



# One Trial Judge Overruling Another

Michael Crowell

It is often stated that one trial judge may not overrule another. As one would expect, the rule is more complicated than that simple phrase. Judges often consider matters previously considered by other judges, especially in superior court where regular rotation of judges is the norm. Generally, however, one trial judge ought not change the legal ruling of another. This bulletin attempts to explain when modification of another judge's order is allowed and when it is not.

## The Rule

As it has developed in the nearly four decades since the leading case of *Calloway v. Ford Motor Co.* (281 N.C. 496, 189 S.E.2d 484 (1972)), the rule about one judge not overruling another, as stated in *First Financial Insurance Co. v. Commercial Coverage Inc.* (154 N.C. App. 504, 507, 572 S.E.2d 259, 262 (2002)), is as follows:

One superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order [citation omitted]. A substantial change in circumstances exists if since the entry of the prior order, there has been an "intervention of new facts which bear upon the propriety" of the previous order [citing *Calloway*]. The burden of showing the change in circumstances is on the party seeking a modification or reversal of an order previously entered by another judge [citation omitted].

In other words, (1) an order which concerns a matter of law, i.e., is not discretionary, may not be modified by another trial judge and (2) an order concerning a matter of discretion may be modified only upon a showing of changed circumstances. Application of the rules is more complicated than that, however. The appellate courts have not provided much guidance about the kind of changed circumstances needed to justify a modification of a discretionary order, nor is it always clear whether a ruling is on a matter of law or discretion. Also, the requirement of changed circumstances does not apply when the matter of discretion being ruled upon is a

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Michael Crowell is professor of public law and government at the School of Government specializing in the law of judicial administration.

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procedural issue clearly intended for the trial judge, such as the form of jury voir dire. (In that case the trial judge is not bound by another judge's pretrial order and need not show changed circumstances to justify a different procedure, as discussed below at pages 11–12.)

Of course, the rule against a second judge reconsidering a legal decision by the first judge does not apply when the second judge is being asked to decide a different legal issue from that decided by the first judge. Sometimes, though, it can be difficult to determine whether the legal question is different, particularly when the judge is being presented with a second motion for summary judgment. The particular problem of consecutive summary judgment motions is discussed below at pages 12–14.

### History and Relevance of Pre-1972 Cases

Before *Calloway*, the generally understood rule was that an interlocutory order entered by one judge was subject to modification by a second judge so long as it did not affect a substantial right and thus was not appealable.<sup>1</sup> For the most part, the cases did not distinguish between rulings on matters of law and rulings on matters of discretion. Also, except for child custody cases, which specifically required a change in circumstances, there was no particular standard for modifying an order, although some cases spoke of good cause. Because of the widespread confusion about the rule of one judge not overruling another, the pre-*Calloway* cases still may be cited at times to justify a second judge's action, but their usefulness is significantly restricted by *Calloway*.

### Most Common Statement of the Current Rule

The statement of the rule used most often by the appellate courts, from *State v. Woolridge*, 357 N.C. 544, 549, 592 S.E.2d 191, 194 (2003), is:

“The power of one judge of the superior court is equal to and coordinate with that of another” [citation omitted]. Accordingly, it is well established in our jurisprudence “that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action” [citation omitted].

### Applicability to District Court, Court of Appeals

Although the question arises most often in superior court, the same rule of law applies to one district court judge overruling another.<sup>2</sup> It also applies to one panel of the court of appeals overruling another panel.<sup>3</sup>

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1. As examples of pre-*Calloway* cases, see *Mebane v. Mebane*, 80 N.C. 34 (1879); *Allison v. Whittier*, 101 N.C. 490, 8 S.E. 338 (1888); *Revis v. Ramsey*, 202 N.C. 815, 164 S.E. 358 (1932); *Stanback v. Stanback*, 266 N.C. 72, 145 S.E.2d 332 (1965).

2. *Town of Sylva v. Gibson*, 51 N.C. App. 545, 277 S.E.2d 115, *appeal dismissed*, 303 N.C. 319, 281 S.E.2d 659 (1981); *In re Royster*, 361 N.C. 560, 648 S.E.2d 837 (2007).

3. *North Carolina Nat'l Bank v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E.2d 629 (1983).

## Interlocutory Orders and Final Orders

The rule about one judge not overruling another is a rule about interlocutory orders, that is, orders that are not final decisions in cases. An interlocutory order does not finally determine the rights of the parties but awaits further action by the trial court to settle and determine the entire controversy.<sup>4</sup> Generally, interlocutory orders are not appealable, but appeal is allowed when the order affects a substantial right.<sup>5</sup> Thus, for example, the denial of a motion to dismiss on grounds of governmental immunity is immediately appealable because it involves a substantial right,<sup>6</sup> whereas orders denying or allowing discovery generally are not appealable.<sup>7</sup>

If an order is a final order or an interlocutory order which affects a substantial right and has been appealed, the trial court then loses jurisdiction to act further in the case.<sup>8</sup> No trial judge, whether the original or a different judge, may act further on the matter except in certain circumstances, such as settling the record on appeal.

## Motions to Amend Judgment and Motions for Appropriate Relief

By statute and rule there are instances when a final decision in a case may be modified later by a trial court. Indeed, the failure to reconsider the original decision may be error.

In civil cases a motion may be made under Rule 59(e) of the Rules of Civil Procedure to amend a judgment or under Rule 60(b) to grant relief from a judgment. These rules spell out the circumstances under which the modification of the final order is permissible and the time within which the motion must be made. Rule 60, for example, requires that a motion for relief from judgment be based on mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, or other specified grounds.

The very purpose of a Rule 59 or 60 motion is to reconsider a previous decision, and it matters not that the judge hearing the motion is someone other than the original judge. “A Superior Court judge has the authority to grant relief under a Rule 60(b) motion without offending the rule that precludes one Superior Court judge from reviewing the decision of another.”<sup>9</sup>

In *Trent v. River Place, LLC* (179 N.C. App. 72, 632 S.E.2d 529 (2006)), the trial court initially dismissed with prejudice plaintiff William Trent’s declaratory judgment action about a development in Wake County. Trent later moved to amend the trial court’s order under Rule 59 to dismissal without prejudice or, in the alternative, for relief from the judgment under Rule 60. The trial judge who heard the Rule 59 and 60 motions denied them, saying he thought they needed to be brought before the judge who entered the dismissal. The court of appeals said the rule about modifying another judge’s order did not apply to a motion under Rule 59 or 60, that it was the new judge’s duty under those rules to determine whether relief was warranted. The refusal

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4. *Veazey v. City of Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh’g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950).

5. Sections 1-227 and 7A-27(d) of the North Carolina General Statutes (hereinafter G.S.).

6. *Lovlace v. City of Shelby*, 133 N.C. App. 408, 515 S.E.2d 722 (1999), *rev’d on other grounds*, 351 N.C. 458, 526 S.E.2d 652 (2000).

7. *Dworsky v. Travelers Ins. Co.*, 49 N.C. App. 446, 271 S.E.2d 522 (1980).

8. *Bowen v. Motor Co.*, 292 N.C. 633, 234 S.E.2d 748 (1977); *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975).

9. *Hoglen v. James*, 38 N.C. App. 728, 731, 248 S.E.2d 901, 904 (1978).

of the second judge to entertain the motions was an abuse of discretion, causing the appellate court to vacate the decision dismissing the Rule 59 and 60 motions.

On the other hand, a Rule 60 motion may not be used as a substitute for an appeal. In *Whitfield v. Wakefield* (51 N.C. App. 124, 275 S.E.2d 263 (1981)), for example, Paul Whitfield had sued Walter Wakefield, a New Hampshire resident, over the purchase of antique books from Wakefield. In response, Wakefield wrote a letter saying that the complaint was “highly laughable & a disgrace” and that he was not going to hire a lawyer. When Wakefield filed nothing else, Whitfield moved for judgment by default, which was granted based on a finding that Wakefield had filed no responsive pleading and had not otherwise appeared. Almost two years later Wakefield moved to set aside the default under Rule 60(b). The new judge granted relief, finding that the letter was an appearance and, having so appeared, that Wakefield had been entitled to notice of the application for default that he was not given. The court of appeals, though, said Rule 60(b) did not allow the second judge to substitute his own finding that the letter constituted an appearance for the first judge’s finding that it did not. The proper course would have been appeal of that finding.

For a criminal case a motion for appropriate relief is the vehicle for setting aside a judgment. The procedure for a motion for appropriate relief is set out in G.S. 15A-1420, and the time limits for filing the motion are in G.S. 15A-1414, -1415, and -1416. Generally the motion must be made within ten days of entry of judgment, but G.S. 15A-1415(b) allows later motions for certain specified grounds, such as the trial court lacking jurisdiction, a significant change in the law requiring retroactive application, and the sentence being unauthorized. G.S. 15A-1413 allows the motion to be heard by any judge in the district but also allows the judge to whom the motion is made to refer it to the judge who heard the case, and that judge may act even if the judge’s commission has expired or the judge is now assigned to another district.

Further discussion of motions to amend or for relief from judgments, or motions for appropriate relief in criminal cases, is beyond the scope of this bulletin. For a comprehensive discussion of motions for appropriate relief see Jessica Smith, “Motions for Appropriate Relief,” *Administration of Justice Bulletin* 2010/03 (June 2010), available at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb1003.pdf>.

## Reason for the Rule

The rule barring one trial judge from modifying or vacating an interlocutory order entered by another trial judge serves judicial economy by avoiding protracted reargument of the same issue, prevents judge shopping and the resulting public perception that the outcome of a case depends on knowing the judge, and helps preserve relationships between judges.

## The Calloway Decision

As previously mentioned, the current rule about one judge not overruling another dates from the 1972 case of *Calloway v. Ford Motor Co.* In *Calloway*, an Asheville police officer, Charles Calloway, sued Ford Motor Company and the local dealer after he was injured because of a defective seat belt in his patrol car. Neither Ford nor the local dealer raised the statute of limitations in its initial answer, but the dealer later moved to amend its answer in order to include the

defense. The motion was denied by Judge Hasty. The other defendant, Ford, subsequently filed an amended answer which did include the statute of limitations defense. Calloway moved to strike Ford's statute of limitations defense, but Judge Sam Ervin denied the motion and allowed summary judgment for Ford based on expiration of the time limit. Ervin then denied the dealer's motion to be allowed to plead the statute of limitations, saying that Hasty already had ruled on the issue and that he could not overrule another trial judge.

The North Carolina Supreme Court stated that while one superior court judge ordinarily may not overrule another, an interlocutory order can be modified based on changed circumstances. The court decided that Ervin could have reversed the Hasty decision, which had denied the dealer's request to amend its answer because of the changed circumstance of Ford being allowed to use the statute of limitations in its defense.

## Situations in Which the Second Judge Could Not Act

### Rulings on Matters of Law

In the following cases the appellate court decided that the second judge did not have authority to modify the order of the first judge because the first judge was ruling on a matter of law.

***Motion to suppress evidence*** (State v. Woolridge, 357 N.C. 544, 592 S.E.2d 191 (2003))

The first judge suppressed evidence of twenty grams of heroin found in the defendant's apartment, but a second judge later granted a motion to reexamine the evidence and allowed its admission. The first judge had suppressed the evidence based on his finding of no exigent circumstances for the warrantless search. The second judge allowed the evidence under the inevitable discovery exception, which had not been argued at the first hearing. That argument was supported by the same evidence the prosecutor used at the first hearing plus additional testimony from the officers as to the likelihood of finding the heroin in the subsequent search with a warrant if the heroin had not already been discovered.

The supreme court held that the second judge should not have acted on the motion. In part the court seemed to say that while the prosecutor used a different legal theory at the second hearing, the question of law being decided was still the same, i.e., whether the evidence should be suppressed. The court also said that there was no change in circumstances because the prosecution's evidence was essentially the same as in the first hearing or could have been presented at that time. Under either view the court saw this as a case of judge shopping:

The reason one superior court judge is prohibited from reconsidering the decision of another has remained consistent for over one-hundred years. When one party "wait[s] for another [j]udge to come around and [takes its] chances with him," and the second judge overrules the first, an "unseemly conflict" is created [citations omitted]. Given this Court's intolerance for the impropriety referred to as "judge shopping" and its promotion of collegiality between judges of concurrent jurisdiction, this "unseemly conflict" . . . will not be tolerated" [citations omitted]. (*Woolridge*, 357 N.C. at 550, 592 S.E.2d at 194)

***Award of attorneys' fees*** (Able Outdoor Inc. v. Harrelson, 341 N.C. 167, 459 S.E.2d 626 (1995))

The Department of Transportation revoked Able's billboard permit but then reinstated the permit when the billboard company appealed. The first judge awarded Able attorneys' fees under G.S. 6-19.1. The second judge vacated the award after deciding that the statute was not



applicable and the first judge did not have jurisdiction to award fees, thus making the order void. The supreme court held that the first judge did have jurisdiction; therefore, it was improper for the second judge to act and alter the award of attorney's fees. (Also see the section entitled "The Effect of a Void Order" beginning on page 14.)

**Motion for summary judgment based on same issue as motion to dismiss** (*Adkins v. Stanly County Bd. of Educ.*, 692 S.E.2d 470 (N.C. Ct. App. 2010))

Ordinarily the denial of a motion to dismiss does not bar a second judge from considering a motion for summary judgment from the same party because the legal standards for the two motions are different. For a motion to dismiss, the question is whether the pleading is legally sufficient; for summary judgment, it is whether a party is entitled to judgment as a matter of law based on uncontested facts which may come from either the pleadings or other materials. (See the discussion of *Barbour v. Little* on page 10.)

In some instances, however, action by the second judge will not be appropriate because the decision on summary judgment depends on a legal ruling that has already been made in denying the motion to dismiss. In *Adkins*, assistant superintendent Mary Adkins had sued the school board for libel and breach of contract when the board cut her salary in 2000. That case was settled, her salary was restored, and her contract was extended to 2004. In 2004, though, the board refused to renew her contract. Adkins sued again, claiming retaliation for the earlier lawsuit. The new claim depended on whether Adkins's original 2000 lawsuit had been on a matter of public concern. The school board moved to dismiss, but the judge denied the motion for most claims, one of his findings being that the 2000 lawsuit had been on a matter of public concern. A year later a second judge granted summary judgment for the school board.

The court of appeals held that although the motions to dismiss and for summary judgment involved different legal standards, the dispositive legal issue for both—whether the 2000 lawsuit was on a matter of public concern—was the same and, therefore, that the second judge improperly overruled the first. To reach that result the appellate court had to look beyond the fact that the motions came under different rules with different legal tests and instead parsed the complaint, motions, and orders to determine whether there was a common legal ruling. It might appear from *Barbour v. Little* that a motion for summary judgment always involves a different legal ruling from that in a motion to dismiss, but *Adkins* says it is necessary to look beyond the titles of the motions and ascertain the actual dispositive legal ruling for each.

**Exclusion of time from calculations for Speedy Trial Act** (*State v. Sams*, 317 N.C. 230, 345 S.E.2d 179 (1986))

The first judge ordered that a two-month continuance not be counted toward the deadline under the Speedy Trial Act. Contrary to the requirement of the statute, the prosecutor had not served on the defendant the motion to continue and to exclude that time. The defendant then argued to another judge that the charges should be dismissed for violation of the Speedy Trial Act because the first judge's order was entered *ex parte* in violation of the statute. The second judge refused to dismiss the case. The supreme court held that because the first judge had jurisdiction to enter the order it was not void *ab initio*; it was merely voidable and had to be honored by the second judge until the order was attacked directly and vacated. The defendant, however, did not attack the order directly by filing a motion to vacate—he only attacked it collaterally with his motion to dismiss under the Speedy Trial Act. Therefore, the second judge was correct in honoring the order. (Also see the section entitled "The Effect of a Void Order" beginning on page 14.)

***Invalid order to reimburse insurance company for partial advance payment*** (Thornburg v. Lancaster, 303 N.C. 89, 277 S.E.2d 423 (1981))

The plaintiff, who was suing for injuries in an automobile accident, already had accepted a payment from the defendant car owner/driver's insurance company. There was a dispute about whether she had entered a final settlement. The first judge denied the defendant's motion for summary judgment but ordered the plaintiff to reimburse the insurance company several thousand dollars. When she failed to do so, the defendant moved to dismiss the case, and the second judge granted the motion. The supreme court held that the order for reimbursement was invalid but also held that the second judge properly determined that he could not consider the propriety of the first judge's order; the second judge could consider only whether the plaintiff had complied with the order for reimbursement, not whether the order was correct.

***Order dismissing divorce action based on file record showing no service of complaint*** (Bumgardner v. Bumgardner, 113 N.C. App. 314, 438 S.E.2d 471 (1994))

The wife filed for divorce from the husband, but the complaint was never served. When the parties were in court on another matter, the husband waived service, the divorce was heard, and the first judge announced a judgment of divorce. No judgment was entered, however. The husband subsequently moved to dismiss the complaint based on failure to serve the summons and complaint. The second judge, reviewing the file and seeing no indication of service and nothing indicating the first judge's judgment, granted the motion ex parte. The wife then returned to the first judge with a proposed judgment, which the first judge entered, including setting aside the dismissal by the second judge. The court of appeals held that the first judge had no authority to set aside the second judge's order of dismissal. The order of dismissal was valid based on the information in the file when the second judge entered it, there being no valid entry of judgment by the first judge at that time. The wife should have appealed from the dismissal or moved for relief under Rule 60.

### **No Showing of Material Change in Circumstances**

In the following cases the first judge was dealing with a matter of discretion, but the second judge was not justified in modifying the order because there was an insufficient showing of a material change in circumstances.

***Motion for special jury venire*** (State v. Duvall, 304 N.C. 557, 284 S.E.2d 495 (1981))

The first judge denied the prosecutor's motion for a special jury venire to bring in out-of-county jurors to hear a hit-and-run case. Six months later another judge granted the motion. Although additional affidavits had been submitted for the second hearing on the motion, the supreme court found that they were repetitive of the evidence submitted at the initial hearing and that the second judge should not have acted. In endorsing the "general impropriety" of one judge attempting to correct another's legal error, the court explained the dangers of a different rule:

Indeed, if the rule were otherwise, the normal reviewing function of appellate courts would be usurped, and, in some instances, the orderly trial process could be converted into a chaotic, protracted affair as one party attempted to shop around for a more favorable ruling from another superior court judge. It is thus clear that the power of a superior court judge to modify an interlocutory order, previously entered by another judge, can be exercised only in the limited situation where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter. (*Duvall*, 304 N.C. at 562, 284 S.E.2d at 498–99)

The court went on to say that the mere passage of time between rulings would not necessarily indicate a change in circumstances, and that the presentation of additional affidavits was pertinent only if they concerned new and different facts which were not before the first judge. (Note the emphasis on the same issue in the later *State v. Woolridge* case discussed above at page 5.) The implication of the court's discussion of the facts is that if there had been a material change in circumstances, the second judge could have granted the motion for a special jury venire.

***Motion to amend answer in divorce action*** (*Madry v. Madry*, 106 N.C. App. 34, 415 S.E.2d 74 (1992))

The husband sued his wife for divorce. The wife, who had suffered brain damage, moved to amend her answer to assert that the husband had to proceed under G.S. 50-5.1 because of her "incurable insanity." The first district court judge denied the motion to amend. The wife then moved to dismiss under Rule 12(b)(6) of the Rules of Civil Procedure, asserting the same argument, that the husband's action had to be made under G.S. 50-5.1. The second district court judge converted the motion to dismiss into a motion for summary judgment and granted summary judgment to the wife. The court of appeals held that the first judge erred in denying the motion to amend the answer but also that the second judge could not enter the summary judgment because "the legal issue decided in that judgment, whether G.S. 50-5.1 bars this plaintiff's claim for absolute divorce pursuant to G.S. 50-6, was precisely the same issue decided to the contrary by [the first judge's] earlier order denying defendant's motion to amend." *Madry*, 106 N.C. App. at 38, 415 S.E.2d at 77. The court noted that the first order was one directed to the discretion of the trial judge, but it still could not be modified unless there was a material change in circumstances. There was no material change in circumstances here where the motion to dismiss was filed even before the first judge had signed the order denying the motion to amend. Although not explicitly stated by the court, the decision implies that the second judge could have modified or reversed the order denying the motion to amend the complaint if there had been a material change in circumstances.

***Motion to compel discovery*** (*Crook v. KRC Management Corp.*, 697 S.E.2d 449 (N.C. App. 2010))

This slip-and-fall case seemed to be one continuous fight over discovery, with each side filing multiple motions to compel over an eighteen-month period. In the first round of motions, the judge granted the plaintiffs' request that KRC provide additional responses to some interrogatories but denied the request that KRC be required to produce certain documents. Upon further motions to compel, a later judge ordered the documents produced and imposed a \$50,000 fine plus costs and attorney's fees for KRC's failure to do so. The court of appeals held, though, that the sanctions were invalid because the second judge in effect was overruling the first on whether KRC had to produce the documents. Although the first judge's order had not specifically identified the documents in question, it was clear from the plaintiffs' subsequent motions that the documents in dispute throughout the eighteen months were the same ones sought in the original discovery requests. The plaintiffs tried to argue on appeal that a change in circumstances justified the later order, but there were no findings by the trial judge to support that position. In fact, the second judge had not known of the first judge's order because the plaintiffs had failed to inform him of the earlier motion to compel and the first judge's decision.



## Situations in Which the Second Judge Could Reconsider the First Judge's Order

In the following cases, the appellate court held that the second judge had authority to modify the first judge's decision.

**Clarification of order on disclosure of financial records** (*Rosenstadt v. Queens Towers Homeowners' Ass'n Inc.*, 177 N.C. App. 273, 628 S.E.2d 431 (2006))

The court held that the second judge was only clarifying the first judge's order on disclosure of financial records. Because the first order had not specified where the records were to be examined and whether copies were sufficient, the second judge could modify the order to address those issues without running afoul of the rule about one judge not modifying the order of another.

**Setting aside sanctions for not complying with discovery** (*Stone v. Martin*, 69 N.C. App. 650, 318 S.E.2d 108 (1984))

The second judge was allowed to set aside the first judge's order of sanctions for failure to comply with discovery. The first judge had entered default against defendants as a sanction under Rule 37 for their refusal to answer interrogatories or requests for admissions. The court of appeals considered the sanction subject to later modification because, first, it was an interlocutory discretionary order and, second, Rule 55(d) of the Rules of Civil Procedure specifically allows setting aside an entry of default "for good cause shown." The court then reviewed the change in circumstances and found that it justified the second judge's decision. (Note that the "good cause" language in Rule 55(d) applies only to setting aside entry of default. Once default judgment is entered, Rule 60(b) on setting aside a judgment applies.)

**Setting aside entry of default** (*Global Furniture Inc. v. Proctor*, 165 N.C. App. 229, 598 S.E.2d 232 (2004))

Rule 55(d) of the Rules of Civil Procedure allows an entry of default to be set aside for "good cause." The plaintiff against whom default had been entered (on a counterclaim), however, had failed to use Rule 55, so the court of appeals reviewed the trial court's decision to strike the default under the *Calloway* "substantial change in circumstances" test and found that the second judge should not have altered the first judge's entry of default. Had the motion to set aside the default been made under Rule 55(d), however, the second judge would have had to only find "good cause" to act.

**Revocation of pro hac vice admission** (*Smith v. Beaufort County Hosp. Ass'n Inc.*, 141 N.C. App. 203, 540 S.E.2d 775 (2000), *rev. denied*, 353 N.C. 381, 547 S.E.2d 435 (2001))

The statutes governing *pro hac vice* admission of out-of-state lawyers specifically state in G.S. 84-4.2 that such permission "may be summarily revoked by the General Court of Justice . . . on its own motion and in its discretion." Thus the court held that a second superior court judge could revoke the *pro hac vice* admission of Florida lawyers in a medical malpractice action without any findings of fact and without a showing of a change in circumstances or misconduct or other evidence to warrant the revocation. Because of the statute, the appellate court reviewed the trial court's decision only for abuse of discretion.

**Class certification** (*Dublin v. UCR Inc.*, 115 N.C. App. 209, 444 S.E.2d 455, *rev. denied*, 337 N.C. 800, 449 S.E.2d 569 (1994))

A second judge had authority to decertify a class of plaintiffs that had been certified by the first judge because the certification was a discretionary interlocutory order which was subject to later modification. The modification was not allowable in this particular case, however, because there was no changed circumstance to justify it. Between the original certification of the class

and the later decertification new defendants and new claims had been added, but those additions did not affect the nature of the claims against the original defendants.

**Motion for summary judgment after motion to dismiss** (*Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252, *rev. denied*, 295 N.C. 733, 248 S.E.2d 862 (1978))

A motion for summary judgment under Rule 56 of the Rules of Civil Procedure involves a different legal standard from that in a motion under Rule 12(b)(6) to dismiss for failure to state a claim; therefore, the first judge's denial of the motion to dismiss usually will not preclude the second judge from later considering and granting summary judgment. *Barbour* was a challenge by landowners to the adoption of a master plan for the Eno River State Park by the Department of Natural and Economic Resources (DENR). DENR's motion to dismiss was denied, but after discovery and the submission of affidavits the second judge granted summary judgment to the agency. As the court explained:

While one superior court judge may not overrule another, the two motions do not present the same question. *Alltop v. Penney Co.*, 10 N.C. App. 692, 179 S.E.2d 885 (1971). The test on a motion to dismiss under Rule 12(b)(6) is whether the pleading is legally sufficient. The test on a motion for summary judgment made under Rule 56 and supported by matters outside the pleadings is whether on the basis of the materials presented to the court there is any genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. Therefore, the denial of a motion to dismiss under Rule 12(b)(6) does not prevent the same court, whether in the person of the same or a different superior court judge, from thereafter allowing a subsequent motion for summary judgment made and supported as provided in Rule 56. (*Barbour*, 37 N.C. App. at 692, 247 S.E.2d 255–56)

As the discussion of *Adkins v. Stanly County Board of Education* on page 6 indicates, however, one cannot automatically assume that the motion for summary judgment and the motion to dismiss involve different legal issues. It may be, as in *Adkins*, that the dispositive legal ruling for both motions is the same and that the second judge should not act. In deciding whether it is appropriate to rule, the second judge needs to look beyond the titles of the motions and determine whether a ruling on summary judgment requires reconsideration of the legal issue that was critical to the decision on the motion to dismiss.

**Motion for permissive intervention after motion to dismiss for lack of standing** (*Bruggeman v. Meditrust Co. LLC*, 165 N.C. App. 790, 600 S.E.2d 507 (2004))

The first judge dismissed plaintiffs Newton and McGonigal from the lawsuit for lack of standing in a dispute among real estate brokers about commissions. Later, though, a second judge allowed Newton and McGonigal to intervene. In remanding, the court of appeals noted that

this Court has upheld a subsequent order by a different judge in the same action where the subsequent order was “rendered at a different stage of the proceeding,” did not involve the same materials as those considered by the previous judge, and did not “present the same question” as that raised by the previous order. (*Bruggeman*, 165 N.C. App. at 795, 600 S.E.2d at 511)

The court then discussed the difference between the lack-of-standing issue and the intervention. Standing requires the plaintiff to show actual injury, that there is a justiciable controversy between adverse parties with substantial interest affected. Permissive intervention, on the other hand, only requires that the intervenor's action and the main action have a question of law or

fact in common. Standing is only one factor for a court to consider in deciding whether to grant permissive intervention. The second judge, therefore, was ruling on a separate legal issue from the one decided by the first judge and would not be violating the rule of one judge not overruling another. (Judge John Tyson wrote a strong dissent, however, concluding that the two issues really were essentially the same and that the second judge could not have acted without a showing of a substantial change in circumstances. Indeed, the second judge's order acknowledged that it was overruling the first judge's decision.)

***Order directing referee to determine amounts owed on policies*** (First Fin. Ins. Co. v. Commercial Coverage Inc., 154 N.C. App. 504, 572 S.E.2d 259 (2002))

The first judge had ordered a referee to decide "in his sole discretion" which insurance policies were involved in a dispute between companies over commissions and bonuses and then to determine the amount owed in bonus on each policy. The referee previously had conducted a sampling, and the new order was intended to complete his work. The parties then disagreed over the materials to be provided to the referee and ended up before a second judge. Finding that the referee had not been able to complete his work through no fault of his own, the second judge rescinded the first judge's order, adopted the referee's earlier report, and entered summary judgment. The court of appeals decided that while the initial order was interlocutory and subject to modification, the later rescission was not justified because there had been no change in circumstances. The only change after the first order was that the parties could not agree on the materials to submit to the referee, but the order gave the referee sole discretion to determine what materials to use. Therefore, the parties' disagreement was irrelevant.

***Motion to amend answer in divorce action*** (Madry v. Madry, 106 N.C. App. 34, 415 S.E.2d 74 (1992))

See the discussion of *Madry* on page 8 under the section entitled "No Showing of Material Change in Circumstances." Note that the court considered the decision on the motion to amend to be a matter of discretion with the trial judge, meaning it could be altered upon a showing of a material change in circumstances.

***Motion for special jury venire*** (State v. Duvall, 304 N.C. 557, 284 S.E.2d 495 (1981))

See the discussion of *Duvall* on pages 7–8 under the section entitled "No Showing of Material Change in Circumstances." Note that the court considered the decision on the motion for a special jury venire to be a matter of discretion, meaning it could be modified or reversed upon a showing of a material change in circumstances.

## **Procedural Matters within the Discretion of the Trial Judge**

Some matters of procedure are considered to be specifically within the discretion of the trial judge, and that judge is not bound by a pretrial order entered by another judge. In these instances the trial judge may choose a different procedure from that ordered by the earlier judge without the need for any particular showing of changed circumstances.

### **Voir Dire of Jurors**

In a pretrial order, the first judge provided for individual voir dire of prospective jurors in a capital murder case. The judge presiding at the trial denied individual voir dire. The supreme court said that the rule of one judge not reviewing the order of another "does not apply, however, to *interlocutory* orders given during the progress of an action which affect the procedure and conduct of the trial. . . . *Such order or judgment is subject to change during the pendency of the action*

to meet the exigencies of the case.” *State v. Stokes*, 308 N.C. 634, 642, 304 S.E.2d 184, 189–90 (1983) (emphasis in original). The court noted that the statute on jury selection stated that in capital cases “the *trial* judge for good cause shown *may* direct that jurors be selected one at a time.” *Id.* (emphasis in original). The statute, the court concluded, left the discretionary power with the judge who actually tries the case.

### Consolidation of Cases for Trial

The plaintiffs in *Oxendine v. Catawba County Department of Social Services* (303 N.C. 699, 281 S.E.2d 370 (1981)) filed an action in district court seeking permanent custody of a child for whom they were providing foster care. They also filed an adoption petition with the clerk of court. The clerk transferred the adoption proceeding to superior court because it involved both factual and legal issues. Rule 42(a) of the Rules of Civil Procedure allows a superior court judge to consolidate for trial actions pending in both district and superior court when they involve common questions of law or fact. Applying that rule, a superior court judge ordered the cases consolidated. The supreme court held that the consolidation is a discretionary decision to be determined by the judge who is to preside, and the earlier judge could not restrain the presiding judge by the entry of the order of consolidation. The court cited the “general principle that one superior court judge may not restrain another from proceeding in a cause over which he has jurisdiction.” *Oxendine*, 303 N.C. at 703–04, 281 S.E.2d at 373.

### Second Motions for Summary Judgment

A motion for summary judgment is a decision on a matter of law. Therefore, a judge usually may not consider a second motion for summary judgment, whether from the same party or another, because it would mean reconsidering a legal decision by the first judge. If the second motion for summary judgment is on a different legal issue from that in the first motion, however, it may be considered. Determining whether the second motion is on the same or a different legal issue can be difficult. The following cases involve second motions for summary judgment.

- *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 272 S.E.2d 374 (1980), *rev. denied*, 302 N.C. 217, 276 S.E.2d 914 (1981). The second judge did not have authority to consider the defendants’ motion for summary judgment on punitive damages (for emissions from a manufacturing plant) when the same motion had been denied earlier by another judge. A decision on summary judgment is a matter of law, and, in this case, although fourteen additional deposition transcripts and seven new witness affidavits were presented the second time, the legal issue to be determined by the judge was the same. To rule otherwise, the court said, would mean that “an unending series of motions for summary judgment could ensue so long as the moving party presented some additional evidence at the hearing on each successive motion” and that such a procedure “would defeat the very purpose of summary judgment.” *Carr*, 49 N.C. App. at 634, 272 S.E.2d at 377. Noting that the case could have been resolved by jury trial in the time taken for the summary judgment motions, the court stated, “The conservation of judicial manpower and the prompt disposition of cases are strong arguments against allowing repeated hearings on the same legal issues.” *Id.* at 636, 272 S.E.2d at 378. Successive summary judgment motions are allowed, though, when they present different legal issues, as discussed below.
- *Fox v. Green*, 161 N.C. App. 460, 588 S.E.2d 899 (2003). A medical malpractice claim was based on a sponge being left in the patient. The defendant moved for summary judgment



asserting that the sponge was left for therapeutic purposes. The motion was denied and could not be reconsidered in a subsequent motion for summary judgment before a second judge, but the second judge could consider the portion of the second motion which dealt with punitive damages since that legal issue had not been presented in the first motion.

- *Iverson v. TM One, Inc.*, 92 N.C. App. 161, 374 S.E.2d 160 (1988). In a dispute over a property easement the first judge denied the defendant's motion for summary judgment and granted a preliminary injunction to plaintiff. In denying summary judgment the judge found that there were genuine issues of material fact. When the case came for trial before the second judge the plaintiff requested a jury trial, causing the judge to first conduct a hearing on whether there were any issues of facts for a jury to decide. The judge found that there was no disputed issue of fact for a jury and dismissed the complaint. The court of appeals reversed, holding that the second judge's decision was, in essence, summary judgment, though not characterized as such. Because the legal issue to be determined was the same as that decided by the first judge—whether there were any genuine issues of material fact—the second judge improperly overruled the first judge on a matter of law. “As the same legal issue was presented to both trial judges, it is immaterial that the second judge . . . may have had before him evidence not available to [the first judge].” *Iverson*, 92 N.C. App. at 164–65, 374 S.E.2d at 163.<sup>10</sup>
- *Hastings for Pratt v. Seegars Fence Co.*, 128 N.C. App. 166, 493 S.E.2d 782 (1997). The plaintiff sued over injuries to a child from an allegedly defective gate and fence. The defendant's answer included a claim of contributory negligence because the child engaged in “horseplay” on the fence. The defendant moved for summary judgment, which was denied by the first judge. A second judge heard and granted defendant's second motion for summary judgment based on G.S. 99B-3, the statute exempting manufacturers of products from liability when the product has been improperly modified or used. The court of appeals held that the G.S. 99B-3 defense effectively had been raised in the contributory negligence defense of the answer and therefore could not be reconsidered by the second judge.
- *Cail v. Cerwin*, 185 N.C. App. 176, 648 S.E.2d 510 (2007). The plaintiff took out a construction loan with Canusa Mortgage, which Canusa sold to defendant Cerwin. The plaintiff paid off the loan, but Canusa did not notify Cerwin, and Cerwin subsequently foreclosed. When the plaintiff sued for a declaratory judgment on the status of the note, defendant Cerwin moved for summary judgment on both the plaintiff's claims and her counterclaim. The first trial judge denied the motion on most issues, including the plaintiff's first two claims for relief. Subsequently the plaintiff moved for summary judgment, and the second judge granted judgment for plaintiff on some issues, for defendant Cerwin on some issues, and reserved judgment on others. The court of appeals held that the second judge should not have ruled on the issues raised and ruled upon in the first motion for summary judgment. The first judge's denial of defendant Cerwin's motion for summary judgment on plaintiff's first two claims for relief was a legal conclusion that there were material facts in dispute. Therefore, the second judge was without jurisdiction to grant summary judgment on the same claims and conclude that there were no genuine issues of material fact. No party had raised the question of one judge overruling another; the court of appeals identified the issue itself, declaring that it was a question of the second

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10. *Also see Metts v. Piver*, 102 N.C. App. 98, 100–101, 401 S.E.2d 407, 408 (1991) (“It is the rule in this State that an additional forecast of evidence does not entitle a party to a second chance at summary judgment on the same issues.”).



trial judge's jurisdiction and could be raised at any time. That the first motion for summary judgment was made by the defendant and the second by the plaintiff did not matter. Nor did it matter that additional evidence was offered in support of the second motion because the essential legal issue was the same.

- *Profile Investments No. 25, LLC v. Ammons East Corp.*, 700 S.E.2d 232 (N.C. App. 2010). In a breach of contract case for a real estate transaction gone bad the defendant Ammons filed three separate motions for summary judgment. The first two were denied, but the third was granted by a different judge. The court of appeals reversed without examining the legal bases for the different motions, saying that the judge granting the third motion had made no determination of a change in circumstances. It appears that the court mixed up the analysis. A decision on summary judgment is a ruling on a matter of law and ought not be changed by a second judge regardless of any change in circumstance; it is only when the ruling is on a matter of discretion that a change in circumstances allows a later modification.
- *Shelf v. Wachovia Bank*, No. COA-10-1510 (N.C. Ct. App. June 21, 2011). Theresa and Robert Shelf were caregivers for their grandson Travis Gambrell who had been injured by medical malpractice. As trustee for the trust established by the malpractice settlement, Wachovia paid the Shelves monthly for Gambrell's care in addition to his medical expenses. When Gambrell died the remainder of the trust was to go to the state Department of Health and Human Services (DHHS) to partly repay its costs in providing medical assistance to Gambrell. Upon his death, however, the Shelves sued Wachovia and DHHS claiming they were owed another \$500,000 plus. Both the Shelves and DHHS moved for summary judgment, and both motions were denied. The Shelves then voluntarily dismissed their case against DHHS, but DHHS came back in the case when the Shelves continued to pursue Wachovia. A second judge heard DHHS's motion to dismiss, converted it to summary judgment, and ruled in favor of DHHS. The court of appeals held that the second judge could not overrule the first judge by granting summary judgment for DHHS when it had previously been denied by the first. In reaching its decision the court reviewed and compared the original motion for summary judgment and the subsequent motion to dismiss and determined that the legal basis for both was the same, that as a matter of law the trust instrument foreclosed any claim by the Shelves following Gambrell's death.

### The Effect of a Void Order

An order is void ab initio and is a nullity and may be ignored by a later judge if the first judge had no jurisdiction to enter the order. *State v. Sams*, 317 N.C. 230, 345 S.E.2d 179 (1986). If the initial judge had jurisdiction, however, the order is merely voidable and remains in effect until voided by a direct challenge to its validity. In *Sams*, discussed above at page 6, the order in question had excluded a certain number of days from counting toward the speedy trial deadline. The order was entered ex parte, however, in violation of the statute. The supreme court determined that the order was voidable, not void ab initio, and thus had to be honored by the second judge unless challenged directly and vacated. The defendant attacked the order collaterally in a motion to dismiss for failure to comply with the speedy trial law. Because the order excluding the time had not been attacked directly and vacated, it had to be honored by the second judge.

In *Able Outdoor Inc. v. Harrelson* (341 N.C. 167, 459 S.E.2d 626 (1995)), discussed above on pages 5–6, the second judge vacated the first judge's award of attorney's fees against the

Department of Transportation, finding that the first judge did not have jurisdiction to enter the order and thus the order was void and did not limit the second judge ruling on the same issue. The supreme court, however, found that the first judge did have jurisdiction and, therefore, that the second judge could not overrule the award.

### Declaratory Judgment Actions

In *Edmisten v. Tucker* (312 N.C. 326, 333 S.E.2d 294 (1984)), the supreme court reiterated that a declaratory judgment action may not be used by a superior court judge to oversee, direct, or instruct the district court. In *Tucker*, the attorney general sought declaratory judgment against various district court judges who in criminal prosecutions for driving under the influence had ruled portions of the Safe Roads Act of 1983 unconstitutional. The supreme court upheld the trial court's dismissal of the lawsuit, holding that there was no actual existing controversy because judges were not parties with an adverse interest and a stake in the outcome, nor was the attorney general directly and adversely affected by their rulings. Declaratory judgment generally is not available when there is a pending criminal or civil action involving the same issue and the same parties. The constitutional issues about the 1983 legislation would be resolved through the appeals of the several individual criminal cases.

### Advice

Any judge should be cautious about taking up an order previously entered by another judge. If the order concerns a legal matter, it may not be modified by the second judge; even if it concerns only a matter of discretion, it may be altered only for a change in circumstances. For some few decisions, such as an entry of default or a *pro hac vice* admission (see page 9 above), a particular statute or rule may allow modification and provide the standard for doing so. In that instance, the second judge may proceed without worry. If there is no statute or rule specifically allowing modification, on closer scrutiny the judge may be able to determine fairly that the legal issue being presented truly is different from the one decided by the first judge, and the judge may proceed with the modification. If the legal issue is the same, however, the second judge must not modify the first judge's order. If the order does not concern a matter of law, only a matter of discretion, the second judge may proceed but must be certain to delineate the change in circumstances that justifies the modification. There is an exception, however, when the matter of discretion is a procedural point specifically left to the discretion of the trial judge; in that instance the trial judge need not show a change in circumstances to choose a different procedure from that set by an earlier judge in a pretrial order.

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