

STATE OF NORTH CAROLINA  
MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
16 CVS 16404

CHRISTOPHER DICESARE;  
JAMES LITTLE; and DIANA  
STONE, individually and on behalf of  
all others similarly situated,

Plaintiffs,

v.

THE CHARLOTTE-  
MECKLENBURG HOSPITAL  
AUTHORITY, d/b/a CAROLINAS  
HEALTHCARE SYSTEM,

Defendant.

**ORDER REGARDING  
JURISDICTION TO CONSIDER  
PENDING MOTIONS**

1. THIS MATTER is before the Court following the entry of its Briefing and Stay Order on 18 February 2021 (the “February 18 Order”). (Briefing & Stay Order, ECF No. 326 [“Feb. 18 Order”].)

2. The February 18 Order directed the parties to submit their positions on the following jurisdictional question: In light of the plaintiffs (“Plaintiffs”) filing a Notice of Appeal on 18 February 2021, (Notice of Appeal, ECF No. 325), does the Court have jurisdiction to consider two motions that Plaintiffs filed before filing their Notice of Appeal? (*See* Feb. 18 Order 1–2.) The two motions in question are (1) Plaintiffs’ Motion for Relief from Judgment and Leave to Amend filed on 10 February 2021 pursuant to North Carolina Rule of Civil Procedure 60(b)(6) (the “Rule 60(b)(6) Motion”), (Mot. for Relief, ECF No. 316), and (2) Plaintiffs’ Motion for Leave to File Under Seal filed on 9 February 2021 (the “Motion to Seal”), (Mot. to Seal, ECF No.

312). In the February 18 Order, the Court also stayed any further proceedings on Plaintiffs' Rule 60(b)(6) Motion and Motion to Seal pending the resolution of the jurisdictional question arising from Plaintiffs' Notice of Appeal. (Feb. 18 Order ¶ 5.c.)

3. Pursuant to the Court's directive, Plaintiffs and defendant The Charlotte-Mecklenburg Hospital Authority d/b/a Carolinas Healthcare System ("Defendant") filed briefs stating their respective positions on the jurisdictional question before the Court. (Pls.' Br. in Supp., ECF No. 327; Def.'s Br. in Opp'n, ECF No. 328.) Plaintiffs contend that the Court has jurisdiction to consider their Rule 60(b)(6) Motion and Motion to Seal, notwithstanding the filing of their Notice of Appeal. (*See generally* Pls.' Br. in Supp.) Defendant disagrees, arguing that Plaintiffs' Notice of Appeal has divested the Court of its jurisdiction in this action, including its jurisdiction to consider Plaintiffs' two pending motions. (*See generally* Def.'s Br. in Opp'n.)

4. Having considered the parties' briefs and applicable North Carolina law, the Court concludes, for the reasons stated below, that the Notice of Appeal has divested the Court of its jurisdiction to consider Plaintiffs' pending Rule 60(b)(6) Motion and Motion to Seal. Thus, during the pendency of Plaintiffs' appeal, all further proceedings in this action, including any briefing and deadlines pertaining to the Rule 60(b)(6) Motion and the Motion to Seal, shall be stayed.

## I. BACKGROUND

5. On 18 December 2020, the North Carolina Supreme Court issued an Opinion (the "December 18 Opinion"), (ECF No. 309), affirming in part and reversing in part the Order and Opinion entered by this Court on 27 February 2019, (ECF No.

281), and on 7 January 2021, the Supreme Court issued a Mandate regarding its December 18 Opinion (the “Mandate”), (ECF No. 310).

6. Pursuant to the December 18 Opinion and the Mandate, this Court entered its Order Dismissing Plaintiffs’ Claim Brought Pursuant to Article I, Section 34, on 21 January 2021 (the “January 21 Order”). (ECF No. 311.)

7. After the Court entered its January 21 Order, Plaintiffs filed their Rule 60(b)(6) Motion on 10 February 2021, requesting (1) that the Court grant Plaintiffs relief from the effect of the January 21 Order and (2) that the Court grant Plaintiffs leave to file a proposed Fourth Amended Complaint attached to the Rule 60(b)(6) Motion, (ECF No. 316.1). (Mot. for Relief.) In connection with the filing of the Rule 60(b)(6) Motion, Plaintiffs also filed their Motion to Seal on 9 February 2021,<sup>1</sup> requesting that the Court maintain under seal (1) Plaintiffs’ brief in support of their Rule 60(b)(6) Motion, (ECF Nos. 317, 319), and (2) Plaintiffs’ proposed Fourth Amended Complaint. (Mot. to Seal.)

8. While the briefing on Plaintiffs’ Rule 60(b)(6) Motion and Motion to Seal was underway, Plaintiffs filed their Notice of Appeal on 18 February 2021, providing notice of their appeal of the Court’s January 21 Order. (Notice of Appeal.)

9. Recognizing that Plaintiffs’ Notice of Appeal potentially implicated the Court’s jurisdiction to consider Plaintiffs’ pending Rule 60(b)(6) Motion and Motion to Seal, the Court entered the February 18 Order and expressly ordered as follows:

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<sup>1</sup> The filings associated with the Rule 60(b)(6) Motion and the Motion to Seal were made around midnight, resulting in different dates for some of the filings.

- a. Any party contending that this Court retains jurisdiction to consider the Rule 60(b)(6) Motion and the Motion to Seal shall file a brief in support of its contention on or before March 8, 2021;
- b. Any response to a supporting brief filed pursuant to [the above subparagraph] shall be filed within 20 days of service of the supporting brief; and
- c. The Court STAYS any further proceedings, including filings and briefing, concerning the Rule 60(b)(6) Motion and the Motion to Seal pending the resolution of the jurisdictional question arising from the Notice of Appeal.

(Feb. 18 Order ¶ 5.)

10. On 5 March 2021, Plaintiffs filed their Brief in Support of Plaintiffs' Contention that the Court Retains Jurisdiction to Consider and Rule on Plaintiffs' Rule 60(b)(6) Motion and Motion to Seal. (Pls.' Br. in Supp.) Defendant responded on 25 March 2021 by filing its Brief in Opposition to Continued Jurisdiction Following the Filing of a Notice of Appeal. (Def.'s Br. in Opp'n.)

11. On 2 April 2021, Plaintiffs filed a Reply Brief in Support of Plaintiffs' Contention that the Court Retains Jurisdiction to Consider and Rule on Plaintiffs' Rule 60(b)(6) Motion and Motion to Seal. (Pls.' Reply Br., ECF No. 330.) The Court, however, has not considered Plaintiffs' reply brief, and the Court will strike this brief because the Court's February 18 Order did not expressly permit Plaintiffs to file a second supporting brief.<sup>2</sup>

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<sup>2</sup> It appears that Plaintiffs believe they were entitled to file a reply brief pursuant to Business Court Rule ("BCR") 7.7. (See Pls.' Reply Br.) However, BCR 7.7 applies to a reply brief that is filed in connection with a pending motion. See generally BCR 7 (governing motions practice in the Business Court). BCR 7.7 therefore does not apply here because the jurisdictional question that the Court directed the parties to submit briefs on did not arise from the filing of a motion; it arose from the filing of Plaintiffs' Notice of Appeal.

## II. ANALYSIS

12. As set forth by the North Carolina Supreme Court, the long-standing “general rule” in our State is that “an appeal takes a case out of the jurisdiction of the trial court[,]” and “[t]hereafter, pending the appeal, the judge is *functus officio*.”<sup>3</sup> *Am. Floor Mach. Co. v. Dixon*, 260 N.C. 732, 735 (1963). In addition, our Legislature has enacted N.C.G.S. § 1-294, which provides, in relevant part, that “[w]hen an appeal is perfected . . . it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein[.]” “An appeal is not ‘perfected’ until it is docketed in the appellate court, but when it is docketed, the perfection relates back to the time of notice of appeal, so any proceedings in the trial court after the notice of appeal [is filed] are void for lack of jurisdiction.” *Romulus v. Romulus*, 216 N.C. App. 28, 33 (2011) (citing *Lowder v. All-Star Mills, Inc.*, 301 N.C. 561, 580–81 (1981)).

13. Defendant contends that North Carolina Supreme Court precedent and N.C.G.S. § 1-294 together establish that Plaintiffs’ Notice of Appeal has divested the Court of its jurisdiction to consider Plaintiffs’ Rule 60(b)(6) Motion and, by extension, their related Motion to Seal. (Def.’s Br. in Opp’n 9–13.) As support for its contention, Defendant cites to *Wiggins v. Bunch*, 280 N.C. 106 (1971). (Def.’s Br. in Opp’n 10.)

14. In *Wiggins*, the North Carolina Supreme Court addressed whether a notice of appeal divested a trial court of its jurisdiction to enter an order granting a Rule 60

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<sup>3</sup> “*Functus officio*, which translates from Latin as ‘having performed his [or] her office,’ is defined as being ‘without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.’” *Rpr & Assocs. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 347 (2002) (citation omitted).

motion. 280 N.C. at 108–11. There, the plaintiff gave notice of appeal in open court on the same day that the trial court dismissed his case and entered a judgment to that effect. *Id.* at 108. Approximately two months later, the plaintiff moved under Rules 59 and 60 to set aside the trial court’s judgment, and the trial court entered an order granting the plaintiff’s motion. *Id.* On appeal by the defendant, the Supreme Court stated that the order, which was entered after the plaintiff’s notice of appeal, “present[ed] a problem of first impression in this jurisdiction” due to the “general rule [that] an appeal takes the case out of the jurisdiction of the trial [c]ourt.” *Id.*

15. After concluding that the plaintiff was not entitled to relief under Rule 59 because he had not filed his motion within the timeframe permitted by that rule, the Supreme Court analyzed whether the plaintiff was entitled to any relief under Rule 60(b). *Id.* at 109. As part of its analysis, the Supreme Court consulted federal court decisions on the similarly worded Federal Rule of Civil Procedure 60(b) and the treatise *Moore’s Federal Practice*, which, as relevant here, stated the following:

But the general rule is that when an appeal is taken from the district court the latter court is divested of jurisdiction, except to take action in aid of the appeal, until the case is remanded to it by the appellate court. Hence 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.***

*Id.* at 109–11 (emphasis added) (quoting 7 James W. Moore, *Moore’s Federal Practice* ¶ 60:30(2) (2d ed. 1970)).

16. Based on these authorities and North Carolina’s general rule that an appeal divests a trial court of its jurisdiction, the Supreme Court held that “when the appeal

was taken the trial court was divested of jurisdiction except to aid in certifying a correct record.” *Id.* at 111. As a result, the Supreme Court vacated the trial court’s order granting the plaintiff’s motion to set aside the judgment pursuant to Rules 59 and 60, “since it was entered after the trial court was divested of jurisdiction.” *Id.*

17. Recently, while citing to *Wiggins*, the Supreme Court stated that “[a] trial judge does not have jurisdiction to ***rule upon a motion for relief from judgment*** made pursuant to N.C.G.S. § 1A-1, Rule 60(b) ***once an appeal has been noted from the relevant order***[,]” and did so without stating or otherwise suggesting that the applicability of this rule depends on whether the Rule 60(b) motion is filed before, after, or at the same time the appeal is taken.<sup>4</sup> *In re C.M.C.*, 373 N.C. 24, 27 (2019) (emphasis added) (citing *Wiggins*, 280 N.C. 106); *see also Bowen v. Hodge Motor Co.*, 292 N.C. 633, 636 (1977) (“The opinion [in *Wiggins*] was concerned essentially with whether motions filed pursuant to Rules 59 and 60 might properly be addressed to the trial court pending an appeal. The holding was that they might not.”).

18. Plaintiffs nonetheless argue that the *Wiggins* decision is inapplicable to the present situation before this Court. Relying on *York v. Taylor*, 79 N.C. App. 653 (1986), a North Carolina Court of Appeals case decided after *Wiggins*, Plaintiffs assert that “a notice of appeal does not divest the trial court of jurisdiction to hear a motion pursuant to Rule 60(b) filed before or at the same time as the notice.” (Pls.’ Br. in Supp. 1.) Thus, because Plaintiffs filed their Rule 60(b)(6) Motion and related Motion

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<sup>4</sup> Plaintiffs characterize the Supreme Court’s statement in this recent 2019 case as dictum. (Pls.’ Br. in Supp. 8–9, 12–13.) Even if that were true, this statement by the Supreme Court nevertheless shows that the Court continues to consider *Wiggins* good law.

to Seal before filing their Notice of Appeal, Plaintiffs contend that *York* permits this Court to consider and rule on the two motions. (Pls.' Br. in Supp. 2–4.)

19. In *York*, the plaintiff filed a notice of appeal from a default judgment at the same time that he filed a Rule 52(b) motion for amended and additional findings of fact and a Rule 60(b) motion for relief from judgment. 79 N.C. App. at 654. The trial court denied the plaintiff's Rule 60(b) motion. *Id.* at 655. On appeal, the Court of Appeals addressed whether the trial court had jurisdiction to enter the order on the Rule 60(b) motion following the filing of the notice of appeal. *Id.* at 654–55. The Court of Appeals began its analysis on this issue by citing to *Wiggins* for the proposition that “[t]he trial court does not have jurisdiction . . . to rule on motions pursuant to Rule 60(b) where such motion is made after the notice of appeal has been given.” *Id.* at 655 (citing *Wiggins*, 280 N.C. 106). The Court of Appeals then stated that it had “discovered no cases with respect to whether the trial court has jurisdiction to rule on Rule 60(b) motions that are filed contemporaneously with the notice of appeal.” *Id.*

20. Notwithstanding the absence of such case law, the Court of Appeals held that the trial court retained jurisdiction to consider the plaintiff's Rule 60(b) motion. *Id.* Based on this holding, Plaintiffs contend *York* establishes that a notice of appeal does not divest a trial court of its jurisdiction to consider a Rule 60(b) motion that is filed before or contemporaneously with the notice of appeal. (Pls.' Br. in Supp. 2–4.)

21. The Court believes that *York* does not control here and that Plaintiffs misconstrue its holding. To begin with, *York* did not deal with a Rule 60(b) motion

filed before a notice of appeal; the Rule 60(b) motion in that case was filed contemporaneously with the notice of appeal. More importantly, the Court of Appeals' holding in *York* was largely influenced by the fact that the plaintiff had also filed a Rule 52(b) motion in addition to filing the Rule 60(b) motion. Indeed, when *York* was decided, existing Court of Appeals precedent permitted a trial court “to hear and rule on a Rule 52(b) motion even though notice of appeal [had] been given.” *York*, 79 N.C. App. at 654–55 (citing *Parrish v. Cole*, 38 N.C. App. 691 (1978)). Therefore, the *York* Court believed “[i]t would be incongruous for [the Court] to say that the trial court had jurisdiction to rule on a Rule 52(b) motion but was divested of jurisdiction to hear **a Rule 60(b) motion filed at the same time.**” *Id.* at 655 (emphasis added).

22. Thus, based on a careful reading of *York*, the Court concludes that this case's holding was limited to the specific facts before the Court of Appeals—a notice of appeal that was filed **contemporaneously** with **both** a Rule 52(b) motion<sup>5</sup> and a Rule 60(b) motion. *See id.* (“Therefore, **under the circumstances of this case**, we hold that the trial court had jurisdiction to rule on plaintiff's Rule 60(b) motion.”) (emphasis added). Such facts are not before this Court.

23. In addition, Plaintiffs have not pointed to, and the Court's research has not revealed, any Supreme Court decisions endorsing the *York* decision or the purported rule that Plaintiffs contend the Court of Appeals established in that case. The only

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<sup>5</sup> The Court only notes that a Rule 52(b) motion was filed with the Rule 60(b) motion in *York* to show that the facts in *York* are distinguishable from the facts here. Accordingly, the Court's interpretation of the *York* decision should not be construed as adopting the view that a trial court may properly consider a Rule 52(b) motion, notwithstanding the filing of a notice of appeal. *See Parrish*, 38 N.C. App. at 693. That issue is not before the Court, nor was it before the Supreme Court in *Wiggins*. *See Wiggins*, 280 N.C. 106.

other relevant and supporting appellate court decision that Plaintiffs cite to in their brief is an unpublished Court of Appeals opinion,<sup>6</sup> *Town of Leland v. HWW, LLC*, where the Court remanded an action to the trial court so that the trial court could decide a Rule 60(b) motion that the defendant had filed before filing a notice of appeal. 725 S.E.2d 1, 4 (N.C. Ct. App. 2010).

24. Citing to *York*, the Court of Appeals in *Town of Leland* stated that “the trial court is not divested of jurisdiction to entertain and may fully rule upon a Rule 60(b) motion that is filed prior to or contemporaneously with the notice of appeal.” *Id.* (citing *York*, 79 N.C. App. at 655).<sup>7</sup> This interpretation of *York* would be more persuasive were it not for two subsequent and contrary Court of Appeals decisions that Defendant has identified in its brief: *Lovallo v. Sabato*, 216 N.C. App. 281 (2011), and *FSI, Inc. v. Newson*, No. COA13-222, 2013 N.C. App. LEXIS 1172 (N.C. Ct. App. Nov. 5, 2013) (unpublished). (Def.’s Br. in Opp’n 2, 18–19.)

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<sup>6</sup> Pursuant to North Carolina Rule of Appellate Procedure 30(e)(3), “[a]n unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority.” N.C. R. App. P. 30(e)(3).

<sup>7</sup> As further support for their contention that this Court continues to have jurisdiction, Plaintiffs also rely on a treatise on North Carolina appellate practice, *North Carolina Appellate Practice and Procedure*. (Pls.’ Br. in Supp. 2.) The Court recognizes that this treatise, which is not binding on the Court, cites to *York* and *Town of Leland* for the proposition that “[w]hen a Rule 60(b) motion is filed *before or contemporaneously with the* filing of a notice of appeal, the trial tribunal retains jurisdiction to rule on the motion and enter an order, even when the ruling is made after a notice of appeal has been filed.” Elizabeth Brooks Scherer & Matthew Nis Leerberg, *North Carolina Appellate Practice and Procedure* § 3.03[17][e][ii] (2019) (emphasis in original). However, another commentator has cautioned against a broad application of *York*, stating that this “case **may establish a very limited exception** to [the] rule” set forth in *Wiggins*. Thomas L. Fowler, *Functus Officio: Authority of the Trial Court after Notice of Appeal*, 81 N.C. L. Rev. 2331, 2361 n.216 (2003) (emphasis added).

25. In *Lovallo*, the defendant filed motions under Rules 52, 59, and 60, seeking to amend the trial court's findings of fact and requesting a new trial and relief from the trial court's order regarding visitation rights. 216 N.C. App. at 282. After filing these motions and before the trial court ruled on them, the defendant filed a notice of appeal from the trial court's visitation rights order. *Id.* The Court of Appeals ultimately dismissed the defendant's appeal as untimely and, as relevant here, noted that

[u]nder the circumstances of the present case, upon filing a notice of appeal, defendant improvidently set in motion the appellate review process. ***Although filing the notice of appeal did not divest the trial court of jurisdiction to hear and rule on defendant's Rule 52(b) motion, York v. Taylor, 79 N.C. App. 653, 654–55, 339 S.E.2d 830, 831 (1986), such action did divest the trial court of jurisdiction to hear and rule on her Rule 59 and 60 motions. Sink v. Easter, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975).***

*Id.* at 284–85 (emphasis added).

26. Since the *Lovallo* Court encountered a Rule 60(b) motion filed before a notice of appeal, but chose not to apply the rule that Plaintiffs contend *York* created, the *Lovallo* decision confirms that the holding in *York* was limited to the facts of that case, i.e., a notice of appeal filed contemporaneously with both a Rule 52(b) motion and a Rule 60(b) motion. Indeed, the Court of Appeals in *Lovallo* conspicuously only cited to *York* for the proposition that a notice of appeal does not divest the trial court of its jurisdiction to consider a Rule 52(b) motion. *See id.* at 285.

27. Likewise, in *Newson*, 2013 N.C. App. LEXIS 1172, the Court of Appeals did not adopt the rule that Plaintiffs believe *York* recognized. The defendants in *Newson* filed a Rule 60(b) motion to set aside the trial court's order entering summary

judgment against them. *Id.* at \*7–8. After filing their motion, the defendants filed a notice of appeal from the summary judgment order. *Id.* at \*8. While the defendants’ appeal was pending, the trial court entered an order denying the defendants’ Rule 60(b) motion. *Id.* The Court of Appeals subsequently concluded that “the trial court was without jurisdiction to rule on the [Rule 60(b)] motion” and therefore vacated the trial court’s order denying this motion. *Id.* at \*19. In reaching this determination, the Court of Appeals relied on N.C.G.S. § 1-294, *Wiggins*, and *Lovallo*. *See id.* at \*18–19. Although *Newson* is unpublished, the Court finds this case persuasive to the extent that it further confirms that the scope of *York* is not as broad as Plaintiffs aver.

28. In sum, the Court concludes that the Supreme Court’s *Wiggins* decision controls here. Under *Wiggins*, Plaintiffs’ Notice of Appeal has divested the Court of its jurisdiction to consider Plaintiffs’ Rule 60(b)(6) Motion and, by extension, their related Motion to Seal.<sup>8</sup> This limitation on the Court’s jurisdiction is consistent with N.C.G.S. § 1-294. Finally, Plaintiffs’ reliance on *York* is misguided, as the facts of that case are distinguishable from the facts here.

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<sup>8</sup> There is a practice apparently followed in the Court of Appeals, but never adopted by the Supreme Court, which permits a trial court to consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating to the appellate court how it would be inclined to rule on the motion were the appeal not pending. *See, e.g., Talbert v. Mauney*, 80 N.C. App. 477, 478–79 (1986). This practice, which is akin to issuing an advisory opinion, is expressly permitted by the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 62.1, but not the North Carolina Rules of Civil Procedure. In any event, Plaintiffs state in their brief that this practice applies when a Rule 60(b) motion is filed after a notice of appeal, (*see* Pls.’ Br. in Supp. 4–8), and therefore, the Court concludes that this practice does not apply here, given the procedural history of this case.

### III. CONCLUSION

29. For the foregoing reasons, the Court determines that it does not have jurisdiction to consider and enter an order on Plaintiffs' Rule 60(b)(6) Motion and Motion to Seal. Accordingly, the Court hereby STAYS all further proceedings in this action, including all briefing and deadlines regarding the two motions, pending the resolution of Plaintiffs' appeal. Lastly, the Court STRIKES Plaintiffs' Reply Brief in Support of Plaintiffs' Contention that the Court Retains Jurisdiction to Consider and Rule on Plaintiffs' Rule 60(b)(6) Motion and Motion to Seal, since the Court's February 18 Order did not permit the filing of such a brief.

SO ORDERED, this the 6th day of April, 2021.

/s/ Michael L. Robinson

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Michael L. Robinson  
Special Superior Court Judge  
for Complex Business Cases