

# Civil Procedure Essentials

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Orientation for New Superior Court Judges  
January 15, 2019

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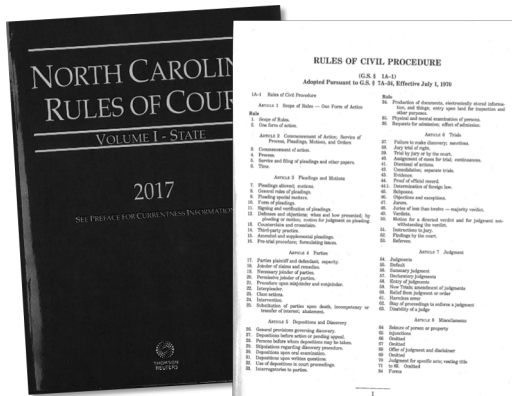


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# N.C. Rules of Civil Procedure G.S. § 1A-1

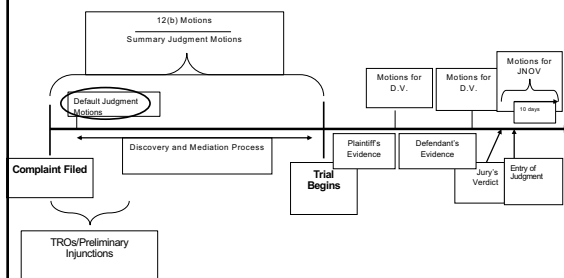
(and G.S. Chapter 1)



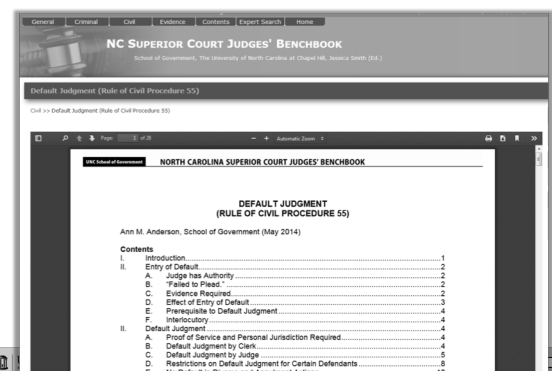
- Injunctive Relief – 65
- “Early” Dismissal Motions – 9(j), 12, 56  
– Voluntary Dismissals (Rule 41(a))
- Sanctions – 37 (discovery); 11 (“papers”)
- Judgment Before Case Goes to Jury (Directed Verdict) – 50 (and 41(b))
- Judgment/Relief Despite What Jury Said (JNOV, New Trial) – 50, 59
- Post-Judgment Relief – 60(b)



## A Civil Case

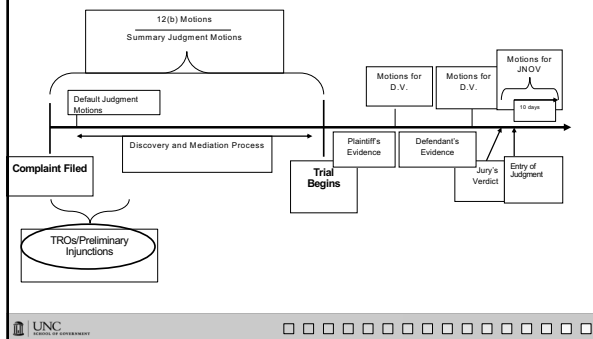


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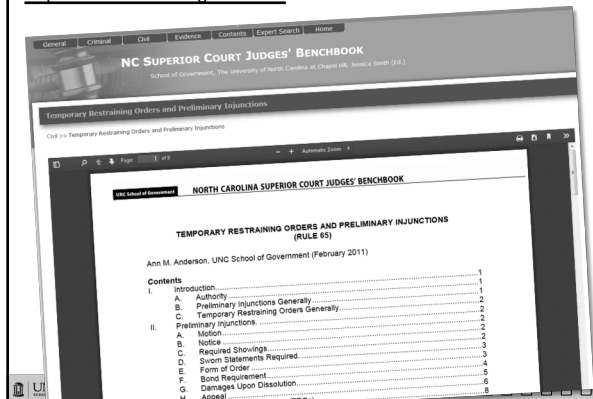
## A Civil Case



## Injunctions Rule 65



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## TROs and Prelim. Injunctions

Provide a party some relief while the case is pending.

- Temporary Restraining Orders (TROs)
  - Very short-term relief until a hearing
- Preliminary injunctions
  - Relief until the litigation ends

## *Little Lamb, Inc. v. Mary* Exercise 1



## TROs

- Judge may issue a TRO without notice to the adverse party *if*:
  - Clearly appears from affidavit or verified complaint that movant will suffer immediate and irreparable harm;
  - The movant's attorney certifies in writing the efforts made to give notice and the reasons notice should not be required;
  - The movant pays bond (as determined by judge) to protect other party against harm.

## TROs

- Court must first have *subject matter jurisdiction* over the underlying action.
- The complaint must be filed first!  
– Revelle, Carolina Freight

## TROs

- The order must:
  - Define the injury
  - State why it is irreparable
  - State why it was entered without notice
  - Set forth the reasons for issuance
  - Be specific in terms
  - Describe, in reasonable detail, the act or acts enjoined or restrained.
    - “Not by reference to the complaint or other document.”

## TROs

- Bond exceptions:
  - State, county, municipality, officer
  - Certain domestic contexts
  - Where the TRO will not harm defendant, plaintiff has considerable available assets [RARE]
  - To preserve court’s jurisdiction.

## Preliminary Injunction

### Hearing:

- After TRO is issued, hearing (*with notice to adverse party*) is calendared “at earliest possible time”.
- Judge can convert the TRO to preliminary injunction or dissolve it.
  - Evidentiary hearing
- Judge may award damages to restrained party if TRO is dissolved. 65(e).

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Superior Court Judges’ Fall Conference  
October 19-21, 2015

RECEIVERSHIPS  
IN NORTH CAROLINA STATE COURTS

Ann M. Anderson, UNC School of Government

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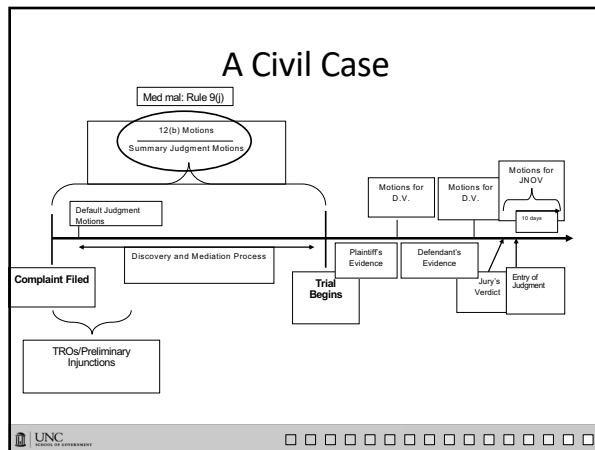
**Introduction**

A receiver is an individual or entity appointed by the court to “receive” a debtor’s property when the property is at risk of being lost, wasted, harmed, or devalued. The receiver’s job is to preserve and manage the property, or, in certain circumstances, liquidate the property and distribute the proceeds according to law. The receiver takes possession of the property essentially as an officer of the court and is “not appointed for the benefit of either party and does not derive...authority from either one.”<sup>1</sup> A receivership is an ancillary remedy; the court must first have jurisdiction over an underlying action to which the property relates.<sup>2</sup> Receiverships often are ordered in connection with a preliminary injunction restraining the defendant (debtor) from harming or disposing of the property. While courts have broad discretion to appoint receivers, receivership is considered a “harsh” remedy, to be used “only with attendant caution and circumspection.”<sup>3</sup>

The scope of a receivership will vary according to its purpose. In North Carolina,

## Motions to Dismiss Rule 12(b) (and 9(j))





## Quick Review

### Rule 9(j)

**The Law:**  
If a medical malpractice complaint does not contain the assertions required by Rule 9(j), it "shall be dismissed."

★ Must comply with Rule 9(j) prior to expiration of statute of limitations!

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Complaint dismissed unless...

- (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care; [or]
- (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint[.]

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## Rule 9(j) before Oct. 1, 2011

Complaint dismissed unless...

- (1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care; [or]
- (2) The pleading specifically asserts that the medical care has been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint[.]

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## Rule 9(j) after Oct. 1, 2011

Complaint dismissed unless...

- (1) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care; [or]
- (2) The pleading specifically asserts that the medical care and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by a person that the complainant will seek to have qualified as an expert witness by motion under Rule 702(e) of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care, and the motion is filed with the complaint[.]

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## Defective Rule 9(j) certifications

*Vaughn v. Mashburn* (N.C. App. Dec. 2016; N.C. 2018)

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707 S.E.2d 299 (Mem)  
Supreme Court of North Carolina.

Maria VAUGHAN  
v.  
Lindsay MASHBURN, M.D. and Lakeshore  
Women's Specialists, PC

No. 22/23

**ORDER**

Upon consideration of the petition filed on the 31st of January 2017 by Plaintiff in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to O.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals.

*...in conference, this the*

**REVERSED** ?




*"...a plaintiff...may file an amended complaint under Rule 15(a) to cure a defect in a Rule 9(j) certification when the expert review and certification occurred before the filing of the original complaint...[and]...such an amended complaint may relate back under Rule 15(c)"*

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## Defective Rule 9(j) certifications

*Fairfield v. Wakemed* (N.C. App. Oct. 2018)

Plaintiff files  
med mal  
complaint –  
Rule 9(j) cert,  
*but defective*



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16 empty square boxes



**Defective Rule 9(j) certifications**

*Fairfield v. Wakemed* (N.C. App. Oct. 2018)

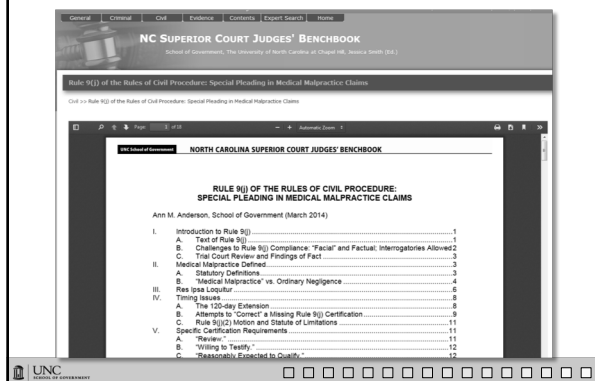
Here, Plaintiffs' use of the word "certain" instead of "all" in their complaint with regard to those medical records actually reviewed by their proposed expert witness constitutes a failure to adhere to Rule 9(j)'s specific requirements.

↓  
Statute of limitations expires

Affirmed.

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## Motions to Dismiss – 12(b)

- (1) Lack of subject matter jurisdiction
- (2) Lack of personal jurisdiction
- (3) Improper venue
- (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.

Raising an affirmative defense *sua sponte*  
*Unifund CCR, LLC v. Francois* (COA July 2018)



Ms. Francois incurred card debt in May 2013.

Unifund (debt buyer) sued to collect in Nov. 2016.  
 Obtained entry of default.

Default judgment hearing: DCJ **denied**. Outside statute of limitations.

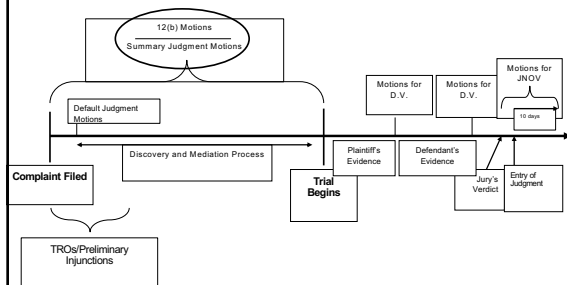
COA: REVERSED.

*"[T]rial courts have no authority to raise the statute of limitations defense on their own initiative; the defendant must assert this affirmative defense or it is waived."*

## Rules 12(b)(6) & Summary Judgment (56)



## A Civil Case



When is it appropriate to issue judgment on the merits without a trial?

## 12(b)(6) and Summary Judgment Comparison

### Motion to Dismiss for Failure to State a Claim (12(b)(6))

- Only tests whether complaint states a claim "upon which relief can be granted"
- Assumes allegations of complaint are true; does not look beyond complaint (and incorporated attachments)

### Motion for Summary Judgment (56)

- Looks to all the materials before the court to determine if there "is any issue of material fact." (Will there be anything for a jury to decide?)
- Examines the evidence in light most favorable to non-movant

## Little Lamb, Inc. v. Mary Exercise 2



## 12(b)(6)

### Motion to Dismiss for Failure to State a Claim (12(b)(6))

- Only tests whether complaint states a claim "upon which relief can be granted"
- Assumes ~~allegations of complaint~~ are true; does not look beyond complaint (and incorporated attachments)

**Narrow exception:** Court may consider an unattached copy of an "instrument [contract] upon which plaintiffs are suing" if referenced in the complaint. -Coley, 41 N.C. App. 121 (1979); Oberlin, 147 N.C. App. 52 (2001).

## Summary Judgment

- Motion served at least 10 days before hearing
- Adverse party allowed to serve opposing affidavits 2 days before hearing
  - If not, court may continue hearing.

## Summary Judgment

*"[A]dverse party may not rest upon the mere allegations or denials of his pleading, but..." must set forth specific facts showing that there is a genuine issue for trial."*

56(e)

## S.J. – Contradictory Testimony

*"If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."*

–Mortgage Co. v. Real Estate, Inc., 39 N.C. App. 1 (1978)

## S.J. – Contradictory Testimony

*Cousart v. Charlotte-Mecklenburg Hospital Authority*,  
209 N.C. App. 299 (2011).



## S.J. – Contradictory Testimony

18 April 2008 Depo:

Q: “And you can’t say to any reasonable degree of medical certainty as you sit here today that if fundal pressure was applied when shoulder dystocia was encountered with this delivery, that it caused the brachial plexus injury, can you?”

A: “I don’t think anybody can say that.” ... “One will never know if fundal pressure, given or not given, contributed.”



## S.J. – Contradictory Testimony

18 November 2008 Affidavit:

“If the legal standard is whether these departures from the standard of care [for example, fundal pressure] were a cause or substantial contributing factor to [the] brachial plexus injury, then I am of the opinion that these departures from the standard of care were a cause or contributing factor to [the] brachial plexus injury. ... [T]he use of fundal pressure would likely...be a cause or substantial contributing factor[.]”



## S.J. – Contradictory Testimony

18 November 2008 Affidavit:

“If the legal standard is whether these departures from the standard of care [for example, fundal pressure] were a cause or substantial contributing factor to [the] brachial plexus injury, then I am of the opinion that these departures from the standard of care were a cause or contributing factor to [the] brachial plexus injury. ... [T]he use of fundal pressure would likely...be a cause or substantial contributing factor[.]”



## S.J. – Contradictory Testimony

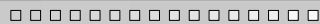
*Hawkins v. Emer. Med. Phys. Of Craven Cty*, 770 S.E.2d 159 (2015).

However, approximately one week before the calendared summary judgment hearing, Dr. Meredith, Dr. Strothers, and Dr. Stark executed separate affidavits in which each independently provided:

[I]n my opinion, starting this patient (Mr. Hawkins) on a course of Lovenox by Dr. Lavine was unquestionably a direct cause of his ultimate demise.

During the depositions, these expert witnesses did not opine on the issue of causation. Specifically, not suggested that Dr. Lavine’s conduct did cause or probably caused Mr. Hawkins’ death. In fact, when asked if he had an opinion on causation, Dr. Meredith expressly responded “no,” he did not have an opinion on the issue of causation. Despite this clear testimony, Dr. Meredith nevertheless testified in his affidavit that Dr. Lavine’s conduct “was unquestionably a direct cause of [Mr. Hawkins] ultimate demise.”

However, the conflict between the experts’ deposition testimony and their affidavits has created a credibility issue, not a genuine issue of material fact. See *id.* As such, it is improper for this Court to consider the affidavit testimony of the expert witnesses in determining whether plaintiff raised a genuine issue of material fact on the issue of proximate cause. We must now discern whether plaintiff submitted other proximate cause evidence to create a genuine issue of material fact.



## S.J. – Contradictory Testimony

*Unitrin Auto & Home Ins. Co. v. McNeill*, 716 S.E.2d 48 (N.C. App. 2011)

Issue: Did defendant sign a rejection form?

- Depo: A: “...it doesn’t look like my signature. ... [repeated]  
Q: “...Is that just so different that it just couldn’t be your signature?”  
A: “It could be my signature.”
- Affid: “Since my deposition was taken, I looked at this signature further and have also looked at a better copy of [the form]. I am now certain I did not sign this [form].”

NOT CONTRADICTORY



## Summary Judgment – Findings of Fact?

### Rule 52(a)(2):

- General Rule: Written findings of fact are not required in decisions on motions.
- Exception: When requested by a party, findings of fact are required.

## Summary Judgment – Findings of Fact?

### Rule 52. Findings by the court

#### (a) Findings –

(1) In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

(2) Findings of fact and conclusions of law are necessary on decisions of any motion or order ex mero motu only when requested by a party and as provided by Rule 41(b). Similarly, findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party.

## Summary Judgment – Findings of Fact?

BUT...

Certain types of motions *just can't* properly include findings of fact.



## Summary Judgment – Findings of Fact?

### • Summary judgment –

- The Court only determines *whether* there's a dispute of fact.
- Does not *resolve* the dispute (i.e., “find the facts”).



## Summary Judgment – Findings of Fact?

- So, no findings of fact in a summary judgment order, even if parties request it.
  - Also 12(b)(6), 12(c), directed verdict, JNOV
- Statement of undisputed facts = okay. Label them “undisputed.”

## Summary Judgment – Findings of Fact?

*“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.” – War Eagle (2010)*

(Reiterated in *Good Neighbors v. County of Rockingham*, 774 S.E.2d 902 (N.C. App. 2015))





## Rule 41(a) dismissal?

Market America, Inc.

- Hearing on motion and judgment
- At end of argument, announces intent to grant motions.
- A few hours later, voluntary dismissal.
- Trial judge vacates

"Once the trial court has informed the parties of its ruling against the plaintiff on the defendant's dispositive motion, Rule 41 does not permit the proceeding to devolve into a footrace between counsel to see whether a notice of voluntary dismissal can be filed before the court's ruling is memorialized in a written order and filed with the clerk of court. To hold otherwise would 'make a mockery of' the court's ruling."

Was the Rule 41 dismissal effective?

COA: Not effective. Bad faith exception to Rule 41(a)(1).

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NC SUPERIOR COURT JUDGES' BENCHMARK	
Voluntary Dismissals (Rule of Civil Procedure 41(a))	
NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHMARK	
VOLUNTARY DISMISSALS UNDER RULE 41(a): THE SAVINGS PROVISION AND THE "TWO DISMISSAL RULE"	
Ann M. Anderson, UNC School of Government (November 2014)	
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### Taking a Voluntary Dismissal: Some Pitfalls

This entry was contributed by Ann Anderson on March 18, 2015 at 5:00 am and is filed under Civil Practice, Civil Procedure, General.

The "savings" provision of North Carolina Rule of Civil Procedure 41(a) allows a plaintiff to voluntarily dismiss its case without prejudice before it rests its case. Plaintiff may file the notice of dismissal at any time before the case is set for trial. The limitations on its claim is extended for that refiling. It can be a tricky business. If done improperly, it can be a costly mistake.

The "two-dismissal" rule. If a party has previously dismissed its case, it cannot file a new case without the court's permission. If a party has voluntarily dismissed its case, it cannot file a new case without the court's permission. If a party has voluntarily dismissed its case, it cannot file a new case without the court's permission.

More on Voluntary Dismissals: Consequences of Inadequate Pleading

This entry was contributed by Ann Anderson on July 15, 2015 at 5:00 am and is filed under Civil Practice, Civil Procedure, General.

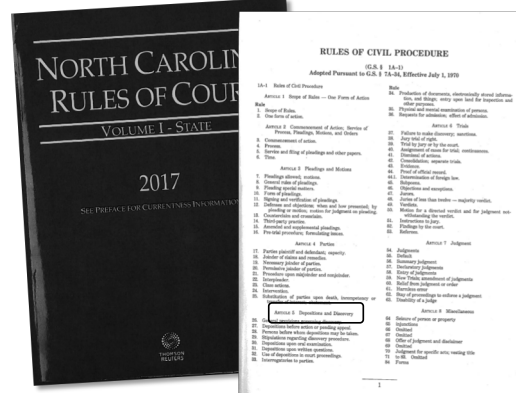
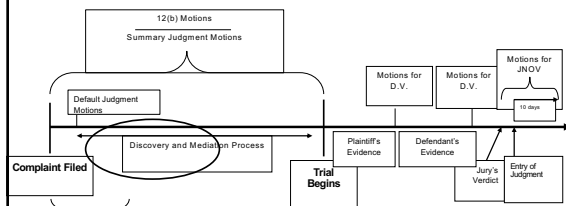
In an earlier post, I talked about some of the deficiencies in a complaint that can prevent a party from taking advantage of the statute of limitations extension in Rule 41(a). In short, if a party voluntarily dismisses without prejudice a claim for which the underlying statute of limitations has expired, and—until it comes out—the complaint was never timely served or was not properly "dismissed," the refiled action is subject to dismissal with prejudice. Last week, the Court of Appeals affirmed on this point, holding that Rule 41(a)'s savings provision does not extend the statute of limitations in a case that failed to satisfy Rule 8(a)'s notice pleading rule.

In *Middleton v. Middleton*, a man died of carbon monoxide poisoning while he was sleeping in a barn. The barn was owned by the defendant. The wrongful death complaint alleged that defendant had been negligent in maintaining, installing, and selling the propane tank that was installed in the barn and in the defendant's negligence, carelessness, recklessness, and/or willfulness of defendant. The plaintiff voluntarily dismissed the complaint and refiled within the one-year statute of limitations. The Court of Appeals affirmed the trial court's judgment that the original complaint's allegations were too bare to constitute a "notice pleading" under Rule 8(a).

## Sanctions (Discovery, Rule 11)



## A Civil Case



## Discovery Methods

- Depositions (Rules 30-32)
- Interrogatories (Rule 33)
- Requests for Production of Documents (Rule 34)
- Physical and Mental Examination of Persons (Rule 35)
- Requests for Admission (Rule 36)



## Discovery Sanctions

### Rule 37: Enforcing the Rules

- Orders compelling discovery
  - When a party responds to a request, but incompletely, evasively, or without candor.
- Sanctions
  - When a party:
    1. Just simply didn't respond; or
    2. Didn't comply with prior order compelling discovery.

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NC SUPERIOR COURT JUDGES' BENCHBOOK  
School of Government, The University of North Carolina at Chapel Hill, Justice South 001

Civil Discovery Sanctions

Civil v. v. Civil Discovery Sanctions

NC School of Government NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK

CHART OF CIVIL DISCOVERY SANCTIONS UNDER RULE 37

Ann M. Anderson, UNC School of Government (January 2012)

BASIS OF MOTION FOR SANCTIONS	SANCTIONS AVAILABLE	ATTORNEY FEES, EXPENSES
<b>Rule 37(a)(2), (3)</b> Failure to: • Answer a question posed at a deposition or propounded in writing. Rule 36, 31. • Designate a person to be deposed on behalf of corporate party. Rule 30(b)(6). • Answer an interrogatory or serve a candid complete answer. Rule 33.	<b>Rule 37(a)</b> Court may make order compelling failing party to properly respond. (Notes) • Party moving to compel must include certification that it has in good faith attempted to confer with the non-movant to obtain the materials before resorting to court action. • If party fails to comply with this order compelling...	<b>Rule 37(a)(4)</b> • If motion granted, court shall order non-complying party to pay reasonable expenses and attorney fees incurred in obtaining order unless court finds the failure was (a) substantially justified, or (b) that other circumstances make award unjust. • If motion denied, court shall order movant to pay expenses and attorney fees incurred in...

## *Little Lamb, Inc. v. Mary* Exercise 3



## Discovery Sanctions

- Within the sound discretion of the trial court.
- Reviewed for abuse of discretion.
  - *Baker v. Charlotte Motor Speedway, Inc.*, 180 N.C. App. 296, 299 (2006).



## Discovery Sanctions

But...

- When the sanction is “outcome determinative”, ***“the [trial] court must first consider less severe sanctions.”***
  - Dismissal of a claim. *Fayetteville Publishing*, 192 N.C. App. 419 (2008)
  - Striking an answer. *Rosner*, 197 N.C. App. 604 (2009)
  - Striking defenses/counterclaims. *Clawser*, 184 N.C. App. 526 (2007).



## “Lesser Sanctions”

- Put your “consideration of lesser sanctions” on the record.
  - In transcript.
  - In written order.



## “Lesser Sanctions”

- Sample language:

*“[t]he Court has carefully considered each of [the party’s] acts [of misconduct], as well as their cumulative effect, and has also considered the available sanctions for such misconduct. After thorough consideration, the Court has determined that sanctions less severe than dismissal would not be adequate given the seriousness of the misconduct....”*

*In Re Pedestrian Walkway Failure*, 173 N.C. App. 237 (2005).



## “Lesser Sanctions”

*Need not “list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate.”*

– *Badillo v. Cunningham*, 177 N.C. App. 732 (2006).



## “Lesser Sanctions”

Tip: The “lesser sanctions” rule also applies to “dismissals for failure to prosecute” under Rule 41(b).

- See Survival Guide: Civil – “**RULE 41(b) DISMISSAL FOR FAILURE TO PROSECUTE**” (September 2010)



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- “Every pleading, motion, or other paper”
- Signature “constitutes a certificate” that, “to the best of his knowledge, information, and belief formed after reasonable inquiry it is:
  - **Well grounded in fact, and**
  - **Warranted by existing law or good faith argument for extension, modification, or reversal of existing law, and**
  - **Not interposed for any improper purpose.**

**Rule 11. Signing and verification of pleadings.**

(a) **Signing by Attorney** – Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it

"[A more specific rule governing sanctions [for] discovery responses is the proper avenue for sanctioning such improper conduct. *Brooks v. Giesey*, 334 N.C. 303 (1993).

- ✓ Letters to the court
- ✓ Affidavits (probably)
- ✓ Briefs
- ✗ Discovery responses

## Rule 26(g)

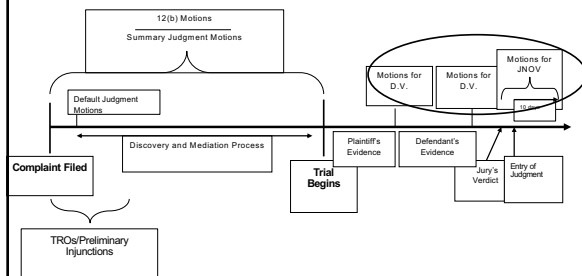
(g) Signing of discovery requests, responses, and objections—Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in that attorney's name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state that party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the request, response, or objection and that the request, response, or objection is not signed by that attorney or party for the purpose of harassing or annoying another party. If a request, response, or objection is not signed by an attorney or party, the court, on its own motion or after a responsive motion is filed, may: (1) consistent with the rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake, order that the request, response, or objection be signed by an attorney or party, or that the request, response, or objection be dismissed or the omission be called to the attention of the party making the request, response, or objection, and that a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

# Directed Verdict, JNOV, and New Trial Rules 50, 59



## A Civil Case



## Relief from Judgment in North Carolina Civil Cases

2015

Ann M. Anderson



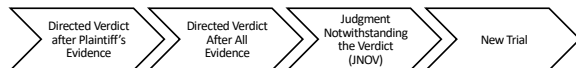
When is it appropriate to take the case away from the jury once trial is underway (and after verdict)?

## Directed Verdict and New Trial



Standard: Evidence of plaintiff provides no basis for jury to decide in plaintiff's favor. (There's not "more than a scintilla of evidence" in plaintiff's favor.)

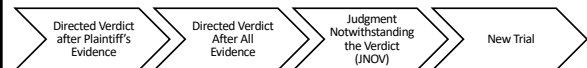
## Directed Verdict and New Trial



Standard: After all evidence, no basis in evidence for jury to decide in favor of non-movant. (Again, there's not "more than a scintilla of evidence" in non-movant's favor.)

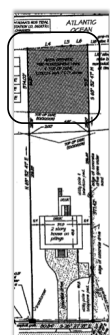
Necessary in order to preserve right to move for JNOV.

## Directed Verdict and New Trial



Standard: Same as directed verdict. (It is a "renewal" of the directed verdict motion.)

Must be made within 10 days of entry of judgment.



### Nags Head v. Richardson (COA July 2018)

Town filed condemnation of temporary easement for beach renourishment.

Jury verdict: 60K for value of easement

Trial court granted JNOV (on own motion, sort of) after concluding that Town was already entitled to access through the **public trust doctrine**.

(See p. 24)

COA: REVERSED.

JNOV is a **renewal** of a directed verdict motion. No JNOV on grounds **not asserted** by the movant at directed verdict.

## Directed Verdict and New Trial



Standard: Grounds listed in 59(a).

Motion must be **served** within 10 days of entry of judgment.

Often combined with JNOV. Court must rule on both. 59(c)(1).



## New trial grounds (59(a))

(4) Grounds.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

- (1) Any irregularity by which any party was prevented from having a fair trial;
- (2) Misconduct of the jury or prevailing party;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
- (5) Manifest disregard by the jury of the instructions of the court;
- (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;
- (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
- (8) Error in law occurring at the trial and objected to by the party making the motion, or
- (9) Any other reason heretofore recognized as grounds for new trial.

## Little Lamb, Inc. v. Mary Exercise 4



## Decision Chart

Court's Conclusion	Evidence insufficient to support a verdict for plaintiff.	Evidence strongly favors defendant, but some evidence for plaintiff.	Evidence does not clearly weigh in favor of either party.	Evidence strongly favors plaintiff, but some evidence for defendant.	Evidence for plaintiff is uncontroverted (met burden as a matter of law).
	Court should grant d.v. for defendant. (Should grant JNOV for defendant if verdict is for plaintiff.)	Court should deny d.v. and JNOV motions.* May consider granting new trial for defendant if verdict is for plaintiff.	Court should deny d.v. and JNOV motions.	Court should deny d.v. and JNOV motions. May consider granting new trial for plaintiff if verdict is for defendant.	Court should grant d.v. for plaintiff.** (Should grant JNOV for plaintiff if verdict is for defendant.)

\* This diagram assumes a jury trial. In a non-jury trial, the court, as finder of fact, may grant a Rule 41(b) dismissal for defendant at close of plaintiff's evidence even where the plaintiff has presented evidence that would be sufficient to take to a jury.  
\*\* This is a rare occurrence. A court should take extra caution when granting directed verdict or JNOV for the party with the burden of proof.

## JNOV and Punitive Damages

### JNOV standard:

- Whether there was “more than a scintilla” of evidence to support the jury’s verdict.
- Viewing the evidence in the light most favorable to the non-movant.
- Same standard as directed verdict.

## JNOV and Punitive Damages

### JNOV on a punitive damages verdict:

“Whether the non-movant produced ‘clear and convincing evidence’ by which the jury could find one of the aggravating factors necessary for punitive damages—fraud, malice, or willful/wanton conduct.”

*Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 693 S.E.2d 640 (2009).

## JNOV and Punitive Damages

- In making its decision to deny or grant a JNOV on a punitive damages claim, the trial court must issue a written opinion as set forth in 1D-50, or the case will be remanded to the trial court upon appeal.

*Springs v. City of Charlotte*, No. COA-839 (N.C. App. Jan. 18, 2011); *Hudgins v. Wagoner*, 694 S.E.2d 436, 447–48 (N.C. App. June 15, 2010).

## JNOV and Punitive Damages

### § 1D-50. Judicial review of award.

When reviewing the evidence regarding a finding by the trier of fact concerning liability for punitive damages in accordance with G.S. 1D-15(a), or regarding the amount of punitive damages awarded, the trial court shall state in a written opinion its reasons for upholding or disturbing the finding or award. In doing so, the court shall address with specificity the evidence, or lack thereof, as it bears on the liability for or the amount of punitive damages, in light of the requirements of this Chapter. (1995, c. 514, s. 1.)

## Rule 59(a) grounds

(a) Grounds.—A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

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- (6) Inadequacy of the evidence to justify the verdict or that the verdict is contrary to law;
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- (7) Inadequacy of the evidence to justify the verdict or that the verdict is contrary to law;
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- (9) Any other reason heretofore recognized as grounds for new trial.

ALSO: Must have been materially prejudicial error.

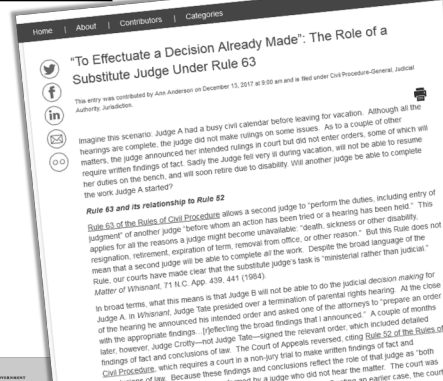
### Rule 63. Disability of a judge.

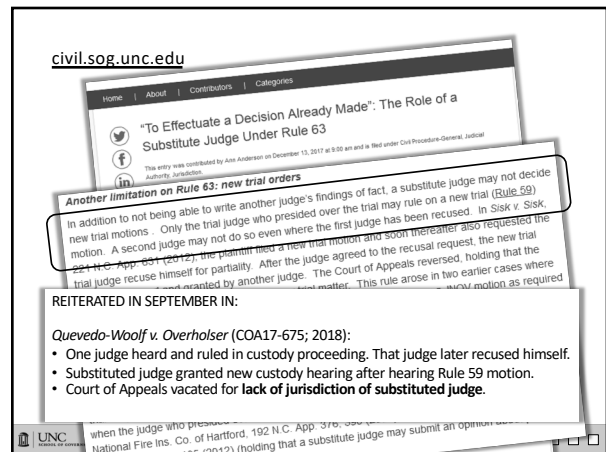
If by reason of death, sickness or other disability, resignation, retirement, expiration of term, removal from office, or other reason, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, including entry of judgment, may be performed:

- (1) In actions in the superior court by the judge senior in point of continuous service on the superior court regularly holding the courts of the district. If this judge is under a disability, then the resident judge of the district senior in point of service on the superior court may perform those duties. If a resident judge, while holding court in the judge's own district suffers disability and there is no other resident judge of the district, such duties may be performed by a judge of the superior court designated by the Chief Justice of the Supreme Court.
- (2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.

If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing. (1967, c. 954, s. 1; 2001-379, s. 7.)

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## What about bench trials?

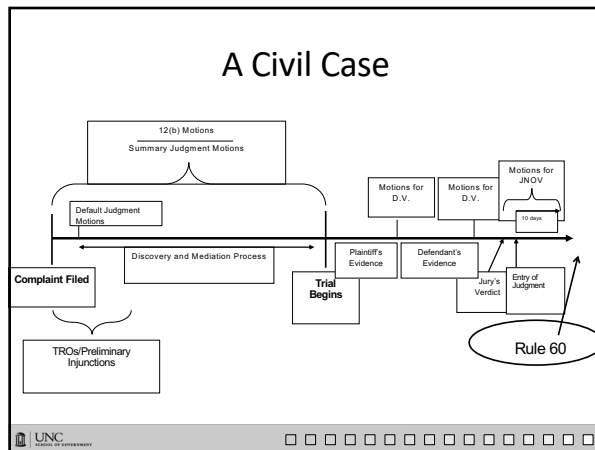
### Rule 41(b)



## Relief from Judgment (Rule 60)

- In a non-jury trial, the judge may render a decision against plaintiff after plaintiff rests, even if the evidence would be sufficient to go to a jury.
  - Very different than the standard for directed verdict in jury trials.
  - Court must make written findings of fact and conclusions of law. Rule 52(a)(1).





### Rule 60(b)

- Relief from a “final judgment, order, or proceeding” for reasons relating to circumstances:
  - (1) Mistake, inadvertence, surprise, or excusable neglect;
  - (2) Newly discovered evidence which by due diligence could not have been discovered in time for new trial motion;
  - (3) Fraud, misrepresentation, or other misconduct of an adverse party;

### Rule 60(b)

- (4) Judgment is void;
  - (5) Judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or vacated, or it is no longer equitable that the judgment have prospective application; or
- (6) Any other reason justifying relief from the operation of the judgment.

### *Little Lamb, Inc. v. Mary* Exercise 6



### 60(b)(6)

- “Grand reservoir of equitable power to do justice in a particular case.”
- ~~Catch-all~~

### 60(b)(6)

Requires:

- Extraordinary circumstances
- That “justice demands it”
- Movant must have “meritorious defense.”

*Gibby v. Lindsey*, 149 N.C. App. 470 (2002); *Oxford Plastics v Goodson*, 74 N.C. App. 256 (1985).

## 60(b)(6)

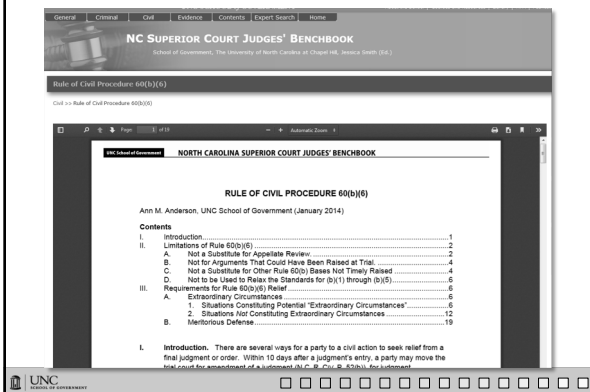
- Cannot be used to circumvent requirements for 60(b)(1) to (b)(5).
  - For example: If argument is newly-discovered evidence, and more than 1 year has passed, cannot make same argument under (b)(6).  
*Bruton v. Sea Captain Prop., Inc.*, 96 N.C. App. 485 (1989).

## 60(b)(6)

### KEY POINTS:

- NOT to be used to correct errors of law.  
*Catawba Valley Bank v. Porter*, 188 N.C. App. 326 (2008); *Hagwood v. Odom*, 88 N.C. App. 513 (1988).
- NOT a substitute for appellate review or motions for new trial. *Id.*; *Jenkins v. Richmond Cty*, 118 N.C. App. 166 (1995).

<http://benchbook.sog.unc.edu/>



[www.civil.sog.unc.edu](http://www.civil.sog.unc.edu)



## Rule 60 – Effect of Appeal

- Once appeal is filed, trial court divested of jurisdiction to decide Rule 60(b) motion.
  - *Sink v. Easter*, 288 N.C. 183 (1975).
- If an appeal withdrawn, jurisdiction regained.
  - *York v. Taylor*, 79 N.C. App. 653 (1986).
- If appeal pending, trial court may conditionally determine how it would rule (if Court of Appeals remands for that determination.) – *Hall v. Cohen*, 177 N.C. App. 456 (2006).

(See p. 225.)

