THE RIGHT TO A JURY TRIAL IN CIVIL ACTIONS IN NORTH CAROLINA

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May 2007

"The right of trial by jury as declared by the Constitution or statutes of North Carolina shall be preserved to the parties inviolate." [1]

This statement set forth in Rule 38 of the North Carolina Rules of Civil Procedure, that litigants in North Carolina have the right to a jury trial if that right is created by the constitution or by statute is not as simple as it appears. It has been the topic of many court opinions and legal writings. The rule which "neither diminishes nor enlarges the right to a trial by jury"[2] leaves the trial judge with the duty to determine whether or not there is a right to a trial by jury in cases before the court.

In order to determine if there is a right to a trial by jury in a particular case, the trial judge must answer three questions. First, is there a constitutional right or a statutory right for a jury trial in the case at hand? Second, if there is a right to a jury trial, was a demand made for a jury trial? Third, was there a waiver of the right to a trial by jury? The purpose of this presentation is to assist the trial judge in answering those three questions. As a practical matter, the first place for the trial judge to look if a question arises as to whether or not there is a right to a trial by jury is the North Carolina Pattern Jury Instructions. If a jury instruction exists the need for further research is eliminated.

1. WHEN IS THERE A CONSTITUTIONAL RIGHT TO A JURY TRIAL?

In North Carolina the right to a jury trial is guaranteed by our state constitution. There have been three constitutions in the history of North Carolina. They are the Constitution of 1776, the Constitution of 1868 and the Constitution of 1971. John Sanders, the Director of the Institute of Government, University of North Carolina at Chapel Hill, has written about the history of the three constitutions of North Carolina and his writing is an excellent resource for trial judges.[3] In the 1989 decision of *Kiser v. Kiser*[4], former North Carolina Supreme Court Justice Harry C. Martin wrote an excellent review of the

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[1] N.C. R. Civ. P. 38
[2] Shuford, N. C. Civ. Prac. & Proc. (3rd Ed.) Sec. 38.
[3] Sanders, *A Brief History of the Constitutions of North Carolina,* in *North Carolina History* 795 (J. L. Cheney, Jr. ed 1981).
[4] *Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2nd 487 (1989).

historical development of the right to a trial by jury in North Carolina. *Kiser*[5] was a case of first impression on the issue of whether or not there was a right to trial by jury in an equitable distribution action. There are many other resources and law review articles cited or referred to in these writings that will assist trial judges in developing an expertise in this area of the law.

For purposes of this presentation, only a brief review of the historical development of the constitutional right to a trial by jury in North Carolina is provided in order to assist the trial judge in analyzing a case to determine whether or not a litigant has the right to a trial by jury. The issue of a statutory right will not be addressed further than to say if the General Assembly has created a right to a jury trial by statute in a civil action than the parties have the right to have the issue tried by a jury under whatever procedures are specified in the statute. Examples of statutes that provide for a right to a trial by jury are set forth below in section 3, on page eleven.

The Constitution of 1776 states, "*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."*[6] In 1782, the Legislature enacted a statutory right to trial by jury in equity[7] which had previously been denied "because of the sentiment that all issues of fact in North Carolina should be tried by jury and the belief that this right to a jury trial would be infringed upon if a judge was permitted to sit as the trier of fact in a court of equity"[8] This statutory right lasted only forty-one years because in 1823, the Legislature abolished the right to a jury trial in equity cases.[9] In practice the change was not that significant because juries continued to determine equity issues in the law courts by means of a "feigned issue".[10] A "feigned issue" is when the proceeding, in this case a trial by jury, was held when the court lacked jurisdiction.[11]

In 1868, North Carolina ratified the second state constitution. The second constitution is referred to as the Constitution of 1868. The substantive rights to a jury trial originally set forth in the Constitution of 1776 were retained in Article I of the new constitution.[12] The Constitution of 1868 made a number of changes regarding the judiciary. For example, it provided that instead of judges being appointed for life as provided in the Constitution of 1776, judges were now elected by the people and had specified terms of office. It also created a uniform court system. It abolished feigned issues and the distinctions between actions at law and at equity. Within the Judicial Article of the Constitution of 1868, Article IV, §1, provided:

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[5] *Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2nd 487 (1989).
[6] N.C. Const. of 1776, art. I, §14.
[7] 1782 N. C. Sess. Laws ch. 11, § 3.
[8] *Kiser v. Kiser*, id at 505. 1 Ashe, *History of North Carolina* 714 (1908).
[9] 1823 N.C. Sess. Laws ch. 35.
[10] For more information on this procedure, reference is made to Chesnin and Hazard, *Chancery Procedure and the Seventh Amendment: Jury Trial of Issues in Equity Cases Before 1791*, 83 Yale L. J. 999 (1974)
[11] Blacks Law Dictionary, 632 (7th ed. 1999).
[12] N.C. Const. of 1868, art. I, sec. 19.

"The distinction between actions at 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 action . . . . Feigned issues shall be abolished and the fact at issue tried by order of the court before a jury."[13]

After the enactment of Article IV, §1 of the Constitution of 1868, the North Carolina Supreme Court, in the 1873 case of *Lee v. Pearce*,[14] ruled that the principles of the courts of law and the courts of equity were not modified by the adoption of the Constitution of 1868. The only change created by the new constitution was that the principles of both systems, law and equity, would be applied and acted on in one court and using one procedure. This meant all issues of fact in a case would be entitled to a trial by jury. The North Carolina Supreme Court has continued to hold that the abolishing the distinctions between actions at law and equity "created no additional substantive rights to trial by jury in all civil cases, but rather assured that the jury trial rights substantively guaranteed by Article I, §19 (now Article I, § 25) would apply equally to questions of fact arising in cases brought in equity as well as those cases brought in law."[15]

As a result of the Constitutional Convention of 1875, a series of amendments to the Constitution were adopted that became effective January 1, 1877. Certain amendments significantly affected the judiciary by returning the power over the courts to the legislature. The simple and uniform court system established in the Constitution of 1868 was revoked and the legislature was given the power to establish and determine the jurisdiction of the courts below the Supreme Court. The Supreme Court was reduced from five to three members and Superior Court judges were to rotate among all judicial districts in the state.[16] While the Convention of 1875 had significant impact on the courts, there were no amendments that directly affected the rights to a trial by jury.

During the 1959 General Assembly there were efforts made to enact major changes in the judiciary by means of constitutional amendments. These efforts failed because the legislators were unable to reach a consensus on a proposal to submit to the voters. However, the efforts to enact changes in the judicial branch continued into the next decade and there were a number of significant changes made in the 1960's. A constitutional amendment adopted in 1962 created a unified and uniform General Court of Justice for North Carolina. The archaic "feigned issues" language was deleted and there was a general reorganization to Article IV of the Constitution for the Judicial Branch. Later, in 1965, a constitutional amendment authorized the legislature to create the Court of Appeals. In 1967 there was a major undertaking by Governor Dan K. Moore to study revision of the Constitution of 1868. As a result of the Governor's initiative, a North Carolina State Constitution Study Commission was formed by the North Carolina

[13] N.C. Const. of 1868, art IV, §1.
[14] *Lee v. Pearce*, 68 N. C. 76 (1873)
[15] *Kiser v. Kiser*, id at 506, 507.
[16] John Sanders, *Our Constitutions: A Historical Perspective*.

State Bar and the North Carolina Bar Association. The Constitution Study Commission made many proposals for change to the North Carolina constitution. In 1970, the proposed Constitution and five of the six proposed amendments were approved by the voters. The new constitution took effect on July 1, 1971, known as the Constitution of 1971. Article I of the new Constitution, the Declaration of Rights, states:

> *"Right of jury trial in civil cases. 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."*[17]

It is interesting to note that the only difference between the Constitution of 1776 and the Constitution of 1971 is that the Constitution of 1776 states that the right to a jury trial in civil cases "ought to remain sacred and inviolable" while 195 years later in North Carolina's third constitution it states the right to a jury trial "shall remain sacred and inviolable." The Constitution of 1971 also continued in effect the abolition of the procedural distinction between actions at law and actions at equity as set forth in the Constitution of 1868. Article IV, §13 of the Constitution of 1971 provides[18]:

> *1) Forms of action. 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 denominated a civil action, and in which there shall be a right to have issues of fact tried before a jury. Every action prosecuted by the people of the State as a party against a person charged with a public offense, for the punishment thereof, shall be termed a criminal action.*
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> *(2) Rules of procedure. The Supreme Court shall have exclusive authority to make rules of practice and procedure for the Appellate Division. The General Assembly may make rules of procedure and practice for the Superior Court and the District Court Divisions, and the General Assembly may delegate this authority to the Supreme Court. No rule of procedure or practice shall abridge substantive rights or abrogate or limit the right of trial by jury. If the General Assembly should delegate to the Supreme Court the rule-making power, the General Assembly may, nevertheless, alter, amend, or repeal any rule of procedure or practice adopted by the Supreme Court for the Superior Court or District Court Divisions.*

The present North Carolina Constitution, the Constitution of 1971, establishes that there is a substantive right to a jury trial (Article I, § 25) and that the right applies to all cases, regardless of whether or not they are actions at law or actions at equity (Article IV, § 13). The Supreme Court of North Carolina has consistently held that the Article I right to a trial by jury applies "*only where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted*".[19] "*Conversely, where the prerogative*

[17] N.C. Const. of 1971, art. I, § 25.
[18] N.C.Const. of 1971, art. IV, § 13.
[19] *Kiser v. Kiser*, id at 507.

did not exist by statute or at common law upon the adoption of the Constitution of 1868, the right to trial by jury is not constitutionally protected today."[20]

There have been arguments made to the appellate courts that the standard should be whether or not a right to a trial by jury existed at the time of the adoption of the Constitution of 1971 as opposed to Constitution of 1868. On this issue, the Supreme Court has held that the Constitution of 1971 was meant to remedy "*obsolete language, outdated style and illogical arrangement*" and not intended to "*enlarge upon the rights granted by the 1868 Constitution"*.[21] The history and the work of the North Carolina State Constitutional Study Commission shows that the Commission actually did both by modernizing the 1868 document and also making substantive changes to the existing constitution. However, they wisely made those substantive changes separate and apart from the changes that updated the Constitution of 1868. The substantive changes were put in the form of proposed constitutional amendments and those amendments were submitted individually to the voters. Of the six proposed amendments, five amendments were approved by voters in the general election.

It is important for the trial courts to understand the distinction between the modernization of the Constitution of 1868 and the substantive changes that were made in the passage of the five constitutional amendments to the Constitution of 1971. If an argument is made to the trial court that there is a constitutional right to a jury trial in a particular case based upon the law in effect in 1971 when the current constitution was adopted then the issue would have to be related to one of the five amendments that were adopted in 1971 and not an issue related to the main body of the document. Unless the issue relates to a right contained in one of the amendments, the trial judge needs to evaluate the right to a trial by jury as of the time of the adoption of the Constitution of 1868 and not at the time of the adoption of the Constitution of 1971. An example of how this issue may arise and how it should be treated by the trial court is provided in the case of *N.C. State Bar v. Dumont*,[22] which is summarized in the section two below.

2. A REVIEW OF NORTH CAROLINA APPELLATE DECISIONS ON THE ISSUE OF THE RIGHT TO A TRIAL BY JURY

A benefit to the trial judges in 2007 is that the issue of whether or not there is a constitutional right to a jury trial in North Carolina has been ruled upon in numerous Supreme Court and Court of Appeals decisions since the adoption of the Constitution of 1868, almost 140 years ago. While it is difficult to forecast what future issues that may be raised on whether or not there is a right to a trial by jury, the existing opinions give guidance to the trial court in ruling on the issue of whether or not there is a right to a trial by jury in a particular case. A brief summary is provided of the following cases to assist the trial court in evaluating cases that are presented to the court on the issue of whether or not there is a right to a trial by jury.

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[20] *Kiser v. Kiser,* id at 508.
[21] *N.C. State Bar v. Dumont*, 304 N.C. 627, 286 S.E.2nd 89 (1982).
[22] *N.C. State Bar v. Dumont*, id.

1. *Railroad v. Parker*, 105 N.C. 246, 11 S.E.2nd 328 (1890). This case involved a special proceeding to assess damages for the right of way for a railroad through the defendant's land. There was a hearing before the Clerk and the defendant appealed. On appeal in the Superior Court, the trial judge granted the defendant's request for a trial by jury over the objections of the plaintiff. On appeal of the judgment entered in Superior Court, the Supreme Court noted that there was a constitutional right to a trial by jury in controversies respecting property under the common law and that fixing the amount of compensation to the landowner for the right of way that was condemned for use by the railroad might be a question of fact for the jury. (The Court never specifically answered the question as to whether or not there was a right to jury). The statute in effect at that time for the special proceedings required a demand for a jury trial to be made before the entry of an order appointed the commissioners. However, the defendants only demanded a jury after they appealed the decision of the commissioners. The Supreme Court ruled that the trial judge did not have the power "*to disregard the protest of the plaintiff and restore to the defendants a right that they had previously waived, if the law had ever given it."*

2. *Groves v. Ware*, 182 N.C. 553, 109 S.E. 568 (1921). This case involved an appeal by a family member from the decision of a jury of six for restoration of sanity to an individual on the ground that the statute authorizing a jury of six members was unconstitutional because it denied the right to a trial by a jury of twelve. The Supreme Court ruled there was no constitutional right to a trial by jury because the proceeding was created by statute and did not exist at common law. The Court held the legislature had the authority to determine how many jurors were required for a trial.

3. *McInnish v. Bd. Of Education*, 187 N.C. 494, 122 S.E. 182 (1924). The plaintiffs brought an action to enjoin the Hoke County Board of Education from building a school building on property they felt was inappropriate for a school. The plaintiffs alleged that they were entitled to a jury trial pursuant to Article I, §19 of the Constitution, *"in all controversies at law respecting property…"*. The North Carolina Supreme Court ruled that there was no right to a jury trial at common law or by statute at the time the constitution was adopted and the Supreme Court affirmed the decision of the trial court to deny the plaintiffs of the trial by jury. The Supreme Court found that the right and remedy against the school was created by statute and it did not permit a trial by jury.

4. *Hagler v. Highway Commission*, 200 N.C. 733, 158 S.E.2nd 383 (1931). In this case the widow of an employee killed in the performance of his duties as an employee of the Mecklenburg Highway Commission appealed the award of the Industrial Commission on two grounds. One of the grounds alleged the denial of the constitutional right to a jury trial. The North Carolina Supreme Court ruled there was no constitutional right to a jury trial in a Worker's Compensation case.

5. *Unemployment Compensation Comm. V. Willis*, 219 N.C. 709, 15 S.E.2nd 4 (1941). The defendant appealed the decision of the Unemployment Compensation Commission and alleged that he had the right to a trial by jury on the issue of the defendant's liability for taxation as an employer under the statute. The North Carolina

Supreme Court ruled that the constitutional right to a jury trial generally does not apply to tax laws and the machinery for collection of taxes, unless the statute gives express authority for trial by jury. The rights and remedies under the laws of the Unemployment Compensation were created by statute after the time the Constitution was adopted and did not include the right to a trial by jury.

6. *Utilities Commission v. Trucking Co*., 223 N.C. 687, 28 S.E.2nd 201 (1943). In this case a trucking company appealed the denial of a franchise petition by the North Carolina Utilities Commission. The North Carolina Supreme Court ruled that the issue was one of public policy as to what constitutes public convenience and necessity and that it was not the intent of the legislature in enacting the statute that the public policy of the state would be determined by a jury.

7. *Belk's Department Store, Inc. v. Guilford County*, 222 N.C. 441, 23 S.E.2d 897 (1943). In this case the plaintiff alleged that it had the right to a trial by jury on the issue of the valuation of land by the County for real property taxes. The Supreme Court ruled that there is no right to a trial by jury on the issue of the valuation of land for the purpose of determining the amount of taxes that are assessed against the property.

8. *In re Annexation Ordinances*, 253 N.C. 637, 117 S.E.2nd 795(1961). In 1959, the Legislature enacted laws regarding the annexation of land by municipalities with populations greater than 5,000. The City of Raleigh, pursuant to the annexation statute proceeded with the annexation of certain property. On appeal, the appellants argued that the Act allowing annexation was unconstitutional because it denied them the right to a trial by jury in violation of Article I, § 19 of the Constitution of North Carolina. In the decision finding there was no constitutional right to a jury trial in an annexation case, the court ruled, "*The procedure and requirements contained in the Act under consideration being solely a legislative matter, the right of trial by jury is not guaranteed, and the fact the General Assembly did not see fit to provide for trial by jury in cases arising under the Act, does not render the act unconstitutional. There was no right to a jury trial on the issue at common law at the time of the adoption of the constitution*."

9. *State ex rel. Bowman v. Malloy*, 264 N.C. 396, 141 S.E.2nd 796 (1965). The solicitor of Brunswick County filed a complaint to abate a public nuisance against a landowner and a business club operator alleging that "there intoxicating beverages were sold, and carousing, drinking and fighting were commonplace at all hours of the day and night". The plaintiff obtained an order padlocking the premises and for a sale of all personal property on the premises. An order to appear and show cause why the order should not be permanent was entered by the trial judge. The landowner was served but the other defendant, the operator of the business, was not served prior to the court date. On the hearing date, the trial judge entered an order that the operation of the club was a nuisance as defined by N.C.Gen.Stat. §19-1 and should be abated. The court made the terms of the ex parte order into a permanent order. The following month, the club owner, Malloy, was served and filed a motion to vacate the order as to his interests and that motion was denied. The Supreme Court reversed the decision of the trial judge and ruled that the defendant had the right to "*traverse the factual allegations of the complaint*" and *"if he*

does so, he can not be deprived of his right to a jury trial on the issues raised by the pleadings" quoting Art. I, §19 and Article IV, §12 of the North Carolina Constitution. The case was remanded to give the defendant the right to file an answer within a reasonable time and the court ruled that should not be less than thirty days.

10. *In re Wallace*, 267 N.C. 204, 147 S.E.2nd 922 (1966). In this case, the petitioner filed an action to recover money on deposit with the Clerk of Superior Court that she claimed was part of the personal property she had purchased from an estate. The Administrator of the Estate filed an answer alleging the funds should be distributed to him in his capacity as administrator of the estate. The Clerk of Superior Court held a hearing and ordered the funds distributed to the administrator. The petitioner appealed. The trial judge, after a trial without a jury, affirmed the decision of the Clerk of Court. On appeal to the Supreme Court, the petitioner alleges error, "*In the action of the Court in signing the judgment."* The Supreme Court found that because there had been no waiver by the parties to the right to a trial by jury and because it was a controversy at law respecting property as to ownership of the money that the parties were entitled to a trial by jury.

11. *Bell v. Martin,* 299 N.C.715, 264 S.E.2nd 101 (1980). One of the issues in this case was the defendant's argument that because paternity must be proven beyond a reasonable doubt pursuant to N.C. Gen.Stat. §49-14(b)[23], that the proceeding to establish paternity was quasi-criminal in nature and therefore required a trial by jury. The Supreme Court disagreed and held that a paternity action under N.C.Gen.Stat. §49-14 was a civil action and that the defendant had a right to a trial by jury but that the right could be waived by failure to make a demand for a jury trial as provided in Rule 38(d) of the North Carolina Rules of Civil Procedure.

12. *In re Clark*, 303 N.C. 592, 281 S.E.2nd 47 (1981). This case involved the termination of parental rights of the Respondent Mother. The mother and the minor child both had a guardian *ad litems* appointed on their behalf. The guardian *ad litems* for both the Respondent Mother and the minor child filed motions pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure to dismiss the action because they alleged it failed to state a claim upon which relief could be granted because the termination of parental rights statute violated both the North Carolina and United States Constitutions on three grounds, one of which was the denial of a right to a trial by jury. The trial court ruled the Act was unconstitutional because it deprived the parties of a trial by jury. The North Carolina Supreme Court found that statute authorizing the proceedings for the termination of parental rights, N.C.Gen.Stat.§ 7A-289.30(a)[24], provided that the District Court shall hear the case without a jury, and the proceedings to terminate parental rights were unknown at common law and did not exist by statute until the adoption of the

[23] Effective October 1, 1993, N.C.Gen.Stat. §49-14(b) was amended to change the burden of proof in a civil paternity action to clear, cogent and convincing evidence for cases filed on or after that date. 1993 N.C. Sess. Laws ch. 333.

[24] The Termination of Parental Rights statutes are presently contained in Article 11 of the Juvenile Code, N.C.Gen.Stat. § 7B-1100–1113.

Termination of Parental Rights Act in 1969. The Supreme Court reversed the decision of the trial judge and found there was no right to a jury trial in a proceeding to terminate parental rights pursuant to the North Carolina statutes.

13. *N. C. State Bar v. Dumont*, 304 N.C. 627, 286 S.E.2nd 89 (1982). The defendant argued he was entitled to a trial by jury in a State Bar disciplinary action that alleged he had procured false testimony in a civil case in violation of the Code of Professional Conduct. The basis of the defendant's position was that the legislature had created, in 1933, the right to a jury trial in Superior Court for attorneys in a disciplinary proceeding and that right remained in effect until 1975 when the legislature amended N.C.Gen.Stat. §84-28 to provide disciplinary action "*under such rules and procedures as the council (of the North Carolina State Bar) shall promulgate*." The rules and procedures adopted by the State Bar did not include the right to a jury trial. The defendant argued that since there was a right to a trial by jury at the time the Constitution of 1971 was enacted that there was a continued right to a trial by jury and that the issue of whether or not there was a right for trial by jury in North Carolina in 1868 was irrelevant.

The North Carolina Supreme Court ruled that the new constitution "*was an extensive editorial revision of the 1868 document*" and that it did not include "*important and significant substantive changes*". As discussed above on pages four and five, the substantive changes were put in the proposed amendments to the constitution and not in the body of the document. The Supreme Court determined it was necessary to examine the right to a jury trial as of the time of the adoption of the Constitution of 1868 and not at the time of the Constitution of 1971. The Supreme Court ruled that there was no right to a trial by jury as of the time of the adoption of the Constitution of 1868 in a case involving disciplinary proceeds before the State Bar.

It is interesting to note that the opinion refers to the current constitution as the Constitution of 1970 and not 1971. The constitution was approved by the voters on November 3, 1970 but was not effective per the language in the document until July 1, 1971.

14. *In re Huyck Corp. v. Mangum, Inc.,* 309 N.C. 788, 309 S.E.2nd 183 (1983). This case involved claims against the State of North Carolina for monies allegedly due pursuant to a state highway construction contract under N.C.Gen.Stat §136-29(1981). The statute provides *"(c) all issues of law and fact and every other issue shall be tried by the judge, without a jury, …"*. The defendant/third party plaintiff, Mangum, Inc., argued the statute abrogated its right to a jury trial under the North Carolina Constitution. The North Carolina Supreme Court held that there was no constitutional right to a trial by jury because: (1) there was no common law right for defendant/third party plaintiff to bring an action against the State of North Carolina due to the doctrine of sovereign immunity; (2) there was no right to bring the action before the statute was enacted in 1981; (3) the right to bring the action was created by the statute and the legislature did not intend or provide for a trial by jury.

15. *Jackson v. Lundy Packing Co*., 72 N.C.App. 337, 324 S.E.2nd 290 (1985). An employee sued his employer pursuant to N.C.Gen.Stat. §97-6.1 for retaliatory discharge because he filed a workers' compensation claim. The plaintiff demanded a jury trial in

the complaint. The defendant employer moved to dismiss the request for a trial by jury and argued there was no right to a jury trial because there was no cause of action for retaliatory discharge at the time of the adoption of the Constitution of 1868 and the General Assembly did not expressly provide for a jury trial when the statute was enacted. The defendant argued the statute only said the right was enforceable by a civil action and would therefore need to be tried by the judge.

The Court of Appeals rejected the defendant's argument and stated in the opinion that the fact that the Constitution did not guarantee a right to a jury trial for the new civil remedy was beside the point. The Court determined the question presented was "*whether under the circumstances defendant had a right not to have its case tried to a jury."* The Court ruled that because retaliatory discharge claims were designated as civil actions required to be processed in the General Court of Justice and without designating the mode of trials indicated to the court that the "*General Assembly intended for these actions to be tried in the usual way by juries upon the timely request of any party there to. The practice of trying civil money damages cases to juries is too customary and well regarded by the people and profession alike to us to presume, as defendant would have us do, that the General Assembly intended to forbid jury trials in these cases."* The court affirmed the decision of the trial court to deny the defendant employer's motion to deny the plaintiff's request for a trial by jury.

16. *Phillips v. Phillips*, 73 N.C. App. 68, 326 S.E.2nd 57 (1985). The defendant appealed the entry of an equitable distribution judgment by the trial court after a jury trial. The plaintiff argued that the judge only used the jury as an "advisory jury" pursuant to Rule 39(c) of the North Carolina Rules of Civil Procedure. The Court of Appeals found that the trial judge had the jury determine issues such as what was marital property and what was an equitable distribution of that property. The Court of Appeals found those were not "*pure questions of fact*" but included questions of law and decisions as to what was equitable. The appellate court also noted that the trial judge had made separate findings and on one of the issues the trial judge did not accept the jury's verdict. However, the Court of Appeals reversed the trial court and ruled that the only issue an advisory jury could find would be the net value of the property and that it would be the duty of the trial judge to identify the marital property and decide an equitable distribution of the property.

NOTE: In Gray Wilson's *North Carolina Civil Procedure,* Wilson argues the decision of the Court of Appeals was probably incorrect because it was inconsequential if issues of law were submitted to the advisory jury because the appellate court should review all the findings as if they were made by the trial judge alone instead of by a jury.[25]

17. *Faircloth v. Beard*, 320 N.C. 505, 358 S.E.2nd 512 (1987). The plaintiff's brought a shareholders' derivative action against the defendant and in the original complaint made a jury demand. An amended complaint was later filed for breach of fiduciary duty and punitive damages. The defendant filed a motion for the trial court to deny the right to a jury trial alleging no right to a jury trial. On appeal, the Supreme Court compared Article I, § 25 and Article IV, § 13 of the North Carolina Constitution. The Supreme

[25] G. Gray Wilson, *North Carolina Civil Procedure*, Vol. II, Sec. 39-4, at 17 (1989).

Court ruled that the plaintiff's claims were for the protection of private rights and the redress of private wrongs and therefore were a civil action under Article IV, § 13 and therefore there was a guarantee to a right to a trial by jury. The Supreme Court stated, *"although shareholders' derivative suits may be equitable actions they are actions to protect private rights and to redress private wrongs. They are civil actions under Article IV, § 13 and this section of the constitution guarantees that parties to such may have questions of fact tried by juries."*

Note: It was argued in the North Carolina Supreme Court in 1989 in the case of *Kiser v. Kiser*[26] that *Faircloth* should be construed broadly "*as holding that Article IV, section 13 creates a constitutional right to a trial by jury in all civil cases affecting private rights and redressing private wrongs.*" The Supreme Court in *Kiser* simply ruled, *"This we decline to do.*" The Supreme Court stated that the decision in *Kiser "does not disturb the result in Faircloth."* [27] The Court ruled that even though the shareholders' derivative action was not recognized by statute until 1973 that "*there was a common law right to bring a shareholders' derivative suit in courts of equity long before that time."*

18. *Kiser v. Kiser*, 325 N.C. 502, 385 S.E.2nd 487 (1989). The defendant sought a jury trial on the plaintiff's complaint for equitable distribution. The parties agreed that there was no right to a jury trial on the issue of equitable distribution at the time of the enactment of the Constitution of 1868 as the action for equitable distribution was not created by the legislature until 1981. The parties also agreed there was no right created by the statute which stated "*nothing in G.S. § 50-20 or this section [N.C.Gen.Stat. § 50-21(c)] shall restrict or extend the right to trial by jury as provided by the Constitution of North Carolina."* However, the defendant argued that his right to a jury trial was not under Article I, § 25 (*right to a jury trial in all controversies at law respecting property where the right existed by statute or common law at the time the Constitution of 1868 was adopted)* but that it was under Article IV, § 13 (*there shall be one form of action…a civil action, and in which there shall be a right to have issues of fact tried before a jury*) of the North Carolina Constitution of 1971. Defendant contended Article IV, § 13 created a constitutional right to a jury trial in all civil cases.

The Supreme Court ruled that Article IV, §13 established the form and procedure for all civil trials (actions formerly at law and at equity) but that the right of the jury trial was determined by Article I, § 25, which provides the right to jury trial if there was such a right at the time of the adoption of Constitution of 1868 regardless of whether or not it was an action would have been in law or in equity. The Supreme Court rejected the defendant's argument and ruled that since there was no right to bring an equitable distribution action in 1868 because equitable distribution did not exist until 1981 and there was no statutory right to a trial by jury, that there is no right to a jury trial on the issue of equitable distribution.

NOTE: It would appear difficult to reconcile the analysis of *Faircloth* with the analysis in the *Kiser.* In *Kiser,* the Supreme Court stated that Article IV, § 13 of the Constitution established the form and procedure for all civil trials but that the right to a jury trial was determined only by Article I, § 25, but in *Faircloth* the Supreme Court

[26] *Kiser v. Kiser, id.*
[27] *Kiser v. Kiser*, *id* at 509.

ruled that Article IV, § 13 guaranteed the right to a trial by jury. However, in Kiser the North Carolina Supreme Court specifically rejected the argument that Faircloth created a right to a jury trial in all civil cases. The Court explained there was a common law right to a jury trial in a shareholders' derivative suit and that was why the court granted the right to a trial by jury in Faircloth. It is interesting to note that the opinion in Faircloth was written by Associate Justice John Webb. Justice Webb wrote a strong dissent in Kiser stating that, regardless of what Associate Justice Harry Martin wrote for the majority in Kiser, that Kiser overrules Faircloth.

19. *Sharp v. Sharp*, 351 N.C. 37, 519 S.E.2nd 523 (1999). The plaintiff wife filed an action for equitable distribution and imposition of a constructive trust along with other issues. The defendants included the plaintiff's husband and the husband's brother and father and a partnership that was the subject of the constructive trust claim. The defendants brother-in-law and father-in-law and the partnership filed a motion seeking a trial by jury on the issue of constructive trust and the motion was denied. The trial court stated, *"The issue of constructive trust is not a cause of action which is to be severed from other actions, but rather it is a request for equitable relief within the equitable distribution action itself."* The Court of Appeals found there was a common law right to a trial by jury in a constructive trust claim that was recognized prior to the enactment of the Constitution of 1868 and that it has continued to be heard by juries in modern times. The court ruled, "Honoring a third party's constitutional right to a jury trial is sound public policy." There was a dissent and an appeal. On appeal, the North Carolina Supreme Court rule adopted the dissent and ruled that a third party to an equitable distribution action does not have constitutional right to a jury trial on a claim seeking imposition of a constructive trust on property to which the third party holds legal title.

20. *McCall v. McCall,* 138 N.C.App. 706, 531 S.E.2nd 894(2000). The defendant appealed the denial of his motion for a trial by jury to determine the date of separation in an action for divorce from bed and board. The defendant argues that because there is a right to a trial by jury in a divorce action pursuant to N.C.Gen.Stat. § 50-10(a),(c) and such jury verdict would collaterally estop a party from relitigating the issue of the date of separation, then the same body, a jury, should determine the issue in each setting, divorce and divorce from bed and board.

The Court of Appeals wrote, *"the defendant's argument, however, is largely in the abstract."* The court noted that the date of separation is not even an issue in an action for divorce from bed and board and ruled that the most collateral estoppel would mandate is the order of the proceedings. The jury trial should precede the bench trial but that has nothing to do with who (judge or jury) determines the issue.

NOTE: While the jury trial should precede the bench trial if both actions are pending, it is likely that the divorce action will not be filed until the after the issue of a divorce from bed and board has already been determined because the divorce cannot be filed until after the parties have been separated for a year[28] and the divorce from bed and board is usually required to obtain the separation[29] necessary to file for the divorce.

[28] N.C.Gen.Stat. § 50-6.
[29] N.C.Gen.Stat. § 50-7.

3. STATUTORY RIGHT TO A TRIAL BY JURY

There is a right to a trial by jury in any action where that right is provided by the General Assembly in the statutes. There are a number of statutes that expressly provide a right to a trial by jury. Examples of statutes that provide a right to a trial by jury are set for below but it is not intended to be a comprehensive listing of all such statutes.

N.C.Gen.Stat. § 35A-1110.

There is a right to a trial by jury in a hearing to determine incompetence. The failure to request a jury trial constitutes a waiver. The Clerk can require a jury trial even if there is a waiver of the right. The jury must consist of 12 jurors. *Note:* Hearings pursuant to N.C.Gen.Stat. § 35A-1110 are before the clerk unless the clerk has "an interest, direct or indirect, in the proceeding"[30] If such a conflict exists, the jurisdiction is vested with the Superior Court judge for hearing.

N.C.Gen.Stat. § 35A-1115 and § 35A-1130. **CHECK #**

An appeal of a decision of the clerk on incompetency (N.C.Gen.Stat. § 35A-1115) and the restoration of competency (N.C.Gen.Stat. § 35A-1130) is to the Superior Court for a trial de novo. See Pattern Jury Instructions, N.C.P.I. – Civil 817.

N.C.Gen.Stat. § 50-10(a).

There is a right to a trial by jury in a divorce or annulment proceeding.

N.C.Gen.Stat. § 50-16(d).

There is a right to a trial by jury on the issue of marital misconduct in a claim for alimony.

N.C.Gen.Stat. § 43-11.

There is a right to a trial by jury in a land registration case on appeal from the Clerk to the Superior Court. It can be upon demand of any party or on the motion of the Superior Court judge.

N.C.Gen.Stat. § 43-17.1.

There is a right to a trial by jury in an appeal from the clerk on a petition for the issuance of a certificate of title to land.

N.C.Gen.Stat. § 38-3.

There is a right to a trial by jury in an appeal from the Clerk in a processioning proceeding and it is the duty of the jury to locate the boundary line of the property.

N.C.Gen.Stat. § 62-260(d).

There is a right to a trial by jury in Superior Court for a determination of whether or not someone is exempt from the public utility regulations for operation of motor carriers.

N.C.Gen.Stat. § 75D-8(g).

There is a right to a trial by jury in Superior Court for any party who brings an action for damages or divestitures under the North Carolina RICO Act. (Racketeer Influenced and Corrupt Organizations Act).

N.C.Gen.Stat. § 106-54966(b).

[30] N.C.Gen.Stat. § 35A-1103.

There is a right to a trial by jury in Superior Court for any party in a case contesting the seizure of any dead, dying, disabled, diseased poultry or poultry product pursuant to the Poultry Inspection Act.

N.C.Gen.Stat. § 113A-123(b).

There is a right to a trial by jury in Superior Court for any party when there is petition for judicial review by any person affected by a final decision or order of the Coastal Resources Commission pursuant to the provisions of the Coastal Area Management Act.

N.C.Gen.Stat. § 115C-431(c).

There is a right to a trial by jury in Superior Court for either party when there is an action filed in Superior Court for resolution of a dispute between the Board of Education and the Board of County Commissioners. Note: The statute requires that the jury trial shall take precedence over all other business of the court and if it the presiding judge does not believe that is in the public interest due to the "accumulation of other business" the trial judge must certify that information to the Chief Justice of the North Carolina Supreme Court who shall immediately call a special term of superior court to convene "as soon as possible" and try the case.

N.C.Gen.Stat. § 7A-196.

"In civil trials in the district court there shall be a right to a trial by jury of 12 in conformity with Rules 38 and 39 of the Rules of Civil Procedure."

N.C.Gen.Stat. § 7A-230.

An appellant in a small claims action may demand a trial by jury for a trial de novo in the district court.

N.C.Gen.Stat. §23-33, 39.

There is a right to a trial by jury in District or Superior Court on the issue of fraud in a petition for discharge of insolvent debtors.

N.C.Gen.Stat. § 42-32.

There is a right to trial by jury in appeals from the magistrate in actions for summary ejectment.

N.C.Gen.Stat. §19-2.4.

A defendant is entitled to a jury trial, if requested, in an action for abatement of nuisances.

N.C.Gen.Stat. § 19-17.

There is a right to trial by jury in District Court when the District Attorney brings a civil action to enjoin a defendant from selling harmful materials to minors.

N.C.Gen.Stat. § 98-6.

There is a right to a trial by jury in Superior Court where a party seeks to establish the contents of a will where the original (and any copies) were destroyed.

N.C.Gen.Stat. § 98-3.

There is a right to a trial by jury in Superior Court to establish the boundaries and interest when the conveyance granting such is lost and the registry destroyed.

4. HOW WILL THE ISSUE OF A RIGHT TO A JURY TRIAL BE RAISED?

More often than not the issue that there is or is not a right to jury trial in a particular case will be raised initially by the parties, either in the pleadings or orally during a pre-trial hearing. However, it is important to note that the trial judge can raise the issue on the court's own motion. Rule 39(a)(2) of the North Carolina Rules of Civil Procedure states, *"The trial of all issues so demanded shall be by jury unless, the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes.*[31]

If the trial judge does not believe there is a right to trial by jury in a case and the issue has not been raised by the parties, it would be appropriate to advise the parties that the court questions whether or not there is a right to a trial by jury and schedule a hearing date so that the parties can have the opportunity to prepare and argue the issue on the record in open court. The trial court should also make findings of fact and conclusions of law to support the order denying or granting a trial by jury. An order denying a motion for a trial by jury affects a substantial right and is immediately appealable.[32]

5. CAN YOU HAVE A JURY TRIAL EVEN IF THERE IS NO CONSTITUTIONAL OR STATUTORY RIGHT TO A TRIAL BY JURY?

There is no constitutional right or statutory right to a trial by jury unless the right existed in the common law or by a statute that was in effect at the time the Constitution of 1868 was adopted. However, the case can still be tried by a jury if all the parties consent. Under those circumstances, the verdict of the jury is binding on the parties. In addition, there is a procedure for the trial judge to use an advisory jury, on motion of a party or on the court's own motion, to try one or more issues question of fact in a case where there is no right to a jury trial. The North Carolina Rules of Civil Procedure, Rule 39(c), states:

> *In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue or question of fact with an advisory jury or the court, with the consent of the parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right. In either event, the jury shall be selected in the manner prescribed by Rule 47(a).*

The use of an advisory jury is not a common practice in North Carolina but it has been used on occasion. In a case where both parties have waived their right to a jury trial, the trial judge may still want a jury to hear the evidence and render an advisory verdict on a question of fact, such as in a tort case. The trial judge does not have to accept the verdict of the jury but may consider, in the judge's discretion, the jury's verdict in deciding the disputed fact. The Rules of Civil Procedure require that the trial judge to still make findings of fact and conclusions of law and enter a judgment in accord with the findings of fact and conclusions of law.[33] There is only one North Carolina appellate case[34]

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[31] N.C.Gen.Stat. § 1A-1- N.C. R. Civ. P. 39(a)(2).
[32] *Faircloth v. Beard*, id at 507. Wilson, *North Carolina Civil Procedure*, Vol. II, id at 8.
[33] N.C.Gen.Stat. § 1A-1 – N.C. R. Civ. P 52(a).

dealing with a trial judge's decision to use an advisory jury presumably because the only issue subject to appeal would be whether or not there was an abuse of discretion in the judge's consideration of the jury's verdict. The case, *Phillips v. Phillips*, was based on an equitable distribution case and is discussed above on page 10 herein.

In light of the decision in the *Phillips*[35] case, it is an interesting question as to whether or not the District Court would want to use an advisory jury in an equitable distribution case to determine the value of marital property. There may be a case where the evidence is so conflicting (the plaintiff's evidence is that the value of a business is five million dollars and the defendant's evidence is that the value of the business is fifteen million dollars) or the property is so unique (rare piece of art or collection of antique automobiles) that it may be of assistance to the trial judge to have an advisory jury render a verdict on the value of that asset. It may also be a useful tool to facilitate a settlement of a difficult case by advising counsel of the possibility of seeking the opinion of an advisory jury. The use of an advisory jury would not be feasible or practical in most equitable distribution cases, but it is a resource the trial judge may wish to consider in the appropriate case.

As noted above, Gray Wilson in *North Carolina Civil Procedure*[36], states that it would not matter whether or not the advisory jury heard questions of law or fact because it is a not binding and the appellate review would be limited to the judge's findings. Under Wilson's theory, the trial judge could submit all the equitable distribution issues to the advisory jury and consider the verdict when entering the court's judgment. Caution is advised in following that approach because the North Carolina statute specifically states the jury may try "*any issue or question of fact*."[37] That language is not included in the corresponding Federal Rule. The argument could be made that to ask the jury to consider an issue or question of law when that is not specifically authorized by statute would be an abuse of discretion by the trial court. However, in that it is only advisory and the trial court must make its own findings of fact and conclusions of law independent of the jury's decision, it is difficult to imagine how a litigant could show harm or prejudicial error. As a practical matter, it would be an unusual case where the use of an advisory jury would be warranted.

6. WHEN IS A DEMAND MADE FOR A JURY TRIAL?

After the trial judge determines that a party has the right to have a jury trial, the second issue for the judge is to determine is whether or not a party has properly requested a jury trial, known as a "Demand". Rule 38(b) and 38(c) of the North Carolina Rules of Civil Procedure establishes the procedure for making a demand for a jury trial.

> *Rule 38 (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties*

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[34] *Phillips v. Phillips*, 73 N.C.App. 68, 326 S.E.2nd 57 (1985).
[35] *Phillips v. Phillips*, 73 N.C.App. 68, 326 S.E.2nd 57(1985).
[36] Gray Wilson, *North Carolina Civil Procedure*, id at 17.
[37] N.C.Gen.Stat. § 1A-1,-N.C. R. Civ. Proc. 39(c).

a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be made in the pleading of the party or endorsed on the pleading.

Rule 38(c) Demand – specification of issues. In his demand a party may specify the issues which he wishes so tried; otherwise, he shall be deemed to have demanded trial by jury for all the issues so triable. If a party has demanded trial by jury for only some of the issues, the other party within ten days after service of the last pleading directed to such issues or within ten days after service of the demand, whichever is later, or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues in the action.[38]

The trial judge should determine the following:

a. Was the demand put in writing after the action was commenced?
b. Was the demand served on the other parties?
c. Was it timely served? That is, no later than ten days after service of the last pleading directed to issues to be tried?
d. Was it a general demand for a jury trial on all issues or was it limited to specific issues?
e. If it was limited to specific issues, has another party demanded a jury trial on any or all remaining issues timely – that is within ten days after service of the last pleading directed to such issues or after service of the demand, whichever is later OR within a lesser time as the judge ordered.

Although the Rule requires that the demand for a jury trial be put in writing, there has been at least one case where an oral request for a jury trial by both parties was held sufficient to accomplish the purpose of the rule. The case was *Shankle v. Shankle*,[39] and it involved a family dispute in a special proceeding for the partition by sale of land in Richland County. There was a last minute withdrawal of counsel and request for a continuance by all parties because none of the parties were ready to proceed with trial. The trial judge denied the motions to continue the case.

The North Carolina Court of Appeals vacated the judgment of the Superior Court and remanded the case for trial de novo because of prejudicial error to the parties. On further appeal to the North Carolina Supreme Court, the decision of the Court of Appeals was upheld. Both of the appellate courts found the trial judge had denied the motion to continue summarily without considering the reasons given for the motion. However, the Supreme Court went further and also addressed the trial judge's finding of fact that the parties had waived their right to a jury trial by failing to file a written request required by N.C.Gen.Stat. § 1A-1, Rule 38(b) of the North Carolina Rules of Civil Procedure. The Supreme Court found the parties did not demand a jury trial in accord with Rule 38 but because all of the parties orally requested a trial by jury and the Clerk noted the request

[38] N.C. R. Civ. P. 38(b)(c).
[39] *Shankle v. Shankle*, 289 N.C. 473 (1976).

for a jury trial in an order that transferred the case to the civil issue docket that the purpose of the rule was accomplished. Chief Justice Sharp wrote, "*Nothing else appearing in the interim, we anticipate that at the next trial the court will exercise its discretion in favor of a jury trial in the event one is requested."*

7. CAN A DEMAND FOR A JURY TRIAL BE WITHDRAWN?

A trial judge may need to determine if a party who properly made a demand for a jury trial has subsequent to the making of the demand withdrawn it. Rule 38(d) of the North Carolina Rules of Civil Procedure allows a demand to be withdrawn but only with the consent of each of parties who have made an appearance or filed a pleading. If no party has filed a pleading or made an appearance, than the party who initially made a demand for a jury trial can withdraw that demand.

> *Rule 38(d) …..A demand for a trial by jury as herein provided may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action.*[40]

This rule was at issue in the 2000 North Carolina Court of Appeals case of *Cabe v. Worley.*[41] The plaintiff, Cabe, filed a complaint on February 1, 1999, against the defendant for personal injuries as a result of the defendant's reckless driving. The plaintiff requested a jury trial in her complaint. The defendant was served by certified mail on February 4, 1999, but the defendant did not file an answer or responsive pleading. The plaintiff made a motion for entry of default on March 10, 1999, and the Clerk entered a default. On March 16, 1999, the defendant filed a motion to set aside the default and that motion was denied on April 12, 1999. On April 13, 1999, the defendant filed a motion for reconsideration of the motion to set aside the default. On April 29, 1999, the plaintiff filed a motion for the court to enter a default judgment, a motion for an evidentiary hearing on damages and withdrawing her demand for a jury trial and seeking a bench trial. The defendant's motion for reconsideration of the motion to set aside the default was denied on May 12, 1999.

A bench trial was held on July 6, 1999 over the defendant's objection to the plaintiff's withdrawal of a jury demand. On appeal the issue was whether or not the defendant had "*otherwise appeared in the action*"[42] The Court of Appeals ruled that the defendant had "*appeared*" in the case for purposes of Rule 38(d) when he filed his motion to set aside the entry of default. In that the defendant "*otherwise appeared*" the trial court should not have proceeded with a bench trial because the plaintiff did not have the right to withdraw the demand for a jury without the consent of the defendant after he filed a motion to set aside the default on March 16, 1999. In anticipation of the plaintiff seeking to file an amended complaint and delete her demand for a jury, the Court of Appeals stated that the plaintiff could not amend her complaint pursuant to Rule 15A of the Rules of Civil Procedure in order to delete her demand for a jury because it would "*contravene the clear*

[40] N.C.Gen.Stat. § 1A-1, N.C. R. Civ. P. 38(d).
[41] *Cabe v. Worley*, 140 N.C.App. 250, 536 S.E.2nd 328 (2000).
[42] N.C.Gen.Stat. § 1A-1, N.C. R. Civ. P. 38(d). Cabe v. Worley, id.

teaching of Rule 38(d) and must not be permitted."[43] It is very clear that once the demand is made the right to a jury trial extends to all parties who have appeared in a case and one party cannot unilaterally deprive the other party or parties of their right to the trial by jury.

8. CAN A PARTY WAIVE HIS RIGHT TO A JURY TRIAL?

A trial judge may be required to determine if a party has waived his right to a jury trial. The rules for waiver of a right for a jury trial are also found in Rule 38(d) of the North Carolina Rules of Civil Procedure and simply state the failure to serve a demand and file it as required by Rule 5(d) constitutes a wavier of a jury trial. Rule 5(d) of the North Carolina Rules of Civil Procedure requires that all papers required to be served upon a party shall be filed with the court either before service or within five days thereafter.[44] The rule also makes it clear that if a jury trial is required by statute, it cannot be waived. An example of a mandatory jury trial is a caveat proceeding.

> *Rule 38(d). Waiver. Except in actions wherein jury trial cannot be waived, the failure of a party to serve a demand as required by this rule and file it as required by Rule 5(d) constitutes a waiver by him of trial by jury.*

In the case of *Whitfield v. Todd*[45], the North Carolina Court of Appeals addressed the issue of a waiver of right to jury trial. The plaintiff filed a complaint on December 5, 1991 seeking an easement by necessity over the defendant's land. The defendant filed an answer on February 14, 1992, and that was the last pleading in the case. Eleven months later, the defendant filed a request for a jury trial. The trial court denied that request as well as a later request for a jury trial. A bench trial was held on July 13, 1993 and a judgment was entered granting an easement by necessity. The Court of Appeals decision on that issue consisted of one sentence, "*Pursuant to N.C.Gen.Stat. § 1A-1, Rule 38(d), defendant's failure to timely demand a jury trial constituted a waiver by him of jury trial of right."*[46] The Court of Appeals cited *Arney v. Arney*[47] and added that the denial of a belated demand for a jury trial is within the sound discretion of the trial judge. The Court ruled the defendant Todd had not shown any abuse of discretion by the trial judge in denying the late requests for a jury trial.

There is another way that a party may waive their right to a jury trial in addition to the waiver of a right to a jury trial set forth in the Rules of Civil Procedure, Rule 38(d). The case law in North Carolina is clear that if a party fails to appear in court at the time of the trial, the party has waived his right to a jury trial. In *Morris v. Asby*[48], the defendant had filed an answer and counterclaims after the plaintiff's complaint seeking a constructive

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[43] *Cabe v. Worley*, id.
[44] N.C.Gen.Stat. § 1A-1, Rule 5(d).
[45] *Whitfield v. Todd*, 116 N.C. App. 335, 447 S.E.2nd 796 (1994).
[46] *Whitfield v. Todd*, id at 338.
[47] *Arney v. Arney*, 71 N.C. App. 218, 321 S.E.2nd 472 (1984).
[48] *Morris v. Asby*, 48 N.C. App. 694, 269 S.E.2nd 796 (1994).

trust with a demand for a jury trial. The defendant's counsel had been allowed to withdraw and the defendant appeared in court at the call of the calendar on February 13, 1978. At the calendar call, the defendant advised the trial court that he wanted to re-hire his attorney but he had not done so yet. The defendant was told the case would be tried as soon as it could be reached that term. The case was called for trial the following day. A telephone message had been left for the defendant at 7:15 a.m. to advise him the case would be called for trial that day. The defendant did not appear and the plaintiff withdrew her request for a jury trial. A bench trial was held and judgment entered against the defendant on the plaintiff's complaint and against the plaintiff on the defendant's counterclaim. The defendant argued on appeal that the judgment was void because the plaintiff was allowed to withdraw her request for a jury trial without his consent as required by the Rules of Civil Procedure.

The Court of Appeals ruled a party waives the right to a jury trial by failing to appear in court because the failure to appear in court for the trial constitutes consent to the other party's withdrawal of the jury demand.

A demand for a jury trial may also be waived by stipulation of the parties. Rule 39 of the North Carolina Rules of Civil Procedure provides that the parties may waive a jury trial by written or oral stipulations.

> *Rule 39(1) The trial of all issues so demanded shall be by jury, unless the parties who have pleaded or otherwise appeared in the action or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered into the minutes, consent to trial by the court sitting without a jury.*[49]

One of the few cases on this issue is *Wachovia Bank & Tr. Co. v. Templeton Olds.-Cadillac-Pontiac*.[50] The primary issue in the case is the denial of a motion to continue when the defendant's lead counsel failed to appear in court for the trial. In his absence, co-counsel waived the right to a jury trial and on appeal it is alleged that the co-counsel did not have the client's consent to waive the right to a jury trial. The Court of Appeals ruled that while the consent of the parties is necessary to consent to a withdrawal of a demand for a jury trial pursuant to Rule 38(d) of the Rules of Civil Procedure, there is a presumption than an attorney has authority to act for his client. In this case, the defendant did not meet his burden of proof as defendant did not present any evidence to rebut that presumption.

9. WHEN IS A WAIVER OF RIGHT TO JURY TRIAL NOT PERMITTED?

Regardless of the rules and case law allowing a waiver of right to a jury trial, the trial court cannot permit a waiver of a jury in a caveat proceeding. "Our Supreme Court has held that once a caveat to a will is filed and the proceeding transferred to the superior court for trial "there can be no probate except by a jury's verdict. The trial court may not,

[49] N.C. Gen.Stat. 1A-1, N.C. R. Civ. Proc. 39(1)
[50] *Wachovia Bank and Tr. Co. v. Templeton Olds.-Cadillac-Pontiac*, 109 N.C. App. 352 (1993).

at least where there are any factual issues, resolve those issues even by consent…." *In re Will of Mucci*, 287 N.C. 26, 35, 213 S.E.2nd 207, 213 (1975)." [51] In the *Dunn case*[52], the North Carolina Supreme Court was very clear that parties cannot waive a jury trial, by consent or implication, when the evidence is in conflict and material facts are in controversy.

A waiver of a right to a trial by jury is not permitted by means of a language included in a contract between parties. N.C.Gen.Stat. § 22B-10 (1933) provides, *"any provision in a contract requiring a party to the contract to waive his right to a trial by jury is unconscionable as a matter of law and the provision shall be unenforceable. This section does not prohibit parties from entering into agreements to arbitrate or engage in other form of alternative dispute resolution."*

10. DISCRETION OF THE TRIAL JUDGE

Rule 39(b) of the North Carolina Rules of Civil Procedure states that the trial judge has the discretion on motion of a party or on its own motion to order a trial by jury on any or all issues even if there was no demand or a waiver. The standard of review is the abuse of discretion by the trial court. In *Wycoff v. Pritchard Paint & Glass Co*.,[53] the trial court granted a motion for a jury trial even though the motion was made two years and ten months after the filing of the complaint. The opposing party was unable to show an abuse of discretion and therefore the decision was upheld.

> *Rule 39(b) By the court. Issues not demanded for trial by jury as provided by Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a trial by jury in an action in which such a demand might have been made of right, the court in its discretion upon motion or of its own initiative may order a trial by jury of any or all issues.*[54]

[51] *In the Matter of Dunn*, 129 N.C. App. 321(1998).
[52] *In the Matter of Dunn*, id.
[53] *Wycoff v. Pritchard Paint & Glass Co*., 31 N.C. App. 246, 229 S.E.2nd 47 (1976).
[54] N.C.Gen.Stat. § 1A-1- N.C. R. Civ. P. 39(b).