

TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTIONS (RULE 65)

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I. Introduction.

- A. Authority.** Rule 65 of the North Carolina Rules of Civil Procedure governs the procedure for the issuance of preliminary injunctions and temporary restraining orders. Preliminary injunctive relief is authorized by G.S. 1-485.
- B. Preliminary Injunctions Generally.** A **preliminary injunction** is an order of the court preventing a party from doing specified acts during the underlying litigation. It is an “extraordinary measure” to preserve the status quo until a trial can be had on the merits. *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983); *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 16, 431 S.E.2d 828, 835 (1993). See Section II. below.
- 1. Permanent Injunction.** The court has no authority to issue a permanent injunction (or otherwise to decide the merits of the case) in the context of a preliminary injunction hearing. The parties cannot confer this jurisdiction on the court. *Everette v. Taylor*, 77 N.C. App. 442, 444, 335 S.E.2d 212, 214 (1985).
 - 2. Prohibitory vs. Mandatory.** Typically, preliminary injunctions are “prohibitory”—they prevent an action to preserve the status quo. “Mandatory” injunctions, which require a party to *take* a particular action, are within a court’s jurisdiction under Rule 65, but they are generally disfavored and appropriate only “where the case is urgent [and] the right is clear.” *Roberts v. Madison Cty Realtors Assoc.*, 344 N.C. 394, 399–400, 474 S.E.2d 783, 787–88 (1996); *Automobile Dealer Resources, Inc.*

v. Occidental Life Ins. Co. of North Carolina, 15 N.C. App. 634, 639, 190 S.E.2d 729, 732–33 (1972).

- C. Temporary Restraining Orders Generally.** A temporary restraining order (TRO) is an emergency measure that precedes a hearing on a preliminary injunction and serves the same function. Because it is issued without notice to the restrained party, however, it is of very short duration and available only where the need is immediate and the movant's harm irreparable. *Lambe v. Smith*, 11 N.C. App. 580, 582, 181 S.E.2d 783, 784 (1971). A TRO typically is sought at the outset of litigation when the plaintiff would suffer harm while waiting for a hearing on a motion for preliminary injunction. A TRO must be followed by notice and a hearing to determine whether a preliminary injunction will be issued. See Section III. below.

II. Preliminary Injunctions.

- A. Motion.** A preliminary injunction motion may come before the court as:
- A motion considered at the required hearing following the court's issuance of a TRO against the adverse party (See Section III.E. below); or
 - As a stand-alone motion, if the movant did not previously obtain a TRO.
 - Unless a local rule provides otherwise, the motion may be heard whether it is filed as a separate document or as part of the complaint, as long as its language is "clear and unambiguous." *Collins v. Freeland*, 12 N.C. App. 560, 562, 183 S.E.2d 831, 832 (1971) (where the motion for preliminary injunction was included in the prayer for relief).
- B. Notice.** No preliminary injunction may be issued without notice to the party to be restrained. Rule 65(a); *Helbein v. Southern Metals Co., Inc.*, 119 N.C. App. 431, 433, 458 S.E.2d 518, 519 (1995).
1. **Personal Jurisdiction Required.** The court must have personal jurisdiction over the party to be restrained before issuing a preliminary injunction. COMMENT TO Rule 65.
 2. **Rule 5 Service.** Once the summons and complaint have been properly served, notice of the hearing on the preliminary injunction motion may be served pursuant to Rule 5 of the Rules of Civil Procedure. *Perry v. Baxley Dev.*, 188 N.C. App. 158, 162, 655 S.E.2d 460, 463 (2008) (holding that notice on attorney was not proper where he was defendant's attorney in another matter, but not the attorney of record in the case).
 3. **Actual Notice Required.** A preliminary injunction will "be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive *actual notice* in any manner of the order by personal service or otherwise." Rule 65(d) (emphasis added).
- C. Required Showings.** Because a preliminary injunction is 'an extraordinary measure,' it will issue only upon the movant showing that:
- There is a 'likelihood of success on the merits of his case; and

- The movant will likely suffer “irreparable loss unless the injunction is issued.” *Visionair, Inc. v. James*, 167 N.C. App. 504, 508, 606 S.E.2d 359, 362 (2004); or, issuance is “necessary for the protection of a plaintiff’s rights during the course of the litigation.” *Setzer v. Annas*, 286 N.C. 534, 537, 212 S.E.2d 154, 156 (1975); *North Carolina Baptist Hosp. v. Novant Health, Inc.*, 195 N.C. App. 721, 673 S.E.2d 794 (2009); *Robins & Weill v. Mason*, 70 N.C. App. 537, 541, 320 S.E.2d 693, 696 (1984).

D. Sworn Statements Required. A court must base its issuance of a preliminary injunction on competent, sworn statements (and accompanying exhibits) such as a verified complaint, affidavit, deposition testimony, or live testimony. See generally *Hinson v. Union Cty Bd of Educ.*, 125 N.C. App. 373, 481 S.E.2d 326 (1997); Gray Wilson, NORTH CAROLINA CIVIL PROCEDURE § 65-2 (2008).

1. **Personal Knowledge.** Affidavits must be based on personal knowledge, but “the affidavits need not meet as high a standard as those for a summary judgment ruling.” *Schultz v. Ingram*, 38 N.C. App. 422, 427, 248 S.E.2d 345, 349 (1978) (holding that the standards set forth in Rule 56(e) were not applicable to Rule 65).
2. **Specific Facts.** Specific facts must be alleged to support the court’s required findings. *Id.* at 428, 248 S.E.2d at 350.

a. Examples:

- A preliminary injunction was improper in a misappropriation of trade secrets case, where it was based on “sweeping and conclusory statements” without identifying with specificity the trade secrets allegedly misappropriated. *Visionair*, 167 N.C. App. at 510–11, 606 S.E.2d at 363–64 (2004).
- No irreparable injury was shown where municipality merely alleged that defendant’s operation of a used car lot caused “real and immediate irreparable injury...in that [it] represents a continuous impediment to the Plaintiff in carrying out the goals and purposes [of its zoning ordinances].” The Court of Appeals stated, “[i]t is not enough that Plaintiff merely allege irreparable injury, [but must] set out with particular facts supporting such statements so the court can decide for itself if irreparable injury will occur.” *Town of Knightdale v. Vaughn*, 95 N.C. App. 649, 650–51, 383 S.E.2d 460, 461 (1989).

E. Form of Order.

1. **Contents.** Every preliminary injunction order shall:
 - Set forth the reasons for its issuance;
 - Be specific in terms;
 - Describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained. Rule 65(d).
 - The party enjoined should be able to determine “from the language of the order itself, without resort to other documents, exactly what the court is ordering it to do.” *Automobile Dealer Resources, Inc. v. Occidental Life Ins. Co. of North Carolina*, 15 N.C. App. 634, 642, 190 S.E.2d 729, 734 (1972).

- An injunction violated Rule 65(d) where it simply incorporated by reference an existing injunction into a new injunction issued in a new proceeding. *Ferrell v. Doub*, 160 N.C. App. 373, 379–80, 585 S.E.2d 456, 460–61 (2003).
- Where parties consented to the entry of the preliminary injunction, the order did not violate Rule 65(d) by failing to include specific reasons for its issuance. *Uptegraff v. Int'l Union*, 20 N.C. App. 544, 548, 202 S.E.2d 309, 314 (1974).

2. Findings of Fact.

- a. **Not Required Unless Requested.** While a preliminary injunction must include the information required by Rule 65, the trial court, pursuant to Rule 52(a)(2), is not required to make separate, written findings of fact to support the order unless a party specifically requests them. *Iverson v. TM One, Inc.*, 92 N.C. App. 161, 166, 374 S.E.2d 160, 164 (1988) (remanding for findings of fact on injunction bond where requested by a party).
- b. **Not Binding on Merits.** Any “findings of fact and other proceedings [made with respect to the injunction] are not binding at the trial on the merits.” *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 578, 561 S.E.2d 276, 282 (2002); *Kaplan v. Prolife Action League of Greensboro*, 111 N.C. App. 1, 16, 431 S.E.2d 828, 835 (1993).

F. Bond Requirement.

1. **Generally.** The party seeking an injunction must pay security, “in such sum as the judge deems proper,” to protect the restrained party against costs and damages it may suffer in the event the injunction is dissolved or otherwise found to have been wrongful. Rule 65(c).

The amount of the bond is within the trial court’s sound discretion. *Schultz v. Ingram*, 38 N.C. App. 422, 430, 248 S.E.2d 345, 351 (1978).

In granting a preliminary injunction, the trial court need not necessarily revisit or alter the bond set in conjunction with the TRO hearing. *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 639–40, 568 S.E.2d 267, 274 (2002).

2. Exceptions to the Bond Requirement.

- a. **Civil Procedure Rule 65(c).** Rule 65(c) excuses the requirement of a bond where:
 - The movant is the State of North Carolina, or of any county or municipality, or any officer or agency thereof acting in an official capacity; or
 - The action is between spouses relating to support, alimony, custody of children, separation, divorce from bed and board, and absolute divorce, and the injunction restrains the defendant spouse from interfering with, threatening, or in any way molesting the plaintiff spouse during pendency of the suit;
- b. **Case Law.** Case law further establishes two instances in which the judge has discretion to set no bond:
 - Where the “restraint will do the defendant ‘no material damage,’ ...and where the applicant for equitable relief has

- 'considerable assets and [is]...able to respond in damages if [defendant] does suffer damages by reason of [a wrongful] injunction." *Stevens v. Henry*, 121 N.C. App. 150, 154, 464 S.E.2d 704, 707 (1995) (citing *Keith v. Day*, 60 N.C. App. 559, 562, 299 S.E.2d 296, 298 (1983)); or
- When a preliminary injunction is issued "to preserve the trial court's jurisdiction over the subject matter involved." *Staton v. Russell*, 151 N.C. App. 1, 12–13, 565 S.E.2d 103, 110 (2002) (analyzing injunction to prevent one party from pursuing declaratory judgment in Florida that duplicated pending action in North Carolina).
- c. **Exceptions Apply Only to Bond Requirement Itself.** These exceptions excuse only the bond requirement itself, and do not excuse the restraining party from paying costs and damages, if applicable, upon a finding that the restraint was wrongful. Rule 65(c).
3. **Jurisdiction Over the Surety.** "A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the persons giving the security and the sureties thereon if their addresses are known." Rule 65(c).
4. **Cash Bond.** A trial court has discretion to allow a party to post its own bond without surety. *Stevens*, 121 N.C. App. at 154, 464 S.E.2d at 707.
- G. Damages Upon Dissolution.**
1. **Recovery Upon Bond.** When a preliminary injunction or TRO is dissolved either upon motion or as a result of the judgment on the merits, the restrained party may in the same proceeding obtain "an award of damages against the party procuring the injunction and the sureties on his undertaking." Rule 65(e).
- a. **Limited to Bond.** When the party seeks to recover damages on the bond pursuant to Rule 65(e), recovery is limited to the amount of the bond. *Int'l Brotherhood of Elec. Workers Local 755 v. Country Club East, Inc.*, 283 N.C. 1, 9, 194 S.E.2d 848, 853 (1973); *Schwartz Properties, LLC v. Town of Franklinville*, 693 S.E.2d 271, 273 (2010).
 - b. **Final Determination Required.** There can be no recovery under Rule 65(e) until "the court has finally decided that plaintiff was not entitled to the injunction, or until something occurs equivalent of such a decision." *Leonard E. Warner, Inc. v. Nissan Motor Corp. in USA*, 66 N.C. App. 73, 77–78, 311 S.E.2d 1, 3–4 (1984).
 - i. Where the restraining party in a TRO dismisses its motion for preliminary injunction before the hearing, it is the equivalent of a final determination that plaintiff was not entitled to the TRO, and it is sufficient to permit the court to allow recovery on the bond. *Id.*; *Pinehurst, Inc. v. O'Leary*

Bros. Realty, 79 N.C. App. 51, 65, 338 S.E.2d 918, 926 (1986).

- c. **Actual Damages Required.** The party must show actual damages to recover under Rule 65(e). *Tedder v. Alford*, 128 N.C. App. 27, 36, 493 S.E.2d 487, 492 (1997) (“The fact that the [restrained] party prevailed at trial, does not, by itself, entitle it to the posted bond. The prevailing party must have also suffered damages as a result of the injunction.”)
 - d. **No Malice/Lack of Probable Cause Required.** To obtain damages, the restrained party is not required to show that the restraining party exercised malice or want of probable cause in procuring the injunction. Rule 65(e). *But see Democratic Party of Guilford Cty v. Guilford Cty Bd of Elections*, 342 N.C. 856, 862, 467 S.E.2d 681, 685 (1996) (“In an election setting, . . . damages for improperly entered temporary restraining orders . . . will not issue . . . in the absence of evidence of bad faith on the part of the party or person(s) obtaining the orders.”).
 - e. **Who Determines Damages.** The damages may be determined by the judge, or he may direct that they be determined by a referee or jury. Rule 65(e).
 - f. **Evidence.** The damages must be proven through competent, admissible evidence. *Hinson v. Union County Bd of Educ.*, 125 N.C. App. 373, 389, 481 S.E.2d 326, 330 (1997) (holding that attorney’s unsworn statement at hearing regarding harm suffered as a result of the TRO was not competent evidence as to amount of damages).
 - g. **Attorney Fees and Other Costs.** Attorney fees and other costs incurred in defending against injunction are available as part of damages contemplated by Rule 65(e). *Schwartz Properties*, 693 S.E.2d at 273–74 (2010). *But see Midgett v. Vann*, 158 N.C. 128, 73 S.E. 801 (1912).
2. **Recovery in Separate Action.** In the alternative to proceeding on the bond pursuant to Rule 65(e), a party “may institute an action for malicious prosecution against the party who procured the injunction and recover damages without regard to the limit of the bond upon establishing the elements necessary to constitute an action for malicious prosecution.” *Int’l Brotherhood.*, 283 N.C. at 9, 194 S.E.2d at 853; *Schwartz Properties*, 693 S.E.2d at 273.

H. Appeal.

1. **Interlocutory.** The appeal of a preliminary injunction is interlocutory and thus will not be allowed unless it affects a substantial right. *Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984) (citing *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983)).

Appellate review is frequently allowed in covenant-not-to-compete litigation because the inherent immediacy of the contractual issues tend to affect substantial rights of the parties. *Id.*

A substantial right is also affected when the preliminary injunction is issued without proper notice. *Baxley Development*, 188 N.C. App. at

162, 655 S.E.2d at 463 (“To hold otherwise would eviscerate the legislative mandate that parties receive notice of a preliminary injunction.”).

2. Standard of Review.

a. “Essentially De Novo.” The standard of review of an order regarding preliminary injunctive relief is often described as “essentially de novo,” but some appellate opinions reflect a view toward deference to the trial court. The standard has been described in various ways. Some examples:

- “The standard of review from a preliminary injunction is ‘essentially de novo.’ Nevertheless, a trial court’s ruling on a motion for preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous.” *Visionair*, 167 N.C. App. at 507, 606 S.E.2d at 362 (internal quotes omitted).
- “In reviewing the grant of a preliminary injunction, an appellate court may weigh the evidence and find facts for itself. Nevertheless, a decision by the trial court to issue or deny an injunction will be upheld if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings. *Wrightsville Winds Townhouses Homeowners’ Assoc. v. Miller*, 100 N.C. App. 531, 535, 397 S.E.2d 345, 346 (1990) (citing *Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984)).
- “On appellate review of a preliminary injunction, this Court is not bound by the trial court’s findings of fact. Rather, the appellate court reviews the evidence *de novo* and makes its own findings of fact and conclusions of law.” *Szymczyk v Signs Now Corp.*, 168 N.C. App. 182, 184, 606 S.E.2d 728, 731 (2005); *see also Kennedy v. Kennedy*, 160 N.C. App. 1, 8, 584 S.E.2d 328, 333 (2003) (“[O]ur de novo review of the record reveals no equitable reason why the injunction should not issue”)

b. Examples of Application. For examples of application of the standard of review, see generally *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (1999); *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 302 S.E.2d 754 (1983); *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 561 S.E.2d 276 (2002); *Kaplan v. ProLife Action League of Greensboro*, 111 N.C. App. 1, 431 S.E.2d 828 (1993).

III. Temporary Restraining Orders (TROs)

A. Ex Parte Nature of TROs. Rule 65(b).

1. **Issuance.** A TRO may be issued without written or oral notice to the adverse party or that party's attorney *only* if the movant:
 - makes the showings required by Rule 65(b); and
 - posts the bond required by 65(c).
2. **Subject Matter Jurisdiction Required.** Before obtaining a TRO, the movant must first *commence* the underlying action. *Revelle v. Chamblee*, 168 N.C. App. 227, 230-31, 606 S.E.2d 712, 714 (2005) ("Because there is no pending litigation between petitioner and respondent..., there is no action to which the ancillary remedy may attach and the trial court had no jurisdiction to grant the preliminary injunction."); *Carolina Freight Carriers Corp. v. Local Union #61 of Teamsters*, 11 N.C. App. 159, 161, 180 S.E.2d 461, 463 (1971) ("Rule 65(b) is permissible only after an action is commenced as provided by Rule 3.").

B. Required Showings. Before the court may issue a TRO:

- It must clearly appear from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition; and
- The applicant's attorney [must] certify to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required. Rule 65(b).

C. Bond Requirement. The party must post security as required by Rule 65(c). See Section II.E. above.

D. Form and Filing of Order.

1. **Rule 65(b).** Rule 65(b) states that every TRO granted without notice must:
 - Be endorsed with the date and hour of issuance;
 - Be filed forthwith in the clerk's office and entered of record;
 - Define the injury;
 - State why it is irreparable;
 - State why the order was entered without notice; and
 - Expire by its terms within such time after entry as the judge fixes, **not to exceed 10 days**.
- a. **Extension.** A TRO may be extended before the original duration expires:
 - for a "like period", if good cause is shown; or
 - For a longer period, if the restrained party so consents.
2. **Rule 65(d).** In addition, a TRO order must comply with Rule 65(d), which requires that it:
 - Set forth the reasons for its issuance;

- Be specific in terms;
- Describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained. See Section II.D. above.

E. Hearing Following Issuance of TRO. Rule 65(a).

- 1. Hearing on Preliminary Injunction Motion.** Upon issuance of a TRO without notice, the matter must be set for hearing “at the earliest possible time and takes precedence over all matters except older matters of the same character.” At the hearing, the restraining party “shall proceed with a motion for a preliminary injunction.” If the restraining party does not proceed, the judge “shall dissolve the temporary restraining order.” If the restraining party proceeds, the judge may grant a preliminary injunction or dissolve or modify the TRO. See Section II.D. above regarding evidentiary standards.
- 2. Motion for Dissolution.** The party restrained by the TRO need not wait until the calendared preliminary injunction hearing in order to seek relief from the court. On two day’s notice to the restraining party (or less, if the court allows), the restrained party may move for dissolution or modification. At such hearing, the judge “shall proceed to hear and determine such motion as expeditiously as the ends of justice require.” Rule 65(a).
- 3. Damages upon Dissolution.** When a TRO is dissolved, the court may award damages to the restrained party that were incurred as a result of the TRO. Rule 65(a), (e). See Section II.G. above.