolina Court of Appeals held that a notice of appeal did not divest the trial court of jurisdiction over a pending Rule 52(b) motion, explaining that allowing the trial court to rule on the Rule 52(b) motion would ultimately help streamline the appellate process and allow the trial court to rule on matters that it was uniquely equipped to handle.⁴⁷ But in *Wiggins v.*

43. *Lovallo v. Sabato*, 715 S.E.2d 909, 912 (N.C. Ct. App. 2011) (citing *Sink v. Easter*, 217 S.E.2d 532, 541 (N.C. 1975)).

44. *Id.* (citing *York v. Taylor*, 339 S.E.2d 830, 831 (N.C. Ct. App. 1986)).

45. *Am. Aluminum Prods., Inc. v. Pollard*, 389 S.E.2d 589, 592 (N.C. Ct. App. 1990) (citing *Seafare Corp. v. Trenor Corp.*, 363 S.E.2d 643, 649 (N.C. Ct. App. 1988)).

46. *Parrish v. Cole*, 248 S.E.2d 878 (N.C. Ct. App. 1978).

47. *Id.* at 880.

Bunch,⁴⁸ the Supreme Court of North Carolina held that a notice of appeal divested a trial court of jurisdiction over a Rule 59 motion.⁴⁹ In contrast to the *Parrish* decision, the *Wiggins* court did not provide much explanation as to why the notice of appeal divested the trial court of jurisdiction. This different treatment of the tolling motions is unwarranted, given that the reasoning of the *Parrish* court as to why the trial court should retain jurisdiction over a Rule 52(b) motion extends to the other tolling motions as well. Some aspects of Rule 50(b) motions and Rule 59 motions are uniquely addressed to the trial court, like Rule 52(b) motions, and it is unclear what effect divestiture of jurisdiction would have on the error-preservation requirements to obtain appellate review of Rule 50(b) motions.

A. Rule 52(b) Motions

In *Parrish v. Cole*, the North Carolina Court of Appeals held that the filing of a notice of appeal did not divest a trial court of jurisdiction over a Rule 52(b) motion to amend findings of fact.⁵⁰ The *Parrish* court reasoned that allowing the trial court to resolve a 52(b) motion would ultimately not disrupt the appellate process, and accordingly, the trial court was not divested of jurisdiction over a Rule 52(b) motion even after a notice of appeal had been filed.⁵¹ Allowing trial courts to retain jurisdiction over Rule 52(b) motions would not cause significant delay in the appellate process, given that proper motions made pursuant to Rule 52(b) must be brought within ten days of entry of the judgment or of an order by the trial court—and the trial judge cannot extend this time period.⁵² The *Parrish* court cited to *Wiggins*, distinguishing *Wiggins* because that case also involved a Rule 60(b) motion, which can be made within one year of the entry of judgment.⁵³ Additionally, a Rule 60(b) motion is not a tolling motion under Rule 3.⁵⁴ Accordingly, when compared to a Rule 52(b) motion, “a Rule 60(b) motion has a greater potential for disrupting the appellate process because an appeal may have been substantially advanced at the time the motion is made.”⁵⁵

48. *Wiggins v. Bunch*, 184 S.E.2d 879 (N.C. 1971).

49. *Id.* at 882.

50. *Parrish*, 248 S.E.2d at 880.

51. *Id.*

52. *Id.* at 879–80.

53. *Id.* at 880 (citing *Wiggins*, 184 S.E.2d 879); see also N.C. GEN. STAT. § 1A-1, Rule 60(b) (2013).

54. *Parrish*, 248 S.E.2d at 880.

55. *Id.*

The *Parrish* court reasoned that allowing the trial court to fix its own errors through ruling on the Rule 52(b) motion promoted judicial economy and ultimately would streamline the appellate process. Allowing the trial court to retain jurisdiction over the Rule 52(b) motion “results in a system in which the trial court has jurisdiction to reform, amend or alter its decision prior to an appeal in order to give the appellate court a clearer understanding of the trial court’s decision.”⁵⁶

The *Parrish* court also discussed the purpose of motions made pursuant to Rule 52(b), stating that “the 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.”⁵⁷ In addition to allowing a trial court to amend findings of fact, Rule 52(b) also permits a trial court to make new findings of fact.⁵⁸ The court noted that, “[i]f 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.”⁵⁹ Further, “[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.”⁶⁰ Thus, the primary factors driving the *Parrish* court’s holding that a notice of appeal did not divest a trial court of jurisdiction over a Rule 52(b) motion were the unique relationship of the trial court to a case and the potential to streamline the appellate process by allowing the trial court to fix its own errors before the case progressed on appeal.

B. Rule 59 Motions

In *Wiggins v. Bunch*, the Supreme Court of North Carolina held, without a great deal of explanation, that a notice of appeal divests a trial court of jurisdiction over a Rule 59 motion.⁶¹ In *Wiggins*, both a Rule 59 motion and a Rule 60(b) motion were pending before the trial court.⁶² The *Wiggins* court looked to federal practice, since the question of whether a trial court retained jurisdiction over a Rule 59 motion and a Rule 60(b) motion after a notice of appeal had been filed was one of first impression

56. *Id.*

57. *Id.* at 879 (quoting CHARLES ALLEN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 96, at 478 (3d ed. 1976)).

58. N.C. GEN. STAT. § 1A-1, Rule 52(b).

59. *Parrish*, 248 S.E.2d at 879.

60. *Id.* at 880.

61. *Wiggins v. Bunch*, 184 S.E.2d 879, 882 (N.C. 1971).

62. *Id.* at 880–82.

for North Carolina courts.⁶³ Specifically, the court considered whether the general rule regarding divestiture of jurisdiction had been changed by the 1948 amendments to the Federal Rules of Civil Procedure.⁶⁴ The court quoted *Moore's Federal Practice* in its discussion for the proposition that under the Federal Rules of Appellate Procedure,

during the pendency of an appeal it is generally held that the district court is without power to grant relief under Rule 59; or to vacate, alter or amend the judgment under Rule 60(b), whether the 60(b) motion is made prior to or after the appeal is taken, except with permission of the appellate court.⁶⁵

Ultimately, the court concluded that the 1948 amendments to the Federal Rules of Civil Procedure did not change the general rule of divestiture of jurisdiction, and once “the appeal was taken[,] the trial court was divested of jurisdiction except to aid in certifying a correct record.”⁶⁶ Thus, the *Wiggins* court held that a notice of appeal divested the trial court of jurisdiction over a Rule 59 motion.

Despite the holding in *Wiggins*, the reasoning of the *Parrish* court also applies to Rule 59 motions and suggests that trial courts should retain jurisdiction over Rule 59 motions even after a notice of appeal is filed. Rule 59 provides nine grounds for which a trial court may grant a new trial or amend a judgment.⁶⁷ These nine grounds include the following:

(1) Any irregularity by which any party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice; (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law; (8) Error in law occurring at the trial and objected to by the party making the motion, or (9) Any other reason heretofore recognized as grounds for new trial.⁶⁸

Several of these grounds are uniquely addressed to the trial court—for example, claims of trial-court irregularities and excessive or inadequate damages. The trial judge is in the best position to make the determination of whether a new trial should be granted or the judgment amended on these

63. *Id.*

64. *Id.* at 881.

65. *Id.* (quoting 7 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 60:30(2) (2d ed. 1970)).

66. *Id.* at 882.

67. N.C. GEN. STAT. § 1A-1, Rule 59(a) (2013).

68. *Id.*

grounds, since he has presided over the presentation of evidence and observed the witnesses and their testimony.

Applying the *Parrish* court's reasoning, by allowing the trial judge to make these determinations, the trial court would be correcting its own errors before the case progresses on appeal. This might also avoid the possibility of the appellate court having to remand the case, which would further prolong the ultimate resolution. And Rule 59, like Rule 52, requires that motions be brought within ten days of the entry of judgment.⁶⁹ Thus, allowing trial courts to retain jurisdiction over a Rule 59 tolling motion would not delay the appellate process, since these motions must be brought quickly after the entry of judgment. The *Parrish* court also discussed the impact of the pending Rule 60(b) motion in *Wiggins*, noting that parties have more time to file a Rule 60(b) motion and that such motions do not toll the time for filing a notice of appeal.⁷⁰ The presence of the Rule 60(b) motion may have impacted the *Wiggins* holding that a subsequent notice of appeal divested the trial court of jurisdiction. Further, if a Rule 59 motion is pending and a trial court is divested of jurisdiction by the filing of a notice of appeal, the reviewing appellate court is left without the guidance of the trial judge on that issue. The guidance of the trial judge may be particularly valuable, given his or her relationship to the case. Accordingly, the *Parrish* court's reasoning also applies to Rule 59 motions and suggests that trial courts should retain jurisdiction over Rule 59 motions even after a notice of appeal is filed.

C. Rule 50(b) Motions

The case law is unclear as to whether a notice of appeal would divest a trial court of jurisdiction over a pending Rule 50(b) motion for judgment notwithstanding the verdict. The *Parrish* reasoning, however, also suggests that a trial court should retain jurisdiction over a Rule 50(b) motion. Rule 50(b)(2) requires a party who is seeking appellate review of a motion for directed verdict made at the close of all the evidence to also make a motion for JNOV under Rule 50(b)(1) to preserve the issue for appellate review.⁷¹ As with the other tolling motions, a motion for JNOV must be made within ten days of the entry of judgment, and thus, allowing a trial court to retain jurisdiction over a Rule 50(b) motion would not substantially delay the appellate process.⁷² Further, it is unclear what impact divestiture of jurisdiction would have on Rule 50(b)'s error-

69. *Id.* § 1A-1, Rules 52, 59.

70. *Parrish v. Cole*, 248 S.E.2d 878, 880 (N.C. Ct. App. 1978).

71. N.C. GEN. STAT. § 1A-1, Rule 50(b)(2).

72. *Id.* § 1A-1, Rule 50(b)(1).

preservation requirements—whether the filing of a motion for JNOV is enough to preserve the issue for appellate review, or whether a party must actually obtain a ruling from the trial court on the motion.

The current case law draws an arbitrary distinction between the tolling motions under Rule 3 to determine whether the filing of a notice of appeal divests a trial court of jurisdiction over a pending tolling motion. The reasoning of the *Parrish* court actually suggests that trial courts should retain jurisdiction over all of the tolling motions, not just a motion made under Rule 52(b). In the interests of efficiency, trial courts should be able to fix their own errors before a case progresses on appeal. In many cases, this allows trial judges to make discretionary determinations that they are in the best position to make, having presided over the trial and having seen the evidence first-hand. Additionally, all three tolling motions must be brought within ten days of the entry of judgment. Allowing trial courts to retain jurisdiction over these motions will not unduly delay the appellate process, as these tolling motions must be filed quickly after the entry of judgment. One commentator on the divestiture doctrine in North Carolina makes the same suggestion—that trial courts should retain jurisdiction over tolling motions, even after the filing of a notice of appeal—stating that “[p]ermitting a trial court to correct its own errors in a timely fashion, through . . . Civil Rules 52 and 59 . . . is more efficient than a literal application of the *functus officio* rule.”⁷³

III. THE FEDERAL APPROACH

The Federal Rules of Appellate Procedure have been amended to allow a trial court to rule on a pending tolling motion even after a notice of appeal is filed.⁷⁴ The Federal Rules include the same tolling motions as the North Carolina Rules of Appellate Procedure, in addition to motions for attorney’s fees and motions for relief under Rule 60.⁷⁵ The tolling provision in Rule 4 was amended in 1979 to provide that the filing of a notice of appeal had no effect on a pending tolling motion.⁷⁶ After the trial court ruled on the tolling motion, the parties had thirty days to file another notice of appeal.⁷⁷ The committee note explained that the purpose of other contemporaneous amendments to the Federal Rules was “to expedite the processing of appeals after the filing of the notice of appeal, and that it was

73. Fowler, *supra* note 14, at 2369.

74. FED. R. APP. P. 4(a)(4).

75. *Id.*

76. 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.4, at 322 (4th ed. 2008).

77. *Id.*

therefore desirable for the amended Rule 4(a)(4) to forestall ‘proceed[ing] with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from.’”⁷⁸ The drafters of the Federal Rules of Appellate Procedure, like the North Carolina Court of Appeals in *Parrish*, were considering judicial economy and ways to expedite the appeals process. The federal drafters were similarly hoping to avoid the need to remand a case if a trial judge could address any issues before the case proceeded on appeal and was removed from the trial court’s jurisdiction.

The 1979 amendments to the Federal Rules created problems for parties who failed to file a second notice of appeal after a trial court ruled on a tolling motion.⁷⁹ Thus, in 1993, the Federal Rules of Appellate Procedure were amended again to provide “that a notice filed before disposition of any of the motions listed in Rule 4(a)(4) was ineffective until the entry of the order disposing of the last such remaining motion.”⁸⁰ As discussed in *Wiggins*, the North Carolina appellate courts have been willing to take guidance from the federal practice regarding divestiture. The North Carolina appellate courts should do so again in this instance and adopt the federal approach, whereby a notice of appeal does not divest a trial court of jurisdiction over a pending tolling motion, regardless of which type of tolling motion is pending. In order to make this change, in light of the existing case law and the statutory language of section 1-294, there will need to be amendments to the North Carolina Rules of Appellate Procedure to address this issue of divestiture of jurisdiction and posttrial tolling motions. Such amendments would provide much-needed clarity in this area, and could eliminate the jurisdictional issues that are so easy to unwittingly create under the current case law. Given the recent amendment to section 1-294, these amendments to the North Carolina Rules of Appellate Procedure appear to be forthcoming.

CONCLUSION

The current case law provides that the filing of a notice of appeal may divest a trial court of jurisdiction over a pending tolling motion under Rule 3 of the North Carolina Rules of Appellate Procedure, depending on which type of tolling motion is pending before the trial court. The North Carolina appellate courts have drawn arbitrary distinctions among the tolling motions, in an attempt to justify why a notice of appeal divests trial courts of jurisdiction over certain motions but not others. The North Carolina

78. *Id.* at 322–23 (quoting the advisory committee’s notes to 1979 amendments).

79. *Id.* at 323–24.

80. *Id.* at 325.

Court of Appeals has held that a trial court retains jurisdiction to consider a Rule 52(b) motion to amend the judgment, as this allows the trial court to fix its own errors and lessens the chance that the appellate courts may have to remand the case back to the trial court during the pendency of the appeal. Applying that same reasoning to tolling motions made under Rule 50(b) and Rule 59, trial courts should also retain jurisdiction over those motions even when a notice of appeal is filed before a court has ruled on the tolling motion. Because of their relationship to the case, a trial judge is in a unique position to correct errors made at trial in the context of a Rule 59 motion. Further, it is unclear what effect divestiture of jurisdiction would have on the error-preservation requirements in Rule 50(b)(2)—whether the trial court must actually rule on a motion for JNOV or whether simply filing the motion preserves the issue for appellate review.

The Federal Rules of Appellate Procedure provide that a notice of appeal filed while a tolling motion is pending has no effect until the tolling motion is resolved. The drafters of the federal rules recognized that a tolling motion may allow a trial judge to alter or amend a judgment being appealed from, and concerns of judicial economy weigh in favor of allowing the trial judge to rule on that motion before the appeals process begins. The reasoning behind the federal procedure mirrors the discussion of the court of appeals in *Parrish* as to why the trial court retains jurisdiction over a Rule 52(b) motion, and accordingly, the North Carolina Rules of Appellate Procedure should be amended so that trial courts retain jurisdiction over posttrial tolling motions even after a notice of appeal is subsequently filed.