


Civil Procedure Update

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Roadmap

- Punitive damages
- Voluntary and involuntary dismissals
- Jury selection
- Issue preclusion
- Statutes of limitation
- Personal jurisdiction






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Punitive Damages

- *Daniel Jones v. J. Kim Hatcher Insurance Agencies*, ___ N.C. ___, ___ S.E.2d ___, 2025 WL 1479229 (May 23, 2025)
 - Rule: 9(k)
 - G.S. 1D-15



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The pond in question



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Then came Hurricane Florence



Downed trees, floodwaters, power outages wreak havoc



Deluged: Florence swamps the Carolinas

Hurricane Florence, the first major hurricane to strike the Southeast since 2017, is expected to hit the Carolinas as a Category 4 storm on September 14. The storm is expected to bring heavy rain, flooding, and strong winds. The National Hurricane Center has issued a Category 4 warning for the Carolinas. The storm is expected to hit the coast near Wilmington, North Carolina. The storm is expected to bring heavy rain, flooding, and strong winds. The National Hurricane Center has issued a Category 4 warning for the Carolinas.

Florence by the numbers	
UNC rainfall average	35.93
2017	34
2016	34.96
2015	36.38
2014	25.91
2013	23.20
2012	25.04

Image courtesy Wilmington Star-News

Image courtesy News & Observer

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Notice pleading

“A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief ... ”

Rule 8(a)(1)

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Rule 9(k) modifies the general rule

“A demand for punitive damages shall be specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity. The amount of damages shall be pled in accordance with Rule 8.”

Aggravating Factor, G.S. 1D-15(a)

Claimant must prove liability for compensatory damages for the same injury plus aggravating factor:

- (1) Fraud
- (2) Malice
- (3) Willful or wanton conduct

Willful or wanton conduct

“[T]he conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm. ‘Willful or wanton conduct’ means more than gross negligence.”

G.S. 1D-5(7)

But see Rule 9(b)

Fraud, duress, mistake, condition of the mind. - In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

A Tension in Rule 9

- To state a claim for punitive damages, willful or wanton conduct must be pleaded with particularity. Rule 9(k).
- Willful or wanton conduct involves “conscious and intentional disregard ... which the defendant knows ...” G.S. 1D-5(7).
- Malice, intent, knowledge, and other condition of mind of a person may be averred generally. Rule 9(b).

Not an exception to notice pleading

“[N]otice pleading principles apply to the specific pleading requirements for a demand for punitive damages.”

Jones v. J. Kim Hatcher Insurance Agency, slip op. at 20.

Not incorporated by Rule 9(k)

Punitive damages shall not be **awarded** against a person solely on the basis of vicarious liability for the acts or omissions of another. Punitive damages may be awarded against a person only if that person **participated** in the conduct constituting the aggravating factor giving rise to the punitive damages, or if, **in the case of a corporation**, the officers, directors, or managers of the corporation **participated in or condoned** the conduct constituting the aggravating factor giving rise to punitive damages.

G.S. 1D-15(c)

Voluntary and involuntary dismissal

- *Cowperthwait v. Salem Baptist Church, Inc.*, 386 N.C. 580 (Oct. 18, 2024)
 - Rule 41(a)(1)
 - Rule 41(b)
- *Jones v. Catholic Charities of the Diocese of Raleigh, Inc.*, ___ N.C. App. ___, 909 S.E. 2d 512 (Nov. 5, 2024)
 - Rule: 41(b)

Cowperthwait

- Trial judge grants defendant's motion to dismiss for failure to prosecute orally in open court.
- Before any written order is entered, counsel for plaintiff files Notice of Voluntary Dismissal Without Prejudice under Rule 41(a)(1).



Cowperthwait

- Defendant moves to set aside the voluntary dismissal; trial court grants motion.
- Trial court enters written order dismissing case for failure to prosecute under Rule 41(b)

Two questions

- Did the trial court err in vacating the Rule 41(a)(1) notice of voluntary dismissal without prejudice?
- Did the trial court abuse its discretion in dismissing the case under Rule 41(b)?

Rule 41(a)(1)

“[A]n 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... the dismissal is without prejudice ...”

Rule 41(a)(1)

"The only limitations are that the dismissal not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial." *Brisson v. Santoriello*, 351 N.C. 589, 597 (2000).

Rule 41(b) appellate history

- In *Cowperthwait*, the trial court dismissed the complaint under Rule 41(b).
- The Court of Appeals reversed the trial court. A minority opinion was filed concurring with the Rule 41(a)(1) result and dissenting from the Rule 41(b) issue.
- The Supreme Court adopted the concurrence and dissent and reversed the Court of Appeals.

Rule 41(b)

"For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him."

Rule 41(b) failure to prosecute

- (1) whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter;
- (2) the amount of prejudice, if any, to the defendant; and
- (3) the reason, if one exists, that sanctions short of dismissal would not suffice.

Wilder v. Wilder, 146 N.C. App. 574, 578 (2001)

Trial court order

- Included findings about Plaintiffs' promises to produce medical records and failure to respond to discovery requests
- Trial court considered whether sanctions short of dismissal would suffice: "the adverse effects of witness availability and faded memories that inevitably accompany lengthy periods of time cannot be reversed. Nor should the trial court be expected to carry a personal injury action over multiple terms due to failure in prosecution."
Wilder, 290 N.C. App. at 271 (cleaned up).

Jones v. Catholic Charities of the Diocese of Raleigh, Inc. (p.5)

- COA case applying the *Wilder* factors
- The injuries to Plaintiff occurred in 1967 and 1969. SAFE Child Act revived claims.
- Plaintiff took six months to serve the summons on the Defendants.
- Counsel for Plaintiff had served Defendants in other suits under the same law, "including one filed in the same county 32 minutes prior to this action," proving intent to delay.

Jones v. Catholic Charities of the Diocese of Raleigh, Inc.

- Trial court found unreasonable delay by Plaintiff: "Defendants assert they were not aware of this claim while preparing to defend against other pending cases brought under the SAFE Child Act."
- Trial court also found no sanction short of dismissal will suffice.
- Rule 41(b) dismissal affirmed.

Issue preclusion

- *Fish v. Stetina*, ____ N.C. App. ____, 919 S.E.2d 236 (Feb. 19, 2025)
 - Issue preclusion
 - Law of the case

Two trial court cases in *Fish*

First case

- Alienation of affection
 - Survives Summary Judgment
 - Voluntarily dismissed by the plaintiff "without prejudice"
- Criminal conversation
 - Summary judgment granted to defendant

Second case

- Alienation of affection
 - Jury renders verdict for plaintiff
 - Evidence of GPS data and phone call data submitted to jury

GPS data

- Plaintiff offered in trial of second case to prove alienation of affection
- On appeal, defendant argued that admitting this evidence means re-litigating pre-separation sex

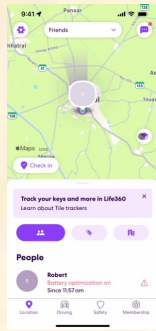
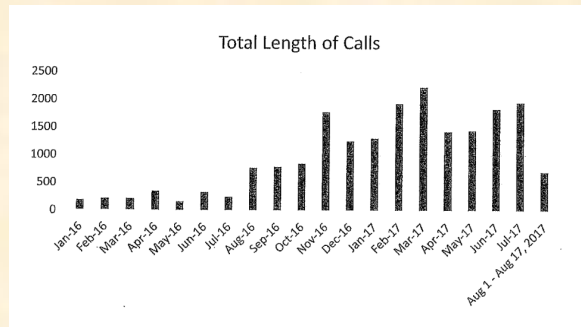


Image courtesy Life360

Phone call data



Two doctrines that prohibit re-litigating issues

Issue Preclusion

- Prevents re-litigation in future lawsuit (different trial court docket number)

Law of the Case

- Prevents re-litigation in same lawsuit (same trial court docket number)

Issue Preclusion

(collateral estoppel or estoppel by judgment)

- (1) prior suit resulting in final judgment on merits
- (2) identical issues
- (3) issue actually litigated in prior suit and necessary to judgment
- (4) issue actually determined

Fish, briefly

- Evidence and issues are not the same.
- Evidence probative of an issue that has already been litigated is not always inadmissible ...
- ... the question is whether the issue is re-litigated in the second suit.

An aside on Rule 41(a)(1)

- “[A]n 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**... the dismissal is without prejudice ... ”
- Includes a plaintiff resting its case on summary judgment. *Troy v. Tucker*, 126 N.C. App. 213, 216 (1997).

Jury selection

- *Warren v. Bonner*, 922 S.E.2d 303 (Jan. 15, 2025)
- Case of first impression before the Court of Appeals
- Statute: G.S. 9-19



Image courtesy of the University of North Dakota



Image courtesy of the University of North Dakota

Warren v. Bonner

- The issue: “[w]hether North Carolina's statutes governing civil litigation authorize peremptory challenges after a jury has been impaneled[.]”

911 S.E.2d at 305.

G.S. 9-19: peremptory challenges

“The clerk, before a jury is impaneled to try the issues in any civil suit, shall read over the names of the prospective jurors in the presence and hearing of the parties or their counsel; and the parties, or their counsel for them, may challenge peremptorily eight jurors without showing any cause therefor, and the challenges shall be allowed by the court.”

Peremptory challenges

“A peremptory challenge is a challenge which may be made or omitted according to the judgment, will, or caprice of any party entitled thereto, without assigning any reason therefor, or without being required to assign a reason therefor.”

State ex rel. Freeman v. Ponder, 234 N.C. 294, 299 (1951) (cleaned up).

Peremptory challenges, cont'd

"To allow a party to challenge peremptorily a juror after he has accepted him, or after he has accepted the twelve, would give the plaintiff the manifest advantage that, if doubtful of using his peremptory challenge, he can wait to see if the other side will not challenge them peremptorily or for cause ..."

Dunn v. Wilmington & W. R. Co., 131 N.C. 446 (1902)

Warren adopts *Dunn's* reasoning

- Trial court may reopen *voir dire* in its discretion and allow challenges for cause
- But trial court may not allow peremptory challenges after impaneling
- Criminal law does not apply: "the life and liberty considerations" are not present in civil cases

Selection of alternate jurors

- Governed by Chapter 9, Art. 2 and 3
 - G.S. 9-18(a): alternates in civil cases
 - G.S. 9-18(b): alternates in criminal cases to be governed by Chapter 15A, Article 72

Jury selection

- G.S. 9-18(a): “An alternate juror ... shall be discharged upon the final submission of the case to the jury. If before that time any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel.”

Statute of limitations

- *McKinney v. Goins*, 387 N.C. 35 (Jan. 31, 2025)
 - Statutes of limitations generally
 - Law of the Land clause

McKinney v. Goins

- Issue: does the North Carolina Constitution prohibit the legislature from passing a law reviving time-barred tort claims?
- As the Supreme Court puts it: “does the expiration of a tort claim's statute of limitations create a constitutionally protected vested right?” *McKinney*, 387 N.C. at 37.

SAFE Child Act, Sec. 4.2(b)

“

Effective from January 1, 2020, until December 31, 2021, this section revives any civil action for child sexual abuse otherwise time-barred under G.S. 1-52 as it existed immediately before the enactment of this act.

Presumption of Constitutionality

“[A] constitutional limitation on the General Assembly must be explicit in the text and demonstrated beyond a reasonable doubt.”
McKinney, 387 N.C. at 42.

Law of the Land clause

“

No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.

N.C. Const., art. I, § 19

Statutes of Limitations

“Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover.”

Boudreau v. Baughman, 322 N.C. 331, 340 (1988).

Ex Post Facto clause

“

Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted.

N.C. Const. art. I, § 16

Substantive due process

The majority held that a substantive due process analysis is “inappropriate in the context of North Carolina’s vested rights doctrine.” *McKinney*, 387 N.C. at 59.

Res Judicata

- *Doe 1K v. Roman Catholic Diocese of Charlotte*, 387 N.C. 12 (Jan 31, 2025)
- While the legislature has the authority to extend a statute of limitations, it does not have the authority to set aside a final judgment of the court.

Personal jurisdiction: Rule 4

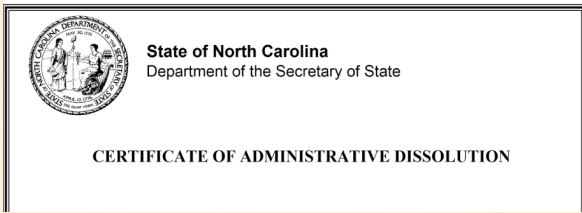
- *Russell v. Taylor*, COA24-745 (June 4, 2025)
 - Rule: 60
 - Rule 4(i)

2021 Dodge Durango Hellcat



Michael Simari, *Car and Driver*

The problem



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Personal jurisdiction

“For a court to obtain personal jurisdiction over a defendant, a summons must be issued in the name of that individual and service of process secured on that individual by one of the statutorily specified methods.”
Russell, slip op. at 4.

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Rule 4(i)

- Allows amendment of summons to correct a misnomer
- Does not allow amendment of summons to substitute a different party
- Even if a person is served in their capacity as a registered agent with a summons naming an entity, the court does not have personal jurisdiction over that person in their individual capacity.

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Personal jurisdiction

- *Ferris v. North Carolina Board of Architecture*, ____ N.C. App. ____, 910 S.E.2d 1 (Nov. 19, 2024)
 - Petition for judicial review
 - Strict compliance with service requirements necessary for superior court to acquire personal jurisdiction over parties to appeal from administrative agency
 - Page 6 of manuscript

Service after admin. appeal

"Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings." G.S. 150B-46.

Discretion to extend

"[T]he superior court has the authority to grant an extension in time, for good cause shown, to a party to serve the petition beyond the ten days provided for under G.S. 150B-46." *NC Dep't of Pub. Safety v. Owens*, 245 N.C. App. 230, 234 (2016).
