# THE RIGHT TO A JURY TRIAL IN NORTH CAROLINA

JUDGE REBECCA B. KNIGHT

## THE ISSUE WILL BE RAISED BY:

- PLEADINGS
- MOTIONS
- THE JUDGE, ON THE JUDGES OWN MOTION

## What do you do?

- Index of the Pattern Jury Instructions
- Schedule a Hearing on the Issue
- Require Attorney's to
  - Brief the Issue
  - File a Week before the Hearing

## In open court and on the record

- A written order with findings of fact and conclusions of law
- An order denying a motion for trial by jury affects a substantial right and is immediately appealable

## TWO QUESTIONS:

CONSTITUTIONAL RIGHT?

OR

STATUTORY RIGHT?

## Constitutional Right in North Carolina

- Constitution of 1776
- Constitution of 1868
- Constitution of 1971

## Constitution of 1776

*"That in controversies at law, respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people and ought to remain sacred and inviolable."*

## What about controversies in equity?

- In 1782 the Legislature passed a statute to give parties the right to a trial by jury in an action in equity based on the belief that all issues, in law and in equity, should be tried by a jury.
- Trial judge as sole trier of fact in equity infringed on right to trial by jury

## What the legislature giveth, the legislature taketh away:

1823 the Legislature abolished the right to trial by jury in equity cases, a right that they had created 42 years earlier in 1782

## Did the Court yield to the wisdom of the Legislature?

No, they still had jury trials on equity issues.

## How did they do that?

By means of a "Feigned" Issue

A feigned issue is when the proceeding (jury trial) is held even though the court lacks jurisdiction (*Blacks Law Dictionary*).

## NC Constitution of 1868 (2nd)

- Judges now elected and with set terms – previously appointed for life!
- Created uniform court system
- Abolished feigned issues
- Abolished distinction between action at law and at equity

## Article IV, § 1 of Constitution of 1868

*"The distinction between actions and law and suits in equity, and the forms of all such actions and suits shall be abolished, and there shall be in this State but one form of action, for the enforcement or protections of private rights or the redress of private wrongs which shall be denominated a civil actions…..Feigned issues shall be abolished and the fact at issue tried by order of the court before a jury."*

## *Lee v. Pearce*, 68 N.C. 76 (1873).

- New constitution did not create new substantive rights to trial by jury
- One court and one procedure for any issue of fact – trial by jury regardless of action at law or at equity

## Constitutional Convention of 1875

- Power over the courts returned to the legislature
- Simple and uniform court system revoked
- Legislature had power to establish and determine jurisdiction of courts below Supreme Court
- Supreme Court reduced from five to three members
- Superior Court judges were to rotate among all judicial districts in the state

## Constitutional Amendments in 1962

Created a unified and uniform court system – General Court of Justice for NC

- "Feigned issues" language deleted
- Reorganization of Article IV for Judicial Branch

## North Carolina State Constitution Study Commission 1976

- Initiative of Governor Dan K. Moore
- Committees of North Carolina State Bar and North Carolina Bar Association
- Updated, modernized and reorganized the Constitution of 1868
- Proposed six amendments to the Constitution

## Constitution of 1971

- Approved by voters in November 1970 election
- Became effective July 1, 1971

## Article I, §25 of Constitution of 1971:

*"In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable."*

## 1776 Constitution vs. 1971 Constitution

- 1776 "**Ought"** to remain sacred and inviolable
- 1971 **"Shall**" remain sacred and inviolable

## Constitution of 1971

Continued the abolition of procedural distinction between actions of law and equity that was in Constitution of 1868

## Article IV, § 13 Constitution of 1971

"*There shall be in this state but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denomination a civil action, and in which there shall be a right to have issues of fact tried before a jury.*"

## Article IV, §13 (2)
## Constitution of 1971

… *"No rule of procedure or practice shall abridge substantive rights or arrogate or limit the right of trial by jury."*

## North Carolina Supreme Court

- Consistently ruled that Article I right to trial by jury is only when
  "*the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted*"
- And if the right does not exist by statute or at common law upon the adoption of the Constitution of 1868
  – no constitutional right to trial by jury

Why must the right exist at common law as of the time of the Constitution of 1868 and not the Constitution of 1971?

Because the 1971 document updated, modernized and reorganized the 1868 document but did not change the substance of it

Exception:

If the right deals with one of the five amendments to the constitution in 1971 because they changed the substance of the 1868 constitution.

## North Carolina Appellate Decisions supporting a right to jury trial

- "might" be a question for jury on amount of compensation to a landowner for a right of way condemned for building of a railroad (1890);
- There was a right in an abatement of public nuisance case;
- There was a right in a paternity case under Chapter 49;
- There was a right in action for Retaliatory Discharge because of the filing of a worker's compensation claim;
- There is a right in a shareholder's derivative action

## North Carolina Appellate Decisions finding NO common law right for jury by jury:

- Jury of 12 for a hearing on restoration of sanity
- To enjoin board of education from building a school on property the plaintiffs felt was inappropriate
- Worker's Compensation case
- Liability for taxation as employer in Unemployment compensation Commission case;
- Denial of franchise petition by NC Public Utilities commission;
- Valuation of land for real property tax assessments by county
- Annexation cases
- Ownership of money on deposit with Clerk in an Estate proceeding;
- Termination of parental rights cases;
- State Bar disciplinary action
- Monies owed under a state highway construction contract;
- Equitable Distribution cases
- Constructive Trust claim within an Equitable Distribution case
- Divorce from Bed and Board

## Right to trial by jury created by Statute:

- incompetency hearing
- restoration of competency
- divorce or annulment
- martial misconduct issue in alimony case
- land registration case
- petition for issuance of certificate of title to land
- Processioning proceeding to determine boundary line
- Exemption from public utility regulations for operation of motor carriers
- Damages or divestitures under NC RICO Act
- Seizure of dead, dying, disabled, diseased poultry
- Judicial review Coastal Resources Commission decisions
- Resolution of dispute between Board of Education and Board of Commissioners
- Small claims appeals
- Summary ejectment appeals
- Abatement of nuisances
- Enjoin defendant from selling harmful materials to minors
- Establishing contents of a will that was destroyed
- To establish boundaries when the conveyance and registry is lost/destroyed

## What if there is no constitutional or statutory right to trial by jury?

- You can still have a jury trial if all parties consent.
- Regardless of consent, you can use an advisory jury on any issue or question of fact

## How is a demand for a jury trial made?

- In writing (one case oral and in open court entered by the Clerk was sufficient)
- No later than 10 days after service of the last pleading
- Served on other parties
- Demand can be on all issues or limited issues

## Withdrawal of demand

- Can withdraw if no party has filed a pleading or made an appearance
- A motion to set aside a default constitutes an appearance if party has filed a pleading or made an appearance, consent of all parties who have filed or made appearance is necessary

A party can waive the right to trial by jury by:

- failing to make a demand
- failing to appear in court at time of trial
- by written stipulations
- by oral stipulations made on the record and entered in the minutes

A waiver of the right to a trial by jury is not permitted when:

- Statute requires a jury trial
  – i.e. caveat proceeding
- when language is contained in a contract that waives a party's right to trial by jury as it is unconscionable as a matter o law (NCGS 22B-10 (1933).

## What if no demand or a waiver of the right?

- Trial judge can order a trial by jury on his own motion on any or all issues
- Standard of Review – abuse of discretion
- No abuse shown when motion granted 2 years and 10 months after time expired for making the demand