Civil Procedure Basics

UNC SCHOOL OF GOVERNMENT

1

(919) 843-2032

jlaizure@sog.unc.edu

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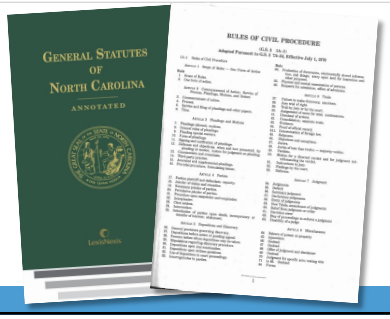
N.C. Rules of Civil Procedure

N.C.G.S. § 1A-1
N.C.G.S. Chapter 1



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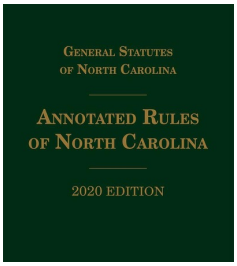
Other Sources



- General Rules of Practice for the Superior and District Courts
- Local Rules adopted by Senior Resident Superior Court Judges
- North Carolina Civil Procedure by G. Gray Wilson (secondary)

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Scope of the Rules

N.C. R. Civ. P. – Rule 1

"These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute. They shall also govern the procedure in tort actions brought before the Industrial Commission except when a differing procedure is prescribed by statute."

FRCP – Rule 1

"These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

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Purpose

"[I]t is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities."

Mangum v. Surles, 281 N.C. 91, 99 (1972).

"Technicalities and form are to be disregarded in favor of the merits of the case. One of the purposes of the rules was to take the sporting element out of litigation. ... The rules are designed to eliminate legal sparring and fencing and surprise moves of litigants."

Lemons v. Old Hickory Council, Boy Scouts of Am., Inc., 322 N.C. 271, 275 (1988).

"The aim is to achieve simplicity, speed and financial economy in litigation."

Lemons v. Old Hickory Council, Boy Scouts of Am., Inc., 322 N.C. 271, 275 (1988).

6

Purpose

"It was the intent of the General Statutes Commission that drafted the civil rules to develop a scheme under which cases could be disposed of on the merits and not on the basis of procedural errors."

1 G. Gray Wilson, *North Carolina Civil Procedure* § 1–2, at 2 (2d ed. 1995).

"[T]he Rules of Civil Procedure promote the orderly and uniform administration of justice…"

Goins v. Puleo, 350 N.C. 277, 281 (1999).

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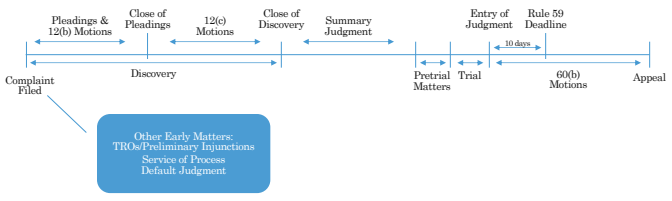
Life of a Civil Case



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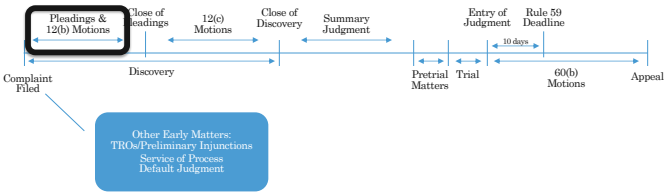
Initiation and Pleadings



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Rule 3

"A civil action is commenced by filing a complaint with the court."

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Rule 3

"A civil action is commenced by filing a complaint with the court."

12

Rule 7 – Pleadings Allowed

Complaint
Answer
Reply to a Counterclaim
Answer to a Crossclaim
Third-Party Complaint
Third-Party Answer
Reply to Answer or Third-Party Answer (if permitted)

13

Rule 8 – Notice Pleading

(a) Claims for relief. – A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain

(1) 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; and

(2) A demand for judgment for the relief to which he deems himself entitled.

But see N.C.G.S. § 1A-1, Rule 9

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Rule 9 – Pleading Special Matters

9(b): 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.

9(g): When items of special damage are claimed each shall be averred.

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Rule 9(j) – Medical Malpractice

(j) Medical malpractice. – Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)(a). in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be 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;

(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; or

(3) The pleading alleges facts establishing negligence under the existing common-law doctrine of res ipsa loquitor.

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Rule 12 – Answers

(a) (1) When Presented. – A defendant shall serve his answer within 30 days after service of summons of the complaint upon him. . . . Service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

a. 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 the trial on the merits;

b. If the court grants a motion for a more definite statement, the responsive pleading shall be served within 20 days after service of the more definite statement.

Note: A defendant can file an answer at any time until entry of default by the clerk. *See Peebles v. Moore*, 302 N.C. 351 (1981).

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Rule 8 – General Rules of Pleadings

(b) Defenses; form of denials – A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial.

(c) Affirmative defenses – In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, truth in actions for defamation, usury, waiver, and any other matter constituting an avoidance or affirmative defense.

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Raising Affirmative Defenses *Sua Sponte*

- "[T]he statute of limitations is a technical defense, and must be timely pleaded or it is deemed waived." *Gragg v. W. M. Harris & Son*, 54 N.C. App. 607, 609 (1981).
- Trial courts have no authority to raise the statute of limitations defense on their own initiative; the defendant must assert this defense or it is waived. *Unifund CCR, LLC v. Francois*, 260 N.C. App. 433, 445 (2018).

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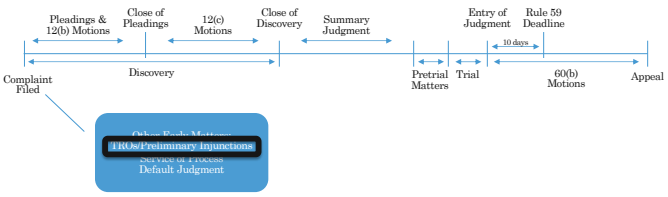
TROs and Preliminary Injunctions



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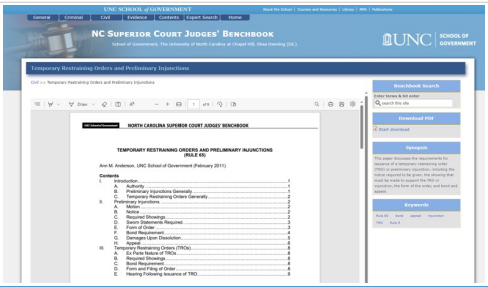
N.C. Superior Court Judges' Benchbook

A helpful resource to reference when handling TROs/PIs



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TROs vs Preliminary Injunctions

Temporary Restraining Orders	Preliminary Injunctions
May be issued ex-parte under limited circumstances.	Issued after a hearing where both parties have had notice and an opportunity to be heard.
Short-term relief until a hearing.	Relief until the litigation ends.

TROs and Preliminary Injunctions are forms of temporary, ancillary relief.
This means they:

- Will dissolve if the case is dismissed.
- Are not final orders/adjudications.
- Cannot be granted unless the plaintiff has stated a separate civil cause of action.

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Rule 65 – TROs

A TRO may be granted without written or oral notice to the adverse party or that party's attorney if:

- It clearly appears from specific facts shown by affidavit or verified complaint that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or that party's attorney can be heard in opposition; and
- The movant's attorney certifies to the court in writing the efforts, if any, that have been made to give the notice and the reasons supporting the claim that notice should not be required.

Court must have subject matter jurisdiction over the underlying action. TRO signed before the filing of the complaint is void.

23

Rule 65 – TRO Requirements

Every TRO must:

- Define the injury and state why it is irreparable.
- State why the order was granted without notice.
- State the exact time of expiration, not to exceed 10 days.
- Set forth the reasons for its issuance.
- Be specific in terms.
- Describe in reasonable detail, and not by reference to the complaint or other document, the acts or acts enjoined or restrained.
- Consider requiring that the movant provide a proposed order.

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Rule 65 – TRO Time Limits

- The TRO cannot exceed 10 days and will expire automatically.
- May be extended for good cause shown only for an additional 10-day period, unless the party against whom the order is directed consents that it may be extended for longer.
- On 2-day notice to party who obtained the TRO or on such shorter notice as the judge may prescribe, the adverse party may appear and move for dissolution or modification. "[I]n that event, the judge shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

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Rule 65 – Practical Pointers

- The TRO must also set a date and time (within the 10-day life of the TRO) for a hearing on a Preliminary Injunction.
- If possible, order that the hearing on the Preliminary Injunction come before you. If you set the Preliminary Injunction hearing before another judge, show that judge the courtesy of a telephone call to advise them of the case.
- Encourage parties to work out consent TRO.
- Ask counsel about limited expedited discovery.
- If you are the "follow on" judge, how would you like to inherit the file?

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Rule 65 – Preliminary Injunctions

(a) Preliminary injunction; notice. – No preliminary injunction shall be issued without notice to the adverse party.

- Where a motion for preliminary injunction is made, "it shall be set down for hearing at the earliest possible time and takes precedence over all maters except older matters of the same character." Rule 65(b).
- A judge may convert a TRO to a preliminary injunction or dissolve it. If the TRO is dissolved, the judge may award damages to the restrained party. Rule 65(e).

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Rule 65 – TRO and PI Bonds

(c) Security. – No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

No security required for:

- State of North Carolina, counties, municipalities, officers/agencies thereof acting in official capacity.
- Spouses relating to support, alimony, custody, separation, divorce (from bed and board or absolute).
- When preliminary injunction issued to preserve the trial court's jurisdiction. *See Keith v. Day*, 60 N.C. App. 559 (1983).
- Where the record establishes no material damage or likelihood of harm and the plaintiff has considerable assets with which to respond in damages if the defendant suffers damages by reason of a wrongful injunction. *See Huff v. Huff*, 69 N.C. App. 447 (1984).

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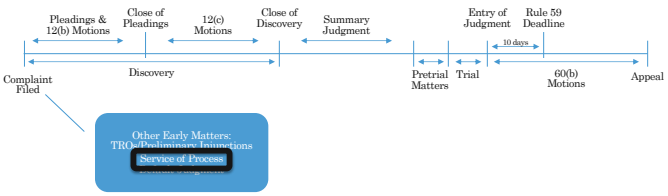
Rule 4: Service of Process



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Service of Process + Jurisdiction

Rule 3: Filing of the complaint → Court obtains subject matter jurisdiction.

Rule 4: Service of process → Court obtains personal jurisdiction over the defendant upon proper service of the summons (unless service is waived).

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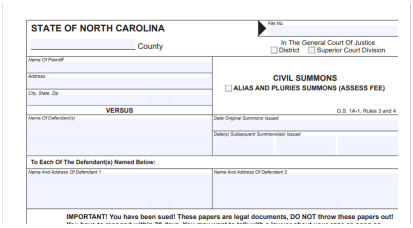
Rule 4 – Summons

(a) Summons – Issuance; who may serve. – Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days.



STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice

☐ District ☐ Superior Court Division

Name Of Plaintiff

Address

City, State, Zip

VERSUS

Name Of Defendant(s)

CIVIL SUMMONS

☐ ALIAS AND PLURIES SUMMONS (ASSESS FEE)

G.S. 1A-1, Rules 3 and 4

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

To Each Of The Defendant(s) Named Below:

Name And Address Of Defendant 1

Name And Address Of Defendant 2

IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out!

AOC-CV-100

Rule 4 – Methods of Service

- Rule 4 details the proper manner of service for several categories of defendants, including:
  - (j)(1): Natural persons.
  - (j)(2): Natural persons under disability.
  - (j)(3): The State.
  - (j)(4): An agency of the State.
  - (j)(5): Counties, cities, towns, villages and other local public bodies.
  - (j)(6): Domestic or foreign corporations.
  - (j)(7): Partnerships.
  - (j)(8): Other unincorporated associations and their officers.
  - (j)(9): Foreign states and their political subdivisions, agencies, and instrumentalities.

Rule 4 – Methods of Service

- Service of process can be made upon a natural person by one of the following:
  - Delivering a copy of the summons and complaint to the natural person OR by leaving copies thereof at the defendant's dwelling house or usual place of abode with a person of suitable age and discretion then residing therein.
  - Delivering a copy of the summons and complaint to an agent authorized by appointment or by law to be served or to accept service of process OR by serving process upon such agent or the party in a manner specified by any statute.
  - Mailing a copy of the summons and complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.
  - Depositing with a designated delivery service a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt.
  - Mailing a copy of the summons and complaint by signature confirmation as provided by the USPS, addressed to the party to be served, and delivering to the addressee.
- A party may be served by publication where the party cannot with due diligence be served by another method. *See* Rule 4(j1).
- An attorney may accept service on behalf of her client pursuant to Rule 4(j5).

Rule 4 – "Delivering to the Addressee"

- *Hamilton v. Johnson*, 228 N.C. App. 372 (2013):
  - Building concierge signed for the delivery of summons and complaint by FedEx. No evidence that concierge was an agent authorized to accept service of process on the defendant's behalf.
  - Court of Appeals found this was not sufficient to satisfy the "delivering to the addressee" requirement.
- *Washington v. Cline*, 233 N.C. App. 412 (2014):
  - FedEx delivered summons and complaint and left package on the defendant's doorstep at her home.
  - Court of Appeals found this was sufficient to meet the "delivering to the addressee" requirement because the plaintiffs could prove that the defendant had actually received the package.
- N.C.G.S. §§ 1-75.10(4)–(6):
  - Required to show that the summons and complaint were "in fact received."

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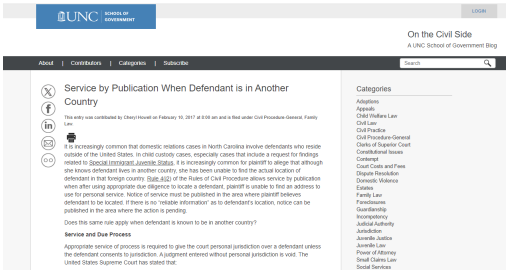
UNC School of Government Blog

A helpful resource on service of process for international defendants

https://civil.sog.unc.edu/service-by-publication-when-defendant-is-in-another-country/



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Rule 4 – Deadlines for Service

- Personal service or substituted personal service of summons must be made within 60 days after the date of the issuance of the summons.
- A summons not served within the required period "loses its vitality and becomes *functus officio*, and service obtained thereafter does not confer jurisdiction on the trial court over the defendant." *Dozier v. Crandall*, 105 N.C. App. 74, 75–76 (1992) (citation omitted).
- A summons not served within 60 days becomes dormant and unserveable.
  - However, under Rule 4(c), the summons is **not invalidated nor is the action discontinued.**

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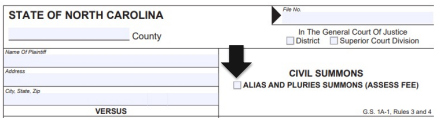
Rule 4 – Reviving a Dormant Summons

- Under Rule 4(d), when any defendant in a civil action is not served within the time allowed for service, the action may be continued by either of the following methods:
  - An endorsement upon the original summons for an extension of time within which to complete service of process. This must be obtained within 90 days after issuance of the summons or the date of the last prior endorsement.
  - Plaintiff may sue out an alias and pluries summons. This must be done within 90 days after issuance of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement.


STATE OF NORTH CAROLINA
County
File No.
In The General Court Of Justice
District Superior Court Division
Name Of Plaintiff
Address
City, State, Zip
VERSUS
CIVIL SUMMONS
ALIAS AND PLURIES SUMMONS (ASSESS FEE)
G.S. 1A-1, Rules 3 and 4

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Rule 4 – Discontinuance

(e) Summons – Discontinuance. – When there is neither endorsement by the clerk nor issuance of alias or pluries summons within the time specified in Rule 4(d), the action is discontinued as to any defendant not theretofore served with summons within the time allowed. Thereafter, alias or pluries summons may issue, or an extension be endorsed by the clerk, but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.

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Rule 4 – Discontinuance

Lemons v. Old Hickory Council, Boy Scouts, Inc., 322 N.C. 271 (1988).	*Dozier v. Crandall*, 105 N.C. App. 74 (1992).
6 Feb. 1986: Complaint filed, summons issued. **2 May 1986**: Initial summons returned unserved and alias summons issued. **5 Jun. 1986**: Alias summons served **AFTER** time allowed for service under Rule 4(c) expired. **13 Oct. 1986**: P filed Motion for retroactive extension of time to serve the alias summons.	**15 Mar. 1990**: Complaint filed, summons issued. **15 Jun. 1990**: Alias and pluries summons issued **92 days after** issuance of original summons. **20 Aug. 1990**: P filed Motion to extend period for issuing alias and pluries summons for three days pursuant to Rule 6.
Because the alias and pluries summons was issued within 90 days after issuance of the original summons, the action was not discontinued under Rule 4(e). Therefore, the trial court had authority to extend the time to serve the alias summons under Rule 6(b).	Because the alias and pluries summons was issued more than 90 days after the original summons, the action was discontinued under Rule 4(e). The action was deemed commenced on 15 June 1990, and as a result certain claims were time-barred.

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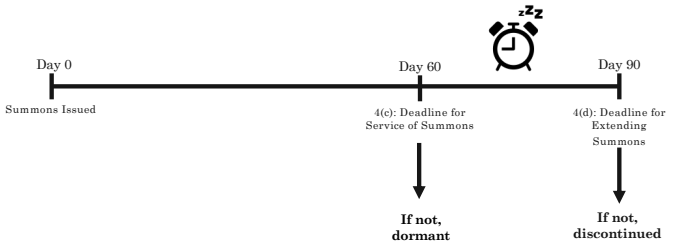
Rule 4 – Deadlines for Service



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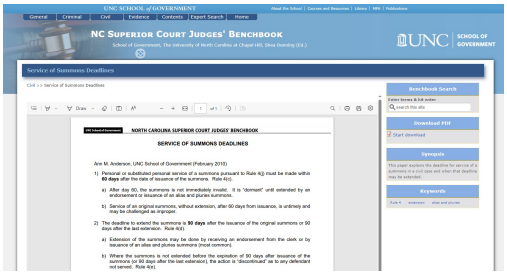
N.C. Superior Court Judges' Benchbook

A helpful resource on service deadlines

https://benchbook.sog.unc.edu



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See N.C.G.S. § 1-75.7

A court of this State having jurisdiction over the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person:

(1) Who makes a **general appearance** in an action; provided, that obtaining an extension of time within which to answer or otherwise plead shall not be considered a general appearance . . . .

Taking any action that does not contest the court's jurisdiction waives objections to personal jurisdiction. *Slattery v. Appy City*, LLC, 385 N.C. 726, 731 (2024) ("[L]ack of personal jurisdiction renders a court's actions voidable rather than void, and it is incumbent upon the defendant to preserve her objections by raising them at the first available opportunity.")

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See Rule 12(h)

(h) Waiver or preservation of certain defenses. –

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g), or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof . . . .

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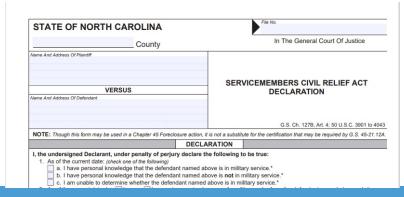
Servicemembers Civil Relief Act (SCRA)

- 50 U.S.C. §§ 3901–4043
  - Applies to all non-criminal and administrative proceedings.
  - If defendant has not made an appearance, no judgment or order can be entered without affidavit re: defendant's military service.
  - If defendant is in service, attorney must be appointed to locate defendant and inform of right to request temporary stay.

Note: 90 day stay if appointed counsel cannot locate **OR** there is a defense for defendant that cannot be presented without his/her presence.



STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice

VERSUS

SERVICEMEMBERS CIVIL RELIEF ACT DECLARATION

G.S. Ch. 127B, Art. 4; 50 U.S.C. 3901 to 4043

DECLARATION

I, the undersigned Declarant, under penalty of perjury declare the following to be true:

AOC-G-250

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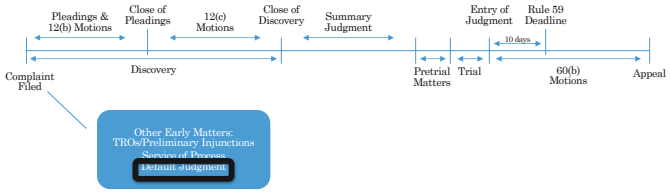
Default Judgment



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Rule 55 – Default

(a) Entry. – When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made clear to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

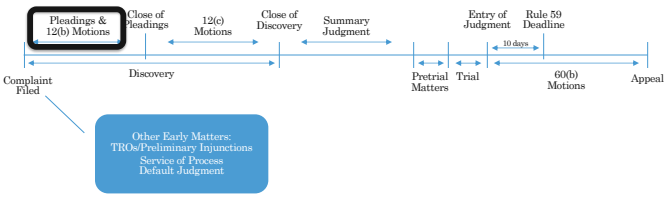
Rule 55 – Default Judgment

- In most cases, the judge enters default judgment. Rule 55(b)(2).
  - In some cases, the clerk may enter default judgment (for example, when the plaintiff's claim is for a sum certain). *See* Rule 55(b)(1).
- Things to look for before signing:
  - Adequate service of process.
  - Has time expired without an extension or responsive pleading?

Setting Aside Default – Two Standards

- Setting aside an **entry of default**.
  - Rule 55(d): For good cause shown court may set aside entry of default.
- Setting aside a **default judgment**.
  - Rule 60(b): Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.
    - Usually requires a showing that the defendant has a meritorious defense to the action.

Pleadings and Rule 12(b) Motions



Rule 12(b) – Motions

(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

Rule 12(h) – Waiver of Defenses

- The following defenses are waived if they are (i) omitted from a motion in the circumstances described in Rule 12(g), or (ii) neither made by motion under Rule 12 nor included in a responsive pleading or amendment thereof permitted by Rule 15(a) to be made as a matter of course:
  - Lack of personal jurisdiction. Rule 12(b)(2).
  - Improper venue. Rule 12(b)(3).
  - Insufficiency of process. Rule 12(b)(4).
  - Insufficiency of service of process. Rule 12(b)(5).
- The following defenses 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:
  - Failure to state a claim upon which relief can be granted. 12(b)(6).
  - Failure to join a necessary party. 12(b)(7).
  - An objection of failure to state a legal defense to a claim.

Rule 12(b)(1) – Lack of SMJ

- Lack of subject matter jurisdiction **cannot be waived** by the parties.
- "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court **shall dismiss the action**." Rule 12(h)(3).
- Lack of subject matter jurisdiction can be raised at any time, even on appeal.

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Rule 12(b)(3) – *Sua Sponte* Change?

- Our Court of Appeals has held that a trial court has "no legal authority to change venue under N.G. Gen. Stat. § 1-83 where no defendant had answered or objected to venue." *Zetino-Cruz v. Benitez-Zetino*, 249 N.C. App. 218 (2016).
- A Rule 12(b)(3) motion to dismiss for improper venue must be raised by a party.
- If an action is filed in the wrong county and proceeds to judgment, that judgment is not void.

53

Rule 12(b)(7)

- When there is an absence of necessary parties, the trial court should correct the defect *ex mero motu* upon failure of a competent person to make a proper motion. *White v. Pate*, 308 N.C. 759, 764 (1983).
- A judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void. *Ludwig v. Hart*, 40 N.C. App. 188, 190 (1979).
- "Even where there is a fatal defect of the parties . . . dismissal of the action is not warranted. Rather, the court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by ex mero motu ruling of the court." *Smith v. Bumgarner*, 115 N.C. App. 149, 150 (1994) (quotations and citations omitted).

54

Rule 12(b)(6) – Failure to State a Claim

- Only tests whether the complaint states a claim "upon which relief can be granted."
- Assumes the allegations of the complaint are true; does not look beyond the complaint (and incorporated attachments).
  - Exception: The court may consider the terms of a contract that is both the subject of the action and specifically referenced in the complaint without converting the motion into a motion for summary judgment. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60–61 (2001).
    - There can be no complaint of surprise in the nonmoving party when the court considers a contract which is the subject of the action. *See Coley v. N.C. Nat'l Bank*, 41 N.C. App. 121, 126 (1979).

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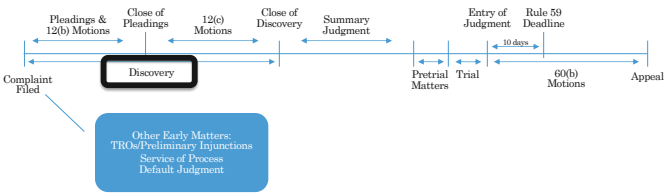
Discovery



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Discovery Parameters

- Rule 26 allows discovery of information:
  - Relevant to the subject matter of the case;
  - Admissible or "reasonably calculated to lead to the discovery of admissible evidence;"
  - Not privileged; and
    - All traditional privileges: spousal, confessional, attorney-client.
  - Not attorney work product.

57

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)
- Subpoenas (Rule 45)
  - Note: a subpoena can be signed by the clerk, judge, magistrate, or attorney; and, under Rule 45(e)(i), there can be contempt or sanctions for failure to comply.

Discovery Tools for the Court

- The Court has the power to:
  - Limit discovery to prevent abuse and undue burdens on the parties. Rule 26(b)(1a).
  - Issue protective orders to prevent unnecessary disclosure of sensitive information. Rule 26(c).
  - Order a discovery conference to set the parameters and plan. Rule 26(f).
  - Issue sanctions for violations of obligation to certify that requests were made without improper intent. Rule 26(g).

Rule 37 – Discovery Sanctions

- Orders compelling discovery:
  - When a party fails to respond to a request or responds incompletely, evasively, or without candor.
- Sanctions:
  - When a party simply did not respond or did not comply with a prior order compelling discovery.
  - Sanctions under Rule 37 are within the sound discretion of the trial court.
  - Sanctions are reviewed for abuse of discretion. *Baker v. Charlotte Motor Speedway, Inc.*, 180 N.C. App. 296, 299 (2006).

Rule 37 – Discovery Sanctions

- Any sanction must be weighed, taking into account the nature of the violation. Your order should state that you weighed other sanctions.
- The sanction cannot be pre-determined, just as no decision made in the exercise of discretion can be made in advance.
- Do not enter a self-executing order.

61

Rule 37 – Discovery Sanctions

- When the sanction is "outcome determinative," the trial court must first consider less severe sanctions.
  - Dismissal of a claim. *See Fayetteville Publ. Co. v. Advanced Internet Techs., Inc.*, 192 N.C. App. 419 (2008).
  - Striking an answer. *See Baker v. Rosner*, 197 N.C. App. 604 (2009).
  - Striking defenses/counterclaims. *See Clawser v. Campbell*, 184 N.C. App. 526 (2007).

62

"Lesser Sanctions"

- Put your consideration of lesser sanctions **on the record.**
  - In transcript.
  - In written order.
- You need not list and specifically reject each possible lesser sanction prior to determining that dismissal is appropriate. *See Badillo v. Cunningham*, 177 N.C. App. 732 (2006).
- Sample language:
  - "[t]he Court has carefully considered each [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).

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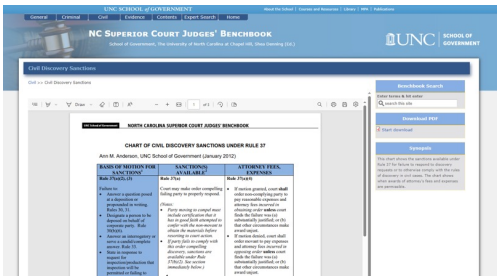
N.C. Superior Court Judges' Benchbook

A helpful resource on discovery sanctions



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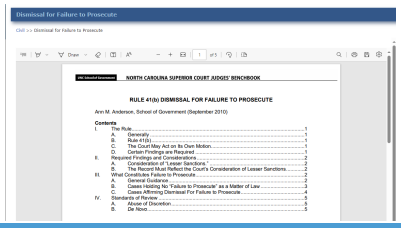
"Lesser Sanctions"

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

For more on Rule 41(b) dismissals:



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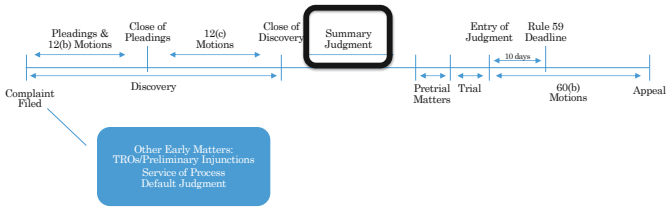
Summary Judgment



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Rule 56 – Summary Judgment

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c).

12(b)(6) vs. Summary Judgment

Rule 12(b)(6) Motions	**Summary Judgment Motions**
Usually filed early in the pleadings.	Usually filed after the completion of Discovery.
Tests whether the complaint states a claim "upon which relief can be granted."	Court must determine if there is any genuine issue of material fact (think: whether there is anything for the jury to decide).
Assumes allegations of the complaint are true; does not look beyond complaint (and incorporated attachments).	Looks to all materials and examines the evidence in light most favorable to the non-movant.

Rule 56 – Summary Judgment

- A motion for summary judgment must be served at least 10 days before a hearing.
- The adverse party is allowed to serve opposing affidavits 2 days before the hearing.
  - If not, the Court may continue the hearing.
- Court may grant summary judgment against the moving party. Rule 56(c).

Rule 56 – 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." Rule 56(e).

70

Rule 56 – Summary Judgment

"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).

71

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 specifically 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.

72

Summary Judgment – Findings of Fact?

- Rule 52(a): Generally, written findings of fact are not required in decisions on motions.
  - Except when requested by a party. Then, findings of fact are required.
- However, orders on certain types of motions cannot properly include findings of fact.
  - Example: Orders on motions for summary judgment.
    - Because the court only determines whether there is a genuine dispute of material fact, the court is not resolving the disputes and, therefore, is not "finding the facts."
    - Okay to state which facts are "undisputed" and label them as such.
  - Other examples: 12(b)(6), 12(c), directed verdict, JNOV

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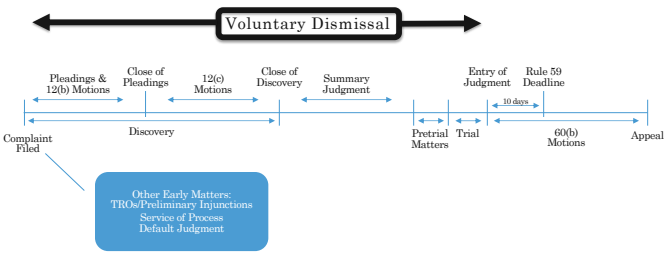
Voluntary Dismissal



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Rule 41(a) – Voluntary Dismissal

- A party may dismiss a claim "at any time before the plaintiff rests."
  - This includes "resting" a summary judgment argument. *See Troy v. Tucker*, 126 N.C. App. 213 (1997).
- The dismissed claim may be refiled within one year.
- Two-Dismissal Rule: A voluntary dismissal is without prejudice, except that a notice of dismissal operates as an adjudication on 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.

75

Rule 41(b) – Involuntary Dismissal

- Almost all involuntary dismissals are adjudications on the merits (meaning with prejudice) unless the court specifically states otherwise.
- Exceptions:
  - Dismissal for improper venue.
  - Dismissal for failure to join a necessary party.
  - Dismissal for lack of jurisdiction.

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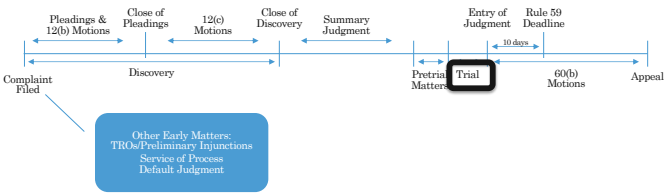
Trial



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Pretrial Conferences

- Judge may order a pre-trial conference in any case. Rule 16(a).
- There shall be a pre-trial conference in every civil case. *See* Rule 7 of the General Rules of Practice for the Superior and District Courts.

78

Rule 38 – Jury Trial of Right

- Jury trials are a matter of right.
- However, the right to a jury trial may be waived by a failure to serve a demand (*see* Rule 38(d)) or by stipulation of the parties.

79

Jury Selection

- Get clear with TCA about juror qualification and excuses.
- The procedure is different in civil and criminal cases.
- N.C.G.S. § 15A-1214: The State always gets the first crack at newly selected jurors. A defendant must exercise all challenges to each batch before new jurors are called.
  - Note: This statute does not apply in civil cases.
- Consider having each party pass a full box to the opponent.

80

Jury Selection

- Presumptive number of jurors is 12, but the parties can stipulate to a smaller group (this rarely occurs).
- The parties can also stipulate to a non-unanimous jury in a civil case.
- Alternate jurors:
  - "Usual stipulation" – parties may agree to be bound by a unanimous verdict of 10 or more jurors in lieu of alternates.
  - This is becoming rare, especially in significant cases. You cannot force this stipulation.
  - If no stipulation, consider 2 or more alternates.
  - Pick 12 first and then pick alternates.
  - Unused peremptory challenges remain plus one additional challenge per alternate.

81

You Control Process

Are you going to ask jurors any questions?
What kind of questions are you going to allow?

82

Opening Statements

- Court may allow opening statements and impose time limits in the exercise of discretion. *See* Rule 9 of the General Rules of Practice for the Superior and District Courts.
- Some judges generally allow 30 minutes.
- Consider use of demonstratives (cover in Final Pretrial Order).

83

Handling Exhibits in Deliberations

- *See* N.C.G.S. § 1-181.2:
  - Conduct the jury back into the courtroom.
  - Follow the statute carefully.
  - Articulate that your decision is made *in the exercise of discretion*.
  - Stipulations of the parties (if possible) are helpful.
  - Carefully review subsection (b) regarding what can and cannot be taken into the jury room.

84

N.C.G.S. § 1-181.2

§ 1-181.2. Use of evidence by the jury.

(a) If the jury in a civil action after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The court in its discretion, after notice to the parties and giving the parties an opportunity to be heard, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. The court in its discretion may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

(b) Upon request by the jury, the court may in its discretion and after permitting the parties an opportunity to be heard permit the jury to take into the jury room admitted exhibits which have been passed to the jury, photographs admitted into evidence and shown to the jury and used by any witnesses in their testimony before the jury, and any illustrative exhibits admitted into evidence and used by any witnesses in their testimony before the jury. Summaries of testimony prepared in the courtroom by any party, lists made by any party in the courtroom and such similar documents shall not be sent to the jury room with the jury, even if admitted into evidence and requested by the jury. Depositions may be taken into the jury room upon request of the jury only with consent of the parties.

(c) Upon request by the jury, the court may permit the jury to take into the jury room any exhibit that all parties stipulate and agree may be taken into the jury room.

(d) In sending any exhibits to the jury, the court should ensure that the evidentiary integrity of the exhibit is preserved. (2007-407, s. 1.)

Jury Instructions

- In a criminal case, the jury decides on a verdict.
- In a civil case, the jury answers a number of specific questions, called "issues."
- Your verdict sheet (and jury instructions) should include a roadmap for the jury on where to go, depending on the answers to each issue.
- Ask attorneys in advance of trial (if possible) for proposed instructions.
- Consider giving jurors a copy of issue sheet during instructions.
- The pattern software package is great, but …
- Print out before giving.
- Consider sending a copy of the instructions back with the jury.
- Consider giving counsel a copy before you read them to the jury.
  - If possible, have "friend" mark instructions as you give them.

Jury Issues – Example

1. Was the Plaintiff injured by the negligence of the Defendant? Answer: _____.

   If you answer Issue #1 "No," do not consider any other issue; if you answer Issue #1 "Yes," then proceed to Issue #2.
2. Did the Plaintiff, by his own negligence, contribute to his own injury? Answer: _____.

   If you answer Issue #2 "No," then go to Issue #4; if you answer Issue #2 "Yes," then proceed to Issue #3.
3. Did the Defendant have the last clear chance to avoid injuring the Plaintiff? Answer: _____.

   If you answer Issue #3 "No," do not consider Issue #4; if you answer Issue #3 "Yes," then proceed to Issue #4.
4. What amount is the Plaintiff entitled to recover from the Defendant for his personal injuries? Answer: $_____.

Taking the Verdict

- Normally, the Courtroom Clerk takes the verdict.
- Make sure they are comfortable reading.
- Look at SOG Bench Book.
- Don't comment on the verdict after discharge.

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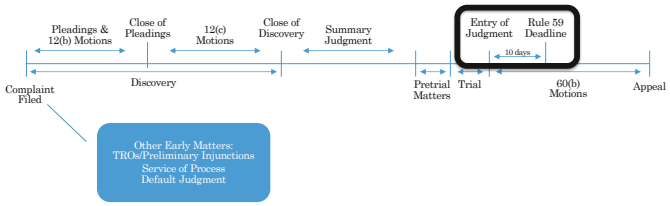
Entry of Judgment and Post-Trial Motions



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Rule 58 – Entry of Judgment

- A judgment is entered when:
  - Reduced to writing;
  - Signed by the judge; and
  - Filed with the clerk of court.
- A ruling from the bench is not binding and enforceable under Rule 58.

90

Entering Judgment

- Prepare (or direct the prevailing attorney to prepare) a written judgment that recites the jury issues and answers, with an order directing the relief granted.
- Interest:
  - Statutory rate from entry of judgment.
  - Pre-judgment interest? (In certain cases).
- Be mindful of the issue of costs:
  - Costs shall be taxed against either party, or apportioned among the parties, in the discretion of the court. N.C.G.S. § 6-21.
  - If there is any dispute as to taxable costs, schedule a hearing, consider arguments, and follow the statute. N.C.G.S. § 7A-305(d).
  - Attorney fees may be awarded only when specifically authorized by statute. *See generally* N.C.G.S. §§ 6-21, 6-21.1, 6-21.2.

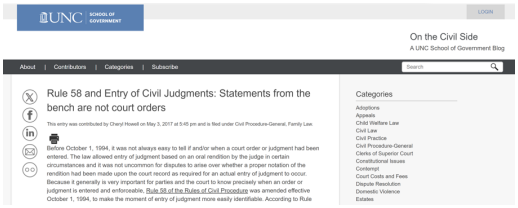
91

Rule 58 – Entry of Judgment

- AOC Form CV-220 (Memorandum of Judgment) may be used when a party or judge wants to ensure a directive from the bench will be immediately enforceable. The MOJ may be the final version of the order or may be substituted by a more detailed order.

See SOG Blog:

https://civil.sog.unc.edu/rule-58-and-entry-of-civil-judgments-statements-from-the-bench-are-not-court-orders/



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Nunc pro tunc

- A signed order or judgment that claims to be effective at a past date.
- Can only be used if trial court determines:
  - An order/judgment was actually decreed or signed on the date in the past;
  - The order/judgment was not entered on the record due to accident, mistake, or neglect of the clerk; and
  - No prejudice will result if the order/judgment is entered *nunc pro tunc*.
- SOG also has a blog on this: https://civil.sog.unc.edu/rule-58-and-entry-of-civil-judgments-statements-from-the-bench-are-not-court-orders/.

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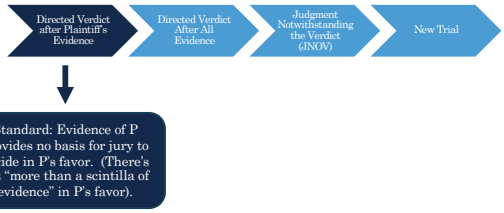
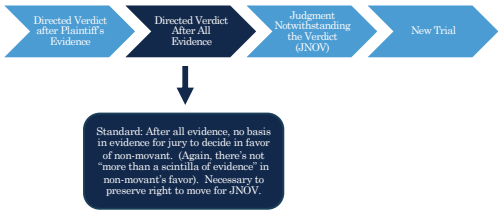
Directed Verdict, JNOV, and New Trial



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

94

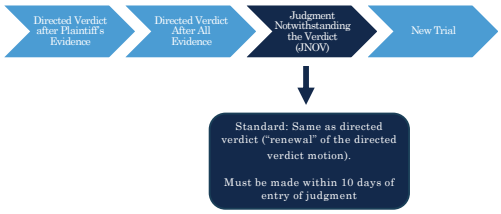
Directed Verdict, JNOV, and New Trial



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 to preserve right to move for JNOV.

95

Directed Verdict, JNOV, and New Trial

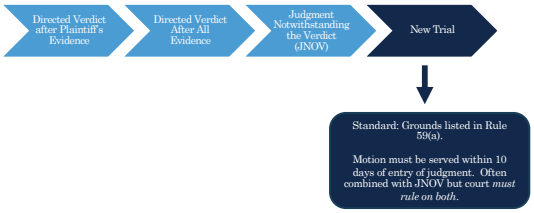


Standard: Same as directed verdict ("renewal" of the directed verdict motion).

Must be made within 10 days of entry of judgment

96

Directed Verdict, JNOV, and New Trial



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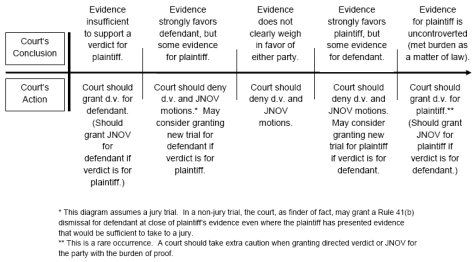
Decision Chart



* 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.

98

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 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 (2009).

99

JNOV and Punitive Damages

- In making its decision to deny or grant JNOV on a punitive damages claim, the trial court must issue a written opinion as set forth in N.C.G.S. § 1D-50, or the case will be remanded to the trial court upon appeal.
  - *See Springs v. City of Charlotte*, 209 N.C. App. 271 (2011).

100

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:

(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.

"Against the greater weight of the evidence."

101

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(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.

Also must have been materially prejudicial error.

102

Rule 59

What if, after you enter judgment in a case, you discover you made a legal error?

(d) On initiative of court. – Not later than 10 days after entry of judgment the court of its own initiative, on notice to the parties and hearing, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. – A motion to alter or amend the judgment under section (a) of this rule shall be served no later than 10 days after entry of the judgment.

Note: Once the ten-day period has passed, all that you have is Rule 60.

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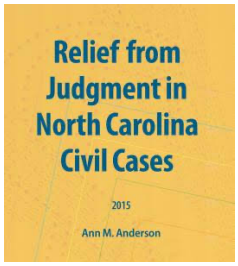
Post-Judgment Motions

A great resource dealing with Rules 59 and 60.



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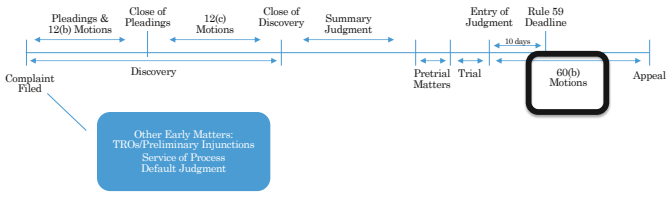
Rule 60(b) Motions



105

Rule 60(b)

- Relief from a "final judgment, order, or proceeding" for the following reasons:
  - Mistake, inadvertence, surprise, or excusable neglect;
  - Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
  - Fraud, misrepresentation, or other misconduct of an adverse party;
  - The judgment is void;
  - The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
  - Any other reason justifying relief from the operation of the judgment.
- Note: Motions made on the first three grounds must be brought within one year of the entry of judgment.

Rule 60(b)(6)

- "Grand reservoir of equitable power to do justice in a particular case."
  - Really, this is NOT a catch-all.
- Requires:
  - Extraordinary circumstances exist;
  - Justice demands setting aside the judgment; and
  - The defendant has a meritorious defense.

  See Engility Corp. v. Nell, 258 N.C. App. 402, 407 (2018).
- [T]he defendant must have a real or substantial defense on the merits, otherwise the court would engage in the vain work of setting a judgment aside when it would be its duty to enter again the same judgment on motion of the adverse party." *Norton v. Sawyer*, 30 N.C. App. 420, 423 (1976).

Rule 60(b)(6)

- Rule 60(b)(6) cannot be used to circumvent requirements for Rule 60(b)(1)–(5).
  - For example, if the argument is newly-discovered evidence under Rule 60(b)(2) but more than one year has passed since entry of judgment, the movant cannot make the argument under Rule 60(b)(6). *Bruton v. Sea Captain Prop., Inc.*, 96 N.C. App. 485 (1989).
- In other words, Rule 60(b)(6) concerns any other reason than those contained in Rule 60(b)(1)–(5).

Rule 60(b)

- Key Limitation:
  - Not to be used to correct errors of law.
  - Not a substitute for appellate review or motions for a new trial.
- Note: Rule 60(b) motions CAN be heard by a different judge (unlike Rule 59).

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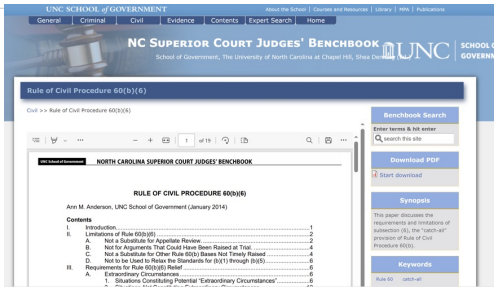
N.C. Superior Court Judges' Benchbook

A helpful resource on Rule 60(b)(6):



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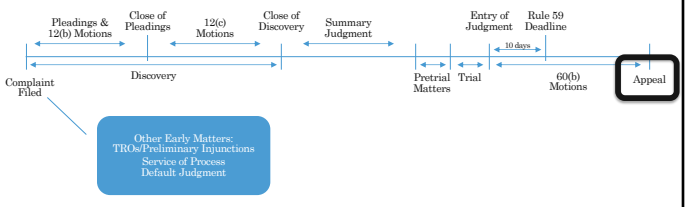
Appeal



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Effect of Appeal

- Once an appeal is filed, the trial court is divested of all jurisdiction related to the claim/matter on appeal. *Sink v. Easter*, 288 N.C. 183 (1975).
- If an appeal is withdrawn, dismissed, or deemed abandoned, jurisdiction is regained. *Estrada v. Jaques*, 70 N.C. App. 627, 638 (1984).
- There are a host of exceptions to the automatic stay rule, especially where the appeal is interlocutory.
  - Consider asking parties for briefing on effect of appeal and having oral argument.

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Effect of Appeal

- There is a unique rule for Rule 60 motions:
  - The Court of Appeals has recognized that "the trial court is better suited to address the issues presented in a Rule 60(b) motion." *Harrington v. Harrington*, 273 N.C. App. 219 (2020).
    - May dismiss the appeal and remand to trial court for entry of a final order on the Rule 60(b) motion.

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