Top Civil Procedure Nuggets Panel

Superior Court Judges' Summer Conference
Hon. Robert C. Ervin, Senior Resident Superior Court Judge, District 36
Hon. Richard S. Gottlieb, Resident Superior Court Judge, District 31
Hon. Michael L. Robinson, Chief Judge, North Carolina Business Court
Moderator: Joseph Laizure
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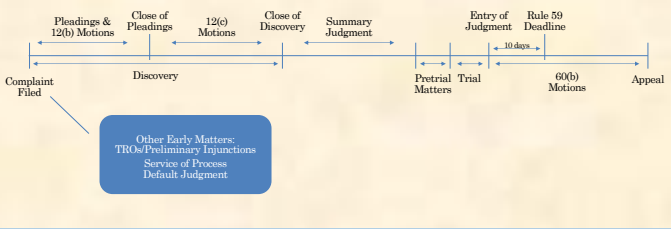
Life of a Civil Case



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Four critical stages

- Rule 12 motions
- Discovery
- Summary judgment
- Trial

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3

PROCEDURAL ASPECTS OF RULE 12(b)(6) MOTIONS

June 17, 2025

4

RULE 12(b)(6)

"THE FOLLOWING DEFENSE MAY AT THE OPTION OF THE PLEADER BE MADE BY MOTION:

* * * *

(6) FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED,

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WHAT IS THE PURPOSE OF A RULE 12(b)(6) MOTION?

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A RULE 12(b)(6) MOTION TESTS THE LEGAL SUFFICIENCY OF THE COMPLAINT.

Harrell v. Brown, 362 N. C. 142, 144, 655 S. E. 2d 350 (2008); Sutton v. Duke, 277 N. C. 94, 176 S. E. 2d 161 (1970)

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WHAT CLAIMS OR DEFENSES CAN BE THE SUBJECT OF A RULE 12(b)(6) MOTION?

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A CLAIM FOR RELIEF IN ANY PLEADING, WHETHER A CLAIM, COUNTERCLAIM, CROSS-CLAIM. OR THIRD-PARTY CLAIM…

RULE 12(b)

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A MOTION TO STRIKE UNDER RULE 12(f) IS THE MEANS TO TEST THE LEGAL SUFFICIENCY OF AN AFFIRMATIVE DEFENSE.

Mozingo v. North Carolina National Bank, 31 N. C. App. 157, 229 S. E. 2d 57 (1976).

10

THE DEFENSE OF FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED MAY BE ASSERTED EITHER BY MOTION TO DISMISS OR IN THE RESPONSIVE PLEADINGS.

Forrester v. Garrett, 280 N. C. 117, 184 S. E. 2d 858 (1971); Osborne v. Redwood Mt. LLC., 282 N. C. App. 727, 870 S. E. 2d 153 (2022)

11

RULE 12(h)(2) PROVIDES THAT "A DEFENSE OF FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED…MAY BE MADE IN ANY PLEADING PERMITTED OR ORDERED UNDER RULE 7(a), OR BY MOTION FOR JUDGMENT ON THE PLEADINGS, OR AT THE TRIAL ON THE MERITS."

A RULE 12(b)(6) MOTION CAN BE MADE AS LATE AS THE TRIAL ON THE MERITS.

Bodie Island Beach Club Ass'n. v. Wray, 215 N. C. App. 283, 292, 716 S. E. 2d 67 (2011); Dale v. Lattimore, 12 N. C. App. 348, 183 S. E. 2d 417 (1971).

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CAN A PARTY APPEAL THE DENIAL OF A RULE 12(b)(6) MOTION TO DISMISS?

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A RULING DENYING A RULE 12(b)(6) MOTION IS AN INTERLOCUTORY ORDER FROM WHICH NO IMMEDIATE APPEAL MAY BE TAKEN.

Teachy v. Coble Dairies, Inc., 306 N. C. 324, 293 S. E. 2d 182 (1982); Bellows v. City of Asheville City Board of Education, 243 N. C. App. 229, 777 S. E. 2d 522 (2015).

BUT—IMMUNITY RULINGS ARE APPEALABLE.

Petroleum Traders Corp v. State, 190 N. C. App. 542, 660 S. E. 2d 662 (2008).

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WHAT IF THE PLEADING IS SO VAGUE THAT IT'S SUFFICIENCY IS DRAWN INTO QUESTION?

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MERE VAGUENESS OF THE COMPLAINT DID NOT ENTITLE DEFENDANT TO DISMISSAL, BUT RATHER SHOULD HAVE BEEN TESTED BY A RULE 12(e) MOTION. (MOTION FOR A MORE DEFINITE STATEMENT)

Smith v. City of Charlotte, 79 N. C. App. 517, 529, 339 S. E. 2d 844 (1986).

16

WHAT DO YOU DO IF THE PLEADING CAREFULLY OMITS CRITICAL FACTS?

17

WHEN A SALIENT FACT IS OMITTED FROM THE PLEADING, THAT CAN BE ADDRESSED BY A MOTION FOR MORE DEFINITE STATEMENT (Rule 12 (e)).

Smith v. City of Charlotte, 79 N. C. App. 517, 530, 339 N. C. App. 844 (1986).

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WHEN YOU DECIDE A RULE 12(b)(6) MOTION, WHAT ARE YOU CONSIDERING?

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A TRIAL COURT'S CONSIDERATION OF EVIDENCE OTHER THAN THE PLEADING IS CONTRARY TO THE PURPOSE OF RULE 12(b)(6).

Carlisle v. Keith, 169 N. C. App. 674, 614 S. E. 2d 542 (2005).

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THERE ARE EXCEPTIONS!!!

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EXHIBITS THAT ARE ATTACHED TO THE PLEADING DO NOT CONSTITUTE EXTRANEOUS MATTER THAT CONVERT A MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT.

Carlisle v. Keith, 169 N. C. App. 674, 614 S. E. 2d 542 (2005).

BECAUSE THE PLAINTIFF REFERRED TO THESE DOCUMENTS IN THE COMPLAINT AND THEY FORM THE PROCEDURAL BASIS FOR THE COMPLAINT, THE TRIAL COURT DID NOT CONVERT THE MOTION INTO ONE FOR SUMMARY JUDGMENT BY CONSIDERING THEM.

Brackett v. SGL Carbon Corp, 158 N. C. App. 252, 580 S. E. 2d 757 (2003); Oberlin Capital, LP v. Slavin, 147 N. C. App. 52, 554 S. E. 2d 840 (2001)

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DOCUMENTS OR FACTS SUBJECT TO BEING JUDICIALLY NOTICED CAN ALSO BE CONSIDERED.

See Devonwood-Loch Lomond Lake Ass'n. v. City of Fayetteville, ___ N. C. App. ___, 908 S. E. 2d 66 (2024).

23

DO YOU MAKE FINDINGS OF FACT IN YOUR RULING ON A RULE 12(b)(6) MOTION?

24

NO

A TRIAL COURT DOES NOT MAKE FINDINGS OF FACT ON A RULE 12(b)(6) MOTION SINCE THE RESOLUTION OF FACTUAL QUESTIONS IS NOT WITHIN THE SCOPE OF THE RULE.

White v. White, 296 N. C. 661, 252 S. E. 2d 698 (1979).

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HOW DO YOU CONSIDER THE FACTS ALLEGED IN THE PLEADING AT ISSUE?

26

ON A MOTION TO DISMISS, ALL MATERIAL FACTUAL ALLEGATIONS ARE TAKEN AS TRUE OR DEEMED ADMITTED AND ARE VIEWED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF OR PLEADING PARTY.

Isenhour v. Hutto, 350 N. C. 601, 517 S. E. 2d 121 (1999); Ford v. Peaches Entertainment Corp, 83 N. C. App. 155, 349 S. E. 2d 82 (1986).

27

LEGAL CONCLUSIONS, HOWEVER, ARE NOT ENTITLED TO A PRESUMPTION OF VALIDITY.

Charlotte Motor Speedway, LLC. v. County of Cabarrus, 230 N. C. App. 1, 748 S. E. 2d 171 (2013).

28

DO YOU GRANT A MOTION TO DISMISS IF THE PLEADING PARTY ASSERTS A CLAIM UNDER THE WRONG LEGAL THEORY?

29

NO.

IT DOES NOT MATTER THAT A CLAIM IS MISLABELED OR DESCRIBED UNDER THE WRONG LEGAL THEORY SO LONG AS THE FACTUAL ALLEGATIONS GIVE RISE TO A CAUSE OF ACTION UNDER SOME VALID LEGAL THEORY.

McAlister v. Ha, 347 N. C. 638, 496 S. E. 2d 577 (1998); Stanback v. Stanback, 297 N. C. 181, 254 S. E. 2d 611 (1979).

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WHAT HAPPENS IF YOU GO BEYOND THE FACTS ASSERTED IN THE PLEADING AT ISSUE IN CONSIDERING THE MOTION TO DISMISS?

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"IF, ON A MOTION TO DISMISS ASSERTING THE DEFENSE, NUMBERED (6), TO DISMISS FOR FAILURE OF THE PLEADING TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, MATTERS OUTSIDE THE PLEADING ARE PRESENTED TO AND NOT EXCLUDED BY THE COURT, THE MOTION SHALL BE TREATED AS ONE FOR SUMMARY JUDGMENT AND DISPOSED OF AS PROVIDED IN RULE 56…

RULE 12(b)

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WHAT HAPPENS IF A PARTY OBJECTS TO THAT CONVERSION?

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"ALL PARTIES SHALL BE GIVEN REASONABLE OPPORTUNITY TO PRESENT ALL MATERIAL MADE PERTINENT TO SUCH A MOTION BY RULE 56."

RULE 12(b)

THE PROPER ACTION FOR A PARTY IS TO REQUEST A CONTINUANCE OR ADDITIONAL TIME TO PRODUCE FURTHER EVIDENCE.

Raintree Homeowners Ass'n, Inc. v. Raintree Corp, 62 N. C. App. 668, 303 S. E. 2d 579 (1983).

34

PARTICIPATION IN THE HEARING WITHOUT OBJECTION RESULTS IN A WAIVER OF ANY OBJECTION TO THE CONVERSION.

Belcher v. Fleetwood Enterprises, 162 N. C. App. 80, 590 S. E. 2d 15 (2004); Knotts v. City of Sanford, 142 N. C. App. 91, 541 S. E. 2d 517 (2001).

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WHAT ABOUT MOTIONS TO AMEND THAT ARE FILED PRIOR TO THE HEARING OR EVEN ORAL MOTIONS TO AMEND MADE AT THE HEARING?

36

FAILURE TO RULE ON A MOTION TO AMEND CONTRAVENES THIS PURPOSE BY INVITING PIECEMEAL LITGATION AND PREVENTING CONSIDERATION OF THE MERITS OF THE ACTION ON ALL THE EVIDENCE AVAILABLE.

Carolina Builders Corp. v. Gelder & Associates, Inc., 56 N. C. App. 638, 289 S. E. 2d 628 (1982).

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THE TRIAL COURT'S DECISION TO RULE ON A MOTION TO DISMISS BEFORE RULING ON THE PLAINTIFF'S MOTION FOR LEAVE TO AMEND CONSTITUTES REVERSIBLE ERROR.

Zenobile v. McKecuen, 144 N. C. App. 104, 548 S. E. 2d 756 (2001)

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WHEN SHOULD A RULE 12(b)(6) MOTION BE GRANTED?

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WHEN THE PLEADING LACKS MERIT

THE LACK OF MERIT MAY BE DEMONSTRATED IN THREE WAYS:

1. WHEN THE COMPLAINT ON ITS FACE REVEALS THAT NO LAW OR VALID LEGAL THEORY SUPPORTS PLAINTIFF'S CLAIM;
2. WHEN THE COMPLAINT REVEALS ON ITS FACE THE ABSENCE OF FACT SUFFICIENT TO MAKE A GOOD CLAIM; OR
3. WHEN SOME FACT DISCLOSED IN THE COMPLAINT NECESSARILY DEFEATS THE PLAINTIFF'S CLAIM.

Oates v. JAG, Inc., 314 N. C. 276, 333 S. E. 2d 222 (1985).

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WHAT HAPPENS IF THE PARTY ONLY FILED A RULE 12(b)(6) MOTION AND YOU DENY THAT MOTION AFTER A HEARING?

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"THE RESPONSIVE PLEADING SHALL BE SERVED WITHIN 20 DAYS AFTER NOTICE OF THE COURT'S ACTION IN RULING ON THE MOTION OR POSTPONING ITS DISPOSITION UNTIL AFTER TRIAL ON THE MERITS."

RULE 12(a)(1)b

THAT IS, "UNLESS A DIFFERENT TIME IS FIXED BY ORDER OF THE COURT."

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IF YOU GRANT THE MOTION TO DISMISS, IS THE DISMISSAL WITH PREJUDICE?

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A DISMISSAL UNDER RULE 12(b)(6) OPERATES AS AN ADJUDICATION ON THE MERITS UNLESS THE COURT SPECIFIES THAT THE DISMISSAL IS WITHOUT PREJUDICE.

Hoots v. Pryor, 106 N. C. App. 397, 417 S. E. 2d 269 (1992)

RULE 41(b) PROVIDES IN PERTINENT PART THAT UNLESS THE COURT IN ITS ORDER FOR DISMISSAL OTHERWISE SPECIFIES, A DISMISSAL UNDER THIS SECTION AND ANY DISMISSAL NOT PROVIDED FOR IN THIS RULE (OTHER THAN CERTAIN EXCEPTIONS) OPERATES AS AN ADJUDICATION ON THE MERITS. (parenthetical added for clarity.)

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Thank You

Robert C. Ervin

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JUDICIAL BRANCH of NORTH CAROLINA
SUUM CUIQUE TRIBUERE
GENERAL COURT of JUSTICE

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JUDICIAL BRANCH of NORTH CAROLINA
SUUM CUIQUE TRIBUERE
GENERAL COURT of JUSTICE
Summary Judgment Fundamentals
June 10, 2025

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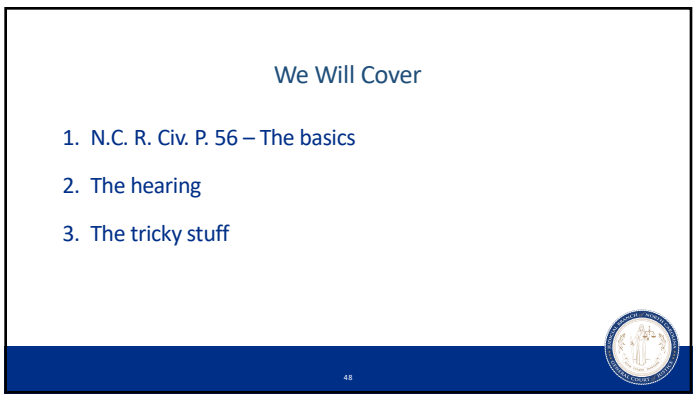
We Will Cover
1. N.C. R. Civ. P. 56 – The basics
2. The hearing
3. The tricky stuff
48

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A Little About Me: Richard S. Gottlieb

- Resident Judge from Forsyth County
- Primarily civil practice for 19 years
- Came onto bench in 2015

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background:

Simple.

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background:

- Summary Judgment is:

A powerful [ ] weapon for the just, swift and efficient disposition of claims or defenses patently without merit. The rule provides a device whereby it can expeditiously be determined whether or not there exists between the parties a *genuine issue as to any material fact*. It is not the purpose of the rule to *resolve disputed material issues of fact* but rather to determine if such issues exist.

(Emphasis added. Rule 56, Comment.)

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background:

- Summary Judgment is:

[A] device whereby judgment is rendered if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law.

Johnson v. Phoenix Mut. Life Ins. Co., 300 N.C. 247, 266 S.E.2d 610 (1980); *Rose v. Guilford County, 60 N.C. App.* 170, 298 S.E.2d 200 (1982).

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background:

- Summary Judgment is:

[D]esigned to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed." *Hall v. Post*, 85 N.C. App. 610, 355 S.E.2d 819 (1987), rev'd on other grounds, 323 N.C. 259, 372 S.E.2d 711 (1988).

And to Allow a Preview or Forecast of the Proof. - The procedure for a summary judgment motion is designed to allow a "preview" or "forecast" of the proof of the parties in order to determine *whether a jury trial is necessary*. (Emphasis added) *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E.2d 897 (1981); *Asheville Contracting Co. v. City of Wilson*, 62 N.C. App. 329, 303 S.E.2d 365 (1983).

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The Hearing:

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The Hearing:

- What are we doing here?

While a day in court may be a constitutional necessity when there are disputed questions of fact, the function of the motion of summary judgment is to smoke out if there is any case, i.e., any genuine dispute as to any material fact, and if there is no case, to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970); *Town of Southern Pines v. Mohr*, 30 N.C. App. 342, 226 S.E.2d 865 (1976).

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The Hearing:

- What are we doing here?

Summary judgment is *not* a device to resolve factual disputes; however, complex facts and legal issues do not preclude summary judgment. *Land-of-Sky Regional Council v. County of Henderson*, 78 N.C. App. 85, 336 S.E.2d 653 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

Nor to Test the Sufficiency of the Evidence. - Summary judgment is not to test the sufficiency of the evidence. *Mitchell v. Mitchell*, 12 N.C. App. 54, 182 S.E.2d 627 (1971).

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The Hearing:

- What evidence may be considered?

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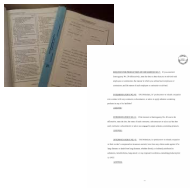
The Hearing:



- What evidence may be considered?
  - admissions in the pleadings,
  - depositions on file,
  - answers to interrogatories under Rule 33,
  - admissions on file under Rule 36,
  - affidavits, and
  - any other material which would be admissible in evidence or of which judicial notice may properly be taken.

Kessing v. National Mtg. Corp., 278 N.C. 523, 180 S.E.2d 823 (1971)

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The Hearing:

- What evidence may be considered cont.?
  - oral testimony and admissible documentary evidence,
  - presumptions that would be available at trial, and
  - verified pleadings.

Mozingo v. North Carolina Nat'l Bank, 31 N.C. App. 157, 229 S.E.2d 57 (1976), cert. denied, *291 N.C. 711*, 232 S.E.2d 204 (1977); *McLaughlin v. Bailey*, 240 N.C. App. 159, 771 S.E.2d 570 (2015)

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The Hearing:

- Our Job:
  - Court "shall" grant a motion for summary judgment if "there is no genuine issue of material fact" as shown by "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any."
  - The record must be viewed in the light most favorable to the party against whom judgment is sought.

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The Hearing:

- The party seeking summary judgment must establish the absence of any triable issue; this burden may be met by (1) proving the nonexistence of an essential element of the opposing party's claim, (2) establishing through discovery that the opponent cannot produce evidence supporting an essential element, or (3) showing that the opposing party cannot overcome an affirmative defense that would bar the claim.
- The moving party has the *burden of proof*.

N.C. Farm Bureau Mut. Ins. Co. v. Allen, 146 N.C. App. 539, 553 S.E.2d 420 (2001).

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The Hearing:

- Stay focused on the record:
  - Where is *this* "fact" in the record?
  - Ask the attorneys if an important fact is disputed?
  - Especially in negligence cases, be careful of facts and conduct that are "clear."
    - Summary judgment is rarely appropriate in negligence actions because ordinarily it is the duty of the jury to apply the standard of care of a reasonably prudent person. *Bernick v. Jurden*, 306 N.C. 435, 293 S.E.2d 405 (1982).

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The Hearing:

- If the moving party satisfies its burden of proof, then the burden shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial. The nonmoving party may not rest upon the mere allegations of his pleadings.

Taylor v. Greensboro News Co., 57 N.C. App. 426, 291 S.E.2d 852.

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The Hearing:

- Matters determined by summary judgment, as by any other judgment, are res judicata in a subsequent action.

Taylor v. Greensboro News Co., 57 N.C. App. 426, 291 S.E.2d 852.

the tricky stuff:

- May be filed by a defending party any time.
- May be filed by a complaining party any time after 30 days from commencement of action.

Rule 56(a), (b).

- The motion must be filed at least 10 days prior to hearing.
- Opposing affidavits must be served at least 2 days prior to hearing.

Rule 56(c).

the tricky stuff :

- If opposing affidavits are not served two days in advance, Court may continue hearing.

Rule 56(c).

- If opposing affidavits are not available, Court may continue hearing so affidavits may be obtained or depositions taken

Rule 56(f).

- Affidavits must be based on admissible evidence, based on personal knowledge, and absence of hearsay.

Rule 56(e)

the tricky stuff :

- Adverse party affidavits
  - May *not* create a genuine issue of material fact simply by filing an affidavit contradicting its prior testimony.

Cousart v. Charlotte-Mecklenburg Hosp. Auth., 209 N.C. App. 299, 704 S.E.2d 540 (2011)

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the tricky stuff :

- Summary Judgment (Rule 56) is *different* than a Motion to Dismiss under Rule 12(b)(6)
  - The denial of a motion to dismiss under G.S. 1A-1, Rule 12(b)(6) does not prevent the court from allowing a subsequent motion for summary judgment.
  - Attorneys may argue that SJ is not proper because a previous motion to dismiss was denied.

Dull v. Mutual of Omaha Ins. Co., 85 N.C. App. 310, 354 S.E.2d 752, cert. denied, 320 N.C. 512, 358 S.E.2d 518 (1987)

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the tricky stuff :

- The Court may grant summary judgment as to all claims or some of them.

Rule 56(c)

- If only a portion of the claims are adjudicated, then you must specify the remaining material issues in an order.
  - The court may grant summary judgment as to liability only and leave damages for the jury.

Rule 56(d)

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the tricky stuff :

- The Court may grant summary judgment against the moving party, if appropriate, and may be done *on judge's own motion*.

Rule 56(c)

- Briefs must be served at least *two* days in advance of the hearing.
  - If not served two days in advance, court may "continue the matter for a reasonable period." Rule 5(a1)
  - Service of brief on Thursday before Monday hearing complies with the rule. *Harrold v. Dowd*, 149 N.C. App. 777, 786-87, 561 S.E.2d 914, 921 (2002)

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the tricky stuff:

- Your Order
  - You should *not* include findings of fact, even if a party requests them pursuant to Rule 52.
  - The court's task is to determine only whether genuine issues of material fact exist, and not to decide those facts one way or the other. *War Eagle, Inc. v. Belair*, 204 N.C. App. 548, 694 S.E.2d 497 (2010)
  - "By making findings of fact on summary judgment, the trial court demonstrates to the appellate courts a fundamental lack of understanding of the nature of summary judgment proceedings." *Hodges v. Moore,* 205 N.C. App. 722, 697 S.E.2d 406 (2010).

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the tricky stuff:

I.

FACTUAL AND PROCEDURAL BACKGROUND

3. While the Court does not make findings of fact on a motion for summary judgment, "it is helpful to the parties and the courts for the trial judge to articulate a summary of the material facts which he considers are not at issue and which justify entry of judgment." *Collier v. Collier*, 204 N.C. App. 160, 161–62 (2010) (citation and quotation marks omitted). Accordingly, the following background, drawn from the undisputed evidence submitted by the parties, is intended only to provide context for the Court's analysis and ruling and not to resolve issues of material fact.

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the tricky stuff:

- Your Order
  - Or, keep it simple (denied):

[redacted]Defendants") and upon the Motion for Summary Judgment pursuant to N.C. R. Civ. P 56 of the[redacted]Defendants as to [redacted]claims against th[redacted]Defendants. Having considered the briefs, affidavits, depositions, and additional materials submitted by the parties, and having reviewed the file and having considered the arguments of counsel at the hearing, the undersigned is of the opinion that genuine issues of material facts are present as to each of the claims for which the parties seek summary judgment and, therefore, the cross-motions should be **DENIED**.

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Thank You

Richard S. Gottlieb
Resident Superior Court Judge

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N.C. Superior Court Judges' Conference

Chief Judge Michael L. Robinson
North Carolina Business Court

18 June 2025

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OVERVIEW

- Getting In – Consideration of *Pro Hac Vice* Motions
- Getting Out – Motions to Withdraw
- Voluntary Dismissals Under Rule 41
  - Compulsory Counterclaims
  - Derivative Claims
  - Class Action Claims
- Timing of Rule 12(b)(6) Motions

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PRO HAC VICE

§ 84-4.1. Limited practice of out-of-state attorneys.

Any attorney domiciled in another state, and regularly admitted to practice in the courts of record of and in good standing in that state, having been retained as attorney for a party to any civil or criminal legal proceeding pending in the General Court of Justice of North Carolina, the North Carolina Utilities Commission, the North Carolina Industrial Commission, the Office of Administrative Hearings of North Carolina, or any administrative agency, may, on motion to the relevant forum, be admitted to practice in that forum for the sole purpose of appearing for a client in the proceeding. The motion required under this section shall be signed by the attorney and shall contain or be accompanied by:

N.C.G.S. § 84-4.1.

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PRO HAC VICE
MOTION REQUIREMENTS

If the client is a corporate entity, the statement should include the signer's position with the entity and an affirmative statement that the signer has proper authority to sign the statement.

Local counsel must be counsel of record for the client in question.

(1) The attorney's full name, bar membership number, and status as a practicing attorney in another state.

(1a) The attorney's mailing address, phone number, and email address to be used as the attorney's contact information of record with the court, pursuant to G.S. 1A-1, Rule 5.

(2) A statement, signed by the client, setting forth the client's address and declaring that the client has retained the attorney to represent the client in the proceeding.

(3) A statement that unless permitted to withdraw sooner by order of the court, the attorney will continue to represent the client in the proceeding until its final determination, and that with reference to all matters incident to the proceeding, the attorney agrees to be subject to the orders and amenable to the disciplinary action and the civil jurisdiction of the General Court of Justice and the North Carolina State Bar in all respects as if the attorney were a regularly admitted and licensed member of the Bar of North Carolina in good standing.

(4) A statement that the state in which the attorney is regularly admitted to practice grants like privileges to members of the Bar of North Carolina in good standing.

(5) A statement to the effect that the attorney has associated and is personally appearing in the proceeding, with an attorney who is a resident of this State, has agreed to be responsible for filing a registration statement with the North Carolina State Bar, and is duly and legally admitted to practice in the General Court of Justice of North Carolina, upon whom service may be had in all matters connected with the legal proceedings, or any disciplinary matter, with the same effect as if personally made on the foreign attorney within this State.

(6) A statement accurately disclosing a record of all that attorney's disciplinary history. Discipline shall include (i) public discipline by any court or lawyer regulatory organization, and (ii) revocation of any pro hac vice admission.

(7) A fee in the amount of two hundred twenty-five dollars ($225.00) submitted and made payable to one of the following: (i) for judicial proceedings, the presiding clerk of court and (ii) for administrative proceedings, the presiding administrative agency. The clerk of court or administrative agency shall: (i) remit two hundred dollars ($200.00) of the fee collected to the State Treasurer for support of the General Court of Justice, and (ii) transmit twenty-five dollars ($25.00) of the fee collected to the North Carolina State Bar to regulate the practice of out-of-state attorneys as provided in this section.

The motion for admission should be signed by local counsel and the attorney seeking PHV admission.

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PRO HAC VICE
OTHER REQUIREMENTS

- The Supreme Court has opined that the statute "forbids the courts from allowing non-resident counsel . . . from practicing habitually in our courts, and they cannot acquire the right to do so." *State v. Hunter*, 290 N.C. 556, 568 (1976) (quoting *Manning v. Roanoke & T.R.R. Co.*, 122 N.C. 824, 964 (1898)).
- The Motion should state the number of times the attorney seeking PHV admission has been admitted to practice *pro hac vice* in North Carolina (both State and Federal courts) in the preceding five years.
  - Note: You can check prior registrations with the State Bar.
    Phillip Blaine McWilliams
    (919) 828-4620 x 225
    pmcwilliams@ncbar.gov
- *Pro Hac Vice* Motions Practice in the Business Court

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MOTIONS TO WITHDRAW

Rule 16. Withdrawal of Appearance

No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court. (See *Smith vs. Bryant*, 264 N.C. 208. See also Rule 43 of Rules of the N.C. State Bar, Volume 4A of General Statutes of North Carolina, page 278, entitled "Withdrawal from employment as attorney or counsel.")

General Rules of Practice for the Superior and District Courts

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MOTIONS TO WITHDRAW

Mandatory Withdrawal

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of law or the Rules of Professional Conduct;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

N.C. Rules of Professional Conduct, Rule 1.16.

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MOTIONS TO WITHDRAW

Permissive Withdrawal

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client; or

(2) the client knowingly and freely assents to the termination of the representation; or

(3) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; or

(4) the client insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or

(5) the client has used the lawyer's services to perpetrate a crime or fraud; or

(6) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or

(7) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(8) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; or

(9) other good cause for withdrawal exists.

N.C. Rules of Professional Conduct, Rule 1.16.

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MOTIONS TO WITHDRAW

- You can't just quit.
- You can't just "substitute counsel" – a Notice of Substitution of Counsel is a fiction.
- Withdrawal of attorney(s) from a particular firm does not automatically relieve the firm – the motion must be clear that the attorney(s) and their firm are seeking to withdraw.
- Should supervising counsel personally appearing with an attorney admitted *pro hac vice* move to withdraw as counsel, moving counsel should notify the court of who will assume the role of appearing with counsel previously admitted *pro hac vice*.

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VOLUNTARY DISMISSALS

Rule 41. Dismissal of actions.

(a) Voluntary dismissal; effect thereof. –

(1) By Plaintiff; by Stipulation. – Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

N.C.G.S. § 1A-1, Rule 41(a).

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VOLUNTARY DISMISSALS
COUNTERCLAIMS

- A plaintiff may not unilaterally take a voluntary dismissal if the defendant has likewise stated a claim for affirmative relief arising out of the same transaction or occurrence alleged in plaintiff's complaint. *McCarley v. McCarley*, 289 N.C. 109, 113 (1976).
  - The defendant's consent is required under these circumstances.
- If the counterclaim is factually independent of plaintiff's allegations, however, the plaintiff may proceed with a voluntary dismissal. *McCarley*, 289 N.C. at 112.
- If plaintiff and defendant simultaneously dismiss their respective claims, the effect is the same as consent to or stipulation of dismissal. *Gilliken v. Pierce*, 98 N.C. App. 484, 486–87 (1990).

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VOLUNTARY DISMISSALS
DERIVATIVE ACTIONS

- "A derivative proceeding may not be discontinued or settled without the court's approval"
  - N.C.G.S. § 57D-8-04 (N.C. Limited Liability Company Act).
  - N.C.G.S. § 55-7-45 (N.C. Business Corporation Act).
  - *See* N.C.G.S. § 55A-7-40 (N.C. Nonprofit Corporation Act) ("Such action shall not be discontinued, dismissed, compromised, or settled without the approval of the court.").

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VOLUNTARY DISMISSALS
DERIVATIVE ACTIONS

- Notice:
  - "The court, in its discretion, may direct that notice . . . shall be given to any directors, members, creditors, and other persons whose interests it determines will be substantially affected by the discontinuance, dismissal, compromise, or settlement." N.C.G.S. § 55A-7-40(d) (N.C. Nonprofit Corporation Act).
  - "If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the corporation's shareholders or a class of shareholders, the court shall direct that notice be given to the shareholders affected." N.C.G.S. § 55-7-45(a) (N.C. Business Corporation Act).
  - "If the court determines that a proposed discontinuance or settlement will substantially affect the interests of the LLC's members, the court shall direct that notice be given to the members who would be affected." N.C.G.S. § 57D-8-04 (N.C. Limited Liability Company Act).

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VOLUNTARY DISMISSALS
CLASS ACTIONS – AFTER CERTIFICATION

- The provisions of Rule 41(a)(1) are "[s]ubject to the provisions of Rule 23(c)[.]"
- "A class action shall not be dismissed or compromised without the approval of the judge." N.C.G.S. § 1A-1, Rule 23(c).
- Pursuant to Rule 23(c), "notice of a proposed dismissal or compromise shall be given to all members of the class in such manner as the judge directs."

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VOLUNTARY DISMISSALS
CLASS ACTIONS – PRE-CERTIFICATION

- Court approval of a voluntary dismissal is also required pre-certification.
- Where a voluntary dismissal is sought before a class has been certified, the North Carolina Court of Appeals has held that the trial court must conduct a limited inquiry into:
  - Whether the parties have abused the class action mechanism for personal gain; and
  - Whether dismissal will prejudice absent putative class members.
  - *Moody v. Sears Roebuck & Co.*, 191 N.C. App. 256, 269 (2008).

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VOLUNTARY DISMISSALS
CLASS ACTIONS – PRE-CERTIFICATION

- The North Carolina Business Court has required counsel to submit the following in consideration of a request to voluntarily dismiss claims at the pre-certification stage:
  - (1) a statement of the reason for dismissal, (2) a statement of the personal gain received by the plaintiffs in any settlement, (3) a statement of any other material terms of the settlement, specifically including any terms which have the potential to impact other potential class members, (4) a statement of any counsel fees paid to plaintiff's counsel by defendants, and (5) a statement of any agreement by plaintiff(s) restricting their ability to file other litigation against any defendant. *See Rickenbaugh v. Power Home Solar, LLC*, 2022 NCBC LEXIS 57, at *6 (N.C. Super. Ct. June 10, 2022).
  - A statement either detailing any prejudice to putative class members or representing that no prejudice exists. *See Moody v. Sears Roebuck & Co.*, 2008 NCBC LEXIS 14, at *3 (N.C. Super. Ct. Aug. 6, 2008).

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TIMING OF RULE 12(b)(6) MOTIONS

(b) How Presented. – Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
(1) Lack of jurisdiction over the subject matter,
(2) Lack of jurisdiction over the person,
(3) Improper venue or division,
(4) Insufficiency of process,
(5) Insufficiency of service of process,
(6) Failure to state a claim upon which relief can be granted,
(7) Failure to join a necessary party.
A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The consequences of failure to make such a motion shall be as provided in sections

The North Carolina Business Court has consistently held that "in the absence of case law from appellate courts interpreting such language to mean otherwise, a Rule 12(b) motion to dismiss for failure to state a claim must be filed *prior* to [the filing of] an answer, not contemporaneously with or minutes after." *See Biomilq, Inc. v. Guiliano*, 2023 NCBC LEXIS 142, at **142 (N.C. Super. Ct. Nov. 13, 2023) (citations omitted).

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