Magistrate's Oath of Office

I do solemnly swear that I will administer justice without favoritism to anyone or to the State; that I will not knowingly take, directly or indirectly, any fee, gift, gratuity or reward whatsoever, for any matter or thing done by me or to be done by me by virtue of my office, except the salary and allowances by law provided; and that I will faithfully and impartially discharge all the duties of magistrate of the District Court Division of the General Court of Justice to the best of my ability and understanding, and consistent with the Constitution and laws of the State; so help me, God.

Basic School for Magistrates: Summer 2024 Civil Session

UNC School of Government

July 22-July 26, 2024

Monday, July 22

9:00 a.m. **Orientation & Introductions**
Melanie Crenshaw, School of Government

9:20 a.m. **Introduction to the Law & Judicial Process** (1.75 CE)
James Drennan, School of Government

11:05 a.m. *Break*

11:20 a.m. **Ethics** (1.0 CE)
Corrine Lusic, Deputy Legal Counsel, Administrative Office of the Courts

12:30 p.m. *Lunch (provided at SOG)*

1:20 p.m. **NCAOC Language Access Services for Magistrates** (1.0 CE)
Kara Mann, Manager Language Access Services, Administrative Office of the Courts

2:20 p.m. **Small Claims Procedure** (1.0 CE)
Melanie Crenshaw, School of Government

3:20 p.m. *Break*

3:45 p.m. **Small Claims Procedure** *(continued)* (1.0 CE)

4:45 p.m. **Mandatory Reporting** (0.5 CE)
Sara DePasquale, School of Government

5:15 p.m. *Adjourn*

Tuesday, July 23

9:00 a.m. **Small Claims Procedure** *(continued)* (1.5 CE)
Melanie Crenshaw, School of Government

10:30 a.m. *Break*

10:45 a.m. **Involuntary Commitment** (1.25 CE)
Mark Botts, School of Government

12:00 p.m. *Lunch (provided at SOG)*

1:00 p.m. **Involuntary Commitment** *(continued)* (1.5 CE)

2:30 p.m. *Break*

2:45 p.m. **Involuntary Commitment** *(continued)* (1.25 CE)

4:00 p.m. *Adjourn*

Wednesday, July 24

9:00 a.m. **Landlord-Tenant Law** (1.5 CE)
Melanie Crenshaw, School of Government

10:30 a.m. *Break*

10:45 a.m. **Landlord-Tenant Law** *(continued)* (1.25 CE)

12:00 p.m. *Lunch (provided at SOG)*

1:00 p.m. **Landlord-Tenant Law** *(continued)* (1.0 CE)

2:00 p.m. **Landlord-Tenant Law** *(continued)* (1.0 CE)

3:00 p.m. *Break*

3:15 p.m. **Landlord-Tenant Law** *(continued)* (2.0 CE)

5:15 p.m. *Adjourn*

Thursday, July 25

8:00 a.m. **Review for Exam** (*attendance optional*)
Melanie Crenshaw, School of Government

8:50 a.m. *Break*

9:00 a.m. **Contracts** (1.25 CE)
Melanie Crenshaw, School of Government

10:20 a.m. **NC Magistrates' Association**
Christopher Bazzle, Magistrate, Mecklenburg County/President of NCMA

10:30 a.m. *Break*

10:40 a.m. **Issuing Ex Parte DVPOs** (1.5 CE)
Antares Holloway, Assistant Legal Counsel, Administrative Office of the Courts

12:15 p.m. *Lunch (provided at SOG)*

1:00 p.m. **Understanding Domestic Violence** (2.0 CE)
Chief District Court Judge J. Corpening, New Hanover & Pender Counties

3:00 p.m. *Break*

3:15 p.m. **Contracts** *(continued)* (1.0 CE)

4:15 p.m. **Torts** (1.0 CE)
Melanie Crenshaw, School of Government

5:15 p.m. *Adjourn*

Friday, July 26

9:00 a.m. **Actions to Recover Personal Property** (1.5 CE)
Melanie Crenshaw, School of Government

10:30 a.m. **Marriage** (0.5 CE)
Melanie Crenshaw, School of Government

11:00 a.m. **Small Claims Procedure Review** (0.5 CE)
Melanie Crenshaw, School of Government

11:30 a.m. *Lunch (provided at SOG)/Study*

12:00 p.m. **Civil Session Exam** *(Room 2601)*

Sponsored by: North Carolina Administrative Office of the Courts and the UNC School of Government

Any breakfast or lunch provided as part of this program is paid for by the Administrative Office of the Courts. When claiming reimbursement for expenses for this program, the portion of the daily travel allowance allocated for these breakfasts or lunches may not be claimed.

Tab: General Information

UNC SCHOOL OF GOVERNMENT

Mission
The mission of the School of Government is to improve the lives of North Carolinians by engaging in practical scholarship that helps public officials and citizens understand and improve state and local government.

Values
Consistent values for more than 75 years have built a legacy of trust with North Carolina's public officials:

- Nonpartisan
- Policy-neutral
- Responsive

How We Serve North Carolina
As the largest university-based local government training, advisory, and research organization in the United States, the School of Government offers up to 200 courses, seminars, and specialized conferences for more than 12,000 public officials each year.

Faculty members respond to more than 100,000 phone calls and e-mail messages each year on routine and urgent matters and also engage in long-term advising projects for local governing boards, legislative committees, and statewide commissions.

In addition, faculty members annually publish approximately 50 books, periodicals, and other reference works related to state and local government. Each day that the General Assembly is in session, the School produces the *Daily Bulletin*, which reports on the day's activities for members of the legislature and others who need to follow the course of legislation.

History
Established in 1931 as the Institute of Government, the School provides educational, advisory, and research services for state and local governments. The School of Government is also home to specialized centers focused on information technology, environmental finance, and civic education for youth.

School of Government faculty members have made notable contributions to North Carolina government:

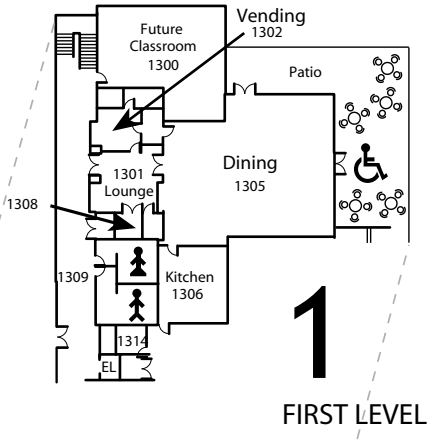
- Study to reorganize state government
- Study of the state's court system
- North Carolina Constitutional Commission
- Local Government Study Commission
- Open Meetings Study Commission
- NC Sentencing and Policy Advisory Commission
- Governor's Crime Commission on Juvenile Crime and Justice

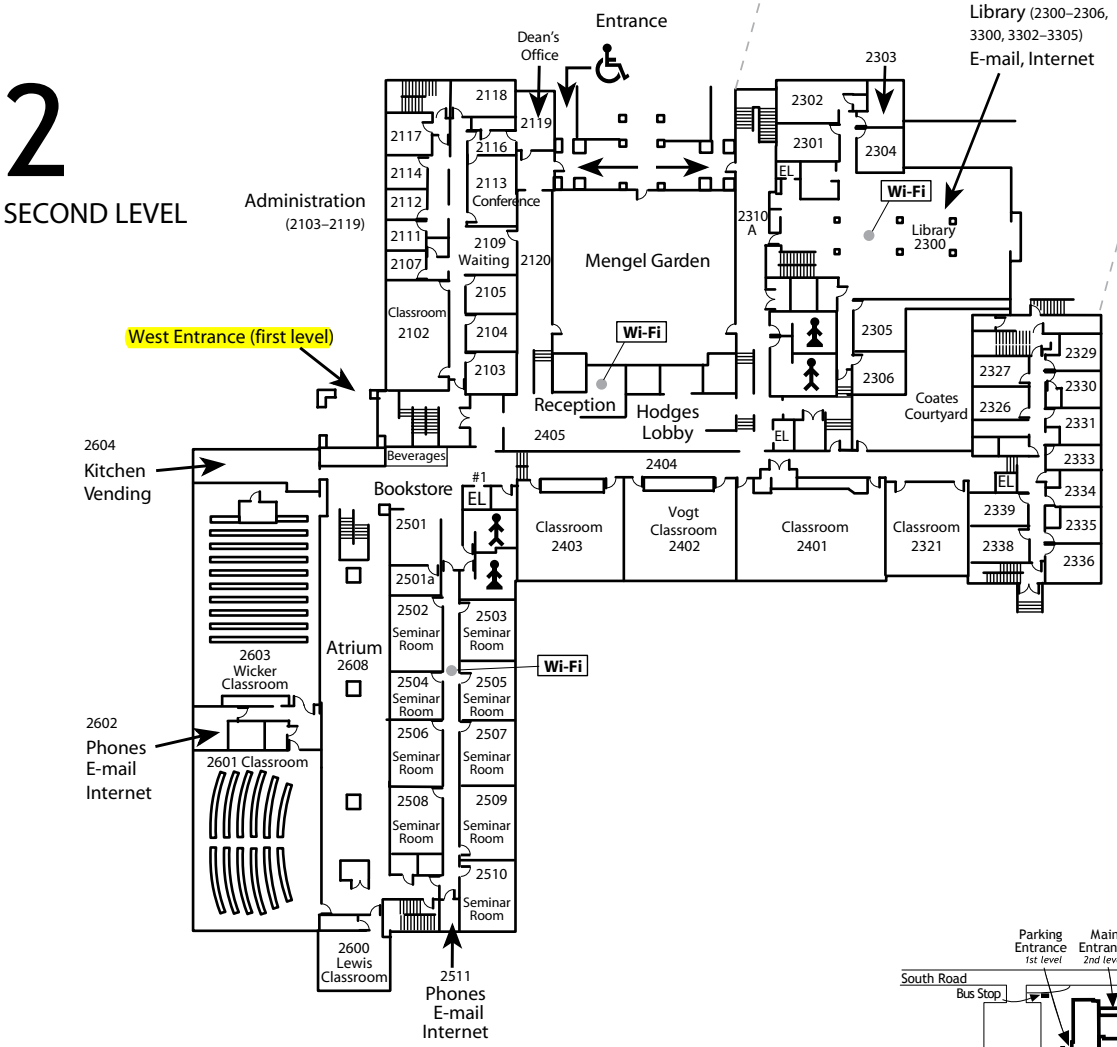
Support for the School of Government
Operating support for the School of Government's programs and activities comes from many sources, including state appropriations, local government membership dues, private contributions, publication sales, course fees, and service contracts. Visit www.sog.unc.edu or call 919.966.5381 for more information on the School's courses, publications, programs, and services.

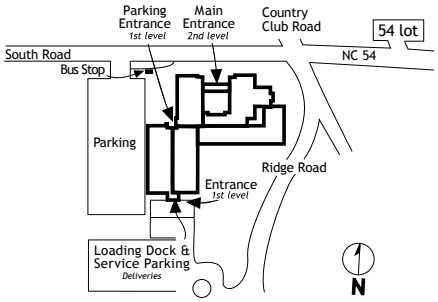
Knapp-Sanders Building

School of Government
UNC-Chapel Hill

May 2008
Guest Map







School of Government - Courts Faculty List

Mark Botts botts@sog.unc.edu 919.962.8204
Areas of Expertise: Mental health law, including involuntary commitment procedures; Legal responsibilities of area boards; Client rights (especially confidentiality)

Brittany Bromell bwilliams@sog.unc.edu 919.445.1090
Areas of Expertise: Criminal law and procedure; Computer crimes; Domestic violence; First appearances; Pretrial release; District Court Judges; Magistrates

Melanie Crenshaw mcrenshaw@sog.unc.edu 919.962.2761
Areas of Expertise: Civil law; Landlord/tenant; Small claims; Magistrates

Shea Denning denning@sog.unc.edu 919.843.5120
Areas of Expertise: Criminal law and procedure; Judicial authority, administration, and leadership; Motor vehicle law, including legal aspects of driving while impaired and driver's license revocations; Procedural justice; Court system and structure; Superior Court Judges

Sara DePasquale sara@sog.unc.edu 919.966.4289
Areas of Expertise: Child welfare law (abuse, neglect, dependency; termination of parental rights; emancipation); Adoptions of minors; Indian Child Welfare Act; Judicial waiver of parental consent; Legitimation; District Court Judges; Parent Attorneys; Social Service Attorneys

Phil Dixon dixon@sog.unc.edu 919.966.4248
Areas of Expertise: Cannabis/Hemp and drug crimes; Criminal law and procedure; Firearms law; Post-conviction; Right to counsel; Sex offenders; Search and seizure; Public Defense Education; Public Defenders

Jacqui Greene greene@sog.unc.edu 919.966.4327
Areas of Expertise: Confidentiality (delinquency); Juvenile delinquency; Juvenile justice; Juvenile transfer; Raise the Age; District Court Judges

Timothy Heinle heinle@sog.unc.edu 919.962.9594
Areas of Expertise: Incompetency and guardianship; Juvenile abuse, neglect, and dependency; Social services law (child welfare, protective services); Termination of parental rights; Evidence; Civil Defenders; Adult Guardian Ad Litems (GALs)

Cheryl Howell howell@sog.unc.edu 919.966.4437
Areas of Expertise: Civil Law; Family law; Contempt; Civil domestic violence; Judicial education; District Court Judges; Court of Appeals Judges

Joseph Hyde jhyde@sog.unc.edu 919.966.4117
Areas of Expertise: Criminal law and procedure; Criminal pleadings; Evidence; Appellate procedure; Double jeopardy; MARs; Self-defense; Prosecutors

Jamie Markham markham@sog.unc.edu 919.843.3914
Areas of Expertise: Criminal sentencing; Community corrections; Corrections; Habitual offenses; Jails and prisons; Sex offenders

John Rubin rubin@sog.unc.edu 919.962.2498
Areas of Expertise: (*half-time*) Capacity to proceed; Collateral consequences; Expunctions; Mental health defenses; Right to counsel; Self-defense

Jessie Smith smithj@sog.unc.edu 919.966.4105
Areas of Expertise: Criminal justice data and policy; Supporting stakeholder pilot projects and empirical evaluations in areas such as policing and responding, system scope and impact, case management, indigent defense, pretrial systems, and re-entry

Meredith Smith meredith.smith@sog.unc.edu 919.843.2986
Areas of Expertise: Abuse, neglect, and exploitation (adults); Elder abuse; Estate administration; Foreclosures; Guardianship; Incompetency; Powers of attorney; Special proceedings; Trusts; Clerks of Superior Court

Danny Spiegel spiegel@sog.unc.edu 919.966.4377
Areas of Expertise: Criminal law and procedure; Evidence; Drug crime; Public Defenders

Emily Turner eturner@sog.unc.edu 919.843.2032
Areas of Expertise: Civil procedure; Conducting civil proceedings

Jeff Welty welty@sog.unc.edu 919.445.1082
Areas of Expertise: Criminal law and procedure; Cybercrime/computer crime; Firearms law; Habitual offenses; Search and seizure law; Policing

Website Resources

School of Government Website
www.sog.unc.edu

School of Government's Magistrate Website
https://sog.unc.edu/resources/microsites/nc-magistrates

School of Government's Criminal Law Website
https://www.sog.unc.edu/resources/microsites/criminal-law-north-carolina

School of Government's District Court Judges Website
http://www.sog.unc.edu/programs/dcjudges

NC Judicial College Website
http://www.sog.unc.edu/programs/judicialcollege

NC Magistrate's Association Website
www.aoc.state.nc.us/magistrate

Administrative Office of the Courts' (AOC) Website
www.nccourts.gov

General Assembly's Website
(can download any bill or statute)
https://www.ncleg.gov

School of Government Blogs

School of Government's Criminal Law Blog
https://nccriminallaw.sog.unc.edu/

School of Government's *On The Civil Side* Blog
http://civil.sog.unc.edu/

Tab: Orientation

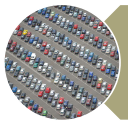
ORIENTATION

WELCOME TO BASIC SCHOOL FOR NEW MAGISTRATES CIVIL SESSION

Melanie Crenshaw
UNC School of Government

1

LOGISTICS



Parking

Textbooks

Food & Drink

Restrooms

2

INTRODUCTIONS

Melanie Crenshaw is a licensed attorney and a Teaching Assistant Professor at the School of Government. As a member of the faculty, Melanie teaches, researches, writes and advises NC judicial officials and judicial branch employees, with a focus on magistrates, on issues related to small claims, civil law, and landlord-tenant law. Melanie can be reached by email at mcrenshaw@sog.unc.edu or by telephone at (919)962-2761.

The mission of the UNC School of Government is to improve the lives of North Carolinians by engaging in practical scholarship that helps public officials and citizens understand and improve state and local government. The School's core values include being responsive, nonpartisan, and policy-neutral.

As the largest university-based local government training, advisory, and research organization in the U.S., the School of Government offers up to 200 courses, webinars, and specialized conferences for more than 12,000 public officials each year. Faculty respond to thousands of phone calls and e-mail messages each year on routine and urgent requests for technical assistance and engage in long-term advising projects. More information about the School can be found at www.sog.unc.edu.

3

WELCOME

Belal Elrahal is a licensed attorney and an Assistant Professor at the School of Government. As a member of the faculty, Belal teaches, researches, writes and advises NC judicial officials and judicial branch employees, with a focus on magistrates, on issues related to criminal law and procedure, specializing in motor vehicle law. Belal served as an assistant public defender in Mecklenburg County for nearly eight years. He is a graduate of Davidson College and the UNC School of Law. Belal can be reached by email at elrahal@sog.unc.edu.

4

YOUR TURN

What is your name?

Where are you appointed?

What have you heard about being a magistrate?

5

5

A magistrate is an independent judicial official holding Constitutional office who is nominated by the Clerk of Court, appointed by the Senior Resident Superior Court Judge, and supervised by the Chief District Court Judge.

6

TRAINING IN DUTIES OF MAGISTRATE N.C.G.S. 7A-177

- A course of basic training
- Annual training requirements in the years after completion of basic training
  - 12 hours annually
  - 7 mandatory subjects
    1. Setting conditions of pretrial release
    2. Impaired driving laws
    3. Issuing criminal processes
    4. Issuing search warrants
    5. Technology
    6. Orders of protection
    7. Summary ejectment laws

7

BASIC SCHOOL

"Within six months of taking the oath of office as a magistrate for the first time, a magistrate is required to attend and satisfactorily complete a course of basic training of at least 40 hours in the civil and criminal duties of a magistrate."

-N.C.G.S. 7A-177(a)

8

SUCCESSFUL COMPLETION OF BASIC SCHOOL

- Attend all sessions
- Participate in and complete activities in all sessions
- Attain combined score above 65% on end-of-week exams

9

QUESTIONS?

10

Welcome to the Job!

Revised by Melanie Crenshaw, SOG, 07/09/2023

The office of magistrate dates to 12th Century England, when King Richard assigned knights the duty of keeping "the King's peace." While the office of Justice of the Peace was a prestigious and honorable one for centuries, it was abolished in North Carolina in 1962 due to corruption, widespread lack of professionalism, and general disrepute. The old justice of the peace was replaced bythe newly-created office of magistrate, sharing many of the same responsibilities but lacking the factors that eventually led to the downfall of the justice of the peace.

A Constitutional Office

For each county, the senior regular resident Judge of the Superior Court serving the county shall appoint from nominations submitted by the Clerk of the Superior Court of the county, one or more Magistrates who shall be officers of the District Court. The initial term of appointment for a magistrate shall be for two years and subsequent terms shall be for four years. The number of District Judges and Magistrates shall, from time to time, be determined by the General Assembly. .....Vacancies in the office of Magistrate shall be filled for the unexpired term in the manner provided for original appointment to the office, unless otherwise provided by the General Assembly.

NC Constitution, Art. IV, Sec. 10.

Qualifications

(a) In order to be eligible for ***nomination or for renomination*** *as a magistrate an individual* ***shall either be a resident of the county for which the magistrate is seeking nomination or renomination or a resident of a county that is contiguous to that county.*** *[NC. G.S. 7A-171.2(a), as amended by Session Law 2022-47, effective June 30, 2022].*

(b) To be eligible for nomination as a magistrate, an individual shall have at ***least eight years' experience as the clerk of superior court*** *in a county of this State or shall have a* ***four-year degree*** *from an accredited senior institution of higher education or shall have a* ***two-year associate degree and four years of work experience in a related field,*** *including teaching, social services, law enforcement, arbitration or mediation, the court system, or counseling. The Administrative Officer of the Courts may determine whether the work experience is sufficiently related to the duties of the office of magistrate for the purposes of this subsection. In determining whether an individual's work experience is in*

a related field, the Administrative Officer of the Courts shall consider the requisite knowledge, skills, and abilities for the office of magistrate.
G.S. 7A-171.2.

Appointment

The procedure established in the NC Constitution for appointment as a magistrate has multiple layers and involves the senior regular resident superior court judge and the clerk of superior court. That procedure is set out in G.S. 7A-171(b) as follows:

Not earlier than the Tuesday after the first Monday nor later than the third Monday in December of each even-numbered year, the clerk of the superior court shall submit to the senior regular resident superior court judge of the district or set of districts as defined in G.S. 7A-41.1(a) in which the clerk's county is located the names of two (or more, if requested by the judge) nominees for each magisterial office for the county for which the term of office of the magistrate holding that position shall expire on December 31 of that year. Not later than the fourth Monday in December, the senior regular resident superior court judge shall, from the nominations submitted by the clerk of the superior court, appoint magistrates to fill the positions for each county of the judge's district or set of districts.

G.S. 7A-171: Term of Office

(a1) The initial term of appointment for a magistrate is two years and subsequent terms shall be for a period of four years. The term of office begins on the first day of January of the odd-numbered year after appointment. The service of an individual as a magistrate filling a vacancy as provided in subsection (d) of this section does not constitute an initial term. For purposes of this section, any term of office for a magistrate who has served a two-year term is for four years even if the two-year term of appointment was before the effective date of this section, the term is after a break in service, or the term is for appointment in a different county from the county where the two-year term of office was served.

. . .

(c) If an additional magisterial office for a county is approved to commence on January 1 of an odd-numbered year, the new position shall be filled as provided in subsection (b) of this section. If the additional position takes effect at any other time, it is to be filled as provided in subsection (d) of this section. [Upon] a vacancy in the office of magistrate . . . the senior regular resident superior court judge shall appoint from the nominations received a magistrate who shall take office immediately and shall serve until December 31 of the even-numbered year, and thereafter the position shall be filled as provided in

subsection (b) of this section.

Supervision

G.S. 7A-146 provides that the chief district judge . . . has administrative supervision and authority over the operation of the district courts and magistrates in his district. These powers and duties include, but are not limited to, the following:

(4) Assigning matters to magistrates, and consistent with the salaries set by the Administrative Officer of the Courts, prescribing times and places at which magistrates shall be available for the performance of their duties; however, the chief district judge may in writing delegate his authority to prescribe times and places at which magistrates in a particular county shall be available for the performance of their duties to another district court judge or the clerk of the superior court, or the judge may appoint a chief magistrate to fulfill some or all of the duties. . . , and the person to whom such authorityis delegated shall make monthly reports to the chief district judge of the times and places actually served by each magistrate.

(13) Investigating written complaints against magistrates. Upon investigation and written findings of misconduct in violation of the Rules of Conduct for Magistrates, a chief district court judge may discipline a magistrate in accordance with the Rules of Conduct for Magistrates. Written complaints received by the chief district court judge and records of investigations into those complaints are to be treated as personnel records under Article 7 of Chapter 126 of the General Statutes. Notwithstanding Article 7 of Chapter 126 of the General Statutes, once a letter of caution, written reprimand, or suspension has been issued by the chief district court judge, the written complaints, and the record of the chief district court judge's action on that complaint, including any investigatory records, are no longer confidential personnel records." [G.S. 7A-146.
[New section added by Session Law 2022-47, effective October 1, 2022.]

The authority of chief district court judges to discipline magistrates is also made clear by the new Rules of Conduct.

Note: Counties vary widely in procedures related to vacation leave for magistrates.

Training & Education

Magistrates are required to satisfactorily complete Basic School to be eligible for reappointment. G.S. 7A-171.2.

In addition, except for the calendar year in which a magistrate completes the Basic School, each magistrate must annually satisfactorily complete at least 12 hours in the civil and criminal duties of a magistrate. G.S. 7A-177 (Effective January 1, 2022. As amended in Session Law 2021-146 and Session Law 2022-47.)

Further of the 12 hours required annually, the following subjects shall be annually and satisfactorily completed:

(1) Setting conditions of pretrial release.
(2) Impaired driving laws.
(3) Issuing criminal processes.
(4) Issuing search warrants.
(5) Technology.
(6) Orders of Protection.
(7) Summary ejectment laws **(effective January 1, 2023, added by Session Law 2022-47)**.

See also Magistrate Continuing Education Policy of the NC Judicial Branch Training and Services Division (effective January 1, 2023), for details about implementation of G.S. 7A-177. A copy is included immediately after this section.

Most opportunities for continuing education credit for magistrates are offered by the AOC and the SOG. The AOC provides extensive training opportunities related to technology for magistrates. Additional information and class schedules are available through the AOC intranet. The AOC has also established an online Learning Center which contains many online educational modules that magistrates can take to satisfy the requirements of G.S. 7A-177.

In addition, the following regularly scheduled events are designed specifically to address magistrates' educational needs:

<u>Spring and Fall Conferences</u>
Jointly sponsored by the AOC, SOG, and the NC Magistrates' Association. Each conference typically provides a minimum of 12 hours of continuing education credit. Beginning in 2022, the conference planners have also strived to make sure that all of the subjects required by the legislature are covered.

SOG Judicial College Seminars

Consisting of 2-3 days of intensive small-group instruction, these seminars are offered periodically:

- Involuntary Commitment
- Introduction to Holding Small Claims Court
- Special Topics in Small Claims Law
- Advanced Criminal Procedure
- DWI
- Domestic Violence
- Judicial Decision-Making for Magistrates

Course announcements and registration information are sent out to magistrates by email well in advance of each course.

SOG Criminal and Civil Law Seminars

These seminars focus on criminal law, civil law, and other topics of particular interest to magistrates. Historically offered in the fall in different locations across the state, since the start of the COVID-19 pandemic these seminars have been offered live online, then segments posted online in the AOC's online Learning Center. A seminar typically provides 6 hours of continuing education credit.

Other Training Opportunities

Numerous other training opportunities for magistrates are offered by a wide variety of providers. Note that training offered by providers other than AOC and SOG must be approved in advance for continuing education credit. Students should carefully consult AOC policy, available on the AOC intranet, concerning requirements for credit approval. For further detail, contact Felicia Kisselburg of the AOC at felicia.kisselburg@nccourts.org or 919-890-1284.

Duties of the Office

The duties a magistrate may be authorized to perform include the following:

- Accept guilty pleas, admission of responsibility and enter judgment for infractions
- Handle misdemeanor and infractions for cases involving alcohol, boating offenses, state park/recreational areas, littering offenses, and wildlife offenses (e.g., hunting, fishing, etc.)
- Accept written appearances, waivers of trial or hearing and guilty pleas and, in appropriate cases, enter judgment and collect fines, penalties and costs
- Issue arrest warrants and other forms of criminal process (valid statewide)
- Issue search warrants (valid in county of jurisdiction)
- Grant bail or set release conditions (non-capital offenses)
- Hear and enter judgments on worthless checks (<$2000.00)
- Conduct initial appearances
- Conduct first appearances, in limited circumstances
- Conduct small claims court in cases involving up to $10,000
- Administer oaths
- Provide punishment for direct criminal contempt
- Take depositions and examination before trial
- Issue subpoenas and capiases
- Take affidavits for verification of pleadings
- Assign years allowances to surviving spouses and children
- Perform marriage ceremonies
- Take acknowledgment of written contract or separation agreement
- Accept applications for involuntary commitments
- Conduct hearing for driver license revocations
- Validate vehicle towing by law enforcement
- Validate impounding of vehicles in certain DWI/DWLR charges
- Issue temporary domestic violence protection orders in certain emergency conditions
- Appoint an umpire pursuant to GS 20-279.21 to determine the amount of property damage to a motor vehicle

Removal from Office

The grounds for removing a magistrate from office are "the same as for a judge……. " *G.S. 7A-173(a).*

The grounds for removing a judge from office are:
(1) willful misconduct in office,
(2) willful and persistent failure to perform the judge's duties,
(3) habitual intemperance,
(4) conviction of a crime involving moral turpitude,
(5) conduct prejudicial to the administration of justice that brings the judicial office into disrepute.
G.S. 7A-376(b).

The new *North Carolina Rules of Conduct for Magistrates*, first published by the AOC on October 1, 2021, provide that a violation of any of the rules it contains may be deemed conduct prejudicial to the administration of justice. A copy of these Rules can be found in the **Ethics** tab of the **Civil Basic School Notebook**.

The procedure for removing a magistrate from office is set out in G.S. 7A-173. The first step occurs when a sworn written complaint is filed with the clerk of superior court. The next step requires the chief district court judge to examine the charges in order to determine whether the allegations, "if true, constitute grounds for removal." The final step in the statutory process is a public hearing conducted by a superior court judge; upon finding that grounds for removal exist, the judge is required to remove the magistrate from office.

While the grounds for removing a magistrate from office are identical to those for removing a judge, the procedures are quite different. In the case of judges, complaints are considered by The Judicial Standards Commission, which in turn makes recommendations to the North Carolina Supreme Court, based on a written ethical code enacted by that Court termed the **Code of Judicial Conduct**. By contrast,neither the Commission nor the Supreme Court is involved in considering complaints against magistrates.

Since the creation of the **NC Rules of Conduct for Magistrates** in 2021, **the Code of Judicial Conduct** itself has only indirect application as a source for determining whether particular conduct is "prejudicial to the administration of justice."

27 N.C.A.C. CHAPTER 1D - SECTION .1500

.1517 EXEMPTIONS

(c) Judiciary and Clerks. Members of the state judiciary who are required by virtue of their judicial offices to take an average of twelve (12) or more hours of continuing judicial or other legal education annually and all members of the federal judiciary are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such judicial capacities.

Tab:
Intro to Law

INTRODUCTION TO THE LAW & JUDICIAL PROCESS

Introduction to Law & Judicial Process

1

Part I

WHERE DOES LAW COME FROM?

2

Law you see in your work comes mostly from two sources.

Statutes are laws enacted by the legislature.

Case law comes from the decisions of appellate courts in specific lawsuits.

3

Imagine a lawyer hands you this . . .

§ 42-46. Authorized late fees and eviction fees.

(a) In all residential rental agreements in which a definite time for the payment of the rent is fixed, the parties may agree to a late fee not inconsistent with the provisions of this subsection, to be chargeable only if any rental payment is five days or more late. If the rent:

(1) Is due in monthly installments, a landlord may charge a late fee not to exceed fifteen dollars ($15.00) or five percent (5%) of the monthly rent, whichever is greater.

(2) Is due in weekly installments, a landlord may charge a late fee not to exceed four dollars ($4.00) or five percent (5%) of the weekly rent, whichever is greater.

(3) Repealed by Session Laws 2009-279, s. 4, effective October 1, 2009, and applicable to leases entered into on or after that date.

(b) A late fee under subsection (a) of this section may be imposed only one time for each late rental payment. A late fee for a specific late rental payment may not be deducted from a subsequent rental payment so as to cause the subsequent rental payment to be in

Is this from a statute or a case?

4

G.S. 42-37.3	§ 42-37.3. Waiver.	
Article 5 - Residential Rental Agreements.		
G.S. 42-38	§ 42-38. Application.	
G.S. 42-39	§ 42-39. Exclusions.	
G.S. 42-40	§ 42-40. Definitions.	
G.S. 42-41	§ 42-41. Mutuality of obligations.	
G.S. 42-42	§ 42-42. Landlord to provide fit premises.	
G.S. 42-42.1	§ 42-42.1. Water, electricity, and natural gas conservation.	
G.S. 42-42.2	§ 42-42.2. Victim protection - nondiscrimination.	
G.S. 42-42.3	§ 42-42.3. Victim protection - change locks.	
G.S. 42-43	§ 42-43. Tenant to maintain dwelling unit.	
G.S. 42-44	§ 42-44. General remedies, penalties, and limitations.	
G.S. 42-45	§ 42-45. Early termination of rental agreement by military personnel, surviving family members, or lawful representative.	Modified by: SL 2019-161 (S420)
G.S. 42-45.1	§ 42-45.1. Early termination of rental agreement by victims of domestic violence, sexual assault, or stalking.	
G.S. 42-45.2	§ 42-45.2. Early termination of rental agreement by tenants residing in certain foreclosed property.	
G.S. 42-46	§ 42-46. Authorized late fees and eviction fees.	
G.S. 42-47 through 42-49	§§ 42-47 through 42-49: Reserved for future codification purposes.	
Article 6 - Tenant Security Deposit Act.		
G.S. 42-50	§ 42-50. Deposits from the tenant.	
G.S. 42-51	§ 42-51. Permitted uses of the deposit.	

5

Case law

Comes from written opinions in specific cases decided by appellate courts.

6

Imagine a lawyer hands you this . . .

purpose doctrine our Supreme Court has explained that,

> [while] performance remains possible, [it] is excused whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of [**284] the expected value of the performance. The doctrine of commercial frustration is based upon the fundamental premise of giving relief in a situation where the parties could not reasonably have protected themselves by the terms of the contract against contingencies which later arose.

Brenner v. Little Red School House, Ltd., 302 N.C. 207, 211, 274 S.E.2d 206, 209 (1981). However, the doctrine is inapplicable where the frustrating event is reasonably foreseeable. *Id.* Additionally, "if [*79] the parties have contracted in reference to the allocation of the risk involved in the frustrating event, they may not invoke the doctrine of frustration to escape their obligations." *Id.* Essentially the doctrine of frustration of purpose requires proof that: (1) there was an implied condition in the contract that a changed condition would excuse performance; (2) the changed condition results in a failure of consideration or the expected value of the performance; and (3) the changed condition was not reasonably foreseeable. *Faulconer v. Wysong and Miles Co.*, 155 N.C.App. 598, 602, 574 S.E.2d 688, 691 (2002).

Is this from a statute or a case?

7

Brenner v. Little Red School House, Ltd., 302 N.C. 207, 211, 274 S.E.2d 206, 209 (1981). However, the doctrine is inapplicable where the frustrating event is reasonably foreseeable. *Id.* Additionally, "if

[Plaintiff] v. [Defendant], [Vol #] [Court] [Page #] [Year]

[Brenner] v. [Little Red School House, Ltd.], [302] [NC Supreme Court] [207] [quoted language appears on p. 211] [alternative publication citation] [1981]

8

the changed condition was not reasonably foreseeable. *Faulconer v. Wysong and Miles Co.*, 155 N.C.App. 598, 602, 574 S.E.2d 688, 691 (2002).

Plaintiff?

Defendant?

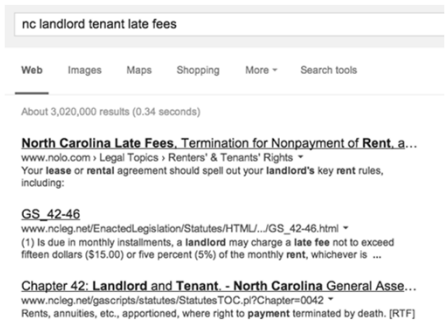
What court?

9

Part 2

HOW DO STATUTES AND CASES WORK TOGETHER?

10



11

§ 42-46. Authorized late fees and eviction fees.

(a) In all residential rental agreements in which a definite time for the payment of the rent is fixed, the parties may agree to a late fee not inconsistent with the provisions of this subsection, to be chargeable only if any rental payment is five days or more late. If the rent:

(1) Is due in monthly installments, a landlord may charge a late fee not to exceed fifteen dollars ($15.00) or five percent (5%) of the monthly rent, whichever is greater.

(2) Is due in weekly installments, a landlord may charge a late fee not to exceed four dollars ($4.00) or five percent (5%) of the weekly rent, whichever is greater.

.....

(4) Any provision of a residential rental agreement contrary to the provisions of this section is against the public policy of this State and therefore void and unenforceable.

*For illustration only. This statute has been amended.

12

Friday v. United Dominion

- Landlord used computer program to generate individualized leases, including 5% late fee clause.
- Lease called for monthly rent of $610, and late fee of $31 (rounded up from actual calculation of $30.50).
- In actual practice, LL charged $30 late fee.

13

Who wins?

??

Landlord entitled to late fees of $30/month.

??

Tenant, because landlord has forfeited right to charge late fees.

14

Friday Court held:

- "We hold that although Northwinds only charged and Ms. Friday only paid a $30 late fee each time her rent was late, the $31 late fee provision of the Northwinds lease agreement is contrary to the provisions of G.S. § 42-46(a) and therefore void and unenforceable as against North Carolina public policy."

15

Part 3

WHAT'S YOUR ROLE IN ALL THIS?

16

About the Magistrate

A magistrate is an independent judicial official, recognized by the North Carolina Constitution as an officer of the district court. Magistrates take the same oath as judges. They are subject to the NC Rules of Conduct for Magistrates (October 1, 2021). NC Const. Art IV, Sec. 10; and General Statutes 7A-170 and 7A-171.3.

Magistrates should strive for values like those listed on the next slide.

17

Neutral

Detached

Objective

Impartial

18

What is "the rule of law?"

Involves 4 basic ideas:

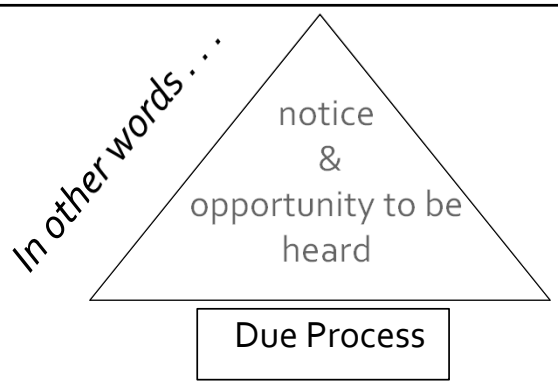
- Applies to everyone equally
- Is determined by a fair process
- Is administered by competent, impartial individuals
- Rules are clear, public, stable, & just, applied evenly, and protect fundamental rights

19

No State shall deprive any person of life, liberty, or property, without due process of law.

U.S. Constitution, 14th Amendment

20



21

"Important as it is that people should get justice, it is ever more important that they be made to feel and see that they are getting it."

Lord Chancellor Farrer Herschell

22

Discussion

What does a magistrate do that advances our system toward these 4 "Rule of Law" goals?

What common errors by a magistrate have you observed that cause us to be further away?

Reminder: The goals are that the law

1. will apply to everyone equally;
2. is determined by a fair process;
3. is administered by competent, impartial individuals; and
4. consists of rules that are clear, public, stable, and just, applied evenly, and protect fundamental rights.

23

HOW JUDICIAL OFFICIALS MAKE DECISIONS

24

The Judicial Process

Crime?

- Is there evidence sufficient to establish PC on each essential element of offense?

Cause of Action?

- Is there prima facie evidence on each essential element of claim?
- Does defendant's evidence successfully weaken an essential element

OR

- Establish an affirmative defense?

25

Defendant's behavior has caused me damage:

- ☐ D broke an agreement with me.
- ☐ D behaved negligently toward me.
- ☐ D deliberately injured me.
- ☐ D has my property and won't give it back.

26

Action for conversion

"My neighbor took my lawnmower without my permission and junked it!"

27

Action for conversion

Essential elements:

- ☐ I own the property.
- ☐ D wrongfully took or retained the property.
- ☐ I suffered damages as a result.

28

"I came home and my lawnmower was gone. When I asked D if she'd seen anyone around my house, she told me she'd borrowed it. I told her I wanted it back, and she said it was broken, and she'd taken it to the dump for me. I told her I'd see her in court."

29

Step 1:

Has π introduced credible evidence on every essential element?

30

Essential elements:

- ☐ I own the property.
- ☐ D wrongfully took or retained the property.
- ☐ I suffered damages as a result.

"I came home and my lawnmower was gone. When I asked D if she'd seen anyone around my house, she told me she'd borrowed it. I told her I wanted it back, and she said it was broken, and she'd taken it to the dump for me. I told her I'd see her in court."

31

That mower was old, but they don't make them like that anymore. I could have gotten at least $300 for it. Also, I had to pay a lawn guy $50 3 times before I finally found a new mower. So I'm asking for $450.

32

Step 1: Has π introduced credible evidence on every essential element?

Step 2: Does Δ's evidence challenge an essential element?

"The mower actually belongs to plaintiff's mom, and she gave me permission to use it."

33

Action for conversion

Essential elements:

- ~~I own the property.~~
- D wrongfully took or retained the property.
- I suffered damages as a result.

34

Action for conversion

Essential elements:

- ~~I own the property.~~
- ~~D wrongfully took or retained the property~~.
- I suffered damages as a result.

35

Step 1: Has π introduced credible evidence on every essential element?

Step 2: Does Δ's evidence challenge an essential element?

Step 3: Does Δ's evidence raise new material in defense?

"This all happened 8 years ago."

36

What Did We Learn?

Legislatures make law by enacting statutes, and appellate courts interpret (and sometimes make) law by writing opinions explaining their decisions in specific cases.

NC has two appellate courts: The NC Court of Appeals (identified as *N.C. App.*) and the NC Supreme Court (identified as *N.C.).*

A magistrate is an independent judicial official holding office under the NC Constitution.

Fundamental due process = notice + opportunity to be heard.

Judicial officials make decisions using a specific analysis. In civil cases, that begins with whether the plaintiff has offered evidence related to each essential element and (sometimes proceeding to whether) the defendant has offered evidence establishing a defense.

37

Content Outline: Module 1/Intro to Law & Judicial Process

Part 1: Where does law come from?

Statutes/ordinances enacted by local, state, and & federal legislative bodies
Opinions written by federal and state appellate courts in individual cases.

Statutes enacted by the NC General Assembly are cited in the following format:
NC/NCGS/NC Gen Stat/ [Chapter #] – [Section #] Example: *GS 42-46.*

Cases decided by the NC appellate courts are cited in the following format:
[Plaintiff's name] v. [Defendant's name], [volume #] [N.C. *or* N.C. App] [page #] [year]
Example: *Friday v. United Dominion Realty, Inc., 155 NC App 671 (2003)*

Part 2: What's your role in all of this?

A magistrate is a judicial official holding constitutional office.

The *rule of law* has 4 components:
- The law applies equally to everyone.
- The law is determined by a fair process.
- The law is administered by competent, impartial individuals.
- Rules are clear, public, stable, & just, applied evenly, and protect fundamental rights

14th Amendment: *No State shall deprive any person of life, liberty, or property, without due process of law.*

Fundamental due process involves notice + an opportunity to be heard.

What duties of a magistrate, properly carried out, bring us closer to achieving the goals associated with the rule of law? What common errors by a magistrate have you observed that cause us to be further away?

_____

_____

_____

_____

Part 3: How Judicial Officials Make Decisions

Every crime – and every civil cause of action – has *essential elements* that must be established by the plaintiff to a specific degree of certainty called the *burden of proof* before the government, in the form of the court system, will take action detrimental to the defendant.

In a civil case, the plaintiff is asserting that the defendant is legally responsible for an injury suffered by plaintiff. A *cause of action* is the legal rule imposing such responsibility.

Example: Plaintiff's car was damaged when a large overhanging tree limb located on defendant's property fell on plaintiff's car, which was parked in plaintiff's driveway.

> *"[W]here a landowner knows that he has a tree on his property which is in a dangerous condition and which is likely to fall and injure the property of an adjoining landowner, he has a duty to eliminate such danger."*
> Rowe v. McGee, 5 N.C. App. 60, 66, 168 S.E.2d 77, 81 (1969).

In a criminal case, a magistrate is typically asked to determine whether there is *probable cause* to believe that a crime has been committed and the defendant committed the crime.

In a small claims case, a magistrate is asked to determine whether plaintiff has established each essential element of the cause of action *by the greater weight of the evidence.*

In a small claims case, the presiding magistrate must also consider possible defenses. Defenses may be of two types:

- Evidence that challenges or contradicts one of the essential elements;
- Evidence establishing an *affirmative defense*: "Even if everything the plaintiff says is true, I am still entitled to win because of this additional information."

Some new magistrates begin their job knowing a great deal about the law and the courts, and others know nothing more than they've learned from watching "Law and Order." Understanding some basic information and vocabulary will not only help you do your job, but it will also help you understand what people are talking about at the water fountain. (It helps to know ACC basketball really well, too.)

WHERE DOES LAW COME FROM?

The "bedrock" of the law is found in the *U.S.* and *N.C. Constitutions*. For example, the principle that citizens are protected from the government performing unreasonable searches comes from the U.S. Constitution. Constitutional law often seems vague, because it states a general principle that will apply in many different circumstances. HOW a constitutional principle should be applied in any particular case is a question for a court to decide.

When certain higher-level courts (called *appellate* courts) consider legal questions in the context of the particular facts of individual cases, their written decisions (*opinions*) are published and their decisions become law (called *case law*).

Example: the U.S. Supreme Court was faced with a case in which a police officer searched a suspect's house for evidence of a crime. He had no warrant for the search, but he DID have a good reason to think he would find the evidence there. Based on these facts, was the search "unreasonable" under the Constitution? The Court said that it was, explaining in its opinion some of the rules for deciding whether a warrant is required before a search is conducted. The Court's decision, applying the Constitution to those particular facts, became law that would be applied to all similar cases in the future.

But what if the facts were only somewhat similar? What if another policeman performed a warrantless search in similar circumstances, but this time the suspect's spouse consented to the search? In that case, the Court found that a different rule applied, yielding a different result, and thus different law: a spouse who resides at the home may consent to the search of the premises, and that search is not "unreasonable."

Another important source of law is legislation passed by the General Assembly (or, in laws that apply to the entire country, by Congress). These laws (called *statutes)* are (usually) clear statements of rules and consequences. For example, magistrates have authority to punish people for direct criminal

contempt because the General Assembly enacted a statute in 1965 giving them that authority. (N.C.G.S. 7A-292)

Like the case involving unreasonable searches under the Constitution, sometimes the application of a statute to particular facts is not clear. In deciding on the language to use in a statute, the General Assembly can't possibly imagine all the situations in which its words might be applied. In those cases, as above, a court may have to *interpret* the statute in order to decide a case. For example, if a city ordinance prohibits walking on the grass in a particular area, and a person runs through the grass, has that person violated the law? While the statute seems clear, it may be necessary to ask a court to decide what "walking" means.

Summing up: There are three sources of law: Constitutional law, case law, and statutory law.

KINDS OF CASES

(Almost) all cases that come before a court are either criminal or civil. This is a very important distinction, because a lot depends on whether a case is one or the other.

In a *civil* case, one person has a complaint about the actions of another. In essence, s/he is saying, "I have been harmed by the actions of this person." The person doing the complaining is called the *plaintiff* and the person being complained about is called the *defendant*. With only a few exceptions, the plaintiff is asking the court to order the defendant to pay money as compensation for the injury.

Example: Kendra hits Kyle during an argument in a bar. Kyle may bring a civil lawsuit (*Kyle vs. Kendra*), in which he will try to prove (1) Kendra hit me, and (2) she should pay me $500 for my medical bills and pain and suffering. If Kendra responds by saying, "I had a right to hit him, because he hit me first," she has presented a *defense* to Kyle's claim.

In a civil case, the plaintiff must prove the case by *the greater weight of the evidence*. This means Kyle does not have to show enough proof to make the judge *positive* that what he says is right; he only needs enough proof to convince the judge that what he says is *most likely* right. In a civil case, the defendant usually has to pay money if she loses, but sometimes she will be ordered to do something instead, such as move out of her apartment or hand over her refrigerator to Sears after she misses a payment. Some examples of typical civil cases are breach of contract cases, cases arising out of automobile accidents, medical malpractice cases, cases involving divorce or other family law questions, and landlord-tenant cases.

In a *criminal case*, the party doing the complaining is the State of North Carolina. You might have expected the complainant to be the victim of the crime, and in fact a victim might sue a defendant in a civil lawsuit for the same behavior that the State is arguing is a crime. For example, if your bank teller puts your deposit in his pocket, he has committed a crime and the State may bring a criminal action against him. At the same time, you may bring a civil action, arguing (quite correctly) that his improper behavior caused you to suffer a loss for which he should be obligated to compensate you.. The State's interest is not so personal, however—the State is concerned with more than your individual loss. The State is concerned that this is a person breaking very important rules designed to

protect the public in general. By bringing criminal charges, the State is seeking to PUNISH the defendant, as well as to let other bank tellers know that they better not do the same thing.

If the State decided to proceed criminally against Kendra in the example above, that case would be called *State vs. Kendra*, and Kyle, while an important witness, would not be a party to the case. While people often think it is necessary to choose whether to proceed against a defendant criminally or civilly, that is not true. Because the interest of the victim is not at all the same as that of the State, a defendant may be called to account for her actions in both kinds of actions. O.J. Simpson, a famous example, was found not guilty of murder (a criminal charge), but was later found in a civil lawsuit to be responsible for the wrongful deaths of the two homicide victims.

There are several important differences between civil and criminal cases, in addition to their different names. Most importantly, a defendant in a criminal case faces more than a loss of money: she may end up in jail. Because we believe that loss of freedom is much more serious than loss of money, special rules apply. For one thing, the burden of proof is much higher. To send Kendra to jail for hitting Kyle, the State will have to prove its case *beyond a reasonable doubt.* For another thing, the U.S. Constitution gives criminal defendants some special protections: A criminal defendant is entitled to an attorney even if unable to pay for one. A criminal defendant has a legal right to refuse to answer questions that might reveal incriminating evidence. In criminal cases, a jury trial is available upon request. Finally, the defendant is entitled to face and question the witnesses at trial. These special protections are designed to make it hard for an innocent man or woman to be sent to jail; it is sometimes said that it is better for 100 guilty people to go free than for one innocent person to be imprisoned.

There are three kinds of offenses against the State (or The People) in North Carolina. Most serious are *felonies*, involving crimes such as rape, murder, and theft of valuable property. Less serious are *misdemeanors*, involving crimes such as shoplifting, worthless checks, and simple assault. Least serious—and technically not crimes at all—are **i***nfractions*, involving offenses such as speeding and failure to have your vehicle inspected.

THE COURT SYSTEM

The court system is somewhat like a factory, in that it has many different parts, working together but each responsible for doing a particular job.

ADMINISTRATION AND RECORD-KEEPING.

The Clerk of Superior Court is the business office of the court system, charged with keeping accurate records and handling money.
The Administrative Office of the Courts (AOC) is management: it administers the business of the courts, including personnel matters and a host of other responsibilities required to keep the courts operational, efficient, fair, and effective.

TRIAL COURTS

The trial courts are divided into the district court division and the superior court division.

Cases handled in the *district court division* may be heard by a magistrate or by a district court judge, depending on the type of case.
Magistrates have a number of duties, including issuing search warrants, setting conditions of pretrial release, and taking guilty pleas in certain small criminal cases. Magistrates also hear civil cases involving less than $10,000 in small claims court.
District court judges hear appeals from small claims court. The district court is also the proper court for civil cases involving less than $25,000, misdemeanor criminal cases, family law and juvenile cases, and involuntary commitments.

Cases handled in the *superior court division* may be heard by a superior court clerk or a superior court judge, depending on the type of case.
The clerk of superior court is responsible for hearing cases involving probate, adoptions, foreclosures, and guardianship, among others.
Superior court judges are responsible for trying felony criminal cases, misdemeanor criminal cases appealed from district court, civil cases involving more than $25,000, and appeals from cases decided by the clerk.

Both *district attorneys* (also called *prosecutors*) and *public defenders* work only on criminal cases. The DA represents the State, while the PD represents criminal defendants who cannot afford to hire a private attorney.

The district and superior courts together make up the *trial divisions* of North Carolina's judicial system. These courts conduct *trials,* meaning they hear witnesses, determine important facts, and hand down legally binding decisions called *judgments*. But what happens if a judge makes a mistake?

Appellate Courts

Appellate courts have one purpose, and one purpose only: to determine whether the trial judge in a particular case has done his or her job correctly. An appellate court does not hear witnesses, and it does not decide the facts of a case. Instead, it examines the official record of the case for legal errors. For example, a landlord-tenant case might involve a tenant who asks that the landlord be ordered to reimburse him for padlocking the rental property in which he lives without first going through the eviction procedure. If a trial judge dismissed this case, based on a ruling that a landlord is entitled to terminate a residential tenancy by merely locking the premises, the tenant might appeal the case. If he did, the appellate court would almost certainly say that the trial judge made an error in law: in fact, *self-help eviction* such as this is prohibited in residential rentals. The appellate court would write an opinion explaining the law so that other judges could avoid making the same mistake in other

cases in the future, and it would direct the trial judge to correct the error in the particular case that had been appealed.

In North Carolina, there are two appellate courts: the *North Carolina Court of Appeals* (fifteen judges who consider cases in a "panel" of three judges for each case) and the *North Carolina Supreme Court* (seven "justices" who all consider and vote on each case). In cases in which the Court of Appeals cannot agree on the law, and in some other cases of great importance (for example, death penalty cases), the North Carolina Supreme Court makes the final decision.

THE COURT SYSTEM'S PUBLIC FACE: THE MAGISTRATE

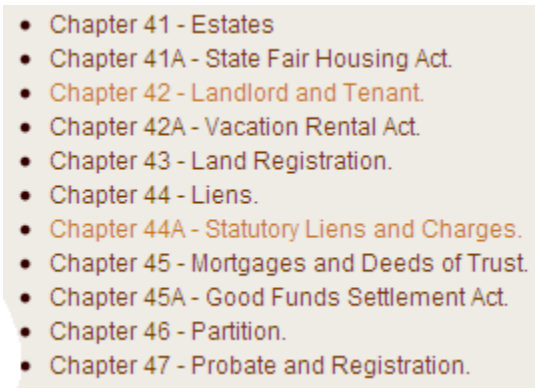
For most citizens, the first member of the court system they encounter is a magistrate, and in many cases, the magistrate is the ONLY court official they interact with. North Carolina's more than 600 magistrates hold an office that dates back to 1195, when King Richard the Lionhearted appointed certain knights to serve as "Keepers of the Peace," the forerunner of the Justice of the Peace. In 1970, North Carolina modified its court system and moved from *justices of the peace* to *magistrates*, but the office remained in many ways the same. Nominated by the Clerk of Superior Court, appointed by the Resident Superior Court Judge, and supervised by the Chief District Court Judge, it is somewhat ironic that the magistrate—with so many conceivable bosses—is actually an independent judicial official, removable from office only for serious reasons found to exist in an official removal procedure established by statute.

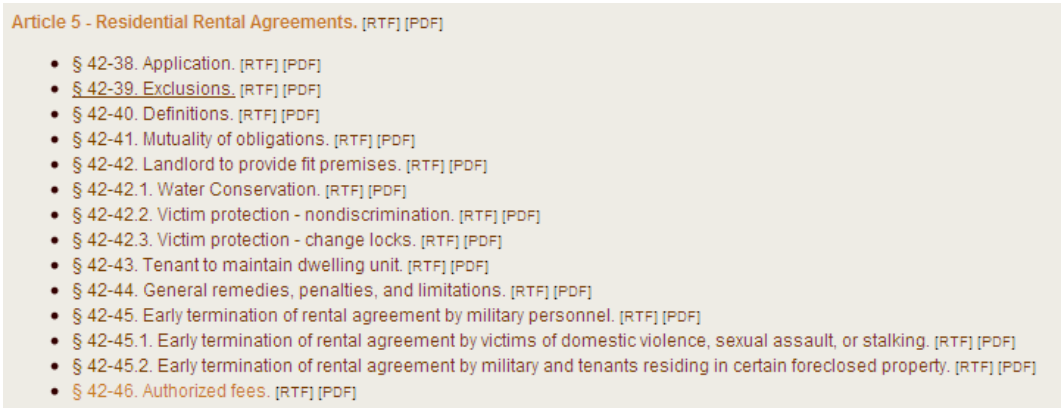
Introduction to Law & Judicial Process

Where does law come from?

Statutes

- Are laws passed by a legislative body
- Congress enacts federal statutes
- Local governing bodies pass ordinances.
- The NC General Assembly enacts state statutes
    - NC statutes are organized into *chapters* which are in turn organized into *articles, sections,* and *subsections.*





    - A citation to a NC statute may begin with *NCGS, NC Gen Stat,* or simply GS, followed by a number—indicating the *chapter*—a hyphen, and another number—indicating the *section.*

      EXAMPLES:
      The statutes of limitation for most civil actions may be found in GS Ch. 1, Art. 5.

The qualifications for appointment as a magistrate are set out in NC Gen Stat. 7A-171.2.

- Statutes are available online at https://www.ncleg.gov/Laws/GeneralStatutes. If you search for North Carolina statutes via a search engine, make sure you choose pages that are created by the NC General Assembly. Many online sources from other websites are not reliable, mostly because they are not regularly updated when the legislature makes changes.

- Statutes must be read carefully, giving every word its precise meaning. When a statute's meaning is not clear, there are legal rules about *statutory construction*, i.e., interpreting the meaning of the statute.

Appellate Court Opinions (aka *Case Law*)

- Written opinions provided by panels of appellate court judges reviewing trials in individual cases.
- Appellate courts do not hear evidence or conduct trials. Instead they review the record of a trial to determine whether the trial judge made an error.
- Reading an appellate opinion requires a different approach than reading a statute.

  The part of the opinion essential to the result reached by the Court is a *holding*. The Court's *holding* in an appellate case is binding on lower courts in future cases.
  Language in the opinion not essential to the result is *dicta*. *Dicta* in an opinion, however intriguing and suggestive, is not binding on lower courts and may be ignored in future opinions of the deciding court.

- NC has two appellate courts, the Court of Appeals and the Supreme Court, with the former being the intermediate court and the latter being – well-- Supreme.

- Case names are in the form of *Plaintiff v. Defendant, XX NC App* (or *NC) YYY (year of decision)*.
  Examples: Friday v. United Dominion Realty, Inc., 155 N.C. App. 671 (2003).
  State v. Knoll, 422 N.C. 535 (1988).

- If you are interested in reading court opinions as they're handed down, you can go to *www.nccourts.org* and click on "opinions" in the column on the right. If you're VERY eager, you can sign up there to be notified of new cases as soon as they're filed. If you're looking for a case and have only the name or what it's about, sometimes GOOGLE is your best bet.

Example:

Facts: LL-T case involving dispute over late fees assessed but unpaid in residential lease providing for monthly rent of $600. Late fees were calculated by computer and filled in automatically in written lease agreement. Computer rounded up to whole dollars, providing that late fee in amount of $31 would be assessed. LL never charged this amount, instead assessing $30.

Statute:

§ 42-46. Authorized fees.

(a) In all residential rental agreements in which a definite time for the payment of the rent is fixed, the parties may agree to a late fee not inconsistent with the provisions of this subsection, to be chargeable only if any rental payment is five days or more late. If the rent:

(1) Is due in monthly installments, a landlord may charge a late fee not to exceed fifteen dollars ($15.00) or five percent (5%) of the monthly rent, whichever is greater.

(4) Any provision of a residential rental agreement contrary to the provisions of this section is against the public policy of this State and therefore void and unenforceable.

Case

IN THE COURT OF APPEALS 671

FRIDAY v. UNITED DOMINION REALTY TR., INC.

[155 N.C. App. 671 (2003)]

REBECCA M. FRIDAY, PLAINTIFF V. UNITED DOMINION REALTY TRUST, INC., T/A AND D/B/A NORTHWINDS APARTMENTS, DEFENDANT

No. COA02-283

(Filed 21 January 2003)

"We hold that although Northwinds only charged and Ms. Friday only paid a $30 late fee each time her rent was late, the $31 late fee provision of the Northwinds lease agreement is contrary to the provisions of G.S. § 42-46(a) and therefore void and unenforceable as against North Carolina public policy."

What is the rule of law?

- *There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny.* —U.S. Supreme Court Justice Felix Frankfurter (1947).
- *From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial*

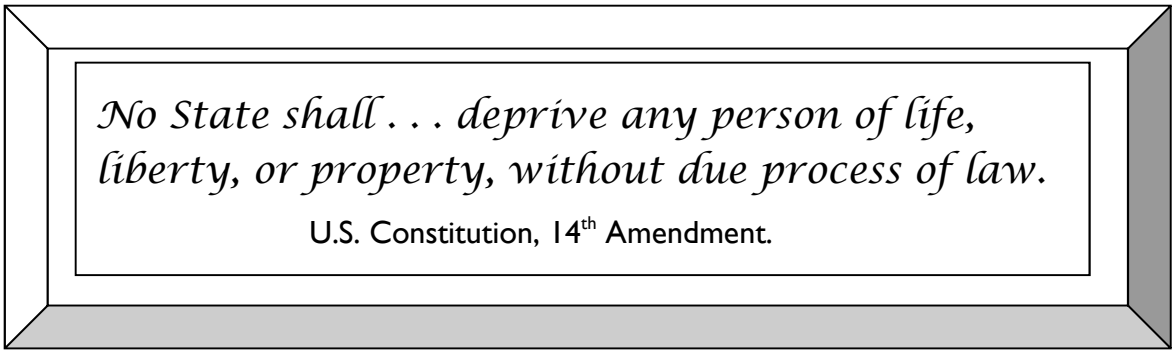
tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. —U.S. Supreme Court Justice Hugo Black (1963)

- *[N]either laws nor the procedures used to create or implement them should be secret; and . . . the laws must not be arbitrary.* —U.S. Court of Appeals Judge Diane Wood (2003)
- *When we [Americans] talk about the rule of law, we assume that we're talking about a law that promotes freedom, that promotes justice, that promotes equality.* —U.S. Supreme Court Justice Anthony Kennedy (2007)

Some people have said it boils down to four components:

1. _____
2. _____
3. _____
4. _____

Due Process: The Heart of Your Job



Put this in your own words:

_____

_____

_____

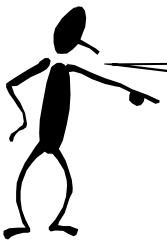
DGL/SOG/2018

How Judicial Officials Make Decisions

Before we allow a plaintiff to use the force of law to take away property belonging to another, we require every plaintiff to establish specific facts. We call these facts.

Essential Elements

Only after a plaintiff has introduced sufficient evidence to prove each individual element do we require a defendant to either rebut the evidence against her, or introduce additional evidence establishing an affirmative defense.

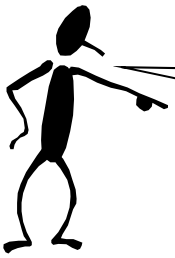


You injured me by

_____,

so I'm suing you for

_____.



Here are the essential elements of my case:

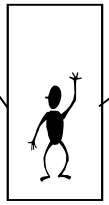
1. _____
2. _____
3. _____
4. _____

I am not responsible for your injury, because one of your essential elements is not true:

_____

_____

_____



Even if everything you say is true, I'm STILL not responsible for your injury, because

_____

_____

_____

DGL/SOG/2018

THE GREEN BAG
AN ENTERTAINING JOURNAL OF LAW

How to Read a Legal Opinion

A Guide for New Law Students

Orin S. Kerr

Second Series • Autumn 2007 GB Volume 11 • Number 1

Published by The Green Bag, Inc., in cooperation with the George Mason University School of Law.

How to Read a Legal Opinion

A Guide for New Law Students

Orin S. Kerr

This essay is designed to help new law students prepare for the first few weeks of class. It explains what judicial opinions are, how they are structured, and what law students should look for when reading them.

I. What's in a Legal Opinion?

When two people disagree and that disagreement leads to a lawsuit, the lawsuit will sometimes end with a ruling by a judge in favor of one side. The judge will explain the ruling in a written document referred to as an "opinion." The opinion explains what the case is about, discusses the relevant legal principles, and then applies the law to the facts to reach a ruling in favor of one side and against the other.

Modern judicial opinions reflect hundreds of years of history and practice. They usually follow a simple and predictable formula. This

---

Orin Kerr is a professor of law at the George Washington University Law School.

11 Green Bag 2d 51

section takes you through the basic formula. It starts with the introductory materials at the top of an opinion and then moves on to the body of the opinion.

The Caption

The first part of the case is the title of the case, known as the "caption." Examples include *Brown v. Board of Education* and *Miranda v. Arizona*. The caption usually tells you the last names of the person who brought the lawsuit and the person who is being sued. These two sides are often referred to as the "parties" or as the "litigants" in the case. For example, if Ms. Smith sues Mr. Jones, the case caption may be *Smith v. Jones* (or, depending on the court, *Jones v. Smith*).

In criminal law, cases are brought by government prosecutors on behalf of the government itself. This means that the government is the named party. For example, if the federal government charges John Doe with a crime, the case caption will be *United States v. Doe*. If a state brings the charges instead, the caption will be *State v. Doe*, *People v. Doe*, or *Commonwealth v. Doe*, depending on the practices of that state.[1]

The Case Citation

Below the case name you will find some letters and numbers. These letters and numbers are the legal citation for the case. A citation tells you the name of the court that decided the case, the law book in which the opinion was published, and the year in which the court decided the case. For example, "U.S. Supreme Court, 485 U.S. 759 (1988)" refers to a U.S. Supreme Court case decided in 1988 that appears in Volume 485 of the *United States Reports* starting at page 759.

The Author of the Opinion

The next information is the name of the judge who wrote the opinion. Most opinions assigned in law school were issued by courts

[1] English criminal cases normally will be *Rex v. Doe* or *Regina v. Doe*. Rex and Regina aren't the victims: the words are Latin for "King" and "Queen." During the reign of a King, English courts use "Rex"; during the reign of a Queen, they switch to "Regina."

with multiple judges. The name tells you which judge wrote that particular opinion. In older cases, the opinion often simply states a last name followed by the initial "J." No, judges don't all have the first initial "J." The letter stands for "Judge" or "Justice," depending on the court. On occasion, the opinion will use the Latin phrase "per curiam" instead of a judge's name. Per curiam means "by the court." It signals that the opinion reflects a common view among all the judges rather than the writings of a specific judge.

The Facts of the Case

Now let's move on to the opinion itself. The first part of the body of the opinion presents the facts of the case. In other words, what happened? The facts might be that Andy pulled out a gun and shot Bob. Or maybe Fred agreed to give Sally $100 and then changed his mind. Surprisingly, there are no particular rules for what facts a judge must include in the fact section of an opinion. Sometimes the fact sections are long, and sometimes they are short. Sometimes they are clear and accurate, and other times they are vague or incomplete.

Most discussions of the facts also cover the "procedural history" of the case. The procedural history explains how the legal dispute worked its way through the legal system to the court that is issuing the opinion. It will include various motions, hearings, and trials that occurred after the case was initially filed. Your civil procedure class is all about that kind of stuff; you should pay very close attention to the procedural history of cases when you read assignments for your civil procedure class. The procedural history of cases usually will be less important when you read a case for your other classes.

The Law of the Case

After the opinion presents the facts, it will then discuss the law. Many opinions present the law in two stages. The first stage discusses the general principles of law that are relevant to cases such as the one the court is deciding. This section might explore the history of a particular field of law or may include a discussion of past cases (known as "precedents") that are related to the case the court is de-

ciding. This part of the opinion gives the reader background to help understand the context and significance of the court's decision. The second stage of the legal section applies the general legal principles to the particular facts of the dispute. As you might guess, this part is in many ways the heart of the opinion: It gets to the bottom line of why the court is ruling for one side and against the other.

Concurring and/or Dissenting Opinions

Most of the opinions you read as a law student are "majority" opinions. When a group of judges get together to decide a case, they vote on which side should win and also try to agree on a legal rationale to explain why that side has won. A majority opinion is an opinion joined by the majority of judges on that court. Although most decisions are unanimous, some cases are not. Some judges may disagree and will write a separate opinion offering a different approach. Those opinions are called "concurring opinions" or "dissenting opinions," and they appear after the majority opinion. A "concurring opinion" (sometimes just called a "concurrence") explains a vote in favor of the winning side but based on a different legal rationale. A "dissenting opinion" (sometimes just called a "dissent") explains a vote in favor of the losing side.

II. Common Legal Terms Found in Opinions

Now that you know what's in a legal opinion, it's time to learn some of the common words you'll find inside them. But first a history lesson, for reasons that should be clear in a minute.

In 1066, William the Conqueror came across the English Channel from what is now France and conquered the land that is today called England. The conquering Normans spoke French and the defeated Saxons spoke Old English. The Normans took over the court system, and their language became the language of the law. For several centuries after the French-speaking Normans took over England, lawyers and judges in English courts spoke in French. When English courts eventually returned to using English, they continued to use many French words.

Why should you care about this ancient history? The American colonists considered themselves Englishmen, so they used the English legal system and adopted its language. This means that American legal opinions today are littered with weird French terms. Examples include plaintiff, defendant, tort, contract, crime, judge, attorney, counsel, court, verdict, party, appeal, evidence, and jury. These words are the everyday language of the American legal system. And they're all from the French, brought to you by William the Conqueror in 1066.

This means that when you read a legal opinion, you'll come across a lot of foreign-sounding words to describe the court system. You need to learn all of these words eventually; you should read cases with a legal dictionary nearby and should look up every word you don't know. But this section will give you a head start by introducing you to some of the most common words, many of which (but not all) are French in origin.

Types of Disputes and the Names of Participants

There are two basic kinds of legal disputes: civil and criminal. In a civil case, one person files a lawsuit against another asking the court to order the other side to pay him money or to do or stop doing something. An award of money is called "damages" and an order to do something or to refrain from doing something is called an "injunction." The person bringing the lawsuit is known as the "plaintiff" and the person sued is called the "defendant."

In criminal cases, there is no plaintiff and no lawsuit. The role of a plaintiff is occupied by a government prosecutor. Instead of filing a lawsuit (or equivalently, "suing" someone), the prosecutor files criminal "charges." Instead of asking for damages or an injunction, the prosecutor asks the court to punish the individual through either jail time or a fine. The government prosecutor is often referred to as "the state," "the prosecution," or simply "the government." The person charged is called the defendant, just like the person sued in a civil case.

In legal disputes, each party ordinarily is represented by a lawyer. Legal opinions use several different words for lawyers, includ-

ing "attorney" and "counsel." There are some historical differences among these terms, but for the last century or so they have all meant the same thing. When a lawyer addresses a judge in court, she will always address the judge as "your honor," just like lawyers do in the movies. In legal opinions, however, judges will usually refer to themselves as "the Court."

Terms in Appellate Litigation

Most opinions that you read in law school are appellate opinions, which means that they decide the outcome of appeals. An "appeal" is a legal proceeding that considers whether another court's legal decision was right or wrong. After a court has ruled for one side, the losing side may seek review of that decision by filing an appeal before a higher court. The original court is usually known as the trial court, because that's where the trial occurs if there is one. The higher court is known as the appellate or appeals court, as it is the court that hears the appeal.

A single judge presides over trial court proceedings, but appellate cases are decided by panels of several judges. For example, in the federal court system, run by the United States government, a single trial judge known as a District Court judge oversees the trial stage. Cases can be appealed to the next higher court, the Court of Appeals, where cases are decided by panels of three judges known as Circuit Court judges. A side that loses before the Circuit Court can seek review of that decision at the United States Supreme Court. Supreme Court cases are decided by all nine judges. Supreme Court judges are called Justices instead of judges; there is one "Chief Justice" and the other eight are just plain "Justices" (technically they are "Associate Justices," but everyone just calls them "Justices").

During the proceedings before the higher court, the party that lost at the original court and is therefore filing the appeal is usually known as the "appellant." The party that won in the lower court and must defend the lower court's decision is known as the "appellee" (accent on the last syllable). Some older opinions may refer to the appellant as the "plaintiff in error" and the appellee as the "defendant

in error." Finally, some courts label an appeal as a "petition," and require the losing party to petition the higher court for relief. In these cases, the party that lost before the lower court and is filing the petition for review is called the "petitioner." The party that won before the lower court and is responding to the petition in the higher court is called the "respondent."

Confused yet? You probably are, but don't worry. You'll read so many cases in the next few weeks that you'll get used to all of this very soon.

III. What You Need to Learn from Reading a Case

Okay, so you've just read a case for class. You think you understand it, but you're not sure if you learned what your professor wanted you to learn. Here is what professors want students to know after reading a case assigned for class:

Know the Facts

Law professors love the facts. When they call on students in class, they typically begin by asking students to state the facts of a particular case. Facts are important because law is often highly fact-sensitive, which is a fancy way of saying that the proper legal outcome depends on the exact details of what happened. If you don't know the facts, you can't really understand the case and can't understand the law.

Most law students don't appreciate the importance of the facts when they read a case. Students think, "I'm in law school, not fact school; I want to know what the law is, not just what happened in this one case." But trust me: the facts are really important.[2]

---

[2] If you don't believe me, you should take a look at a few law school exams. It turns out that the most common form of law school exam question presents a long description of a very particular set of facts. It then asks the student to "spot" and analyze the legal issues presented by those facts. These exam questions are known as "issue-spotters," as they test the student's ability to understand the facts and spot the legal issues they raise. As you might imagine, doing well on an issue-

Know the Specific Legal Arguments Made by the Parties

Lawsuits are disputes, and judges only issue opinions when two parties to a dispute disagree on a particular legal question. This means that legal opinions focus on resolving the parties' very specific disagreement. The lawyers, not the judges, take the lead role in framing the issues raised by a case.

In an appeal, for example, the lawyer for the appellant will articulate specific ways in which the lower court was wrong. The appellate court will then look at those arguments and either agree or disagree. (Now you can understand why people pay big bucks for top lawyers; the best lawyers are highly skilled at identifying and articulating their arguments to the court.) Because the lawyers take the lead role in framing the issues, you need to understand exactly what arguments the two sides were making.

Know the Disposition

The "disposition" of a case is the action the court took. It is often announced at the very end of the opinion. For example, an appeals court might "affirm" a lower court decision, upholding it, or it might "reverse" the decision, ruling for the other side. Alternatively, an appeals court might "vacate" the lower court decision, wiping the lower-court decision off the books, and then "remand" the case, sending it back to the lower court for further proceedings. For now, you should keep in mind that when a higher court "affirms" it means that the lower court had it right (in result, if not in reasoning). Words like "reverse," "remand," and "vacate" means that the higher court though the lower court had it wrong.

Understand the Reasoning of the Majority Opinion

To understand the reasoning of an opinion, you should first identify the source of the law the judge applied. Some opinions interpret the Constitution, the founding charter of the government. Other cases

---

spotter requires developing a careful and nuanced understanding of the importance of the facts. The best way to prepare for that is to read the fact sections of your cases very carefully.

interpret "statutes," which is a fancy name for written laws passed by legislative bodies such as Congress. Still other cases interpret "the common law," which is a term that usually refers to the body of prior case decisions that derive ultimately from pre-1776 English law that the Colonists brought over from England.[3]

In your first year, the opinions that you read in your Torts, Contracts, and Property classes will mostly interpret the common law. Opinions in Criminal Law mostly interpret either the common law or statutes. Finally, opinions in your Civil Procedure casebook will mostly interpret statutory law or the Constitution. The source of law is very important because American law follows a clear hierarchy. Constitutional rules trump statutory (statute-based) rules, and statutory rules trump common law rules.

After you have identified the source of law, you should next identify the method of reasoning that the court used to justify its decision. When a case is governed by a statute, for example, the court usually will simply follow what the statute says. The court's role is narrow in such settings because the legislature has settled the law. Similarly, when past courts have already answered similar questions before, a court may conclude that it is required to reach a particular result because it is bound by the past precedents. This is an application of the judicial practice of "stare decisis," an abbreviation of a Latin phrase meaning "That which has been already decided should remain settled."

In other settings, courts may justify their decisions on public policy grounds. That is, they may pick the rule that they think is the best rule, and they may explain in the opinion why they think that rule is best. This is particularly likely in common law cases where judges are not bound by a statute or constitutional rule. Other courts will rely on morality, fairness, or notions of justice to justify

---

[3] The phrase "common law" started being used about a thousand years ago to refer to laws that were common to all English citizens. Thus, the word "common" in the phrase "common law" means common in the sense of "shared by all," not common in the sense of "not very special." The "common law" was announced in judicial opinions. As a result, you will sometimes hear the phrase "common law" used to refer to areas of judge-made law as opposed to legislatively-made law.

their decisions. Many courts will mix and match, relying on several or even all of these justifications.

Understand the Significance of the Majority Opinion

Some opinions resolve the parties' legal dispute by announcing and applying a clear rule of law that is new to that particular case. That rule is known as the "holding" of the case. Holdings are often contrasted with "dicta" found in an opinion. Dicta refers to legal statements in the opinion not needed to resolve the dispute of the parties; the word is a pluralized abbreviation of the Latin phrase "obiter dictum," which means "a remark by the way."

When a court announces a clear holding, you should take a minute to think about how the court's rule would apply in other situations. During class, professors like to pose "hypotheticals," new sets of facts that are different from those found in the cases you have read. They do this for two reasons. First, it's hard to understand the significance of a legal rule unless you think about how it might apply to lots of different situations. A rule might look good in one setting, but another set of facts might reveal a major problem or ambiguity. Second, judges often reason by "analogy," which means a new case may be governed by an older case when the facts of the new case are similar to those of the older one. This raises the question, which are the legally relevant facts for this particular rule? The best way to evaluate this is to consider new sets of facts. You'll spend a lot of time doing this in class, and you can get a head start on your class discussions by asking the hypotheticals on your own before class begins.

Finally, you should accept that some opinions are vague. Sometimes a court won't explain its reasoning very well, and that forces us to try to figure out what the opinion means. You'll look for the holding of the case but become frustrated because you can't find one. It's not your fault; some opinions are written in a narrow way so that there is no clear holding, and others are just poorly reasoned or written. Rather than trying to fill in the ambiguity with false certainty, try embracing the ambiguity instead. One of the skills of top-flight lawyers is that they know what they don't know: they know

when the law is unclear. Indeed, this skill of identifying when a problem is easy and when it is hard (in the sense of being unsettled or unresolved by the courts) is one of the keys to doing very well in law school. The best law students are the ones who recognize and identify these unsettled issues without pretending that they are easy.

Understand Any Concurring and/or Dissenting Opinions

You probably won't believe me at first, but concurrences and dissents are very important. You need to read them carefully. To understand why, you need to appreciate that law is man-made, and Anglo-American law has often been judge-made. Learning to "think like a lawyer" often means learning to think like a judge, which means learning how to evaluate which rules and explanations are strong and which are weak. Courts occasionally say things that are silly, wrongheaded, or confused, and you need to think independently about what judges say.

Concurring and dissenting opinions often do this work for you. Casebook authors edit out any unimportant concurrences and dissents to keep the opinions short. When concurrences and dissents appear in a casebook, it signals that they offer some valuable insights and raise important arguments. Disagreement between the majority opinion and concurring or dissenting opinions often frames the key issue raised by the case; to understand the case, you need to understand the arguments offered in concurring and dissenting opinions.

IV. WHY DO LAW PROFESSORS USE THE CASE METHOD?

I'll conclude by stepping back and explaining why law professors bother with the case method. Every law student quickly realizes that law school classes are very different from college classes. Your college professors probably stood at the podium and droned on while you sat back in your chair, safe in your cocoon. You're now starting law school, and it's very different. You're reading about actual cases, real-life disputes, and you're trying to learn about the law by picking up bits and pieces of it from what the opinions tell

you. Even weirder, your professors are asking you questions about those opinions, getting everyone to join in a discussion about them. Why the difference?, you may be wondering. Why do law schools use the case method at all?

I think there are two major reasons, one historical and the other practical.

The Historical Reason

The legal system that we have inherited from England is largely judge-focused. The judges have made the law what it is through their written opinions. To understand that law, we need to study the actual decisions that the judges have written. Further, we need to learn to look at law the way that judges look at law. In our system of government, judges can only announce the law when deciding real disputes: they can't just have a press conference and announce a set of legal rules. (This is sometimes referred to as the "case or controversy" requirement; a court has no power to decide an issue unless it is presented by an actual case or controversy before the court.) To look at the law the way that judges do, we need to study actual cases and controversies, just like the judges. In short, we study real cases and disputes because real cases and disputes historically have been the primary source of law.

The Practical Reason

A second reason professors use the case method is that it teaches an essential skill for practicing lawyers. Lawyers represent clients, and clients will want to know how laws apply to them. To advise a client, a lawyer needs to understand exactly how an abstract rule of law will apply to the very specific situations a client might encounter. This is more difficult than you might think, in part because a legal rule that sounds definite and clear in the abstract may prove murky in application. (For example, imagine you go to a public park and see a sign that says "No vehicles in the park." That plainly forbids an automobile, but what about bicycles, wheelchairs, toy automobiles? What about airplanes? Ambulances? Are these "vehicles" for the purpose of the rule or not?) As a result, good lawyers

need a vivid imagination; they need to imagine how rules might apply, where they might be unclear, and where they might lead to unexpected outcomes. The case method and the frequent use of hypotheticals will help train your brain to think this way. Learning the law in light of concrete situations will help you deal with particular facts you'll encounter as a practicing lawyer.

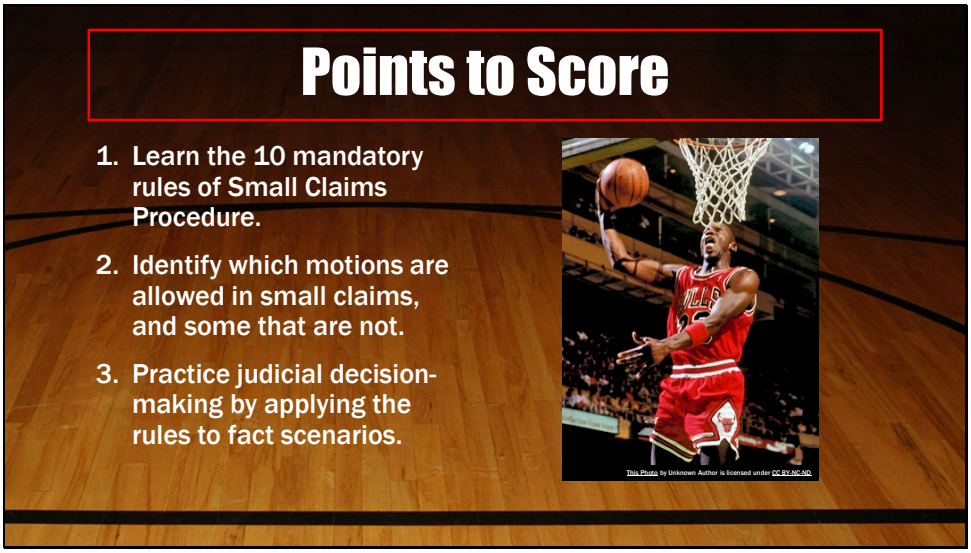
Good luck!

	Civil Law	Criminal Law
Who brings the action?		
What is the term for above?		
How does it begin?		
For what purpose?		
Does D have right to attorney?		
Can D refuse to testify?		
What are the consequences?		

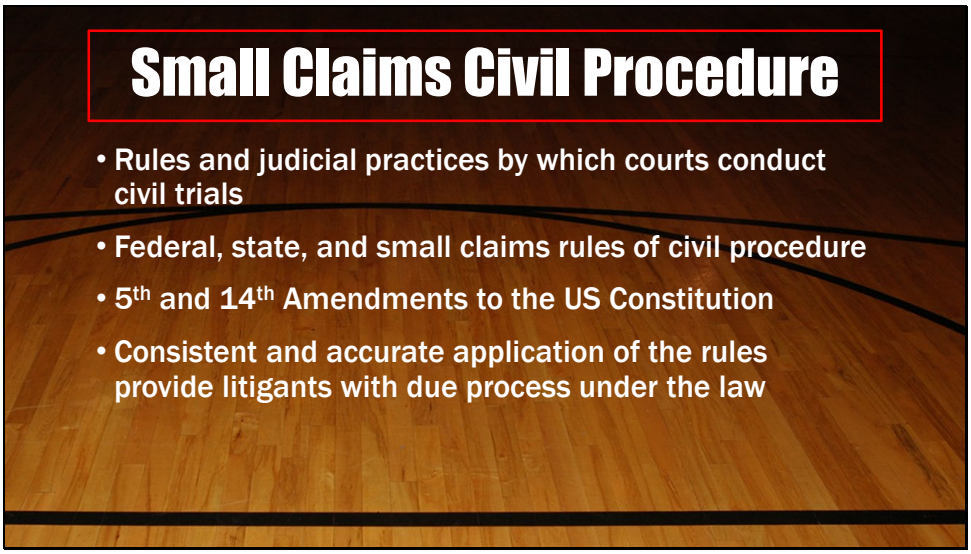
	Civil Law	Criminal Law
Who brings the action?	**Private party**	**The State**
What is the term for above?	**Plaintiff**	**State, or Prosecution**
How does it begin?	**Files complaint**	**Criminal process**
For what purpose?	**Compensation for injury, to enforce civil right**	**Punishment, deterrence**
Does D have right to attorney?	**Not usually**	**Usually**
Can D refuse to testify?	**No**	**Yes**
What are the consequences?	**$$, sometimes coercive order**	**Jail, fine, or death**

Tab:
Small Claims Procedure

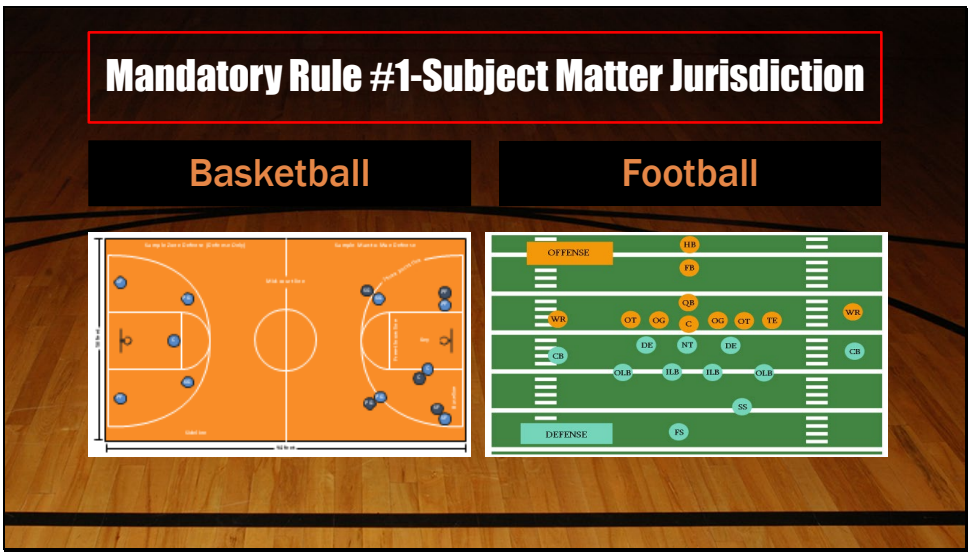
SMALL CLAIMS PROCEDURE

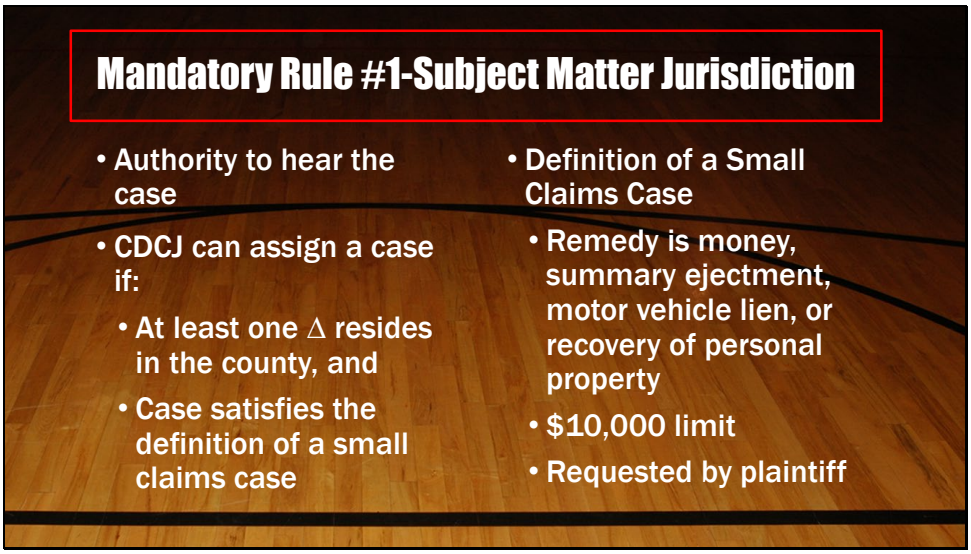


- These rules have right and wrong answers, and if you don't follow them, it's an error. The rules of small claims procedure are set out in Ch. 7A, Art. 19 of the NCGS and are different in a number of ways from the NC Rules of Civil Procedure set out in Ch. 1A. For lawyers accustomed to practicing in district or superior court, they may be surprised to learn of these differences.
- As a magistrate, you will encounter motions in small claims, many of which you will be able to hear, but others you will not be able to hear, or you may have to have authorization from your Chief District Court Judge (CDCJ) to hear them.
- As you become familiar with each mandatory rule, we will put your knowledge to the test by giving you fact scenarios to apply the rules to and make your decision.



Just like in sports, civil trials have rules and judicial processes by which courts conduct trials. As we discussed, you are already familiar with rules and processes in the criminal context, and those rules are similarly designed to protect the due process rights of the defendants, just as the rules of civil procedure protect the due process rights of litigants. The Fifth Amendment says to the federal government that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment, ratified in 1868, uses the same eleven words, called the Due Process Clause, to describe a legal obligation of all states. The Due Process Clause requires procedural fairness which includes notice and an opportunity to be heard. Part of that procedural fairness is consistent and accurate application of the rules.





Jurisdiction is the official power to make legal decisions and judgments.
Subject Matter Jurisdiction is our first mandatory rule, and it sets out your authority to hear certain types of cases. This authority is bestowed upon you by your CDCJ who can assign cases to small claims if:

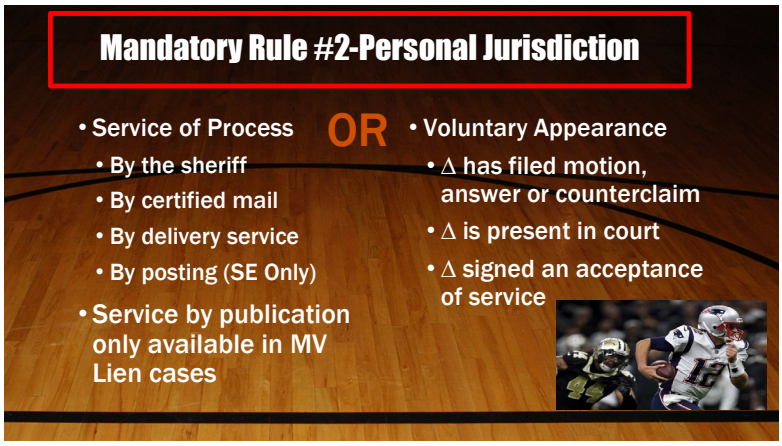
- At least one defendant resides in the county, and
- The case meets the definition of a small claims case.
    - The remedy sought has to be either money, summary ejectment, motor vehicle lien, or recovery of personal property.
    - The amount in controversy cannot exceed $10,000–refers to the monetary value of the case and is determined at the time of filing.
    - The plaintiff requests the case to be heard in small claims by filing the action in small claims rather than in district or superior court.

Notice: the list of remedies does not include coercive orders available in district court, such as motions for injunctions, orders of specific performance of a contract, or actions to recover real property for trespass.

If this rule is violated, the clerk should not allow it to be filed in small claims. If it is filed in small claims, and it is not the type of case heard in small claims, you can either dismiss the case or return it to the clerk for nonassignment. There is a practice of allowing the party seeking more than $10,000 the option of amending their complaint to the jurisdictional limit, but some magistrates take the position this is inappropriate because it should never have been assigned to small claims and the magistrate is without authority to allow the amendment.

CHECKPOINT #1

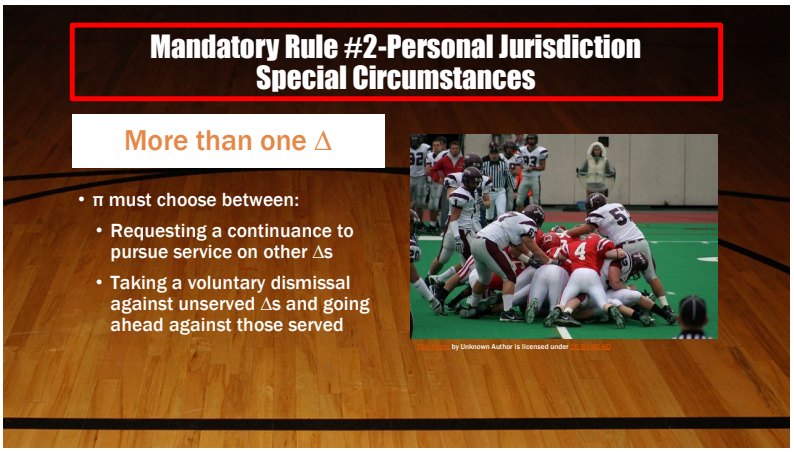
1. Susan paid Website Developers to design a website for her small business, but WD has refused to release the completed design so that Susan may actually put it on the web. Susan asks you to order WD to perform its part of the contract.
2. The Credit Union has brought an action alleging that defendant defaulted on a loan agreement and asking that you issue an order authorizing the CU to recover the amount owed from the defendant's other accounts.
3. Landlord Larry filed an action for summary ejectment seeking only possession of the rental property. On the complaint he alleges that the tenant owes rent in arrears of $12,000.
4. Carl Creditor filed an action on a promissory note, which required Danny Debtor to repay a $10,000 loan along with $750 in interest. Carl points out the amount in controversy statute contains language specifying that the amount is to be determined "exclusive of interest."
5. Patty Plaintiff & Danny Defendant broke up several months ago. Patty has filed this action to recover from her ex-boyfriend a long list of property which she claims belongs to her and is in Danny's possession.
6. Landlord has filed a SE action against Tommy Tenant. The case involves a commercial lease, with the property being located in your county. Tommy objects, pointing out that he actually resides in an adjacent county.



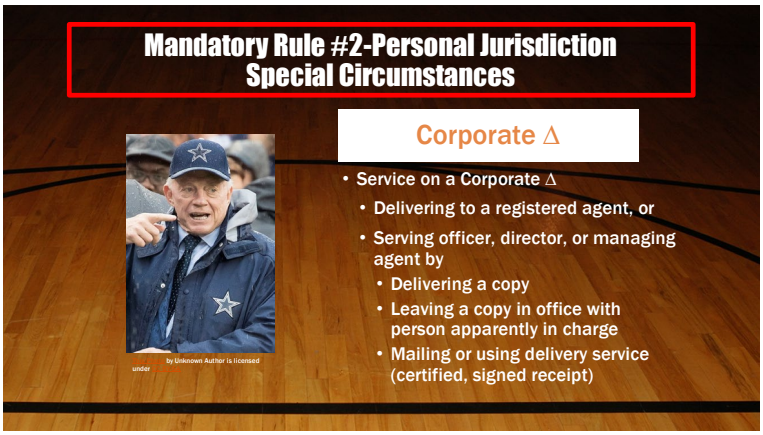
In football, who are the defensive players trying to stop? What happens if they tackle someone not carrying the ball? Mandatory Rule #2 is similar because you can only proceed if you have authority over the person being sued, in other words, personal jurisdiction. If we think about it like the football is the complaint, and the quarterback delivers the football to the receiver, giving the defense the ability to now tackle the receiver, once the complaint is properly served on the defendant, the court now has authority over that defendant to make legal decisions and judgments.

Just like there are a number of ways the quarterback can get the ball into the receiver's hands, there are a number of ways a defendant can be served in small claims. Later, we will look at some of the forms that go along with these methods of service. For now, just know that the complaint can be served by the sheriff, by certified mail or by a delivery service. In summary ejectment cases only, it can be served by posting the summons and complaint in a conspicuous place on the premises, and the sheriff mails a copy to the defendant. And in motor vehicle lien cases only, it can be served by publication if the plaintiff, after due diligence, cannot serve the defendant by other means.

Sometimes, the quarterback chooses to keep the ball and run it, just like the defendant may choose to voluntarily appear either by filing an answer or a motion (other than a motion challenging personal jurisdiction) or by being present in court. The defendant does not have to file an answer, but if they do, it is an appearance for purposes of personal jurisdiction.



When the plaintiff sues more than one defendant, but only one defendant has been served by the time of the hearing, the plaintiff must choose to either request a continuance to pursue service on the other defendant(s) or take a voluntary dismissal against the unserved defendant(s) and go ahead against the defendant(s) who have been served.



A corporation resides in the county in which the principal office is located or the county where the corporation maintains a place of business, or if neither, any county it is regularly conducting business. Service on a corporate defendant can be accomplished by serving the registered agent whose identity can be found on the NC Secretary of State website or by serving an officer, director, or manager of the corporation. The complaint can be served personally on the officer, director, or manager, or it can be left at their office with a person apparently in charge. The complaint can also be served by mail or delivery service, certified with return receipt signed.

CHECKPOINT #2

1. Bert sues William for money owed. When the case is called for trial, you notice the summons has been returned unserved. William is present in the courtroom.
2. Watertown Supply sues Ben James and Sam James on a contract for goods delivered. At the time of trial, you notice that the summons indicates Ben was served personally, but the sheriff was unable to serve Sam. Watertown wants to proceed against both Ben and Sam.
3. Paul sued Clark for conversion of his lawnmower. On the day the case is set, Paul is present, Clark is not, and the summons indicates that the sheriff has been unable to locate Clark. Paul says he paid a lot of money for this case and he wants it heard today.

The designated hitter is a player who does not play a position in the field, but instead replaces the pitcher in the batting order. However, a starting pitcher may choose to also start as the designated hitter, so that the pitcher bats for himself and can stay in the game as the designated hitter after he is finished pitching. Who may appear on behalf of a party in small claims court is a little like the designated hitter rule in baseball, although after reading the designated hitter rule, I think the small claims procedure may be easier to follow. Just like the pitcher can hit for himself and not use a designated hitter, a party can represent himself in court. When a party chooses to represent himself, the party is referred to as pro se or unrepresented. A party may also choose to hire an attorney to represent him in court. Although the party is likely still going to have to be there to testify, the attorney presents and argues the party's case.

There are two exceptions where someone other than the party or an attorney can appear on behalf of a party. First, when the party is a corporation or other business entity, they may appear through an agent, usually an officer or employee with personal knowledge of the facts of the case. This exception applies in small claims and in district court on appeal and is a big deviation from the general rule that requires corporations to be represented by an attorney. The second exception is in a summary ejectment action where an agent with personal knowledge may sign the complaint and appear on behalf of an owner. If someone without personal knowledge and who is not the owner's agent tries to appear, they should not be allowed to represent the owner because that would be the unauthorized practice of law if the person is not an attorney.

CHECKPOINT #3

1. Acme Property Management has filed an action for summary ejectment in the name of the owner, Twila Harris, against Tommy Tenant. On the day the case is set, Paula Clark, property manager, is there on behalf of Twila Harris. Tommy objects and insists that Ms. Harris must represent herself.
2. The Good Life, LLP is suing Harold Homeowner for unpaid restoration work done to his home after some water damage. In court, an employee of the company who handles contracts and billing appears on behalf of the LLP.

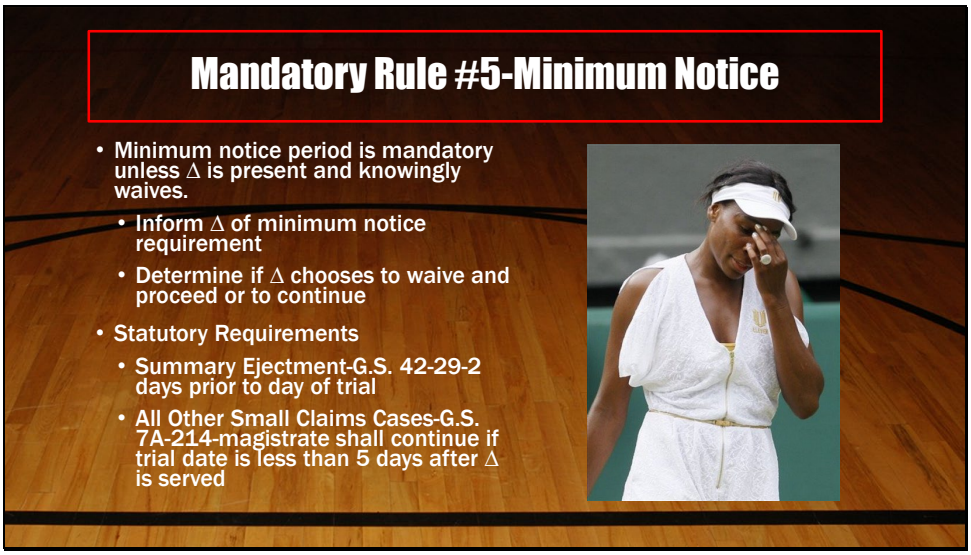
3. Michael Landlord sued Tammy Tenant for summary ejectment from a property he has been renting to Tammy. Michael owns and manages the property himself. On the day of court, he is called out of town, so he sends his mother to court to represent him. His mother is not a licensed attorney.

The Servicemembers Civil Relief Act (SCRA) protects active duty members of the military from being sued and having a judgment entered against them while they may be away serving the country. An SCRA affidavit or declaration is required in every civil action where the defendant is not present. The affidavit must be legally sufficient, and just like a referee makes calls in the game, you make the call about whether the declaration is legally sufficient. A printout from the Department of Defense website is not required, although it is reliable evidence of a defendant's military status, and the plaintiff may rely on other evidence. If the plaintiff is unable to determine the defendant's military status, you should not enter judgment unless the plaintiff is willing to post a bond that will indemnify the defendant from any losses that may result from the judgment. The bond could be quite high depending on the case, and the plaintiff may want to seek another means of determining the defendant's status such as a website that uses the defendant's addresses if plaintiff does not know defendant's Social Security Number and date of birth. If the defendant is in the military and does not appear in court, you should continue the case and follow your county's procedures for appointing an attorney to contact the servicemember. Once the attorney has had a chance to reach out to the servicemember, the attorney may request to enter a stay for 90 days, or the court may determine the 90-day stay is necessary if the appointed attorney is unable to make contact with the servicemember and verify the servicemember's knowledge of the proceeding.

CHECKPOINT #4

1. Peggy Smith sued Ozzy Thomas for money owed. Ozzy is not present in court. On the day of trial, you notice the SCRA Declaration indicates Peggy is unable to determine if Ozzy is in military service.

2. Apex Apartments, LLC sued Terry Tenant for summary ejectment. Prior to the day of trial, the plaintiff filed an SCRA Declaration with a copy of the results of the search from the DOD website attached indicating Terry is not in military service. You call the case and Terry is not present.
3. Fiona Farmer sued Andrew Baker for eggs she had sold him, but for which she claims he did not pay. You review the shuck and do not find an SCRA Declaration. Both Fiona and Andrew are present in court.

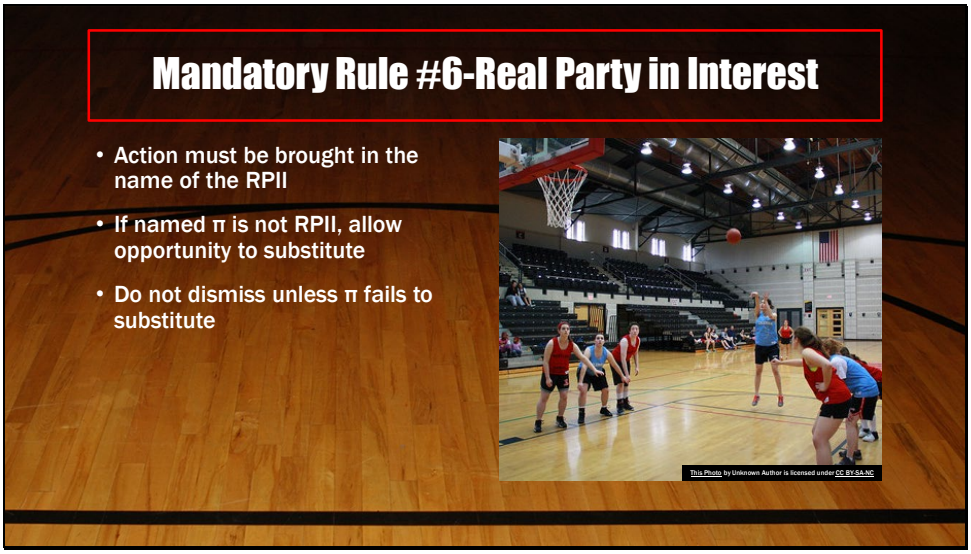


In tennis, the Recovery Rule requires the Referee to offer a player two hours of rest between certain types of singles matches. The player who has just played the singles match may waive the rest. Similarly, in small claims, there is a minimum amount of notice to which the defendant is entitled before the hearing. However, even if the complaint has not been served in enough time to meet the minimum notice requirement, the defendant can waive the time, as long as the waiver is knowing. In order for the defendant to make a knowing waiver of minimum notice, you should inform the defendant of the minimum amount of notice to which he was entitled and ask the defendant if he wants to proceed or if he wants a continuance to satisfy the notice requirement. In summary ejectment actions, the complaint must be served at least 2 days before the hearing, excluding legal holidays. In all other small claims matters, the complaint must be served at least 5 days before the hearing, excluding weekends and legal holidays.

CHECKPOINT #5

1. Peggy Smith sued Ozzy Thomas for money owed. Ozzy was served on Monday, January 23rd, and the case is set for Thursday, January 26th. Ozzy appears on Thursday but says he has not had time to hire a lawyer.
2. Apex Apartments, LLC sued Terry Tenant for summary ejectment. You notice the summons indicates that Terry was served on Monday, January 30th, and the case is on your docket for Thursday, February 2nd.
3. Fiona Farmer sued Andrew Baker for eggs she had sold him, but for which she claims he did not pay. The summons indicates that Andrew was served two days

before the hearing date. You tell Andrew that the minimum notice requirement for service before the hearing has not been met and that he is entitled to more time. Andrew says he doesn't want more time. He wants to "plead guilty and get back to baking."



Just like the fouled player is the one who shoots the foul shots, the person bringing the lawsuit must be the person who is entitled to the relief sought. This person is called the real party in interest. If it becomes clear that someone else is actually the injured party, the magistrate must offer the named plaintiff the opportunity to substitute the real party in interest as the plaintiff. You would not dismiss the action unless the party fails to substitute the real party in interest. The most common violation of this rule occurs in summary ejectment cases when the property manager files as the plaintiff rather than naming the property owner as the plaintiff. The property manager should have an opportunity to substitute the property owner as the plaintiff before you dismiss the case.

CHECKPOINT #6

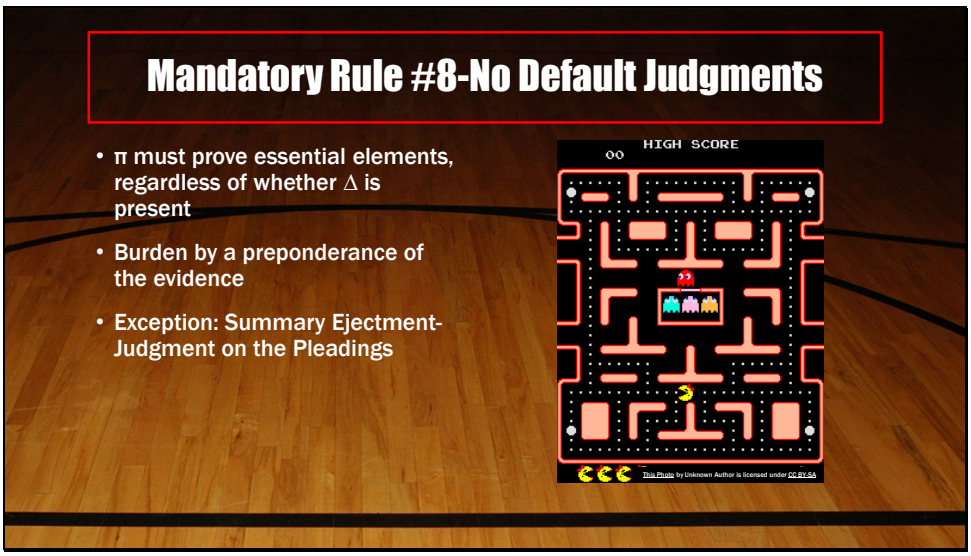
1. Acme Property Management has filed an action for summary ejectment against Tommy Tenant. Even though the property is owned by Twila Harris, Acme is listed as the plaintiff.
2. Emily Child was allowed to drive her mother's car while she was away at school. While Emily was driving, the car was hit by a car driven by Larry Racer. The car is owned by Julia Child, Emily's mother. Emily sues Larry to recover for the property damage to the car.
3. Homeowners Realty, LLC has a property management agreement with Lucy and Mark Waters to manage their rental property. Mark Renter is holding over after his lease ended, so Homeowners filed an action for summary ejectment and listed the LLC as the plaintiff. At trial, Mark objects to the LLC being listed as the plaintiff and

not the owners. Homeowners agrees and substitutes Lucy and Mark Waters as the plaintiffs.

In life, just like in sports, when the pressure gets too high, you may want to call a "time out." Filing for bankruptcy is in effect a time out from debt collection and can include small claims cases. Notice I did not say it ended the game, just stopped it. So, you will not dismiss the case but discontinue it using AOC-G-108. When a bankruptcy petition is filed in federal court, an automatic stay goes into effect immediately. The stay is extremely broad and prohibits the continuation or commencement of most legal proceedings against the debtor or the debtor's property. Violations of the stay can lead to harsh sanctions against creditors, so you should immediately stop a case once you become aware that a bankruptcy case has been filed by one of the parties. Unless the bankruptcy court grants relief from the stay, it generally remains in effect until the debtor is granted or denied a discharge or until the bankruptcy case is dismissed or closed.

CHECKPOINT #7

1. Acme Property Management has filed an action for summary ejectment against Tommy Tenant. Prior to court, Tommy calls the magistrate's office and says he is thinking about filing for bankruptcy and has talked to a lawyer. He does not appear on the day of court.
2. Julia Child sued Larry Racer for damage to her vehicle as a result of a car accident. Larry appears in small claims court on the day of the hearing and presents to you a copy of his filed bankruptcy petition.
3. Peggy Smith sued Ozzy Thomas for money owed. On the day of the hearing, Ozzy shows up to court on January 23rd with a letter from his bankruptcy attorney dated January 2nd indicating that the attorney planned to file the bankruptcy petition on January 10th. You go ahead with the case because Ozzy did not bring a copy of the filed petition.



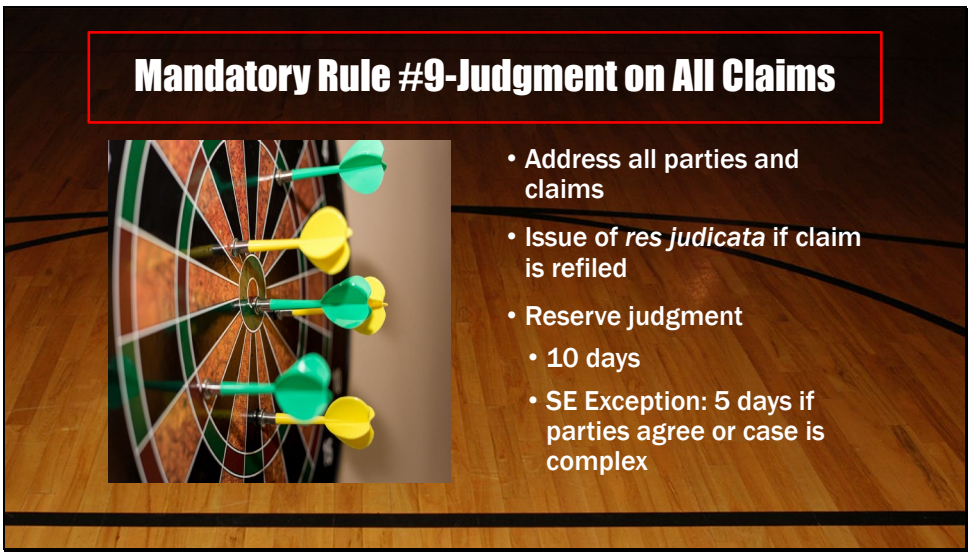
What will eventually happen if I start the game but I never move Ms. Pac-Man? In a small claims action, it is not enough to just file the complaint and hope the defendant does not show up. Just like you have to actually play the game to win Ms. Pac-Man, the plaintiff must prove each essential element of the claim by the greater weight of the evidence. There are no default judgments in small claims, meaning you do not enter judgment for plaintiff just because the defendant failed to appear. The plaintiff still must put on evidence sufficient to meet the burden of proof for you to rule in their favor.

There is one exception, and it applies in summary ejectment cases when a party moves for judgment on the pleadings. In order to make this motion, the following must be present:

- Complaint is for breach of the lease for failure to pay rent,
- Complaint was served on the defendant,
- Defendant did not file an answer and fails to appear in court on the day of the hearing, and
- Plaintiff requests judgment on the pleadings in open court.

CHECKPOINT #8

1. Peggy Smith sued Ozzy Thomas for money owed. Both parties are present at the hearing. You look over the complaint, and then turn to Ozzy and ask, “Do you owe Ms. Smith the money?” He says he does, and you enter judgment against Ozzy for the amount on the complaint.
2. Apex Apartments, LLC sued Terry Tenant for summary ejectment. At the hearing, Apex is represented by Attorney Justice, and Terry was not present, although he had been properly served. Attorney Justice makes a motion for judgment on the pleadings. You enter the judgment.
3. Julia Child sued Larry Racer for damage to her vehicle as a result of a car accident. Julia offers evidence of negligence including duty, breach of the duty and causation, but she fails to offer any evidence of the damage to the vehicle.



Imagine a game of darts where the green darts represent the evidence for the plaintiff and the yellow darts represent the evidence for the defendant. Once both sides have finished throwing, the score is tallied, and the winner is determined. In the same way in a small claims case, once both sides have finished presenting their evidence, you must determine if each side has presented evidence that is sufficient to win their case.

You must make this determination for every claim asserted and for every party to the action. Res judicata is raised when a party thinks that a particular claim was already, or could have been, litigated and therefore, should not be litigated again. When addressing a res judicata argument, a court will usually look at three factors. First, the court will consider whether there was previous litigation in which identical claims were raised, or in which identical claims could have been raised. The second factor to be considered is that the parties must be the same parties as those who litigated the original action. The third factor is that the original action must have received final judgment on the merits. Silence in a small claims judgment is treated as a denial of the claim for purposes of refiling the claim and res judicata, so it's important that your judgment resolves all the claims for all the parties. After you announce your judgment, you should inform the parties they have a right to appeal, and the notice must be filed within 10 days of your judgment.

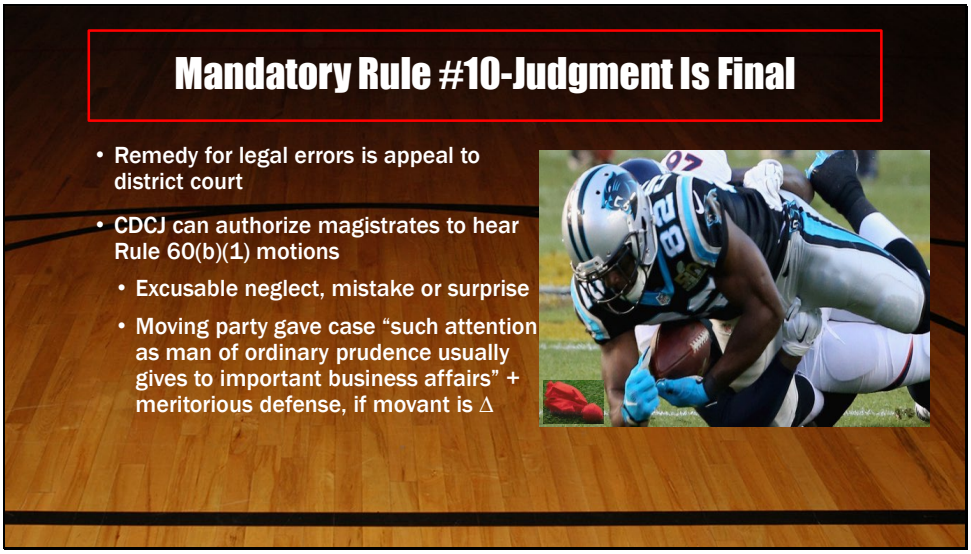
For the majority of cases, you will announce your judgment at the close of all of the evidence, but there may be circumstances that warrant reserving judgment. If you reserve judgment, you will render your judgment within 10 days for most small claims actions or 5 days for summary ejectment actions and sign the certification at the bottom of the judgment form indicating that you have mailed a copy of the judgment to all parties.

CHECKPOINT #9

1. Julia Child sued Larry Racer for damage to her vehicle, medical bills, and pain and suffering as a result of a car accident. Julia offers evidence of Larry's negligence, photos, estimates, and receipts for the car damage, and medical bills. She testified

that she broke her wrist in the accident and suffered for weeks and continues to have pain on rainy days. You enter judgment for the damage to the car and the medical bills, but you do not enter judgment for pain and suffering because you don't know how to quantify it.

2. Apex Apartments, LLC sued Terry Tenant for summary ejectment, requesting both possession and money damages for unpaid rent and late fees. Terry was properly served and is present in court. He offers no defense. You enter judgment for possession and rent through the date of the hearing and late fees.
3. Same facts as above, but Terry filed a counterclaim against Apex for rent abatement. You don't believe Terry's testimony, so you do not abate the rent, but your judgment is silent as to the counterclaim.

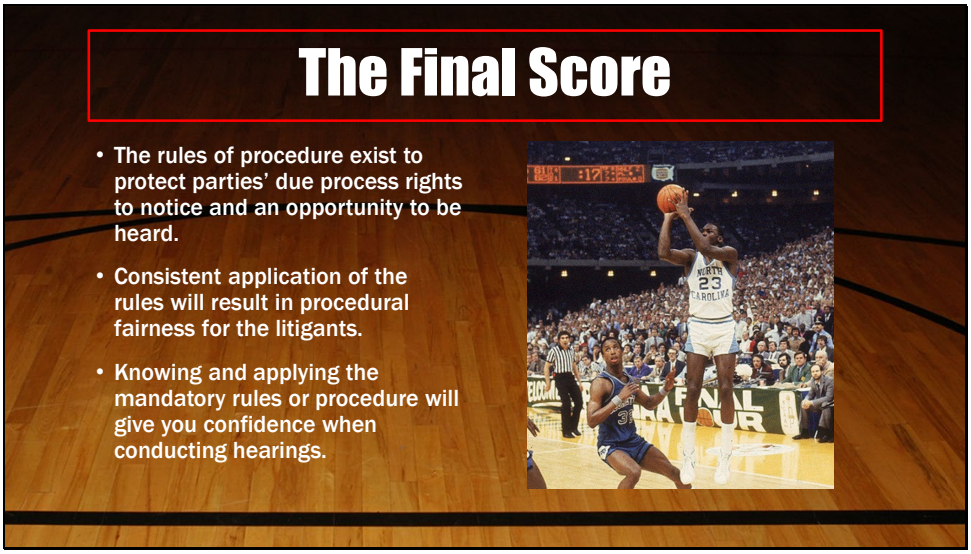


Most football fans are familiar with the red "challenge flag." The head coach of a football team keeps a special red flag with him throughout the game. If the head coach disagrees with a call, he will throw the red challenge flag onto the field. The referees then use instant replay to determine whether the ruling on the field will stand as called or be reversed. After a small claims action, if a party disagrees with the magistrate's ruling, they have the right to appeal the case to district court for a completely new trial before a district court judge. Unlike in football, in a small claims appeal, the party gets a second bite at presenting their evidence and no deference is given to what the magistrate ruled.

Appeal is the only remedy for any legal errors made by the magistrate, but sometimes parties can file a motion for the magistrate to set aside their judgment. This motion is not used to remedy legal errors by the magistrate. Your CDCJ may authorize magistrates to hear 60(b)(1) motions for the excusable neglect, mistake, or surprise of the party. The moving party must have given the case "such attention as a man of ordinary prudence usually gives to important business affairs" and if the movant is the defendant, must show there is a meritorious defense.

CHECKPOINT #10

1. You just entered judgment in an action for summary ejectment and rent in arrears. You entered the amount of rent in arrears as listed on the complaint, which was $1000.00 for the previous month's rent, but the case was heard on June 15th, so the judgment should have been for $1500.00. The clerk asks you to correct the judgment at the end of the day.
2. Kabuto, LLC rents restaurant space from Greenway Development Corporation. Kabuto failed to pay rent in December, so Greenway sued for summary ejectment and rent in arrears. Kabuto was properly served, but they failed to let their attorney know about the court date and you entered judgment. You are authorized by your CDCJ to hear Rule 60(b)(1) motions, and Kabuto files such a motion for you to hear.

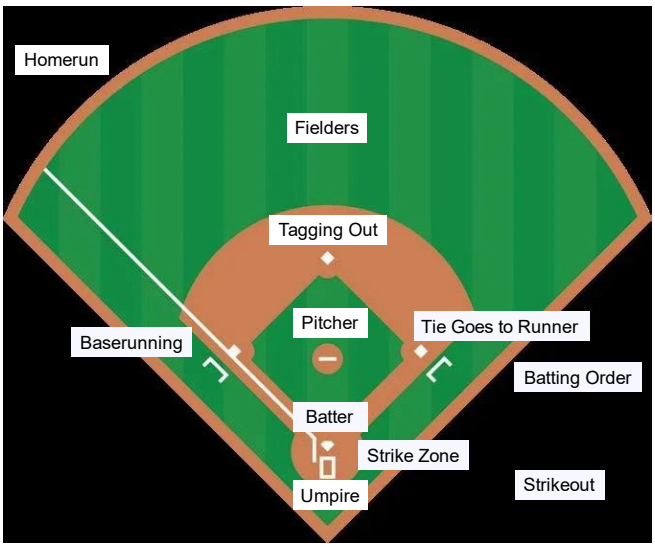


When I train magistrates and ask them what their objective is when presiding over small claims, they most often say it is to be fair, impartial and neutral. The rules of procedure exist so that everyone is treated fairly. You achieve impartiality and neutrality by consistently applying the rules in every case. The more comfortable you become with knowing and applying the rules the more confident you will feel in your decisions.

Referees often get accused of making bad calls or siding with one team over the other. While you may face similar accusations from parties, if you know that you have followed the rules, you can feel secure that the decision you made was fair, and if they don't like the decision, they can always appeal.

Small Claims: Conducting the Hearing
Magistrates' Basic School
Notes Handout

Rules of the Game: Comparing Small Claims & Baseball

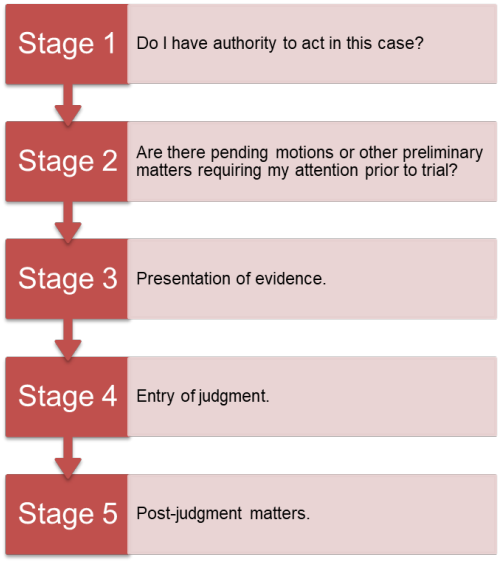


Baseball	Hearing
Umpire	
Strike Zone	
Batting Order	
Pitcher	
Batter	
Fielders	
Baserunning	
Tagging Out	
Tie Goes to the Runner	
Strikeout	
Homerun	

Mandatory Rules of Small Claims Procedure

1. Subject Matter Jurisdiction	
2. Personal Jurisdiction	
3. Who May Appear	
4. SCRA	
5. Minimum Notice	
6. Real Party in Interest	
7. Bankruptcy	
8. No Default Judgments	
9. Judgment on All Claims	
10. Judgment is Final	

The Bench Trial



Rules at Every Stage

Pre-Hearing Procedures

- Subject Matter Jurisdiction
- Personal Jurisdiction
- Who May Appear
- SCRA
- Minimum Notice
- Real Party in Interest

- Bankruptcy
- Motions

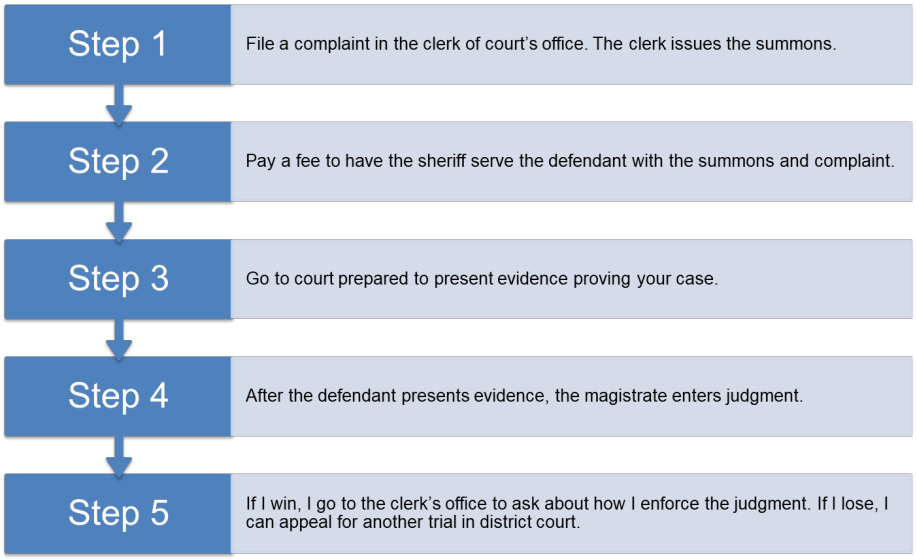
During the Hearing

- No Default Judgments
- Admission & Weight of Evidence
- Judgment on All Claims for All Parties

Judgment/Post Judgment

- Judgment is Final
- Rule 60 Motions
- Appeals

Resolving Pre-Trial Issues



For Check-Ins You will need to refer to the Pleadings Handout.

Check-In #1

1. Did the plaintiff request small claims? How do you know?

2. Is the amount in controversy $10,000 or less?

3. What remedy is the plaintiff seeking?

4. Does the defendant live in the county where you are appointed (assume for this question that you are a Cumberland County magistrate)?

5. Do you have subject matter jurisdiction over the case?

Check-In #2

1. How was the defendant served?
2. Do you have personal jurisdiction over this defendant?
3. What is the minimum notice required before a hearing in a money owed case?
4. Were the summons and complaint served in time to comply with the minimum notice requirement for a money owed case?
5. Who can appear at the hearing for the parties?
6. Is this a legally sufficient Servicemembers Civil Relief Act Declaration? Why or why not?
7. If Tommy is present, but there is no SCRA Declaration in the shuck, can you go forward?

What's in the "shuck"?

Motion to dismiss for failure to state a claim GS 1A-1, Rule 12(b)(6)	**Rule: Not allowed in small claims court. Consider ordering plaintiff to provide additional information on complaint form, if necessary.**
Motion challenging personal jurisdiction or venue GS 1A-1, Rule 12(b)(2) or 12(b)(3)	**Rule: Must be filed prior to date of trial and heard by district court judge.**
Answer	**Not required. Primary significance is possible counterclaim.**
Counterclaim	**Allowed only if filed prior to time set for trial and must meet requirements for kind of case and amount in controversy.**

Check-In #3

1. How do you know if Howard is the real party in interest?

2. If Tommy states that he has filed a petition for bankruptcy, can you enter judgment in the case? If not, how do you let the clerk know the defendant has filed bankruptcy?

3. Before the hearing, Tommy moves to dismiss the claim for failure to state a claim. How do you rule?

4. On the day of the hearing, the defendant says he wants to countersue the plaintiff for defamation because Howard has been telling people around down not to do business with Tommy. Do you hear the counterclaim? Why or why not?

Pre-trial Motions for Continuance

- Law favors allowing if both parties join in the request
- Law requires good cause if only one party makes request
- Magistrate required to give parties notice of new date and time
- Record Continuance on AOC-G-108

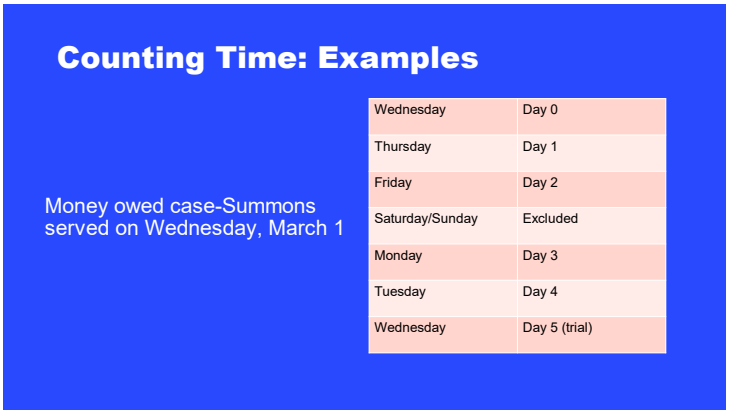
Counting Time in Small Claims

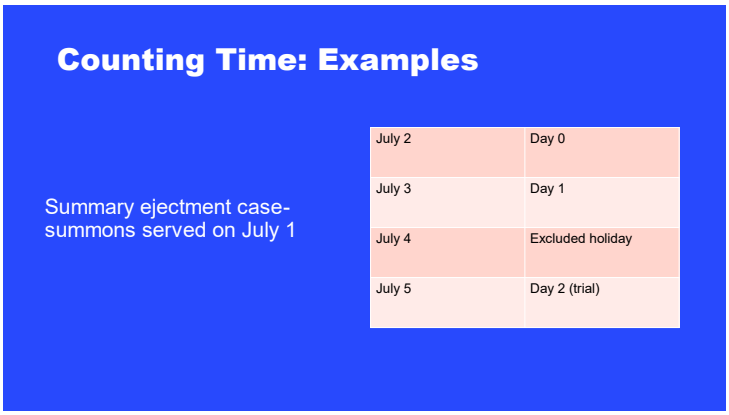
GS 1A-1, Rule 6(a) applies to most time periods in small claims

- First day not included, final day is.
- If final day is a day when courthouse is closed, go to next business day.
- Less than 7 days, weekends and holidays excluded.

GS 42-29 service of process in SE

- At least 2 days prior to trial, excluding legal holidays
- Does not exclude weekends





Dismissal
Voluntary

- π can dismiss at any point before close of their evidence

Involuntary

- Failure to prosecute
- Neither party appears or only Δ is present

Dismissal
Without Prejudice

- π may refile (subject to SOL)
- Check for local practice if π fails to appear

With Prejudice

- Final determination that Δ is not liable
- If π files same case again, Δ entitled to dismissal of 2nd case
- G.S. 1A-1, Rule 41(b) states dismissal is with prejudice unless it falls into certain specified exceptions or unless court indicates

Check-In #4

1. The day before the hearing, Howard contacts your office and says that he has the flu and doesn't think that he will be able to make it to court. Do you continue the case?

2. Howard filed his complaint for money owed on July 1. What is the earliest date that he could have had the case heard?

3. If Howard releases before he finishes presenting his evidence, that he forgot to bring the contract to court and asks to take a voluntary dismissal, do you allow it?

Conducting the Hearing

MR# 8 No Default Judgments

- GS 7A-218 Answer of Defendant

        - Defendant may file an answer.
        - Not filing an answer constitutes a general denial.
        - Plaintiff's evidence must establish a prima facie case to avoid dismissal, whether defendant is present or not.
- Exception in summary ejectment for judgment on the pleadings.

Conducting the Trial

- Allow amendments to the complaint, beware of notice
- Maintain control and decorum
- Apply the North Carolina Rules of Court
- Follow the rules of evidence generally
- Interrogate parties and witnesses as necessary
- Rule on objections

Amending the Complaint

- The law is liberal in allowing amendments:
    - Permission should be freely granted when justice so requires;
    - Pleadings are considered amended to conform to evidence;
    - Continuance is authorized if necessary.
- Note any amendments on judgment form

Role of the Magistrate

- Blend of inquisitor and referee.
- Parties present their cases.
- Magistrate intervenes to clarify the facts and to bring out additional facts.
- If attorneys are present, they can question parties and witnesses.
- Magistrate maintains control over the proceedings.

Rules of Evidence

Rule 611. Mode and order of interrogation and presentation.

- Exercise reasonable control
- Effective for ascertainment of truth
- Avoid needless consumption of time
- Protect witnesses

Rule 614. Calling and interrogation of witnesses by court.

- Call witnesses
- Interrogate witnesses
- No objection necessary

Getting the Information You Need

- Use neutral language
- Ask nonleading questions
- Seek a narrative response

- Slow your pace
- Allow time for the response
- Leading vs Non-Leading

Check-In #5

1. How do you see your role as a magistrate when conducting hearings?

2. Imagine you are hearing the case of Howard Homeowner v. Tommy Smith. What questions would you ask each of the parties?

Holding Court

- Prepare scripts for how you will open court.
- Convey to everyone your expectations for their behavior.
- Ask questions to illicit or clarify information.
- Use open-ended questions.
- If a party or attorney relies on legal a**uthority in their case, ask them to hand it up.**

Evaluating Evidence

"The rules of evidence applicable in the trial of civil actions generally are observed." NCGS 7A-222(a)

"In a trial before the judge, sitting without a jury, the ordinary rules as to the competency of evidence applied in a trial before a jury are to some extent relaxed, for the reason that the judge with knowledge of the law is able to eliminate from the testimony he hears that which is immaterial and incompetent and consider that only which tends properly to prove the facts to be found."
Muirhead Const. Co. v. Housing Authority of Durham, 1 N.C.App. 181, 60 S.E.2d 542 (1968)

Making Decisions About Evidence

Relevant & Reliable

In general, evidence is admissible and entitled to consideration if it is relevant and reliable. Relevant evidence means having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence.

Admission v. Weight

The decision to admit evidence and the decision about the weight you give to evidence are two different considerations. Just because you allow testimony or look at a document does not mean that you have to give that evidence any weight when making your decision. You will need to determine if it is barred by a rule of evidence, privilege or lacks credibility.

Not a Court of Record

Small claims is not subject to review on appeal in the same way other trial courts are, so whether evidence does or does not become part of the record is not relevant in the same way. District court is not locked into your findings of fact. The appeal is for a trial de novo, so the attorneys are not preserving a record for review, and attorneys who fail to object are not waiving those objections on review.

Assessing Credibility

1. Even a little bit of corroboration significantly improves the odds of a correct assessment of credibility. The existence of written corroborative evidence, particularly that created in the ordinary course of business and/or at or near the time of the even in question, is the best way to tell if a party is telling the truth.
2. Much of the evidence a party presents to prove his or her point will be oral testimony, not documentary or other physical evidence. Under the law, no kind of evidence counts more than another, so one way to determine if oral testimony is credible is the extent to which it is consistent internally and historically.
3. Another factor in assessing credibility is the degree to which the proffered evidence is consistent with evidence offered by others, helping to build an overall narrative that makes sense and seems likely.
4. The degree to which the witness had reason to be attentive and was in a position to observe the events in question influences credibility.
5. Another factor is the presence or absence of motivation to lie.
6. A witness's credibility may also be assessed by his ability to answer questions related to details of the event, particularly questions that the witness might not be expected to anticipate.
7. Sometimes, but not always, the absence of evidence is itself evidence.
8. Demeanor is frequently cited, but it is last on the list for a reason. Most of us are not as good at detecting when someone is lying as we think we are. Physical manifestations of non-specific emotions such as blushing, breathing, blinking or sweating may be an indication of embarrassment, fear, or anger, not just lying.

Objections to Evidence

- Rule on the objection by admitting the evidence but pointing out that its weight is to be determined.
- When an attorney repeatedly objects, it is proper to require the attorney to hold objections until the close of the evidence.

Magistrate's Statement About Objections

Small claims court is designed to be faster and less expensive than traditional trial courts, and procedures are simplified. Please hold evidentiary objections until the presentation of evidence is complete. Once the evidence is complete, either party may give any brief legal arguments they have about the weight and admissibility of the any evidence presented.

Check-In #6

1. Howard testifies that his neighbor told him that Tommy goes all over town promising to fix stuff and never gets the job done. Tommy says the neighbor is lying. Is Howard's testimony relevant and reliable? What weight, if any, would you give it in your decision?

2. Tommy wants to show you his text messages with Howard because he says he has a text from Howard telling him to never come back, making his performance of the contract impossible. Do you accept evidence on the phone? Why or why not?

Entering Judgment & Post-Judgment Procedures

MR# 9 Judgment on All Claims

- Dispose of all claims of all the parties.
- Unsure about the correct decision?
    - Reserve judgment.
        - 10 days non-SE cases
        - 5 days SE cases
    - Fill out certificate on judgment form.
    - Mail decision to parties.

MR# 10 Judgment Is Final

- Judgment is a final legal event.
- Only changed by either:
    - Appeal for trial de novo
    - Motion to set aside under Rule 60(b)
- Inform parties about right to appeal.
- Appeals are heard by district court judge.
- Magistrates may be authorized to hear Rule 60(b)(1) motions.

Appeal Procedure

- **Notice of appeal**
    - In court
    - In clerk's office
    - 10-day deadline
- **Must pay costs of appeal in clerk's office**
    - 20-day deadline non-SE cases
    - 10-day deadline SE cases

Entering Judgment

- Indicate the time for evidence is over.

- Complete the judgment form.
- Read from the judgment form using party names.
- Avoid legalese.
- Inform the parties of the right to appeal.

Check-In#7

1. Assume that before the hearing date, Tommy files an answer and counterclaim seeking $150 for additional labor and parts not in the contract. When you enter judgment do you have to address both Howard's claim and Tommy's claim?

2. Assume the contract between Howard and Tommy includes a pre-judgment interest rate of 15% if either party breaches. On your judgment form, you mistakenly believe that you can only award 8% interest so that is what you write in the blank in your findings for pre-judgment interest. When Howard gets a copy of the judgment from the clerk's office, he tells the clerk the pre-judgment interest should be 15%. The clerk brings the judgment to you and asks you to change it. What do you do?

3. After you render your judgment, Tommy stands up and says he wants to appeal. Is that proper notice of appeal or does he have to file notice in the clerk's office? What should you do?

Final tips & takeaways

- Apply the rules of small claims procedure.
- Conduct the hearing exercising control and maintaining decorum.
- Assess evidence for relevance and reliability.
- Deliver your judgment concisely and clearly.

STATE OF NORTH CAROLINA

CUMBERLAND County

File No. 24 CVM 1000

In The General Court Of Justice
District Court Division - Small Claims

Plaintiff(s)
Howard Homeowner

VERSUS

Defendant(s)
Tommy's Repairs
Tommy Smith, Owner

MAGISTRATE SUMMONS

☐ **ALIAS AND PLURIES SUMMONS (ASSESS FEE)**

G.S. 1A-1, Rule 4; 7A-217, -232

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

TO

Name And Address Of Defendant 1
Tommy Smith
3600 Magnolia Lane

Fayetteville NC 28314

Telephone No. Of Defendant 1
919-425-2094

TO

Name And Address Of Defendant 2

Telephone No. Of Defendant 2

IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

¡IMPORTANTE! ¡Se ha entablado un proceso civil en su contra! Estos papeles son documentos legales. ¡NO TIRE estos papeles!
¡Puede querer consultar con un abogado lo antes posible acerca de su caso y, de ser necesario, hablar con alguien que lea inglés y que pueda traducir estos documentos!

A Small Claim Action Has Been Commenced Against You!

You are notified to appear before the magistrate at the specified date, time, and location of trial listed below. You will have the opportunity at the trial to defend yourself against the claim stated in the attached complaint.

You may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court at any time before the time set for trial.

If you fail to appear and defend against the proof offered, the magistrate may enter a judgment against you.

Date Of Trial	Time Of Trial	Location Of Court
07/23/2024	9:00 ☒ AM ☐ PM	Cumberland County Courthouse Room 122

Name And Address Of Plaintiff Or Plaintiff's Attorney
Howard Homeowner
6767 Main St

Fayetteville NC 28303

Date Issued
07/01/2024

Signature

☒ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

(Over)

AOC-CVM-100, Rev. 12/23

RETURN OF SERVICE

I certify that this summons and a copy of the complaint were received and served as follows:

DEFENDANT 1

Date Served	Time Served	Name Of Defendant
07/12/2024	11:36 ☒ AM ☐ PM	Tommy Smith

☒ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein, who is named below.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copy Left (if corporation, give title of person copy left with)

☐ Acceptance of service. Summons and complaint received by: ☐ Defendant 1. ☐ Other: *(type or print name)*	*Date Accepted*	*Signature*

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served	Time Served	Name Of Defendant
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein, who is named below.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copy Left (if corporation, give title of person copy left with)

☐ Acceptance of service. Summons and complaint received by: ☐ Defendant 2. ☐ Other: *(type or print name)*	*Date Accepted*	*Signature*

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

FOR USE IN SUMMARY EJECTMENT CASES ONLY:

☐ Service was made by mailing by first class mail a copy of the summons and complaint to the defendant(s) and by posting a copy of the summons and complaint at the following premises:

Date Served	*Name(s) Of The Defendant(s) Served By Posting*

Address Of Premises Where Posted

Service Fee	*Signature Of Deputy Sheriff Making Return*
$ 30.00	
Date Received	*Name Of Deputy Sheriff Making Return (type or print)*
07/01/2024	Deputy Doolittle
Date Of Return	*County Of Sheriff*
07/12/2024	Cumberland

AOC-CVM-100, Side Two, Rev. 12/23

File No.
24 CVM 1000

COMPLAINT FOR MONEY OWED

G.S. 7A-216, 7A-232

STATE OF NORTH CAROLINA

CUMBERLAND County

In The General Court Of Justice
District Court Division - Small Claims

Spoken Language Court Interpreter Needed For Any Party, Victim, Or Witness? (If Yes, identify person(s) and language(s). Interpreters provided for all court proceedings at no cost.) ☒ No ☐ Yes: *(explain)*

Name And Address Of Plaintiff

Howard Homeowner
6767 Main St

Fayetteville NC 28301

County	*Telephone No.*
Cumberland	(919)867-5309

VERSUS

Name And Address Of Defendant 1 ☒ *Individual* ☐ *Corporation*

Tommy's Repairs
Tommy Smith, Owner
3600 Magnolia Lane
Fayetteville NC 28314

County	*Telephone No.*
Cumberland	(919)425-2094

Name And Address Of Defendant 2 ☐ *Individual* ☐ *Corporation*

County	*Telephone No.*

Name And Address Of Plaintiff's Attorney

1. The defendant is a resident of the county named above.
2. The defendant owes me the amount listed for the following reason:

Defendant was supposed to fix my dishwasher but he never got it running even though I paid him $250 to fix it. I want my money back.

Principal Amount Owed	$	250.00
Interest Owed *(if any)*	$	0.00
Total Amount Owed	$	250.00

(check one below)

☐ On An Account *(attach a copy of the account)*	*Date From Which Interest Due*		*Interest Rate*
☐ For Goods Sold And Delivered Between	*Beginning Date*	*Ending Date*	*Interest Rate*
☐ For Money Lent	*Date From Which Interest Due*		*Interest Rate*
☐ On a Promissory Note *(attach copy)*	*Date Of Note*	*Date From Which Interest Due*	*Interest Rate*

☐ For a Worthless Check *(attach a copy of the check)*

☐ For Conversion *(describe property)*

Other: *(specify)*

I demand to recover the total amount listed above, plus interest and reimbursement for court costs.

Attorney Bar No.	*Date*	*Name Of Plaintiff Or Attorney (type or print)*	*Signature Of Plaintiff Or Attorney*
	07/01/2024	Howard Homeowner	

(Over)

INFORMATION FOR THE PLAINTIFF AND DEFENDANT

The clerk or magistrate cannot advise you about your case or assist you in completing this form.
If you have any questions, you should consult an attorney.
The North Carolina Judicial Branch provides information on small claims actions at
www.nccourts.gov/help-topics/lawsuits-and-small-claims.

1. The PLAINTIFF must file a small claim action in the county where at least one of the defendants resides.
2. The PLAINTIFF cannot sue in small claims court for more than $10,000.00 excluding interest and costs. This amount may be lower, depending on local judicial order. If the amount is lower, it may be an amount determined by the chief district court judge of the judicial district.
3. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses.
4. If the defendant is a corporation, the plaintiff must sue in the complete corporate name. If the business is not a corporation, the plaintiff must determine the owner's name and sue the owner.
5. The PLAINTIFF may serve each defendant, who is a natural person, by:
   - the sheriff delivering a copy of the summons and complaint to the defendant(s) after payment of the service fee;
   - the sheriff leaving copies of the summons and complaint at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion residing therein after payment of the service fee;
   - mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee;
   - mailing a copy of the summons and complaint by signature confirmation as provided by the United States Postal Service, addressed to the party to be served, and delivering to the addressee; or
   - depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt.

   If certified or registered mail is used, the plaintiff must prepare and file a sworn statement, such as the AOC-CV-105, with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing proof of service in accordance with G.S. 1A-1, Rule 4(j2).
6. The PLAINTIFF may serve each defendant, who is not a natural person (e.g. corporation, partnership, government entity) by methods provided in G.S. 1A-1, Rule 4(j).
7. If the defendant is a natural person under a disability (e.g., minor, incompetent adult), the PLAINTIFF must comply with G.S. 1A-1, Rule 4(j)(2).
8. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. A plaintiff, who is unable to pay advance court costs, may apply to sue as an indigent pursuant to G.S. 1-110(a). In the event that judgment is entered in favor of the plaintiff, court costs may be charged against the defendant.
9. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear before the magistrate to assert the defendant's defense.
10. Whether or not an answer is filed, the PLAINTIFF must appear before the magistrate.
11. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is rendered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is rendered. If notice is given in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within twenty (20) days after the judgment is rendered (ten (10) days in summary ejectment cases). If the appealing party petitions to appeal as an indigent and is denied, the party shall have an additional five days to perfect the appeal by paying the court costs.
12. This form is supplied in order to expedite the handling of small claims. It is designed to cover the most common claims.

AOC-CVM-200, Side Two, Rev. 7/24

STATE OF NORTH CAROLINA

CUMBERLAND County

File No. 24 CVM 1000

In The General Court Of Justice

Name And Address Of Plaintiff		
Howard Homeowner 6767 Main St. Fayetteville	NC	28301

VERSUS

Name And Address Of Defendant		
Tommy Smith 3600 Magnolia Ln Fayetteville	NC	28314

SERVICEMEMBERS CIVIL RELIEF ACT DECLARATION

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

NOTE: *Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.*

DECLARATION

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

1. As of the current date: *(check one of the following)*
   - ☒ a. I have personal knowledge that the defendant named above is in military service.*
   - ☐ b. I have personal knowledge that the defendant named above is **not** in military service.*
   - ☐ c. I am unable to determine whether the defendant named above is in military service.*
2. As of the current date, I ☐ have ☒ have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. *See* G.S. 127B-27 and G.S. 127B-28(b).
3. I ☐ used ☒ did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant's federal military service.
   ☐ The results from my use of that website are attached.
   (**NOTE:** *The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will not appear in the SCRA Website database.*)
4. The following facts support my statement as to the defendant's military service: *(State how you know the defendant is or is not in the military. Be specific.)*
   Tommy Smith owns his own repair business. He is not in the military. I have hired him several times over the years. He told me he never served in the military and now he's too old.

***NOTE:** *The term "military service" includes the following: active duty service as a member of the United States Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard; service as a member of the National Guard under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days for purposes of responding to a national emergency; active service as a commissioned officer of the Public Health Service or of the National Oceanic and Atmospheric Administration; any period of service during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause. 50 U.S.C. 3911(2). The term "military service" also includes the following: State active duty as a member of the North Carolina National Guard under an order of the Governor pursuant to Chapter 127A of the General Statutes, for a period of more than 30 consecutive days; service as a member of the National Guard of another state who resides in North Carolina and is under an order of the governor of that state that is similar to State active duty, for a period of more than 30 consecutive days. G.S. 127B-27(3) and G.S. 127B-27(4).*

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Date	Signature Of Declarant	Name Of Declarant (type or print)
07/01/2024		Howard Homeowner

NOTE TO COURT: ***Do not proceed to enter judgment in a non-criminal case in which the defendant has not made an appearance until a Servicemembers Civil Relief Act affidavit or declaration (whether on this form or not) has been filed, and if it appears that the defendant is in military service, do not proceed to enter judgment until such time that you have appointed an attorney to represent him or her.***

(Over)

AOC-G-250, Rev. 4/24

Information About Servicemembers Civil Relief Act Affidavits And Declarations

1. **Plaintiff to file affidavit/declaration**
   In any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit—
   (A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or
   (B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.
   50 U.S.C. 3931(b)(1).

2. **Appointment of attorney to represent defendant in military service**
   If in a civil action or proceeding in which the defendant does not make an appearance it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed to represent a service member cannot locate the service member, actions by the attorney in the case shall not waive any defense of the service member or otherwise bind the service member. 50 U.S.C. 3931(b)(2).
   State funds are not available to pay attorneys appointed pursuant to the Servicemembers Civil Relief Act. To comply with the federal Violence Against Women Act and in consideration of G.S. 50B-2(a), 50C-2(b), and 50D-2(b), plaintiffs in Chapter 50B, Chapter 50C, and Chapter 50D proceedings should not be required to pay the costs of attorneys appointed pursuant to the Servicemembers Civil Relief Act. Plaintiffs in other types of actions and proceedings may be required to pay the costs of attorneys appointed pursuant to the Servicemembers Civil Relief Act. The allowance or disallowance of the ordering of costs will require a case-specific analysis.

3. **Defendant's military status not ascertained by affidavit/declaration**
   If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court. If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. The bond shall remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable Federal or State law or regulation or under any applicable ordinance of a political subdivision of a State. The court may issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this Act. 50 U.S.C. 3931(b)(3).

4. **Satisfaction of requirement for affidavit/declaration**
   The requirement for an affidavit above may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury. 50 U.S.C. 3931(b)(4). The presiding judicial official will determine whether the submitted affidavit is sufficient.

5. **Penalty for making or using false affidavit/declaration**
   A person who makes or uses an affidavit permitted under 50 U.S.C. 3931(b) (or a statement, declaration, verification, or certificate as authorized under 50 U.S.C. 3931(b)(4)) knowing it to be false, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both. 50 U.S.C. 3931(c).

AOC-G-250, Side Two, Rev. 4/24

File No. 24 CVM 1000

Film No.

Judgment Docket Book And Page No.

JUDGMENT IN ACTION TO RECOVER MONEY OR PERSONAL PROPERTY

G.S. 7A-210(2), 7A-224

Name And Address Of Plaintiff
HOWARD HOMEOWER

6767 Main St

Fayetteville NC 28303

County | Telephone No.

VERSUS

Name And Address Of Defendant 1
TOMMY SMITH
3600 Magnolia Lane

Fayetteville NC 28314

County | Telephone No.

Name And Address Of Defendant 2

County | Telephone No.

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

CUMBERLAND County

In The General Court Of Justice
District Court Division-Small Claims

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of trial.

FINDINGS

The Court finds that:

- [x] the plaintiff has proved the case by the greater weight of the evidence.
- [ ] the plaintiff has failed to prove the case by the greater weight of the evidence.

the defendant(s) [ ] was [ ] was not present at trial.

- [x] the case involves a breach of contract and the date of breach is: 06/30/2024.
  - [x] the contract provides for pre-judgment interest on damages for breach at the rate of 8 % and/or post-judgment interest at the rate of -- %.
  - [ ] the contract does not provide a specific pre-judgment interest rate.
  - [x] the contract does not provide a specific post-judgment interest rate.
- [ ] Other:

ORDER

It is ORDERED that:

- [ ] the plaintiff recover possession of the personal property described in the complaint.
- [ ] the plaintiff recover possession of the personal property listed below:

- [ ] the plaintiff recover nothing of the defendant(s) and that this action be dismissed with prejudice.
- [x] *(for breach of contract cases)* the plaintiff recover of the defendant(s) the following principal sum plus interest on the principal from the date of breach to the date of judgment (1) at the rate provided in the contract, as found above; or (2) at the legal rate. In addition, the principal shall bear interest from the date of judgment until the judgment is satisfied (1) at the rate provided in the contract, as found above; or (2) at the legal rate.
- [ ] *(for tort cases)* the plaintiff recover of the defendant(s) the following principal sum, plus interest at the legal rate from the date the action was instituted until judgment is satisfied.
- [ ] Other: *(specify)*
- [x] Costs of this action are taxed to the [ ] plaintiff. [x] defendant.

Principal Sum Of Judgment	$ 250.00	Name Of Judgment Debtor(s) From Whom Amount Recovered
Pre-judgment Interest Not Included In Principal	$ 1.67	[x] Judgment Announced And Signed In Open Court
Attorney's Fees Or Other Damages *(when appropriate)*	$	Date 07/23/2024 — Signature Of Magistrate M. Magistrate
TOTAL AMOUNT	$ 251.67	Name Of Party Announcing Appeal In Open Court: Tommy Smith

CERTIFICATION

NOTE: *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.*
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date | Signature Of Magistrate

AOC-CVM-400, Rev. 2/12

Conducting the Hearing Checklist

Pre-Evidence Issues

1. Do you have authority to hear this kind of case? (MR#1)
    a. Amount in controversy $10,000 or less
    b. Remedy money, recover personal property, summary ejectment or motor vehicle lien
    c. At least one defendant resides in county
2. Do you have authority over this defendant? (MR#2)
    a. Service
    b. Voluntary appearance
3. Who will present the case for each party? (MR#3)
    a. Are the parties present?
    b. Are any parties represented by attorneys?
    c. Do agent rules apply: SE cases/corporations?
4. If Δ is not present, do you have a satisfactory SCRA declaration? (MR#4)
5. Was Δ served with enough notice before the hearing? (MR#5)
    a. 5 days most small claims cases
    b. 2 days summary ejectment cases
6. Is π the real party in interest? (MR#6)
7. Does π ask for a voluntary dismissal? Does Δ ask for involuntary dismissal?
8. Has Δ filed a counterclaim?
    a. Amount in controversy $10,000 or less
    b. Remedy money, recover personal property, summary ejectment or motor vehicle lien
9. Does one party ask for a continuance?
    a. Do the parties agree?
    b. If not, is there good cause?
10. Do you have any reason to suspect Δ has filed for bankruptcy? (MR#7)
    a. If yes, discontinue the case on AOC-G-108.
    b. If no, hear the case.

Conducting the Trial

1. Whether or not Δ is present, the π has the burden of proving each essential element of the case by the greater weight of the evidence. (MR#8)
2. What if π asks to amend the complaint?
    a. Amendments are freely allowed.
    b. Make sure Δ has sufficient notice of amended claim.
3. The magistrate should conduct the trial with control and decorum.
4. The magistrate should apply the rules of evidence generally, making decisions about admissibility and weight.

Entering Judgment

1. Your judgment should dispose of all the claims of all the parties. (MR#9)
2. What if you're not sure about the correct decision?
    a) Instead of announcing judgment in open court
        i. Up to 10 days most small claims cases
        ii. Up to 5 days in summary ejectment cases
    b) Fill out certificate on judgment form
    c) Mail decision to the parties

After Judgment

1. Your judgment is a legal event which is final and may be changed in only one of two ways: appeal for trial de novo or being set aside under Rule 60(b). (MR#10)
2. The magistrate should inform the parties about the procedure for appeal and the deadlines.
    a. Notice of appeal, either in court or in clerk's office. 10-day deadline
    b. Mandatory visit to clerk's office to pay costs of appeal.
        i. 20-day deadline most small claims cases
        ii. 10-day deadline summary ejectment cases
    c. Appeal for trial de novo=whole new trial in district court
3. Your authority to act ends when you enter judgment.

THE TEN MANDATORY RULES OF SMALL CLAIMS PROCEDURE

1. You must have subject matter jurisdiction.

2. You must have jurisdiction over the defendant, either through service of process or voluntary appearance.

3. A party may appear only *pro se* (on his or her own behalf) or through an attorney unless an exception applies.

4. If defendant does not appear for trial, the SCRA prohibits the court from entering judgment in the absence of a legally sufficient affidavit attesting to the defendant's military status.

5. Unless defendant is present and waives a continuance, the magistrate must continue an action in which service of process was not accomplished a minimum time before trial.

6. Every action must be brought in the name of the real party in interest (rpii). If the plaintiff is not the rpii, the court must allow the plaintiff an opportunity to correct the error, continuing the case if necessary.

7. If defendant files a petition for bankruptcy, the small claims magistrate must stop the trial, discontinuing the action (using G-108) until the automatic bankruptcy stay is lifted.

8. Whether or not the defendant is present at trial, plaintiff must prove the essential elements of the case by the greater weight of the evidence (subject to one exception).

9. The judgment must contain the magistrate's decision about all claims in relation to all parties.

10. The judgment in a small claims action is a final judgment and may be changed only by appeal or by an order entered pursuant to Rule 60(b) setting the judgment aside.

Small Claims Procedure/Basic School Study Guide

1. List the 3 requirements for a case to be heard in small claims court:

   _____

   _____

   _____

2. If the defendant has not been served when you call the case for trial, what should you do?

   _____

   Does your answer change if the defendant is present in the courtroom?

   _____

3. The defendant has been served, but is not present in the courtroom when you call the case for trial. What do you do?

   _____

   _____

4. In a small claims action for money owed, the defendant was served on Friday, July 7, and the trial is held Monday, July 10. The defendant is not present in court. What do you do?

   _____

   Is your answer different if the action is for summary ejectment?

   _____

5. In a small claims action, defendant's attorney has filed a motion to dismiss "pursuant to GS 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief may be granted." What do you do?

   _____

6. In a small claims action for summary ejectment, the plaintiff/landlord does not appear in court, but instead sends her secretary. The secretary shows you a document giving her power of attorney to act on behalf of her employer. The defendant is present and asks you to dismiss the case. What do you do?

   _____

7. What difference does it make whether a case is dismissed with prejudice or without prejudice?

_____

8. In a summary ejectment action the plaintiff-landlord submits an SCRA affidavit stating that the plaintiff has been unable to determine whether the defendant-tenant is in the military. Attached to the affidavit is a DoD website printout indicating that the person's status is unknown, and the landlord explains that s/he does not know the birthdate or social security number of the tenant, John Smith. Do you accept the affidavit as sufficient?

_____

9. Would you say that the formal rules of evidence apply strictly or leniently in small claims court? Give a reason for your answer.

_____

10. What is the most common example in small claims court of a violation of the real party in interest rule? What should a magistrate do when a violation occurs?

_____

11. What AOC form should you use if you learn that the defendant has filed for bankruptcy? _____

12. What should you do if the plaintiff checks the wrong box on the complaint form?

_____

13. List the four steps for announcing your judgment in open court:

_____

_____

_____

_____

14. What should you do if, at the end of the evidence, you're not sure about your decision?

_____

How would you go about it?

_____

15. List the two things a party must do to appeal your decision, and explain in a few words what information you would give them about that.

_____

_____

_____

_____

_____

16. Imagine that after you've entered judgment, you realize that you made a legal error in your decision. What should you do?

_____

What remedy is available to the party who is hurt by your error?

_____

17. Assume that you have been authorized by your chief district court judge to consider motions under Rule 60(b)(1) to set aside small claims judgments. Give an example of a typical situation in which you might grant such a motion.

_____

_____

SMALL CLAIMS PROCEDURE

Mandatory Rule #1: You must have subject-matter jurisdiction.

IS IT A SMALL CLAIMS ACTION?

What is the principal relief sought?
- Summary Ejectment
- Money Owed
- Return of Personal Property

Not Coercive Judgment
Not Action to Recover Real Property

In case of a claim for $$ or personal property, what is amount in controversy? Maximum $10,000

Does at least one Δ reside in your county?

Amount in Controversy Rules

~ Amount in controversy is determined as of time case is filed.

~ Claim-splitting is not allowed.

~ In actions for return of personal property, amount in controversy is FMV.

~ In summary ejectment actions in which π seeks only possession, amount in controversy requirement does not apply.

Q: What should the magistrate do if a case does not meet one of these requirements?

A: The magistrate should not hear the case.
- ≈ If the case isn't the type that may be heard in small claims: dismiss.
- ≈ If the amount in controversy too high: may be cured in some cases by amending complaint. Otherwise, dismiss or return to clerk.
- ≈ Δ isn't a resident: dismiss or return to clerk

Q: Where does a corporation "reside"?

A: Corporations that have authority to do business in NC reside in either the county in which the principal office is located or the county in which the corporation maintains a place of business. If neither of these applies to a particular corporation, it resides in any county in which it is regularly conducting business. G.S. 1-79.

Q: What if π has sued more than one Δ, but only one Δ resides in the county?

A: The law requires only that at least one Δ reside in the county.

Mandatory Rule #2: You must have jurisdiction over the Δ: either service of process or voluntary appearance.

HAS Δ BEEN SERVED?

Check the file for one of the following: Completed return of service on back of summons
π's affidavit & postal receipt
Δ's written acceptance of service
Δ has filed motion, answer, or counterclaim
OR
Δ is present in court

Q: What should the magistrate do if the summons and complaint have not been served?
A: Continue the case to allow additional time for service. Use AOC Form G-108.

Q: What if π has sued more than one Δ, but only one has been served?
A: π must choose between
- ≈ requesting continuance to pursue service on other Δs, or
- ≈ taking a voluntary dismissal against unserved Δs and going ahead against Δ that has been served.

Service on a Corporate Δ:

- ≈ Delivering to registered agent, or
- ≈ Serving officer, director, or managing agent by
  - Delivering copy
  - Leaving copy in office with person apparently in charge
  - Mailing or using delivery service (certified, signed receipt)

Hint: Be careful not to confuse service of process with the rule about at least one Δ residing in the county**.** They are two separate requirements.

HAVE ANY OTHER DOCUMENTS BEEN FILED WITH THE CLERK?

Check the file for: an answer (which may also contain a counterclaim)
a motion for continuance
a motion to dismiss for
- ≈ failure to state a claim [Rule 12(b)(6)]
- ≈ lack of personal jurisdiction
- ≈ improper venue

Q: What difference does it make if Δ files an answer?

A: It makes very little difference. Quite often, answers are filed in cases in which Δ is represented by an attorney unused to small claims practice who are unaware that answers are not required in small claims court. Filing an answer in a case does constitute a voluntary appearance, though, and so it may be important in an action in which Δ has not been served and is not present in court.

Q: How should I handle a pre-trial motion for a continuance?

A: The law favors, but does not require, granting a continuance if both parties join in the request.

If a request for a continuance is made by only one party, the law requires that party to demonstrate good cause.

If the magistrate grants a continuance, s/he must be certain that the other party receives

notice of the new trial date and time.

In summary ejectment actions, a continuance is permitted only for good cause and for a maximum of 5 business days unless both parties agree to a longer period.

	LOCAL PRACTICE ALERT: Be sure to find out what your county's policy is about the procedure for pre-trial requests for a continuance.	

Q: What should I do if Δ files a Rule 12(b)(6) motion to dismiss the case for failure to state a claim for relief?

A: This motion is not allowed in small claims court. GS 7A-216. Because it is a common motion in general civil actions, this error is usually made by an attorney unused to small claims practice and unfamiliar with the rules of small claims procedure set out in GS Ch. 7A, Art. 19. A magistrate should either instruct the attorney to withdraw the motion or deny it as improperly made.

Q: What if the motion is actually valid in the sense that the complaint is virtually blank or so poorly-stated that it in fact does fail to adequately notify Δ of the underlying basis for the lawsuit sufficient to permit Δ to identify potential defenses?

A: GS 7A-216 authorizes the magistrate to direct the π to amend the complaint to provide adequate details, and to grant whatever continuances may be necessary to allow Δ to respond to the new information.

Q: What should I do if Δ files a motion to dismiss pursuant to GS 1A-1, Rule 12(b)(2) and/or (3), challenging venue or personal jurisdiction?

A: GS 7A-221 provides that assignment to the magistrate is automatically suspended if a Δ files one of these motions. The clerk must schedule the motion for hearing before a district court judge.

NOTE: These objections are waived unless filed in writing prior to trial. A Δ who objects to personal jurisdiction or venue for the first time at trial will not be heard, unless the defect is so severe as to deprive the court of total authority to hear the case. E.g., the

complaint and summons clearly states that Δ is not a resident of the county, thus depriving the small claims court of subject matter jurisdiction.

BEFORE YOU HEAR THE EVIDENCE

Complete the *Pre-Trial Checklist*

Determine whether both parties, or their *authorized representatives*, are present.

> Mandatory Rule #3: A party may appear only pro se (on his own behalf) or through an attorney unless an exception applies.

Who is an authorized representative? The party's attorney

An agent
- SE cases: with personal knowledge
- Corporate party: officer or employee

Special cases: estates, guardians (ad litem & otherwise)

Who is NOT an authorized representative? Anyone having only *power of attorney*

If neither party is present, or only Δ is present: Dismiss the case for *failure to prosecute*, using AOC-G-108.

Q: If Δ appears and π does not appear, is it appropriate to continue the case to allow the π another chance to appear?
A: No.

Q: In this situation, should I mark my dismissal as *with* or *without prejudice*?
A: If Δ asks you to dismiss the action, dismissal with prejudice is appropriate unless some special circumstances dictate a different result.

Q: What do these terms actually mean?

A: When a case is dismissed *without prejudice*, the π may refile the same lawsuit. Unless barred by a statute of limitations, the only consequence to the π for failing to appear is paying court costs when the π files again.

When a case is dismissed *with prejudice*, it is a final determination that Δ is not liable for the particular fault alleged in the lawsuit. If π attempts to bring a second lawsuit against the same Δ for the same reason, Δ is entitled to have the second case dismissed. And the fact that Δ is not liable for that wrong may well be binding in future lawsuits involving the same events and circumstances.

Q: If neither party appears, is the dismissal with or without prejudice?

A: GS 1A-1, Rule 41(b) states that a dismissal is with prejudice unless it falls into certain specified exceptions not relevant here, or unless the court specifically indicates to the contrary. The court has authority to so specifically indicate, but in light of the rule's "default setting" the rule seems to contemplate a general rule favoring dismissal with prejudice, with the court having authority to deviate from that when justice so requires.

	Local Practice Alert: Not all magistrates follow this practice. Some magistrates dismiss with prejudice if the Δ appears and the plaintiff does not, while others require the Δ to appear AND to request dismissal.	

Mandatory Rule #4: If defendant does not appear for trial, the SCRA prohibits the court from entering judgment in the absence of a legally-sufficient affidavit attesting to the defendant's military status.

If the π is present and Δ is not present, verify that the π has provided a legally sufficient SCRA affidavit pertaining to whether Δ is a member of the military. The affidavit must have the general form and contain the same information as AOC-G-250.

Q: What is a legally sufficient affidavit?

A: Plaintiff must have sworn to the truth of the statements before an official authorized to administer oaths and filed the completed document with the clerk. The π must select one of three alternatives:

- ✓ Δ is in the military
- ✓ Δ is not in the military
- ✓ I am unable to determine whether Δ is in the military

If either of the last two alternatives are checked, the affidavit must contain specific facts in support of the selected alternative.

Q: Who determines whether an affidavit is sufficient?

A: The federal requirement applies to the judicial official conducting the trial—not to the π — and it is the judicial official who violates the law by proceeding to trial and entering judgment in the absence of an adequate affidavit. For this reason, it is the small claims magistrate who determines whether an affidavit is sufficient.

Q: Does the law require the π to check the DoD website and supply the results to the court?

A: No. If the π has sufficient information (SS# and/or DOB) to obtain a definitive result from the DoD website, few if any additional facts are likely to be necessary for the affidavit to be accepted by the magistrate. But the website is not a mandatory source of information, and in fact is not helpful in the absence of sufficient identifying information about Δ. The π may rely on other evidence to support a conclusion that Δ is not a servicemember.

Q: What should the magistrate do if the affidavit simply states that the π is unable to determine Δ's military status?

A: This, without more, is an insufficient affidavit. The affidavit should state facts in support of the conclusion that the π is unable to make this determination.

Q: If Δ is in the military, what should the magistrate do?

A: The law requires that an attorney be appointed in this circumstance to contact Δ to make sure Δ knows both of the lawsuit and about Δ's rights to request a stay of proceedings under the SCRA.

	Local Practice Alert: The procedure for appointing an attorney when required by the SCRA is established by each county or judicial district. Because the SCRA applies to all civil cases, clerks and trial judges also encounter this requirement and should be able to answer any questions.	

Mandatory Rule #5: Unless Δ is present and waives a continuance, the magistrate must continue an action in which service of process was not accomplished a minimum time before trial.

Determine whether the statutory requirements for minimum notice to Δ have been satisfied:

- ≈ For summary ejectment cases: GS 42-29 requires sheriff's office to serve T "at least two days prior to the day of trial."
- ≈ All other small claims cases: GS 7A-214 requires a magistrate to continue the case if trial date is less than five days after Δ is served.

Q: What should the magistrate do if Δ is present but the minimum notice requirements have not been met?

A: The magistrate should inform Δ that the law entitles the Δ to additional time to prepare for trial if the Δ wishes. If the Δ waives the right to a continuance, the magistrate should proceed as usual with the case. If the Δ prefers a continuance, the magistrate should continue the case for a time long enough to provide the Δ with the minimum notice period.

AT THE BEGINNING OF TRIAL

Identify the parties present and resolve any issues raised by the Pretrial Checklist.

Deal with any *last-minute developments*. These are perhaps most likely to come up at the beginning of trial, but they sometimes arise as the parties present their evidence.

> Mandatory Rule #6: Every action must be brought in the name of the real party in interest. If the named plaintiff is not the rpii, the court must allow the plaintiff an opportunity to correct the error, continuing the case if necessary.

Real party in interest (rpii) requirement: The law requires that the person bringing a lawsuit be the person who is entitled to the relief sought. If at any point during the trial it becomes clear that someone other than the π is actually the injured party, the magistrate must offer the π an opportunity to add or substitute the "real party in interest," continuing the case if necessary.

The most common instance of a rpii violation occurs when a property management company files a summary ejectment action in its own name, rather than in the name of the property owner.

Plaintiff requests a voluntary dismissal. (Sometimes this happens before trial as well.)

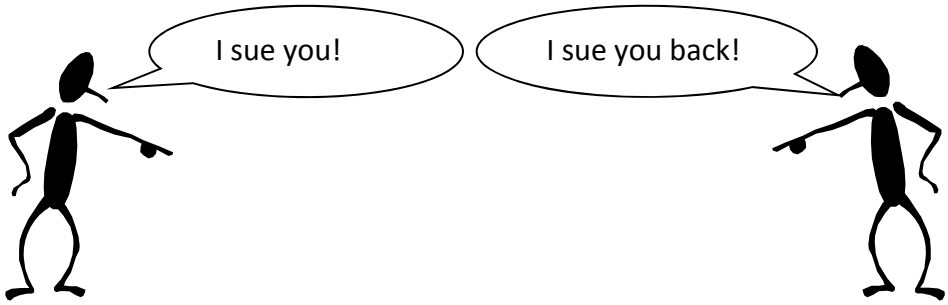
Rule: π can dismiss the case at any point before s/he has finished presented evidence. Use AOC-G-108 to record the dismissal.

Δ has filed (or says she wants to file) a counterclaim.

Q: What's a counterclaim?

A: A counterclaim is simply a document (very similar to a complaint) in which Δ asserts a claim against the π. Generally, a counterclaim is filed as part of an answer, and the document should ideally be titled "Δ's Answer & Counterclaim." Sometimes it may not be completely clear whether a Δ intended to file a counterclaim or merely an answer. A counterclaim is different from an answer because it goes further. Instead of simply defending against π 's claim, a Δ is essentially saying, "Not only do I not owe π money. Plaintiff owes ME money!" A

Δ is required to pay court costs for filing a counterclaim, just as a π is for filing a complaint. Counterclaims will be discussed again in the *Trial* section of this document.



Q: What should I do if Δ files the counterclaim at the last minute and then brings a copy to trial, surprising the π?
A: Assuming counterclaim meets above conditions, tell Δ to give π a copy. If π needs time to prepare a defense, grant a continuance.

Rules for Counterclaims

Must not exceed $10,000.

Must be in writing.

Must be filed with clerk before the time the trial is scheduled to begin.

Q: What if Δ asks to file counterclaim after the time case is set for trial**?**
A: Tell Δ that s/he may file it as a separate action, but has missed the deadline for having the claim heard in this action.

Q: What if counterclaim is for more than $10,000?
A: Δ has two choices:

- ≈ reduce the amount so that the counterclaim can be heard today, or
- ≈ take a voluntary dismissal and refile in district or superior court.

NOTE: Be sure to inform Δ that claim-splitting is not allowed, and that Δ should accurately state all the damages s/he wishes to recover for the alleged wrongful act of the π . Example: Δ can't reduce a $18,000 counterclaim to $10,000 and then bring another action for the $8,000 excess.

Q: What's the procedure if Δ chooses to reduce the amount of damages?
A: This requires Δ to amend her counterclaim. The magistrate need only write something like the following in the *Other* section of the judgment, under *Findings*: "Δ filed a counterclaim in this action in the amount of $18,000" but amended her complaint in open court to reduce the amount claimed to $10,000."

Q: What's the procedure if Δ chooses to take a voluntary dismissal of her counterclaim?
A: Be sure to state that in your judgment.

Q: What happens to Δ's counterclaim if π voluntarily dismisses his case?
A: Verify that π has received notice of the counterclaim, and then hear the counterclaim just as though it had been filed as a small claims action in the first place.

One of the parties requests a continuance.

If both parties are present and agree to a continuance, the law favors—but does not compel—allowing it.

If one party's request for a continuance is opposed by the other party, the party seeking a continuance must show good cause.

> "[T]he trial court must pass on … the question whether the moving party has acted with diligence and good faith. . . . The chief consideration to be weighed in passing on [the request] is whether the grant or denial of a continuance will be in furtherance of substantial justice."
> Shankle v. Shankle, 289 N.C. 473 (1976).

There is reason to believe the Δ has filed for bankruptcy.

> Mandatory Rule #7: If Δ files a petition for bankruptcy, the small claims judge must stop the trial, discontinuing the action (using G-108) until the automatic bankruptcy stay is lifted.

When a person files a bankruptcy petition, it triggers an *automatic stay* under federal law which prohibits creditors from attempting to collect debts from the person, including pursuing legal actions against the debtor. The stay goes into immediate effect when the petition is filed, and

any action taken by a state court thereafter is void, assuming the stay is applicable. (Criminal cases, for example, are not actions by a creditor and are not subject to the stay.)

Q: Is the small claims judge subject to the stay even if the Δ takes no action to inform the court that a bankruptcy petition has been filed?

A: Yes. The stay goes into effect automatically, and judgments entered in violation of the stay—whether knowingly or not—are void.

Q: What should a magistrate do upon learning that a bankruptcy petition has been filed?

A: Fill out the bottom portion of AOC-G-108, discontinuing the action until the stay has been lifted. Do not dismiss the action.

Q: Does the stay apply to actions for summary ejectment?

A: Yes, unless judgment was entered prior to Δ's filing the bankruptcy petition. A landlord is not without a remedy in this situation, however; the landlord may ask the bankruptcy court to lift the stay in regard to the tenant's obligation to pay rent.

HEARING THE EVIDENCE

Place both parties and any witnesses under oath at the outset.

Explain to both parties that you will make a decision only after hearing from them both. Because the π has the burden of proving the case by the greater weight of the evidence, π must testify first.

If only the π is present, administer the oath to π and any witnesses and hear testimony just as you would if Δ were present. This situation is handled exactly as though Δ were present, but presented no effective defense. Exception: In summary ejectment actions π may request a judgment on the pleadings and thereby avoid the requirement that π prove entitlement to relief.

Mandatory Rule #8: Whether or not Δ is present at trial, π must prove the essential elements of the case by the greater weight of the evidence (subject to one exception).

The degree of formality with which a small claims trial is conducted lies within the discretion of the magistrate. It is appropriate for magistrates to question witnesses and to provide the parties with information about small claims procedure, so long as the magistrate is careful to avoid asking leading questions, advising a party about the best course of action, or acting in a manner showing favoritism to either party.

Trying a Case with a Counterclaim

Recommended: Conduct the trial in two parts, trying the primary claim first and then separately hearing evidence on the counterclaim. After you've heard and decided both cases, calculate the total amount of the judgment, setting off as necessary. Enter one judgment, making clear how you ruled on both cases and what damages were awarded in each case.

Amending the Complaint

The law says that a judge *should freely allow* a π to amend a complaint. Assuming the statute of limitations has not run, there is little reason to deny such a motion. Generally, the only issue of concern is whether fairness requires a continuance so that Δ -- particularly an absent Δ -- can be given notice and make any necessary adjustments to defend against the amended claim.

Amendment to correct name? Allowed, provided that the correct person was served. Not allowed to substitute a different Δ.

Amendment to substitute remedy? Common in actions to recover property where creditor discovers property is no longer in Δ's possession. Creditor should be allowed to amend complaint to request money owed, but take care that Δ has notice of amendment.

Amendment to amount requested? Allowed, but be sure Δ has notice of increased amount.

Amendment to change theory of recovery (aka, checked the wrong box)? Unnecessary, but allowed. Again, issue is notice to Δ.

Q: What is the procedure for amending a complaint?

A: In small claims court a motion to amend is often made during trial. In this circumstance, it is not necessary for the π to physically write the amendment on the complaint. It is preferable for the magistrate to write the amendment on the judgment form.

Entering Judgment and Other Post-Trial Issues

Mandatory Rule #9: The judgment must contain the magistrate's decision about all claims in relation to all parties.

Usually, small claims judgments are announced in open court. If the magistrate prefers, the magistrate may reserve judgment for up to 10 days. Note the exception for summary ejectment cases. GS 7A-221(b) prohibits a magistrate from reserving judgment unless the parties agree or the case is complex. If the magistrate reserves judgment because the case is complex, judgment must be rendered within five business days.

Q: What's the procedure for reserving judgment?

A: The magistrate should inform the parties that they will receive a copy of the written judgment within the next two weeks, and explain the procedure for appeal. The magistrate must complete the section at the bottom of the judgment form labeled *Certification*, have the judgment stamped in by the clerk, and mail a copy to both parties.

Q: Can a magistrate correct a clerical error in a judgment?

A: A magistrate can correct a clerical error at any time, on the magistrate's own motion. Note that a *clerical error* is an error that does not affect the legal rights of the parties. For that reason, notice to the parties is usually not necessary. An example would be misspelling the name of one of the parties. See Small Claims Law p. 41 for details of procedure.

Steps in Entering Judgment

Make a clear division between the close of evidence and your readiness to announce your decision.

Announce your decision, clearly identifying by name the party you're ruling in favor of.

Provide a brief explanation of the legal reason for your decision.

Allow the parties to ask questions about next steps, and inform the losing party of the right to appeal.

Mandatory Rule #10: The judgment in a small claims action is a final judgment and may be changed only by appeal or by an order entered pursuant to Rule 60(b) setting the judgment aside.

Appeal

The remedy for a magistrate's legal error is appeal to district court for trial *de novo*.

Q: What is trial *de novo*?

A: When a small claims judgment is appealed, the district court judge conducts a whole new trial. The parties are not bound by their decisions at the small claims level: they may make new arguments, present new evidence, and even change the remedy they're seeking in the lawsuit.

Q: What is the procedure for appeal?

A*:* A party may give notice of appeal in two ways, either by notifying the small claims judge in open court, or by filing a written notice of appeal with the clerk within 10 days. An appealing party must pay costs of appeal within 20 days, or else appeal is dismissed. Note: costs must be paid within 10 days in summary ejectment actions. A party who cannot afford to pay the costs of appeal may be excused by qualifying as indigent.

Q: What is the effect of the small claims judgment while an appeal is pending in district court?

A: A judgment for money is automatically stayed when a party gives notice of appeal. An judgment awarding possession of real or personal property is not automatically stayed and so may be enforced just as if there were no appeal. In summary ejectment actions a tenant appealing a judgment in favor of a landlord can delay enforcement of the judgment through a procedure in the clerk's office requiring the tenant to pay the undisputed rent in arrears and sign an undertaking to pay rent as it comes due.

Q: What happens after the small claims judgment?

A: A π who wins in small claims court is not permitted to enforce a judgment immediately; first, the 10-day period during which the Δ may give notice of appeal must end. Only then may the π initiate enforcement procedures by going to the clerk. There is an additional cost to

enforce a judgment, which will be added to the costs owed by the losing party. The next steps vary, depending on whether the judgment is for money or recovery of rental or personal property. Some magistrates provide the parties a copy of the handout in the Reference Section titled "What Happens After Small Claims Court."

Motions to Set Aside Judgment under Rule 60(b)

Rule 60(b) sets out six reasons for setting aside a judgment. The first ground is that the judgment should be set aside because of excusable neglect, mistake, or surprise. In small claims, the "excusable neglect" at issue almost always involves a party's failure to appear. When a judgment is set aside under Rule 60(b), the case will be re-tried, usually based on the original complaint with no need to repeat service of process.

Q: What is the procedure for deciding whether to set aside a judgment?

A: Typically, the losing party files a motion to set aside the judgment, specifying the reason. Motions must be filed within a reasonable time, usually within one year. The other party is given notice of the motion, and the court conducts a hearing on whether the motion should be granted.

Q: Who conducts the hearing?

A: A district court judge generally hears Rule 60(b) motions, but some magistrates are authorized by their chief district court judge to hear motions <u>provided that the motion is based on Rule 60(b)(1)</u> (mistake, excusable neglect, inadvertence, or surprise.)

Q: How does a magistrate determine whether the judgment should be set aside?

A: The test is whether the party who made the error gave the case "such attention as a man of ordinary prudence usually gives to important business affairs." If the moving party is Δ, she must also allege that she has a meritorious defense to π's claim. Finally, our appellate courts have repeatedly stated that a motion under Rule 60(b) is not to be used as a substitute for appeal. If the error in question was a legal error made by the magistrate, the judgment will not be set aside (unless the error was so serious that it renders the judgment void).

Q: If a magistrate decides to set aside the judgment, how is this decision implemented?

A: The magistrate enters a written order setting aside the judgment, making appropriate findings about the grounds for doing so and, if the motion was filed by the Δ, the existence of a meritorious defense. The magistrate should then re-calendar the case for trial.

Pre-Evidence Checklist

Related to π

Name as it appears on complaint: _____
(If 2 names appear in one box, list both.)

Name of person who signed complaint, if different: _____

Name of person standing in front of you: _____

If not the π, relationship of person to π: _____

Name of injured party (rpii): _____

Related to Δ

How many Δs are listed on complaint (in separate boxes)? ____

Do you have a separate summons for each separate Δ? (circle one) Y N

For each Δ:

Name exactly as it appears on complaint: _____
(If 2 names appear in one box, list both.)

Name exactly as it appears on summons: _____

Name of person who was served: _____

Name of person standing in front of you: _____

If not the Δ, relationship of person to Δ: _____

Do you have any indication at this point that someone other than Δ is a more appropriate Δ? Y N

Special Cases

Is any party deceased, a minor, or a corporation?

Related to Case

What is π asking for? ___ money

___ possession of personal property

___ SE (i.e., recovery of possession of rental property)

___ something else

POINTS TO REMEMBER IN MAKING DECISIONS ABOUT EVIDENCE

Distinguish between the decision to admit evidence and the decision about the weight you give to evidence. In general, evidence is admissible and entitled to consideration if it is *relevant* to an issue in the case and *reliable (*that is, likely to be true).

Why?

- Small claims court is not subject to review on appeal in the same way other trial courts are, so whether evidence does or does not become part of the record is not relevant in the same way.
- Small claims cases never involve juries, and so the legal principles governing consideration of evidence that apply to trials before the judge without a jury are more relevant than are the rules used in jury trials.

Unless evidence is objected to, or unless you, the judge, feel that the evidence is such that it might improperly bias your decision, it should be freely admitted – and given appropriate weight.

When evidence is objected to, it is appropriate to rule on the objection by admitting the evidence but pointing out that its weight is to be determined.

When an attorney repeatedly objects—or when you anticipate that this may happen – it is proper to instruct the attorney to hold objections until the close of the evidence, at which point the attorney may be allowed to present arguments about its weight and admissibility.

What you might say:

> *"As you know, we are about to conduct a trial before the judge without a jury, and one of the parties is not represented by an attorney, which is often the case in this court. My policy in such situations is to be lenient in allowing evidence to be offered, so that parties may testify without interruption. At the close of the evidence, I will hear any argument the parties would like to offer about evidence that you believe I should not consider. After hearing your argument, I will carefully consider all the relevant admissible evidence and determine what weight I will give it before arriving at my decision."*

Factors to consider in assessing credibility:

Motive to lie	Corroborating evidence	Person in best position to observe
Demeanor	Ability to provide details	Which version seems more likely?

A Note on Dealing With Attorneys

~ Remember that attorneys have a different role, and thus a different agenda, than you in your role as a judge.

~Don't expect that an attorney will necessarily approve of or agree with your decisions, or the way you run your courtroom. Be respectful and polite, but be prepared to be assertive if necessary in maintaining control of the courtroom.

~ Like everyone else, attorneys vary in skill and ability. Don't assume that an attorney is more knowledgeable than you about the law, and don't accept general proclamations about what "the law says" at face value.

~ Let attorneys know that you will not rule in their favor unless they explain their argument clearly, in a way that everyone in the courtroom can understand. Communicate that you won't be intimidated into ruling favorably by a complicated jargon-laden legal argument made quickly and without regard for your ability to understand. This is an appropriate requirement, and one that an advocate should anticipate and respect.

~Never hesitate to require an attorney to establish the truth of his or her contentions by supplying a copy of a case or statute, granting a brief continuance if necessary for the attorney to obtain a copy or for you to read it carefully. Insist that copies of cases and statutes be complete, and specifically ask whether the law provided is current as of the date of trial if you have any reason to be doubtful.

~Be aware of procedural errors frequently made by attorneys unused to small claims practice.

~Particularly when confronted with an attorney who is disruptive or insists on interrupting the testimony of the unrepresented party, be prepared to cite GS Ch. 8C, Rule 611, which provides:

> *The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.*

~Similarly, when confronted with an attorney who objects to your questioning of parties or contends that your participation is inappropriate because you are "helping," be prepared to cite Rule 614, which says

> *. . . The court may, on its own motion or at the suggestion of a party call witnesses, and all parties are entitled to cross-examine witnesses thus called. . . . The court may interrogate witnesses, whether called by itself or a party.*

Four Rules of Evidence You Should Know

Business records exception to hearsay rule

Writing or records of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge are admissible if kept in the regular course of business and if it was the regular course of business to make that record, unless the source information or circumstances of preparation indicate a lack of trustworthiness.

G.S. 8-45: Verified statement of account

In an action on an account for goods sold, rents, services rendered, or labor performed, or any oral contract for money loaded, a verified itemized statement of the account is admissible into evidence and is deemed correct unless disputed by the defendant.

Verified: Accompanied by an affidavit from a person who (1) would be competent to testify at trial; (2) has personal knowledge of the particular account, or of the books and records of the business in general; and (3) swears that the account is correct and presently is owed by defendant to plaintiff.

Itemized: Describes each item with price and item number, if there is one.

Best Evidence Rule (paraphrased)

When an action by a party is based on a right created by a written contract, and the content of that contract is in dispute, the party must either produce the contract or adequately explain why he is unable to do so.

Parole Evidence Rule

When contract is in writing, parties may not introduce evidence of prior or contemporaneous oral agreement that varies the terms of the written contract

Note that the rule has no application in two circumstances:

(1) When the evidence is offered to assist the court in determining the meaning of an ambiguous term in the contract; and

(2) when the evidence offered relates to an oral agreement taking place after the written contract and thus in support of an allegation that the written contract was subsequently modified by a later oral agreement.

Small Claims: What Lawyers Need to Know

Small claims procedure is governed in large part by GS Ch. 7A, Art. 19.

The Rules of Civil Procedure apply only when Article 19 does not contain a more specific rule applicable to small claims court. Here are a few of the most significant differences in small claims procedure:

Service by publication is allowed only in (certain) cases involving motor vehicle liens. G.S. 7A-217, -211.1.

Motions to dismiss based on *Rule 12(b)(6)* are not permitted. See GS 7A-216 (referring to such motions by the old common-law term "demurrer").

The defendant is not required to file an answer, and failure to do so constitutes a general denial. G.S. 7A-218. There are *no default judgments* in small claims, and (with the exception of summary ejectment actions meeting the requirements set out in GS 42-30 for obtaining a judgment on the pleadings) the plaintiff must prove the case by the greater weight of the evidence even if the defendant files no answer and fails to appear at trial.

The compulsory *counterclaim* rule does not apply in small claims court. GS 7A-219.

The result in a case in which the plaintiff fails to produce sufficient evidence to establish a right to relief is a judgment *of dismissal*.

Time periods for service of process, calendaring a case for hearing, and giving notice of appeal *are abbreviated* in small claims court. The procedure overall is less formal, and the rules of evidence are only generally observed. See GS 7A-222.

Appeal of a small claims judgment is to district court for trial de novo.

WHAT HAPPENS AFTER SMALL CLAIMS COURT

Location of Clerk's Office: _____

Notice to Both Parties

If you are either the plaintiff (the person suing) or defendant (the person being sued) and are unhappy with the decision of the magistrate, you may appeal the case to district court. You may appeal either by telling the magistrate at the trial that you want to appeal or by filing a written request with the clerk of court within 10 days after the magistrate ruled in your case. If you want to file a written request, ask the clerk to give you a copy of form AOC-CVM-303, which is the notice of appeal form. If you give written notice of appeal to the clerk, you must also send a copy of the form to the opposing parties in your case.

Whether you appeal in open court or file a written appeal, you MUST PAY $150 court costs to the clerk. These costs must be paid within 20 days of the magistrate's ruling, unless you are a tenant appealing from judgment in a summary ejectment action, in which case the costs must be paid within 10 days of the magistrate's ruling. If you cannot pay the appeal costs, you may be able to qualify to file your appeal as an indigent. If you are a tenant appealing an eviction and you want to continue to live at the premises until the case is heard on appeal, you will be required to pay past due rent to the clerk and to sign an undertaking that you will pay rent into the court as it becomes due to keep the judgment from being carried out. If you meet the requirements for appeal as an indigent, you may be excused from the requirement that you pay past due rent in order to remain on the premises while the appeal is pending.

If one party appeals, there will be a completely new trial before a district court judge. (In some cases, the matter may be assigned first to an arbitrator. If that occurs contact the clerk to have the procedure explained to you.) The clerk will notify both parties of the trial date (usually by mailing the trial calendar), and both must appear at that time. If you are the defendant and don't appear at trial, the plaintiff will probably win the case. Both parties should bring all your evidence and witnesses to the trial. The trial before the district court judge will be more formal than the one before the magistrate; therefore, you may wish to consider hiring an attorney to represent you.

Notice to Plaintiff (Party Suing)

If you won your case, your judgment against the defendant is good for 10 years. Before the end of the 10 years, you may bring another lawsuit to extend the judgment an additional 10 years. If you have won a money judgment, it becomes a lien against any land owned by the defendant, which means the defendant cannot sell that land without paying your judgment. Just because you have a judgment does not mean that you will be able to collect it. The defendant must have enough property to enable the sheriff to sell the property to satisfy the judgment. You may try as many times in the 10-year period as you wish to collect the judgment.

If you have won a judgment that the defendant owes you money, the court cannot try to help you collect that money unless you have given the defendant an opportunity to claim his or her exemptions. "Exemptions" is a legal term referring to a judgment debtor's right to shelter certain property from being seized and sold to satisfy a judgment. After the judgment is rendered, you must get two forms (Notice of Rights and Motion to Claim Exempt Property) from the clerk. You must serve these on the defendant. The back of the Notice of Rights tells you how to serve the forms. If you have not heard anything from the defendant within 20 days after you have served the Notice of Rights and Motion, you may go to the clerk ask to have an execution issued. The back of the Notice of Rights form tells you what you have to bring to the clerk. If the defendant responds to your notice and claims exemptions, you may either (1) agree with the exemptions claimed and ask the clerk to issue an execution for non-exempt property or (2) object to the claimed exemptions and have the district court judge determine the exempt property. After the district

judge determines the defendant's exemptions, you may ask the clerk to issue an execution for all nonexempt property. You will have to pay $55 to have an execution issued--$25 for the court and $30 for the sheriff. Those costs will be added to the judgment to be repaid by the defendant. An execution is an order to the sheriff to seize and sell property of the defendant to satisfy the judgment. If you know of any property that belongs to the defendant, you should attach to the execution a description of the property and where it may be found to help the sheriff. The sheriff will sell any property that can be found and turn the proceeds over to the clerk of court, who will then turn the money over to you.

If the defendant pays all or part of the money owed to you directly, you MUST go to the clerk's office and indicate how much you have been paid.

If you have a judgment ordering the defendant to turn personal property over to you and if the defendant has not turned it over within 10 days after the magistrate enters the judgment, you may ask the clerk to issue a writ of possession to the sheriff. The cost to you for having the writ issued is $25, plus $30 for the sheriff. The sheriff will then try to recover the property from the defendant and turn it over to you. You may be asked to advance the costs of having the sheriff pick up the property.

If you are a landlord and have a judgment for eviction and the tenant fails to leave the premises within 10 days after the judgment was rendered, you may pay $25 and have the clerk issue a writ of possession to the sheriff. The sheriff will then remove the defendant from the premises. You will have to pay the sheriff $30. You may be asked to advance the costs of removing the tenant's property and one month's storage costs or you may request the sheriff, in writing, to lock the premises and you will then be responsible for handling the tenant's property in the manner required by the law.

If the defendant won a judgment against you on a counterclaim, read the section below for defendants.

Notice to Defendant (Party Being Sued)

If a judgment is entered against you stating that you owe the plaintiff money and you want to pay the amount owed, it would be safer to pay the money to the clerk of court rather than to the plaintiff. If you do pay the plaintiff directly, make sure he or she notifies the clerk so the judgment won't continue to be listed against you. If you cannot or do not pay the judgment, the plaintiff will serve a notice of rights on you, telling you that you must claim your exemptions or they will be waived. It is very important that you respond to that notice. Exemptions are property the law allows you to keep from being taken from you to pay off judgments against you. If you fail to claim your exemptions, the sheriff will be able to seize and sell any property you own. If you fail to claim your exemptions when notified, you may ask the clerk to set aside your waiver if you have the grounds. Also, even if you have waived your statutory exemptions, you may go to the clerk any time up until the proceeds of the sale of your property have been distributed to the plaintiff and request your constitutional exemptions. The judgment is good against you for 10 years and may be extended for another 10 years. It becomes a lien against any land you own now or buy later until it is satisfied.

If you have a judgment against you to turn personal property over to the plaintiff, you may not prevent the property from being turned over to the plaintiff unless the plaintiff is a finance company and the judgment against you is to recover household goods that you listed as collateral in a security agreement with the finance company and the finance company did not lend you the money to buy those goods. In that case, the finance company must give you notice of your right to claim exemptions as described in the paragraph above and you may keep the household goods from being repossessed by claiming them as exempt.

If you are a tenant and have an eviction judgment against you, you will have to leave the premises. If you do not leave voluntarily, the sheriff may forcibly evict you and remove and store your belongings for you or may leave them with the landlord who may dispose of them in the manner allowed by the law. You will be held responsible for the costs of moving you out.

If you won a counterclaim against the plaintiff in which you were awarded money, read the section for plaintiffs to see what to do.

Sample Judgment for Plaintiff

I have listened carefully to the testimony you've presented and considered all the evidence in the case of Smith v. Jones. I am ready to make my decision (*enter judgment).*

Mr. Smith, I am going to rule in your favor on your claim for summary ejectment. Based on the evidence you've presented, I find that you and Mr. Jones entered into an oral lease agreement which required Mr. Jones to make monthly rental payments, due on the first of each month, in the amount of $500. I find that he paid $250 for August, and has made no payment since that time. And I find that you demanded payment of the rent at least ten days before filing this action, as required by law.

Mr. Jones, I listened to your testimony that you wanted, and intended, to pay Mr. Smith the rent, but were unable to do so because of circumstances beyond your control. I appreciate your coming to court today to explain the reason for your nonpayment, and I have no reason to doubt your word. Nevertheless, the law says that a landlord has the right to take possession of rental property when a tenant stops paying rent, even when the tenant is unable to make the payments. As a result Mr. Smith is entitled to possession of the rental premises at 110 S. Ginsberg Ave, in Colbin, NC, and to past due rent calculated up to this day in the amount of $850. I am denying Mr. Smith's claim for late fees because there was no agreement as to late fees in the lease. Mr. Jones, this judgment will earn interest at the rate of 8% until you pay what you owe to the clerk of court. The law provides that this judgment will become final after 10 days. Mr. Smith, 10 days from now if you wish to have this judgment carried out, you can go to the clerk's office to begin that procedure.

Mr. Jones, you have the right to appeal my decision to district court. You must give formal notice of appeal, and you may either do that now in open court, or you may file written notice of appeal in the clerk's office, so long as you do that within 10 days. If you do appeal, you must pay the costs of appeal to the clerk's office within 10 days.

Do either of you have any questions?

Chapter II
Small Claims Procedure

A special set of statutes governs the trial of small claims before a magistrate. The procedural rules set out in Article 19 of the North Carolina General Statutes, Chapter 7A (hereinafter G.S.) are for the most part simpler than those applied in district and superior court actions. However, when the small claim procedural rules are silent on an issue, the Rules of Civil Procedure applicable in district and superior court cases apply.[1] This chapter discusses the procedures magistrates follow in handling small claims cases as well as issues related to appeal to district court.

Definition of a Small Claim

The statute defines a *small claim* as a civil action in which (1) the amount in controversy does not exceed $10,000; (2) the principal relief sought is money, the recovery of specific personal property, summary ejectment, or any combination of the three; and (3) the plaintiff (the person suing) requests that the action be assigned to a magistrate.[2]

Amount in Controversy

The first requirement—that the amount in controversy cannot exceed $10,000—refers to the monetary value of the case and is determined at the time the complaint is filed. However, the statutory rules that apply to determining that amount often raise more questions than they answer.

When Plaintiff Seeks Monetary Damages

How is the amount in controversy determined in an action seeking monetary damages? One would think this would be easy to answer—the amount in controversy is the dollar amount requested in the complaint. Generally, that is the case. However, in an action for

1. N.C. GEN. STAT. § 1A-1, Rule 1 (hereinafter G.S.) provides that the Rules of Civil Procedure govern the procedure in the district courts in all actions and proceedings of a civil nature. *See* Provident Finance Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988) (Rule 58 applied to small claim case). Some rules of civil procedure, such as the discovery rules, may not apply because they do not seem applicable to small claims cases because trials are scheduled within thirty days of the complaint's filing date.

2. G.S. 7A-210.

breach of contract the total amount prayed for includes a claim for a specific amount as principal and for prejudgment interest and then also asks for post-judgment interest and court costs, which are added by the clerk. The statute defining the *amount in controversy* provides (1) that the amount in controversy is computed without regard to interest and costs but then states (2) that when monetary relief is prayed, the amount prayed for is in controversy.[3]

> ***Example 1.*** Jordan borrows $10,000 from his friend, Sara Beth. He agrees to pay the money back in six months with interest at the rate of 5 percent per year. The loan repayment was due January 3, but Jordan doesn't pay. Sara Beth files the action at the end of July, one year after she made the loan. She sues for $10,000 principal, $500 interest, for a total amount prayed for of $10,500, plus interest from the date of judgment and costs.

If the first rule of determining the amount in controversy—computing it without regard to interest and costs—is read alone, it would seem that the amount in controversy in Example 1 is $10,000 and that the case can be assigned to a magistrate. But the second rule—in which the amount prayed for is in controversy—would indicate that the total amount prayed for ($10,500) is the amount in controversy, and therefore, that the case should not be assigned to a magistrate. Under the rules of statutory construction, a statute must be "considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant."[4]

There is, however, a way to read the subsections of the statute to give meaning to both: this way interprets the total amount prayed for as the principal and prejudgment interest already accrued on the debt (in Example 1, the $10,000 principal plus the $500 interest) and excludes the language "interest and costs" from the amount in controversy, reading it instead as postjudgment interest and the court costs that the clerk will add to the judgment. The complaint would thus pray for $10,500, plus interest on the principal from the date of judgment and court costs; the "interest from the date of judgment and costs" are not computed in arriving at the amount in controversy, whereas the prejudgment interest is part of the total amount prayed for in the complaint. This interpretation rests on sounder policy grounds than determining that the amount in controversy is based solely on the principal amount of the debt, as the General Assembly clearly intended to limit the dollar amount of cases heard in small claims court. However, because no appellate decision has interpreted the interest subsection of the amount-in-controversy statute, there is no definitive answer to this question. Until there is, the interpretation of the statute rests with the chief district judge who determines which cases are assigned as small claims in his or her district. A chief district judge can resolve this issue for the district by specifying in an administrative order how the clerk assigning cases to magistrates should determine the amount in controversy.

3. G.S. 7A-243(1), (2).

4. Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). *See also* State v. Bates, 348 N.C. 29, 35, 497 S.E.2d 276, 279 (1998).

A second question about determining the amount in controversy arises when the plaintiff prays for actual damages of a specified amount and then asks for that amount to be trebled because of an unfair and deceptive practice claim.

Example 2. Tenant files a small claims action against landlord for constructive eviction and seeks damages of $5,000 for moving costs. In addition, the complaint alleges a claim for unfair trade practice in which the tenant wants the $5,000 trebled.

The amount-in-controversy statute provides that when a single party asserts two or more properly joined claims, the claims are aggregated (added together) unless they are mutually exclusive and in the alternative (the test is whether the plaintiff can recover on only one of the claims), in which case the highest claim is the amount in controversy.[5] An unfair trade practice claim, like a claim for breach of contract, is a separate claim; but the plaintiff cannot collect damages for both breach of contract and unfair trade practices.[6] Thus the highest claim—the trebled amount of damages—would be the amount in controversy. In this example the amount in controversy would be $15,000 and the case should not be assigned to a magistrate.

When Plaintiff Seeks Return of Personal Property

How is the amount in controversy determined when the plaintiff is suing to recover possession of specific personal property that was either wrongfully taken or listed as collateral in a security agreement that is in default? "Where no monetary relief is sought but the relief sought would establish, enforce, or avoid an obligation, right or title, the value of the obligation, right, or title is in controversy."[7] In an action to recover property as a nonsecured party, the relief would establish the right to recover the property; therefore the amount in controversy is the fair market value of the property the plaintiff is seeking to recover plus any monetary damages sought for loss of use or damage to the property.

Example 3. Acme Rent-All brings an action against James to recover a chain saw it rented to him. The fair market value of the chain saw is $250. Acme also seeks $50 damages for loss of use of the saw, since it was unable to rent the saw to another customer who sought to rent it during the period James wrongfully held the saw. In this case, the plaintiff is seeking to establish the right to recover the chain saw and is seeking monetary damages of $50. The establishment of the right is the value of the right, or $250. Therefore, the amount in controversy in this case is $300.

5. G.S. 7A-243(4).

6. *See. e.g.,* Britt v. Jones, 123 N.C. App. 108, 112 (1996) (citing Marshall v. Miller, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103 (1980) *modified on other grounds and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981)) ("[W]here the same course of conduct gives rise to a traditionally recognized action such as breach of contract as well as a cause of action for unfair trade practices, damages may be recovered for either breach of contract or unfair trade practices, but not both.").

7. G.S. 7A-243(3).

But what if the plaintiff is a secured party and is seeking to recover the specific personal property listed in the security agreement?

Example 4. Sears sells a refrigerator, stove, microwave, washing machine, and dryer to Virginia for $4,800. She pays $500 down and Sears finances the remainder. Virginia signs a security agreement listing all the items purchased as security for the extension of credit. One year later, she stops making her monthly payments and Sears brings an action to recover possession of the refrigerator, stove, microwave, washing machine, and dryer. At the time, the personal property Sears is seeking to recover has a fair market value of $4,100, but the total amount owed on the debt is $2,500.

It is not clear whether the plaintiff is establishing the right to possession of the property—in which case the value of the property is the amount in controversy—or whether the relief sought would enforce an underlying obligation—in which case the amount owed on the debt would be the amount in controversy. The standard small claims complaint form used by litigants assumes that the amount in controversy is the value of the property that plaintiff seeks to recover.[8] The better rule may be that the amount in controversy is the underlying obligation. Unlike the action by a nonsecured party, in which the plaintiff recovers property owned by the plaintiff, in an action by a secured party the plaintiff is recovering property owned by the defendant in order to apply it toward payment of the underlying debt owed by the defendant. Any surplus recovered is then returned to the defendant. As a practical matter, however, the determining factor is the value the plaintiff fills in on the complaint form. If the plaintiff indicates the value as $10,000 or less, the clerk will assign the case to the magistrate and the magistrate should hear it. On the other hand, if the plaintiff fills in an amount greater than $10,000, the case should not be assigned to a magistrate.

Actions to Enforce Motor Vehicle Lien

In motor vehicle lien cases in which the garage owner seeks a judgment allowing the lien to be enforced, the amount in controversy is the amount of the lien (the value of the obligation) and not the value of the motor vehicle.[9] The lawsuit authorizes enforcement of a lien on the motor vehicle, which means the garage owner must sell the motor vehicle and apply the proceeds to the amount owed, giving any surplus to the owner of the vehicle.

Principal Relief Sought

The second criterion defines a small claim according to the type of relief sought, not by the subject matter of the lawsuit. As long as no more than $10,000 is sought, a plaintiff can bring a suit in small claims court based on any subject: for example, an unfair trade

8. *See* AOC-CVM-202, "Complaint to Recover Possession of Personal Property."

9. G.S. 7A-243(3), which governs the amount in controversy when the owner of the motor vehicle seeks to recover property on which a motor vehicle lien is asserted, specifies that the amount in controversy is that portion of the asserted lien that is under dispute.

practice, medical malpractice, fraud, or breach of contract. Nor is the plaintiff limited in the kinds of monetary damages allowed. As long as the amount in controversy does not exceed $10,000, the plaintiff is entitled to any kind of monetary damages authorized for the particular type of claim, such as damages for pain and suffering in tort cases, treble damages in unfair trade practice claims, and punitive damages in intentional tort cases.

What matters in determining whether an action may be brought as a small claim is the remedy sought by the plaintiff. Only three remedies are appropriate for small claims court: (1) requests for money, (2) recovery of specific personal property, and (3) summary ejectment. A magistrate cannot grant injunctive relief or specific performance (that is, requiring a party to perform some contractual obligation other than paying money). Nor can a magistrate hear domestic cases (divorce, custody, support, or equitable distribution).

> ***Example 5.*** Buster and Franklin enter into a contract under which Buster agrees to paint Franklin's car. Franklin pays Buster $500 when he picks up the car. One week later, spots appear on the car because it was not properly painted, and Franklin asks Buster to take the car back and get it right. Buster refuses. Franklin sues Buster and seeks to make him repaint the car.
>
> A magistrate cannot hear this lawsuit because the remedy sought—specific performance—is not within the definition of a small claim. If, however, Franklin had taken the car to another place to have it repainted for $500 and then sued Buster for $500, the case could be heard by a magistrate since the relief sought is money.

The only exception to the limitation of small claims cases to those seeking these three types of relief is an action to enforce a motor vehicle mechanic-and-storage lien arising under G.S. 44A-2(d) or G.S. 20-77(d). By specific statute, a magistrate may hear a motor vehicle lien claim seeking the right to enforce such a lien.[10]

Plaintiff Requests Assignment

North Carolina does not require that civil actions for $10,000 or less be heard in small claims court. Even a plaintiff who files a $5 lawsuit may choose to have that case heard in district court. No case may be assigned to a magistrate unless the plaintiff requests that assignment, and, interestingly, only the plaintiff may do so.[11] The defendant can neither object to a case being heard by the magistrate, nor request that it be heard in district court, nor seek to have a case filed in district court moved to the magistrate's court.

The plaintiff need not, however, make a specific formal request to have the matter assigned as a small claim. It is sufficient to file the claim on one of the standard Administrative Office of the Courts (AOC) complaint forms, which specify that the action is being brought in the "district court division−small claims."

10. G.S. 7A-211.1.
11. G.S. 7A-210(3).

Filing a Small Claims Action

A small claims case is initiated when the plaintiff files a complaint with the clerk of superior court. The complaint gives notice to the defendant (the person being sued) of who is suing, the reason for the suit, and what relief the plaintiff wishes to recover. A complaint must be made in writing and signed by the plaintiff or the plaintiff's attorney. In a summary ejectment action or back-rent action, a plaintiff's agent who handles the rental also may sign it.[12] If the plaintiff, plaintiff's attorney, or in a summary ejectment action, the plaintiff's agent fails to sign the complaint, the magistrate should bring the omission to the attention of the party and allow them to sign the complaint in open court, noting same on the judgment form. [13]The complaint should not be dismissed unless it is not promptly signed once the omission is brought to the attention of the party.[14] The complaint should be a simple, brief statement easily grasped by a person of common understanding. No particular form is required, although most plaintiffs use the standard small claims complaint forms prepared by AOC.

Where Action Is Filed

Unlike a district or superior court action, a small claim action must be filed in the county where the defendant resides.[15] If there are multiple defendants who live in different counties, one action against all of them may be filed in a county in which one of them resides. In most cases, the county where a lawsuit is filed (the *venue*) is considered a procedural, not a jurisdictional matter—which means that a defendant who raises no objections before trial waives the matter of venue. The small claims statute, however, is more directive than a typical venue statute. Because the general rule by which most chief district court judges assign cases to magistrates specifies that one defendant must reside in the county, a magistrate who determines that none of the defendants is a county resident may send the case back to the clerk because the case was not assigned by the judge. (See discussion below on "Motion Objecting to Venue or Jurisdiction.")

Residence is the defendant's actual place of abode, whether permanent or temporary.[16] A person may have more than one residence.[17] If the defendant is a domestic corporation (that is, is incorporated in North Carolina), its residence is the registered or principal office of the corporation or wherever the corporation maintains a place of business. If the corporation has neither a principal office nor a place of business, its residence is "any place where the corporation . . . is regularly engaged in carrying on

12. G.S. 7A-216, -223.
13. G.S. 1A-1, Rule 11.
14. *Id.*
15. G.S. 7A-211.
16. Sheffield v. Walker, 231 N.C. 556, 559, 58 S.E.2d 356, 359 (1950).
17. Davis v. Maryland Cas. Co., 76 N.C. App. 102, 106, 331 S.E.2d 744, 746 (1985). *See* Glover v. Farmer, 127 N.C. App. 488, 491, 490 S.E.2d 576, 578 (1997) (Whether a person is a resident of a particular place is not determined by any given formula but rather depends significantly on the facts and circumstances surrounding the particular issue.).

business.”[18] This same rule applies to “foreign corporations” (those incorporated in another state) that have qualified with the North Carolina Secretary of State to transact business in the state.[19]

Example 6. Franklin Office Supply Inc., a North Carolina corporation, has its principal office in Forsyth County. It also has a store in Stokes County. Beatrice buys a chair from Franklin Office Supply Inc. and is unhappy because she believes the corporation breached the warranty of merchantability. Beatrice can file a small claims action in either Forsyth County or Stokes County.

If a foreign corporation has not been granted authority to transact business in North Carolina, the statute does not specify how to determine the corporation’s residence. Although the general venue law provides that a corporation may be sued in any county in which it usually does business,[20] its residence apparently is in the state where it is incorporated. Therefore, it appears that a foreign corporation not granted authority to transact business in North Carolina must be sued in district or superior court, not in magistrate’s court.

Residence is determined at the time the complaint is filed.[21] If a case is filed in the county in which the defendant resides and the defendant moves to another county before trial, the magistrate in the county where the case was filed should hear the case.

The one exception to the requirement that a defendant reside in the county where the case is filed is an action to enforce a motor vehicle mechanic-and-storage lien. Such a case must be filed in the county where the claim arose (that is, where the motor vehicle was towed or repaired) rather than in the defendant’s county of residence.[22]

District Judge Assigns Case

If the plaintiff files a complaint requesting assignment to a magistrate, the chief district judge has the discretion to decide whether to assign the case to a magistrate. The assignment may be made by specific order or general rule.[23] No chief district court judge reads every complaint and determines assignment on a case-by-case basis; all make assignments by means of administrative orders to the clerk. Such orders usually authorize the clerk to assign to the magistrate “any case within the magistrate’s jurisdiction for which the plaintiff requests assignment as a small claim” or “any case with an amount in controversy of $10,000 or less for which the plaintiff requests assignment as a small claim.”[24] Based on this administrative or general order, the clerk assigns the case to a magistrate as soon as it is filed.

18. G.S. 1-79.

19. Hill v. Atlantic Greyhound Corp., 229 N.C. 728, 51 S.E.2d 183 (1949); Moore Golf, Inc. v. Shambley Wrecking Contractors, Inc., 22 N.C. App. 449, 206 S.E.2d 789 (1974).

20. G.S. 1-80.

21. Bass v. Bass, 43 N.C. App. 212, 215, 258 S.E.2d 391, 393 (1979).

22. G.S. 7A-211.1.

23. G.S. 7A-211.

24. A model general rule is attached as [Appendix I] at the end of this chapter.

Although the statute defines a small claims action as having a jurisdictional limit of $10,000, the chief district court judge's administrative order may set a jurisdictional limit that is less than $10,000. In order to know the maximum amount in controversy for which a magistrate has jurisdiction, the magistrate will need to review the administrative or general order of the chief district court judge.

The clerk then issues a *magistrate's summons*, which officially commences the court action.[25] The summons notifies the defendant of the date, time, and location of the trial. After service of the summons, according to the statute, the clerk gives the plaintiff written notice of the assignment.[26] Although some counties follow the statutory procedure, most notify plaintiffs when they file their complaint that the case has been assigned to a magistrate and inform them of the date and time of the trial.

If the complaint does not fall within the chief district judge's general order of assignment, the clerk issues a *civil summons* rather than a magistrate's summons and gives the plaintiff notice of nonassignment. The clerk also informs the plaintiff that the action will be heard in district court and that those court costs must be paid. Even when a case falls within the chief district judge's general rule, a case may not be assigned to a magistrate if the clerk brings to the judge's attention some particular aspect of a complaint filed as a small claim: for example, that a magistrate is a party to the action or that it includes a very unusual claim.

If the judge assigns a case to a magistrate, the magistrate's judgment is valid and is not subject to challenge on the basis that the action was not properly assignable to a magistrate. The sole remedy for improper assignment is appeal.[27] This occurs in the rare case when the chief district court judge's administrative order directs the assignment of cases that are not eligible to be heard in small claims. For example, the chief district court judge's administrative order directs assignment of cases to small claims with an amount in controversy of $12,000 or less. If the clerk calendars a case in small claims with an amount in controversy of $12,000, the case is assigned by the chief district court judge, but the assignment was improper.

However, it is unlikely that a case assigned according to the judge's general order would ever be assigned improperly. Moreover, if a clerk did send a magistrate a case that is not within the judge's order, that case probably would fall under the rule that the magistrate's judgment is invalid because the chief district court judge did not assign the case to the magistrate.[28] In the circumstance where the clerk assigns a case to small claims that is not within the chief district court judge's order, the magistrate may dismiss the case for lack of subject matter jurisdiction. There are practical reasons why the magistrate may not want to choose that option and subject the plaintiff to additional court filing fees for a new action. The magistrate has no statutory authority to transfer the case to district

25. G.S. 7A-213.
26. *Id*.
27. G.S. 7A-212.
28. *Id*.

court, but the magistrate may return the case to the clerk for the clerk to follow the procedure for nonassignment. [29]

Small Claim for More Than $10,000

Occasionally a plaintiff, usually through an attorney, will try to file a claim for more than $10,000 in small claims court. In doing so, the attorney will argue that there is no jurisdictional limitation based on the amount in controversy and that a defendant who objects can move to transfer the case to district court. That analysis would be accurate with regard to cases filed in district or superior court, where there is no jurisdictional limitation based on amount in controversy between those two divisions[30] and where the statute provides for transfers of a case filed in the improper division.[31] However, small claims are unique. First, the magistrate is part of the district court division, so that such a transfer would not be between different divisions.[32] Moreover, because the $10,000 is jurisdictional, any proceeding before the magistrate would be void.[33] Finally, as mentioned above, a small claims action must be assigned to the magistrate by the chief district court judge. Since judges assign cases through an administrative or general order, a case that does not comply with the order but is sent to the magistrate has not been assigned by a judge; the magistrate's judgment would therefore be invalid.[34]

A magistrate who receives a case in which the amount in controversy at the time the complaint is filed exceeds $10,000 should not hear the case but should return it to the clerk, indicating that he or she lacks jurisdiction to hear it. Sometimes the plaintiff may choose to reduce the amount prayed for to $10,000 and forgive the remainder of the amount owed in order to have the case heard in small claims court. In that situation the magistrate may allow the plaintiff to amend the complaint to ask for only $10,000 and proceed with the case. The magistrate can either allow the plaintiff to amend the copy of the complaint in the file by noting the reduced amount prayed for and signing and dating the complaint where the amount is reduced or can orally request the amendment; in the latter case the magistrate should indicate in the "findings" portion of the judgment that the plaintiff in open court reduced the amount prayed for to $10,000.

Splitting Claims to Reduce Amount in Controversy

Occasionally a plaintiff will attempt to divide a claim for more than $10,000 and bring two or more actions, each for $10,000 or less. The general rule is that for the breach of an entire and indivisible contract, more than one action for damages is not sustainable.[35] If a plaintiff tries to split one contract into separate claims, the defendant may raise the

[29] G.S. 7A-215.

30. G.S. 7A-243 specifies that the district court is the "proper" division for cases of $25,000 or less and the superior court is proper for cases over $25,000.

31. G.S. 7A-257, -258.

32. N.C. CONST. art. IV, § 10.

33. *See* Falk Integrated Technologies, Inc. v. Stack, 132 N.C. App. 807, 513 S.E.2d 572 (1999).

34. G.S. 7A-212.

35. Gaither Corp. v. Skinner, 241 N.C. 532, 536, 85 S.E.2d 909, 912 (1955).

affirmative defense of res judicata (the matter has been adjudicated) to the second or subsequent action and the magistrate will have to dismiss that action. The question for the magistrate is whether the contract was indivisible. Early cases indicate that when an account consists of several items, either for goods sold or services provided at different times, the plaintiff may sue for each transaction separately before a magistrate even though the aggregate amount exceeds $10,000.

However, if the debt is for one item, it cannot be split;[36] nor can it be split if several items were purchased in one continuous shopping spree.[37] Moreover, if the plaintiff has rendered a statement for the entire amount due and the defendant has accepted the account or not responded within a reasonable time, a new contract to pay the entire amount as one debt has been created.[38] Thus, if transactions were originally separate but the plaintiff has sent the defendant a statement for the full amount due to which the defendant has not objected within a reasonable amount of time, the account has become one debt and may not be split.

Time for Trial

The clerk must set the time for trial not more than thirty days after the summons is issued[39] —except that for summary ejectment cases, in which the clerk must set the time of trial within seven business days after the summons is issued.[40] In counties where small claims court is held only once or twice a week, it may be impossible for the clerk to set all summary ejectment cases within that period; in that case, the clerk should schedule the cases for the first small claims court held after seven days.

Service of Process

The magistrate acquires jurisdiction to hear a case when copies of the complaint and summons are served on that defendant. Four methods of subjecting a defendant to the jurisdiction of the court apply in all small claims cases; a fifth applies in summary ejectment cases only; and a sixth applies in motor vehicle lien cases only.

These methods of service are as follows.

1. The sheriff, or in some instances a private process server, serves a defendant by delivering a copy of the summons and complaint to the defendant personally.[41]

36. Mayo v. Martin, 186 N.C. 1, 118 S.E. 830 (1923); Simpson v. Elwood, 114 N.C. 528, 19 S.E. 598 (1894); Boyle v. Robbins, 71 N.C. 130 (1874).

37. T.J. Magruder & Co. v. W.H. Randolph & Co., 77 N.C. 79 (1877).

38. Copland v. Am. De Wireless Telegraph Co., 136 N.C. 11, 48 S.E. 501 (1904); D. Marks & Son v. Ballance, 113 N.C. 28, 18 S.E. 75 (1893).

39. G.S. 7A-214.

40. G.S. 42-28.

41. Except in actions for summary ejectment, if the sheriff returns a summons unserved the plaintiff may select anyone 21 years of age or older who is not a party to the action and not related by blood or marriage to a party to the action to serve the *alias and pluries* (second or subsequent) *summons*. G.S. 1A-1, Rule 4 (h1).

2. The sheriff, or in some instances a private process server, serves the defendant by leaving a copy of the summons and complaint at the defendant's dwelling with a person of suitable age and discretion who also resides in the dwelling.[42]
3. The plaintiff serves the defendant by mailing a copy of the summons and complaint by certified or registered mail, return receipt requested, addressed to the defendant, and the post office delivers the copies to the addressee.[43]
4. Even if the defendant is not served by one of the first three methods, the court has jurisdiction to proceed against the defendant if he or she signs a written acceptance of service or makes a voluntary appearance in the case.[44]
5. In summary ejectment cases only, the sheriff may serve the defendant by mailing a copy of the summons and complaint to the defendant by first class mail at the premises from which the defendant is to be evicted *and* by posting a copy of the summons and complaint in a conspicuous place on the premises.[45]
6. In motor vehicle lien cases only, a defendant can be served by any method authorized by Rule 4 of the Rules of Civil Procedure. This means that in addition to the first four methods listed above, the defendant may be served by (a) depositing with a designated delivery service copies of the complaint and summons addressed to the defendant, to be delivered to the addressee; (b) mailing a copy, signature confirmation required, via the U.S. Postal Service; or (c) if the defendant cannot with due diligence be served by any of the above methods, by publishing a notice of service of process in a newspaper qualified for legal advertising and circulated in the area where the defendant is believed be located, or in the county where the action was filed. [46]

G.S 7A-217, which sets out methods of service of small claims actions, speaks only to serving defendants who are natural persons. If the defendant is a corporation, G.S. 1A-1, Rule 4 (j)(6) specifies the manner of service. The methods of service for a corporation are as follows:

a. by delivering a copy to an officer, director, or managing agent or leaving a copy at the office of any officer, director, or managing agent with the person who is apparently in charge of the office;

b. by delivering a copy to an agent authorized by appointment or by law to be served or to accept service of process;

43. G.S. 7A-217(2) and G.S. 1A-1, Rule 4(j)(1)c.

44. G.S. 7A-217(3).

45. G.S. §§ 7A-217(4), 42-29. If service is by posting, no monetary damages may be awarded. See discussion in [Chapter VI, "Landlord–Tenant Law," page 150].

46. G.S. 7A-211.1; G.S. 1A-1, Rule 4(j)(1) and (j1).

c. by mailing a copy by certified mail, return receipt requested, to an officer, director, or agent specified in (a) or (b); or

d. by delivery by a designated delivery service to an officer, director, or agent specified in (a) or (b).

Proof of Service

Service by Sheriff

The sheriff's return of the summons showing the place, time, and manner of service is sufficient to prove service.[47] A sheriff's return is presumed to be correct; therefore, if it indicates that the process was left with a person of suitable age and discretion, the plaintiff need not offer any further proof of service.[48] A defendant who wishes to challenge the service must file a motion objecting to jurisdiction over his or her person. A district court judge, not a magistrate, must hear this and other pretrial motions (which are discussed below on [page 19]).

Service by a Private Process Server

A private process proves service by filing an affidavit (1) showing the place, time, and manner of service; (2) stating the server's qualifications to make service under Rule 4 of the Rules of Civil Procedure; (3) declaring that the server knew the person served to be the defendant and that he or she delivered to and left with the defendant a copy of the summons and complaint; and (4) if the defendant was not personally served, stating when, where, and with whom such copies were left.[49]

Service by Certified Mail

If the plaintiff serves the defendant by certified mail, the plaintiff must file an affidavit showing proof of service and must attach to the affidavit the signed postal return receipt.[50] An *affidavit* is a statement that is sworn to before a person authorized to administer oaths—usually a notary public but sometimes a magistrate. The affidavit must indicate that a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested, and that it was in fact received—as evidenced by the attached postal receipt or other evidence of delivery.[51] If the postal receipt is signed by someone other than the defendant, the person signing is

47. Williams v. Burroughs Wellcome Co, 46 N.C. App. 459, 462, 265 S.E.2d 633, 635 (1980).

48. Guthrie v. Ray, 293 N.C. 67, 235 S.E.2d 146 (1977); Harrington v. Rice, 245 N.C. 640, 97 S.E.2d 239 (1957).

49. G.S. 1-75.10(a)(1)b.

50 *See* AOC-CV-105, "Affidavit of Service of Process by Registered Mail/Certified Mail/Designated Delivery Service."

51. G.S. 1-75.10(a)(4).

presumed to be an agent authorized to accept service or a person of suitable age and discretion residing in the house, subject to rebuttal by the defendant.[52]

Written Acceptance of Service

A defendant may also sign a written acceptance of service, which obviates the need to prove proper service by the sheriff or by certified mail.[53] Acceptance of service is rarely used in small claims cases.

Voluntary Appearance

A voluntary appearance dispenses with the need for valid service of process. Voluntary appearance is an appearance "whereby the defendant submits his person to the jurisdiction of the court by invoking the judgment of the court in any manner on any question other than that of the jurisdiction of the court over his person."[54] In other words, a defendant who was not served or was not served properly but makes a voluntary appearance can be treated for all purposes as if he or she were properly served. Generally, in a small claims case the defendant makes a voluntary appearance by appearing at trial. However, a defendant also may make a voluntary appearance by seeking a continuance or filing a motion other than a motion objecting to jurisdiction over the person. To establish that the court had jurisdiction because the defendant made a voluntary appearance, the magistrate should note on the "findings" portion of the judgment form that the defendant was present at trial or, if the defendant makes a voluntary appearance by some other method such as by filing a motion, the magistrate should indicate that fact as a finding on the judgment in the "Other" block.

> ***Example 7.*** Bert Jones sues William Smith for money owed. When the case is called for trial, the magistrate notes that the summons indicates that Smith was not served. Smith is present in the courtroom and participates in the trial. The magistrate may issue a judgment against Smith because he made a voluntary appearance in the case. The same result would occur if Smith were absent at trial but had requested a continuance two weeks before trial.

Service by Publication

Service by publication is not allowed in most small claims cases.[55] If a defendant cannot be served by one of the methods discussed above, the plaintiff cannot go forward with the small claims case. The plaintiff may, however, take a voluntary dismissal in the small claims case and refile the case as a district court case where service by publication is authorized. As mentioned earlier, the one exception to the rule regarding publication in small claims cases is motor vehicle lien cases. In an action to enforce a motor vehicle lien, a plaintiff who after a due and diligent search is unable to serve the defendant by personal

52. G.S. 1A-1, Rule 4 (j2)(2). If the defendant wishes to challenge service, he or she must file a motion before trial; the motion must be heard by a district court judge.

53. G.S. 7A-217(3) and G.S. 1A-1, Rule 4 (j5).

54. *In re* Blalock, 233 N.C. 493, 504, 64 S.E.2d 848, 856 (1951).

55. G.S. 7A-217, which lists methods of service in small claims cases, does not include publication.

service—including leaving the process with the defendant personally or leaving it at the defendant's dwelling with a proper person—or by certified or registered mail, may serve the defendant by publication.[56] Service by publication is discussed in detail in [Chapter VII, "Motor Vehicle Mechanic and Storage Liens."]

Determining Proper Service

Before hearing a case, the magistrate must determine whether he or she has jurisdiction over the defendant. Fundamental due process requires that a defendant be notified of the lawsuit and date of the trial, and North Carolina courts require strict compliance with the service statutes.[57] The magistrate must (1) see either the sheriff's return of service on the summons indicating that the sheriff served the defendant or the private process server's affidavit that service was carried out; (2) see the plaintiff's affidavit indicating service by registered or certified mail and the postal receipt indicating receipt of service; (3) see the defendant's written acceptance of service; (4) see that the defendant is present at trial or made an earlier voluntary appearance by seeking a continuance or filing a motion other than one challenging jurisdiction over the defendant; or (5) in motor vehicle lien cases when publication is used, see the plaintiff's and publisher's affidavits.

If the defendant has not been served or the magistrate does not have documented evidence of service (for example, the sheriff's return or plaintiff's affidavit of service by certified mail) that the defendant has been served, the magistrate should not hear the case. Rather, the magistrate should continue the case to allow the plaintiff further time to try to serve the defendant. A summons is valid for only sixty days and cannot be served after that time. However, if the defendant is not served within the sixty-day period, the plaintiff may ask the clerk to issue another summons (called an *alias and pluries summons*), which will give plaintiff a new sixty-day period to try to serve the defendant.[58] A plaintiff could have the clerk issue successive alias and pluries summonses indefinitely, thus keeping the lawsuit alive while he or she attempts to locate the defendant. As a practical matter, most plaintiffs give up after two or three unsuccessful attempts at service and take a dismissal of the case. If a summons is unserved and no new alias and pluries summons is issued within ninety days after issuance of the preceding summons, the case is discontinued automatically.[59]

56. G.S. 7A-211.1.

57. *See* Guthrie v. Ray, 293 N.C. 67, 235 S.E.2d 146 (1977); Roshelli v. Sperry, 57 N.C. App. 305, 291 S.E.2d 355 (1982).

58. G.S. 1A-1, Rule 4(d). Some clerks use a method called "endorsement" instead of issuing an alias and pluries summons. An endorsement is a notation on the original summons giving it a new sixty-day period for service. Endorsements have the same effect as alias and pluries summonses.

59. G.S. 1A-1, Rule 4(e). Under the computerized civil tracking system developed by the Administrative Office of the Courts the case is automatically discontinued and moved to a closed status. A plaintiff can reopen the discontinued case by asking the clerk to issue an alias and pluries summons. However, when an alias and pluries summons is issued after the case has been discontinued, the case is commenced for statute of limitations purposes when the new summons is issued and not when the original summons was issued.

Multiple Defendants and Service

Should a magistrate proceed in a case where there are multiple defendants and at least one but not all of the defendants have been served? If so, against which defendants may the magistrate proceed? The rules regarding service of process apply to each individual defendant; the court has no jurisdiction over a particular defendant unless he or she has been properly served or makes a voluntary appearance. Therefore, if one defendant has been served but another has not, the magistrate cannot hear the case and enter judgment against both defendants.

When some, but not all, of the defendants have been served, the decision whether to proceed to trial rests with the plaintiff. As the magistrate cannot hold separate trials for multiple defendants in the same case, he or she should require the plaintiff to decide whether to proceed against all of the defendants or against only those served. If the plaintiff wishes to proceed against all the defendants, the magistrate should continue the case to give the plaintiff time to attempt to serve the other defendants. When all of the defendants have been served, the trial can be held against all defendants. A plaintiff who chooses to proceed against only those defendants who have been served may file a voluntary dismissal against the unserved defendants. When the only defendants remaining in the lawsuit are those who have been served, the magistrate may proceed to trial against them.

Example 8. Watertown Supply sues Ben James and Samuel James on a contract for goods delivered. The trial is scheduled for September 5. At that time the summons indicates that Ben has been served but the sheriff has been unable to locate Sam. As Watertown wants a judgment against both defendants, it can ask for a continuance and then seek an alias and pluries summons from the clerk so that the sheriff can try again to serve Sam (or Watertown can mail the alias and pluries summons by certified mail, return receipt requested). When Sam is served, the trial may be held against both Ben and Sam.

Example 9. But suppose that when Watertown Supply comes to court on September 5, the sheriff's return indicates that Ben has been served but Sam has not been served because he has moved to California. Watertown therefore decides it doesn't want to pursue its case against Sam; even if Sam were served and Watertown obtained a judgment against him, it would be too expensive to try to collect the judgment in California. The firm can file a voluntary dismissal against Sam and ask the magistrate to proceed to trial against Ben. The magistrate can proceed because at this point the only defendant in the case is Sam, who has been served.

Defendant's Answer and Counterclaim

Answer

After being served with the plaintiff's complaint and a summons, the defendant may file a written response to the complaint, which is called an *answer*. In district or superior court actions, a defendant must file a written answer to the complaint or a default judgment will be entered against him or her without a trial. The law for small claims cases is very

different. Default judgments are not allowed, and defendants are not required to file written answers, though they may do so. If the defendant does not file an answer, the court assumes that the defendant denies everything the plaintiff says in the complaint.[60] If the defendant chooses to file an answer, it must be written in a manner enabling a person of common understanding to know the nature of the defense and must be filed with the clerk before the time set for the trial. Like a complaint, an answer merely gives the other party notice of what the defense claims; it is not evidence. The defendant must appear at trial to offer any defense he or she might have.

Counterclaim

A defendant might also want to file a counterclaim, initiating a counter suit against the plaintiff. Essentially, a counterclaim requires the magistrate to hear two lawsuits in one case, one in which the plaintiff is suing the defendant, and the other in which the defendant is suing the plaintiff.

There are two types of counterclaims—compulsory and permissive. A *compulsory* counterclaim is one that arises out of the same transaction or occurrence that is the subject matter of the complaint.[61] For example, plaintiff might sue defendant for automobile negligence, and defendant's counterclaim might allege that plaintiff's negligence, not defendant's, caused the accident. A *permissive* counterclaim is any other claim the defendant might have against the plaintiff. If, for example, the plaintiff files a summary ejectment action against the defendant for failure to pay rent, the defendant may file a counterclaim against the plaintiff for failing to repay a loan. Under Rule 13 of the Rules of Civil Procedure, if a compulsory counterclaim is not asserted in a pending action, it is barred from being asserted later in an independent action. However, G.S. 7A-219 and G.S. 7A-220 set out special rules for counterclaims in small claims cases; they make it clear that Rule 13 provisions regarding compulsory counterclaims do not apply in small claims court.

Filing a Counterclaim

A counterclaim is asserted by filing a written answer alleging it. Usually the defendant designates the filing as an "Answer and Counterclaim," although this description is not required. Sometimes a defendant will use a standard AOC complaint form and strike through "complaint" and write in "counterclaim." The only statutory requirements are that a counterclaim must be written and must be filed with the clerk of court before the time set for trial.[62] The Rules of Civil Procedure, on the other hand, require a counterclaim to be served on the plaintiff or the plaintiff's attorney by delivering a copy to one of them

60. G.S. 7A-218.

61. G.S. 1A-1, Rule 13. A counterclaim is compulsory when (1) it is in existence when the defendant serves the answer on the plaintiff; (2) it arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim; and (3) it does not require the presence of third parties over whom the court cannot acquire jurisdiction. Faggart v. Biggers, 18 N.C. App. 366, 370, 197 S.E.2d 75, 78 (1973).

62. G.S. 7A-218.

personally or by mailing a copy by first class mail;[63] the defendant also must file a certificate showing the date and method by which the counterclaim was served on the plaintiff.[64] The small claims procedure statute does not specify that the defendant must serve a copy on the plaintiff.[65] Therefore, if the defendant has filed a counterclaim with the clerk before the time set for trial but has not served a copy on the plaintiff, the counterclaim is properly filed. When calling a case for trial, the magistrate should indicate that the defendant has filed a counterclaim; then, if plaintiff indicates that he or she never received a copy, the magistrate may consider continuing the case (both the claim and counterclaim) to give the plaintiff time to prepare evidence on the subject of the counterclaim. Once the defendant files a counterclaim, no further pleading is allowed and any new claim alleged is deemed denied by the plaintiff.[66]

If the defendant tries to offer a counterclaim at trial, the magistrate should indicate that the counterclaim was not properly asserted in writing before the time for trial and therefore cannot be considered. In that situation, the defendant may file the counterclaim as a separate action.

Counterclaim Amount in Controversy

G.S. 7A-219 provides that "no counterclaim . . . which would make the amount in controversy exceed the jurisdictional amount established by G.S. 7A-210(1) is permissible in a small claim action assigned to a magistrate." Under this provision, a defendant may file a counterclaim as long as the amount in controversy is not over $10,000. The rules for determining the amount in controversy set out in the amount-in-controversy statute (discussed earlier in this chapter) apply to both a counterclaim and the original claim. The amount in controversy is not determined by adding the amount of the claim and counterclaim together, each is determined separately;[67] if the claim is for $10,000 or less and the counterclaim is for $10,000 or less, both can be heard by the magistrate. If both parties win, the magistrate will offset the claim and counterclaim (reduce the amount of the larger award by the amount of the smaller one if they are not equal), and if only one party wins, the amount awarded will not exceed $10,000.

Counterclaims for more than $10,000 may not be filed in small claims court. G.S. 7A-219 makes it clear that even if the counterclaim is compulsory under the Rules of Civil Procedure, it may not be filed in a small claims case if it is for more than $10,000:

63. G.S. 1A-1, Rule 5.

64. The defendant usually serves the answer and counterclaim on the plaintiff and then files the answer and counterclaim with the certificate of service attached in the clerk's office. A certificate of service usually includes language like "the undersigned hereby certifies that a copy of the foregoing Answer and Counterclaim was served on the following parties to this action, pursuant to Rule 5 of the Rules of Civil Procedure by depositing a copy in the United States mail, postage prepaid and addressed to Jane Doe, 5402 Jones Street, Apartment 6, Merryville, NC 27777."

65. G.S. 7A-218.

66. G.S. 7A-220.

67. *Cf.* Amey v. Amey, 71 N.C. App. 76, 321 S.E.2d 458 (1984).

> No counterclaim . . . which would make the amount in controversy exceed the jurisdictional amount . . . is permissible in a small claim action assigned to a magistrate. No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claim action.

Thus the statute clearly allows a counterclaim for more than $10,000 to be filed as a separate action.[68]

G.S. 7A-219 also makes it clear that even a counterclaim for $10,000 or less that would be a compulsory counterclaim under Rule 13 does not need to be filed in a small claim action but may be filed as a separate action in small claims, district, or superior court.[69]

Counterclaim for More Than $10,000

When a defendant in a small claims case files an answer and counterclaim, the clerk's role is merely to file the document, not to determine if the amount is appropriate. Therefore, it is not improbable that a magistrate could find a counterclaim for more than $10,000 in a case file. Magistrates who allow plaintiffs who file cases for more than $10,000 to reduce that amount and proceed in small claims court should allow defendants who counterclaim the same opportunity.

Sometimes the defendant asks that both the claim and counterclaim be removed to district court (or superior court if the counterclaim is for more than $25,000), thinking that the entire matter can be postponed by filing a counterclaim for more than $10,000. In this case, the claim and counterclaim are not removed to district court. Rather, the magistrate should try the claim but not the counterclaim.[70] The magistrate should not dismiss the counterclaim but make a finding that the counterclaim was not heard because it was not within the magistrate's jurisdiction. The defendant may request the district

68. *See* Chandler v. Cleveland Sav. & Loan Ass'n, 24 N.C. App. 455, 211 S.E.2d 484 (1975). If the small claim action is appealed to district court, a counterclaim for more than $10,000 may be raised at that time, since G.S. 7A-220 provides that "on appeal from the judgment of the magistrate for trial de novo before a district court judge, the judge shall allow appropriate counterclaims."

69. In 2005 the General Assembly amended G.S. 7A-219 to overrule two court of appeals opinions that had required compulsory counterclaims to be raised on appeal of small claims cases to district court. *See* Cloer v. Smith, 132 N.C. App. 569, 512 S.E.2d 779 (1999) (Compulsory counterclaim that cannot be asserted in small claim because of the amount in controversy must be filed as counterclaim in district court if small claim is appealed.); Fickley v. Greystone Enter., Inc., 140 N.C. App. 258, 536 S.E.2d 331 (2000) (barring defendant who does not assert compulsory counterclaim on appeal to district court from asserting it later, thereby placing an affirmative duty on the defendant to appeal the small claim judgment whether an aggrieved party or not).

70. *See* Ervin Co. v. Hunt, 26 N.C. App. 755, 217 S.E.2d 93 (1975) (Court held that magistrate "correctly refused to hear defendant's counterclaim" when magistrate dismissed $300,000 counterclaim.). *But see* Falk Integrated Technologies, Inc. v. Stack, 132 N.C. App. 807, 513 S.E.2d 572 (1999) (As magistrate lacked subject matter jurisdiction over claim for more than the allowable amount, dismissal of claim was void and does not bar subsequent district court action.).

court judge to allow the counterclaim to be filed if the magistrate's ruling on the claim is appealed; otherwise, the defendant may file it as a separate claim.

Example 10. Hannah sues Winston for $2,500 for physical damage to the house Winston rented from Hannah. Winston files a counterclaim seeking $3,500 damages for breach of the warranty of habitability. The magistrate should hear the counterclaim as well as the claim because the amount in controversy of the counterclaim—$3,500—is within the allowable jurisdictional amount. If both parties prove they are entitled to the damages they seek, the magistrate will set off the claims and award $1,000 against Hannah. If only Hannah wins, the magistrate will award $2,500 against Winston and if only Winston prevails, the magistrate will award $3,500 against Hannah.

Suppose that Winston files a counterclaim for $11,000. The magistrate should hear Hannah's claim but not Winston's counterclaim. If the magistrate rules in favor of Hannah and Winston decides to appeal, he may seek permission to file the $11,000 counterclaim in district court, or he may file it as a separate action in district court. If Winston is satisfied with the magistrate's decision on Hannah's action, he may accept that decision and then file a new action in district court to assert his claim against Hannah.

Cross Claims and Third Party Claims

Cross claims and third party claims that do not bring the amount in controversy above the jurisdictional amount may be filed in small claims cases.[71] A *cross claim* is a claim by one party against a coparty arising out of the transaction or occurrence that is the subject of the claim or counterclaim. For example, Patty sues Adam and Bob for negligence and Adam files a cross claim against Bob, claiming that Bob's negligence caused Adam's injury. A *third party claim* is one in which the defendant brings a new party (called a *third party defendant*) into the lawsuit, claiming that if the defendant is found liable to the plaintiff the third party is liable to the defendant for all or part of the damages. For example, Henrietta sues Big Bob's Towing Inc. for damaging her automobile while towing it from Harry's property. Big Bob's Towing Inc. files a third party claim against Harry, indicating that Harry had signed a contract indemnifying Big Bob's from any liability incurred while towing the car from his property. Although they are authorized, cross claims and third-party claims are extremely rare in small claims court.

Pretrial Motions

Before the trial a party might file one or more of several different motions as described below.

Motion to Name Real Party in Interest

71. G.S. 7A-219 provides "no counterclaim, crossclaim or third party claim which would make the amount in controversy exceed the jurisdictional limit . . . is permissible in a small claim action assigned to a magistrate" thereby indicating that a claim that is within the limit may be filed.

An action can only be brought by the *real party in interest*. In other words, the person or company named in the complaint as the plaintiff must be the person "who is benefited or injured by the judgment"[72] and the person "who is entitled to receive the fruits of the litigation."[73] In summary ejectment cases the owner of the property (the landlord), not the agent handling the property for the owner, is the real party in interest. Sometimes a defendant files a motion objecting to the fact that the plaintiff listed in the complaint is not the real party in interest. Failure to bring the action in the name of the real party in interest is not, however, a basis for immediate dismissal.[74] The magistrate must give the plaintiff a reasonable amount of time after an objection is raised to file an amended complaint substituting the proper plaintiff; this may also be done in open court. If the plaintiff does not substitute the real party in interest within a reasonable time, the magistrate may dismiss the action.

Motion to Perfect Statement

The defendant may bring a motion, in oral or written form, to perfect the statement of the claim in the complaint because it fails to make clear why he or she is being sued.[75] The magistrate assigned to hear the case, the clerk, or a district court judge may rule on the motion without notice to the plaintiff. If the magistrate (or clerk or judge) determines that the complaint is not clearly enough written to enable a person of common understanding to know what is meant—why the defendant is being sued and what remedy is sought—the magistrate must enter an order requiring the plaintiff to amend the complaint to state these matters in clearer and more specific language. The magistrate also may, on his or her own motion, order a plaintiff to perfect the statement of the claim. In either case, the magistrate must mail a copy of the order to the plaintiff and continue the case to give the plaintiff time to perfect the statement. The plaintiff can perfect the statement by either filing another complaint, entitled, "Amended Complaint," or by merely filing a perfected statement with the clerk of court and mailing a copy to the defendant.

Motion Objecting to Venue or Jurisdiction

At any time before trial, but not after an answer has been filed, a defendant may file a motion objecting that the venue is improper, moving for a change of venue, or objecting to the jurisdiction of the court over him or her.

Venue is the legal term for the location where the lawsuit must be filed and heard. A motion objecting that the venue is "improper" argues that the lawsuit is filed in the wrong county, and a motion to change venue requests that the case be moved to another county. A motion objecting to jurisdiction over the defendant is one that challenges the

72. Reliance Insur. Co. v. Walker, 33 N.C. App. 15, 18, 234 S.E.2d 206, 209 (1977) (citations omitted).

73. Hood v. Mitchell, 206 N.C. 156, 165, 173 S.E. 61, 66 (1934) (citations omitted); *see also* Goodrich v. Rice, 75 N.C. App. 530, 537, 331 S.E.2d 195, 199 (1985).

74. G.S. 1A-1, Rule 17(a).

75. G.S. 7A-216.

court's personal jurisdiction over the defendant, which usually entails a complicated legal analysis of whether the State of North Carolina can constitutionally exercise jurisdiction over the defendant.

Both of these motions must be made in writing and, because of their complexity, must be heard by either the chief district court judge or another district court judge the chief judge designates by order or rule.[76] The magistrate has no authority to consider the case or make any rulings about the case while any of these motions are pending. Because some parties may not realize that the law requires the chief district court judge to hear such motions, they may fail to schedule the motion to be heard by that judge. Therefore, at trial the magistrate might find the motion in the case file without a ruling by a judge. In that case, the magistrate should continue the case and ask the clerk to calendar the motion before the chief district judge or another designated district court judge.

Questions about appropriate venue generally are procedural, not jurisdictional, which means they are waived if not raised by the defendant before trial.[77] However, there is some question about whether venue in small claims court is strictly procedural. G.S. 7A-221 seems to indicate that it is procedural by stating (1) that the defendant may object to venue by motion before filing an answer or as part of his or her answer and (2) that the objection is waived if not made before the date set for trial. However, G.S. 7A-211 provides that "[T]he chief district court judge may, in his or her discretion, . . . assign to any magistrate of the district any small claim action pending in the district if the defendant [or at least one of the defendants] is a resident of the county in which the magistrate was appointed." As explained above, all chief district judges assign cases by general or administrative order, and their orders usually include a statement that the clerk should assign cases within the jurisdiction of the magistrate when one of the defendants resides in the county where the action is filed. The same issue arises, therefore, as in actions filed as small claims for more than the allowable amount in controversy: a clerk who sends a case to a magistrate when none of the defendants is alleged to live in the county is not complying with the judge's order, and therefore, the case is not properly before the magistrate and any judgment rendered is not valid. The best way to read the two statutes together is that G.S. 7A-221 sets out the procedure for defendants who wish to object to venue—by filing written motions or answers before trial and having them heard by a district court judge—while G.S. 7A-211 indicates that a magistrate who discovers that no defendant resided in his or her county at the time the complaint was filed may consider the case as not assigned by the chief district court judge.

Motion to Transfer to Superior Court Division

Another possible, but extremely rare motion, is a motion to transfer the action to superior court because that is the proper division for it. If the defendant files a motion to transfer the case to superior court before the case is assigned to a magistrate, the case may not

76. G.S. 7A-221.

77. Gardner v. Gardner, 43 N.C. App. 678, 260 S.E.2d 116 (1979), *aff'd* 300 N.C. 715, 268 S.E.2d 468 (1980).

be assigned, and therefore no magistrate will have authority to hear the matter until a superior court judge has ruled on the motion.[78] The statute assumes that a motion to transfer will be filed before the case is assigned to a magistrate, but this is generally not the case, since in most counties small claims are assigned the moment they are filed. The safest practice for a magistrate is not to hear a case until a superior court judge has ruled on the motion for transfer to superior court.

12(b)(6) Motion

Another motion an attorney representing a defendant might file is called a 12(b)(6) motion—a motion to dismiss the case for failure to state a claim.[79] Essentially, this motion states that even if everything in the plaintiff's complaint is true, it does not state a claim for which the court can grant relief. However, 12(b)(6) motions are not allowed in a small claims action; G.S. 7A-216 provides that "demurrers and motions to challenge the legal and formal sufficiency of a complaint shall not be used." *Demurrer* is the term used before the Rules of Civil Procedure were adopted, and a 12(b)(6) motion is the equivalent motion under the current rules. The magistrate should deny the motion because it is not proper and then hear the case. As discussed above, the magistrate may order the plaintiff to perfect the statement of the claim and amend the complaint if it is not clearly enough written to enable a person of common understanding to know what is meant.

Motion for Continuance

The most common motion a magistrate will hear before trial is a motion for a continuance. Any party may move to have the case continued, and the magistrate may grant a continuance "for good cause shown."[80] If all parties consent to change the date and time of the trial, they file a written notice of the change with the clerk. The magistrate may also grant a continuance at the request of one party without getting the consent of or hearing from the other parties.

Nonetheless, "[c]ontinuances are not favored, and the party seeking a continuance has the burden of showing sufficient grounds for it."[81] As the statute does not specify the circumstances that constitute grounds for good cause, the magistrate must determine in each case whether good cause has been met. "In passing on the motion, the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and good faith. . . [t]he chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice."[82] Common situations in which continuances are granted include the illness of a party or witness[83] or insufficient time for one of the

78. G.S. 7A-258(f)(2). *See* Amey v. Amey, 71 N.C. App. 76, 321 S.E.2d 458 (1984).
79. The motion is set out in G.S. 1A-1, Rule 12(b)(6).
80. G.S. 7A-214.
81. Shankle v. Shankle, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976).
82. *Id.* at 483, 223 S.E.2d at 386 (citation omitted).
83. Moon v. Central Bldrs., Inc., 65 N.C. App. 793, 310 S.E.2d 390 (1984).

parties to prepare for trial.[84] Another frequent reason for requesting a continuance is that one of the party's attorneys must appear in another court at the time the small claim is scheduled. Rule 3.1 of the General Rules of Practice for the Superior and District Courts sets out the following priority of attendance for attorneys with court conflicts: appellate courts, superior court, district court, and magistrate's court. However, Rule 2(e) of the general rules also provides that an attorney who cannot be present in one court because of a conflicting court appearance should make available another member of the law firm who is familiar with the case. When hearing a continuance based on a conflict in another court, the magistrate may ask whether another attorney in the firm can present the case. The attorney may also seek to be excused in advance by notifying the opposing party of the conflict and asking the magistrate for a continuance. Rule 2(e) provides that unless the attorney has taken these the steps, the case will not be continued.

Except in summary ejectment cases, there is no limitation on the length of a continuance or the number of continuances a magistrate may grant in a case. Yet, as the purpose of small claims court is to deal with civil cases in an expedient, efficient, and inexpensive manner, it would be contrary to the underlying policy to grant either long continuances or numerous continuances in a case. G.S. 7A-223 governs continuances in summary ejectment actions and provides that the magistrate shall only grant a continuance "only for good cause shown and upon such terms and conditions as justice may require"[85] and shall not continue the matter more than five days or until the next session of small claims court, whichever is longer without consent of both parties.

A motion for a continuance may be made in writing or orally. G.S. 7A-214 specifies that the magistrate to whom the action is assigned may grant the continuance. However, because in many counties the magistrate who will hear the case is not known until the time of trial, in practice any magistrate who hears small claims cases can grant continuances. If a continuance is granted, the magistrate must notify both parties of the new trial date and time.[86] Merely filing a motion for a continuance is not grounds for not appearing at the trial. A party must appear unless the magistrate has granted the continuance.

Dismissal without Trial

Voluntary Dismissal by Plaintiff

Sometimes a case is dismissed without the magistrate ever holding a trial. The most common kind of dismissal is a voluntary dismissal in which plaintiff withdraws the action without approval of the magistrate. As a matter of right, the plaintiff may do so at any time before resting his or her case (that is, completes presenting the evidence).[87] The plaintiff may take a voluntary dismissal by filing a written notice of dismissal before the

84. Benton v. Mintz, 97 N.C. App. 583, 389 S.E.2d 410 (1990).

85 G.S. 1A-1, Rule 40(b).

86. The proper form to use is AOC-G-108, "Order."

87. G.S. 1A-1, Rule 41(a)(1).

trial[88]—in which case the dismissal will be found in the case file—or by giving oral notice of dismissal at the trial. If the plaintiff gives oral notice of voluntary dismissal at the time of trial, the magistrate should complete form AOC-G-108, "Order," indicating that the plaintiff has elected not to prosecute the action and has taken a voluntary dismissal. The plaintiff may take a voluntary dismissal for any reason before resting his or her case, and the magistrate cannot prevent the dismissal.

> ***Example 11.*** Low Cost Furniture Co. sues Susan to recover possession of ten pieces of furniture Susan purchased from the store at various times over a five-year period. At the trial the business manager for Low Cost Furniture Co. begins testifying about the security agreement with Susan. Based on the nature of the magistrate's questions, the business manager believes that the magistrate will not grant him a favorable judgment. Before he finishes his evidence, he tells the magistrate that he is taking a voluntary dismissal. He stops testifying and leaves the courtroom. Even if the magistrate does not believe Low Cost Furniture Co. can win the case, the magistrate cannot prevent the business manager from taking the voluntary dismissal and ending the matter without prejudice at that point.

The most common reason for a voluntary dismissal is that the plaintiff and defendant have settled the case—either the defendant has fully satisfied the plaintiff's claim or the defendant has agreed to make payments satisfactory to the plaintiff.

Without Prejudice

A voluntary dismissal is a dismissal without prejudice unless the plaintiff indicates otherwise. *Without prejudice* means that the plaintiff may refile the lawsuit within one year after dismissal[89], or longer if the statute of limitations has not run by that time. A second voluntary dismissal bars any further lawsuit based on or including the same claim because the second voluntary dismissal without prejudice converts to one with prejudice as a matter of law[90]. For the "two dismissal" rule to apply, (1) the plaintiff must have filed the notices to dismiss under Rule 41(a)(1) since the two dismissal rule does not apply where plaintiff's dismissal is by stipulation or order of the court,[91] and (2) the second suit must have been based on or including the same claim as the first suit.[92]

Voluntary Dismissal by Court Order

After the plaintiff has lost the right to take a voluntary dismissal (that is, has finished his or her presentation of the evidence), the plaintiff may request the magistrate to grant a voluntary dismissal. In this situation, it is in the magistrate's discretion whether to grant the voluntary dismissal; it is no longer the plaintiff's right. The magistrate should grant

[88] AOC-CV-405, "Notice of Voluntary Dismissal."
[89] *See* Ciesko v. Clark, 92 N.C.App. 290, 374 S.E.2d 456 (1988).
[90] G.S. 1A-1, Rule 41(a)(1).
[91] Parris v. Uzzell, 41 N.C.App. 479, 483-484, 255 S.E.2d 219, 221 (1979).
[92] City of Raleigh v. College Campus Apts., Inc., 94 N.C.App. 280, 282, 380 S.E.2d 163, 165 (1989), aff'd, 326 N.C. 360, 388 S.E.2d 768 (1990).

the voluntary dismissal upon such terms and conditions as justice requires.[93] The purpose of this provision is to allow the magistrate to give the plaintiff another chance to withdraw in hardship cases when the plaintiff is unable to press his or her claim.[94] In exercising discretion, the magistrate should consider the legitimate interests of both the plaintiff and the defendant and the relative prejudice to each.[95] Thus, under the facts of Example 11 above, assume that the business manager does not take a voluntary dismissal while putting on evidence; Susan then begins testifying and indicates that she had paid for most of the items and that Low Cost Furniture was not, therefore, entitled to recover four of the five items claimed. The business manager indicates that he does not have the records with him to show how the payments were allocated and asks the magistrate to grant a voluntary dismissal. The magistrate must determine whether justice is best served by allowing the voluntary dismissal and then either grant or deny the request.

The magistrate deciding to grant a voluntary dismissal must complete form AOC-G-108, "Order," indicating that the magistrate is granting the motion for voluntary dismissal. This type of voluntary dismissal is also without prejudice, which allows the plaintiff to refile the action within one year or until the statute of limitations runs, whichever is longer. If the magistrate denies the request, the magistrate continues to hear evidence and enters judgment.

Involuntary Dismissal

Because the plaintiff initiated the lawsuit, he or she must be present at trial to present evidence or prosecute the case. What happens if the plaintiff (or plaintiff's counsel) is not present when the case is called for trial? "For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action . . . against him."[96] Thus, when the plaintiff does not appear but the defendant does appear and asks that the case be dismissed, the magistrate may dismiss the case. The magistrate also may dismiss the case without a motion from the defendant if the failure to prosecute is clear.[97]

With Prejudice

An involuntary dismissal usually is a dismissal *with prejudice*, which means that the plaintiff may not refile the lawsuit. A dismissal with prejudice "ends the lawsuit and precludes subsequent litigation on the same controversy between the parties under the doctrine of *res judicata*."[98] The magistrate, however, has discretion to provide that the dismissal is without prejudice rather than with prejudice and should do so when a judgment with prejudice would defeat the ends of justice.

93. G.S. 1A-1, Rule 41(a)(2).

94. GRAY WILSON, NORTH CAROLINA CIVIL PROCEDURE § 41-3 (4th ed. 2020).

95. *Id*.

96. G.S. 1A-1, Rule 41(b).

97. WILSON, *supra* note 94, § 41-6.

98. *Id*. at § 41-5. *Res judicata* means "the thing is adjudicated." Under this doctrine a final judgment on its merits is conclusive as to rights, questions, and facts in issue in subsequent actions involving the same parties. Estate of Graham v. Morrison, 168 N.C. App. 63, 66, 607 S.E.2d 295, 298 (2005).

If neither party appears at trial, an involuntary dismissal is appropriate and would generally be with prejudice unless the magistrate, within his or her discretion, indicates that it is without prejudice. The same principle that applies when the defendant appears but the plaintiff does not also applies when neither party appears: It is the plaintiff who has the responsibility to appear and prosecute the case.

Dismissal When Defendant Files a Counterclaim

The rules regarding voluntary and involuntary dismissals of claims also apply to counterclaims, except that for counterclaims it is the defendant's right to dismiss before resting his or her case and it is the defendant's responsibility to appear and prosecute the counterclaim. But is the plaintiff's ability to take a voluntary dismissal affected by defendant's filing of a counterclaim? Under general law if the defendant has filed a compulsory counterclaim, the plaintiff loses the right to take a voluntary dismissal.[99] But if the counterclaim is permissive, the plaintiff may file a voluntary dismissal and the defendant can proceed with the permissive counterclaim.[100] Small claims procedure, however, makes it clear that the distinctions between compulsory and permissive counterclaims do not apply in small claims court and that any counterclaim may be filed as a separate action.[101] It would therefore follow that a plaintiff can always take a voluntary dismissal in a small claims case, even if a counterclaim has been filed, and that the defendant may proceed with the counterclaim after the plaintiff's dismissal of his or her claim.

Judgment on the Pleadings

In one circumstance the law requires the magistrate to enter judgment without hearing evidence from the plaintiff. In summary ejectment cases the magistrate must give a judgment for possession based solely on the filed pleadings if the following five qualifications are met:

1. The pleadings (complaint) allege defendant's failure to pay rent as a breach of the lease for which reentry is allowed[102] (third block under #3 on "Complaint for Summary Ejectment," AOC-CVM-201);
2. The return on the summons indicates the process was served on the defendant;
3. The defendant has not filed an answer;
4. The defendant fails to appear on the day of court; and
5. The plaintiff requests, in open court, a judgment based on the pleadings.[103]

99. Gardner v. Gardner, 48 N.C. App. 38, 269 S.E.2d 630 (1980).

100. *See* Layell v. Baker, 46 N.C App. 1, 5-6, 264 S.E.2d 406, 409-10 (1980).

101. G.S. 7A-219**.**

102. This language means the summary ejectment action for failure to pay rent must be based on a condition specifically stated in the lease and the lease must include an automatic forfeiture clause for breach of its conditions.

103. G.S. 42-30.

If all conditions are met, the magistrate must give judgment for possession without asking the plaintiff to offer any evidence. However, all five qualifications must be met; even if the first four are met but the plaintiff does not request, in open court, a judgment on the pleadings, the magistrate cannot give a judgment for possession without hearing the evidence.

If the plaintiff asking for a judgment based on the pleadings also is seeking monetary damages for back rent or physical damage to the property, he or she must prove by a preponderance of the evidence that monetary damages are due. Without such evidence, the magistrate will grant only the possession part of the judgment. In cases where service was by first-class mail and posting on the premises, the plaintiff may request that the magistrate sever the claim for monetary damages from the claim for possession to allow the plaintiff to obtain personal service on the defendant and to proceed on the claim for monetary damages at a subsequent court date without having to file a second suit.[104] The magistrate will enter judgment on the claim for possession and indicate the plaintiff's request to sever the claim for monetary damages by checking #5 on the order portion of the "Judgment In Action for Summary Ejectment," AOC-CVM-401.

If the plaintiff is seeking possession based on failure to pay rent (first block under #3 on complaint form), holding over after the end of the lease (second block), or criminal activity (fourth block)—and in cases for breaches of condition other than failure to pay rent—G.S. 42-30 does not apply, and the plaintiff must present evidence to prove that he or she is entitled to a judgment for possession.

Trial of the Case

A trial before a magistrate is without a jury, which means that the magistrate acts as the judge in determining the law that applies to the case and as the jury in determining whether the facts are proven. The level of courtroom formality depends on the individual magistrate but is certainly less formal than superior court. Research indicates that citizens prefer to come to small claims court rather than to a more traditionally formal court because they feel they can better and more easily tell their story to the magistrate.[105]

No Default Judgment

Perhaps the most important difference in procedure between small claims and other trial courts in North Carolina is that there are no default judgments in a small claims case heard before a magistrate. This means that before judgment may be entered against a defendant, except in the one instance discussed above, the plaintiff must appear at trial and present witnesses who testify, under oath, to all the facts necessary for the plaintiff to prevail. (In most cases the plaintiff is the sole witness.) Even if the defendant does not appear at trial (and often he or she does not), the plaintiff must present the evidence

[104] G.S. 7A-223(b1).

105. JOHN CONLEY & WILLIAM O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOLOGY OF LEGAL DISCOURSE (Chicago: University of Chicago Press, 1990), 36–37; JOHN RUHNKA & STEVEN WELLER, SMALL CLAIMS COURTS: A NATIONAL EXAMINATION (National Center For State Courts, 1978), 21–22.

necessary to win the case. It is not uncommon for a plaintiff to have several cases before a magistrate on the same calendar; nonetheless, for judgments to be entered, the plaintiff must present evidence under oath in each case. The complaint filed by the plaintiff is not evidence. Because oral evidence is usually sufficient and introduction of written documents is not required, it is relatively easy for a plaintiff to prevail when the defendant is not present.

Example 12. Landlord Smith sues Tenant Jones for possession and back rent. Jones does not appear at trial. Landlord Smith asks the magistrate to enter judgment. The magistrate may not enter judgment unless Landlord Smith testifies under oath to sufficient facts to be entitled to a judgment.

Assume Landlord Smith testifies that she had an oral lease with Jones; that their only agreement was that Jones was to pay $500 per month rent on the first of each month; that Jones didn't pay the rent on the first of March; and that Smith filed this action on March 12. In this case, the magistrate should find against the plaintiff and dismiss the case (ruling that the plaintiff failed to prove the case by the greater weight of the evidence). The plaintiff didn't prove everything required to win the case because she didn't testify that she had demanded the rent and waited ten days before filing the lawsuit.

Burden of Proof

The burden of proof in civil cases is proof by the greater weight of evidence, sometimes referred to as the *preponderance of the evidence*. That means that the party who bears the burden of proof, usually the plaintiff, must prove, by the greater weight of evidence, the existence of those facts that entitle him or her to a favorable judgment. The greater weight of the evidence does not refer to the quantity of evidence, but rather to its quality and convincing force. The magistrate, after considering all of the evidence, must be persuaded that the facts needed to reach a judgment for the party bearing the burden are more likely than not to exist.[106]

In some rare civil cases a stronger burden of proof applies. The party with the burden of proof must prove each element of the case with evidence that is *clear*, *strong*, and *convincing* as these words are ordinarily understood. *Webster's* defines *clear* as "free from obscurity or ambiguity: easily understood: unmistakable." *Strong* means forceful, persuasive, presented in a way that brings out pertinent and fundamental points. *Convincing* is "having power to convince of the truth, rightness, or reality of something," persuasive or "plausible."[107] This higher burden of proof is required, for example, when a magistrate chooses not to evict a tenant for criminal activity even though the landlord has proved that criminal activity occurred. In that situation the law requires the magistrate to determine by clear and convincing evidence that immediate eviction would be a serious injustice.

106. A more detailed discussion of burden of proof is found in [Chapter VIII, "Evidence."]

107. *Merriam-Webster's Collegiate Dictionary*, 11th ed. (Springfield, Mass.: Merriam-Webster, Inc., 2003).

Representing the Parties in Court

Either the party or an attorney must appear in a court proceeding to present that party's case. A plaintiff or defendant cannot designate someone who is not a licensed attorney to appear as his or her agent for purposes of presenting his or her case to the court, except in summary ejectment cases, which are discussed below. The person presenting the case can, however, call witnesses to testify. The reason for limiting persons other than attorneys from acting on behalf of a party is that they would be engaging unlawfully in the practice of law.[108]

However, both parties have the right to represent themselves on their own behalf without an attorney (referred to as *pro se representation*). In small claims court a corporation may represent itself pro se through an employee acting as the agent of the corporation.[109] In 2017, the legislature added subsections to G.S. 7A-222 and G.S. 7A-228 that allow all parties, which includes corporations, to represent themselves without obtaining legal representation both in small claims and on appeal for trial de novo in district court without violating the statute prohibiting the unauthorized practice of law. Where previously corporations and other business entities were required to hire counsel to represent them on appeal for trial de novo in district court, these additions to the statutes remove that requirement in both the proceeding before the magistrate in small claims and the trial in district court.

In summary ejectment or back rent cases, an agent of the landlord who has personal knowledge of the facts alleged in the complaint may sign the complaint.[110] The agent must be someone, like a real estate broker, who handles the rental of the premises for the landlord—not a person the landlord appoints as agent solely for the purpose of bringing the summary ejectment action. There are no cases specifically indicating whether an agent authorized to sign the complaint may appear at trial on behalf of the plaintiff instead of an attorney. The most logical reading of the statute, however, is that the agent may appear and present the plaintiff's case because the agent, not the landlord, has actual knowledge of the transaction.

Another prohibition important for the magistrate to understand involves collection agencies. Such agencies are prohibited from engaging in the practice of law and may not appear in court on behalf of a creditor except when summoned by court order or subpoena.[111] A *collection agency* is defined as any person, firm, or corporation directly engaged in soliciting from more than one creditor delinquent claims due the creditor, or asserting, enforcing, or prosecuting these claims. The statute specifically excludes from

108. G.S. 84-4 makes it unlawful for any person other than a person licensed to practice law in North Carolina to appear as an attorney or counselor-at-law in any action before a judicial body, give legal advice, or prepare legal documents.

109. Lexis-Nexis, Div. of Reed Elsevier, Inc. v. Travishan Corp., 155 N.C. App. 205, 208, 573 S.E.2d 547, 549 (2002); Duke Power Co. v. Daniels, 86 N.C. App. 469, 472, 358 S.E.2d 87, 89 (1987). However, in other civil proceedings a corporation must appear through an attorney. *See* G.S. 84-5 and *Lexis-Nexis* at 209, 573 S.E.2d at 549.

110. G.S. 7A-216; G.S. 7A-223.

111. G.S. 58-70-120.

the definition of collection agency a business that is collecting its own debts, regular employees of a single creditor, a licensed real estate agent when accounts are handled as part of the business, persons who purchase accounts when they are not delinquent, and attorneys. The statute also provides that people who purchase an account from the creditor after it becomes delinquent are categorized as collection agencies and must hire an attorney to represent them at trial. The new owner of an account purchased or assigned before default on the debt could bring an action to collect the debt pro se.

What if an unauthorized person appears before the magistrate on behalf of one of the parties? A pleading filed by someone other than a party or an attorney licensed in North Carolina is not null and void,[112] so that the magistrate may choose whether to hear the case or not. If an improper person appears on behalf of a party, the magistrate has several choices. (1) He or she can ignore the improper representation unless the opposing party makes a motion objecting to the representation; in that case the magistrate should either continue the case until a proper person can appear or, if the party seeking relief is improperly represented, the magistrate can dismiss the case without prejudice. (2) Acting on his or her own motion, the magistrate can continue the case until an appropriate person is present to represent the party or dismiss it. (3) A third option is to notify the North Carolina State Bar that an improper person is appearing on behalf of a party. (4) Finally, if a collection agency appears as a plaintiff without an attorney, the magistrate can notify the North Carolina Department of Insurance, which regulates collection agencies.

Hearing Evidence

Order of Presentation

The formal order of presentation of evidence in a civil case is that the plaintiff, the party with the burden of proof, puts on evidence first. The plaintiff determines the order in which his or her witnesses are called to testify. Before testifying, each witness is sworn or affirmed by the magistrate. After the plaintiff has finished questioning each witness, the defendant has a chance to examine the witness. The magistrate also may put questions to the witness. Then the next witness for the plaintiff testifies and the same procedure is followed. When the plaintiff has finished putting on all of his or her evidence, the magistrate may dismiss the case if the plaintiff has failed to establish a case.[113] If the plaintiff has proved a prima facie case—meaning that if the defendant offers no contrary evidence the plaintiff has proved enough to be given a judgment—the proceedings continue and the defendant presents his or her witnesses. The same procedure is followed with the defendant's witnesses, each of whom is sworn to their testimony beforehand.

112. Theil v. Detering, 68 N.C. App. 754, 315 S.E.2d 789 (1984). *Cf.* North Carolina Nat'l Bank v. Virginia Carolina Builders, 307 N.C. 563, 299 S.E.2d 629 (1983) (default judgment was improper where defendant's answer was filed by out-of-state attorney; however, plaintiff could move to strike answer as filed by attorney who was not qualified).

113. G.S. 7A-222.

Frequently, however, magistrates do not follow this formal presentation of evidence. In many cases there is no formal witness stand from which the witness testifies, and often the only witnesses are the plaintiff and the defendant. Sometimes it is difficult for the parties to understand the difference between asking questions of the opposing party and testifying themselves. Thus, the defendant tells his or her side of the story when "questioning" the plaintiff; or the parties speak to each other or back and forth to the magistrate about what happened. To deal with this reality, many magistrates swear both parties before beginning any testimony so that all of the evidence can be considered even though it is not presented in an orderly fashion.

If the defendant has filed a counterclaim, the magistrate should first hear all of the evidence from both parties on the plaintiff's claim and then hear all of the evidence on the defendant's counterclaim. On a counterclaim, the defendant has the burden of proof and puts his or her witnesses on first, to be followed by the plaintiff's witnesses.

Oath

The magistrate must administer an oath to every witness in a small claims trial. The witness is required to place his or her hand on the Bible and take the following oath: "You swear that the evidence you shall give to the court in the case of (*name plaintiff)* versus *(name defendant)* shall be the truth, the whole truth, and nothing but the truth; so help you, God."[114] Courts have held that non-Christians may take an oath on their holy book or according to the form of their religion.[115] Although the statute does not specify any method other than placing a hand on the Bible, the custom is to have the witness place his or her left hand on the Bible and raise the right hand while taking the oath. A person who has conscientious scruples against taking an oath may be affirmed.[116] To affirm the witness does not place his or her hand on the Bible but raises his or her right hand and the magistrate gives the same oath except the word "affirm" replaces the word "swear" and the language "so help you, God" is deleted.

Applicability of Evidence Laws

114. G.S. 11-11.

115. In *Shaw v. Moore*, 49 N.C. 25 (1856), the North Carolina Supreme Court pointed out that under common law Jews could swear upon the Old Testament or Tanach and other non-Christians could swear "according to the form which they hold to be most sacred and obligatory on their consciences." The court then determined that the sole object of the statute requiring swearing on the Holy Scriptures (which means the Christian Bible) was "to prescribe forms, adapted to the religious belief of the general mass of the citizens, for the sake of convenience and uniformity." If, the court said, the legislature's intent in adopting the statute had been to alter the common law so as to exclude persons of other religions, the statute would be void because it would violate the provision in the North Carolina Constitution affirming that "all persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences." N.C. CONST. art. I, § 13. Therefore, the court held, the common law still applies in North Carolina. A recent superior court case reaffirmed the law set out in *Shaw* in a case challenging a Guilford County judge's ruling prohibiting a Muslim from swearing on the Quran. American Civil Liberties Union of North Carolina v. North Carolina, Wake County Superior Court 05 CVS 9872, May 24, 2006.

116. G.S. 11-4.

Small claims procedure provides that "the rules of evidence applicable in the trial of civil actions generally are observed."[117] That sentence can be interpreted in two ways depending on whether the word "generally" modifies "civil actions" or "are observed"—the former requiring the rules to be followed and the latter allowing them to be observed generally. As a practical matter, evidence rules are not routinely applied in magistrate's court; however, a chapter covering the evidence rules magistrates are most likely to encounter in small claims cases is included in this book.

Amending the Complaint

G.S. 1A-1, Rule 15 provides that "a party may amend his pleading once as a matter of course at any time before a responsive pleading is served, or if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the calendar, he may so amend it at any time within 30 days after it is served." It is not clear how that rule applies to small claims cases since a responsive pleading is permitted but not required and since cases are "placed on the calendar" immediately upon filing. Presumably, a party may amend his or her pleading at any time before trial and serve a copy of the amended pleading on the other party. However, because the trial is held so soon after the complaint is filed, a party would rarely have a chance to file an amended pleading before trial.

It is more likely that questions about amending the complaint (or the answer and counterclaim) will arise at trial. At that stage a party may amend the pleading with the approval of the magistrate, and the magistrate must freely allow such amendments when justice so requires.[118] More importantly, in many instances, issues not raised in the complaint are brought up at trial and heard without requiring an amended pleading. "When issues not raised by the complaint and answer are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."[119] Thus, as occurs in many instances, when evidence presented at trial relates to a claim not set out in the complaint, the plaintiff may amend the complaint but need not do so. The magistrate may decide the case on the basis of the evidence given at trial. If the defendant is present and objects that such evidence is not within the issues raised by the complaint (or the plaintiff raises the same objection with regard to a counterclaim), the magistrate may allow the party to amend the pleading and, if necessary, may grant a continuance to enable the objecting party to prepare to prepare a response to the new issue.

The defendant's failure to appear at trial sometimes raises an issue about how much the proof at trial can vary from the complaint without requiring the plaintiff to serve an amended complaint on the defendant. It really is a fairness issue. If a defendant who is sued for possession of a refrigerator does not appear at trial, is it fair to allow the plaintiff to recover a monetary judgment instead, without serving an amended complaint on the

117. G.S. 7A-222.
118. G.S. 1A-1, Rule 15(a).
119. G.S. 1A-1, Rule 15(b).

defendant? On the other hand, if a plaintiff brings a summary ejectment action against a defendant based on failure to pay rent but provides evidence at trial that the action is actually based on the defendant's breach of a condition of the lease, the magistrate may go forward with the hearing because the defendant was on notice that the suit was for eviction.

If the plaintiff files an amended complaint, the plaintiff must serve it on the defendant by sending a copy to the defendant by first class mail or by personally delivering a copy.[120]

Sometimes a party wishes to amend a pleading to correct the name of another party. An amendment correcting the name of a party who has been properly served is effective as of the original date the lawsuit was commenced.[121] For example, the plaintiff sues John James but means Johnnie James. As the correct Mr. James was served, no prejudice results in this case from correcting the misnomer. However, if the wrong defendant is named and served, the amended complaint must be served under the regular rules for service on a new defendant and the action commences (for statute of limitations purposes) when the summons for the amended complaint is issued.[122]

> ***Example 13.*** Jeannie Customer talks to Harry Hustler about repairing a driveway. Harry operates Harry's Blacktar Resurfacing Inc. Jeannie is upset about the quality of the work and has to hire another company to repair the driveway properly. She files an action to recover money from Harry Hustler for the amount she had to pay the second company. Although Jeannie had all of her conversations with Harry, it is the business that is liable for the damages, not an employee, officer, or even the owner of a wholly owned corporation. Because a business that is incorporated is a separate legal entity, the corporation is the proper defendant. Jeannie Customer discovers this before trial. She must amend the complaint to name Harry's Blacktar Resurfacing Inc. as the defendant, and the magistrate should continue the case to give her time to serve the amended complaint on the new defendant. For statute of limitations purposes, the lawsuit begins when the summons to Harry's Blacktar Resurfacing Inc. is issued by the clerk.

Asking Questions

The N.C. Rules of Evidence allow for the magistrate to call witnesses and to interrogate witnesses.[123] Although magistrates are not required to ask questions, since parties are rarely represented by attorneys in small claims cases and parties are often unaware of what facts are important, most magistrates do ask questions of the parties to elicit the facts needed to make a decision. Magistrates should treat both plaintiff and defendant fairly and equitably by eliciting important facts from both sides. If a magistrate asks

120. G.S. 1A-1, Rule 5.

121. *See* Pierce, v. Johnson, 154 N.C. App. 34, 571 S.E.2d 661 (2002) (naming deceased driver instead of personal representative of driver's estate was misnomer and amended pleading related back to date of original complaint); Jones v. Whitaker, 59 N.C. App. 223, 296 S.E.2d 27 (1982) (amending complaint to "Shirley" instead of "Sherrie" when Shirley was served was a misnomer and related back).

122. WILSON, *supra* note 94, § 15-12.

123 G.S. 8C-1, Rule 614.

questions of the plaintiff to find facts that will help the plaintiff's case, he or she should also ask the defendant questions that will obtain facts related to the defense. Also the magistrate's questions should elicit facts rather than conclusions. For example, a magistrate should ask "Tell me what, if anything, you did to make the defendant aware that the rent was overdue," rather than "Did you demand the rent from the tenant at least ten days before the lawsuit was filed?"

Even when the parties are represented by attorneys, the magistrate is free to ask the witnesses questions.

Rendering Judgment

After both parties have presented their evidence and answered all questions, the magistrate renders a decision. The judgment must include findings of fact, specify the party against whom judgment is entered, and specify the relief granted. In small claims cases, detailed findings of fact are not necessary. The only required finding is either that the plaintiff proved the case by the greater weight of evidence or that the plaintiff failed to prove the case by the greater weight of evidence. In summary ejectment cases the magistrate also must make a finding of the amount of rent in arrears that is not in dispute between the parties and should make a finding whether the defendant is present at trial.

Announcing the Judgment at Trial

Although there is no prescribed form for announcing the judgment to the parties in open court, most magistrates' judgments consist of four parts: notice, judgment, explanation, and advice.[124] The *notice* merely lets the parties know the magistrate is about to render a decision. The *judgment* portion tells the parties of the magistrate's decision (who wins and what is awarded), and the *explanation* segment explains the specific facts and law on which the decision is based. *Advice* is the part of rendering a judgment in which the magistrate answers the parties' questions about the judgment or its effect.

If there is a counterclaim, the magistrate enters one judgment that disposes of both claim and counterclaim. If both parties win, the magistrate should indicate in the judgment that the plaintiff has proved his or her case by the greater weight of the evidence and that the defendant has proved his or her counterclaim by the greater weight of the evidence. The judgment should then identify the relief to which each is entitled and, if both are entitled to money, should offset the two amounts and award the difference to the party entitled to the greater amount.

Signing the Judgment at Trial

If the magistrate announces the judgment at the end of the trial, the magistrate should also reduce the judgment to writing and sign it at that time. If the judgment is signed in open court at the conclusion of the case, the magistrate should check the block on the judgment form so indicating. In that case, the magistrate is not required to mail copies to

124. John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnology of Judicial Decision Making In Informal Courts,* 66 N.C. L. Rev. 467, 479–81 (1988).

the plaintiff and defendant, even if the defendant is not present at the trial. In addition to announcing the judgment and reducing it to writing, the magistrate should make sure that all parties understand the judgment. He or she should then file the judgment with the clerk of superior court.

Reserving Judgment

In all small claims actions other than those for summary ejectment, the magistrate may decide not to announce and enter judgment at the end of the trial and may reserve judgment for up to ten days.[125] In actions for summary ejectment, the magistrate may only reserve judgment if the case is complex or the parties consent to an extension of time for entering judgment, and the continuance is limited to five business days.[126] Examples of complex summary ejectment cases in the statute include cases brought for criminal activity, breaches other than the nonpayment of rent, evictions involving Section 8 and public housing, and cases with counterclaims.[127] In that instance, the magistrate should announce at the end of the trial that he or she is reserving judgment and will make a decision and enter a written judgment within ten days or five business days in summary ejectment actions. The magistrate may reserve judgment for any reason. Some common reasons for not entering judgment at the end of the trial are that the case is unusual and the magistrate wishes to research the law on the subject or that the trial was hotly contested and the magistrate thought it would exacerbate the parties' anger to announce judgment at that time. The magistrate can reserve judgment for up ten days (five days in summary ejectment cases) after the trial; he or she must then reduce the judgment to writing, sign it, mail copies to all parties, certify on the original judgment that copies have been mailed,[128] and file the original judgment with the clerk of superior court.

Effect of Magistrate's Judgment

Once a magistrate's judgment is filed with the clerk, it is treated like any judgment from district or superior court. The clerk records and indexes the judgment, and it becomes a lien on any real property the losing party (the "judgment debtor") owns in the county where judgment is rendered.[129] The judgment is valid for ten years and may be renewed for one additional ten-year period.[130] It can be enforced during the ten-year period by asking the clerk to issue a writ of execution. If the judgment is for money, the execution writ orders the sheriff to seize the defendant's property and sell it to satisfy the judgment.

125. G.S. 7A-222.

126 G.S. 7A-222(b).

127 *Id.*

128. G.S. 1A-1, Rule 58.

129. G.S. 7A-225.

130. A judgment is renewed by filing a new lawsuit, but the lawsuit's claim is the prior judgment, not the underlying contract or tort in the original action. The amount sued for is the principal amount still owing on the original judgment, plus interest. At trial, the plaintiff must prove the existence of the original judgment (by introducing a certified copy of the judgment) and the amount currently due (by affidavit from the clerk where the original judgment was entered).

If the judgment orders the defendant to return specific personal property to the plaintiff, the execution (called a *writ of possession personal property*) orders the sheriff to take the property from the defendant and turn it over to the plaintiff. If the judgment is for summary ejectment, the execution (called a *writ of possession real property*) orders the sheriff to remove the tenant and the tenant's personal property from the landlord's premises.

Appeal

An aggrieved party may appeal a magistrate's decision for a trial de novo in district court. "An *aggrieved party* is one whose rights have been directly and injuriously affected by the action of the court."[131] A party who prevails in small claims is not an "aggrieved party" and cannot appeal to district court for a trial de novo for the purpose of adjudicating counterclaims that exceed the jurisdictional amount in small claims.[132] The proper course of action is for the prevailing party to bring counterclaims that exceed the jurisdictional amount in small claims in a separate action either in district or superior court.[133] *Trial de novo* means a completely new trial—as if no action whatsoever had been instituted in the court below and the suit was being filed for the first time in district court.[134]

The party appealing must give notice of appeal in one of two ways: (1) by giving oral notice in open court when the magistrate announces the judgment or (2) by filing a written notice of appeal[135] with the clerk within ten days after the judgment is entered. A party who appeals by filing a written notice also must serve a copy of the notice of appeal on all other parties by either giving copies of the notice to the other parties or their attorneys or by mailing copies to the parties or their attorneys by first class mail.[136] The ten-day period for appeal is governed by Rule 58 of the Rules of Civil Procedure, which provides that judgment is entered when it is reduced to writing, signed by the magistrate, and filed with the clerk of court.[137] In counting the ten days, the day the judgment was entered (that is, filed with the clerk) is not counted; and if the tenth day falls on a weekend or on a holiday when the courthouse is not open for business, the party has until the end of the next workday to file the appeal.[138]

131. Culton v. Culton, 327 N.C. 624, 625, 398 S.E.2d 323, 324 (1990) (emphasis added).

132 J.S. & Assocs., Inc. v. Stevenson, 265 N.C.App. 199, 828 S.E.2d 183 (2019).

133 *Id.*

134. Caswell County v. Hanks, 120 N.C. App. 489, 491, 462 S.E.2d 841, 843 (1995). *See also* First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

135. AOC-CVM-303, "Notice of Appeal to District Court," is the preprinted form that can be used to give written notice of appeal.

136. G.S. 1A-1, Rule 5. *See* Ball Photo Supply Co. v. McClain, 30 N.C. App. 132, 226 S.E.2d 178 (1976).

137. Provident Fin. Co. v. Locklear, 89 N.C. App. 535, 366 S.E.2d 599 (1988).

138. G.S. 1A-1, Rule 6(a).

In addition to giving oral notice in open court or filing a written notice of appeal, the appellant must pay the court costs for appeal to the clerk within ten days after the entry of the magistrate's judgment in a summary ejectment action and within twenty days after entry of the magistrate's judgment in all other actions.[139] The court costs for appeal are the same amount as the costs for filing a new action in district court.[140] The appeal is perfected upon giving notice but is automatically dismissed if the appellant fails to pay the costs of appeal within ten days for summary ejectment actions and twenty days for all other actions.[141]

If the magistrate does not announce and sign the judgment in open court at the end of the case, the time for appeal is extended until three days after the magistrate mails a copy of the judgment to the parties or a maximum of ninety days after judgment is entered.[142]

Appealing as an Indigent

An appellant who does not have the money to pay the court costs for appeal may file a petition to appeal as an indigent;[143] if petition is granted, he or she may appeal without paying court costs. The petition to appeal as an indigent must be filed within ten days after the magistrate's judgment is entered and is usually considered by a clerk, though it may be handled by a magistrate, district court judge, or superior court judge.[144] A person is indigent if he or she is (1) receiving food stamps, Work First Family Assistance, Supplement Security Income (SSI), or (2) is represented by a legal services organization that has as its primary purpose the furnishing of legal services to indigent persons or by a private attorney working on behalf of a legal services organization.[145] If an appellant meets one of those criteria, the magistrate or clerk must authorize the person to appeal as an indigent. In other cases, a magistrate or clerk must determine whether the particular appellant is unable to pay the costs of appeal by considering all the relevant circumstances, including the party's assets, income, and expenses.

> Reliance solely upon home ownership has been held to be error. . . . It is not required that the litigant deprive himself of the daily necessities of life to qualify to appear in forma pauperis. . . . The courts of North Carolina are not going to require a litigant to become absolutely destitute before being granted permission to appear as a pauper. Such would destroy the dignity of our people.[146]

[139] G.S. 7A-228(b).

140. G.S. 7A-305(b).

141. G.S. 7A-228(b).

142. G.S. 1A-1, Rule 58.

143. G.S. 7A-228(b1). AOC-G-106, "Petition to Sue/Appeal As An Indigent" is the preprinted form used to appeal as an indigent.

144. G.S. 7A-228(b1).

145. G.S. 1-110.

146. Atlantic Ins. & Realty Co. v. Davidson, 320 N.C. 159, 162, 357 S.E.2d 668, 670 (1987) (citations omitted) (finding indigent a sixty-five-year old woman who receives Social Security benefits of $340 per

Stay of Execution Bond

Appealing a case does not necessarily stop enforcement of the trial court's decision. Usually, a defendant who loses at trial and appeals his or her case must sign a bond, called a *stay of execution bond*, to keep the judgment from being enforced while the case is on appeal. The stay of execution bond has a different purpose from the payment of court costs to appeal (appeal costs), which the appellant must pay to have the district court hear the case. The purpose of the stay of execution bond is to protect the plaintiff from the effects of delaying enforcement of the judgment he or she has won. In small claims cases a judgment for money damages is automatically stayed upon appeal until the case is heard in district court.[147] Thus a defendant who receives such a judgment need not post a stay of execution bond.

However, appeal does not stay execution of a judgment for possession of specific personal property or for summary ejectment.[148] To stay execution of a summary ejectment judgment until the case is heard in district court, a defendant must post an undertaking in compliance with G.S. 42-34.[149] To stay execution of a judgment for possession of specific personal property, the defendant must post a bond with the clerk of superior court, executed by one or more sufficient sureties, "to the effect that if judgment be rendered against the appellant the sureties will pay the amount thereof with costs awarded against the appellant." The language of G.S. 7A-227 is odd because judgment against the defendant would require him or her to give the property, not to pay money, to the plaintiff. The bond form, however, correctly specifies that the sureties agree to pay all damages that the plaintiff might sustain by the defendant's failure to comply with the order.[150]

The requirements for appeal of small claims cases may be summarized as follows. (1) In cases where the magistrate has awarded money, the party appealing must post court costs (appeal costs) unless he or she is appealing as an indigent; but the money judgment is automatically stayed and cannot be enforced until the district court judge rules. (2) A plaintiff who appeals a judgment for possession of personal or real property, must pay court costs; but if the defendant appeals the judgment and wishes to keep possession of the property until the district court's decision, he or she must pay court costs and also post the stay of execution bond.

Although an appellant has twenty days (ten days for summary ejectment actions) after the judgment is entered to pay the court costs of appeal, there is no similar provision for posting a stay of execution bond. A defendant who is appealing (*appellant)* must post the bond to stay execution within ten days after the judgment is entered, since the automatic

month, is unable to work, and has monthly expenses for necessities of $362, a $50 television set, furniture worth $200, her home—valued at $27,150—$10 in cash, and debts amounting to $300).

147. G.S. 7A-227.

148. *Id*.

149. AOC-CVM-304, "Bond to Stay Execution on Appeal of Summary Ejectment Judgment" is the preprinted form available for use. The bond is discussed in detail in [Chapter VI, "Landlord–Tenant Law."]

150. AOC-CVM-906M, "Bond to Stay Execution on Appeal of Judgment to Recover Possession of Personal Property."

stay of execution ceases at that time.[151] But a defendant's failure to post a bond to stay execution does not remove the right to appeal; it merely gives the plaintiff the right to have the clerk issue a writ to enforce the judgment while the case is on appeal. If after ten days the plaintiff has not sought to have the judgment executed, the defendant can post the stay of execution bond. Essentially, after the tenth day it becomes a race to the courthouse between the plaintiff seeking issuance of a writ of possession and the defendant posting a stay of execution bond.

Example 14. William brings an action for summary ejectment and back rent against George. The magistrate announces and signs a judgment in open court on January 16, awarding $450 back rent and possession of the property to William. George states in open court that he wishes to appeal, and the magistrate notes the appeal on the judgment and files the judgment with the clerk that day.

On January 29 William asks the clerk to issue process to enforce the judgment. George has not paid the costs to appeal the case; nor has he signed an undertaking to stay execution of the judgment.

The clerk should not issue a writ of execution for the money judgment since that part of the judgment was automatically stayed when George gave notice of appeal on January 16. The clerk should, however, issue a writ of possession to enforce the possession part of the judgment, since the request was made more than ten days after the judgment was entered and George has not posted a bond to stay execution of the judgment. However, he has twenty days from January 16 to post the costs of appeal with the clerk. If he does so, his appeal will be heard in district court even though he has already been removed from the premises. If George fails to pay the costs of appeal by the end of the day on February 5 (the twentieth day), the appeal is automatically dismissed.

Setting Aside Judgments or Orders

One question frequently asked is whether a magistrate may correct a mistake in an order or judgment. There are several types of mistakes: clerical errors by the magistrate; errors by the parties that are not based on fault; the magistrate's error in hearing a case when the defendant was not served; and errors of law (when the magistrate incorrectly applies the law in the case). The last type of error, a legal error, is not correctable by the magistrate. The purpose of a right to appeal is to correct magistrates' errors of law. Rule 60 of the Rules of Civil Procedure provides a mechanism in certain situations for relief from judgments or orders based on errors other than errors of law. All motions to set aside a judgment must be filed within a reasonable time, and for Rule 60(b)(1) motions (the only type of Rule 60(b) motions magistrates may be authorized to hear) not more than one year after the judgment was entered.[152]

151. G.S. 1A-1, Rule 62(a).

[152] G.S. 1A-1, Rule 60(b).

Clerical Errors

A magistrate may correct clerical mistakes in a judgment or order at any time, on his or her own initiative or on a motion from a party.[153] He or she has the authority to correct a clerical error without giving notice to the parties. Examples of clerical errors in a judgment are a misnomer, an incorrect mathematical computation, and transposition of principal and interest.[154] Rule 60 may not, however, be used to make small but substantive changes that affect the underlying legal rights of the parties.[155] To correct a clerical error the magistrate should enter an order stating that the original judgment or order contained a clerical error and that the magistrate is therefore amending the judgment to correct that error. The magistrate should sign the new judgment, which is marked as an amended judgment, date it as of the date it is signed, mail copies to the parties, and file the order and amended judgment with the clerk.

Excusable Neglect, Mistake, or Surprise

G.S. 1A-1, Rule 60(b) authorizes setting aside judgments and orders on the grounds of excusable neglect, surprise, or mistake; newly discovered evidence; or fraud; or because the judgment is void or has been satisfied, released, or discharged; or for other good cause. Generally, a district court judge must hear a Rule 60(b) motion to set aside a magistrate's judgment. However, G.S. 7A-228 allows the chief district court judge to authorize magistrates to hear Rule 60(b)(1) motions to set aside a magistrate's judgment or order because of a mistake, excusable neglect, or surprise. A motion to set aside a magistrate's judgment or order on other grounds must be heard by a district court judge.

Definitions

Excusable neglect arises when a party does not appear at trial to prosecute the case or defend the case through no fault of his or her own. "[W]hat constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case."[156] A party in a lawsuit is required to give the case "such attention as a man of ordinary prudence usually gives to his important business affairs."[157] If the party fails to meet that standard, the neglect is not excusable. A party who is without fault may also be relieved of a judgment entered as a result of negligence on the part of the party's attorney. For example, when a defendant has conferred with attorneys and kept in touch about the case, but the

153. G.S. 1A-1, Rule 60(a). Snell v. Washington County Bd. of Educ., 29 N.C. App. 31, 222 S.E.2d 756 (1976).

154. WILSON, *supra* note 94, § 60-1.

155. Food Services Specialists v. Atlas Rest. Mgmt., Inc., 111 N.C. App. 257, 431 S.E.2d 878 (1993) (Changing the date of entry of judgment to date not actual date judgment entered is not correcting a clerical error.).

156. Thomas M. McInnis & Assoc., Inc. v. Hall, 318 N.C. 421, 425, 349 S.E.2d 552, 555 (1986).

157. Norton v. McLaurin, 125 N.C. 185, 190, 34 S.E. 269, 270 (1899) (citation omitted). *See*, *e.g.*, Jones v. Statesville Ice & Fuel Co., 259 N.C. 206, 130 S.E.2d 324 (1963); Norton v. Sawyer, 30 N.C. App. 420, 227 S.E.2d 148 (1976).

attorneys have failed to notify the defendant of the trial date, the party's failure to appear at trial would be excusable neglect.[158] However, a party who hires an attorney and never follows up with the attorney would not meet the standard. Examples of excusable neglect include a case in which a defendant relied on her husband's assurances that he would take care of the defense of a suit against both of them;[159] a case in which the party never received notice of the date and time of the trial;[160] or one in which a defendant did not respond to a complaint because the agent on whom the summons and complaint were served did not give the papers to the defendant.[161] However, parties may not assert excusable neglect because they are preoccupied with business or other duties at the time of the lawsuit[162] or because they are so old that they forgot they had been served.[163]

A *mistake* that warrants relief from a judgment is a mistake of fact not of law. For example, in a partition proceeding, partition of a tract of land was set aside on the grounds of mistake when counsel for plaintiffs used an incorrect land description given to him by a third person and the description referred to a tract already owned solely by petitioner.[164]

A *surprise* is "some condition or situation in which a party is unexpectedly placed to his injury, without any fault or negligence of his own, which ordinary prudence could not have guarded against."[165] It is not surprise when a party has a mistaken view of the law.[166] Examples of surprise are when counsel withdraws from a case when the case is called for trial without telling the client[167] or when plaintiff's counsel is detained in another court but does not notify the court about the conflict.[168]

Hearing a Rule 60(b)(1) Motion

As noted above, the chief district court judge may authorize a magistrate to set aside judgments and orders on the grounds of excusable neglect, surprise, or mistake. A party who wishes to have a magistrate's judgment or order set aside must file a written request with a magistrate—the magistrate who issued the judgment or any other magistrate in the county authorized by the judge to hear Rule 60(b)(1) motions. In an unusual case the magistrate may act to set aside his or her own motion in the interest of justice.[169]

158. *See* Mayhew Elec. Co. v. Carras, 29 N.C. App. 105, 223 S.E.2d 536 (1976).

159. Hickory White Trucks, Inc. v. Greene, 34 N.C. App. 279, 237 S.E.2d 862 (1977).

160. Callaway v. Freeman, 71 N.C. App. 451, 322 S.E.2d 432 (1984).

161. Townsend v. Carolina Coach Co., 231 N.C. 81, 56 S.E.2d 39 (1949).

162. *E.g.* Johnson v. Sidbury, 225 N.C. 208, 34 S.E.2d 67 (1945); Engines & Equip., Inc. v. Lipscomb, 15 N.C. App. 120, 189 S.E.2d 498 (1972); Rawleigh, Moses & Co. v. Capital City Furniture, Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

163. Pierce v. Eller, 167 N.C. 672, 83 S.E. 758 (1914).

164. Mann v. Hall, 163 N.C. 50, 79 S.E. 437 (1913).

165. Townsend v. Carolina Coach Co., 231 N.C. 81, 85, 56 S.E.2d 39, 42 (1949) (citations omitted). *See* WILSON, *supra* note 94, § 60-6.

166. Crissman v. Palmer, 225 N.C. 472, 35 S.E.2d 422 (1945).

167. Roediger v. Sapos, 217 N.C. 95, 6 S.E.2d 801 (1940). *See* WILSON, *supra* note 94, § 60-6.

168. Endsley v. Wolfe Camera Supply Corp., 44 N.C. App. 308, 261 S.E.2d 36 (1979).

169. WILSON, *supra* note 94, § 60-12.

A motion to set aside a judgment for excusable neglect, mistake, or surprise cannot be heard ex parte.[170] A hearing must be set and the magistrate must give notice of the date and time of the hearing to all parties. At the hearing, the party seeking to set aside the judgment or order must appear and has the burden of showing that there was excusable neglect, mistake, or surprise on his or her part and—if the moving party is the defendant—that there is a meritorious defense. The magistrate must enter a written order either granting the motion to set aside the judgment or denying it. If the judgment or order is set aside, the magistrate, in the written order, should set the date and time for the case to be retried in small claims court.

Meritorious Defense

It would not make sense for the defendant to bring a motion to set aside a judgment or order against the defendant if his or her absence or neglect would have made no difference in the outcome. For that reason, the defendant must show not only that there was excusable neglect, mistake, or surprise but also that the defendant has a meritorious defense. The defendant need not prove the meritorious defense by offering evidence at the hearing as if it were a trial on the merits but must plead that a real or substantial defense on the merits exists.[171]

> ***Example 15.*** The owner of the Acme Store brings an action against a customer, Charles, for money owed on an account, but Charles does not appear at trial. The store owner testifies that Charles owes him $157.30, and the magistrate enters judgment against Charles. Charles moves to set aside the judgment on the basis of excusable neglect. At the hearing, he testifies that he missed the trial because he unexpectedly had to fly to California the night before the trial because his son was involved in an automobile accident and was hospitalized. He says he was so upset, he forgot about the trial and failed to call the court the next day. He brings an affidavit from the hospital emergency physician and a copy of the police accident report to verify his account. The magistrate believes Charles's evidence and finds this to be excusable neglect. However, that evidence is not enough to set aside the judgment. Charles would also have to prove that he had a meritorious defense he could have presented at the trial. If he also testifies that he had paid the store owner two months before the suit was filed, the magistrate could set aside the judgment on the basis of excusable neglect and reschedule the case for trial.

Effect of Bankruptcy

The purpose of bankruptcy is to relieve the honest debtor from the weight of oppressive indebtedness and permit the debtor to start afresh. When a debtor files a petition for bankruptcy, the bankruptcy court takes jurisdiction over all the debts that person owes and all his or her property and handles payment of those debts. For individuals, there are two kinds of bankruptcy. In straight bankruptcy (Chapter 7) the trustee in bankruptcy

170. Doxol Gas of Angier, Inc. v. Barefoot, 10 N.C. App. 703, 704, 179 S.E.2d 890, 892 (1971).
171. Dollar v. Tapp, 103 N.C. App. 162, 165, 404 S.E.2d 482, 484 (1991).

takes possession of the debtor's property, liquidates it, pays off as much of the debt as possible, and discharges the remaining debt. In wage earner or debt adjustment bankruptcy (Chapter 13), the court extends the time allowed for payment of the debt and may reduce the total amount of the debt. Most bankruptcy provisions apply to both Chapter 7 and Chapter 13 bankruptcies, but some special provisions apply only to Chapter 13 bankruptcies. Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,[172] individual debtors can no longer choose which kind of bankruptcy to file. Consumers must file under Chapter 13 unless they meet a specific means test set out in the law.

The federal bankruptcy law provides that the filing of a petition for bankruptcy operates to stay

1. the commencement or continuation—including the issuance or employment of process—of a judicial action against a debtor that was or could have been begun before the filing of the bankruptcy petition or an action to recover a claim against a debtor that arose before the filing of the petition.
2. the enforcement against the debtor or property of the estate, of a judgment obtained before the bankruptcy case was filed.
3. any act to obtain possession of property of the estate or to exercise control over property of the estate.
4. any act to create, perfect, or enforce any lien against property of the estate.
5. any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the bankruptcy case.[173]

What this means is that if the defendant in a case filed in small claims court has filed a bankruptcy petition, the magistrate may not hear or enter judgment in the case.

In Chapter 13 bankruptcies the stay also operates to prevent a creditor from commencing or continuing an action to collect all or part of a debt incurred by the debtor primarily for personal, family, or household purposes from any co-debtor unless the co-debtor became liable in the ordinary course of business.[174] A co-debtor is someone who incurred the debt along with the bankrupt debtor or who gave security for the debt. For example, a husband and wife have a joint VISA card, which is in default. The husband files Chapter 13 bankruptcy. The stay applies not only to the husband, but also to his wife.

The general bankruptcy stay remains in effect until the case is closed or dismissed or a discharge is granted or denied; but the specific Chapter 13 stay for co-debtors operates until the bankruptcy case is closed, dismissed, or converted to a Chapter 7 bankruptcy.

A defendant in a small claims case is not required to file any federal court document with the magistrate to prove that he or she has filed a bankruptcy petition; therefore a magistrate should not go forward with the case if told that the defendant has filed for bankruptcy. However, the magistrate can take steps to verify that the petition has actually

172. Pub. Law No. 109-8.
173. 11 U.S.C. § 362.
174. 11 U.S.C. § 1301.

been filed by telephoning the bankruptcy clerk[175] or checking the website;[176] or he or she may continue the case for a couple of days to ask the debtor to bring in some documentation of the filing or to ask the plaintiff to determine whether the defendant has filed for bankruptcy. If the magistrate determines that the stay applies, he or she must enter an order placing the case on inactive status because the defendant has filed for bankruptcy.[177] The magistrate should not, however, dismiss the case because, as discussed below, in some circumstances the bankruptcy court will allow the plaintiff to proceed with the state court action.

There are a several ways in which the state court can continue an action after a bankruptcy petition has been filed, but all require the creditor to seek relief from the bankruptcy court. The most common way is for the creditor to seek to have the bankruptcy court lift the stay as to particular property or a particular claim. In that case the order from the bankruptcy court lifting the stay will allow the creditor to proceed to enforce his or her claim in state court. Also the trustee in a Chapter 7 bankruptcy may abandon (i.e., release) certain property from the bankrupt's estate and allow creditors who have security interests in that property to enforce those interests in state courts; the trustee signs an order abandoning specific property, and the creditor can proceed in state court to satisfy the debt out of that property.

Example 16. Sam purchases a refrigerator from Sears and signs a security agreement for the $2,000 extension of credit from Sears to purchase the refrigerator. Six months later Sam files Chapter 7 bankruptcy. At that point, the refrigerator has a fair market value of $1,000, but Sam still owes Sears $1,500 on it. Sears can seek to have the trustee abandon the refrigerator since it has no equity (value in excess of the amount owed under the security agreement) that could be used to pay any of Sam's other debts. Sears can then bring an action in small claims court to repossess the refrigerator as authorized by the security agreement, although it cannot sue Sam for any deficiency remaining after repossessing and selling the refrigerator.

Special Provisions for Residential Leases

Judgment for Possession before Bankruptcy

The new bankruptcy code provides that the filing of a petition does not stay enforcement of an eviction involving residential property on which the debtor resides as a tenant if the landlord has obtained a judgment for possession of the property before the filing date of the bankruptcy petition.[178] This provision applies for thirty days after the bankruptcy

175. The telephone numbers for the bankruptcy clerks in North Carolina are: Eastern District—(252) 237-0248 (Greenville); (919) 856-4752 (Raleigh); Middle District (336) 333-5647; and Western District (704) 350-7500.

176. Eastern District—www.nceb.uscourts.gov; Middle District—www.ncmb.uscourts.gov; Western District—www.ncwb.uscourts.gov. These websites may require a PACER account and password and may charge a fee for information.

177. Form AOC-G-108, "Order" should be used.

178. 11 U.S.C. § 362(b)(22).

filing. The bankruptcy petition must indicate that a judgment for possession of residential premises was entered against the debtor before the filing of the petition and must list the name and address of the landlord. The debtor then has thirty days after filing the petition to file with the bankruptcy court a certification that would allow the stay to prevent enforcement of the eviction. If the debtor does not file a certification within the allowable time period, the stay is lifted and the clerk may issue a writ of possession.

The landlord can challenge the certification by filing an objection. The bankruptcy court must then hold a hearing to determine whether to authorize relief from the stay.

Evictions for Criminal Activity

The new bankruptcy code[179] also provides an exception to the automatic stay for an eviction action that seeks possession of the residential property in which the debtor resides as a tenant based on endangerment of the property or illegal use of controlled substances on the property. The landlord must file a certification with the bankruptcy court—and serve a copy on the tenant—that a summary ejectment action had been filed at the time the tenant filed bankruptcy or that the conduct justifying the eviction occurred within the thirty days preceding the certification filing. The stay is lifted fifteen days after the landlord files the certification unless the tenant objects to the certification. If there is an objection the bankruptcy court holds a hearing to determine whether the stay applies; that is, whether the situation giving rise to the certification existed or—if it existed—whether it has been remedied.

If the debtor does not file an objection, the bankruptcy clerk must serve upon the tenant and landlord a certified copy of the docket indicating that no certification was filed. The landlord may use that certified copy to prove to the magistrate that the summary ejectment action in the state court may proceed. The bankruptcy act does not define "endangerment of property." Until the bankruptcy court rules on that issue, a landlord who has grounds for bringing an eviction on the basis of criminal activity might qualify for the exception to the automatic stay.

Stays to Other Bankruptcy Actions

The automatic stay provision prohibits any act to obtain possession of property in the bankrupt debtor's estate, and the debtor's leasehold interest is considered property of the estate.[180] Therefore, if a debtor files a bankruptcy petition before a summary ejectment judgment has been entered, the magistrate may not proceed with the case and must handle it like any other small claims case in which the defendant has filed bankruptcy. The landlord must seek relief in the bankruptcy court, and the bankruptcy court is likely to lift the stay and allow the landlord to proceed with the eviction unless the tenant provides adequate assurance of future compliance with the lease. Past rent

179. 11 U.S.C. § 362(b)(23) and (m).

180. Property of the estate includes all legal and equitable interest of the debtor in property as of the commencement of the bankruptcy case (the filing of the petition). 11 U.S.C. § 541.

that was *in arrears* when the judgment was entered will not be collected, but the debtor must pay future rent.

Effect of Bankruptcy on Judgment

What is the effect of the bankruptcy proceeding when it is completed? The most common result of a bankruptcy proceeding is that the debts covered by the proceeding are discharged; in other words, creditors may not continue to collect debts or file legal action against the debtor seeking money owed them before the bankruptcy filing, *with one exception*: if the debtor had signed a security agreement securing the debt and the debtor remains in possession of the secured property after the discharge in bankruptcy, the creditor may bring an action for possession of the secured property[181] but may not sue for a deficiency. Sometimes a bankruptcy case is dismissed without discharge of the debts because the debtor has not complied with the bankruptcy rules. In that case, the creditor may pursue any actions it had against the debtor before the latter filed for bankruptcy.

Procedural Issues in Appeals to District Court

If the appellant fails to appear in district court and prosecute the appeal, the presiding judge may dismiss the appeal; in such a case the magistrate's judgment is affirmed.[182] Because the failure to appear and prosecute applies only if the appeal is docketed and regularly set for trial,[183] the district court judge's order of dismissal should indicate that the case was set for trial and proper notice was given. The statute specifies that the judgment of the magistrate "be affirmed," but since the appeal is dismissed for failing to appear, the magistrate's judgment becomes the final judgment. As a consequence, the judgment may be enforced immediately, since it was entered more than ten days before the appeal was dismissed. The same result would occur if the appellant had withdrawn or dismissed the appeal.[184]

Upon appeal for a de novo trial, a plaintiff may take a voluntary dismissal under G.S. 1A-1, Rule 41(a) and terminate the lawsuit[185] no matter which party appealed. In that situation the magistrate's judgment is not reactivated, because a de novo appeal is, by its nature, a case originally brought in district court—as if the trial in the magistrate's court never happened.

In an unpublished opinion, the Court of Appeals has held that a plaintiff who files a small claims action for $10,000 but actually had a claim in excess of $10,000 and subsequently appeals the small claims judgment to district court may amend the

181. 11 U.S.C § 524(a). *See* Chandler Bank of Lyons v. Ray, 804 F.2d 577 (10th Cir. 1986).

182. G.S. 7A-228(c). *See* Brown v. County of Avery, 164 N.C. App. 704, 596 S.E.2d 334 (2004) (dismissal rule applies even if there was intervening arbitrator's award because award is a nullity if party seeks trial de novo rather than accepting award).

183. Fairchild Properties v. Hall, 122 N.C. App. 286, 468 S.E.2d 605 (1996).

184. First Union Nat'l Bank v. Richards, 90 N.C. App. 650, 369 S.E.2d 620 (1988).

185. *Id.* at 653–54, 369 S.E.2d at 622.

complaint in district court to seek the full amount of the claim.[186] In that case, the complaint filed by plaintiff in small claims did not seek to recover the entire amount due, but instead sought an amount within the jurisdictional limits of the small claims court. Once defendants appealed the small claims court decision to district court, the judge was permitted to allow "repleading or further pleading by some or all of the parties,"[187] including plaintiff. Plaintiff was permitted to amend the complaint to seek the full amount due, because the jurisdictional limits of the magistrate's court were no longer applicable in district court. While unpublished opinions are not binding precedent, they do give insight into how the court may treat similar cases in the future.

When a small claims case is appealed to district court, the district court, on its own motion, may either order the party to replead or may try the case on the pleadings as originally filed;[188] and, upon the request of a party, the judge must allow appropriate counterclaims, cross-claims, third-party claims, and other pleadings.

[186] Blevins Workshop, Inc. v. Williams, 206 N.C. App. 596, 698 S.E.2d 768 (2010).

[187] G.S. 7A-229.

188. G.S. 7A-229 *See* Don Setliff & Assoc., Inc. v. Subway Real Estate Corp., 178 N.C. App. 385, 631 S.E.2d 526 (2006) (Defendant can raise affirmative defense in district court because not required to be pled in small claims court.).

Appendix 1

Model General Order regarding Small Claims Assignments and Magistrates' Authority

(*Language in parentheses is optional. Language in brackets gives alternatives, and only one should be selected.*)

Pursuant to G.S. 7A-211 the undersigned judge issues this general order to the Clerk of Superior Court and the magistrates of _____ County regarding the assignment of cases to small claims court within the county.

The undersigned hereby assigns to small claims court cases which meet all of the following four requirements and requests the Clerk to calendar those cases for the regular small claims court: Cases in which the amount in controversy at the time of the filing of the complaint is $10,000 or less; the plaintiff is seeking monetary damages, recovery of specific personal property, summary ejectment, or any combination of these remedies; the plaintiff requests that the case be assigned to a magistrate; and at least one of the defendants is a resident of the county in which the complaint is filed. The filing of a complaint on a regular AOC-CVM complaint form is a request for assignment to small claims court.

The Clerk is also ordered to assign to the regular small claims court cases in which the plaintiff seeks to enforce a motor vehicle lien pursuant to G.S. 44A-2(d) or 20-77; the amount in controversy is $10,000 or less; the plaintiff requests assignment to a magistrate; and the claim arose in the county in which the complaint is filed.

(Cases filed on small claims complaints but not meeting the criteria set out above are not assigned and should be sent to district court.)

In determining whether the amount in controversy is within the allowable limit, the clerk shall apply the following rules: [In complaints for money owed, the "total amount owed" is the amount in controversy, except if the complaint alleges an unfair trade practice the amount in controversy is triple the total amount owed.] [In complaints for money owed, the "principal amount owed" is the amount in controversy, except if the complaint alleges an unfair trade practice, the amount in controversy is triple the principal amount owed.][189] In summary ejectment cases, the amount in controversy is the "total amount due." In actions to recover possession of personal property, the amount in controversy is the "total value of the property to be recovered" plus the "total amount of

189. The chief district judge must decide which interpretation of the amount-in-controversy statute to follow and choose one of the two bracketed sections as appropriate. G.S. 7A-243(1) specifies that the amount in controversy is computed without regard to interest and costs, while G.S. 7A-243(2) states that where monetary relief is prayed, the amount prayed for is in controversy. In trying to read the two sections together, it raises the question whether "interest and costs" refers to post-judgment interest and costs that are not known at the time of trial and are added by the clerk as opposed to prejudgment interest in a contract case. There are no cases that answer the question so the chief judge must decide for purposes of assignment. One policy argument for the "total amount" reading is that the legislature wished to limit the dollar amount of cases that were heard by magistrates.

damages," if any. In motor vehicle lien cases, the amount in controversy is the "total lien claimed to date."

When complaints for expedited summary ejectment under vacation rental agreements are filed with the clerk, the clerk shall assign the cases to any magistrate in the county who is available. If such an action is filed at a time when the clerk's office is closed, it shall be filed with the criminal magistrate's office and any magistrate who is on duty shall schedule the case for a hearing and issue a summons pursuant to G.S. 42A-24. Any magistrate within the county is hereby authorized to conduct expedited eviction hearings for vacation rental agreements, whether or not regularly assigned to hold small claims court.

(Pursuant to G.S. 7A-228 the undersigned judge authorizes [the following magistrates: (*name magistrates)*] [all magistrates assigned to hold small claims court] to hear motions to set aside an order or judgment entered in small claims court pursuant to G.S. 1A-1, Rule 60(b)(1) and order a new trial before a magistrate.)

Issued the _____ day of _____, 20__. _____

Chief District Judge, _____ District Court District

Tab: Involuntary Commitment

INVOLUNTARY COMMITMENT

Criteria for Involuntary Commitment in North Carolina

Mental Illness (Adults)
an illness that so lessens the capacity of the individual to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control.

Mental Illness (Minors)
a mental condition, other than mental retardation alone, that so impairs the youth's capacity to exercise age-adequate self-control or judgment in the conduct of his activities and social relationships that he is in need of treatment.

Substance abuse
the pathological use or abuse of alcohol or other drugs in a way or to a degree that produces an impairment in personal, social, or occupational functioning. Substance abuse may include a pattern of tolerance and withdrawal.

Dangerous to self
Within the relevant past, the individual has:

1. acted in such a way as to show that
    a. he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and
    b. there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given. Behavior that is grossly irrational, actions that the individual is unable to control, behavior that is grossly inappropriate to the situation, or other evidence of severely impaired insight and judgment creates an inference that the individual is unable to care for himself; or
2. attempted suicide or threatened suicide and there is a reasonable probability of suicide unless adequate treatment is given; or
3. mutilated himself or attempted to mutilate himself and there is a reasonable probability of serious self-mutilation unless adequate treatment is given.

Previous episodes of dangerousness to self, when applicable, may be considered when determining the reasonable probability of serious physical debilitation, suicide, or serious self-mutilation.

Dangerous to others
Within the relevant past the individual has:

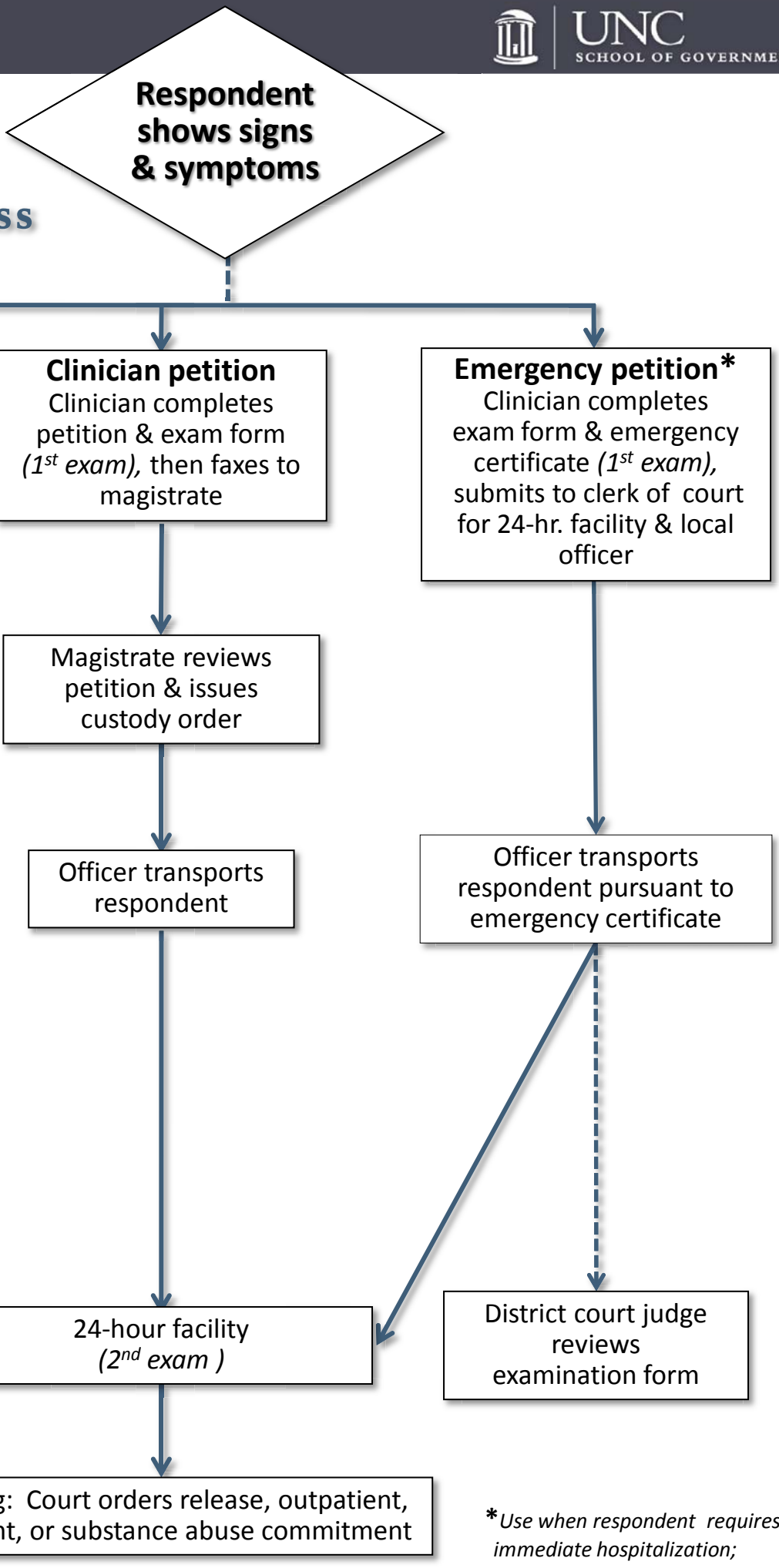
1. inflicted, attempted to inflict, or threatened to inflict serious bodily harm on another and there is a reasonable probability that this conduct will be repeated, or
2. acted in a way that created a substantial risk of serious bodily harm to another and there is a reasonable probability that this conduct will be repeated, or
3. engaged in extreme destruction of property and there is a reasonable probability that this conduct will be repeated.

Previous episodes of dangerousness to others, when applicable, may be considered when determining the reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is evidence of dangerousness to others.

Source: NC General Statutes 122C-3

Mark Botts, Associate Professor (2009)

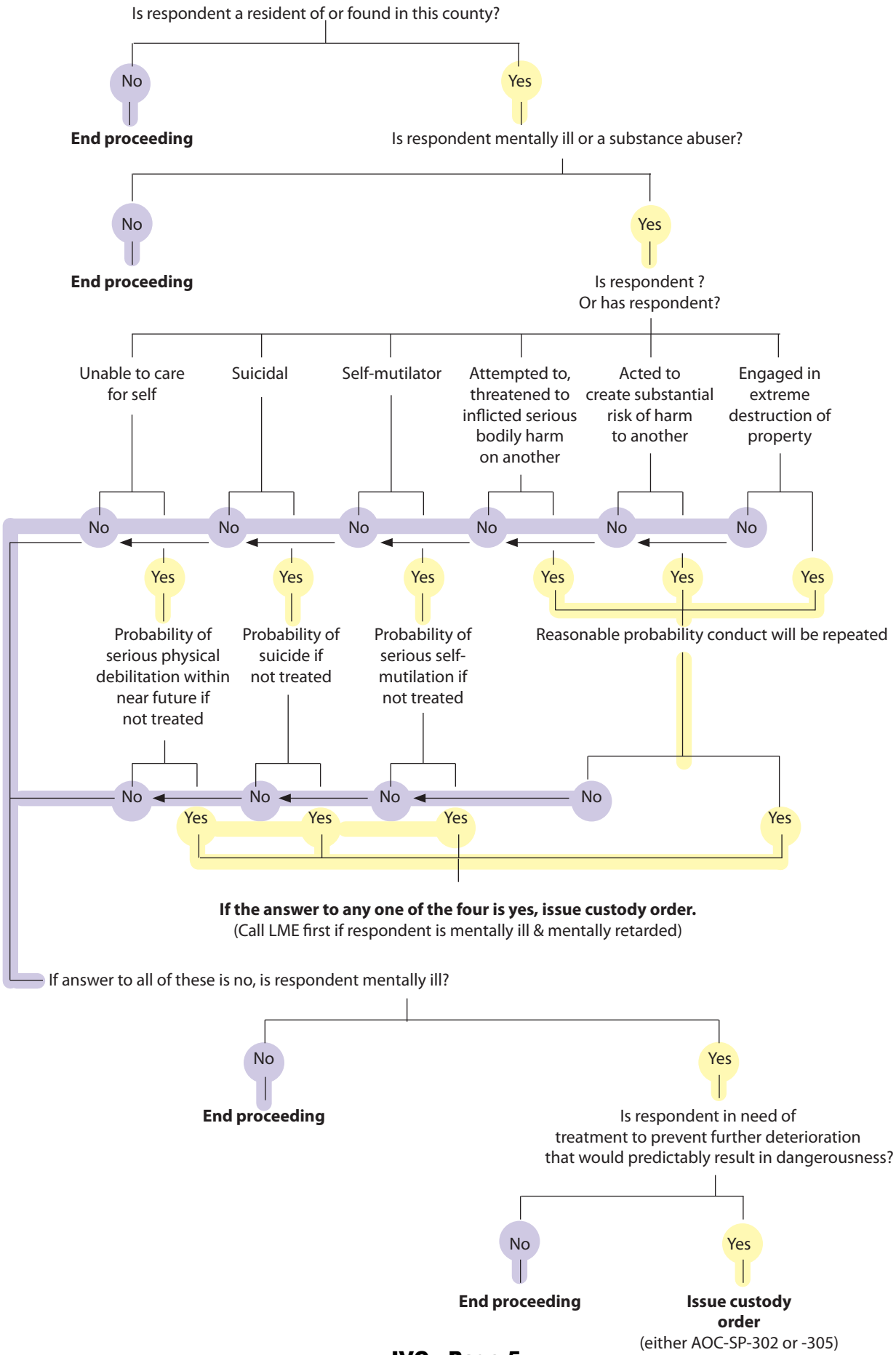
North Carolina Involuntary Commitment Process



**Use when respondent requires immediate hospitalization; procedure by-passes magistrate.*

Mark Botts, Associate Professor (2009)

Magistrate's Involuntary Commitment Decision Tree



Joan Brannon
Institute of Government

COMMON QUESTIONS TO ASK TO OBTAIN INFORMATION FOR THE PETITION FOR INVOLUNTARY COMMITMENT

1. Has the person harmed or threatened to harm himself or others within the past 24 hours? Week? Month? 3 months?
   (a) What did he/she do to you?
   (b) What did he/she do to others?

2. Is the person hallucinating (seeing or hearing things that other people don't see or hear)?
   (a) What is he/she seeing or hearing?

3. Can the person identify the day, where he is, his name, and his age?

4. Does the person have unreasonable thoughts that people are talking about him or are going to kill or hurt him?

5. Is the person making elaborate, exaggerated claims about himself? Such as:
   (a) Being on a special mission;
   (b) Being another important and powerful person;
   (c) Being a part of a powerful organization.

6. Does the person have trouble sleeping at night? How long since the person had a normal night's rest?

7. Has the person consumed more than 1 pint of alcohol per day for the past 3-10 days?

8. Is the person taking any medication?
   (a) What is it?
   (b) Has the person taken any illegal drugs within the past 24 hours? Week? Month? 3 months?
      (1) What kind of drug?
      (2) How much?

9. Has there been any change in the person's appetite? More? Less? Not eating?

10. Is the person working and doing his/her normal activities?

11. Is the person not able to take care of himself of his mental condition? (Eat, sleep, dress, bathe, use the toilet, stay out of traffic?)

Involuntary Commitment—Case Studies
(July 2015)

1. You are a magistrate who receives a petition from an emergency room physician. The physician has checked box number 1 on the petition, which states that the respondent, Martin, is "mentally ill and dangerous to self of others or mentally ill and in need of treatment in order to prevent further disability and deterioration that would predictably result in dangerousness." The facts upon which the physician's opinion is based, according to the petition, are: "Patient behaving in a bizarre manner. Confused. Poor judgment. Unclear if suicidal."

   What do you do? Describe what you do and explain why.

2. Molly lives with her husband and daughter. Her husband reports that Molly has forgotten to turn off the stove two times in the last week, resulting in the burning of some pots and pans and a Formica countertop. Molly is extremely forgetful, frequently talks to the wall, and appears to be out of touch with her real surroundings. She has been diagnosed with bipolar disorder (manic-depressive disorder).

   Is Molly dangerous to herself or others? Why or why not?

3. John goes downtown, hangs out on the main street sidewalk, blocks people from walking by, preaches loud words, and refuses to leave after being directed by the city police. John's brother says that John is religiously preoccupied, has ideas of persecution, and delusions of grandeur. John cannot understand why City Hall will not give him a license. John's brother is afraid that if John persists in trying to convert someone on the street who is resisting John's idea, then this person might become physically aggressive toward John. John's brother does not get any indication that John is aggressively motivated in the sense of being physically violent. John's brother has prepared a petition/affidavit for commitment for the magistrate. John's brother has written down in the petition the facts stated above and added that he believes John is in a mentally ill state of mind, is dangerous to himself or others, and needs medical treatment.

   Is John dangerous to himself or others? Why or why not?

4. Same facts as in number 3, except the petitioner adds that John "assaulted two people yesterday." Is John dangerous to himself or others? Why or why not?

5. Jane has been unemployed for almost one year, having left her job because she felt she was being harassed by married men at work. She has not attempted to seek other employment and has been living in her car for the past two weeks, despite the cold weather (December). Jane believes that people are harassing her. Jane's daughter, Mary, was able to get her mother assessed by a physician who diagnosed Jane as suffering from psychotic depression, and possibly paranoid schizophrenia. The doctor also noted to Mary that Jane was not eating well. Since this initial evaluation two weeks ago, Jane has refused treatment and begun living in her car. Mary reports that her mother seems to have imaginary friends visiting her car, has a flat affect, and believes that others are "harming her." Mary believes that her mother is incapable of providing for herself in her present state and is not getting sufficient nourishment. Mary says that Jane does not appear to have eaten much in the last two weeks and is losing weight. Jane apparently runs the car engine periodically to keep warm. Mary fears that Jane might die of carbon monoxide poisoning if Jane continues to live in her car the rest of the winter.

   Is Jane dangerous to herself? Why or why not?

6. Mary has a hammer in the house, breaks everything she can find, and told her husband that if he went to sleep she would bash his brains out. She has threatened to kill her daughter, granddaughter and sister. The daughter says, "Upon coming home, I found the TV busted, the telephone had been cut away from the wall, and glass was all over the living room. When I asked what happened, mother became excited and said that she had broken the TV, cut the phone, and broke some of the glass. On the phone the night before, mother had threatened to kill father and aunt."

   Is Mary dangerous to herself or others? Why or why not?

7. David was found sitting on the edge of a busy airport runway. He had been observed in the woods with a rope around his neck and cutting his arm with a knife. He kept an iron pipe and hatchet under his bed and threatened his mother three days age by forcing her to sit in one chair and not move for two hours while he was screaming, shouting, and cursing. He threatened to "bust" his mother's head if she called anybody. He complained of demons and of feeling that his bones were being pulled out.

   Is David dangerous? Why or why not?

Involuntary Commitment

"Reasonable Grounds to Believe"

"The affidavit shall include facts on which the affiant's opinion is based." G.S. 122C-261(a).

"The affidavit must set out facts upon which the affiant's opinion is based." In re Hernandez, 46 N.C. App. 265 (1980).

"If the clerk or magistrate finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent [probably meets the commitment criteria], then clerk or magistrate shall issue an order . . . " G.S. 122C-261(b).

Reasonable grounds to believe: The *knowledge of facts* that would lead a reasonable person of ordinary intelligence and prudence to believe.

Reasonable grounds to believe that the respondent probably meets the commitment criteria: The *knowledge of facts* that would lead a reasonable person of ordinary intelligence and prudence to believe the respondent probably meets the commitment criteria.

For the magistrate or clerk to have reasonable grounds to believe, he or she must first have knowledge of facts that lead to that belief. To have knowledge of facts that would give reasonable grounds to believe, the affiant must assert facts (signs and symptoms) in the affidavit. Mere conclusions or opinions do not suffice to give the magistrate or clerk reasonable grounds to believe, for the magistrate cannot simply adopt the belief of others. Rather, the magistrate must come to his or her own belief based on facts asserted in the affidavit.

What Happens After a Magistrate Issues a Custody and Transportation Order

Source: Administration of Justice Bulletin, September 2007

Upon request, the magistrate or clerk of court has issued an order for custody and transportation of a person alleged to be in need of examination and treatment. This order is not an order of commitment but only authorizes the person to be evaluated and treated until a court hearing. The individual making the request has filed a petition with the court for this purpose and is, therefore, called the "petitioner." The individual to be taken into custody for examination will have an opportunity to respond to the petition and is, therefore, called the "respondent." If you are taken into custody, the word "respondent," below, refers to you.

1. A law enforcement officer or other person designated in the custody order must take the respondent into custody within 24 hours. If the respondent cannot be found within 24 hours, a new custody order will be required to take the respondent into custody. Custody is not for the purpose of arrest, but for the respondent's own safety and the safety of others, and to determine if the respondent needs treatment.

2. Without unnecessary delay after assuming custody, the law enforcement officer or other individual designated to provide transportation must take the respondent to a physician or eligible psychologist for examination.

3. The respondent must be examined as soon as possible, and in any event within 24 hours, after being presented for examination. The examining physician or psychologist will recommend either outpatient commitment, inpatient commitment, substance abuse commitment, or termination of these proceedings.

    - *Inpatient commitment*: If the examiner finds the respondent meets the criteria for inpatient commitment, the examiner will recommend inpatient commitment. The law enforcement officer or other designated person must take the respondent to a 24-hour facility.

    - *Outpatient commitment*: If the examiner finds the respondent meets the criteria for outpatient commitment, the examiner will recommend outpatient commitment and identify the proposed outpatient treatment physician or center in the examination report. The person designated in the order to provide transportation must return the respondent to the respondent's regular residence or, with the respondent's consent, to the home of a consenting individual located in the originating county. The respondent must be released from custody.

    - *Substance abuse commitment*: If the examiner finds the respondent meets the criteria for substance abuse commitment, the examiner must recommend commitment and whether the respondent should be released or held at a 24-hour facility pending a district court hearing. Depending upon the physician's recommendation, the law enforcement officer or other designated individual will either release the respondent or take him or her to a 24-hour facility.

    - *Termination*: If the examiner finds the respondent meets neither of the criteria for commitment, the respondent must be released from custody and the proceedings terminated. If the custody order was based on the finding that the respondent was probably mentally ill, then the person designated in the order to provide transportation must return the respondent to the respondent's regular residence or, with the respondent's consent, to the home of a consenting individual located in the originating county.

4. If the law enforcement officer transports the respondent to a 24 hour facility, another evaluation must be performed within 24 hours of arrival. This evaluator has the same options as indicated in step 3 above. If the respondent is not released, the respondent will be given a hearing before a district court judge within 10 days of the date the respondent was taken into custody.

STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
District Court Division

IN THE MATTER OF

Name And Address Of Respondent

AFFIDAVIT AND PETITION FOR INVOLUNTARY COMMITMENT

G.S. 122C-261, 122C-281

Social Security No. Of Respondent (if available)	*Date Of Birth*	*Drivers License No. Of Respondent*	*State*

Spoken Language Court Interpreter Needed For Any Party, Victim, Or Witness? (If Yes, identify person(s) and language(s). Interpreters provided for all court proceedings at no cost.)

☐ No ☐ Yes: *(explain)*

I, the undersigned affiant, being first duly sworn, and having sufficient knowledge to believe that the respondent is a proper subject for involuntary commitment, allege that the respondent is a resident of, or can be found in the above named county, and:

(check all that apply)

☐ 1. has a mental illness and is dangerous to self or others or has a mental illness and is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness.

☐ in addition to having a mental illness, respondent also has an intellectual disability.

☐ 2. is a substance abuser and dangerous to self or others.

The facts upon which this opinion is based are as follows: (*State facts, not conclusions, to support ALL blocks checked.*)

Name And Address Of Nearest Relative Or Guardian		*Name And Address Of Person Other Than Petitioner Who May Testify*	
Home Telephone No.	*Business Telephone No.*	*Home Telephone No.*	*Business Telephone No.*

Petitioner requests the court to issue an order to a law enforcement officer to take the respondent into custody for examination by a person authorized by law to conduct the examination for the purpose of determining if the respondent should be involuntarily committed.

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME

Signature Of Petitioner

Date	*Signature*	*Name And Address Of Petitioner (type or print)*
☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court* ☐ *Magistrate*		

☐ *Notary (use only with commitment examiner petitioner)*	*Date Notary Commission Expires*	*Relationship To Respondent*	
SEAL	*County Where Notarized*	*Home Telephone No.*	*Business Telephone No.*

Original-File Copy-Hospital Copy-Special Counsel Copy-Attorney General
(Over)

AOC-SP-300, Rev. 7/24

PETITIONER'S WAIVER OF NOTICE OF HEARING

I voluntarily waive my right to notice of all hearings and rehearings in which the Court may commit the respondent or extend the respondent's commitment period, or discharge the respondent from the treatment facility.

Signature Of Witness	*Date*
	Signature Of Petitioner

NOTE: *"Upon the request of the legally responsible person or the minor admitted or committed, and after that minor has both been released and reached adulthood, the court records of that minor made in proceedings pursuant to Article 5 of [Chapter 122C] may be expunged from the files of the court." G.S. 122C-54(e).*

STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
District Court Division

IN THE MATTER OF	
Name And Address Of Respondent	**FINDINGS AND CUSTODY ORDER INVOLUNTARY COMMITMENT** **(PETITIONER APPEARS BEFORE MAGISTRATE OR CLERK)** G.S. 122C-252, -261, -263, -281, -283

Social Security No. Of Respondent	*Date Of Birth*	*Driver's License No. Of Respondent*	*State*

I. FINDINGS

The Court finds from the petition in the above matter that there are reasonable grounds to believe that the facts alleged in the petition are true and that the respondent probably:

(Check all that apply)

☐ 1. has a mental illness and is dangerous to self or others or has a mental illness and is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness.

☐ In addition to probably having a mental illness, the respondent also probably has an intellectual disability. *(If this finding is made, see G.S. 122C-261(b) and (d) for special instructions.)*

☐ 2. is a substance abuser and dangerous to self or others.

II. CUSTODY ORDER

TO ANY LAW ENFORCEMENT OFFICER:

The Court ORDERS you to take the above named respondent into custody **WITHIN 24 HOURS AFTER THIS ORDER IS SIGNED** and take the respondent for examination by a person authorized by law to conduct the examination. (A COPY OF THE COMMITMENT EXAMINER'S FINDINGS SHALL BE TRANSMITTED TO THE CLERK OF SUPERIOR COURT IMMEDIATELY.)

→ IF the commitment examiner finds that the respondent is NOT a proper subject for involuntary commitment, then you shall take the respondent home or to a consenting person's home in the originating county and release him/her.

→ IF the commitment examiner finds that the respondent has a mental illness and is a proper subject for outpatient commitment, then you shall take the respondent home or to a consenting person's home in the originating county and release him/her.

→ IF the commitment examiner finds that the respondent has a mental illness and is a proper subject for inpatient commitment, then you shall transport the respondent to a 24-hour facility designated by the State for the custody and treatment of involuntary clients and present the respondent for custody, examination and treatment pending a district court hearing.

→ IF the commitment examiner finds that the respondent is a substance abuser and subject to involuntary commitment, the commitment examiner must recommend whether the respondent be taken to a 24-hour facility or released, and then you shall either release him/her or transport the respondent to a 24-hour facility designated by the State for the custody and treatment of involuntary clients and present the respondent for custody, examination and treatment pending a district court hearing.

Date	*Time*	☐ AM ☐ PM	*Signature*	☐ *Deputy CSC* ☐ *CSC* ☐ *Assistant CSC* ☐ *Magistrate*

This Order is valid throughout the State. If the respondent is taken into custody, this Order is valid for seven (7) days from the date and time of issuance.

Original-File Copy-24-Hour Facility Copy-Special Counsel Copy-Attorney General
(for *Return Of Service*, see AOC-SP-302A Return)

IN THE MATTER OF	_____ County	File No.
Name Of Respondent	Date And Time Of Issuance Of Custody Order	**NOTE:** *Use this page for the return of a Findings And Custody Order Involuntary Commitment.*

III. RETURN OF SERVICE
A. CUSTODY CERTIFICATION

☐ Respondent WAS NOT taken into custody for the following reason:

☐ I certify that this Order was received and respondent served and taken into custody as follows:

Date Respondent Taken Into Custody	Time ☐ AM ☐ PM
Name Of Law Enforcement Officer (type or print)	Signature Of Law Enforcement Officer
Name Of Law Enforcement Agency	Badge No. Of Officer

NOTE TO LAW ENFORCEMENT OFFICER: *If respondent is not taken into custody within 24 hours after this Order is signed, check the appropriate box above and return to the Clerk of Superior Court immediately. If respondent is served and taken into custody, complete return of service. When taking respondent into custody you must inform him or her that he or she is not under arrest and has not committed a crime, but is being transported to receive treatment and for his or her own safety and that of others.*

B. PATIENT DELIVERY TO FIRST EXAMINATION SITE

The respondent was presented to an authorized commitment examiner as shown below:

Date Presented	Time ☐ AM ☐ PM	Name Of Commitment Examiner (type or print)
Name Of Examining Facility		County Of Examining Facility
Name Of Law Enforcement Officer (type or print)		Signature Of Law Enforcement Officer
Name Of Law Enforcement Agency		Badge No. Of Officer

C. FOR USE WHEN TRANSPORTING AFTER FIRST EXAMINATION: PATIENT RELEASED OR DELIVERED TO 24-HOUR FACILITY

☐ 1. The commitment examiner found that the respondent does not meet the commitment criteria, or meets the criteria for outpatient commitment, or meets the criteria for substance abuse commitment and should be released pending a hearing. I returned respondent to his/her regular residence or the home of a consenting person and released respondent from custody.

☐ 2. The commitment examiner found that the respondent has a mental illness and meets the criteria for inpatient commitment, or meets the criteria for substance abuse commitment and should be held pending a district court hearing. I transported and placed the respondent in the custody of the 24-hour facility named below for observation and treatment.

Name Of 24-Hour Facility	County Of 24-Hour Facility

☐ 3. Respondent was temporarily detained under appropriate supervision at the site of first examination because the first commitment examiner recommended inpatient commitment and a 24-hour facility was not immediately available or medically appropriate. Upon further examination, a commitment examiner determined that the respondent no longer meets inpatient commitment criteria or meets the criteria for outpatient commitment. I returned the respondent to his/her regular residence or the home of a consenting person and released respondent from custody.

Date Delivered	Time Delivered ☐ AM ☐ PM	Name Of Commitment Examiner (type or print)
Name Of Examining Facility		County Of Examining Facility
Name Of Law Enforcement Officer (type or print)		Signature Of Law Enforcement Officer
Name Of Law Enforcement Agency		Badge No. Of Officer

NOTE TO LAW ENFORCEMENT OFFICER: *Upon completing this section, immediately return this form and a copy of the commitment examiner's written report (Form No. DMH 5-72-19) to the Clerk of Superior Court of the county where the petition was filed and the custody order issued.*

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
District Court Division

IN THE MATTER OF

Name And Address Of Respondent

FINDINGS AND CUSTODY ORDER INVOLUNTARY COMMITMENT

(PETITIONER IS CLINICIAN WHO HAS EXAMINED RESPONDENT)

G.S. 122C-252, -261, -263, -281, -283

Social Security No. Of Respondent	*Date Of Birth*	*Driver's License No. Of Respondent*	*State*

I. FINDINGS

The Court finds from the petition in the above matter that there are reasonable grounds to believe that the facts alleged in the petition are true and that the respondent probably:

(Check all that apply)

☐ 1. has a mental illness and is dangerous to self or others.

☐ In addition to probably having a mental illness, the respondent also probably has an intellectual disability. *(If this finding is made, see G.S. 122C-261(b) and (d) for special instructions.)*

☐ 2. is a substance abuser and dangerous to self or others.

II. CUSTODY ORDER

TO ANY LAW ENFORCEMENT OFFICER:

The Court ORDERS you to take the above named respondent into custody **WITHIN 24 HOURS AFTER THIS ORDER IS SIGNED** and transport the respondent directly to a 24-hour facility designated by the State for the custody and treatment of involuntary clients and present the respondent for custody, examination and treatment pending a district court hearing.

Date	*Time*	☐ AM ☐ PM	*Signature*	☐ *Deputy CSC* ☐ *Assistant CSC*	☐ *CSC* ☐ *Magistrate*

This Order is valid throughout the State. If the respondent is taken into custody, this Order is valid for seven (7) days from the date and time of issuance.

Original-File Copy-24-Hour Facility Copy-Special Counsel Copy-Attorney General
(for *Return Of Service*, see AOC-SP-302B Return)

IN THE MATTER OF	_____ County	File No.
Name Of Respondent	Date And Time Of Issuance Of Custody Order	**NOTE:** *Use this page for the return of a Findings And Custody Order Involuntary Commitment.*

III. RETURN OF SERVICE
A. CUSTODY CERTIFICATION

☐ Respondent WAS NOT taken into custody for the following reason:

☐ I certify that this Order was received and respondent served and taken into custody as follows:

Date Respondent Taken Into Custody	Time ☐ AM ☐ PM
Name Of Law Enforcement Officer (type or print)	Signature Of Law Enforcement Officer
Name Of Law Enforcement Agency	Badge No. Of Officer

NOTE TO LAW ENFORCEMENT OFFICER: *If respondent is not taken into custody within 24 hours after this Order is signed, check the appropriate box above and return to the Clerk of Superior Court immediately. If respondent is served and taken into custody, complete return of service. When taking respondent into custody you must inform him or her that he or she is not under arrest and has not committed a crime, but is being transported to receive treatment and for his or her own safety and that of others.*

B. FOR USE WHEN 24-HOUR FACILITY NOT IMMEDIATELY AVAILABLE OR MEDICALLY APPROPRIATE

A 24-hour facility is not immediately available or medically appropriate. The respondent is being temporarily detained under appropriate supervision at the facility named below.

Date	Time ☐ AM ☐ PM	Name Of Commitment Examiner (type or print)
Name Of Examining Facility		County Of Examining Facility
Name Of Law Enforcement Officer (type or print)		Signature Of Law Enforcement Officer
Name Of Law Enforcement Agency		Badge No. Of Officer

C. FOR USE WHEN RESPONDENT RELEASED BEFORE TRANSPORT TO 24-HOUR FACILITY

Respondent was temporarily detained under appropriate supervision at the site of first examination because the first commitment examiner (petitioning clinician) recommended inpatient commitment and a 24-hour facility was not immediately available or medically appropriate. Upon further examination, a commitment examiner determined that the respondent no longer meets the inpatient commitment criteria or meets the criteria for outpatient commitment. I returned the respondent to his/her regular residence or the home of a consenting person and released respondent from custody.

Date Delivered	Time Delivered ☐ AM ☐ PM	Name Of Commitment Examiner (type or print)
Name Of Examining Facility		County Of Examining Facility
Name Of Law Enforcement Officer (type or print)		Signature Of Law Enforcement Officer
Name Of Law Enforcement Agency		Badge No. Of Officer

NOTE TO LAW ENFORCEMENT OFFICER: *Upon completing this section, immediately return this form and the commitment examiner's written report (Form No. DMH 5-72-19) to the Clerk of Superior Court of the county where the petition was filed and the custody order issued.*

D. PATIENT DELIVERY TO 24-HOUR FACILITY

I transported the respondent and placed him/her in the custody of the 24-hour facility named below.

Date Delivered	Time Delivered ☐ AM ☐ PM
Name Of 24-Hour Facility	County Of 24-Hour Facility
Name Of Law Enforcement Officer (type or print)	Signature Of Law Enforcement Officer
Name Of Law Enforcement Agency	Badge No. Of Officer

NOTE TO LAW ENFORCEMENT OFFICER: *Upon completing this section, immediately return this form to the Clerk of Superior Court of the county where the petition was filed and the custody order issued.*

STATE OF NORTH CAROLINA
Department of Health and Human Services
Division of Mental Health, Developmental Disabilities, and Substance Abuse Services

County _____
Client Record # _____
File # _____

FIRST EXAMINATION FOR INVOLUNTARY COMMITMENT

Name of Respondent	**DOB**	**Age**	**Sex**	**Race**	**M.S.**

Address *(Street or Box Number)*	**City**	**State**	**Zip**	**County**	**Phone**

Legally Responsible Person or Next of Kin (Name)	**Relationship**

Address *(Street or Box Number)*	**City**	**State**	**Zip**	**County**	**Phone**

Petitioner (Name)	**Relationship**

Address *(Street or Box Number)*	**City**	**State**	**Zip**	**County**	**Phone**

EXAMINATION INFORMATION

The First-Level examination and evaluation for the above-named respondent:

was conducted on _____/_____/_____ *(MM/DD/YYYY)* at _____:_____ ○ **A.M.** ○ **P.M.**

was conducted:
○ In person at the following facility _____ OR ○ Via telemedicine technology

Included in the examination was an assessment of the respondent's:

☐ (1) Current and previous mental illness and intellectual disability including, if available, previous treatment history; (2) Dangerousness to self or others as defined in G.S.122C-3 (11*); (3) Ability to survive safely without inpatient commitment, including the availability of supervision from family, friends, or others; and (4) Capacity to make an informed decision concerning treatment.

☐ (1) Current and previous substance abuse including, if available, previous treatment history; and (2) Dangerousness to self or others as defined in G.S.122C-3 (11*).

The following findings and recommendations are made based on this examination^:

SECTION I – CRITERIA FOR COMMITMENT

It is my opinion that the respondent meets the criteria for the selected type of commitment as the respondent is:

☐ **Inpatient**
(1st Exam – Commitment Examiner, eligible Psychologist or Physician)
- ☐ An individual with a mental illness;
- ☐ Dangerous to:
  - ☐ Self *or*
  - ☐ Others;
- ☐ In addition to having a mental illness is also intellectually disabled;
- ☐ None of the above

☐ **Outpatient** *(1st Exam – Commitment Examiner, eligible Psychologist or Physician)*
- ☐ An individual with a mental illness;
- ☐ Capable of surviving safely in the community with available supervision;
- ☐ Based upon the respondent's treatment history, the respondent is in need of treatment in order to prevent further disability or deterioration which would predictably result in dangerousness as defined by G.S. 122C-3 (11*);
- ☐ Current mental status or the nature of his/her illness limits or negates his/her ability to make an informed decision to seek treatment voluntarily or comply with recommended treatment;
- ☐ None of the above

☐ **Substance Abuse**
(1st Exam – LCAS CE, eligible Psychologist or Physician)
- ☐ A Substance Abuser;
- ☐ Dangerous to:
  - ☐ Self *or*
  - ☐ Others;
- ☐ None of the above

^*For telemedicine evaluations only:* ☐ I certify to a reasonable degree of medical certainty that the results of the examination via telemedicine were the same as if I had been personally present with the respondent **OR** ☐ The respondent needs to be taken for a face-to-face evaluation. *(*Statutory definitions begin on page 3)*

Name of Respondent:	DOB:

SECTION II – DESCRIPTION OF FINDINGS

Clear description of findings (findings for each criterion checked in Section I must be described):

Impression/Diagnosis:

HEALTH SCREENING

A health screening (N.C. G.S. § 122C-3(16a)) does not constitute a medical evaluation† and should be completed at the same location as the first examination or by utilizing telemedicine equipment and procedures (N.C.G.S.§ 122C-263(a1)).

☐ **Check box & sign to attest that the health screening is being replaced by a medical evaluation†** skip to Section III

_____ _____

Signature Printed Name, Credentials, Date & Time

Vital Signs

BP _____ HR _____ RR _____ Temp _____ Date & Time _____

If person taking vitals is different than person completing this form, sign/print name & credentials below:

_____ _____

Signature Printed Name, Credentials, Date & Time

Known/reported medical problems (diabetes, hypertension, heart attacks, sickle cell anemia, asthma, etc.):

Known/reported allergies:

Known/reported current medications (please list):

If ANY of the below are present, check box and send respondent to an <u>Emergency Department</u> by the most appropriate means:

☐ Chest pain or shortness of breath
☐ Suspected overdose on substances or medications within the past 24 hours (including acetaminophen)
☐ Presence of severe pain (e.g. abdominal pain, head pain)
☐ Disoriented, confused, or unable to maintain balance
☐ Head trauma or recent loss of consciousness
☐ Recent physical trauma or profuse bleeding
☐ New weakness, numbness, speech difficulties or visual changes
☐ Other Rationale (including medical evaluation indicated, but not available at current location):

_____

☐ None of the above

Name of Respondent:	DOB:

IF ANY of the below are present, check box and consult° with medical provider‡ within one hour:

☐ Age < 12 or > 65 years old
☐ Systolic BP > 160 or < 100 and/or diastolic > 100 or < 60
☐ Heart Rate >110 or < 55 bpm
☐ Respiratory Rate > 20 or < 12 breaths per minute
☐ Temperature > 38.0 C (100.4 F) or < 36.0 C (96.8 F)
☐ Known diagnosis of diabetes and not taking prescribed medications
☐ Recent seizure or history of seizures and not taking seizure medications
☐ Known diagnosis of asthma or chronic obstructive pulmonary disease and not taking prescribed medications
☐ Visible or reported open sores, wounds, or active bleeding
☐ Severe constipation **or** vomiting **or** diarrhea
☐ Painful urination or new onset incontinence
☐ Known or suspected pregnancy
☐ Used substances of abuse, (e.g. alcohol, opiates, benzodiazepines, cocaine, etc.) or prescription medication not prescribed to them, within the past 48 hours
☐ Other Rationale:

_____

☐ None of the above

_____ Signature of Person Completing Health Screening

_____ Printed Name, Credentials, Date & Time

†***DEFINITION OF Medical Evaluation****: Medical history and physical exam performed by a medical provider*

‡***DEFINITION OF Medical Provider****: MD, DO, PA, or NP licensed in N.C.*

°*Consultation can be via telephone, telemedicine or in person*

***STATUTORY DEFINITIONS for Form No. DMH 5-72-19**

Commitment examiner. - A physician, an eligible psychologist, or any health professional or mental health professional who is certified under G.S. 122C-263.1 to perform the first examination for involuntary commitment described in G.S. 122C-263(c) or G.S. 122C-283(c).

Dangerous to others. - Within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

Dangerous to self. - Within the relevant past the individual has done any of the following: (1) acted in such a way as to show all of the following: (I) The individual would be unable without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of the individual's daily responsibilities and social relations or to satisfy the individual's need for nourishment, personal or medical care, shelter, or self-protection and safety. (II) There is a reasonable probability of the individual suffering serious physical debilitation within the near future unless adequate treatment is given. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a **prima facie** inference that the individual is unable to care for himself or herself. (2) The individual has attempted suicide or threatened suicide and that there is a reasonable probability of suicide unless adequate treatment is given. (3) The individual has mutilated himself or herself or attempted to mutilate himself or herself and that there is a reasonable probability of serious self-mutilation unless adequate treatment is given. NOTE: Previous episodes of dangerousness to self, when applicable, may be considered when determining reasonable probability of physical debilitation, suicide, or self-mutilation.

Health screening. - An appropriate screening suitable for the symptoms presented and within the capability of the entity, including ancillary services routinely available to the entity, to determine whether or not an emergency medical condition exists. An emergency medical condition exists if an individual has acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the individual's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part.

Name of Respondent:	DOB:

Local management entity/managed care organization or **LME/MCO**. - A local management entity that is under contract with the Department to operate the combined Medicaid Waiver program authorized under Section 1915(b) and Section 1915(c) of the Social Security Act.

Local management entity or **LME.** - An area authority.

Mental illness. - When applied to an adult, an illness which so lessens the capacity of the individual to use self-control, judgment, and discretion in the conduct of the individual's affairs and social relations as to make it necessary or advisable for the individual to be under treatment, care, supervision, guidance or control. When applied to a minor, a mental condition, other than an intellectual disability alone, that so lessens or impairs the minor's capacity to exercise age adequate self-control and judgment in the conduct of the minor's activities and social relationships so that the minor is in need of treatment.

Substance abuser. - An individual who engages in the pathological use or abuse of alcohol or other drugs in a way or to a degree that produces an impairment in personal, social, or occupational functioning. Substance abuse may include a pattern of tolerance and withdrawal.

SECTION III – RECOMMENDATION FOR DISPOSITION

☐ **Inpatient Commitment** for_____days *(respondent must have a mental illness **and** dangerous to self or others)*

☐ **Outpatient Commitment** *(respondent must meet **ALL** of the first four criteria outlined in Section I, **Outpatient**)*
Proposed Outpatient Treatment Center or Physician: (Name) _____
(Address & Phone Number) _____

☐ **Substance Abuse Commitment** *(respondent must meet both criteria outlined in Section I, **Substance Abuse**)*
☐ Release respondent pending hearing – Referred to: _____
☐ Hold respondent at 24-hour facility pending hearing – Facility:_____

☐ Respondent or Legally Responsible Person Consented to Voluntary Treatment

☐ Respondent was held at first evaluation site pending placement at a 24-hour facility and no longer meets criteria for inpatient commitment:
☐ Terminate proceedings and release respondent
☐ Recommend outpatient commitment
Proposed Outpatient Treatment Center or Physician: (Name) _____
(Address & Phone Number) _____

☐ Release Respondent and Terminate Proceedings (insufficient findings to indicate that respondent meets commitment criteria)

_____
Signature of Commitment Examiner

_____
Print Name of Examiner

Credentials *(check one):* ☐ MD/DO ☐ Eligible Psychologist ☐ PA
☐ NP *(Master's-level or Higher)* ☐ LCSW ☐ LCMHC ☐ LMFT
☐ LCAS *(Substance Abuse Evaluation Only)*

_____
Address of Facility

_____
City and State

_____
Telephone Number

This is to certify that this is a true and exact copy of the Examination and Recommendation for Involuntary Commitment

_____
Original Signature – Record Custodian

_____
Title

_____
Address of Facility

_____
Date

CC: Clerk of Superior Court where petition was initiated; Clerk of Superior Court where 24-hour facility is located or where outpatient treatment is supervised; Respondent or Respondent's Attorney and State's Attorneys, when applicable; Proposed Outpatient Treatment Center or Physician (Outpatient Commitment); Area Facility/Physician (Substance Abuse Commitment). NOTE: If it cannot be reasonably anticipated that the clerk will receive the copies within 48 hours of the time that it was signed, the examiner shall communicate his findings to the clerk by telephone.

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
Superior Court Division

IN THE MATTER OF

Name And Address Of Respondent

FINDINGS AND ORDER INVOLUNTARY COMMITMENT COMMITMENT EXAMINER RECOMMENDS OUTPATIENT COMMITMENT

G.S. 122C-261

NOTICE: *This form is to be used instead of the Findings And Custody Order (AOC-SP-302) only when the petitioner is a commitment examiner who recommends outpatient commitment or release pending hearing for a substance abuser.*

FINDINGS

The petitioner in this case is a commitment examiner who has recommended outpatient commitment/substance abuse commitment with the respondent being released pending hearing.

The Court finds from the petition in the above matter that there are reasonable grounds to believe that the facts alleged in the petition are true and that the respondent probably:

☐ has a mental illness and is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness.

☐ is a substance abuser and dangerous to self or others.

ORDER

It is ORDERED that a hearing before the district court judge be held to determine whether the respondent will be involuntarily committed.

Date	*Signature*	☐ *Deputy CSC* ☐ *Clerk Of Superior Court*	☐ *Assistant CSC* ☐ *Magistrate*

NOTE TO CLERK: *Schedule an initial hearing for the respondent pursuant to G.S. 122C-264 or G.S. 122C-284 and give notice of the hearing as required by those statutes.*

SUPPLEMENT TO SUPPORT IMMEDIATE HOSPITALIZATION
(To be used in addition to "Examination and Recommendation for Involuntary Commitment, Form 572-01)

CERTIFICATE

The Respondent, _____
requires immediate hospitalization to prevent harm to self or others because:

I certify that based upon my examination of the Respondent, which is attached hereto, the Respondent is (check all that apply):

- ☐ Mentally ill and dangerous to self
- ☐ Mentally ill and dangerous to others
- ☐ In addition to being mentally ill, is also mentally retarded

_____
Signature of Physician or Eligible Psychologist

Address: _____
City State Zip: _____
Telephone: _____
Date/Time: _____

Name of 24-hour facility: _____
Address of 24-hour facility: _____

CC: 24-hour facility
Clerk of Court in county of 24-hour facility

Note: If it cannot be reasonably anticipated that the clerk will receive the copy within 24 hours (excluding Saturday, Sunday and holidays) of the time that it was signed, the physician or eligible psychologist shall also communicate the findings to the clerk by telephone.

NORTH CAROLINA
_____ County
Sworn to and subscribed before me this
_____ day of _____, 20__

(seal)

_____
Notary Public

My commission expires:_____

Pursuant to G.S. 122C-262 (d), this certificate *shall serve as the Custody Order* and the law enforcement officer or other person *shall* provide transportation to a 24-hr. facility in accordance with G.S. 122C-251.

TO LAW ENFORCEMENT: See back side for Return of Service

RETURN OF SERVICE			
☐ **Respondent WAS NOT taken into custody for the following reason:**			
☐ **I certify that this Order was received and served as follows:**			
Date Respondent Taken into Custody	*Time* ☐ AM ☐ PM		
Name of 24-Hour Facility	*Date Delivered*	*Time Delivered* AM ☐ PM ☐	*Date of Return*
Name of Transporting Agency	*Signature of Law Enforcement Official*		

ADMINISTRATION OF JUSTICE BULLETIN

2007/05 September 2007

THE MAGISTRATE'S ROLE IN INVOLUNTARY COMMITMENT

■ Joan G. Brannon

What is Involuntary Civil Commitment?

Involuntary civil commitment is the process that the state, through its courts, uses to order a person who meets certain statutory criteria to obtain mental health treatment. The person ordered to receive treatment is called "the respondent." Civil commitment is involuntary because the respondent is ordered to submit to mental health treatment without his or her consent.

When a respondent is involuntarily committed, the state has substituted its judgment about what is best for the respondent for the respondent's own judgment. This substituted judgment is a significant intrusion on the respondent's right to liberty, as is the involuntary commitment itself. Despite its intrusiveness, the commitment process before 1973 contained very few safeguards to assure that the respondent was not arbitrarily deprived of freedom. Procedural due process was lacking insofar as a person could be committed for twenty days, without notice or a hearing, if a physician certified that the person was mentally ill or inebriate and dangerous to self or others.[1] Substantive due process was lacking in that a respondent could be committed for up to 180 days if, after an informal hearing, the clerk of court found that he or she was mentally ill or inebriate. The respondent did not need to be dangerous to self or others to be committed.[2] In 1973 the process was changed so that no respondent could be taken into custody without a hearing in which a magistrate found that the respondent was either mentally ill or "inebriate" (later changed to

■ The author is a faculty member of the School of Government. She wishes to thank the following people who graciously reviewed this Bulletin: her colleague, Mark Botts, Lisa Corbett and Angel Gray of the Attorney General's Office, and the High Point, North Carolina magistrates.

1. N.C. G.S. § 122-59 (1971).
2. N.C. G.S. § 122-63 (1971).

"substance abuser") and dangerous to self or others.[3] In 1975 the United States Supreme Court held that a finding of mental illness alone could not justify involuntary commitment. The state must show some dangerousness. "A state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of a willing and responsible family members or friends."[4]

Parts six, seven and eight of Article 5, Chapter 122C of the North Carolina General Statutes establish the procedures for involuntary commitment. A brief overview of these procedures is set out below.

Description of Commitment Process

The statutory procedure for an involuntary commitment involves some or all of the following stages:

The Petition for Commitment: A person who has knowledge of someone he or she believes needs mental health or substance abuse treatment petitions the magistrate to begin the involuntary commitment process.[5] (Petitions may also be presented to the clerk of superior court. Although this bulletin will refer to magistrates only, the same law and procedure applies if the petition is presented to a clerk.) This petition is an affidavit setting out facts intended to show that the respondent meets the statutory criteria for issuing an order (called a custody order) to take the respondent into custody for examination by a physician or eligible psychologist.

Review of the Petition: The magistrate reviews the petition to determine whether reasonable grounds exist to find that the respondent meets the criteria for a custody order.[6] If the magistrate does not find reasonable grounds to believe that the respondent meets the criteria, the magistrate must decline to issue the order.

Custody Order: If the magistrate does find reasonable grounds to conclude that the respondent meets the criteria for a custody order, the magistrate must issue an order to a law enforcement officer to take the respondent into custody and transport him or her to a local physician or psychologist for an examination.[7]

Examinations: A local physician or eligible psychologist[8] examines the respondent and if the examiner finds that the respondent does not meet the criteria for commitment, the respondent is released and the process of involuntary commitment ends.[9] If, however, the examiner finds that the respondent meets the commitment criteria, the examiner must recommend outpatient,[10] inpatient,[11] or substance abuse commitment.[12] If outpatient commitment is recommended, the respondent will then be transported to his or her residence (or the residence of a consenting individual) and released pending a district court hearing.[13] If the examiner recommends inpatient commitment, the respondent must be transported directly to a designated 24-hour facility for a second examination.[14] This examiner has the same options as the first examiner: if he or she finds that the respondent meets none of the commitment criteria, the respondent will be released; if the

3. N.C. G.S. §§ 122-58.1, -58.3 (1973). See In re Hayes, 18 N.C. App. 560, 197 S.E.2d 582 (1973) in which the court held the former statutory procedure unconstitutional.

4. O'Connor v. Donaldson, 422 U.S. 563, 576, 95 S.Ct. 2486, 2494, 45 L.Ed.2d 396, 407 (1975).

5. G.S. 122C-261(a), -281(a).

6. G.S. 122C-261(b), -281(b).

7. Id.

8. Eligible psychologist means a licensed psychologist who holds permanent licensure and certification as a health services provider psychologist issued by the North Carolina Psychology Board. G.S. 122C-3(13d).

9. G.S. 122C-263(d)(3), -283(d)(2).

10. Outpatient commitment means treatment in an outpatient setting and may include medication, individual or group therapy, day or partial day programming activities, services and training including educational and vocational activities, supervision or living arrangements, and any other services prescribed either to alleviate the individual's illness or disability, maintain semi-independent functioning, or to prevent further deterioration that may reasonably be predicted to result in the need for inpatient commitment to a 24-hour facility. G.S. 122C-3(27).

11. Inpatient commitment involves holding the respondent in the custody of a facility the state has designated "24-hour" facilities. A "24-hour facility" is one whose primary purpose is to provide services for the care and treatment of persons who are mentally ill or substance abusers and provides a structured living environment and services for a period of 24 consecutive hours or more. G.S. 122C-3(14)g. Such facilities include state operated psychiatric hospitals, public and private psychiatric and substance abuse hospitals, and general hospitals with inpatient psychiatric or substance abuse services.

12. G.S. 122C-283(d). Substance abuse commitment may result in either outpatient or inpatient treatment.

13. G.S. 122C-263(d)(1), 122C-283(d)(1).

14. G.S. 122C-263(d)(2), 122C-283(d)(1). See supra note 11 for a definition of 24-hour facility.

respondent meets the criteria for outpatient commitment, the respondent will be released pending a district court hearing; if the respondent meets the inpatient commitment criteria, he or she will be held at the hospital pending a hearing before the district court.[15]

District Court Hearing: A respondent who is recommended for either outpatient or inpatient commitment is entitled to a hearing in district court. This hearing must occur within 10 days of the date the respondent is taken into custody by order of the magistrate.[16] At the hearing, if the court is persuaded by clear, cogent and convincing evidence that the respondent meets the commitment criteria, it will order involuntary commitment.[17]

The magistrate's role in the involuntary commitment process is a small but important one. Magistrates decide whether to issue orders to take respondents into custody for examination. Magistrates do not actually commit anyone; district court judges determine whether to commit. The role of the magistrate as an independent and neutral judicial official determining whether to initiate the process for involuntary commitment is a safeguard to provide due process to a person before depriving that person of liberty as required by the United States Constitution.[18]

The rest of this bulletin will focus on the magistrate's role in the process that potentially leads to involuntary commitment.

Criteria For Issuing A Custody Order

When a person (called the petitioner) appears before a magistrate to initiate the process of involuntary commitment, the magistrate must determine whether there are reasonable grounds to believe that the respondent meets the statutory criteria for issuing a custody order. Reasonable grounds exist when, taking into consideration all the relevant information, a reasonable person would conclude that there is a fair likelihood that the respondent meets the criteria for a custody order. The "reasonable grounds" standard is synonymous with the probable cause standard that magistrates use in issuing warrants.[19]

There are three situations in which a magistrate can issue a custody order:

1. The respondent is mentally ill and dangerous to self or others.
2. The respondent is mentally ill and needs court-ordered treatment to prevent further disability or deterioration that would predictably lead to dangerousness.
3. The respondent is a substance abuser and dangerous to self or others.[20]

The first standard, mentally ill and dangerous, is the most complicated of the standards.

Mentally Ill and Dangerous to Self or Others

Under this standard the magistrate must draw two conclusions from the facts presented before issuing a custody order: first, that the respondent is probably mentally ill; and next, that the respondent is probably dangerous to self or dangerous to others.[21]

Mentally Ill

An adult respondent is mentally ill when his or her capacity to use self-control, judgment, and discretion in the conduct of his or her affairs and social relations has been so reduced by an illness that it becomes necessary or advisable for the respondent to be under treatment, care, supervision, guidance, or control.[22] A minor respondent is mentally ill when he or she has a mental condition, other than mental retardation alone, that so impairs his or her capacity to exercise age adequate self-control or judgment in the conduct of activities and social relationships that he or she needs treatment.[23] In both cases, the important features of mental illness are: (1) an illness (2) that impairs judgment and self-control and (3) makes treatment advisable. This is a legal standard, not a medical standard, and therefore does not require that the respondent have been diagnosed with a recognized mental illness by a physician or psychologist. Rather,

15. G.S. 122C-266(a), 122C-285(a).

16. G.S. 122C-267(a), 268(a), -286(a).

17. G.S. 122C-267(h) (outpatient commitment), -268(j) (inpatient commitment); 122C-286(h) (substance abuse commitment).

18. See In re Reed, 39 N.C. App. 227, 249 S.E.2d 864 (1978).

19. Id. at 229, 249 S.E.2d at 866.

20. A summary of the standards for involuntary commitment is found at Appendix I at the end of this bulletin.

21. G.S. 122C-261(b).

22. G.S. 122C-3(21)(i).

23. G.S. 122C-3(21)(ii).

the magistrate must listen for facts that show that the respondent needs treatment because of a mental condition that is impairing his or her ability to make judgments or exercise self-control.

In determining whether there are reasonable grounds to find that the respondent is mentally ill, a magistrate should look for conduct that is on the extreme ends of behaviors. Of course every person can, at times, engage in behavior that might be called extreme: a person can be so hostile that he slams the door in someone's face or so agitated that she drives off from the store with the grocery bags on top of her car. But in a respondent who is mentally ill, this behavior should go one step further: hostility may be taken to the point of attacking someone or anxiety may be manifested by a complete inability to carry on with the other functions of daily life. Also the extreme behavior is continuing rather than a one-time occurrence. The magistrate must examine the information provided about the respondent's behavior, movements, speech, motions and thoughts. For example, is the respondent seeing things that are not really there? Is the respondent in constant motion or is he totally quiet and apathetic? Appendix II at the end of this bulletin gives examples of the kinds of extreme behaviors that might indicate mental illness.

If a magistrate determines that the respondent is probably mentally ill, the next step is to determine whether the respondent is probably dangerous to self or others.

Dangerous to Self

A petitioner can show that the respondent is dangerous to self in three different ways: Respondent is unable to care for himself or herself, is suicidal, or has engaged in self-mutilation.

Respondent is unable to care for self

The first way of proving dangerousness is by showing that, within the relevant past, the respondent has been unable to care for himself or herself and as a result is likely to suffer serious physical debilitation in the near future if treatment is not given.[24] Magistrates should note that although the appellate cases cited in this bulletin are instructive, they are based on evidence presented at the district court hearing where the standard of proof—clear, cogent, and convincing evidence—is significantly higher than the reasonable grounds determination that the magistrate must make. The requirement that the behavior have occurred within the "relevant past" does not mean that the behavior must have occurred within the "recent past." There is no specific time within which the past behavior must have occurred to be relevant. (The concept of "relevant past" is discussed more thoroughly below at page 7.)

The test for finding that the respondent is unable to care for self has two prongs and both must be satisfied before issuing a custody order. First, the magistrate must determine that the respondent has acted in such a way as to show that he or she probably would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of daily responsibilities and social relations, or to satisfy the need for nourishment, personal or medical care, shelter, or self-protection and safety. Put more simply, the first prong requires the magistrate to find that the respondent probably would be unable to care for himself or herself in regard to daily affairs without treatment. For example, a respondent, who required anti-psychotic medication but refused to take it, would not eat properly, and refused recommended outpatient treatment was found dangerous to himself. Failure to care for medical, dietary, and grooming needs meets the test of dangerousness to self, the court said.[25] On the other hand, unusual eating habits alone may not show dangerousness to self. The North Carolina Court of Appeals was hesitant to find that a respondent who fasted for a time, then ate a whole chicken or loaf of bread, and also ate about five pounds of sugar every two days was dangerous to himself.[26]

If the respondent seems unable to care for his or her daily needs, the magistrate must go on to make a second, more specific, finding that this inability to care for self creates a probability that the respondent will suffer serious physical debilitation within the near future. In the example above, where the respondent's dietary habits were irregular, the court noted that it could not find a likelihood of serious debilitation because the state had presented no evidence of the effect of the irregular diet on the respondent, or any evidence on how long he had been eating that way.[27] The result might have been different if the respondent was diabetic. On the other

24. G.S. 122C-3(11)a.1.

25. In re Lowery, 110 N.C. App. 67, 428 S.E.2d 861 (1993).

26. In re Monroe, 49 N.C. App. 23, 270 S.E.2d 537 (1980). The decision was an appeal from the district court's commitment so the standard of proof that was not met was clear, cogent and convincing rather than the magistrate's standard of reasonable grounds.

27. Id. at 29, 270 S.E.2d at 540.

hand, where a petitioner presented evidence that the respondent had been living in her car for two weeks during the winter, had been unemployed for the last year, having left her job because she felt she was being harassed, and had no plans for earning income, and that her only means of subsistence was food brought by the petitioner, the court found that the respondent was at risk of serious physical debilitation.[28] In determining the reasonable probability of future dangerous conduct, the magistrate may consider previous episodes of dangerousness to self.[29]

If the petitioner presents evidence that the respondent's behavior is grossly irrational, that the respondent is unable to control his or her actions, that the respondent's behavior is grossly inappropriate to the situation, or that the respondent's insight and judgment are severely impaired, the magistrate may presume that the respondent probably meets this second prong.[30]

To summarize, a magistrate may find a respondent dangerous to self if the respondent seems unable to take care of his or her daily needs and is likely to suffer serious physical debilitation in the near future if he or she does not receive treatment. However, the respondent cannot be found dangerous to self merely because he or she behaves in a way that may provoke others to harm him or her. For example, a respondent who was not physically violent herself, but who aggressively preached on the street corner, trying to convert all passersby, was not dangerous to herself merely because someone who reacted negatively to her conversion attempt might react in a way that is physically harmful to her.[31]

Respondent is suicidal

A respondent also can be dangerous to self if he or she has attempted or threatened suicide and there is a reasonable probability of suicide unless the respondent receives adequate treatment.[32] The magistrate may choose to treat an attempt at suicide, alone, as sufficient evidence that there is a reasonable probability of suicide. The magistrate also may treat a threat of suicide as grounds for issuing a custody order and leave the determination of whether there is a future likelihood of suicide to the examiners. Whether a statement constitutes a threat of suicide will depend on the respondent's history and the context in which the statement was made: for example, a statement like "I could kill myself" probably is not a threat of suicide when it comes from a person who has just done something enormously embarrassing, but it may be when it comes from someone who has suffered a dramatic loss of some kind.

Respondent has engaged in self-mutilation

The third way to show a respondent is dangerous to self is to prove that he or she has mutilated or attempted to mutilate himself or herself and that serious mutilation is likely to occur again unless the respondent is committed.[33] No North Carolina appellate cases have discussed this ground for commitment. Self-harm or self-injurious behavior is fairly prevalent today, [34] particularly among adolescents and may include burning, biting, cutting, head banging, picking at skin, pulling out hair, bruising. But some self-harm, while needing treatment, does not rise to the level of self-mutilation necessary for involuntary commitment, and the magistrate must be careful to distinguish between the two. The involuntary commitment statute requires that the magistrate find that serious self-mutilation is likely to occur unless the respondent is committed. Therefore, the frequency and the severity or seriousness of the injury is critical. The magistrate should also look at other factors such as the reason for the self-harm, whether the respondent has access to weapons to do serious harm, and the progression of seriousness of the injuries. One case from another state in which the facts showed dangerousness to self based on self-mutilative behavior indicated that the patient had a history of cutting himself, injuring

28. In re Medlin, 59 N.C. App. 33, 295 S.E.2d 604 (1982). The finding that the respondent was mentally ill was not disputed.

29. G.S 122C-3(11)a.

30. G.S. 122C-3(11)a.1.II.

31. In re Hogan, 32 N.C. App. 429, 232 S.E.2d 492 (1977).

32. G.S. 122C-3(11)a.2.

33. G.S. 122C-3(11)a.3.

34. About one percent of the United States population uses physical self-injury as a way of dealing with overwhelming feelings or situations, but the problem is more prevalent among teenagers where an estimated ten percent have experimented with self-mutilation. Teenagers and Self Mutilation: The Facts, http://www.psychiatric-disorders.com/warning-signs/self-mutilation.php. A recent study published in the August 2007 issue of the journal, Psychological Medicine, indicated 46% of U.S. high school students surveyed had practiced some form of self-mutilation in the past year. David Andreatta, Self-injury Might Be More Common Than Thought, RALEIGH NEWS & OBSERVER, July 2, 2007 at A3.

himself very seriously to the point that he required blood transfusions.[35]

Dangerous to Others

A magistrate must also issue a custody order for a mentally ill respondent if he or she is dangerous to others. A respondent is dangerous to others if, within the relevant past, he or she has: (1) inflicted or attempted to inflict serious bodily harm on another, or has acted in a way that creates a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property, and (2) there is a reasonable probability that such conduct will be repeated.[36]

Respondent has inflicted or attempted to inflict serious bodily harm on another

Most cases coming before a magistrate probably will be fairly clear cut as to whether the respondent inflicted or attempted to inflict serious bodily harm on another person. But what if the respondent has only threatened to inflict serious bodily harm on another? Is the threat a sufficient basis for finding that the respondent is dangerous to others? Courts addressing the issue have concluded that overt dangerous actions are not necessary to conclude that a respondent is dangerous to others. For example, a respondent who threatened his aged and nervous mother and family with increasing frequency over several weeks, saying he was going to "get you all," in conjunction with evidence that he believed his family had sexually seduced him and that he appeared ready to fight any time one of them said something to him, led the court to conclude that the respondent was dangerous to others.[37] In another case, a respondent was found dangerous to others based on evidence that he kept an iron pipe and hatchet under his bed and, through threats, had kept his mother in one chair, unmoving, while he screamed, shouted, cursed, and threatened to "bust" her head if she called anybody.[38] A respondent who had threatened many people in the neighborhood and had threatened to cut her brother's throat was found dangerous to others.[39]

In order to find a respondent dangerous to others on the basis of threats alone, however, the petitioner must present specific evidence about the kind of harm the respondent threatened, when the threats were made, and in what context. For example, the mere allegation that the "respondent ha[d] made statements to her husband of a threatening nature," without more, is insufficient.[40]

One issue that sometimes troubles magistrates is commitment of persons who are residing in nursing homes. For example, a resident of the nursing home who suffers from dementia or bipolar disorder becomes violent and attacks another resident of the nursing home and the nursing home staff seeks to have the resident involuntarily committed. The fact that the respondent is in a nursing home or the fact that the respondent suffers from dementia should not result in any different decision by the magistrate. If the magistrate finds reasonable grounds to believe the respondent is mentally ill (i.e., has an illness—and dementia and Alzheimer's disease are mental illnesses--that impairs judgment and self-control and makes treatment advisable) and is dangerous to self or others, the magistrate should issue a custody order.

Respondent's behavior creates a substantial risk of serious harm

There are no reported North Carolina cases that have addressed a respondent whose actions, though not intended to inflict serious bodily harm on another, have nonetheless created a substantial risk of serious harm. Some situations, of course, will be clear cut: if the respondent, while playing with matches, sets fire to an occupied twenty-unit apartment building in the middle of the night, the respondent's behavior creates a substantial risk of serious harm. Other cases will require a judgment call: if the respondent has a habit of digging man-sized holes in a field near his house, whether or not such conduct creates a substantial risk of serious harm depends on the depth of the holes, the amount of pedestrian traffic in the field, and the visibility of the holes to pedestrians who do walk in the field. If the field sees significant pedestrian traffic, and the respondent artfully covers the holes

35. In re Best Interest of M.G. 2002 WL 31854887 (Tex. App.-Tyler 2002)

36. G.S. 122C-3(11)(b).

37. In re Monroe, 49 N.C. App. 23, 270 S.E.2d 537 (1980).

38. In re Collins, 49 N.C. App. 243, 271 S.E.2d 72 (1980).

39. In re Jackson, 60 N.C. App. 581, 299 S.E.2d 677 (1983). This respondent had also cut her brother's hand within the last week, but the court did not discuss the seriousness of this cut or its role in the determination that she was dangerous to others.

40. In re Holt, 54 N.C. App. 352, 354, 283 S.E.2d 413, 415 (1981).

with grass, the holes may create a substantial risk, but if the holes are only two inches deep, they may not create a risk of serious physical harm.

Respondent has engaged in extreme destruction of property

The one reported case in North Carolina dealing with dangerousness to others based on engaging in extreme destruction of property emphasized the "extreme" requirement. In that case the respondent had used a hammer to break everything she could find in her house, including the television, the telephone, and all available glass.[41]

Reasonable probability of dangerous behavior being repeated

Unlike the second prong of the dangerousness to self test, the second prong of the dangerousness to others test—a reasonable probability that the dangerous behavior will be repeated—has not been emphasized in court cases. The statute provides that the magistrate may consider previous episodes of dangerous behavior in determining future probability of dangerous conduct.[42] Therefore, as long as the magistrate finds past acts of dangerousness this prong is satisfied.

Within the relevant past

The tests for dangerousness to self and others share the requirement that the respondent's allegedly dangerous behavior has occurred within the relevant past. This requirement is no different than the requirement of relevance in evidence law, generally. That is, any information that tends to make the existence of a material fact more or less likely is relevant.[43] In the context of involuntary commitment, the respondent's behavior occurred within the relevant past if the behavior makes it more or less likely that the respondent is dangerous to self or others at the time commitment is considered. "[The] acts are relevant because they occurred close enough in time to the district court [or magistrate's] hearing to have probative value on the ultimate question before the court of whether there was a 'reasonable probability that such [violent] conduct [would] be repeated.'"[44] So, for example, if the petitioner presents information that the mentally ill respondent, now thirty years old, went through a period when she was ten where she would only eat dirt, the behavior probably did not occur within the relevant past.

The concept of within the relevant past does not depend solely on the passage of time, however, but on the totality of the circumstances as the petitioner presents them. For example, the petitioner presents evidence that the mentally ill respondent tried to kill his brother three years ago after refusing to take medication prescribed for his mental illness. This information may seem remote in time. However, if the petitioner supplements this evidence with the information that the mentally ill respondent has once again stopped taking his prescription medication and is exhibiting symptoms similar to those that preceded the three-year-old incident, that three-year-old evidence may have occurred within the relevant past. Although most information the magistrate hears will probably not be this remote, the important thing to remember is that there is no bright-line in time beyond which information is no longer relevant. In fact, one of the problems the General Assembly wanted to cure in changing the language of the standard from "within the recent past" to "within the relevant past" was the practice of some judicial officials of setting a specific limit on the time frame for the conduct.[45]

Summary

The magistrate must issue a custody order when he or she finds reasonable grounds to believe that the respondent is probably mentally ill and dangerous to self or others.

Mental illness has three elements:
(1) an illness
(2) that impairs judgment and self-control
(3) to a degree that makes treatment or supervision advisable.

A respondent is dangerousness to self if he or she:
(1) is unable to care for self and there is a reasonable probability of serious physical debilitation in the near future or
(2) has attempted or threatened suicide and there is a reasonable probability of suicide or

41. In re Williamson, 36 N.C. App. 362, 244 S.E.2d 189 (1978). There was also evidence that the respondent threatened to physically injure family members.

42. G.S. 122C-3(11)b.

43. G.S. 8C-1, Rule 401.

44. Davis v. N.C. Dep't of Human Res., 121 N.C. App. 105, 115, 465 S.E.2d, 2, 8 (1995)

45. See Joan Brannon "Mental Health," NORTH CAROLINA LEGISLATION 1989 at 127 (Institute of Government 1990).

(3) has mutilated, or attempted to mutilate, himself or herself and there is a reasonable probability of serious self-mutilation.

A respondent is dangerous to others if

(1) he or she has:
  (a) inflicted or attempted to inflict serious bodily harm on another or
  (b) acted in a way that creates a substantial risk of serious bodily harm to another or
  (c) engaged in extreme destruction of property and
(2) there is a reasonable probability that such conduct will be repeated.

Mentally Ill and in Need of Treatment

Even if a mentally ill respondent is not dangerous to self or others, a magistrate still must issue a custody order if the respondent, based on his or her psychiatric history, is in need of treatment to prevent further disability or deterioration that would predictably lead to dangerousness.[46] Mental illness in this context means the same thing as mental illness in the inpatient commitment context: (1) an illness (2) that impairs judgment and self-control (3) to the extent that treatment or supervision is advisable. Although this standard (unlike the mentally ill and dangerous to self or others standard) does not specifically require the petitioner to show that within the relevant past the respondent has engaged in, attempted, or threatened to engage in conduct that is dangerous to self or others, such evidence seems necessary to show a psychiatric history indicating that deterioration leading to dangerousness is likely. That is, psychiatric history that would make dangerous deterioration predictable is bound to be a history of past instances in which the respondent did become dangerous. For example, if the petitioner presents evidence that the respondent has stopped taking her antipsychotic medication and states that the lack of medication will make the respondent dangerous, this statement alone probably is not sufficient grounds to issue a custody order: it should be supported by information that when the respondent has gone off her medication in the past she has done, attempted, or threatened to do, something dangerous.

Involuntary Commitment of Mentally Retarded Respondents

Special rules apply in issuing custody orders for mentally ill persons who are also mentally retarded. A mentally retarded respondent may be involuntarily committed only if he or she meets one of the standards set out above; that is, the respondent must be mentally ill and dangerous to self or others or must be mentally ill and in need of treatment to prevent deterioration that would predictably lead to dangerousness.[47] It is often difficult, if not impossible, to determine whether the dangerous behavior is caused by the mental retardation or mental illness, If the magistrate finds reasonable grounds to believe the respondent is mentally ill as well as mentally retarded and if the magistrate finds dangerousness to self or others, the magistrate should issue the commitment order and leave it to the professionals to determine whether involuntary commitment is appropriate for the respondent.

Moreover, a mentally retarded person cannot be admitted to a state psychiatric hospital unless the respondent is so extremely dangerous as to pose a serious threat to the community and to other patients in a non-state hospital or is so gravely disabled by both multiple disorders and medical fragility or deafness that alternative care is inappropriate. In both of those situations the determination of whether the respondent meets the criteria for commitment to a state psychiatric hospital is made by the Local Management Entity for the area where the respondent resides or is found.[48] If a respondent is mentally retarded, the petitioner must produce facts indicating this on the petition, and the magistrate must specifically note it on the custody order.

"Mental retardation" is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before age 22."[49] Making such a diagnosis is beyond the knowledge of lay petitioners and magistrates alike and should be left to the professional examiner. However, the petition must

46. G.S. 122C-261(b).

47. G.S. 122C-261(b). In Thomas S. v. Flaherty, 699 F. Supp. 1178 (W.D.N.C. 1988) a federal district court held that North Carolina was inappropriately confining and treating mentally ill retarded persons in the state psychiatric hospitals and ordered the state to provide a full range of habilitative treatment for mentally retarded persons confined in state psychiatric hospitals. The requirement limiting admission to state hospitals was enacted in 1995 in response to that case. See Joan Brannon, 1996 Legislation Amending the Involuntary Commitment and Domestic Violence Laws, ADMINISTRATION OF JUSTICE MEMORANDUM No. 96/04 at 1.

48. G.S. 122C-261(f).

49. G.S. 122C-3(22) (1996).

include facts indicating mental retardation. Four questions can help a magistrate determine whether the respondent is probably mentally retarded:

(1) Has a doctor or psychologist ever said that the respondent has mental retardation?
(2) Has the respondent ever been in special education classes for students with mental retardation?
(3) Has the respondent ever received special services for respondents with mental retardation such as sheltered workshops or group home placement?
(4) Did the problems relating to intelligence and functioning begin before age 22?

In order to find the respondent mentally retarded, the answer to the fourth question must be "yes" and at least one of the other three questions must also be answered in the affirmative.[50]

The special provisions regarding mentally retarded persons do not apply to substance abuse commitments.

Substance Abuse Commitment

Magistrates may also be asked to issue custody orders for respondents who are substance abusers. The standard for issuing a custody order in these circumstances is: (1) the respondent is a substance abuser who is (2) dangerous to self or others.[51] Substance abuse means the pathological use or abuse of alcohol or other drugs in a way, or to a degree, that produces an impairment in personal, social, or occupational functioning; it may include a pattern of tolerance and withdrawal.[52] The use does not need to have occurred over any certain length of time or in any certain amount. To be pathological the use need only be habitual or compulsive and have a negative impact on the respondent's functioning. Such functional impairment might mean, for example, that the respondent misses important meetings at work because of alcohol or drugs, verbally abuses friends and family members when drunk, or suffers delusions when she has gone too long without drugs or alcohol.

A magistrate who finds that the respondent is probably a substance abuser and is dangerous to self or others must issue a custody order. The standard for assessing danger to self or others is the same as described under the standard for inpatient commitment of persons with mental illness.

50. Brannon, supra note 47 at 2-3.

51. G.S. 122C-281.

52. G.S. 122C-3(36). Unlike the definition of mental illness, this definition is a medical one.

Procedure for Initiating Involuntary Commitment

To begin the process of involuntary commitment a person must petition for an order (the custody order) to have the respondent picked up for examination by a physician. Petitioning for a custody order differs in several significant ways from the usual small claims court procedure. First of all, the procedure is not a trial; it is merely a mechanism to have the respondent taken into custody for examination. Petitioning for a custody order is an ex parte hearing: that is, the hearing takes place without notice to, or the presence of, the opposing party—in this case, the respondent. The respondent normally is not present, but even if respondent is present, the usual procedure for presentation of evidence is not followed. The respondent is not part of the process and does not present evidence in his or her favor or get to cross examine the petitioner or petitioner's witnesses. Also, two fundamental rules of evidence are not followed in petitioning for involuntary commitment. First, the petitioner is deemed a competent witness even in cases where he or she has no personal, firsthand, knowledge of the respondent's state. This departure from the rules of evidence leads to the second, which is that a petitioner can prove his or her case, and the respondent may be taken into custody and transported for examination, entirely on the basis of hearsay evidence.[53] In this last respect, hearing a petition for a custody order is like the probable cause determination in issuing criminal process.

Who may initiate a petition?

Anyone with information about the respondent may petition for a custody order.[54] The respondent's family members or friends, neighbors, social workers, teachers, physicians or law enforcement officers can all be petitioners. The petitioner's knowledge of the respondent's condition does not have to be firsthand; hearsay information about the respondent is acceptable. For example, a law enforcement officer may petition for a custody order on the basis of information told to him or her by the respondent's neighbor, or a respondent's sister may petition based on information from the respondent's mother. In this respect, the petition resembles an application for a warrant: hearsay evidence can be considered, but at the trial of the matter before a

53. In re Zollicoffer, 165 N.C. App. 462, 598 S.E.2d 696 (2004).

54. G.S. 122C-261(a), -281(a).

district court, the witness must have personal knowledge of the facts about which he or she is testifying.

Who is subject to a custody order?

Any person may be subject to a custody order (assuming the petitioner presents sufficient evidence), no matter his or her age. Involuntary commitment of minor children may occur less frequently than of adults because parents (or guardians) are given the power to consent to treatment for their minor children and can have them admitted to treatment without showing dangerousness. Involuntary commitment thus generally occurs only when a child's parents do not consent to treatment, the parents cannot be found, or because of the child's dangerousness, the parents believe it is best to involuntarily commit the child. However, if the petitioner presents sufficient facts to commit a minor, the magistrate cannot refuse to issue a custody order for a minor simply because the parent could seek a voluntary admission.

Where is the petition initiated?

Petitions may be made to a magistrate in the county where the respondent lives or in the county where the respondent is found.[55] For example, if a resident of Cabarrus County is found wandering the streets of downtown Charlotte without proper clothing, speaking to imaginary friends, either a magistrate in Cabarrus County or a magistrate in Mecklenburg County is authorized to issue a custody order for the respondent and the petitioner can go to either place. Most often the petition is brought in the county where the respondent is found. A respondent who is found in North Carolina need not be a resident of the state to be involuntarily committed. A Mecklenburg County magistrate could also issue a custody order for a resident of South Carolina who is found in Mecklenburg County.[56]

How is a petition made?

Personal Appearance

Most petitioners must appear personally before the magistrate to execute the petition.[57] The magistrate may have the petitioner fill out the petition or may complete it for the petitioner after the petitioner has conveyed the relevant facts about the respondent's condition. Either way, the petitioner must swear to the facts contained in the petition. An unsworn petition cannot serve as the basis for issuance of a custody order.[58]

Physician or Psychologist Petitioner

One group of petitioners does not have to personally appear before the magistrate: when the petitioner is a physician or eligible psychologist[59] who has examined the respondent, he or she may execute an affidavit before any official authorized to administer oaths (usually a notary public) and submit the affidavit to the magistrate by delivering the original to the magistrate or sending a copy by telefacsimile transmission.[60] The physician or psychologist examiner need not appear before the magistrate to testify, but the magistrate must have the notarized affidavit or a faxed copy of it in front of him or her and make a determination from the facts contained in the affidavit that the respondent meets the custody order criteria. Because the physician's or psychologist's evaluation must comply with the requirements of an initial examination, the physician or psychologist petitioner frequently will attach a form called "Examination and Recommendation to Determine the Necessity for Involuntary

55. G.S. 122C-261(a), -281(a).

56. If a resident of another state is involuntarily committed in North Carolina, the State psychiatric hospital may return the respondent to his or her home state. G.S. 122C-345.

57. G.S. 122C-261(a), -281(a).

58. In re Ingram, 74 N.C. App 579, 328 S.E.2d 588 (1985).

59. There is a pilot program operating in several western Local Management Entities (LMEs) allowing the initial evaluation to be performed by a licensed clinical social worker, a masters level psychiatric nurse or a masters level certified addictions specialist in addition to a physician or eligible psychologist. In those LMEs when these clinicians perform the initial evaluation, they are treated like physicians and eligible psychologists and do not have to personally appear before the magistrate when they are the petitioner.

60. G.S. 122C-261(d). A similar provision for transmission by telefacsimile is not included in the substance abuse statute. However, since the procedure could be followed without a statutory provision, it can be followed in substance abuse commitments also.

Commitment"[61] to the affidavit and the facts may be stated in the attachment.

If the affidavit is submitted by telefacsimile transmission, the physician or psychologist must mail the original no later than five days after transmission to the clerk or magistrate to be filed in the case file. Sometimes rather than mailing the original, the physician or psychologist will give it to the law enforcement officer who comes to the physician or psychologist to take the respondent into custody under the order.

Petition Must Show Facts

The "Affidavit and Petition for Involuntary Commitment" (AOC-SP-300) is a sworn affidavit setting forth facts that show that the respondent meets at least one of the standards for issuance of a custody order. The magistrate must issue a custody order if the petition shows that the respondent is probably: (1) mentally ill and dangerous to self or others; (2) mentally ill and in need of treatment to prevent deterioration that would predictably lead to dangerousness; or (3) a substance abuser who is dangerous to self or others.

The petition must set forth facts in support of petitioner's allegations and not just conclusions. Facts are assertions or statements about something having objective reality—an actual event in time or space. Conclusions are judgments. Statements in a petition such as "the respondent lacks self-control and is unable to provide for himself" or "the respondent is a mentally ill … person who is dangerous to [her]self or others [and] [r]espondent has strange behavior and irrational in her thinking"[62] are conclusions. An example of a statement of facts is: "For the past two weeks the respondent has been hallucinating, claiming that an escaped convict is after him and that his wife is secretly keeping the convict in the basement of their home. On three occasions between April 23 and 25 he threatened to shoot his wife if she does not get rid of the convict. On April 26, the respondent purchased a gun, shot his wife in the arm, and told her that she had three days to get the convict out of the house."

The facts stated in the petition must support all the criteria necessary for a custody order. The statement of facts above, for example, establishes that the respondent is probably mentally ill (hallucinating, claiming that an escaped convict is conspiring with his wife), that he inflicted serious physical harm on someone (shot his wife), and that there is a likelihood such conduct will be repeated (past behavior and still hallucinating indicates conduct likely to reoccur); this statement of facts supports a finding that the respondent is mentally ill and dangerous to others. But recall the example of the mentally ill respondent who fasted for days at a time and then ate a whole loaf of bread or a chicken, and ate five pounds of sugar every two days. While this statement of facts may have supported a finding that the respondent was unable to care for himself, it did not show that he was in danger of serious physical debilitation, as required to find the respondent mentally ill and dangerous to himself. The following petition also was found to be insufficient to allege mental illness and dangerous to self: "Respondent has strange behavior and irrational in her thinking. Leaves home and no one knows of her whereabouts, and at times spends the night away from home. Accuses her husband of improprieties."[63] An example of a sufficient petition based on respondent's danger to self is: "Respondent stopped taking her psychiatric medicine (Haldol) three weeks ago. She has begun having trouble sleeping at night and hasn't slept more than one hour in the past 48 hours. She hasn't bathed for a week and has been talking constantly for the last week even though normally she is a quiet person. Last night when it was 25 degrees outside, I found her walking around in the back yard in a short-sleeved shirt saying she was looking for her mother, who died fifteen years ago."

A petition adequate to obtain a custody order for a substance abuser might be the following: "The respondent has been smoking crack cocaine three times daily for the last two weeks; he lost his job two days ago when he showed up at work high and now that he has no income of his own to buy drugs today he beat his mother and father to steal their money."

When a respondent is mentally retarded as well as mentally ill, the petition might allege (in addition to facts necessary to support the other required elements for commitment) something to the effect that the respondent was identified as mentally retarded when she was in second grade and has been receiving special education services for the mentally retarded since that time. It is not clear whether it is necessary to allege facts regarding the mental retardation since that is not a criteria for commitment, but rather a special provision that affects the choice of hospitals for the respondent. However, since the statute requires the magistrate to find that "the respondent is also probably mentally ill"[64] the safest practice is to include facts supporting that finding.

---

61. The form number is DMH 5-72-01 (Sept. 2001).

62. In re Ingram, 74 N.C. App. 579, 581, 328 S.E.2d 588, 589 (1985).

63. Id.

64. G.S. 122C-261(b).

Magistrate's Role in Ascertaining Facts

Asking Questions

A petitioner who appears before a magistrate seeking a custody order is often in a state of crisis. Due to this emotional state and the fact that the petitioner is probably not acquainted with the custody order criteria, the magistrate may have to actively participate in getting information from the petitioner and in writing the petition. The magistrate should always feel free to ask specific questions necessary to determine whether to issue a custody order.

Common questions to ask might include:

1. Has the respondent harmed or threatened to harm self or others within the past 24 hours? Within the last week? Month? Three months?
    a. What did the respondent do to himself or herself?
    b. What did the respondent do to you?
    c. What did the respondent do to others?
2. Is the respondent hallucinating (seeing or hearing things that other people don't)? What kind of things is he or she hearing or seeing?
3. Can the respondent identify the day, where he or she is, his or her name or age?
4. Does the respondent have unreasonable thoughts that people are talking about him or her or are going to kill or hurt him or her? Tell me what he or she said, or how you learned this information?.
5. Is the respondent making exaggerated or elaborate claims, such as:
    a. being on a special mission;
    b. being another important and powerful person;
    c. being part of a powerful organization?
6. Does the respondent have trouble sleeping at night? How long since the respondent had a normal night's sleep?
7. Has the respondent consumed more than one pint of alcohol per day for the past three to ten days?
8. Is the respondent taking any medication?
    a. what is it?
    b. has the respondent taken any illegal drugs within the past 24 hours? Month? Three months? What kind of drug? How much?
9. Has there been any change in the respondent's appetite? Has it grown or decreased? Is the respondent eating at all?
10. Is the respondent doing his or her normal activities? If not, what is the respondent doing differently?
11. Is the respondent unable to care for self because of his or her mental condition? Is he or she eating, sleeping, dressing, bathing, using the toilet, staying out of traffic?

Writing Down All the Relevant Facts

The magistrate must make sure that the petition itself contains all the facts about a respondent's present condition as well as information about previous episodes of dangerousness that are relevant to determining that there is a reasonable probability of future dangerous conduct or that would show the current deterioration would predictably result in dangerousness if treatment is not provided.[65] The facts must support all the bases for commitment that are checked on the order. For example, if the respondent is mentally ill and dangerous to self, the facts must support each of these prongs. If there is not enough space for this information on the petition itself, the magistrate should attach an extra sheet.

Full detail is important for two reasons: First, the district court judge is likely to dismiss the case if the petition is lacking in detail to support a custody order.[66] "[A custody] order is essentially a judgment by which a person is deprived of his liberty …, and as a result, he is entitled to the safeguard of a determination by a neutral officer of the court that reasonable grounds exist for his original detention…."[67] Even if the petitioner is a physician or psychologist, the petition must state sufficient facts to support the issuance of a custody order. Giving too much deference to physicians or psychologists, who are required to give facts like other petitioners, may result in the case being dismissed and is an abdication of the magistrate's role as an independent judicial official determining reasonable grounds to proceed.

---

65. G.S. 122C-261(a), -281(a).

66. In re Ingram, 74 N.C. App. 579, 328 S.E.2d 588 (1985).

67. In re Reed, 39 N.C. App. 227, 229, 249 S.E.2d 864, 866 (1978).

Second, because the physician or psychologist who examines the respondent may not speak to anyone besides the respondent, the petition must convey to the examiner the respondent's current state and past history.

Denying The Custody Order

If, after hearing the petitioner, the magistrate does not find reasonable grounds to believe that the respondent meets one of the custody order standards, the magistrate must not issue a custody order. In this circumstance, the magistrate does not have to fill out a petition (in those cases where the petitioner has not filled out his or her own petition) and is not required to make written findings of fact. The magistrate should give the petitioner the information necessary to contact the local mental health center and pursue whatever treatment options the respondent will voluntarily accept.

Issuing The Custody Order

A magistrate who does find reasonable grounds to believe that the respondent meets one of the custody order standards must issue a custody order. Where the statutory criteria for issuing a custody order are met, the magistrate should issue a custody order even if the respondent, either in person or via the petitioner, agrees to submit to treatment voluntarily. The reason for this result is this: it is possible that the respondent, because of mental illness or substance abuse, may not have the capacity to consent to treatment. Whether the capacity to consent does exist is a determination that should be left to the professional examiner and, if the respondent has capacity to consent, the examiner may convert the involuntary commitment to a voluntary admission. In a case from Florida the respondent agreed to hospitalization but later claimed that he was deprived of his liberty without due process because he didn't have the mental capacity to understand his consent. He successfully claimed that the hospitalization should have occurred under the involuntary commitment process where he would have been afforded the due process safeguards inherent in that procedure.[68] The bottom line is that if a respondent meets the custody order criteria, the magistrate should issue the order.

68. Zinermon v. Burch, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed. 2d 100 (1990).

The kind of order the magistrate issues will depend on who the petitioner is.

When the Petitioner is Not a Physician or Psychologist

When the petitioner is not a physician or eligible psychologist, the magistrate will use the form entitled "Findings and Custody Order Involuntary Commitment" (AOC-SP-302).

Findings

In issuing the order itself the magistrate must first make "findings" of fact. The order contains three possible findings: (1) the respondent is mentally ill and dangerous to self or others or in need of treatment to prevent deterioration that would predictably lead to dangerousness; (2) the respondent, in addition to being mentally ill, is also mentally retarded; or (3) the respondent is a substance abuser and dangerous to self or others. The magistrate should check all that apply, and it is possible that all three could apply. The magistrate, however, may only check the mental retardation box [box (2)] if the respondent is also mentally ill and that box was also checked. If the respondent is a substance abuser and also mentally retarded, there is no similar requirement to make findings concerning mental retardation.

Order

Under the order the magistrate should check the block that directs "any law enforcement officer" to take the respondent into custody and take the respondent for examination by a person authorized by law to conduct the examination (block 1). The officer must take the respondent to an area facility[69] for examination; if a proper person to perform the examination is not available in the area facility or no facility is available, the officer takes the respondent to any physician or psychologist locally available,[70] which typically is the emergency department of the nearest general hospital. If the initial examiner recommends inpatient commitment, the order directs a law enforcement officer to transport the respondent to a designated 24-hour facility for a second examination.

69. An "area facility" is a facility operated by or under contract with an area mental health authority. G.S. 122C-3(14).

70. G.S. 122C-263(a), -283(a).

When the Petitioner is a Physician or Psychologist

When the petitioner is a physician or psychologist[71] who has already examined the respondent and has made a specific recommendation as to the respondent's disposition and the magistrate finds reasonable grounds supporting the recommendation, then the order the magistrate issues depends on the examiner's recommendation for disposition, which is found in Section III of "Examination and Recommendation to Determine Necessity for Involuntary Commitment" (DMH 5-72-01). If the examination form is not attached and the physician has not specified the type of commitment—mentally ill and dangerous; mentally ill and in need of treatment; or substance abuser and dangerous—the magistrate must determine which type of commitment the facts support.

When the physician or psychologist recommends inpatient commitment

If the physician or psychologist petitioner recommends inpatient commitment and the magistrate finds reasonable grounds to affirm that recommendation, the magistrate must issue the regular custody order (AOC-SP-302), make the appropriate finding, and check the box in the order directing the law enforcement officer to transport the respondent directly to a designated 24-hour facility for examination and custody pending a district court hearing (box 2).[72] There is no need to take the respondent to a local examiner because the physician or psychologist petitioner has already performed that examination.

When the physician or psychologist recommends outpatient commitment

If the physician or psychologist petitioner recommends outpatient commitment and the magistrate finds reasonable grounds to affirm the recommendation, the magistrate does not issue a custody order because the respondent will not be taken into custody. Rather, the magistrate issues the order entitled "Findings and Order Involuntary Commitment Physician-Petitioner Recommends Outpatient Commitment" (AOC-SP-305), which requires hearing a district court judge to hold a hearing to determine whether the respondent will be involuntarily committed to outpatient treatment.[73] The clerk will issue a notice of hearing to the respondent.[74]

Outpatient commitment means treatment in an outpatient setting and may include medication, individual or group therapy, day or partial day programming activities, services and training including educational and vocational activities, supervision or living arrangements, and any other services prescribed either to alleviate the individual's illness or disability, maintain semi-independent functioning, or to prevent further deterioration that may reasonably be predicted to result in the need for inpatient commitment to a 24-hour facility.[75]

When the physician or psychologist recommends substance abuse commitment

If the physician or psychologist petitioner recommends substance abuse commitment and the magistrate finds reasonable grounds to affirm that recommendation, the type of order issued by the magistrate depends upon the recommendation of the physician or eligible psychologist as stated in the "Examination and Recommendation" form.[76] If the physician recommends that the respondent be held at a 24-hour facility, the magistrate issues a custody order to transport the respondent directly to the designated 24-hour facility for examination and custody pending a district court hearing AOC-SP-302, block 2). If the physician recommends that the respondent be released pending a hearing, the magistrate issues an order that a hearing before a district court judge be held to determine whether the respondent will be involuntarily committed (AOC-SP-305).

Designate the 24-Hour Facility To Which Respondent Taken

In the final part of the first page of the custody order, the magistrate must fill in the name of the designated 24-hour facility[77] to which the respondent may be

71. See supra note 59.

72. G.S. 122C-261(d).

73. Id.

74. The form is "Notice of Hearing/Rehearing for Involuntary Commitment," AOC-SP-301.

75. G.S. 122C-3(27).

76. G.S. 122C-281(d). The number of the form is DMH 5-72-01.

77. Under G.S. 122C-252 hospitals must be designated by the Secretary of Health and Human Resources to receive and treat involuntarily committed respondents. Any facility

taken if the first examiner finds that the respondent is an appropriate candidate for inpatient commitment or if the petitioner is a physician or psychologist who recommends inpatient commitment. Note that the magistrate does not put the place for the officer to take the respondent to the first evaluation (in other words the mental health center or local hospital emergency room) in this block. The form and statute require that the magistrate put the designated 24-hour facility to which the respondent will be taken for the second evaluation and at which he or she will be held for a district court hearing.

The Department of Health and Human Services maintains a list of designated 24-hour facilities on its website at http: //www/ ncdhhs.gov/mhddsas/ ivc/ ivcdesignatedfacilities_6-14-07.pdf.

In order to ensure that the respondent will be admitted to any designated 24-hour facility (state psychiatric hospital or local public or private hospital that has been designated by the State to take involuntary commitments) to which he or she might be taken, the magistrate should name the 24-hour facility to which most respondents are sent and then put "any designated 24-hour facility," (e.g. "Broughton Hospital or any designated 24-hr. facility"). Some magistrates merely put "any designated 24-hour facility" without naming any specific facility.

Private Hospital Placements

A respondent who has the resources to pay for the cost of inpatient hospital care without the use of any public funds may select a private facility for treatment and care. In those cases where the respondent is able to choose a private placement, the petitioner must have already have made arrangements with the chosen facility and if it is clear that the private facility has agreed to accept the respondent, the magistrate should fill in the name of that facility on the order.[78] If the family has not made prior arrangements for admission to a private facility, the magistrate should send the respondent to the usual 24-hour facility and the Local Management Entity or facility staff can transfer a respondent who qualifies for admission to a private hospital.

Requirement to Contact Area Authority Before Issuing Custody Order

In two different circumstances, the magistrate must contact the local mental health center before issuing a custody order. First, in cases where the magistrate has found that the respondent is probably mentally retarded, in addition to being mentally ill, he or she must contact the area authority (local mental health center) before issuing any order.[79] When the petitioner is not a physician or an eligible psychologist, the area authority will tell the magistrate where to take the respondent for the initial and second examinations. The magistrate should indicate to the officer where to take the respondent for the first evaluation and should write the location of the second evaluation in the block on the form "name of 24-hr. facility for mentally ill." When the petitioner is a physician or eligible psychologist, the area authority will designate the 24-hour facility to which the respondent should be taken and the magistrate should write this location down on the order in the block for the 24-hour facility for mentally ill. In the event that a mentally retarded person gets beyond the magistrate without the petitioner asserting and the magistrate finding that the person is mentally retarded and the mental retardation is discovered at the first evaluation, the examiner at the first evaluation can fill in a non-state facility in the box designated "or following facility designated by area authority."

Second, some counties have local policies that require the magistrate to contact the local mental health center before issuing a custody order. If the chief district court judge has approved the policy, it should be followed by the magistrates.

Who Serves the Custody Order

When the magistrate issues a custody order, generally a law enforcement officer serves the order. City police officers are responsible for transportation to a location within the county if the respondent resides, or was taken into custody, within city limits. If the respondent resides, or was taken into custody, in the county but outside city limits, the county deputy sheriffs are responsible for transportation, including

designated could take the respondent, but private hospitals may not take indigent respondents.

78. G.S. 122C-263(d)(2) implies that direct commitment to a private hospital is appropriate when it provides that if the first examiner recommends inpatient commitment, "the law enforcement officer … shall take the respondent to a [designated] 24-hour facility…. If there is no area 24-hour facility and if the respondent is indigent and unable to pay for care at a private 24-hour facility, the law enforcement officer … shall take the respondent to a State facility for the mentally ill…."

79. G.S. 122C-261(b).

transportation to locations outside the county.[80] This statute is confusing if a respondent resides in the city but is found in the county outside the city limits or vice versa since in those situations both the police and sheriff are designated to transport for evaluations within the county. The local law enforcement agencies must determine which agency transports in those circumstances.

There are two situations where persons other than law enforcement officers may provide transportation under a custody order. The city or county may designate volunteers or other personnel to provide transportation rather than using law enforcement officers.[81] The persons designated by the city or county follow the same procedure as law enforcement officers.

Magistrates may authorize family members or immediate friends of the respondent to carry out the custody order if the following criteria are met: first, a family member or immediate friend must make a request to transport the respondent; and second, the magistrate must find that the respondent does not pose substantial danger to the public.[82] The critical word is "substantial" since all respondents must be dangerous. For example the second criterion might be met in a case where the respondent is an older person who has been found dangerous to self because he is unable to care for himself but becomes extremely agitated when dealing with law enforcement officers. If the magistrate authorizes transportation by a family member or friend, in addition to completing the custody order, the magistrate must also complete the form entitled "Request and Authorization to Deliver Respondent" (AOC-SP-902M). The magistrate should inform the family member or friend providing the transportation where to take the respondent for the initial evaluation and where to take the respondent for the second evaluation if necessary (which is the 24-hour facility designated by the magistrate on the custody order). The magistrate also should inform the person that he or she must return to the clerk of court the form entitled "Request and Authorization to Deliver Respondent" with the acknowledgement of delivery filled in and the "Custody Order" with the "preliminary examination" section filled in.

Validity of Order

The magistrate's custody order directs any law enforcement officer to take the respondent into custody and transport him or her as directed in the order within 24 hours after the order is issued and without unnecessary delay after assuming custody.[83] If the respondent is not taken into custody within 24 hours of issuance of the order, the order is no longer valid and the officer may not take the respondent into custody after that time. What is not clear is the procedure that must be followed if the respondent is not taken into custody within 24 hours and the petitioner still wishes to commit the respondent. One possibility is for the magistrate to issue a second custody order based on the first petition. The other course of action would be to require the petitioner to present evidence of the respondent's continued dangerousness in a new petition and issue a new order based on that petition. The procedure the magistrate follows may depend on the nature of the facts presented in the first petition. Some facts would support the issuance of a custody order even though one or more days might have passed since anyone has seen the respondent and since the issuance of the custody order. Other facts may present a weaker case with the passage of a day or more. If at the time the request for a new custody order is made, the magistrate determines that the facts alleged in the first petition lead the magistrate to find reasonable grounds to believe that the respondent now meets the criteria for commitment, the magistrate can issue a second order based on the first petition.[84]

Where is the order valid? For example, what if a respondent moves back and forth between counties? As long as the custody order was issued by an appropriate magistrate—one sitting in a county where the respondent either resided or was found—it can be served on the respondent anywhere in North Carolina.[85] The only difficulty with service is a practical one of getting the order to the appropriate law enforcement agency in the county where the respondent is to be taken into custody. Generally, an officer from the magistrate's county delivers the order to the appropriate agency. Although there are no cases or statute governing the situation, it probably is sufficient for the officer holding the original custody order to fax a copy of the order and petition to a law enforcement agency in the county where the respondent is now believed to be found for service.

---

80. G.S. 122C-251(a).

81. G.S. 122C-251(g).

82. G.S. 122C-251 (f).

83. G.S. 122C-261(e), -281(e).

84. There are no reported cases in North Carolina dealing with this issue.

85. G.S. 122C-261(e), -281(e).

Inform Petitioner of Next Steps

If the magistrate issues a custody order for a mentally ill respondent, the magistrate must provide the petitioner (and respondent, if present) with information regarding the next steps in the process.[86] Although the statute containing this requirement does not enumerate specific pieces of information that should be relayed, the magistrate should inform the petitioner that:

(1) the custody order is a document that initiates the process leading to commitment; it is not the commitment order itself;

(2) the respondent will be taken into custody by a law enforcement officer and taken to a local facility to be examined by a physician or psychologist who will make one of three recommendations:

(a) release the respondent because he or she does not meet the commitment criteria;

(b) release the respondent but schedule a district court hearing within 10 days because the respondent meets the criteria for outpatient commitment;

(c) take the respondent to a 24-hour facility because he or she meets the criteria for inpatient commitment.

(3) if the second examiner recommends inpatient commitment, the respondent will be held at the 24-hour facility for observation and treatment pending a district court hearing to be held within 10 days. The facility staff must release the respondent when he or she no longer meets the criteria for involuntary commitment.

A model notice of next steps is found at Appendix III at the end of this bulletin.[87]

Inquiry Into Respondent's Indigence

Upon issuing a custody order for inpatient commitment, the magistrate is required by law to inquire as to whether the respondent is indigent (and thus entitled to have appointed counsel at the district court hearing).[88] However, many magistrates no longer make this inquiry because indigent respondents who are sent to a state psychiatric hospital are entitled to receive representation from the special counsel and in that situation determining whether a respondent is indigent is the responsibility of the special counsel.[89] At hearings for mentally ill persons in counties other than where state hospitals are located, counsel is appointed for indigent respondents in accordance with the rules adopted by the Office of Indigent Defense Services.[90] However, even if a mentally ill respondent is not indigent, but refuses to retain counsel, the Office of Indigent Defense Services must appoint counsel for him or her anyway.[91] Therefore, for most mentally ill respondents counsel is going to be appointed so a magistrate's determination of indigence is unnecessary.

For substance abuse respondents, the statute provides that the clerk of court, upon direction of the district court judge, assigns counsel[92] who represents the respondent at the trial level, and upon appeal the Office of Indigent Defense Services appoints counsel.[93]

Respondents who are recommended only for outpatient treatment (that is, those who are not at a state psychiatric hospital) do not have the right to counsel at their district court hearing. However, a judge may appoint counsel for an indigent respondent who is recommended only for outpatient commitment if the judge determines that the issues involved in the outpatient commitment are of significant complexity or that the respondent is unable to speak for himself or herself.[94]

Magistrates who do conduct an indigence inquiry should use the form "Affidavit of Indigency," AOC-CR-226.

Emergency Commitments

In addition to the regular procedure for initiating an involuntary commitment, there are two emergency procedures for circumstances where the respondent requires immediate hospitalization to prevent harm to self or others.

86. G.S. 122C-261(b).

87. The notice is a slightly modified version of one drafted by Mark Botts, a School of Government faculty member who specializes in mental health law.

88. G.S. 122C-261(c), -281(c).

89. G.S. 122C-270(a).

90. G.S. 122C-270(d). Currently the judge or clerk handles the appointments.

91. G.S. 122C-268(d).

92. G.S. 122C-284(a), -286(d).

93. G.S. 122C-289.

94. G.S. 122C-267(d).

Emergency Commitments for Mentally Ill

Magistrates are not involved in emergency commitments of mentally ill respondents. The criteria for the special emergency procedure is that the person not only meet the criteria for a regular commitment but also that person is in need of immediate hospitalization to prevent harm to themselves or others. The emergency commitment procedure allows anyone, including law enforcement officers, to take the respondent directly to a local physician or psychologist or directly to a State facility for examination.[95] If the examiner finds that the respondent is, in fact, (1) mentally ill, (2) dangerous to self or others, and (3) in need of immediate hospitalization, the examiner will send sworn certification of this finding to the clerk of superior court on the form entitled "Supplement to Support Immediate Hospitalization" (DMH 5-72-01-A). This supplement must accompany the examiner's usual examination form ("Examination and Recommendation To Determine Necessity for Involuntary Commitment," DMH 5-72-01).[96] The certification takes the place of the magistrate's custody order and requires a law enforcement officer to transport the respondent to a 24-hour facility for a second examination. If a person comes to the magistrate with an evaluation by a physician and the additional supplement certifying the need for immediate hospitalization, the magistrate should not issue a custody order but should indicate to the law enforcement officer that the certificate takes the place of a custody order.

Emergency Commitment of Substance Abusers

The special procedure for emergency commitment of substance abusers does involve magistrates. Only law enforcement officers may petition for emergency commitment of substance abusers. If a substance abuser is violent and requires restraint, and if delay in taking him or her to a physician or eligible psychologist for examination would probably endanger life or property, the law enforcement officer may take the substance abuser into custody and take him or her immediately before a magistrate to seek a custody order.[97] If magistrate finds by clear, cogent, and convincing evidence (note that this evidentiary standard is higher than that required in the non-emergency case) that (1) the facts in the affidavit are true, (2) that the respondent is in fact violent and in need of restraint, and (3) that delay in taking the respondent to a physician or eligible psychologist would endanger life or property, the magistrate must issue an emergency commitment order to take the respondent directly to a 24-hour facility, bypassing the first examination. The form is entitled "Petition for Special Emergency Substance Abuse Involuntary Commitment Petition and Custody Order" (AOC-SP-909M).

Transportation Orders

In addition to issuing custody orders that require officers to transport the respondent for examination in response to a petition for involuntary commitment, magistrates may order law enforcement officers to provide transportation in two other situations. First, if a substance abuser who is under an order for outpatient treatment fails to comply with that order, the area mental health authority or supervising physician may, after reasonable efforts to solicit the respondent's compliance, ask the magistrate to order that the respondent be taken into custody and transported to the area authority or physician for examination.[98] Also if a substance abuser who has been discharged from inpatient commitment and breaches the conditions of his or her release, the area mental health authority or physician may request that the respondent be taken into custody and transported to the area authority or physician for examination.[99] Upon request, the magistrate must issue an order a law enforcement officer to transport the respondent to a designated physician for examination. The form is "Request for Transportation Order and Order (Committed Substance Abuser Fails to Comply With Treatment or Is Discharged From 24-Hour Facility)" (AOC-SP-223).

The second situation in which the magistrate may be asked to issue a custody order is where transportation is needed to transfer certain respondents from one 24-hour facility to another.[100] In this situation, a respondent being held for a district court hearing or already committed by a district court

95. G.S. 122C-262.

96. Both forms are needed because the examiner must give facts supporting the mental illness and dangerousness as well as the need for immediate hospitalization, and the certificate for emergency commitment does not require facts supporting the mental illness and dangerousness. G.S. 122C-262(b), -264(b1).

97. G.S. 122C-282.

98. G.S. 122C-290(b).

99. Id.

100. G.S. 122C-206(c1).

judge needs to be transferred from the 24-hour facility in which he or she is being held to another 24-hour facility. Frequently this occurs when the respondent was sent to a local hospital but that hospital is unable to handle the respondent and wants the respondent sent to a state psychiatric hospital. The magistrate may also be asked to transfer a minor or incompetent adult who was voluntarily admitted from one facility to another. If a responsible professional at the original facility notifies the magistrate to issue an order, the magistrate must order a law enforcement agency to transfer the respondent. The form is "Notice of Need For Transportation Order and Order (From One 24-Hour Facility to Another)" AOC-SP-222.

Conclusion

After a magistrate has issued an order to take a respondent into custody and transport him or her for examination, the magistrate's involvement in the process of involuntary civil commitment ends. From this point the respondent is examined by two professionals and, if these examinations reveal that the respondent meets the criteria for commitment, the respondent will receive a hearing in the district court, at which time the judge may commit the respondent.

Appendix I

Summary of Involuntary Commitment Standards

Mentally ill and dangerous to self or others	*Mentally ill and in need of treatment to prevent deterioration that would predictably lead to dangerousness*	*Substance abuser and dangerous to self or others*
Respondent is **mentally ill** if he or she has 1) an illness 2) that impairs judgment and self-control *and* 3) makes treatment advisable Respondent is **dangerous to self** if he or she 1) is unable to care for self and in danger of suffering serious physical debilitation in the near future *or* 2) has attempted or threatened suicide and is likely to commit suicide unless treatment is given *or* 3) has mutilated or attempted to mutilate self and is likely to seriously mutilate self unless treatment is given Respondent is **dangerous to others** if 1) he or she has a) inflicted, attempted to inflict, or (in some cases) threatened to inflict, serious bodily harm on another *or* b) acted in a way that creates a substantial risk of serious harm *or* c) engaged in serious destruction of property *and* 2) there is a reasonable probability that such conduct will be repeated	Respondent is **mentally ill** if he or she has 1) an illness 2) that impairs judgment and self-control *and* 3) makes treatment advisable Respondent needs treatment to prevent deterioration if his or her psychological history indicates that his or her present state would predictably lead to dangerousness	Respondent is a **substance abuser** if he or she engages in 1) pathological use or abuse of alcohol or drugs 2) in a way or to a degree that produces an impairment in personal, social, or occupational functioning Respondent is **dangerous to self** if he or she 1) is unable to care for self and in danger of suffering serious physical debilitation in the near future *or* 2) has attempted or threatened suicide and is likely to commit suicide unless treatment is given *or* 3) has mutilated or attempted to mutilate self and is likely to seriously mutilate self unless treatment is given Respondent is **dangerous to others** if 1) he or she has a) inflicted, attempted to inflict, or (in some cases) threatened to inflict, serious bodily harm on another *or* b) acted in a way that creates a substantial risk of serious harm *or* c) engaged in serious destruction of property *and* 2) there is a reasonable probability that such conduct will be repeated

Appendix II

Information Useful in Considering Whether Respondent is Mentally Ill

Behaviors

hostile vs. passive -- acting out in destructive ways vs. withdrawn, quiet, apathetic

erratic, excitable -- sensitive to slight irritation, unpredictable, agitated

combative, violent -- destructive, physically and/or verbally abusive

incontinence --poor control of urine and feces

inappropriate social judgment -- behaviors usually considered in poor taste and usually rejected or found offensive by other people

Movements

overactivity, restlessness, agitation -- parts of body in constant motion, repetitive, activity beyond reasonable level

involuntary movements -- parts of body jerk, shake or activated without apparent reason

underactivity -- immobile, stuporous, sluggish

general muscle tension -- parts of body held taut (e.g., clenched teeth), possibly small tremors, rigid posture or walking stance

Speech

overtalkative vs. mute -- constant talking vs. unresponsive, "pressure of speech"

unusual speech -- strange words, "word salad," disconnected speech

assaultive/suicidal content -- words that suggest harmful intent

Emotions

flat or inappropriate emotions -- little change in expression or expression that doesn't fit occasion (e.g., happy but angry, crying when happy)

mood swings -- dramatic changes from dejection to elation

general over apprehension --anxiety in most areas of life

depression, apathy, hopelessness -- withdrawal and minimal interest in activities of daily life

euphoric -- grandiose and unrealistic feelings, often of feeling indestructible

Thoughts

disturbed awareness -- unaware of self or others or time or place

disturbed memory --impairment of short term and/or long term memory

disturbed reasoning/judgment -- impaired logic or decisions not tied to common thinking

confused thoughts -- inconsistent and/or combination of unrelated thoughts

poor concentration and/or attention

low intellectual functioning

slow mental speed

Abnormal Mental Trends

false perceptions (hallucinations) -- experiences in visual, hearing, smelling, tasting or skin sensations without real basis

false beliefs (delusions) -- usually persecutory or grandiose thoughts without real basis

paranoid ideas -- involves suspiciousness or belief that one is persecuted or unfairly treated

body delusion -- delusion involving body functions (e.g., "my brain is rotting," a 60 year-old insisting she is pregnant)

feelings of unreality or depersonalization -- sense of own reality is temporarily lost, so body parts distorted or sensing self from a distance

repetitious behaviors/thoughts/speech

extreme fears -- especially when seriously impairing activities of daily life

Previous Evidence

psychiatric assessments or treatment

prior petitions or associated legal difficulties

Course of Disturbance

chronic

gradual onset

acute episode

Appendix III

Steps Following the Issuance of a Custody Order for Involuntary Commitment

Upon request, the magistrate or clerk of court has issued an order for custody and transportation of a person alleged to be in need of examination and treatment. This order is not an order of commitment but only authorizes the person to be evaluated and treated until a court hearing is held.

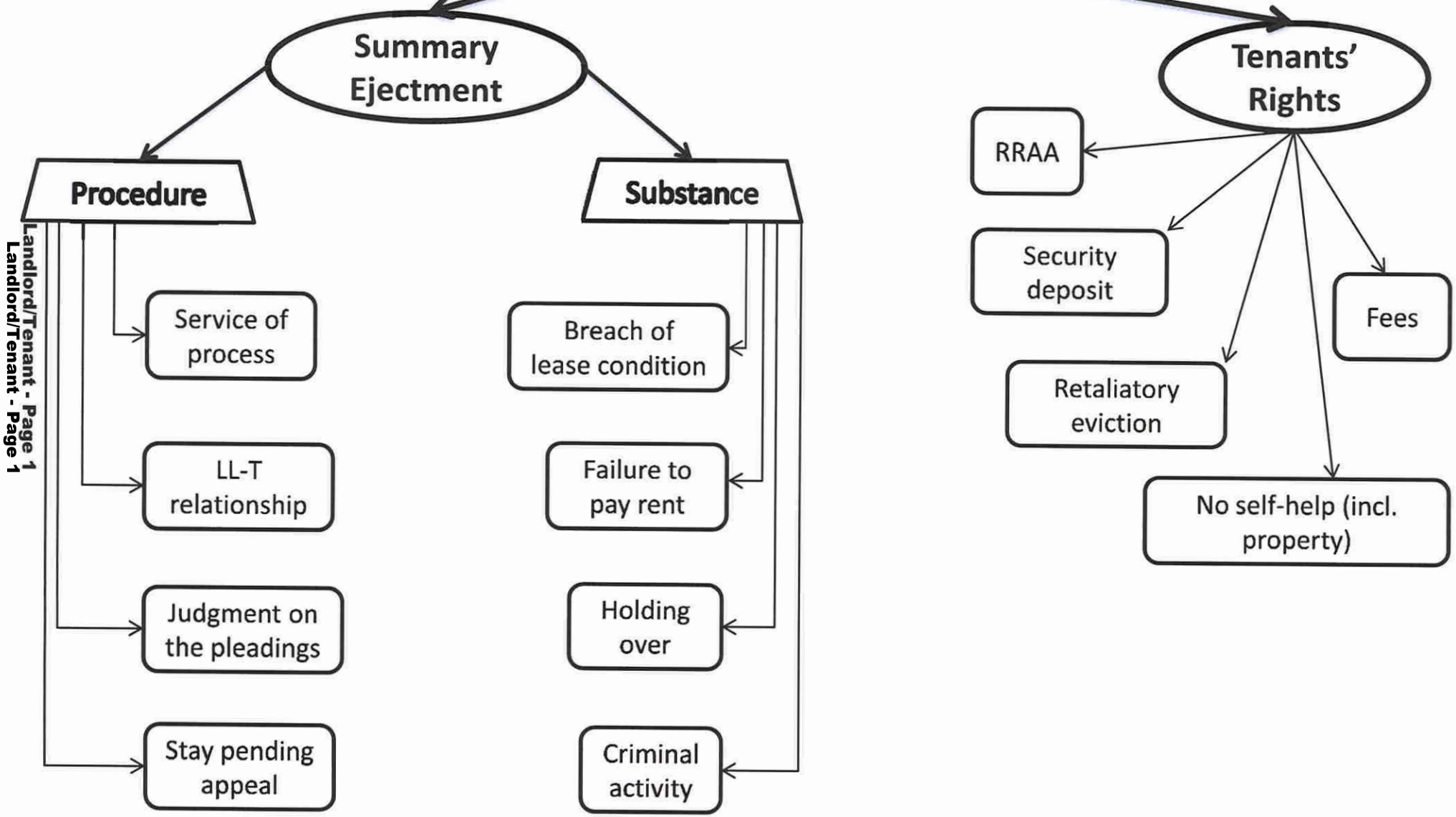
The individual making the request has filed a petition with the court for this purpose and is, therefore, called the "petitioner." The individual to be taken into custody for examination will have an opportunity to respond to the petition and is, therefore, called the "respondent." If you are taken into custody, the word "respondent," below, refers to you. G.S. 122C-261(b) requires that the petitioner and the respondent, if present, be informed of the next steps that will occur for the respondent.

1. A law enforcement officer or other person designated in the custody order must take the respondent into custody within 24 hours. If the respondent cannot be found within 24 hours, a new custody order will be required to take the respondent into custody. Custody is not for the purpose of arrest, but for the respondent's own safety and the safety of others, and to determine if the respondent is in need of treatment.
2. Without unnecessary delay after assuming custody, the law enforcement officer or other individual designated to provide transportation must take the respondent to a physician or eligible psychologist for examination.
3. The respondent must be examined as soon as possible, and in any event within 24 hours, after being presented for examination.
4. Upon examination, the physician or psychologist will recommend either outpatient commitment, inpatient commitment, substance abuse commitment, or termination of these proceedings.
    - Inpatient commitment: If the examiner finds the respondent meets the criteria for inpatient commitment, the examiner shall recommend inpatient commitment. The law enforcement officer or other designated person shall take the respondent to a 24-hour facility.
    - Outpatient commitment: If the examiner finds the respondent meets the criteria for outpatient commitment, the examiner will recommend outpatient commitment and identify the proposed outpatient treatment physician or center in the examination report. The person designated in the order to provide transportation must return the respondent to the respondent's regular residence or, with the respondent's consent, to the home of a consenting individual located in the originating county. The respondent shall be released from custody.
    - Substance abuse commitment: If the examiner finds the respondent meets the criteria for substance abuse commitment, the examiner shall recommend commitment and whether the respondent should be released or held at a 24-hour facility pending a district court hearing. Based on the physician's recommendation, the law enforcement officer or other designated individual shall take respondent to a 24-hour facility or release the respondent.
    - Termination: If the examiner finds the respondent meets neither of the criteria for commitment, the respondent must be released from custody and the proceedings terminated. If the custody order was based on the finding that respondent was probably mentally ill, then the person designated in the order to provide transportation must return respondent to the respondent's regular residence or, with the respondent's consent, to the home of a consenting individual located in the originating county.
5. If inpatient treatment is recommended, the law enforcement officer transports the respondent to a designated 24 hour facility where another evaluation must be performed within 24 hours. This evaluator has the same options as indicated in step 4 above. If the evaluator determines that the respondent needs inpatient treatment, the respondent is admitted to the facility for care and treatment.
6. The inpatient treatment provider must release the respondent when in the provider’s professional opinion the respondent no longer meets commitment criteria. If the respondent is not released, the respondent will be given a hearing before a district court judge within 10 days of date respondent taken into custody. The hearing is usually held in the county where the 24-hour facility is located unless the respondent request a hearing in the county where the petition was initiated.

Tab:
Landlord/Tenant
Law

LANDLORD-TENANT LAW

Overview of Landlord-Tenant Law



Landlord/Tenant - Page 1

Breach of a lease condition for which reentry is specified[1]

Plaintiff/LL must prove:

___ landlord-tenant relationship
___ lease contains a forfeiture clause
___ T breached lease condition for which forfeiture is specified
___ LL followed procedure set out in lease for declaring a forfeiture and terminating tenant's right to possession.

Common defenses:

___ LL failed to strictly follow procedure for termination set out in lease
___ LL fails to prove that T breached relevant lease provision (often due to RRAA)
___ LL continues with rental even after becoming aware of T's breach. [2]

Failure to pay rent

Plaintiff/LL must prove:

___ landlord-tenant relationship
___ terms of lease related to amount of rent and when it is due
___ tenant breached the lease by failing to pay rent when it was due
___ *LL made a clear and unequivocal demand after the rent was due that tenant pay all past-due rent*
___ LL waited at least 10 days after demand to file action
___ T has not yet paid the full amount owed.

Common defenses:

___ T does not owe rent because
  ___T has paid all rent due
  ___ LL's violation of the RRAA offsets total amount of rent due
___ LL failed to make proper demand because
  ___ LL made demand before rent was due
  ___ demand was not clear and unequivocal
___ LL failed to wait ten days after demand before filing complaint
___ This ground is not available because lease contains a forfeiture clause
___ The tenant tenders (i.e., offers to pay) the full amount of rent due plus court costs in cash prior to judgment.

[1] G.S. 42-30 authorizes a magistrate to enter judgment on the pleadings (i.e., without requiring plaintiff to present evidence at trial) if: (1) defendant has been served, but (2) is not present at trial and has not filed an answer; (3) Box #3 is checked on the complaint; and (4) plaintiff requests judgment on the pleadings in open court. Judgment in this instance is for possession only; if the plaintiff seeks money damages, that claim must be supported by evidence as usual.

[2] Exception in GS 42-26(c) provides that LL may accept partial rent without waiving breach if lease so states. Applies only to evictions based on breach of a lease condition triggering forfeiture.

Holdover

Plaintiff/LL must prove:

___ landlord-tenant relationship
___ terms of lease related to duration and procedure for termination, if any
___ LL has followed procedure set out in lease or, if none, given statutory notice, to terminate[3]
___ T has not vacated.

Most common defenses:

___ LL accepted rent for period(s) after the termination date
___ improper notice

Criminal activity[4]

Plaintiff/LL must prove ***one*** of the following things:

___ Criminal activity occurred within the rental unit
___ The rental unit was used to further criminal activity
___ T, household member, or guest engaged in criminal activity on premises or in immediate vicinity
___ T gave permission for a barred person to return to property
___ When person barred from unit re-entered unit, T failed to notify LL or LEO

Most common defenses:

___ T did not know or have reason to know of first three grounds listed above
___ T took all reasonable steps to prevent criminal activity
___ Eviction would create serious injustice[5]

[3] GS 42-14, -14.3 establishes notice requirements for termination in the absence of a provision in the lease:

Year-to-year lease	30 days
Month-to-month	7 days
Week-to-week	2 days
MH space	60 days

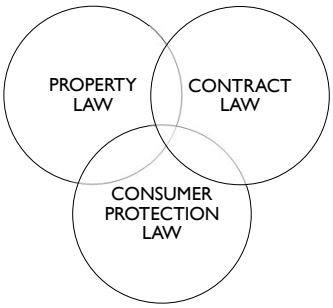
[4] [4] GS Ch. 42, Art. 7; *see* Brannon, NC Small Claims Law pp. 176-186

[5] GS 42-46(c)

INTRODUCTION TO LANDLORD-TENANT LAW

Melanie Crenshaw
Basic School

1



2

PROPERTY LAW

Owning property is like owning a bundles of sticks.

- EXCLUDE
- USE
- POSSESS
- TRANSFER

3

CONTRACT LAW

- A lease is a contract.
- A lease may be oral or written, unless the term is for a period longer than three years.
- A lease establishes and governs the landlord/tenant relationship.

4

CONSUMER PROTECTION LAW

- Residential Rental Agreements Act
- Unfair and Deceptive Practice Claim
- Defense of Retaliatory Eviction
- Self-Help Eviction prohibited
- State and Federal Fair Housing Acts

5

SUMMARY EJECTMENT ACTIONS

An action in summary ejectment is defined as an action brought by a landlord to recover possession of rental property from a tenant.

Two-Step Process in NC

1. Hearing before small claims magistrate

2. Writ of Possession issued by clerk and executed by the sheriff

6

MOST FREQUENT SMALL CLAIMS ACTION – MANY SPECIAL RULES!

RESIDENTIAL	COMMERCIAL
• No self-help eviction	• Self-help eviction okay so long as no breach of the peace
• Procedural statutes very preferential for LLs	• LLs still benefit from most procedural statutes
• Consumer protection statutes very preferential for Ts	• Consumer protection statutes NA
	• Largely governed by contract

7

SUBJECT MATTER JURISDICTION IN SUMMARY EJECTMENT ACTIONS

- The types of cases heard in small claims court are defined by statute (G. S. 7A-210) and assigned by the Chief District Court Judge in each county (G.S. 7A-211).
- An action to recover possession of real property not involving a SIMPLE LANDLORD/TENANT RELATIONSHIP is not an action in summary ejectment.
- A judicial official is without SUBJECT MATTER JURISDICTION to hear such an action.

8

DEFINITION OF A SIMPLE LANDLORD-TENANT RELATIONSHIP:

Regardless of the label attached by the parties, a landlord-tenant relationship is created when:

1. Landlord has the right of possession.
2. The landlord transfers that right to the tenant.
3. There is an exchange of value (rent).
4. There is an agreement, written or oral, specifying the duration of the transfer and the value the landlord is entitled to receive.

9

NO SUMMARY EJECTMENT FOR YOU…MAYBE WHAT TYPES OF RELATIONSHIPS MAY BE EXCLUDED?

1. Buyers/Sellers
2. Cohabitants such as family, friends, or romantic partners
3. Innkeeper/Guest

10

SE IS ALSO USELESS WHEN IT COMES TO …

Removing your sister from the property daddy left you

Forcing the live-in nanny to stop living in after you fire her.

Moving out the former homeowner so that you can move into the foreclosed property.

Helping you sell a home on the installment plan, again … and again … and again … and again.

Making the paying customer leave your hotel, residential treatment center, or group home.

11

BUYERS/SELLERS

- Is there a contract for the sale of the property?
- Has there been a recission of that contract?
- Is the agreement a lease with an option to purchase? Has the option been exercised?

12

PROBLEM 1

STATE OF NORTH CAROLINA
CUMBERLAND County
In The General Court Of Justice
District Court Division - Small Claims

COMPLAINT
IN SUMMARY EJECTMENT

1. The defendant is a resident of the county named above.
2. The defendant entered into possession of premises described below as a lessee of plaintiff.

Description Of Premises (include location and address)
742 EVERGREEN TERRACE
FAYETTEVILLE NC 28301
TWO STORY PINK HOUSE WITH ATTACHED GARAGE

Conventional / Public Housing / Section 8

Rate Of Rent/Tenant's Share: $ 1,100 per Month
Date Rent Due: 01/01/2022
Date Lease Ended: 12/31/2021
Type Of Lease: One Year / Month

3. (X) The defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the 10-day grace period before filing the complaint.
( ) The lease period ended on the above date and the defendant is holding over after the end of the lease period.
( ) The defendant breached the condition of the lease described below for which re-entry is specified.
(X) Criminal activity or other activity has occurred in violation of G.S. 42-63 as specified below.

Description Of Breach/Criminal Activity (give names, dates, places and illegal activity)
MR. LESS IS A TRESPASSER. MY COMPANY PAID OFF A JUDGMENT FOR MR. LESS AGAINST THE PREVIOUS OWNER OF THE HOUSE. MR. LESS AGREED TO PAY ME BACK. I TOOK IT BACK TO HIM IF HE AGREED TO REPAY IT BY 12/31/21 OR GET OUT. HE HASN'T PAID AND HE HASN'T LEFT.

4. The plaintiff has demanded possession of the premises from the defendant, who has refused to surrender it, and the plaintiff is entitled to immediate possession.
5. The defendant owes the plaintiff the following:
Description Of Any Property Damage: UNKNOWN

Amount Of Damage (If known): $
Amount Of Rent Paid Due: $
Total Amount Due: $

6. I demand to be put in possession of the premises and to recover the total amount listed above and daily rental until entry of judgment plus interest and reimbursement for court costs.

Date: 01/01/2022
Name Of Plaintiff/Attorney/Agent (type or print): NED FLANDERS
Signature Of Plaintiff/Attorney/Agent

CERTIFICATION WHEN COMPLAINT SIGNED BY AGENT OF PLAINTIFF

I certify that I am an agent of the plaintiff and have actual knowledge of the facts alleged in this Complaint.

Date
Name Of Agent (type or print)
Signature Of Agent

Attorney Bar No.

(Over)

AOC-CVM-201, Rev. 8/17
© 2017 Administrative Office of the Courts

13

SHARED OCCUPANCY

- What was the intention of the parties at the time of move in?
- Did both parties contribute to the living expenses?
- How long did they live together?
- Did the landlord approve the person moving in?

14

PROBLEM 2

22 CVM 102

STATE OF NORTH CAROLINA
Cumberland County
In The General Court Of Justice
District Court Division - Small Claims

COMPLAINT
IN SUMMARY EJECTMENT

1. The defendant is a resident of the county named above.
2. The defendant entered into possession of premises described below as a lessee of plaintiff.

Description Of Premises (include location and address)
my house - 4 Hummingbird Ln

Rate Of Rent/Tenant's Share: $ 850.00 per (X) Month
Date Rent Due: Monday
Date Lease Ended: 2/14/22
Type Of Lease: (X) One / ( ) Month

Name And Address Of Plaintiff
Lucy Loveless
4 Hummingbird Ln
Fayetteville NC 28304
County: Cumberland
Telephone No.: (910) 867-5809

VERSUS

Name And Address Of Defendant 1: (X) Individual / ( ) Corporation
Tommy Dashnaut
4 Hummingbird Ln
Fayetteville NC 28304
County: Cumberland
Telephone No.: (910) 222-3333

Name And Address Of Defendant 2: ( ) Individual / ( ) Corporation
County:
Telephone No.:

Name And Address Of Plaintiff's Attorney Or Agent:
Attorney Bar No.:

3. (X) The defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the 10-day grace period before filing the complaint.
(X) The lease period ended on the above date and the defendant is holding over after the end of the lease period.
( ) The defendant breached the condition of the lease described below for which re-entry is specified.
( ) Criminal activity or other activity has occurred in violation of G.S. 42-63 as specified below.

Description Of Breach/Criminal Activity (give names, dates, places and illegal activity)

4. The plaintiff has demanded possession of the premises from the defendant, who has refused to surrender it, and the plaintiff is entitled to immediate possession.
5. The defendant owes the plaintiff the following:
Description Of Any Property Damage

Amount Of Damage (If known): $
Amount Of Rent Paid Due: $ 850.00
Total Amount Due: $

6. I demand to be put in possession of the premises and to recover the total amount listed above and daily rental until entry of judgment plus interest and reimbursement for court costs.

Date: 2/7/22
Name Of Plaintiff/Attorney/Agent (type or print): Lucy Loveless
Signature Of Plaintiff/Attorney/Agent: Lucy Loveless

CERTIFICATION WHEN COMPLAINT SIGNED BY AGENT OF PLAINTIFF

I certify that I am an agent of the plaintiff and have actual knowledge of the facts alleged in this Complaint.

Date
Name Of Agent (type or print)
Signature Of Agent

(Over)

AOC-CVM-201, Rev. 8/17
© 2017 Administrative Office of the Courts

15

TRANSIENT OCCUPANCY

This Photo by Unknown Author is licensed under CC BY-SA-NC

- SL 2023-5-Ch. 42 does not apply to transient occupancies unless expressly provided in the agreement (GS 42-14.6)
- Transient occupancies=the rental of an accommodation by an inn, hotel, motel, recreational vehicle park, campground, or similar lodging to the same guest or occupant for fewer than 90 consecutive days (GS 72-1(c))

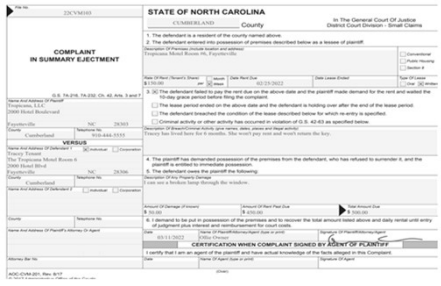
16

INNKEEPER/GUEST

- Is there a lease?
- Is the property the sole and permanent residence of the occupant?
- What is the length of the party's residence at the property?
- What is the layout of the property?
- Does the property have a hotel license and operate as such?
- Does the owner maintain control over the premises?
- Does the owner retain the room key?
- Does the owner provide maid service?
- Does the owner share facilities with the occupant?
- Does the owner repair and maintain the rooms?
- Does the owner or the occupant pay the utilities?

17

PROBLEM 3



COMPLAINT
IN SUMMARY EJECTMENT

STATE OF NORTH CAROLINA
CUMBERLAND County
In The General Court Of Justice
District Court Division - Small Claims

VERSUS

CERTIFICATION WHEN COMPLAINT SIGNED BY AGENT OF PLAINTIFF

18

WHAT DOES IT ALL MEAN?

- Don't assume the relationship of the parties before you is that of landlord/tenant.
- Parties may have relationships that require the magistrate to analyze the facts and determine if the case is properly in small claims court.
- When the relationship is not just that of landlord/tenant, apply the tests set forth by the case law.

19

FOUR GROUNDS FOR SUMMARY EJECTMENT

Breach of a lease condition for which re-entry is specified;	Failure to pay rent	Holding Over	Criminal activity

20

GROUNDS FOR SUMMARY EJECTMENT AND COMMON DEFENSES

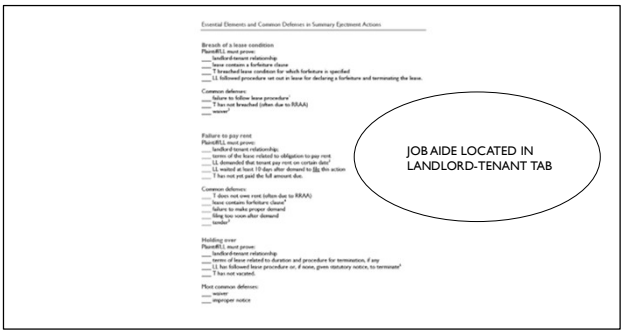
Melanie Crenshaw
Basic School

1

THERE ARE 4 REASONS – AND ONLY 4.

- Breach of a lease condition for which re-entry is specified.
- Failure to pay rent.
- Holding over.
- Criminal activity.

2



Essential Elements and Common Defenses in Summary Ejectment Actions

Breach of a lease condition
Plaintiff/LL must prove:
___ landlord-tenant relationship;
___ lease contains a forfeiture clause
___ T breached lease condition for which forfeiture is specified
___ LL followed procedure set out in lease for declaring a forfeiture and terminating the lease.
___

Common defenses:
___ failure to follow lease procedure[1]
___ T has not breached (often due to RAAA)
___ waiver[2]

Failure to pay rent
Plaintiff/LL must prove:
___ landlord-tenant relationship;
___ terms of the lease related to obligation to pay rent
___ LL demanded that tenant pay rent on certain date[3]
___ LL waited at least 10 days after demand to file this action
___ T has not yet paid the full amount due.

Common defenses:
___ T does not owe rent (often due to RAAA)
___ lease contains forfeiture clause[4]
___ failure to make proper demand
___ filing too soon after demand
___ tender[5]

Holding over
Plaintiff/LL must prove:
___ landlord-tenant relationship;
___ terms of lease related to duration and procedure for termination, if any
___ LL has followed lease procedure or, if none, given statutory notice, to terminate[6]
___ T has not vacated.

Most common defenses:
___ waiver
___ improper notice

JOB AIDE LOCATED IN LANDLORD-TENANT TAB

3

BREACH OF A LEASE CONDITION

TENANT BREACHED A CONDITION OF THE LEASE FOR WHICH THE LANDLORD CAN RETAKE POSSESSION.

4

BREACH OF A LEASE CONDITION

- Plaintiff/LL must prove:
  - landlord-tenant relationship
  - lease contains a forfeiture clause
  - T breached lease condition for which forfeiture is specified
  - LL followed procedure set out in lease for declaring a forfeiture and terminating tenant's right to possession.

5

Normal rule in contract law: Breach of contract gives innocent party the right to sue for money damages.

Measure of damages in breach of contract case? Amount required to restore innocent party to position that party would have occupied if there had been no breach.

6

USUAL RULE ILLUSTRATED (NO FORFEITURE CLAUSE)

- Our lease says no loud parties.
- Tenant has a loud party on the first of the month and thus has breached the lease.
- LL's remedy is to sue for breach of contract, collect money damages calculated based on evidence of damages LL has suffered due to T's loud party.
- Next month, T has another loud party.

7

SPECIAL PREFERENTIAL RULE FOR LLS:

The LL and T have included in the contract the rule they've agreed on if T breaches a provision in the lease: "If T violates a term we've agreed to, LL has the right to cancel our lease and make T leave."

Forfeiture Clause!!!

8

ALWAYS BEGIN WITH *BREACH OF A LEASE CONDITION*

"Let me take a look at your lease."

Written lease "left at home"? = Big Problem (*Best Evidence Rule).*

9

ONE EXAMPLE OF A FORFEITURE CLAUSE

17. Tenant's Breach:
(a) Events Constituting Breach: It shall constitute a breach of this Agreement if Tenant fails to:
(i) pay the full amount of rent herein reserved as and when it shall become due hereunder; or
(ii) perform any other promise, duty or obligation herein agreed to by him or imposed upon him by law and such failure shall continue for a period of five (5) days from the date the Landlord provides Tenant with written notice of such failure or shall occur again any time thereafter without any requirement of further notice from the Landlord.

In either of such events and as often as either of them may occur, the Landlord, in addition to all other rights and remedies provided by law, may, at its option and with or without notice to Tenant, either terminate this lease or terminate the Tenant's right to possession of the Premises without terminating this lease.*

*From the North Carolina Association of REALTORS®, Inc. "Residential Rental Contract"-Standard Form 410-T, Revised 11/2019

10

BREACH OF A LEASE CONDITION: COMMON DEFENSES

- LL failed to strictly follow procedure for termination set out in lease
- LL fails to prove that T breached relevant lease provision (often due to RRAA)
- LL continues with rental even after becoming aware of T's breach.*

* Note GS 42-46(c)/LL can accept partial rent if written in lease/this ground only.

11

FORFEITURE CLAUSE PROBLEMS

12

GENERAL ASSEMBLY TO THE RESCUE!!!

§ 42-3. Term forfeited for nonpayment of rent.
In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within 10 days after a demand is made by the lessor or his agent on said lessee for all past-due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reentry in the lease.

13

FAILURE TO PAY RENT

LEGISLATIVE REMEDY FOR LANDLORDS WHO DO NOT HAVE A FORFEITURE CLAUSE AND THE TENANT FAILS TO PAY RENT.

14

FAILURE TO PAY RENT

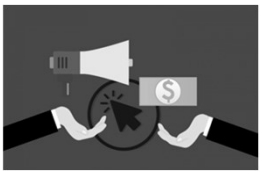
Plaintiff/LL must prove:

- landlord-tenant relationship
- terms of lease related to amount of rent and when it is due
- tenant breached the lease by failing to pay rent when it was due
- *LL made a clear and unequivocal demand after the rent was due that tenant pay all past-due rent*
- LL waited at least 10 days after demand to file action
- T has not yet paid the full amount owed.

15

FAILURE TO PAY RENT

The objective of this statutory ground for ejectment is to the give the landlord an enforcement mechanism to make the tenant pay rent.



16

WHAT'S THE STRATEGY FOR GETTING THE TENANT TO PAY?

Allowing the tenant to avoid eviction by paying all rent due and court costs at any time right up to the minute before you enter judgment is called . . .

TENDER

NOTE WELL: Effective tender requires payment of all rent due + court costs in cash prior to judgment.

17

FAILURE TO PAY RENT: COMMON DEFENSES

- T does not owe rent because
  - T has paid all rent due
  - LL's violation of the RRAA offsets total amount of rent due
- LL failed to make proper demand because
  - LL made demand before rent was due
  - Demand was not clear and unequivocal
- LL failed to wait 10 days after demand before filing complaint
- This ground is not available because lease contains a forfeiture clause.
- T tenders the full amount of rent due plus court costs in cash prior to judgment.

18

FAILURE TO PAY RENT PROBLEMS

19

HOW DO THESE FIRST TWO GROUNDS DIFFER?

BREACH OF A LEASE CONDITION	FAILURE TO PAY RENT
• You're enforcing the contract • Can apply to any rule LL wants • LL chooses procedure • Tender NOT available	• You're enforcing the statute despite the contract • Applies ONLY to default in rent • Demand/10 days mandatory • Tender IS an absolute defense.

20

HOLDING OVER

THE LEASE ENDED AND THE TENANT IS STILL THERE.

21

HOLDING OVER

- Plaintiff/LL must prove:
- Landlord-tenant relationship
- Terms of lease related to duration and procedure for termination, if any
- LL has followed procedure set out in lease or, if none, given statutory notice to terminate
- T has not vacated.

22

TYPES OF LEASES

Tenancy for Years

- Definite, fixed term
- Any fixed period to which parties agree

Periodic Tenancy

- Does not end on definite date or last a defined period of time
- Renewable from one period to the next
- LL or T may terminate by giving notice either as set out in the lease or by statute

23

STATUTORY NOTICE REQUIREMENTS FOR TERMINATION OF PERIODIC TENANCY

- **If a periodic lease does not include a notice provision**, G.S. 42-14 sets out the following notice provisions:
  - Year-to-year lease 30 days
  - Month-to-month lease 7 days
  - Week-to-week lease 2 days
  - Mobile Home space 60 days

24

HOLDING OVER: COMMON DEFENSES

- LL accepted rent for period(s) after the termination date
- Improper notice

25

HOLDING OVER PROBLEMS

26

CRIMINAL ACTIVITY

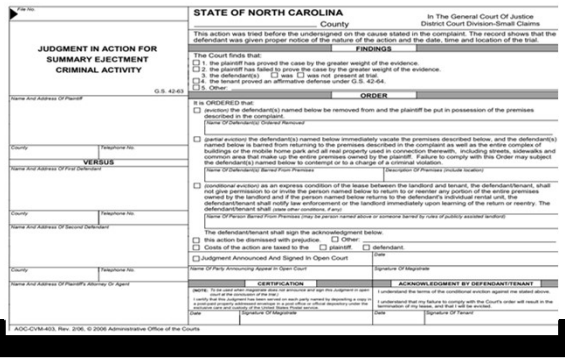
CRIMINAL ACTIVITY OF TENANT, RESIDENT, OR GUEST CAN LEAD TO THE EVICTION OF THE TENANT.

27

CRIMINAL ACTIVITY

- Plaintiff/LL must prove **one** of the following things:
- Criminal activity occurred with the rental unit;
- The rental unit was used to further criminal activity;
- T, a household member, or guest engaged in criminal activity on premises or in immediate vicinity;
- T gave permission for a barred person to return to property; OR
- When person barred from unit re-entered, T failed to notify LL or LEO.

28



File No.

STATE OF NORTH CAROLINA County

In The General Court Of Justice
District Court Division-Small Claims

JUDGMENT IN ACTION FOR SUMMARY EJECTMENT CRIMINAL ACTIVITY

G.S. 42-63

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of First Defendant

County | Telephone No.

Name And Address Of Second Defendant

County | Telephone No.

Name And Address Of Plaintiff's Attorney Or Agent

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of the trial.

FINDINGS

The Court finds that:

1. the plaintiff has proved the case by the greater weight of the evidence.
2. the plaintiff has failed to prove the case by the greater weight of the evidence.
3. the defendant(s) ☐ was ☐ was not present at trial.
4. the tenant proved an affirmative defense under G.S. 42-64.
5. Other:

ORDER

It is ORDERED that:

☐ *(eviction)* the defendant(s) named below be removed from and the plaintiff be put in possession of the premises described in the complaint.

Name Of Defendant(s) Ordered Removed

☐ *(partial eviction)* the defendant(s) named below immediately vacate the premises described below, and the defendant(s) named below is barred from returning to the premises described in the complaint as well as the entire complex of buildings or the mobile home park and all real property used in connection therewith, including streets, sidewalks and common areas that make up the entire premises owned by the plaintiff. Failure to comply with this Order may subject the defendant(s) named below to contempt or to a charge of a criminal violation.

Name Of Defendant(s) Barred From Premises | Description Of Premises (include location)

☐ *(conditional eviction)* as an express condition of the lease between the landlord and tenant, the defendant/tenant, shall not give or permit as an invitee or condition (all the below terms) to be or remain in any portion of the entire premises owned by the landlord and if the person named below returns to the defendant's residential rental unit or reentry, the defendant/tenant shall notify law enforcement or the landlord immediately upon learning of the return or reentry. The defendant/tenant shall *(state other conditions, if any)*:

Name Of Person Barred From Premises (may be person named above or someone barred by rules of publicly assisted landlord)

The defendant/tenant shall sign the acknowledgment below.

☐ this action be dismissed with prejudice. ☐ Other:

☐ Costs of the action are taxed to the ☐ plaintiff. ☐ defendant.

☐ Judgment Announced And Signed In Open Court | Date

Name Of Party Announcing Appeal In Open Court | Signature Of Magistrate

CERTIFICATION

(NOTE: To be used when magistrate does not announce and sign this judgment in open court and in the presence of the parties.)

I certify that this judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date | Signature Of Magistrate

ACKNOWLEDGMENT BY DEFENDANT/TENANT

I understand the terms of the conditional eviction against me stated above.

I understand that my failure to comply with the Court's order will result in the termination of my lease, and that I will be evicted.

Date | Signature Of Tenant

AOC-CVM-403, Rev. 2/06, © 2006 Administrative Office of the Courts

29

CRIMINAL ACTIVITY: COMMON DEFENSES

- T did not know or have reason to know that criminal activity was occurring in the rental unit, that the rental unit was used to further criminal activity or that any member of T's household or guest was engaged in criminal activity.
- T took all reasonable steps to prevent criminal activity.
- Eviction would create a serious injustice.

30

OTHER DEFENSES TO SUMMARY EJECTMENT

- *Res judicata*-LL cannot bring a second action for possession after losing a prior action based on the same breach
- Retaliatory Eviction-certain activities of tenant protected by law against eviction

31

WHAT DOES IT ALL MEAN?

- There are only 4 grounds for summary ejectment.
- A landlord-tenant relationship is always required for summary ejectment.
- Analyze each case using the grounds and common defenses job aide.
- Always start with the terms of the lease.

32

RULES OF PROCEDURE IN SUMMARY EJECTMENT CASES

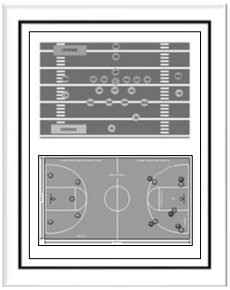
Melanie Crenshaw
Basic School

1

REVIEW: MANDATORY RULES OF SMALL CLAIMS PROCEDURE

1. Subject Matter Jurisdiction
2. Personal Jurisdiction
3. Who May Appear
4. Servicemembers Civil Relief Act
5. Minimum Notice Requirements
6. Real Party In Interest
7. Bankruptcy Stay
8. No Default Judgments
9. Judgment
10. Judgment is Final

2



MANDATORY RULE #1 SUBJECT MATTER JURISDICTION

- If there is no "simple landlord/tenant relationship," there is no subject matter jurisdiction for summary ejectment before magistrate.
- Beware of plaintiffs trying to improperly remove defendants using summary ejectment without a landlord/tenant relationship.

3

MANDATORY RULE #2 PERSONAL JURISDICTION AND SERVICE OF PROCESS

- Service can be by any of the following means:
  1. By personal service by the sheriff,
  2. Leaving dwelling with a person of suitable age and discretion who also resides in the dwelling, or
  3. By certified mail, return receipt requested.
- For SUMMARY EJECTMENT ONLY, service can be by mailing a copy of the summons and complaint and posting a copy in a conspicuous place on the premises from which the defendant is to be evicted.
- Voluntary appearance by defendant

4

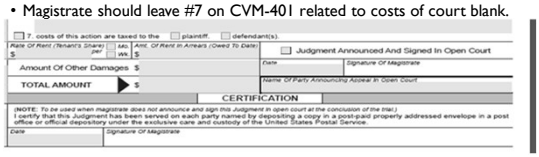
5

6

7

IMPACT OF SERVICE BY POSTING ON MONETARY JUDGMENTS

- Magistrate may enter judgment for possession ONLY.
- Magistrate should leave #7 on CVM-401 related to costs of court blank.



8

VOLUNTARY APPEARANCE BY DEFENDANT

- If defendant has not been served or is served by first class mail + posting, magistrate may enter a monetary judgment if defendant is present in court.
- If LL is seeking both money damages and possession, service is by posting, and defendant is not present, then plaintiff can ask for the claims to be severed. The possession claim is heard immediately. The claim for money damages is heard after defendant has been personally served.
- A private process server can serve the severed claim for money damages.

9

MANDATORY RULE #3 WHO MAY APPEAR

- Usual Rule: only a party or an attorney representing the party may appear.
- Summary Ejectment Exception: Agent with personal knowledge may sign complaint and represent LL.

10

Special rule for who can appear on behalf of LL

plaintiff is entitled to immediate possession.

5. The defendant owes the plaintiff the following:

Description Of Any Property Damage		
Amount Of Damage (if known)	Amount Of Rent Past Due	Total Amount Due
$	$	$

6. I demand to be put in possession of the premises and to recover the total amount listed above and daily rental until entry of judgment plus interest and reimbursement for court costs.

Date	Name Of Plaintiff/Attorney/Agent (type or print)	Signature Of Plaintiff/Attorney/Agent

CERTIFICATION WHEN COMPLAINT SIGNED BY AGENT OF PLAINTIFF

I certify that I am an agent of the plaintiff and have actual knowledge of the facts alleged in this Complaint.

Date	Name Of Agent (type or print)	Signature Of Agent

(Over)

11

MANDATORY RULE #4 SCRA

- Just as in all cases in small claims court, the magistrate should not proceed without the Servicemembers Civil Relief Act Declaration if the defendant is not present.
- Confirm whether the defendant is active duty.
- If plaintiff is unable to determine, do not proceed.

12

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice

VERSUS

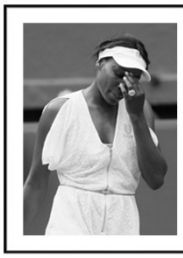
SERVICEMEMBERS CIVIL RELIEF ACT DECLARATION

DECLARATION

13

MANDATORY RULE #5 MINIMUM NOTICE REQUIREMENT

- Mandatory minimum notice period for service of process in SE cases is 2 days, excluding legal holidays.
- If not met, continue the case.
- Defendant can make a knowing waiver of minimum notice, and magistrate should indicate waiver on judgment.



14

MANDATORY RULE #6 REAL PARTY IN INTEREST

- Person entitled to possession (usually the owner) is the RPII and must be named as plaintiff.
- Do not dismiss the case.
- Give reasonable to time to substitute RPII.
  - Amend complaint
  - Finding by magistrate on judgment
- If RPII is not substituted, then magistrate may dismiss.

15

MANDATORY RULE #7 BANKRUPTCY STAY

- If defendant files for bankruptcy, the small claims action is automatically stayed.
- Magistrate should check the "Bankruptcy" box on AOC-G-108 for the clerk to remove the case and put it into inactive status.
- Any efforts by the landlord to lift the stay require the landlord to seek relief from the bankruptcy court.

16

The defendant does not have to file any federal court document with the magistrate to prove the bankruptcy filing, however, the magistrate can take steps to verify that the petition has actually been filed. If the magistrate determines that the stay applies, complete the form below to place the case in inactive status.

ORDER AOC-G-108

☐ BANKRUPTCY

It is ordered that this action be removed from the active calendar and placed on inactive status because a petition for bankruptcy has been filed staying this proceeding. This action may be reinstated if the claim is not resolved in the U.S. Bankruptcy or District Courts.

17

MANDATORY RULE #8 NO DEFAULT JUDGMENTS

- Usual Rule: Plaintiff must introduce sufficient evidence in support of claim, regardless of whether defendant is present.
- Summary Ejectment Exception: Judgment on the Pleadings for possession
  1. Complaint alleges defendant's failure to pay rent as breach of lease for which reentry is allowed;
  2. Summons indicates service on defendant;
  3. Defendant has not filed an answer;
  4. Defendant fails to appear at hearing; and
  5. Plaintiff requests, in open court, a judgment based on the pleadings.

18

JUDGMENT IN ACTION FOR SUMMARY EJECTMENT AOC-CVM-401

FINDINGS

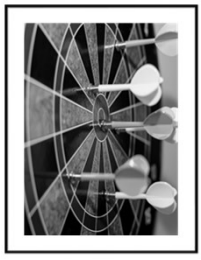
The Court finds that:

1. a. Defendant 1 ☐ was ☐ was not present, and ☐ was served ☐ personally (Rule 4) ☐ by posting. ☐ was not served.
   b. Defendant 2 ☐ was ☐ was not present, and ☐ was served ☐ personally (Rule 4) ☐ by posting. ☐ was not served.
2. ☐ a. the plaintiff has proved the case by the greater weight of the evidence.
   ☐ b. the plaintiff has failed to prove the case by the greater weight of the evidence.
   ☐ c. the plaintiff requested and was entitled to a judgment for possession based on the pleading.
3. ☐ a. there is no dispute as to the amount of rent in arrears, and the amount is $ _____.
   ☐ b. there is an actual dispute as to the amount of rent in arrears. The defendant(s) claims the amount of rent in arrears is $ _____, and this amount is the undisputed amount of rent in arrears.

19

MANDATORY RULE #9 JUDGMENT

- Usual Rule: The magistrate may reserve judgment for a period not in excess of 10 days.
- Summary Ejectment Exception: The magistrate shall render judgment on the same day on which the conclusion of all the evidence and submission of legal authorities occurs, unless the parties concur on an extension of additional time for entering the judgment and except for more complex summary ejectment cases, in which event the magistrate shall render judgment within 5 business days of the hearing.
- Remember it is important that the magistrate rule on all the claims.



20

JUDGMENT IN ACTION FOR SUMMARY EJECTMENT
AOC-CVM-401

CERTIFICATION

(**NOTE:** *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.*)
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date	*Signature Of Magistrate*

21

MANDATORY RULE #10 JUDGMENT IS FINAL

- Remedy for legal errors is appeal to district court for a new trial.
- Must file notice of appeal within 10 days of judgment, unless announced in open court.
- SUMMARY EJECTMENT: Must pay costs of appeal within 10 days of entry of judgment.

22

DAMAGES IN SUMMARY EJECTMENT ACTION

1. Unpaid rent up to date of judgment
2. Breach of contract damages
3. Fees pursuant to GS 42-46 (residential only)
4. Damage to property

23

1. UNPAID RENT UP TO DATE OF JUDGMENT

- Determine daily rent and award up to the date of judgment
- Do not include late fees, administrative fees, out-of-pocket expenses or any other damages in the Amount of Rent in Arrears
- Fees, expenses and damages should be listed as Amount of Other Damages

Amount Of Other Damages $	Date / Signature Of Magistrate
TOTAL AMOUNT ▶ $	Name Of Party Announcing Appeal In Open Court

24

2. BREACH OF CONTRACT DAMAGES

- Occupancy damages for continued possession after end of lease
- When lease is for a fixed period, damages for remainder of term
  - NOTE: LL's Duty to Mitigate
- Check lease for liquidated damages clauses

25

3. AUTHORIZED FEES, COSTS AND EXPENSES

- Late fees
- Administrative fees
- Out-of-Pocket Expenses and Litigation Costs

26

4. DAMAGE TO PROPERTY

- Exceeds normal wear and tear
- Measure=difference between FMV of property before and after damage
- Cost of repair may be relevant to determination, but is not itself proper measure of damages

27

DISMISSAL WITHOUT TRIAL

- There are no special rules in Summary Ejectment.
- Plaintiff may enter a voluntary dismissal, with or without prejudice, at any time prior to resting their case.
- Plaintiff may request magistrate enter a voluntary dismissal after presentation of their evidence.
- Defendant may request an involuntary dismissal if plaintiff fails to appear.
- If neither party appears, the magistrate may enter an involuntary dismissal.

28

ORDER AOC-G-108

Name Of Plaintiff/Petitioner

VERSUS

Name Of Defendant/Respondent

ORDER

☐ DISMISSAL ☐ With Prejudice ☐ Without Prejudice

This action is dismissed for the following reason:

☐ The plaintiff elected not to prosecute this action and has moved for dismissal.

☐ Neither the plaintiff, nor the defendant appeared on the scheduled trial date.

☐ The plaintiff failed to appear on the scheduled trial date; the defendant did appear on that date and has moved to dismiss this action.

☐ Other:

29

NOTICE OF VOLUNTARY DISMISSAL AOC-CV-405

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice

☐ Small Claims ☐ District ☐ Superior Court Division

VERSUS

NOTICE OF VOLUNTARY DISMISSAL

☐ COMPLAINT

☐ COUNTERCLAIM

☐ OTHER _____

G.S. 1A-1, Rule 41

30

WHAT DOES IT ALL MEAN?

- Every SE action must involve a landlord-tenant relationship.
- There are many special rules of procedure for SE actions.
- Your monetary judgment for rent in arrears is through the date of judgment.
- Authorized fees, costs and expenses are limited to what is in the statute.

31

TENANTS' RIGHTS STATUTES

RESIDENTIAL RENTAL AGREEMENTS ACT, RETALIATORY EVICTION AND SELF-HELP EVICTION

1

A FAMILIAR STORY

2

RESIDENTIAL RENTAL AGREEMENTS ACT

- G.S. Chapter 42, Sections 38 to 44
- Protections for tenants not found at common law
- Right to fit housing that cannot be waived
- Greater protections for tenants
- Preferential procedures for landlords

3

WHO AND WHAT IS COVERED BY THE LAW?

- Applies ONLY to residential agreements
- Applies to any dwelling unit, including mobile homes and mobile home spaces, grounds, and facilities
- "Landlord" = property owners and agents
- Does NOT apply to vacation rentals, temporary lodging and permissive occupancy

4

EIGHT OBLIGATIONS OF THE LANDLORD

1. Comply with building and housing codes
2. Keep premises in a fit and habitable condition
3. Keep common areas in safe condition
4. Maintain and promptly repair electrical, plumbing, heating, and other supplied facilities and appliances
5. Install and keep in good repair a smoke detector
6. Install and keep in good repair a carbon monoxide detector
7. Notify tenant if water provided by the landlord exceeds a certain contaminant level
8. Repair within a reasonable time any "imminently dangerous condition" as set out in the statute

5

NOTICE REQUIREMENTS

- GENERAL RULE: T must give notice to reasonably permit the landlord to fulfill their obligation
- Written notice required for electrical, plumbing and other "facilities and appliances," except for emergencies
- Written notice required for replacement of or repairs to smoke alarms and carbon monoxide alarms
- Presumption that LL knows of conditions in existence at beginning of tenancy, no further notice by T required

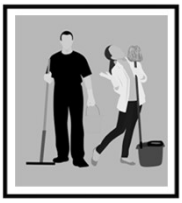
6

7

TENANT'S OBLIGATIONS UNDER THE RRAA

- Keep property clean and undamaged-G.S. 42-43 (a)(1)-(4)
- Comply with applicable building and housing codes-G.S. 42-43 (a)(5)
- Be responsible for damage beyond ordinary wear and tear, acts of LL/third parties, natural forces-G. S. 42-43 (a)(6)
- Cooperate with LL to ensure that unit has operable smoke and/or carbon monoxide alarm-G. S. 42-43 (a)(7)

***LL must notify T in writing of violations, except for emergencies



8

REMEDIES FOR LANDLORD'S VIOLATION OF RRAA

- Mutually dependent obligations, but Tenant may not unilaterally withhold rent
- T may raise RRAA violations as defense
- T may file a claim/counterclaim for rent abatement
- T argues for "set-off" of LL's damages

9

DAMAGES IN A RENT ABATEMENT ACTION

- T entitled to difference between FRV as warranted and FRV as-is + incidental damages
- T may ONLY recover up to amount of rent actually paid
- No punitive damages
- Treble damages in Unfair and Deceptive Practice claim

10

RETALIATORY EVICTION

- G.S. 42-37.1 to 42-37.3
- Cannot be waived by T
- Activities protected by law occurring within 12 months of filing
  1. Asking LL to make repairs
  2. Complaining to government agency about violation of law
  3. Formal complaint lodged against LL by government agency
  4. Attempting to exercise legal rights under law or in lease
  5. Organizing or participating in tenants' rights organizations

11

TENANT'S REMEDY

- Affirmative defense
- Dismiss SE action if proven by greater weight of the evidence
- T may have Unfair or Deceptive Practice claim under G.S. 75-1.1

12

REBUTTAL BY LANDLORD

1. T failed to pay rent or otherwise broke the lease and that is reason for eviction
2. T is holding over after end of tenancy for a definite period
3. T caused the complained of violations
4. Displacement of T required to comply with housing code
5. LL had given T good faith notice to quit before protected conduct occurred
6. LL plans in good faith to:
   1. Live there themselves;
   2. Demolish the premises or make major alterations; or
   3. Terminate use of premises as a dwelling for at least 6 months.

13

14

SELF-HELP EVICTION

- G.S. 42-25.6-42-25.9
- Cannot be waived by T
- Applies only to RESIDENTIAL tenants
- Actual and constructive self-help eviction prohibited
- Distress and distraint of T's personal property prohibited

15

TENANT'S REMEDIES

- Recover possession or terminate lease + damages
- Recover personal property, compensation for its value, and actual damages
- May have UDP claim

16

17

18

WHAT DOES IT ALL MEAN?

- Tenants have a right to fit and habitable rental property.
- Landlord's violations of the tenant protection statutes may be a defense in a summary ejectment action.
- Landlord's violations of these statutes may also cause the tenant to file an Unfair and Deceptive Practice claim.

19

Introduction to Landlord-Tenant Law

I. Property Law

Landlord-tenant law is a challenging combination of three areas of the law: Property Law, Contract Law, and Consumer Protection Law. Owning real property is like owning a bundle of sticks, and the owner of real property has the right to exclude, use, possess, and transfer. The lease is a stick in the bundle that gives the tenant the right to possess the landlord's property and the adjacent right of excluding others from the property, subject to whatever terms the landlord includes in the lease relating to inspection and re-entry for breach. The tenant may also have the right to use the property, but only in a manner consistent with the owner's wishes for how the property is to be used. For example, the owner still gets to determine if the property can be used for a pet or if the property is only for residential or commercial use. The tenant's lease does not give the tenant the right to sell, convey, or transfer the property to another as that right remains with the owner.

II. Contracts Law

In addition to transferring property rights from the owner to the tenant, the lease is a contract that establishes and governs the landlord-tenant relationship. A lease may be oral or written unless the term is for a period longer than three years. Summary ejectment cases are all contracts cases, so the same contract analysis applies and requires answers to the following questions:

1. Is there a contract (lease)?
2. Who are the parties to the contract (lease)?
3. What are the terms of the contract (lease)?
4. Did the defendant breach the contract (lease)?
5. What are the damages?

III. Consumer Protection Law

The landlord-tenant relationship is also governed by consumer protection law. As a matter of social policy, the State of North Carolina requires landlords to maintain residential rental premises at a certain minimal level of habitability. The tenant's rights to these protections under the law cannot be waived nor can the tenant give the landlord permission to violate the law. These protections for tenants are set out by statute and include the Residential Rental Agreements Act, claims for Unfair and Deceptive Trade Practices, the defense of retaliatory eviction, the prohibition against self-help eviction in residential tenancies, and Federal and State Fair Housing Acts. Even if these terms are not expressly stated in the rental contract, they are implied terms in every residential rental agreement.

IV. Summary Ejectment

Summary ejectment is a unique remedy that is only available in cases involving "a simple landlord-tenant relationship" and only for four specific breaches. An action in summary ejectment is defined as an action brought by a landlord to recover possession of rental property from a tenant. In North Carolina, summary ejectment, sometimes referred to as an eviction, is a two-step process that includes: 1. A hearing before a small claims magistrate, and 2. A writ of possession issue by a clerk and executed by the sheriff. Self-help evictions are not available to landlords to remove residential tenants, so to regain possession of the rental premises, the landlord must follow the two-step process set out by statute in Article 3 of NCGS Chapter 42. Self-help eviction is available to commercial landlords so long as there is no breach of the peace.

Summary ejectment cases are the most frequent type of small claims action and involve many special rules. The special rules of civil procedure related to summary ejectment actions will be discussed in more depth in another section, but it is important to remember that these rules must be followed. The procedural statutes for both residential and commercial summary ejectment cases are very preferential for landlords. As a balance to those procedural benefits, residential tenants benefit from consumer protection statutes. Consumer protection statutes related to residential tenants are not applicable to commercial tenants.

V. Subject Matter Jurisdiction

Before a judicial official can proceed in any matter there has to be subject matter jurisdiction that gives that judicial official authority to hear such an action. For summary ejectment actions, the threshold subject matter jurisdiction issue is whether there is a landlord-tenant relationship between the parties to the lawsuit. For magistrates, the type of cases heard in small claims court are defined by statute (NCGS 7A-210) and assigned by the Chief District Court Judge in each county (NCGS 7A-211). It is well established in North Carolina case law that summary ejectment is a statutory remedy that is only available to a landlord seeking to regain possession of real property from a tenant. If the action to recover possession of real property does not involve a simple landlord-tenant relationship, it is not an action in summary ejectment and the magistrate is without subject matter jurisdiction to hear such an action. If the action is not properly a summary ejectment action, then it is not assigned to the magistrate, and if the magistrate enters judgment without having subject matter jurisdiction to do so, the judgment is not valid.

VI. Simple Landlord-Tenant Relationship

Although there is no specific definition of "landlord-tenant relationship" in either the statute or in case law, some elements of that relationship are clear. The tenant must enter into "possession under some contract or lease, either actual or implied, with the supposed landlord, or with some person under whom the landlord claimed in privity, or where the tenant himself is in privity with some person who had so entered." Jones v. Swain, 89 N.C.App. 663

(1988). Landowners are in privity with subsequent landowners for the purpose of a landlord-tenant relationship when the transfer of property occurs (1) by voluntary sale, (2) by inheritance, or (3) by foreclosure. Tenants are in privity with subsequent owners of the leasehold when the transfer occurs by (1) assignment (not subleasing) or (2) by inheritance (subject to some exceptions).

Regardless of the label attached by the parties, [a] landlord-tenant relationship is created when: (1) there is reversion in the landlord; (2) creation of an estate in the tenant either at will or for a term less than that which the landlord holds; (3) transfer of exclusive possession and control of the tenant; and (4) a contract. Estate of Hawkins v. Wiseman, 191 N.C.App. 250 (2008) (unpublished), quoting Santa Fe Trail Neighborhood v. W.F. Coehn, 154 S.W.3d 432, 440 (Mo.App.W.D.2005).

Stated more simply, a landlord-tenant relationship is created when:

1. The landlord has the right of possession.
2. The landlord transfers that right to the tenant.
3. There is an exchange of value, usually referred to as rent.
4. There is an agreement, written or oral, specifying the duration of the transfer and the value the landlord is entitled to receive.

Because the summary ejectment procedures are designed to be efficient and inexpensive, plaintiffs may be attracted to small claims court to try to remove defendants with whom they do not have a landlord-tenant relationship. The benefits to the plaintiff/landlord include an expedited trial, the ability to appear in court through an agent rather than *pro se* or through an attorney, the limitations on continuances, and the promptness of the magistrate's decision. There are also potential benefits to defendant/tenants which may cause a defendant to argue for recognition as a tenant. The benefits to the defendant/tenant include the prohibition against self-help evictions for residential tenants, statutory protections and remedies for wrongful evictions, the prohibition against retaliatory evictions, and protections and remedies under the Residential Rental Agreements Act and the Tenant Security Deposit Act.

Some common situations that might appear in small claims but may not actually satisfy the requirement of a landlord-tenant relationship include: buyers and sellers, employers and employees, cohabitants such as family, friends, or romantic partners, and innkeepers and guests. When these types of relationships appear before the magistrate, it is important that the magistrate get the information that they need to determine if an actual landlord-tenant relationship has been established between the parties, because without the landlord-tenant relationship the case cannot go forward as a summary ejectment action.

Buyers/Sellers

North Carolina case law has long established that buyers and sellers are not within the jurisdiction of magistrates in a small claims action for summary ejectment. Some examples of this scenario include a buyer trying to remove an occupant after a courthouse tax sale, a lender trying to remove a borrower, and an owner trying to remove the buyer in a sales contract with a lease provision where the sales contract has not been cancelled. To analyze whether the parties before the magistrate have a buyer-seller relationship rather than a landlord-tenant relationship, the magistrate may find it helpful to ask the following questions:

- Is there a contract for the sale of the property?
- Has there been a recission of that contract? In other words, has the sales contract been canceled and only the lease provision remains?
- Is the agreement a lease with an option to purchase? Has the option been exercised?

Employers/Employees

As a general rule, an employee who occupies the premises as part of their compensation is in possession as an employee, and not as a tenant. If the employee is not a tenant, then an employee who refuses to leave when their employment terminates is likely a trespasser. However, for the employer/employee exception to apply, the party seeking to invoke it must prove one of the following about the occupancy of the residence:

- It is reasonably necessary for the effective performance of the employee's job; or
- It is inseparable from the job; or
- It is required by the employer as essential to the employment.

If the party claiming an employer-employee relationship cannot show one of the above, then the relationship is likely that of landlord-tenant, and summary ejectment is appropriate.

Shared Occupancy

Until recently, there has been a lack of North Carolina case law addressing what happens when two people who are romantically involved decide to live together and share expenses and one of them decides they no longer want to live together. The Court of Appeals decision in Bradley v. Tapia, 277 N.C.App. 385 (2021) (unpublished) analyzed whether the magistrate in small claims court and the district court judge on appeal had subject matter jurisdiction in a summary ejectment case between ex-lovers. The relevant facts established that the plaintiff purchased the home subject to a mortgage, both only in his name, and the parties orally agreed that defendant would reside in the home with the plaintiff and would pay one-half of all the expenses of the house, including the mortgage payments and utilities. The parties' romantic relationship was on-again-off-again. Defendant paid sporadically, and plaintiff gave her notice to vacate and filed and won a summary ejectment action against plaintiff for failure to pay her portion of the house expenses. Defendant argued that the court lacked

subject matter jurisdiction because there was no landlord-tenant relationship, but rather a business partnership to flip the residence. The Court of Appeals indicates the evidence presents a close question on the issue of an implied partnership between the parties but that ultimately the facts do not imply a partnership but support the conclusion that the legal relationship between the parties was one of a landlord and a tenant.

The facts that supported the legal conclusions made by the magistrate and the district court judge are similar to those any magistrate would need to consider when presented with a relationship between parties based on shared occupancy. The following questions may be helpful in determining whether the parties have created a landlord-tenant relationship:

- What was the intent of the parties at the time of their agreement?
- Is something of value being exchanged?
- If there is no landlord-tenant relationship, is there some other type of relationship not subject to summary ejectment or is the defendant a trespasser?

Courts in other jurisdictions have found the guest to be a trespasser and not a tenant where the parties did not intend to create a landlord-tenant relationship and there was no exchange of value for the defendant's right to occupy the property. Those courts looked at the frequency of any contributions made by the defendant to determine if they were in fact some type of rent or exchange of value in order to live in the property, and whether rent was paid or demanded. In the Bradley case, the court found evidence of an intent to create a landlord-tenant relationship from the parties' agreement to share half of the expenses of the house, including the mortgage and the utilities and payments made by the defendant to the plaintiff toward that obligation. When family, friends and lovers appear before the magistrate, it is necessarily going to require the magistrate to inquire into the nature of the relationship to determine if there is truly a landlord-tenant relationship.

Innkeepers/Guests

In most cases, the typical innkeeper-guest relationship will be easy to identify by the nature of the transient lodging at issue. However, it is possible that a landlord-tenant relationship can exist in a premises that is typical of transient lodging, because the terms of the agreement between the parties are more like a lease. In Baker v. Rushing, 104 N.C.App. 240 (1991), the court found sufficient evidence to support a conclusion that the occupants were residential tenants based on the following:

- Existence of oral leases
- Sole and permanent resident of each tenant
- Length of residency
- Weekly payments referred to as "rent"
- The operation of the building did not change after defendant obtained a hotel license

When a case appears before the magistrate with facts that indicate the relationship between the parties is more like a landlord-tenant relationship than that of an innkeeper and guest, the magistrate may find the following questions helpful to the determination:

- Is there a lease?
- Is the property the sole and permanent residence of the occupant?
- What is the length of the occupant's residence?
- What is the layout of the property?
- Does the property have a hotel license and operate as such?
- Does the owner maintain control over the premises?
- Does the owner retain a room key?
- Does the owner provide maid service?
- Does the owner share the facilities with the occupant?
- Does the owner repair and maintain the rooms?
- Who is responsible for the utilities?
- Is the property furnished or unfurnished?

Whether the premises are a hotel, campground, or boarding house, the magistrate must consider all the circumstances in determining whether a particular agreement between the parties is a lease and whether it created a landlord-tenant relationship. In Shepard v. Bonita Vista Properties, 191 N.C.App. 614 (2008), *aff'd per curiam*, 363 N.C. 252 (2009), the premises at issue were a campground. While the Court of Appeals ultimately did not have to reach the issue of whether the plaintiffs were tenants because the defendant had committed an unfair practice under G.S. Ch. 75 regardless of the plaintiffs' status, but the trial court found that the plaintiffs were residential tenants under G.S. Ch. 42.

In 2023, the legislature passed S.L. 2023-5. The new law defines "transient occupancy" as "the rental of an accommodation by an inn, hotel, motel, recreational vehicle park, campground, or similar lodging to the same guest or occupant for fewer than 90 consecutive days." G.S. 72-1(c). A corresponding change was made to Article 1 of Chapter 42, "Landlord and Tenant," by adding section G.S. 42-14.6, which says: "The provisions of this Chapter shall not apply to transient occupancies as defined in G.S. 72-1(c). An agreement related to a transient occupancy shall not be deemed to create a tenancy or a residential tenancy unless expressly provided in the agreement." Under the new law, there cannot be a landlord-tenant relationship where the occupant in a hotel or similar lodging stays fewer than 90 consecutive days, unless there is evidence of an agreement establishing a landlord-tenant relationship. Rather than having to use the judicial process of summary ejectment to remove occupants whose stays are less than 90 consecutive days, hotels and similar lodgings may restrain occupants from entering the property and remove their property at the expiration of their stay. G.S. 72-1. Guests who refuse to leave may face trespass charges.

Grounds for Summary Ejectment and Common Defenses

1. Grounds for Summary Ejectment

As discussed in the previous section, the unique remedy of summary ejectment is available only in cases involving "a simple landlord-tenant relationship" and this section will discuss the four, and only four, specific breaches for which summary ejectment is an available remedy. Those four breaches are:

1. Breach of a lease condition for which re-entry is specified,
2. Failure to pay rent,
3. Holding over, and
4. Criminal activity.

The most important aspect of making correct decisions in summary ejectment actions is identifying the grounds and then applying the rules associated with that ground.

1. Breach of a Lease Condition for which Reentry is Specified

No matter what the complaint says, the magistrate should begin every case by determining whether the lease contains a forfeiture clause (i.e., a lease condition for which re-entry is specified). The normal rule in contract law is that the innocent party has the right to sue the breaching party for money damages, but a landlord has the right to include a forfeiture clause in the lease allowing them to terminate the lease in addition to any claims they may have for money damages. The analysis for this ground works like this:

- Ask the plaintiff whether the lease is oral or written.
- If written, require that a copy of the lease be placed into evidence.
- Read the lease for language providing in essence that a consequence of breach may be termination of the lease. Key words are right of reentry and default, but neither may be used.
- Identify the trigger for forfeiture.
- Determine whether the plaintiff has demonstrated that tenant's behavior triggered forfeiture.
- Determine whether plaintiff strictly complied with any procedural requirements for declaring forfeiture set out in the lease. (For example, notice requirement.)

2. Failure to Pay Rent

What if there is no forfeiture clause? If the landlord has no contractual right to end the lease because of tenant's breach, the general rule is that a landlord's only remedy is money damages caused by the tenant's behavior. If the breach at issue in the case is failure to pay rent, North Carolina law throws the landlord a life preserver identified as "Failure to Pay Rent." The General Assembly passed a law (G.S. 42-3) specifically targeting a situation in which a tenant is occupying property, not paying rent, and refusing to leave by creating a statutory procedure allowing the landlord to eject the tenant if all efforts to obtain payment fail. **This ground is only available if there is no forfeiture clause in the lease.** The law will not override the parties' contractual agreement, so where the lease includes a valid forfeiture clause, including one triggered by the tenant's failure to pay rent, this ground is not available, and the landlord must follow the procedure set out in the lease for forfeiture.

To qualify for this statutory exception to the general rule, the landlord must make a demand that the tenant pay rent and must give the tenant at least ten days from the date of demand before filing an action for summary ejectment. The landlord has the burden of showing compliance with this requirement as part of a *prima facie* case.

Just as the statute provides a life preserver to the landlord, it also provides a defense for the tenant. If the tenant can come up with all money owed and court costs at any time prior to entry of judgment ("tender"), the tenant is entitled to have the action for SE dismissed. According to G.S. 42-33, effective tender includes "rent due and the costs of the action." If the landlord refuses to accept tender prior to appearing in court, the statute also provides that the tenant may pay the amount "into the court for the use of the plaintiff." No North Carolina case has addressed what "rent due" means in this context, so the School of Government position has been that magistrates should require tenants to pay the full amount of rent necessary to bring them into compliance with the lease. The amount required for effective tender may be greater than what the law allows the magistrate to award in a judgment for summary ejectment since the magistrate can only enter judgment in an amount through the date of court. Case law is also silent about whether effective tender includes late fees authorized by the rental agreement. Tender is a complete defense to a summary ejectment action based on G.S. 42-3, so the court must dismiss the action for possession if the tenant tenders.

3. Holding Over after the End of the Term

When the lease ends, and the tenant is still in possession of the property, the landlord can file an action for summary ejectment based on "Holding Over." There does not have to be any "fault" on the part of the tenant. The landlord can decide not to continue to rent to the tenant and give notice to terminate the lease, and if the tenant does not leave at the end of the term, the tenant is in breach. There are three ways a lease can end:

1. The parties agree at the beginning on the end-date (Example: "This lease for one year begins on September 1, 2011, and ends on August 31, 2012.")
2. The parties agree at the beginning on a procedure for ending the lease (Example: "The landlord will provide the tenant 45 days advance written notice prior to the termination date.")
3. The parties did not agree about when or how the lease would end, resulting in termination based on statute (G.S. 42-14):
    a. lease for 7 days: 2 days' notice
    b. lease for one month: 7 days' notice
    c. lease for one year: 30 days' notice
    d. lease for mobile home space: 60 days' notice

Whether the notice given is pursuant to the terms of the lease or as set out by statute, the notice operates to terminate the lease as of the **end of the rental period**. For example, in a month-to-month lease, with rent payable on the first day of the month, and the lease is silent about notice, the landlord may give notice as early as September 1, or as late as September 23, to terminate the lease as of September 30. As discussed above, the law will not override the parties' contractual agreement, so where the lease includes a notice provision, the landlord must follow the procedure set out in the lease for notice.

4. Criminal Activity

A landlord who wants to evict a tenant because of criminal activity has two potential legal grounds: the statutory procedure set out in G.S. Ch. 42, Art. 7 "Expedited Eviction of Drug Traffickers and Other Criminals" or breach of a lease condition if the lease contains a forfeiture clause triggered by criminal activity. The statutory procedure in Article 7 applies to all residential rental agreements to protect the right of the public to "the peaceful, safe, and quiet enjoyment of their homes." The statute is long and complex, and a magistrate should not hear a summary ejectment action based on the statute before studying pp. 178-184 of North Carolina Small Claims Law. There is very little case law interpreting the statute, thus the relevant law will be found primarily in the statute.

The definitions in G.S. 42-59 explain what, who and where are governed by the statute. "Criminal activity" is defined as conduct that would constitute a drug violation under G.S. 90-95 other than G.S. 90-95(a)(3) (possession of a controlled substance); any activity that would constitute conspiracy to violate a drug provision; or any other criminal activity that threatens the health, safety, or right of peaceful enjoyment of the entire premises by other residents or employees of the landlord. The statute regulates the activity of tenants, residents, and guests as those terms are defined by statute. The statute regulates activities that occur within the individual unit and the entire premises, as defined by statute.

Summary ejectment for criminal activity is a civil action that can be filed in small claims court or in district court. The expedited procedures in the statute apply to actions filed or appealed to district court, as the procedure for eviction in small claims court is already expedited. The magistrate can order a complete eviction, a partial eviction, and/or a conditional eviction. The appropriate judgment form is AOC-CVM-403 "Judgment in Action for Summary Ejectment Criminal Activity."

A complete eviction is an order evicting the tenant and everyone taking under the tenant. This type of eviction requires the landlord to prove one of the five following occurrences:

1. criminal activity occurred on or within the individual rental unit leased to the tenant; or
2. the individual rental unit was used to further or promote criminal activity; or
3. the tenant, any member of the tenant's household, or any guest engaged in criminal activity on or in the immediate vicinity of any portion of the entire premises; or
4. the tenant gave permission to or invited a person to return or reenter any portion of the entire premises knowing that person was barred either by a proceeding under this Article or by reasonable rules of a publicly assisted landlord; or
5. the tenant failed to notify a law enforcement officer or the landlord immediately upon learning that a barred person had returned to the tenant's individual rental unit.

A partial eviction is an order removing a person other than the tenant when the magistrate finds that has engaged in criminal activity on or in the immediate vicinity of some portion of the entire premises. Such a person must be named as a defendant, or if the person's name is unknown, named a "John (or Jane) Doe," stating the name is fictitious and adding a description sufficient to identify him or her (G.S. 42-62(b)).

A partial eviction may be ordered in combination with a conditional eviction. The partial eviction is directed at the person responsible for the criminal activity, while the conditional eviction is directed at

the tenant and addresses the tenant's responsibility in avoiding the risk of criminal activity in the future. In addition, a conditional eviction may be appropriate when the magistrate finds that a resident or guest has engaged in criminal activity, but that person is not named as a party in the action as discussed above. The tenant is not immediately evicted but signs an acknowledgement on the judgment form AOC-CVM-403 stating that he or she understands the terms of the court order and that violation of the court's order will result in termination of the tenancy.

To enforce the conditional eviction against the tenant if the landlord believes the tenant has violated the conditional eviction order, the landlord files a motion in the original action or a new summary ejectment action. At the hearing, the magistrate shall order the eviction of the tenant if the magistrate finds one of the following:

1. the tenant has given permission to or invited a person removed or barred from the premises to return to or reenter any portion of the entire premises; or
2. the tenant has failed to immediately notify appropriate law enforcement authorities or the landlord upon learning that a person who has been removed and barred has returned to or reentered the tenant's individual rental unit; or
3. the tenant has otherwise knowingly violated an express term or condition of any order issued by the court under this statute.

If the lease itself states that criminal activity is a trigger for a forfeiture clause, the ground for summary ejectment is actually breach of a lease condition for which reentry is specified. For a discussion of this situation, see North Carolina Small Claims Law, pp. 182-184. The case can be analyzed in the same way as other breach of a lease condition cases using the following steps:

1. Determine whether the lease contains a forfeiture clause.
2. Determine whether there has been a breach.
3. Determine whether proper procedure was followed in terminating the lease.

2. Common Defenses

1. Failure to Prove Essential Elements

Except for when the landlord asks for judgment on the pleadings which will be discussed in the section on Procedural Rules for Summary Ejectment Cases, the landlord must prove all the essential elements of the grounds for summary ejectment. Most summary ejectment actions decided in favor of a tenant fail because the landlord is unable to prove all the essential elements of any of the four grounds for their claim for possession. Quite often this deficit is apparent to the magistrate even before a tenant begins introducing evidence – or in some cases in which the tenant is not even present at trial. Sometimes, though, a tenant's own testimony or other evidence will challenge one of the essential elements to a degree sufficient to prevent a conclusion that the landlord has proven it by the greater weight of the evidence. For example, in a summary ejectment action based on breach of a lease condition, the landlord must prove that they followed the procedure set out in the lease for declaring a forfeiture and terminating the tenant's right to possession, and if the landlord fails to do so, the landlord has failed to prove an essential element and the case should be dismissed.

One of the most common "essential elements" defenses presented in summary ejectment cases is based on default in rent payments – whether based on "breach of a lease condition" or "failure to pay rent" -- when a tenant claims that the condition of the rental premises violated the Residential Rental Agreements Act (RRAA), thus reducing the actual amount of rent owed to the landlord. See North Carolina Small Claims Law pp. 197- 199 for details, including an example of the calculations necessary to assess this defense.

2. Waiver

Waiver is a broad equitable defense that is very fact-specific and potentially applicable in many contract cases. In the landlord-tenant context, the waiver doctrine provides that when a landlord learns that the tenant has breached the lease in a manner entitling the landlord to terminate the lease, the landlord is presented with a choice: either terminate the lease, or "waive the breach" and continue with the agreement. A landlord may either terminate or continue the lease, but the landlord may not act inconsistently to indicate an intention to waive the breach and then seek eviction. Depending on the particular situation, there are many ways to waive the breach, but the most common behavior is to accept money from the tenant. Nothing else appearing, the assumption is that a tenant who gives a landlord money does so in the belief that the payment will allow the tenant to remain in possession of the property.

There is an exception to the waiver doctrine when (1) the ground for ejectment is breach of a lease condition, (2) the LL accepts partial rent or partial housing subsidy payment, and (3) the written lease contains a non-waiver provision consistent with these requirements. GS 42-26(c).

Waiver is not an available defense when summary ejectment is based on criminal activity pursuant to GS 42, Art. 7, or when plaintiff is a public housing authority, although there are exceptions to this rule. See Small Claims Law, p. 172.

3. Res judicata

A landlord who brings a second action for possession after losing a prior action based on the same breach will have the action dismissed based on this defense, roughly translated as "it has already been adjudicated." Note that failure to pay rent in May is NOT the same breach as failure to pay rent in April.

4. Tender

A tenant who offers to pay the total amount of rent owed plus court costs in cash at any time prior to entry of judgment is entitled to dismissal of the summary ejectment action **provided that the ground for eviction is GS 42-3, the statutory implied forfeiture of failure to pay rent. Tender is not a defense to summary ejectment based on any other ground.** Because tender is a defense – rather than an offer to settle -- when the ground for eviction is failure to pay rent under GS 42- 3, a LL cannot defeat the defense merely by refusing to accept payment.

5. Retaliatory Eviction

See GS Ch. 42, Art. 4A, which sets out the details of this defense.

Rules of Procedure for Summary Ejectment Cases

1. **Mandatory Rule #1 Subject Matter Jurisdiction**
   - In the absence of a "simple landlord-tenant relationship," both small claims magistrate and district court judge lack subject matter jurisdiction to hear action labeled as "summary ejectment."

2. **Mandatory Rule #2 Personal Jurisdiction and Service of Process**
   - Service of process must occur at least 2 days prior to trial date. Action must be calendared within 7 business days of the complaint being filed. The sheriff must serve summons and complaint within 5 days of the complaint being filed.
   - For Summary ejectment only, service by first class mail + posting on rental premises is sufficient for award of possession only. Magistrates should leave #7 related to award of costs on CVM-401 Judgment Form blank.
   - If landlord is seeking both money damages and possession, service is by posting, and defendant is not present, 2017 amendment allows plaintiff to ask that the claims be "severed," with claim for possession heard immediately and money damages claim heard at later time after defendant has been personally served.
   - Service by private process server not allowed even after unsuccessful attempt by sheriff for possession claim, but private process server allowed to serve severed claim for money damages.
   - The magistrate can enter a monetary judgment if the defendant makes a voluntary appearance in court.

3. **Mandatory Rule #3 Who May Appear**
   - Agent with personal knowledge may sign the complaint and represent landlord. GS 7A-223(a).

4. **Mandatory Rule #4 Servicemembers Civil Relief Act**
   - Just as in all cases in small claims court, the magistrate should not proceed without the SCRA Declaration if the defendant is not present.

5. **Mandatory Rule #5 Minimum Notice Requirements**
   - The mandatory minimum notice period is only TWO calendar days in summary ejectment cases.
   - If the mandatory minimum notice period is not met, the magistrate should continue the case unless the defendant makes a knowing waiver.

6. **Mandatory Rule #6 Real Party in Interest**
   - The property owner is the real party in interest (RPII) and must be listed as plaintiff in complaint.
   - If the RPII is not listed as the plaintiff, allow a reasonable time for substitution. Only dismiss if the RPII is not substituted.

7. **Mandatory Rule #7 Bankruptcy Stay**
   - Just as in all cases in small claims court, the magistrate should not proceed if the defendant has filed for bankruptcy.

- The action is automatically stayed, and any efforts to lift the stay require the landlord to seek relief from the bankruptcy court.

8. Mandatory Rule #8 No Default Judgments

- In all small claims actions, the usual rule is that the plaintiff must introduce sufficient evidence in support of the claims, regardless of whether the defendant is present.
- Summary Ejectment Exception: Plaintiff is entitled to judgment on the pleadings (JOTP) if:
    - Complaint alleges defendant's failure to pay rent as breach of lease for which reentry is allowed as grounds.
    - Defendant was served but has not filed an answer nor appeared for trial.
    - Plaintiff requests JOTP in open court

9. Mandatory Rule #9 Judgment

- Continuances are available only for good cause and for no more than five days or the next session of court, whichever is greater, unless the parties consent to a longer period.
- Magistrate prohibited from reserving judgment unless the parties agree or the court finds the case is "more complex." In case of complex case, magistrate required to enter judgment within 5 business days.
- If judgment is for landlord in small claims court and tenant appeals, tenant is subject to being evicted while appeal is pending unless tenant satisfies statutory requirements for obtaining stay.
- Costs of appeal for trial *de novo* must be paid within 10 (not 20) days of entry of judgment.
- Appeal subject to dismissal in district court under some conditions, requiring magistrate to make a finding when tenant presents a defense in small claims court.
- The sheriff must execute a writ of possession within 5 days of issuance.

10. Mandatory Rule #10 Judgment is Final

- Remedy for legal errors is appeal.
- Must file notice of appeal within 10 days of judgment, unless the party wanting to appeal announces it in open court. Magistrate should note on the judgment if a party states in open court that they want to appeal.
- The time period to pay the costs of the appeal with the clerk of court is shorter in summary ejectment actions. The appealing party must pay the costs of appeal within 10 days of the entry of the judgment.

Damages in Summary Ejectment Action

There are four types of damages that might be awarded to a landlord in a summary ejectment action:

1. Unpaid rent up to date of judgment
2. Breach of contract damages
    a. Occupancy damages for continued possession after end of lease
    b. When lease is for a fixed period, damages for remainder of term (*NOTE: landlord has duty to mitigate damages)
    c. Check lease for liquidated damages clauses
3. Fees pursuant to GS 42-46 (residential only)
    a. Late fees
    b. Administrative fees
        1. Complaint-Filing Fee
        2. Court-Appearance Fee
        3. Second Trial Fee
    c. Out-of-Pocket Expenses and Litigation Costs
        1. Filing fees
        2. Costs for service of process
        3. Reasonable attorneys' fees paid or owed
4. Damage to property (exceeding normal wear and tear) Measure is difference between FMV of property before and after damage. Cost of repair may be relevant to determination, but is not itself proper measure of damages

Fees in Summary Ejectment Actions

For Leases Entered into On or After Oct. 1, 2009, the following fees are authorized by G.S. 42-46:

Late Fees

In residential leases, parties may agree to late fees for payments five or more days late. When rent is paid monthly, the maximum fee is $15 or 5%, whichever is greater. In the case of weekly rent, the maximum late fee is $4 or 5%, whichever is greater. Prior to a 2021 amendment to the statute, it was clear that any late fees charged contrary to the provisions of the statute were against public policy and therefore void and unenforceable. The 2021 amendment changed the name of that section of the statute to "Limitations on Charging and Collection of Administrative Fees and Out-of-Pocket Expenses and Litigation Costs" when before it had simply referred to limitations on "fees." Based on this change to the section, the landlord could argue that late fees exceeding the statutory maximums are no longer void and unenforceable, but instead can be made to conform to the statutory maximums. The magistrate should exercise their discretion when determining if the late fees should be void and unenforceable or made to conform to the statute.

Complaint-Filing Fee

In residential leases, parties may agree in writing to an administrative complaint-filing fee, not to exceed $15 or 5%, whichever is greater. The complaint-filing fee may be charged as part of the amount required to cure default. The landlord is entitled to this fee only if:

- tenant was in default,
- LL filed and served complaint for SE,
- tenant cured the default, and
- LL dismissed the claim prior to judgment.

Court-Appearance Fee

In residential leases, parties may agree to an administrative court-appearance fee, not to exceed 10% of the monthly rent, only if:

- tenant was in default
- LL won a SE action
- neither party appealed.

Second Trial Fee

In residential leases, parties may agree to a second administrative trial fee, not to exceed 12% of monthly rent, in the event of a new trial following appeal from small claims judgment. If a Court-Appearance Fee was awarded as part of small claims judgment, that award is vacated. The landlord must prove:

- tenant was in default
- LL prevailed.

Out-of-Pocket Expenses and Litigation Costs

In addition to the late fees and administrative fees outlined above, a landlord also is permitted to charge and recover from a tenant the following out-of-pocket expenses and litigation costs:

1. Filing fees charged by court.
2. Costs for service of process pursuant to statute.
3. Reasonable attorney's fees actually paid or incurred, pursuant to a written lease, not to exceed 15% of the amount owed by the tenant, or 15% of the monthly rent stated in the lease if the eviction is based on a default other than the nonpayment of rent.

Additional Rules Related to Administrative Fees and Out-of-Pocket Expenses and Litigation Costs

LL can charge only one of the three administrative fees, and that fee may not be deducted from subsequent rent payment or asserted as ground for default in subsequent SE action. Landlords are prohibited from attempting to charge larger administrative fees than those provided by statute and any such lease provision in violation of the law is void. Landlords are prohibited from attempting to collect out-of-pocket expenses or litigation costs other than those provided by statute and any such lease provision in violation of the law is void.

Liquidated Damages Provisions

Liquidated damages: "a sum which a party to a contract agrees to pay or deposit which he agrees to forfeit if he breaks some promise . . . arrived at by a good-faith effort to estimate in advance the actual damage which would probably ensue from the breach."

Penalty: "a sum which a party similarly agrees to pay or forfeit, . . . but which is fixed, not as a pre-estimate or probable actual damages, but as a punishment, the threat of which is designed to prevent the breach." McCormick, *Damages* §146 (1935)

A liquidated damages provision is enforceable under North Carolina law when:

1. damages are speculative or difficult to ascertain, and
2. the amount stipulated is a reasonable estimate of probable damages, OR the amount stipulated is reasonably proportionate to the damages actually caused by the breach.

Knutton v. Cofield, 273 NC 355 (1968).

The party challenging the validity of the provision has the burden of demonstrating that it does not satisfy the requirements for enforceability.

Procedural Issues Related to Damages

Related to Complaint

In all cases in which a plaintiff seeks money damages, the magistrate should award damages – if at all – based on the evidence presented at trial. Remember that the complaint serves a notice function, and that the plaintiff is not limited to the amount stated in the complaint. In summary ejectment actions, the amount of rent due as of the date of trial will almost always differ from the amount requested in the complaint. It is not necessary to amend the complaint, unless the amount requested at trial is significantly greater or due to newly asserted claims.

When Service is by Posting

The wording of the summary ejectment complaint form requests money damages in addition to possession unless the plaintiff affirmatively modifies the form. The result is that many times plaintiffs may be largely unaware that they have asserted two separate claims for relief, each of which must be disposed of in a final judgment. When service is by posting and the defendant does not appear, the magistrate does not have jurisdiction to award money damages, including costs. If the plaintiff does not request that the claim be severed pursuant to GS 7A-223(b1), the magistrate should note on the judgment form that the claim for damages was not considered because service was by posting.

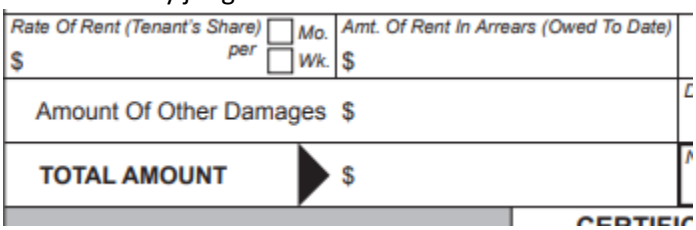
If the plaintiff does request that the claim be severed, note that the issue about costs is resolved: no determination as to costs is made at Part 1 of the trial, regarding possession, and the tenant will have been personally served when Part 2 of the case is decided and a final judgment entered.

Related to Stay of Enforcement

A judgment awarding possession of rental premises is enforceable after ten days even if the tenant appeals, unless the tenant obtains the (entirely separate) stay of enforcement pending appeal.

Because the stay procedure involves calculating amounts of money to be deposited in the clerk's office, litigants and magistrates alike sometimes confuse the details of this procedure with calculation of damages. This is particularly true because the magistrate must enter information related to both aspects of the case on the judgment form.

- On the judgment form, under Findings, the magistrate should complete #3 by recording the smallest amount of rent both parties agree is owed. (If the defendant does not appear for trial or file an answer, this amount will be based on the LL's testimony and/or the amount requested in the complaint.) Note that this record of the parties' contentions is entirely unrelated to the amount of rent, if any, actually determined by the magistrate to be owed.
- On the portion of the judgment form reproduced below, the block labeled Rate of Rent should be completed for use by the clerk if necessary, in case of appeal. On the other hand, the block labeled Amt. of Rent in Arrears should be completed by the magistrate only if the intent is to enter a money judgment.



- Potential *res judicata* issues: The legal doctrine of *res judicata* provides that a final judgment on the merits bars subsequent actions between the same parties on the same issues—not only those issues which actually were litigated, but also those that might have been. GS 42-28 provides that a landlord in a summary ejectment action may seek, in addition to possession, "rent in arrears, and damages for the occupation of the premises since the cessation of the estate of the lessee . . . but if he omits to make such claim, he shall not be prejudiced thereby in any other action for their recovery." In a significant case, the Court of Appeals reminded us that the statutory right to seek monetary damages in a separate action from a summary ejectment claim "does not create an exception to the general rule that all damages must be recovered in one action." Chrisalis Properties, Inc. v. Separate Quarters, Inc., 101 NC App 81 (1990), *rev. denied* 328 NC 570 (1991). The rule applies to all damages arising out of tenant's breach of lease and its subsequent termination. Arguably, damage to property would not fall under this rule, because it is a tort, rather than breach of contract.
- Impact of security deposit: Unless the security deposit is part of the case – typically because tenant has filed a counterclaim – the magistrate should determine damages and enter judgment without regard to any security deposit that might be available as another source of compensation for damages.

Landlord-Tenant Law: North Carolina Small Claims Law by Brannon (2009)

The chapter on Landlord-Tenant Law in Joan Brannon's book on small claims law continues to be an outstanding reference. While a few portions of the text have been rendered inaccurate by subsequent legislation or case law, the majority of these relate to procedural modifications applicable to small claims court.

Readers should be aware of the following changes:

- References throughout the text to damages not exceeding $5000 should read "$10,000" due to legislation in 2013 increasing the jurisdictional amount for small claims cases.
- In 2010 the General Assembly passed GS 47G and GS 47H governing the buyer/seller relationship discussed on p. 151 when the agreement is an option to purchase contract executed with lease agreement or a contract for deed.
- In 2023 the General Assembly passed G.S. 72-1(c) defining "transient occupancy" as "the rental of an accommodation by an inn, hotel, motel, recreational vehicle park, campground, or similar lodging to the same guest or occupant for fewer than 90 consecutive days." Unless the parties have expressly agreed to create a landlord-tenant relationship, the provisions of Chapter 42 will not apply to transient occupancies.
- The unconscionability issue discussed on p. 160 was directly addressed by the NC Supreme Court in Eastern Carolina Regional Housing Authority v. Lofton, 789 SE2d 449 (2016), in an opinion holding that a landlord is not required to produce evidence negating the possibility that eviction in the particular circumstances would be unconscionable.
- Monetary damages are addressed starting on p. 165, and it should be added that if the landlord is seeking both money damages and possession, service is by posting, and defendant is not present, a 2017 amendment to G.S. 7A-223 allows plaintiff to ask that the claims be "severed," with claim for possession heard immediately and money damages claim heard at later time after defendant has been personally served.
- The section on p. 170 referring to "Other Contractual Fees" has been substantially amended by legislation enacted in 2009 amending GS 42-46 establishing a hierarchy of permissible administrative fees as well as out-of-pocket and other litigation expenses.
- In 2012 the General Assembly added GS 42-26(c) permitting a landlord to accept partial payment of rent in certain circumstances without waiving the right to pursue eviction. This legislation is an important addition to the discussion of waiver beginning on p. 171 of the book.
- The section labeled Security Deposits on p. 189 of the book should be supplemented with legislation making minor amendments to GS 42-51. In addition, Neil v. Kuester Real Estate Services, Inc., 237 NC App 132 (2014) is an important case limiting the "full refund" remedy for violation of the Act to willful violations of GS 42-50, the provision related to the deposit of funds to a trust account.
- The section on pp. 190-192 governing a landlord's right to dispose of tenant's property should be revised to correct references to dollar amounts and time periods in accordance with statutory amendments set out in GS 42-25.9 and 42-36.2. In 2012 the General Assembly passed 42-36.3 which allows a landlord to file an affidavit in special proceedings in accordance with G.S.

28A-25-7 rather than having to file for summary ejectment when a tenant who is the sole occupant of the property dies leaving personal property in the unit.

- GS 42-42 was amended to add to the Landlord's Duties under the RRAA listed on p. 193 to include complying with all applicable elevator safety requirements in statute, providing an operable carbon monoxide alarm and repairing and remedying any imminently dangerous conditions on the premises as defined by statute.

Breach of a Lease Condition Problems

Use the following lease provision to answer questions 1-6.

"If the Tenant shall fail to pay rent when due and payable or to perform any of the other conditions as herein provided, such failure shall at the option of the Landlord, terminate this lease and upon one day's notice to the Tenant, the Landlord may without further notice or demand reenter upon and take possession of said premises without prejudice to other remedies."

1. Is this a valid forfeiture clause?
    a. Yes
    b. No
2. What triggers it?
    a. Nonpayment of rent.
    b. Failure to perform conditions in the lease.
    c. All of the above.

3. What procedure is required to exercise it?
    a. Landlord must give tenant one day's notice.
    b. No notice is required.
    c. Landlord has to make demand and wait 10 days.

4. What does it give the landlord the right to do?
    a. Padlock the door and bar the tenant.
    b. File a summary ejectment action to terminate the lease and retake possession.
    c. Call the sheriff to arrest the tenant for the crime of trespass.

5. Tenant rented the property from Landlord beginning January 1st. In another part of the lease, there is a provision that says the Tenant shall not keep a pet on the premises without written approval from the Landlord. On January 15th, Tenant calls Landlord and asks if it is okay that she has a cat, and Landlord says it's fine. Landlord accepts rent from Tenant for January, February, and March, then on April 1st, Landlord sends Tenant a text that says she is going to file for eviction for breach of the lease if Tenant does not have the cat out of the property by April 5th. Landlord files for summary ejectment on April 6th because the cat is still on the property. If Landlord loses, what is the best answer for why?
    a. Landlord continued with the rental even after becoming aware of Tenant's breach.
    b. Landlord failed to include a no waiver clause in the lease for acceptance of partial rent.
    c. Landlord failed to follow the procedure in the forfeiture clause.

6. Same facts as above, except Tenant failed to pay rent on April 1st and Landlord called Tenant and told her that if she did not pay by April 5th, he was going to file for summary ejectment. On April 6th when Tenant still had not paid, Landlord filed a summary ejectment action which was properly served on Tenant. What is the likely outcome?
    a. Tenant wins because landlord waived the breach.
    b. Landlord wins because the failure to pay rent triggered the forfeiture clause and Landlord followed the procedures in the forfeiture clause.
    c. Tenant wins because Landlord failed to give Tenant written notice of her failure to pay rent.

Use the following lease provision to answer questions 7-8.

"In a default other than failure to pay rent, the lessor will take no action to effect a termination of the lease without first giving the tenant a reasonable time to cure the default. Upon payment of the rent and performing the other terms of the lease, the lessee shall have the quiet enjoyment of the property."

7. Is this a valid forfeiture clause?
    a. Yes
    b. No

8. If Lessor filed a summary ejectment action against Lessee for breaching the lease, but the Lessee did not appear at the hearing, what is the likely outcome?
    a. Continue the case to give the Lessee a chance to attend.
    b. Dismiss the case because a valid forfeiture clause is an element of breach of a lease condition.
    c. Grant Lessor possession because Lessee was not present to object to the lease.

Failure to Pay Rent Problems

Choose the best answer.

1. Landlord has a forfeiture clause in the lease providing that being more than 3 days late with the rent on more than 2 occasions in a 6-month period is a breach of the lease authorizing the landlord to terminate the lease. Tenant has recently lost his job and—for the first time—failed to pay rent on March 1st. The following day on March 2nd, Landlord demanded that the tenant make immediate arrangements to catch up the rent or else be evicted. On March 15th, having received no payment, Landlord filed this action for summary ejectment based on Tenant's failure to pay rent. Who wins?
    a. Landlord because he made demand and waited 10 days before filing.
    b. Tenant because statutory failure to pay rent is not an available basis for summary ejectment when the lease contains a forfeiture clause.
    c. Landlord because even though there is a forfeiture clause in the lease, he has the option of choosing which grounds to file under.

2. Landlord's lease contains a provision stating that, in the event the Tenant is late with rent, the Tenant is aware and agrees that, pursuant to the lease, the Landlord is considered to have made a demand effective the moment the payment is late. Tenant misses a payment on March 1st, and Landlord files for summary ejectment based on the statutory failure to pay rent on March 12th without having communicated with Tenant. Who wins?
    a. Landlord because Tenant had demand for the rent in the lease.
    b. Landlord because he followed all the steps in the lease's forfeiture clause.
    c. Tenant because demand must be made after default.

3. Tenant knows that he's likely to have trouble paying the rent in March and discusses it with the Landlord, who says, "Just do the best you can—pay as much as you can as soon as you can, because I don't want to have to evict you." That conversation happened on February 27th, and on March 1st, the Tenant missed the rent payment. On March 12th, Landlord files for summary ejectment based on the statutory failure to pay rent. Who wins?
    a. Tenant because Landlord failed to make demand after the rent came due.
    b. Tenant because Landlord's statement on February 27th was a waiver of the due date.
    c. Landlord because Tenant knew on February 27th that rent would have to be paid on March 1st to avoid eviction.

4. Same facts as question #3, but this time the conversation happened on March 1st instead of February 27th. Who wins?
    a. Landlord wins because the demand just has to mention eviction.
    b. Tenant wins because Landlord's statement could mean anything.
    c. It depends on whether the magistrate hearing the case determines the demand is clear and unequivocal.

5. Tenant failed to pay rent on March 1st, and Landlord promptly demanded the rent. On March 9th, Landlord files for summary ejectment based on the statutory failure to pay rent. Who wins?
    a. Tenant because Landlord filed too soon.
    b. Landlord because even if he filed too soon, Tenant still had not paid by the hearing date.
    c. Tenant because Landlord cannot make demand until five days after the rent is due.

6. Tenant failed to pay rent on March 1st, and Landlord promptly demanded the rent. On March 9th, Landlord accepted half the rent. On March 11th, Landlord files for summary ejectment based on the statutory failure to pay rent. Who wins?
    a. Landlord because he waited 10 days to file.
    b. Tenant because Landlord waived forfeiture by accepting partial rent.
    c. Landlord because he made a prompt demand.

7. Tenant failed to pay rent on March 1st, and Landlord promptly demanded the rent. On March 12th, Landlord filed for summary ejectment based on the statutory failure to pay rent. When the case comes to court, the Tenant offers to pay the total amount of rent due plus the costs of court in cash right then. Landlord refuses to accept the sum offered, saying she's willing to forget about the money, but still wants possession because she doesn't want to have to come back to court every time Tenant is late. Who wins?
    a. Tenant because tender is a complete defense to a claim for possession.
    b. Tenant because the lease did not have a forfeiture clause.
    c. Landlord because Tenant waited too late to tender.

8. Is the result different in question #7 if Tenant is prepared to pay all past due rent but does not have enough cash to pay court costs?
    a. No, because Tenant can pay the court costs after judgment.
    b. Yes, because effective tender requires payment of all rent due plus court costs in cash prior to judgment.
    c. No, because Landlord amended the complaint in court to only seek possession.

Holding Over Problems

Choose the best answer.

Lease runs from January 1-December 31, 2022. On January 3rd, 2023, Landlord files a summary ejectment action. Testimony is that Tenant has always paid rent on time. Tenant testifies that she attempted to pay rent on January 1, 2023, but Landlord refused it. Tenant has not vacated.

1. When did the lease end?
    a. December 31, 2022, because in a fixed term lease, it ends when it says it ends.
    b. January 31, 2023, because Tenant tried to pay rent for January.
    c. It does not end until one of the parties gives the other party 30 days' notice to terminate.

2. Who wins?
    a. Landlord because the lease ended on December 31, 2022.
    b. Tenant because she always paid her rent on time.
    c. Tenant because Landlord failed to give her notice to terminate.

Lease runs from January 1-December 31, 2022. On January 1, 2023, Landlord accepts usual rent payment from Tenant. Tenant pays rent on February 1 and again on March 1. On March 15, Landlord files summary ejectment action, testifying that she has reminded Tenant on several occasions that the lease ended at the end of 2022, and that Tenant needs to find another place to live, but he's still there.

3. When did the lease end?
    a. December 31, 2022, because in a fixed term lease, it ends when it says it ends.
    b. March 31, 2023, because Tenant paid rent for March.
    c. It does not end until one of the parties gives the other party the minimum statutory notice to terminate.

4. Who wins?
    a. Landlord because the lease ended on December 31, 2022.
    b. Tenant because Landlord continued to accept rent after the fixed period and failed to give Tenant notice to terminate.
    c. Landlord because by filing on March 15th she has given Tenant more than 7 days' notice to terminate.

Lease runs from January 1-December 31, 2022, with the right to renew for another year if notice is given in writing at least 30 days prior to expiration. On November 24, 2022, Tenant calls Landlord to inform Landlord that he intends to exercise his option to renew. On January 1, 2023, Landlord refuses to accept rent, and files summary ejectment action on January 3, 2023. Tenant has not vacated.

5. When did the lease end?
    a. It will not end until December 31, 2023.
    b. December 31, 2022.
    c. It has not ended yet because Landlord did not give Tenant 7 days' notice to terminate.

6. Who wins?
    a. Tenant because he called the Landlord more than 30 days before the lease ended.
    b. Tenant because the Landlord did not give him 30 days' notice to terminate.
    c. Landlord because Tenant failed to follow the procedure for renewal in the lease.

Lease runs from January 1-December 31, 2022, with the right to renew for another year if notice is given in writing at least 30 days prior to expiration. On November 24, Tenant calls Landlord to inform her that he intends to exercise his option to renew. On January 1, 2023, Landlord accepts rent. On January 15, 2023, Landlord tells Tenant the lease will end on January 31. On February 1, Landlord files summary ejectment action. Tenant has not vacated.

7. When did the lease end?
    a. January 31, 2023, because Landlord and Tenant's actions created a new periodic tenancy.
    b. December 31, 2022, because a fixed term lease ends when it says it does.
    c. It will end on December 31, 2023, because Tenant gave notice to renew.

8. Who wins?
    a. Tenant because he exercised his option to renew when he called the Landlord on November 24.
    b. Landlord because she gave Tenant more than the 7 days' notice required to terminate a month-to-month tenancy.
    c. Tenant because Landlord accepted rent for January 2023 which shows the parties intended to renew for another year.

Lease runs from January 1, 2022-December 31, 2022, but Tenant continues to pay, and Landlord continues to accept the rent on a monthly basis. On March 27, Landlord tells Tenant that the lease will end effective April 1, 2023, but Tenant does not move out. On April 2, Landlord files summary ejectment action.

9. When did the lease end?
    a. It hasn't ended because Landlord failed to give the minimum notice to terminate.
    b. It ended on December 31, 2022, when it said it did.
    c. It hasn't ended yet because Tenant can stay for all of 2023.

10. Who wins?
    a. Landlord because in a fixed term lease, the lease ends when it says it ends.
    b. Tenant because she exercised her option to renew for another year.
    c. Tenant because a periodic tenancy from month-to-month requires 7 days' notice to terminate.

Month-to-month lease with rent due on the first. On March 15, Landlord tells Tenant that the lease will end on March 23. When Tenant hasn't vacated by March 24, Landlord files summary ejectment action.

11. When did the lease end?
    a. On March 23 at the end of the 7 days' notice to terminate.
    b. On March 31 because it ends at the end of the month.
    c. It hasn't ended yet because the notice did not go to the end of the rental period.

12. Who wins?
    a. Tenant because the earliest Landlord could file is April 1.
    b. Tenant because Landlord's attempt to terminate the lease mid-way through the rental period fails.
    c. Landlord because she gave Tenant 7 days' notice and did not file until the notice period ended.

Month-to-month lease with the following provision: *This lease may be terminated by either party giving thirty days written notice*. On March 15, Tenant tells Landlord that she'll be moving at the end of the month. Landlord tells her that's not enough notice. Tenant moves out as planned. On May 1, Landlord files an action for money damages, based on Tenant's failure to pay rent for April. Landlord testifies that he found another tenant to move in as of May 1.

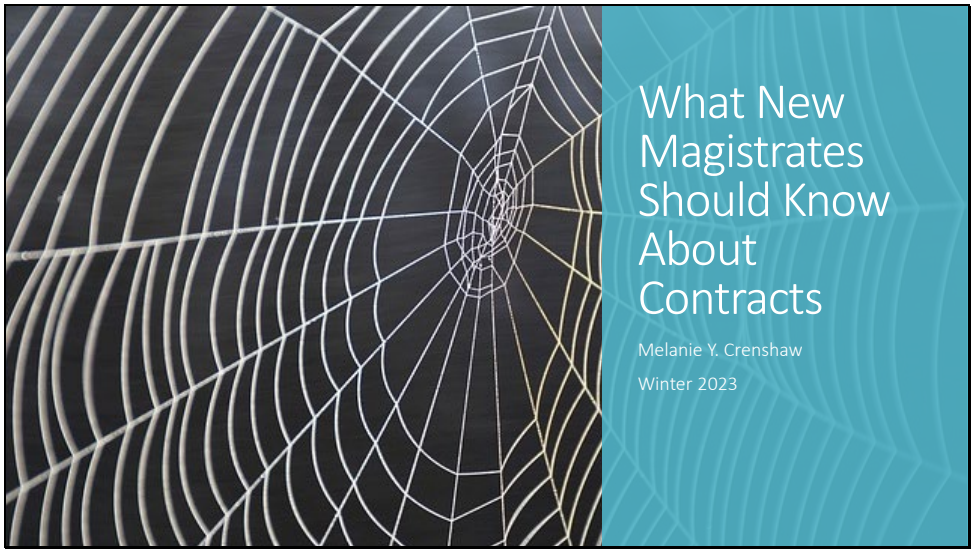
13. When did the lease end?
    a. March 31 because Tenant gave more than 7 days' notice.
    b. April 30 because Tenant did not give the required 30 days' notice.
    c. May 31 because Landlord should get two months of rent for his trouble.

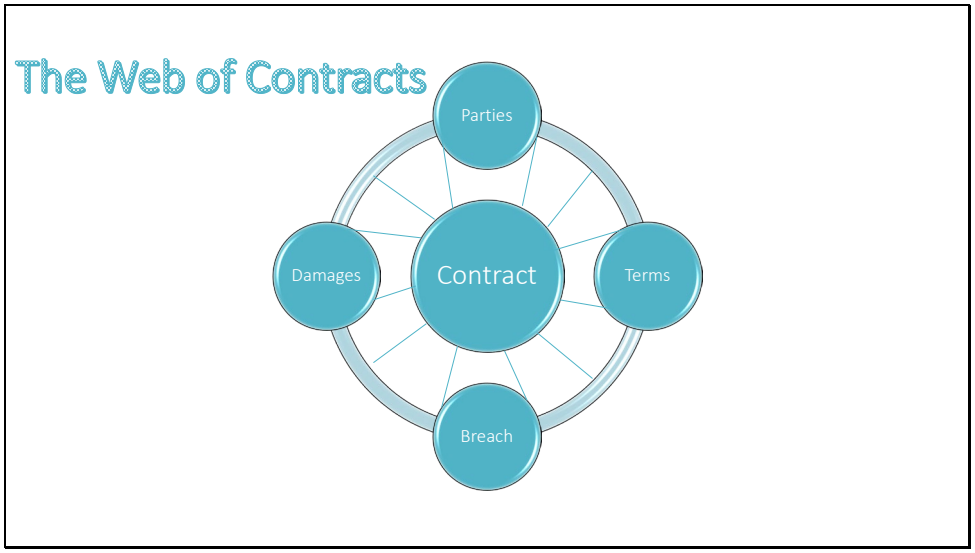
14. What result?
    a. Judgment for Landlord for April rent.
    b. Judgment for Landlord for April and May rent.
    c. Judgment for Tenant because Landlord should have found a new tenant for April.

15. What result if Landlord wished Tenant good luck and said he had a replacement tenant on the waiting list, and he accepted the keys from Tenant on March 31?
    a. Judgment for Landlord for April rent.
    b. Judgment for Landlord for court costs.
    c. Judgment for Tenant.

Tab:
Contracts

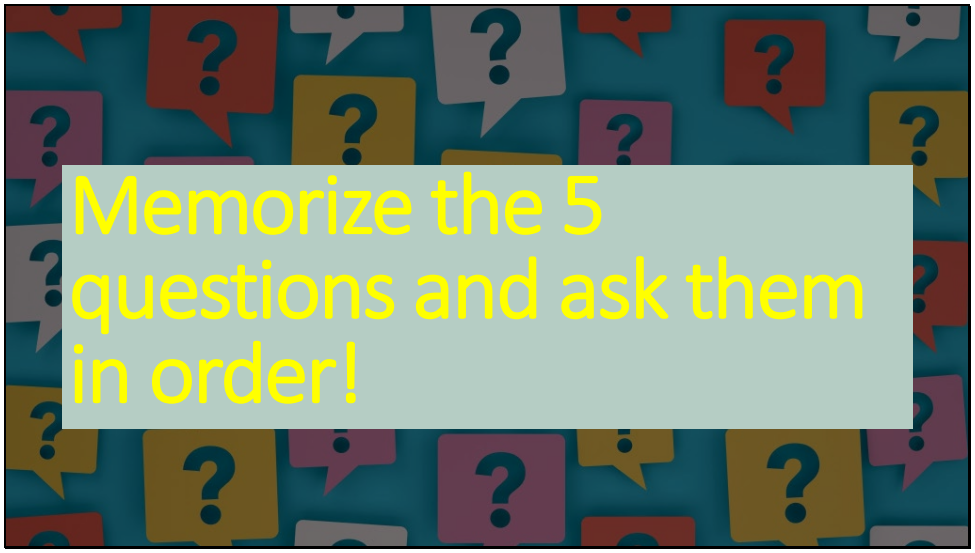
CONTRACTS





The different concepts we study about contracts are all interconnected and form a web. “A contract is a promise between two or more parties that the law recognizes as legally binding and for breach of which it provides legal remedies.” This quotation summarizes all the different threads of the web that we will talk about i.e., contract, terms, parties, breach, and damages.

Slide 3



How to Analyze a Contracts Case

1. Is there an enforceable contract?
2. Who are the parties to the contract?
3. What are its terms?
4. Did defendant breach the contract?
5. What damages is the plaintiff entitled to recover?

Just like when you are finding probable cause in a criminal case you work through the elements of the crime, there are elements and questions to guide your analysis in civil cases. For contracts cases, there are the Big Five Questions you can work through to analyze the case. We will go through each question in order. It's important to answer the questions in order because if you skip questions, you increase the likelihood of making a mistake. Resist the temptation to skip to breach if you can't figure out what the terms are. If you can't figure out the terms, the plaintiff has not presented sufficient evidence to win the case. Remember the plaintiff has the burden of proving all of the elements of their case, even if the defendant is not present. If they can't prove the terms, how can they prove breach? You may hear conflicting testimony as to the

terms, and it is up to you to determine the credibility of the testimony and determine whether the terms are established.

Small Group Exercise-What's the legal issue?

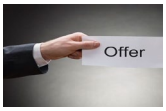
Instructions:

1. Read the scenario.
2. **Identify which of the five questions from How to Analyze a Contracts Case is at issue.**
3. Report back to the class.

Logistics:

- Problems Notebook p. 11
- With a partner or two, complete the activity. Turn to another group and compare your answers.
- Choose someone from the combined group to be your reporter.

1. Is there an enforceable contract?



Offer

Terminating an Offer

Acceptance and Counteroffers

Implied Contracts

Consideration

OFFER

- Express a definite intent to sell or do some other act,
- Be communicated to the person for whom the offer is intended, and
- Be reasonably certain and definite in its terms.

TERMINATING AN OFFER
Any time before accepted
Exceptions for firm offers and options SC Law pp53-54

ACCEPTANCE AND COUNTEROFFERS
Bilateral-exchange of mutual promises (most common)
Unilateral-performance in exchange for a promise
Conforms to terms (except UCC) or is a counteroffer

IMPLIED CONTRACTS
Arises when the intention of the parties is not expressed but an agreement in fact creating an obligation is implied or presumed from their acts or words, when and where there are circumstances which, according to the ordinary course of dealings and common understanding, show a mutual intent to contract

CONSIDERATION
Something of value, usually money, goods, or services
Promise to satisfy one party's desire or to forbear from exercising a right to which he is legally entitled.

DEFENSES TO FORMATION
- Illegality-either the consideration or the subject matter of a contract violates federal or state law or public policy, void
- Mistake-must be mutual regarding the subject matter of the contract

LACK OF CONSENT DEFENSES
- Fraud-deception by the other party as to a material fact
- Duress-undue coercion to force a person to enter into a contract against his will
- Minors-under the age of 18 lack capacity to contract
- Mental incompetence-person who lacks sufficient mental capacity to enter a contract because he is not possessed of the ability to understand the nature of the act and its scope and effect

DEFENSES TO ENFORCEMENT

- Statute of Frauds-requirement that an agreement, to be enforceable, be evidenced in writing, signed by the party against whom enforcement is sought
    - In NC, the following contracts must be in writing and signed by the parties:
        - Any contract for the sale of land and any lease of property for a period longer than three years
        - A promise to pay the debt of another person
        - All retail consumer credit installment contracts (dated and signed by buyer)
        - All contracts for the sale of goods costing $500 or more, except for goods that have already been accepted or paid for or are specially manufactured
- Statute of Limitations
    - Contract for the sale of services or real property-3 years
    - Sealed instrument, except for sale of goods-10 years
    - Under UCC, contract for the sale of goods-4 years
- Unconscionability-inequality of the bargain shocks the judgment of a person of common sense, terms so oppressive that no reasonable person would make them and no honest and fair person would accept them

2. Who are the parties?

Lawsuits for breach of contract have a fundamental requirement that the parties who are bound by the contract should be the parties who are suing and are sued.

So, it's important to figure out who is actually bound by the contract.

The answer to THAT question ≠ (necessarily) the people who signed it.

Who is bound by the contract? Parties often act through agents and generally, agents are not liable for the contracts, but the principals are.

If the parties are not identical to the people who entered into the contract, why not?

- Agency
- Guarantors
- Joint and Several Liability
- Husbands, Wives, and Kids

We will look more closely at agency and joint and several liability because I think you are more likely to see those come up in small claims. A guarantor is a person or entity that agrees to be responsible for another's debt or performance under a contract if the other fails to pay or perform. Spouses can be held liable for the necessary expenses of their spouse. Parents can be held liable for the necessary expenses of their children. Also, husbands and wives can bind each other in contract with third parties when they give the appearance that both parties will be liable. For example, husband and wife go to the appliance store, husband says he's negotiating for himself and his wife to purchase a new dryer, wife stays silent, store can look to husband and wife for payment.

Basic Rule About Agency

Principal is liable on contract.

Agent is not liable on contract.

You bought the fridge from . . . .

Williams Fine Appliances, Inc.

Basic Rule About Joint and Several Liability

- When two or more parties agree to pay an amount of money, each one is jointly liable, which means they can be sued together for the full amount of the debt, and they are severally liable, which means they can be sued individually, each for the full amount.
- NOTE: Plaintiff can get double judgment, but not double recovery.
- Depending on the parties' agreement, one may be able to recover from the other.

Joint and several liability encourages creditors to extend credit because they have additional insurance of getting all their money because they have more than one person to sue. Plaintiff can get a judgment against each defendant but cannot recover the full amount from both. The defendants may have an agreement to indemnify the other, but that is unlikely to be the case in front of you. Decide the case in front of you. One defendant may be able to sue the other, but only decide that case when it's in front of you.

Slide 13

Joint & Several Liability

John and Sam sign the lease on a nice apartment, agreeing to pay $2000/month for a year.

They fight, and Sam moves out – actually, to Australia.

John can't afford the rent without Sam's help, and he moves out too, to a cheaper place down the street.

At the end of the year, the LL sues both John and Sam for money owed due to their failure to pay rent for the last six months of the lease. (LL re-rented, but it took a while.) He wants $6000.

When you call the case, John is present, but Sam has not been served.

Joint & Several Liability Questions

1. Can LL sue John and Sam in Small Claims Court? Why or why not?
2. Can you hear the case if Sam is unserved?
3. In order to proceed against John, what would LL need to do?
4. What do you think John will argue his liability is?
5. Who is responsible for the full amount owed?
6. Does John have any way to recover from Sam?

3. What are the terms?

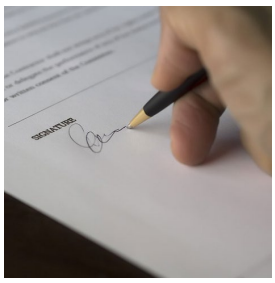
- If the agreement is in writing, ask for a copy and read it carefully. Are the terms clear?
- If the agreement is not in writing, listen to the testimony about the terms.
- What rules of evidence should the magistrate be mindful of in determining the terms?
- Are there additional or different terms written into the agreement by the law?

- This is the hardest question to answer, especially if the contract at issue is oral.
- Even if the parties enter into an agreement that seems final, it may still fail for indefiniteness if essential terms are left to be agreed, or if the terms are so indefinite as to leave a court without an appropriate basis for a remedy. Agreements to agree are unenforceable. Sometimes a contract that is so indefinite is not enforceable because it is void for vagueness.
- As the magistrate, you have to identify those areas on which the parties disagree and then determine if you have sufficient evidence of the terms to proceed. Remember the party seeking enforcement has the burden of proving the terms.
- For most contracts, warranties are not included unless they are expressly provided in the agreement. However, under the UCC, there are implied warranties for the sale of goods.

Best Evidence Rule

"To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."

-N.C. Rules of Evidence, Rule 1002



The document itself is the best evidence of its contents. Under the original document rule, an exact copy of a document—such as a copy produced by a photocopier, carbon paper or photography—is usually considered the same as the original document. If the authenticity of

the original is being questioned, the original rather than a duplicate must be produced. The party offering it must authenticate it—prove that it is genuine. The parties may agree on its authenticity, or if there is a dispute, the party offering it may produce other evidence to authenticate it.

What are the terms?

John signs up with WOW!!!, a health club, agreeing to pay $47/month for the next three years to have "a body that will **WOW!!!**!"

John decides he likes ice cream better than WOW!!! and stops paying. When the health club sues, John tells you that he anticipated this possibility and specifically asked the employee who signed him up if he could change his mind. He says the response was, "Absolutely! People do it all the time!"

That's not in the written contract, though. If you believe John is telling the truth, can you rule in his favor and deny the club a judgment?

Parol Evidence Rule

When a contract is in writing, a court will not consider evidence contradicting the written terms.

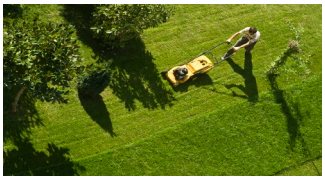
Generally, the purport (substance) of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument. When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court, and the court cannot look beyond the terms of the contract to determine the intentions of the parties. This rule restricts the factfinder's ability to resort to evidence extrinsic to the writing to determine the content of the parties' agreement.
Parties can introduce

- evidence of additional terms on which the written version is silent-doesn't vary or contradict the writing but amplifies it to show more fully what the parties intended (ex. Type of apples)

- Evidence to explain ambiguities
- Evidence of modifications after the contract

NOT the Parol Evidence Rule

- Evidence to explain an **ambiguous term**



What does "yard work" mean?

- Evidence of **modification**

John joined the Club and signed a one-year contract. John wants to cancel and stops paying. The Club sues John. John wants to testify that the Club offered him a "buy-out," allowing him to pay $250 and be released from liability.

What are the terms?-Warranties

EXPRESS	IMPLIED
❖Recognized in common law and UCC	❖UCC recognizes two
❖Affirmation of fact or promise as to quality	❖Warranty of merchantability
❖Sample or model that leads buyer to believe product will conform	❖Warranty of fitness for a particular purpose
❖Not opinions or "puffing of wares"	❖Seller can expressly disclaim such warranties
❖Part of the basis of the bargain	

In most contracts, warranties will not be implied as terms; they must be express warranties. In contracts for the sale of goods under the UCC, magistrates must be aware of the possibility of implied as well as express warranties.

A warranty of merchantability means that the seller guarantees that the goods are of such generally good quality that they

- Are fit for the ordinary purpose intended,
- Pass without objection in the trade,
- Are adequately contained and packaged, and
- Conform to any promises of fact made on the container or label.

A warranty of merchantability requires no affirmative statement on the part of the seller, however only merchants who regularly sell the type of product involved in the transaction are subject to this implied warranty. (neighbor selling car v. used car dealer)

A warranty of fitness for a particular purpose is an implied warranty that the goods will be fit for their intended purpose if

- The seller has reason to know, at the time of contracting, the particular purpose for which the goods are required, and
- That the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.

No affirmative statement by the seller is necessary, and it applies to all sellers, not just merchants.

Sellers may exclude or disclaim warranties by specifying there are no warranties in the contract. A merchant may exclude the implied warranty of merchantability by making specific reference to it in the exclusion and the exclusion provision must be written so that a buyer should notice it. A seller may also exclude the implied warranty of fitness for a particular purpose, but only in writing, and the exclusion must be conspicuous but does not need to refer to the warranty by name. (ex. AS IS)

4. Did Defendant Breach the Contract?

Once you have determined the terms of the contract, whether a breach has occurred is not hard to determine.

HOWEVER, if you skip the other questions and go straight to the question of breach, you increase the chances of making a wrong decision. Resist the temptation to move on to breach if you can't figure out what the terms are. If you can't figure out what the terms are, the plaintiff loses.

5. What are the damages?

The standard measure of damages in an action for breach of contract is that amount of money necessary to restore the non-breaching party to the position s/he would have occupied in the event there had been no breach.

Be on the lookout for the plaintiff's duty to mitigate damages.

Magistrates do not have the authority to order specific performance of a contract, so in a small claims action, the only remedy in a breach of contract action is monetary. Actually, specific performance is not the typical remedy in our legal system, and the remedy for breach of contract is typically the payment of damages. Damages are not recoverable if they can't be estimated with reasonable certainty and were not in the reasonable contemplation of the parties at the time the parties entered into the contract. In other words, the amount of damages must be proven with reasonable certainty and the damages must have been foreseeable. The magistrate cannot award damages based on mere speculation or conjecture.

A party injured by breach of contract or tort should do what reasonable care and business prudence require to minimize his loss. In other words, the plaintiff has a duty to mitigate the damages and cannot simply let the losses pile up. Plaintiff's failure to mitigate must be raised by the defendant.

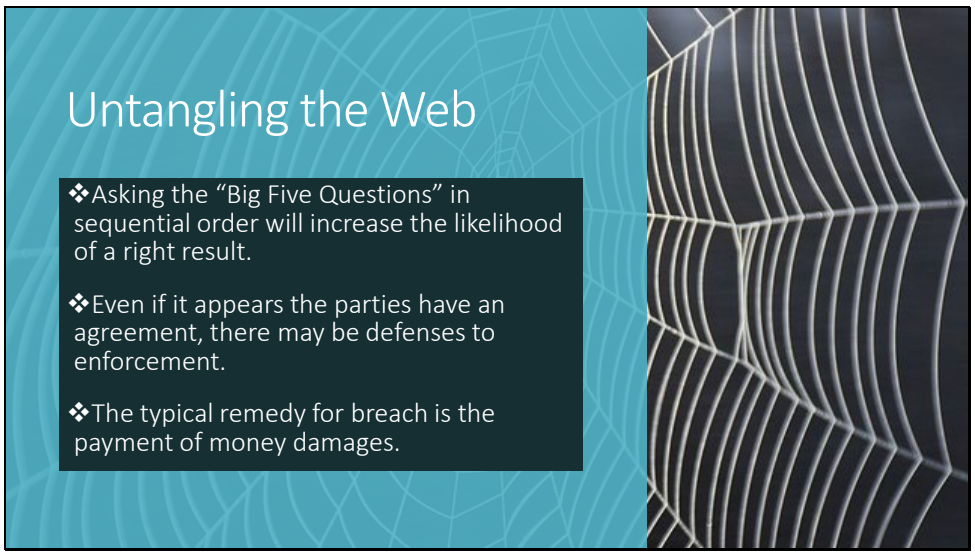
Monetary Damages

- Direct
- Actual
  - *Incidental*
  - *Consequential*
- Allowable Interest

Direct damages are measured by the difference between the value of the performance that had been promised and what acquiring such performance will now cost the plaintiff. In a breach of warranty case, the measure of damages is the difference between the fair market value of the goods as warranted and the fair market value of the goods received.

Actual damages include any incidental or consequential damages suffered. Incidental damages include reasonable costs incurred by the injured party preparing to perform his or her obligations under the contract, amount reasonably incurred in response to the breach, and amounts reasonably incurred for the purpose of minimizing the injury resulting from the breach. Consequential damages include any losses resulting from the circumstances of the breach that the injured party suffered of which the breaching party knew or should have known and which the injured party could not have prevented.

Allowable Interest: In a breach of contract action, the magistrate awards prejudgment interest at the rate established in the contract; if no rate is specified, the contract draws interest at the legal rate of 8% per year from the date of breach. The amount of principal should be separated from the amount of prejudgment interest, because post-judgment interest is assessed only against the principal.



Just like you analyze the elements in a criminal case to determine if there is sufficient evidence to prove each element, you can apply that same skill to analyzing a contracts case if you use the Big Five Questions. Go through them in order and don't try to skip ahead to breach until you have established the terms.

If a defendant raises one of the defenses, consider what the defendant would need to prove in order to avoid enforcement of the contract and determine if the defendant has met that burden.

Breach of contract cases will come to you as money owed cases, and you will need to determine the amount of damages that the plaintiff is able to prove with reasonable certainty and foreseeability to make the plaintiff whole as if the breach had not occurred.

CONTRACTS

NC Small Claims Law, Ch. 3, pp. 51-97

Forms: AOC-CVM-200 "Complaint for Money Owed"
AOC-CVM-400 "Judgment in Action to Recover Money or Personal Property
*Summary ejectment actions are also contract cases, but specialized forms are used in those cases.

INTRODUCTORY ACTIVITY

We are going to do a thought experiment that emphasizes your connections to the subject matter. Drawing on your own instincts and perspectives, imagine how you think the law of contracts should be. Brainstorm rules, concepts, and exceptions related to contracts.

What categories or groups do you see emerging from your thoughts?

Job Aid

How to Analyze a Contracts Case

Is there a contract?

Who are the parties to the contract?

What are its terms?

Did defendant breach the contract?

What damages is plaintiff entitled to recover?

Activity

1. Vet sues Pet Owner to recover payment for services rendered. Vet proves that Pet Owner brought Ms. Kitty to her office for a check-up and vaccinations. Vet examined the cat and gave her a rabies inoculation and injections to prevent feline leukemia and distemper shot. At check-out, Pet Owner refused to pay the $200 charge, claiming it was ridiculously high and that she never agreed to such a payment. What's the legal issue?

   _____

2. Customer sues Salesperson for breach of implied warranty. Customer proves that he purchased a pair of running shoes at Sears after informing Salesperson that he runs approximately 50 miles each week. The shoes fell apart after two weeks. Customer argues that he relied on the advice of Salesperson about which shoes to buy and seeks to recover $125, the cost of the shoes. What's the legal issue?

   _____

3. Landlord sues Tenant for $900 past-due rent. Tenant agrees that he did not pay last month's rent, but contends that he owes only $750 because LL agreed to reduce the rent in exchange for T's services in repairing and maintaining other rental properties owned by LL. T offers evidence that he provided such services. What's the legal issue?

   _____

4. LL sues T for summary ejectment. Written lease provides that LL has the right to evict T if T fails to "keep yard neatly maintained." T offers evidence of her yard maintenance activities (along with pictures). LL contends that these activities were insufficient. What's the legal issue?

   _____

5. Homeowner sues contractor to recover $1500 paid for construction of gazebo. The undisputed facts are that contractor agreed to construct a six-sided gazebo, but in fact constructed a gazebo with only five sides. What's the legal issue?

   _____

CHECKLIST FOR CONTRACT CASES IN SMALL CLAIMS COURT

DOES THIS CASE INVOLVE AN AGREEMENT BETWEEN π AND Δ?

WHO ARE THE PARTIES TO THE CONTRACT?

If parties are not identical to people who entered into contract, why not?

- Agency
- Guarantors
- Joint and Several Liability
- Husbands, Wives, and Kids

WHAT ARE THE TERMS OF THE AGREEMENT?

If the agreement is in writing, ask for a copy. Read it carefully. Are the terms clear?

If the agreement is not in writing, listen to the testimony about the terms.

- ☐ Do the parties agree about the terms of their agreement?
- ☐ If they don't agree, what specifically do they disagree about? What does π contend? What does Δ contend? In the case of a disagreement, the magistrate must determine the terms, remembering that the party seeking to enforce the contract has the B/P on its terms.
- ☐ Are there terms they left out? Assuming the intent to contract is clear, the magistrate "fills in the blanks" based on evidence about what is usual and reasonable, to implement the probable intention of the parties.

What rules of evidence should the magistrate be mindful of in determining the terms?

- ☐ If a contract is written, the *best evidence* of what the parties agreed to is the written contract.
- ☐ If a contract is written, evidence about what the parties said before signing the contract is not relevant unless meaning is unclear (parol *evidence rule).*
- ☐ In an action on an account, a *verified itemized statement of the account* is sufficient to prove that Δ owes that amount of money in the absence of evidence to the contrary.

Are there additional or different terms written into the agreement by the law?

- ☐ *In contracts for the sale of goods*, is π's claim for breach of warranty?
- ☐ *In actions based on a lease,* does the landlord have additional responsibilities under the RRAA?
- ☐ *In actions involving consumer credit sales,* does the Retail Installment Sales Act affect any of the contract terms?

Before moving to the next question, stop and decide what the terms of the agreement are.

Is the agreement one that the law will enforce?

- ☐ Does it involve a bargained-for exchange?
- ☐ Is this particular defendant (rather than someone else) bound by the contract?
  - --Does the contract involve a corporation?
  - --Does the contract involve an agency relationship?
- ☐ Is there any question about Δ's ability to consent?
  - --Was Δ a minor at the time of the contract?
  - -- Is there doubt about Δ's competence to contract?
- ☐ Is there a legal rule that renders this agreement unenforceable?
  - --Is this one of the kinds of contracts the law requires to be written?
  - --Did π wait too long to file the lawsuit?
  - --Are the terms of the agreement so one-sided and unfair as to be *unconscionable*?

DID Δ BREACH THE CONTRACT?

WHAT DAMAGES IS π ENTITLED TO?

Common damage items:

- ☐ Direct damages (difference between value of promised performance and what it will cost now)
- ☐ Incidental damages (costs of preparing to perform, those incurred in response to breach, those involved in minimizing injury)
- ☐ Consequential damages (foreseeable damages resulting from breach)
- ☐ Interest from date of breach

Special cases:

- ☐ Cancelling the contract: damages for putting everything back the way it was
- ☐ Liquidated damages clauses
- ☐ Failure to return property: FMV of property
- ☐ Breach of warranty: difference between FMV of goods as warranted and FMV of goods received
- ☐ Checks NSF: Amount of check + bank charge + processing fee + amount of check x 3 ($100-$500)
- ☐ Attorney fees

Be on the lookout for:

- ☐ Duty to mitigate damages
- ☐ Joint & several liability

Issue Presented	Location in Text
Whether the parties actually reached agreement	pp. 52 - 56
The asserted agreement is based on the behavior of the parties	*Implied contracts* *p. 56*
The terms of the contract don't involve mutual benefit or exchange.	*Consideration* p. 57
The agreement leaves out some important terms.	p. 59
One party claims the written contract is not the complete agreement and wants to testify to additional terms.	*Parole evidence rule* *pp. 61, 73-74*
The case is about a warranty in a contract involving a sale of goods.	pp. 61 - 66
The case is about an implied warranty in a contract for the sale of goods.	pp. 63-64, 65-66
The contract involves an illegal transaction.	*Illegality* p. 67
The contract was based on mistake.	*Mistake* p. 67 - 68
One party did not actually give free consent to the contract terms	pp. 68 - 69
One party to the contract was a minor or mentally competent.	pp. 69 - 72
Whether a contract is required to be written.	*Statute of Frauds* p. 73
Whether a contract is no longer enforceable because of a statute of limitations.	pp. 74 - 76
Whether a contract is so unfair and one-sided as to be unenforceable.	*Unconscionability* pp. 76 - 77
One person has contracted on behalf of another	*Agency* pp. 78 – 81, 95

The contract involves purchase of goods by a consumer on the installment plan	*RISA* pp. 81 - 84
Determining damages to award for breach of contract	*pp. 84 - 86*
Rule of evidence for proving amount owed on an account	*Verified itemized statement of account* pp. 86 - 87
Damages for breach of warranty	*pp. 87*
Damages for bad check	*pp. 87 - 88*
Whether injured party is required to minimize damages from breach	*Duty to mitigate damages pp. 89*
Two debtors sign contract	*Joint & several liability pp. 89*
Complete cancellation of contract	*Recission p. 90*
How to determine interest in contracts case	*pp. 90 – 91, (revised) 96 - 97*
Attorney's fees	*p. 91-94*

Activity

Using the Textbook in a Contracts Case

Find the page in Small Claims Law that addresses the legal question raised by the facts:

_____ A landlord asks that you award attorney fees as part of money damages in an action to recover possession of residential property.

_____ Bill never paid Samantha for the old clunker he bought from her 4 ½ years ago. Samantha finally sued him for the money, but Bill says she waited too long.

_____ Pamela promises her 16-year-old daughter Kamesha that if Kamesha doesn't drink or use illegal drugs before she's 18, Pamela will buy her a car. Kamesha, who just celebrated her 18th birthday, is suing her mom for the cost of the car she never got.

_____ Ivanna financed her purchase of a dining room table and chairs from Sebastian's Sensational Furniture. SSF sells the set for $200 to cash customers and $250 to customers buying on credit. Ivanna paid $50 down, and financed the remaining amount at 15% interest plus $4 for a credit report and $10 for a loan fee. SSF brought this action for money owed after Ivanna defaulted on her monthly payments.

_____ Leonardo and Rachel both signed the lease agreement as tenants on a two-year rental agreement for a very nice apartment. After 6 months, Rachel moved out. Leonardo stayed six more months before leaving with no notice and owing $4800 rent. The landlord doesn't know where Leonardo went, and has sued Rachel (who just won the lottery) for the $4800.

CONTRACTS REVIEW QUESTIONS

Is there a contract?

1. I promise to give my daughter a pony for her birthday. Y N

2. Luna and I agree that I will pay her $35 if she will cut my grass, she agrees to do so.
   Y N
3. I made an appointment to see my doctor, and she diagnosed me with a cold.
   Y N
4. I put an ad in the paper saying, "sofa for sale—best offer." Before Phil shows up at my door saying he'd like to buy it, I change my mind. Y N

5. I agree to pay Samantha $1500 for her gently used computer, but I decide on the way to pick it up that I'd be better off buying a new one. Y N

6. I agree to pay Samantha $1500 for her gently used computer, but I discover after I get home with it that the same computer costs $400 brand new. Y N

Choose the best answer.

1. Luna and Jane have been married for a little over a year, and they've decided to buy furniture. They both signed an installment sales contract for 12 easy payments of $135. Who can the store sue?
   a. Luna and Jane
   b. Just Jane for the full amount
   c. Just Luna for the full amount
   d. All of the above

2. What is the legal rule at issue in question #1?
   a. Contributory negligence
   b. Minimum notice
   c. Service of process
   d. Joint and several liability

3. Joanna is suing for money owed. She testifies that she loaned Tom $50 three months ago, and Tom promised to pay her back "within the next couple of months" with interest but has never done so. Tom testifies that he borrowed the money to buy textbooks for college, and that he and Joanna agreed he would repay the loan at the end of the semester when Tom begins working his summer job.

a. If both Joanna and Tom are credible, dismiss the case because Joanna had the burden of proving the terms and she failed to do so.
b. Enter judgment for Joanna because even though both stories are credible, you think people should repay their debts.
c. Dismiss the case because the contract was not in writing.
d. Enter judgment for Joanna because even though you cannot tell who is telling the truth, Tom should have gotten the agreement in writing.

Use these facts for the next two questions.

Sol and Luna sign a written agreement that says, "I, Sol, will pay Luna $75 for performing yard work on my yard. Luna will complete this work between the 1st and the 5th of this month, and I will pay her upon completion."

4. Luna has brought an action for money owed against Sol after Sol refused to pay her. Sol says that's because Luna didn't trim the shrubbery. Luna wants to introduce evidence that, at the time they were negotiating the agreement, she asked Sol what he meant by "yard work" and Sol said, "Mowing and raking the grass, edging the lawn, and using the weed eater in places where you can't get the mower." Luna says trimming the shrubbery was not actually included in their agreement, and thus she did not breach by failing to do so. Can you consider the evidence?
    a. No, evidence of oral negotiations is barred by the parol evidence rule.
    b. Yes, evidence to explain an ambiguous term can be considered.
    c. Yes, magistrates should always let the parties testify to any matters related to the contract.
    d. No, yard work customarily means trimming the shrubbery, so the term is not ambiguous.

5. Sol wants to testify that two weeks after they signed the contract, he asked Luna to include trimming the shrubbery, and Luna agreed, with the understanding that she would have an extra five days to do the work. Can you consider this testimony?
    a. Yes, evidence of a later modification can be considered.
    b. No, evidence of a later modification is barred by the parol evidence rule.
    c. Yes, Luna got to say what she wanted, so Sol should say what he wants.
    d. No, trimming the shrubbery was part of the original agreement and this evidence contradicts the written terms.

6. Susan signed a contract with Better Bodies as part of her New Year's resolution to finally knock off some weight, but she's thought better of it now. Better Bodies has sued Susan in small claims court for money owed on the contract, but Susan claims that Better Bodies should not be allowed to enforce the contract. She says they used glitzy machinery and a cool smoothie bar to talk her into signing a contract when they know very well that 9 out of 10 people who sign up stop coming within 6 weeks. Susan says she was tricked. Can Better Bodies enforce the contract?

a. No, Better Bodies violated the implied warranty of fitness for a particular purpose.
b. No, Better Bodies forced Susan to sign an unconscionable agreement.
c. Yes, Susan hasn't proven that any warranties were the basis of the bargain.
d. Yes, Susan was not deceived by Better Bodies, and she is not excused from the contract just because she thinks it's a bad bargain.

Use these facts for the next two questions.

I bought a pure-bred puppy from Super Intelligent Pets (SIP). I tell the salesperson I want the smartest dog in the store, and he tells me about the special Doggy IQ Test that all their dogs must take before being matched with an equally smart owner. I agreed to pay $500 over a one-year period, with interest at 10%. After I took Einstein home, I discovered that he's dumb as dirt, and I stopped paying SIP. SIP sued me for breach of contract, and I counterclaimed for breach of implied warranty of fitness for a particular purpose.

7. Assume you rule in favor of SIP and against me on my counterclaim. What will the damages consist of?
    a. The unpaid balance of the contract, 10% interest up to the date of judgment
    b. The unpaid balance of the contract, 8% interest up to the date of judgment
    c. The unpaid balance of the contract, no interest

8. Assume rule against SIP and for me on my counterclaim. How will you determine the damages?
    a. The money paid on the contract
    b. The difference between the fair market value of a super-intelligent puppy of Einstein's breed and the fair market value of an ordinary dog of that breed
    c. The cost of a super-intelligent puppy of Einstein's breed

A Basic Introduction to Contract Law

Although contract law can become extremely complicated, at heart it is really very simple. A contract is nothing more than an agreement between two or more people that each will do something in exchange for receiving something. Regardless of whether a contract has hundreds of pages of fine print or consists of a few words and a handshake, there are four broad categories of legal issues that come up again and again.

Contract Formation

More often than one might think, fact situations may raise an issue about whether the parties actually have entered into a contract. The critical factors are (1) that the parties each *agreed* to a deal in which (2) each of them gives something up and gets something in return. See what you think about the following fact situations: contract or no?

1. I promise to give my daughter a pony for her birthday.
   Contract? Yes No

2. Luna and I agree that I will pay her $35 if she will cut my grass, and she agrees to do so.
   Contract? Yes No

3. I make an appointment to see my doctor, and she diagnoses a cold.
   Contract? Yes No

4. I put an ad in the paper saying "sofa for sale—best offer." Before Phil shows up at my door saying he'd like to buy it, though, I change my mind.
   Contract? Yes No

5. I agree to pay Samantha $1500 for her gently-used computer, but decide on the way to pick it up that I'd be better off buying a new one.
   Contract? Yes No

6. I agree to pay Samantha $1500 for her gently-used computer, but discover after I get home with it that the same computer costs $400 if I buy it new.
   Contract? Yes No

Answers and Explanations:

1. No contract. I promised to make a gift, but my daughter didn't give up anything—there was no agreement or bargain here. It would be different, though, if I had said, "If you do all the work in the garden this summer, I'll buy you a pony" and my daughter said, "Deal!"

2. **Contract.** I agreed to give up money for the benefit of getting my grass cut, and Luna agreed to do the work for the benefit of being paid.

3. **Contract.** Even though there was no negotiation between me and my doctor, it is common knowledge throughout our society that when you seek out treatment by a doctor, you will be charged a reasonable fee. There was agreement here, but it was *implied* from our behavior, rather than being a verbal agreement.

4. **No contract.** By putting an ad in the paper, I indicated my willingness to consider offers for the sofa, but I didn't enter into an agreement with Phil. The result might be different, though, if my ad said, "I'll sell my sofa to the first person who shows up at my door with $150 cash." In that case, I've made an offer, and indicated that a contract will come into existence if Phil shows up at my door with $150. If I change my mind, I will have to withdraw my offer before Phil accepts—I may need to put a sign in my front yard saying, "I withdraw my offer. Keep your money. I love my sofa."

5. **Contract.** Because Samantha and I have entered into an agreement, in which I give up money and get a computer, and she gives up her computer and gets money, I've lost the right to change my mind. Even though the actual performance of the contract has not yet occurred, *the agreement has,* and so a contract has been formed. Quite often a contract consists of an exchange of promises to perform, with performance occurring at a later date.

6. **Contract.** Whether a bargain is a good one or a bad one doesn't affect whether a contract has been formed. (Although in some extreme cases, it may affect whether the law will enforce that contract.) Freedom of contract means that we are all free to make a bad bargain.

Be sure to note the questions you missed and pay particular attention to the rule in those situations. Be sure to ask the instructor if you're puzzled.

Note: An important step in analyzing contract cases is determining WHO is liable under the contract. One common situation involves spouses who together enter into a contract, promising to pay the amount owed.

Example: Luna and Jane have been married for a little over a year, and they've decided it's time to buy furniture. They both sign an installment sales contract provided for 12 easy monthly payments of $135. If they fail to pay the amount owed, the furniture store has a choice under the legal principle of *joint and several liability.* It can sue Luna and Jane together, or either of them separately. If the store sues one of them separately, it can sue for the entire amount due—each of them has promised to pay the entire amount due.

Change the facts: Luna buys the furniture, signs the agreement, gets tired of Jane, and moves to Canada. Can the furniture store sue Jane? *[See p.9 for answer and explanation.]*

Determining the Terms of the Contract

Before you can decide whether a contract has been breached, you have to know what the contract requires each party to do. The details about the agreement between the parties are called the *terms* of the contract.

Judges are happiest when the terms of a contract are clear: preferably written and with enough detail, but without being so complicated that it's hard to understand. All too often, though, it's not easy to determine exactly what the parties agreed to. In trying to figure that out, says the law, judges should have as a guiding beacon the question of what the parties **intended.** [*But note*: When the terms of an agreement are clear, the law will not rewrite a contract even if the evidence shows that one of the parties intended something different.]

Sometimes it is difficult to identify the terms of a contract because the agreement between the parties was oral, and the evidence is conflicting about what the agreement was. In these cases, an important legal principle helps you as the judge decide what to do: The party who has the burden of proof (usually the plaintiff) has the responsibility of producing enough evidence to persuade you that the terms of the contract were most likely what s/he says they were. If you believe that the version offered by that party is the more likely version (i.e., "by the greater weight of the evidence"), then that term is treated as part of the contract. What if you conclude instead that his contention is possible? That term does not become a part of the contract unless you conclude that it is not only possible, but in fact more likely than not.

Try it out: Joanna is suing for money owed, saying that she lent Tom $50 three months ago, and that Tom promised to pay her back "within the next couple of months" with interest but has never done so. Tom says he borrowed the money to buy textbooks for college, and that he and Joanna agreed he would repay the loan at the end of this semester, when Tom begins working at his summer job. You're not sure who to believe. What do you do? *Check p. 9 for answer and explanation.)*

Sometimes the problem is not that the evidence about the terms is conflicting, but instead that there was no discussion about a term at all. In this case, the law sometimes fills in the blanks, and sometimes it does not. The rules about this are complicated, and a specific case may present a situation in which you need to consult reference material or ask for help. In many instances, though, your common sense will lead you to a correct result. When it is

obvious to you from the evidence that a term was not important to either party, or was obvious to both parties, the legal solution is usually to fill in the blank.

Example: I walk by a store and see a black sweater on a mannequin in the window. The mannequin is on a table containing many identical sweaters. The clerk notices my interest and asks if I would like to buy a sweater. I answer, "Yes—that's a great looking sweater." He boxes it up for me, and I pay for it, but when I open the box at home, I discover a polka-dot sweater. The salesclerk and I did not explicitly state that a term of the contract was that the sweater in the box would be identical to the sweater on the table. Nevertheless, that was an *implied* term of the contract.

Problem: Same facts, except this time the folded sweaters on the table are variously colored and patterned. The clerk says, "Would you like to pick one out?" and I respond, "No, thanks. Just box one up for me." Can you conclude from this evidence that one term of the contract was that the sweater would be black? *(Check p.10 for answer and explanation.)*

There is a special legal rule called the *parol evidence rule* about deciding what the terms of a contract are. [*Parol* is an old French word meaning "spoken words." The similar French word *parole* meant "word of honor." Cool, huh?] The legal name for this rule makes it sound very technical, but it actually amounts to common sense. The rule simply says that if a written contract is clear, but one party wants to introduce evidence that the actual verbal agreement between the parties was different from what is written down, the judge will base the decision on what is written down. The logic, of course, is that what is written down is more reliable evidence than recollections about what people said. Also, the law wants to encourage people to write their agreements down, so part of the reason for this rule is to support that encouragement. There are a couple of exceptions to the parol evidence rule, though. See if you can figure them out, based on the fact situations below:

Sol and Luna sign a written agreement that says, "I, Sol, will pay Luna $75 for performing yard work on my yard. Luna will complete this work between the 1st and the 5th of this month, and I will pay her upon completion."

Question #1: Luna has brought an action for money owed against Sol after Sol refused to pay her. Sol says that's because Luna didn't trim the shrubbery. Luna wants to introduce evidence that, at the time they were negotiating the agreement, she asked Sol what he meant by "yard work" and Sol said, "Mowing and raking the grass, edging the lawn, and using the weedeater in places where you can't get the mower." Based on this part of their negotiation, Luna says, trimming the shrubbery was not actually included in their agreement, and thus she did not breach by failing to do so. In this case, the judge can consider Luna's testimony. Can you figure out why?

Question #2: In this situation, Luna and Sol have entered into the same written agreement, but this time Sol wants to testify that, two weeks after they signed the contract, he asked Luna to include trimming the shrubbery, and Luna agreed, with the understanding that the she would have five extra days to do the work. The judge can consider this testimony. Can you figure out why? *[See p.10 for answers.]*

There's another situation in which a contract may have important terms even though the parties didn't discuss them, much less agree to them. *These terms* are automatically part of contracts involving the sale of goods under a comprehensive statute known as the Uniform Commercial Code. These special terms are called *implied warranties*, and there are two of them:

The *implied warranty of merchantability* is a term automatically inserted in a contract for the sale of goods to the effect that the seller promises (or "warrants") that the product it will do what it is ordinarily expected to do. An iron will get hot; a refrigerator will get cold. It doesn't matter that the contract doesn't say that explicitly (although often the contract will, and that's called an express warranty, or guarantee). If a person buys a a new television set that doesn't work, he has a legal claim that an implied term of the contract has been breached—the term that says the TV set I'm buying from you will work. Note that this implied term applies only when the seller is a merchant. If you buy an iron at a yard sale, you're on your own!

The *implied warranty of fitness for a particular purpose* is another term that makes good sense. That term says that if I consult a merchant who is in a specialized business or otherwise purports to be someone who has some expertise about which product is best for some particular purpose, there is an implied promise that the goods I buy based on that advice will be suited to that particular purpose. Let's say I go to a store that sells running shoes and tell the clerk I'm going to run the Boston Marathon, and I buy a pair of running shoes based on the advice of the salesman. Two weeks into my training, the shoes start to fall apart. I now have a legal claim that an implied term of the contract has been breached—the term that says these shoes will be suited for marathon running.

The rules about warranties are the first examples we've discussed of an important aspect of contract law: consumer protection legislation. This is a subject we'll return to in a few pages. For now, just notice that the law sometimes inserts or deletes a contract term, despite our society's commitment to the ideal of freedom of contract, in order to protect consumers.

There are exceptions and qualifications to the rules about implied warranties. One of the best known is that, when a seller sells something "as-is," the seller makes no warranty about the condition of the goods. If you are confronted with a case involving a technical

legal dispute about a question such as whether an attempted waiver of warranty was legally effective, or some similar complex question, it would be best to reserve judgment and consult reference material or otherwise seek assistance.

Is the Contract One That the Law Will Enforce?

So far, I have indicated several times that common sense is a generally reliable guide in arriving at a correct legal answer in contract cases. That statement is much less true when it comes to the rules about legal enforcement of contracts. While there are sound reasons for the legal principles to which we will now turn our attention, sometimes the result of their application in particular cases may seem to contradict common sense. The usual reason for this is that the principle is based on a policy decision made by our society that works well most of the time but may yield surprising or unfair results in a particular case.

Remember: This situation comes up after you have decided that the parties have entered into a contract, you have ascertained its terms, and you have determined that one party has breached the contract. Under what circumstances might the court, in this situation, nevertheless refuse to give the complaining party a remedy?

First, the law will usually refuse to enforce a contract in which one of the parties was not able (i.e., *lacked capacity*) to give legal consent. Stop here and ask yourself: what is an example of a party not able to give legal consent to a contract?

_____

If you said minors or persons who are mentally incompetent, you were correct. The general rule is that a contract by a minor or mentally incompetent person is not enforceable **against that person.** *[Note that* the law is perfectly willing to enforce a contract against another person on behalf of a minor or incompetent—we don't worry about protecting the interests of those who can protect themselves.] Similarly, a person who contracts because he has been tricked or misled, or who has been coerced in an illegal way, does not truly consent to the contract, and the law will not hold him to it. This is one of those general principles that have a lot of exceptions. Let's look at the rule, and at some of the exceptions, in the examples below.

Example #1:
Luna is 17 and looks 22. When she bought a car from Fast Eddie, she assured him she was 21. After she wrecks the car, she wants to return it and get a complete refund of her money. Can she?

Example #2:
Jane is a quiet woman with a sweet smile who gives no outward sign that she suffers from Alzheimer's and has been declared mentally incompetent. She goes to Sears and buys a

refrigerator for $900. She has purchased 3 other refrigerators this week. Sears wants to enforce its contract against Jane. Can it?

Example #3:
Susan signed a contract with Better Bodies as part of her New Year's resolution to finally knock off some weight, but she's thought better of it now. Better Bodies has sued Susan in small claims court for money owed on the contract, but Susan claims that Better Bodies should not be allowed to enforce the contract. She says they used glitzy machinery and a cool smoothie bar to talk her into signing a contract when they know very well that 9 out of 10 people who sign up stop coming within 6 weeks. Susan says she was tricked. Can Better Bodies enforce the contract?

Example #4:
Robbie Robber kidnapped Abe's sweet Petunia pug dog and demanded $1,000 for ransom. Not only did Abe pay, but he also solemnly swore that he wouldn't cooperate in any prosecution of Robbie. Robbie says that because Abe breached the contract by going to the police after recovering Petunia, Robbie has been severely injured—he's out dog and money, and in jail! Abe doesn't dispute that he broke his promise to Robbie. Does Robbie have a good case?

Example #5:
After showing Miranda several sheets of fine print and explaining them to her, Snidely closes the deal on a rental agreement by asking her to sign a rental contract that he has kept concealed until now that contains a very high rental fee, covering the contents with other papers and talking quickly so Miranda doesn't notice. Snidely has filed an action against Miranda, but she says she never laid eyes on the contract that bears her signature, and you believe her. Is the contract enforceable?
[Look at pp. 10-12 for answers and discussion.]

There are three other common reasons for a court to refuse to enforce a contract. Although they have legal-sounding names, they're pretty straightforward. As a general rule, these reasons are *affirmative defenses,* which means the defendant is responsible for bringing them to the attention of the judge and persuading the judge of their validity.

The Statute of Frauds. Some contracts are required to be written, dated, and signed by the debtor to be enforceable. The ones you are likely to see most often are retail installment sales contracts when the seller is furnishing the buyer credit so that he can buy the goods or services.

The Statute of Limitations. There are legal time limits within which a person must bring a lawsuit or else lose the right to do so. There are three important rules that come up frequently in this defense:

1. The statute of limitations for contracts for services or money lent is three years.

2. The statute of limitations for contracts for the sale of goods is four years.

3. In an action on an account, a part payment starts the statute of limitations all over again on the balance due.

Unconscionability. Remember when I said earlier that freedom of contract includes the right to make a bad deal? Sometimes a deal is SO bad, and the circumstances surrounding it are so troublesome, that the law refuses to enforce a contract. One judge described this kind of contract as one that "shocks the conscience." When a contract is made between two parties who are very unequal in terms of their bargaining power and sophistication, and the contract itself strikes almost everyone as extremely unfair, the law simply refuses to lend its support and approval by enforcing it. Instead, the contract—or often one or more of the terms of the contract—is labeled "unconscionable" and not enforced.

What Are the Damages?

Assume that you've determined a contract exists, identified its terms, and decided that the contract has been breached. How do you decide what to award the plaintiff? What is the measure of damages?

General rule: Amount of money owed plus interest from date of breach.

Special measure of damages in actions for breach of warranty term: Difference between fair market value of goods received and goods as warranted.

Interest: In all breach of contract actions, the law awards interest for the time period between the date of breech and the date of judgment. If the contract itself contains a rate of interest, that interest rate will apply (so long as it does not exceed the allowable rate under the law.) If the contract does not contain an interest rate, the rate is set by statute at 8% (sometimes referred to as "the legal rate.")

Attorney fees are not usually allowed as part of damages. In the case of contracts, a notable exception includes action on a note or other evidence of debt. Amount is at contract rate up to maximum of 15% of outstanding balance, and there is a notice provision that allows debtor to avoid attorney fees by paying off debt.

Example: I buy a pure-bred puppy from Super Intelligent Pets. I tell the salesperson I want the smartest dog in the store, and he tells me about the special Doggy IQ Test that all their dogs must take before being matched with an equally smart owner. I agree to pay $500 over a one-year period, with interest at 10%. I also agree that if SIP has to take me to court, I will pay an attorney fee of $200. After I take Einstein home, I discover he's dumb as dirt and I stop paying SIP. SIP sues me for breach of contract, and I counter-sue for breach of implied warranty of fitness for a particular purpose.

Assume you rule in favor of SIP and against me on my counterclaim. What will the damages consist of? [I'm not looking for a specific amount of money—just tell me in words what you'd be thinking about.]

Assume you rule against SIP and for me. How will you determine damages? *[Answers on p. 12.]*

Answers and Explanations

Page 3 *[Joint and several liability]:* Luna buys the furniture, signs the agreement, gets tired of Jane, and moves to Canada. Can the furniture store sue Jane?

Answer: No. Jane did not enter into the agreement with the furniture store, so she was not a party to the contract. Just being married to Luna doesn't mean Jane is legally responsible for all her agreements.

Page 3 *[Conflicting evidence of terms of contract]:* Joanna is suing for money owed, saying that she lent Tom $50 three months ago, and that Tom promised to pay her back "within the next couple of months" with interest but has never done so. Tom says he borrowed the money to buy textbooks for college, and that he and Joanna agreed that he would repay the loan at the end of this semester, when Tom begins working at his summer job. You're not sure who to believe. What do you do?

Answer*:* Dismiss the case. When both parties are credible and the versions offered by each are plausible, the party with the burden of proof loses. Before you become too concerned that this result may be unfair to Joanna—since she might be telling the truth, remember that she could have insisted on putting their agreement in writing.

Page 4 *[Determining contract terms*]: This time the folded sweaters on the table are variously colored and patterned. The clerk says, "Would you like to pick one out?" and I respond, "No, thanks. Just box one up for me." Can you conclude from this evidence that one term of the contract was that the sweater would be black?

Answer: No. Since the display was varied, and I refused to select a particular sweater, there is no evidence to support a finding that the color of the sweater was a term of this particular contract.

Pages 4 & 5 [*Parol evidence rule*]: Luna and Sol sign a written agreement that says, "I, Sol, will pay Luna $50 for performing yard work on my yard. Luna will complete this work between the 1st and the 5th each month, and I will pay her upon completion."

Question #1: Luna has brought an action for money owed against Sol after Sol refused to pay her. Sol says that's because Luna didn't trim the shrubbery. Luna wants to introduce evidence that, at the time they negotiated the agreement, she asked Sol what he meant by "yard work" and Sol said, "Mowing and raking the grass, edging the lawn, and using the weedeater in places where you can't get the mower." In this case, the judge can consider Luna's testimony. Can you figure out why?

Explanation: The term in the contract that refers to "yard work" is not clear—we don't know what the parties meant when they included that in the contract. Evidence about discussions they had before or at the time they negotiated the agreement may be considered by the judge in deciding what the term means. The judge may or may not believe Luna's testimony, of course, but this is an example of a case when the parol evidence rule does not apply to prevent the judge from even hearing the evidence. *Rule:* Parol evidence is properly admitted to explain a term in the contract that is ambiguous.

Question #2: In this situation, Luna and Sol have entered into the same written agreement, but this time Sol wants to testify that, two weeks after they signed the contract, he asked Luna to include trimming the shrubbery, and Luna agreed, with the understanding that the time for her performance would be increased from 5 days to 10. The judge can consider this testimony. Can you figure out why?

Explanation: This evidence is not about the original agreement, but about a change in the agreement that happened **later**. Obviously, we can't expect later agreements (called *modifications*) to be included in the original writing. The parol evidence rule applies only to evidence about events that happened before or at the same time as the contract.

Pages 6 & 7 [Reasons not to enforce a contract]:

Example #1: Luna is 17 and looks 22. She bought a car from Fast Eddie, and she assured Fast Eddie that she's over 18. After she wrecks the car, she wants to return it, and get a complete refund of her money. Can she?

Answer: Yes. Luna is a minor and had no legal ability to enter into this contract—as far as the law is concerned, Luna can enforce it against Fast Eddie if she wants to, but she can also

change her mind and cancel the contract at any point. If this seems unfair to you, remember that one purpose of this law is to encourage adults like Fast Eddie think twice before entering into a contract with a young person who may not be mature enough to make a good business decision.

Example #2: Jane is a quiet woman with a sweet smile who gives no outward sign that she suffers from Alzheimer's and has been declared mentally incompetent. She goes to Sears and buys a refrigerator for $900—one of the less expensive ones on the sales floor. She has purchased 3 other refrigerators this week. Sears wants to enforce its contract against Jane. Can it?

Answer: Maybe. We have a slightly different rule for contracts by people who are mentally incompetent, perhaps because the law realizes that, unlike young people, there may be no way for a merchant to tell if Jane is capable of giving legal consent. If Sears had no reason to know that Jane was incompetent, and there's no evidence that the contract was unfair or that Sears was taking advantage of Janet, courts will enforce the contract.

Example #3: Susan signed a contract with Better Bodies as part of her New Year's resolution to finally knock off some weight, but like most of us, she's thought better of it now. Better Bodies has sued Susan in small claims court for money owed on the contract, but Susan claims that Better Bodies should not be allowed to enforce the contract. She says they used glitzy machinery and a cool smoothie bar to talk her into signing a contract when they know very well that 9 out of 10 people who sign up stop coming within 6 weeks. Susan says she was tricked. Can Better Bodies enforce the contract?

Answer: Yes. This is the classic example of a bad bargain. Susan was not deceived by Better Bodies; the company may not have provided her with facts about how many customers change their minds, but it is under no duty to do so. The law distinguishes between active deception and a passive failure to inform. This situation reminds us of the old saying: Let the buyer beware.

Example #4: Robbie Robber kidnapped Abe's sweet Petunia pug dog and demanded $1,000 for ransom. Not only did Abe pay, but he also solemnly swore that he wouldn't cooperate in any prosecution of Robbie. Robbie says that because Abe breached the contract, he's been severely injured—he's out dog and money, and IN jail! Abe doesn't dispute that he made the promise to Robbie, and agrees as well that he broke it. Does Robbie have a good case?

Answer: I sure hope you said no. There are several problems with this contract, in addition to the main point of the question, which is that contracts made as a result of coercion or extortion are not enforceable. Neither are illegal contracts, of course. Finally, there was no real exchange here. Robbie gave up Petunia, but he had no right to her to begin with—she belonged to Abe!

Example #5: After showing Miranda several sheets of fine print and explaining them to her, Snidely closes the deal on a rental agreement by asking her to sign a rental contract that he has kept concealed until now that contains a very high rental fee, covering the contents with other papers and talking quickly so Miranda doesn't notice. Snidely has filed an action against Miranda, but she says she never laid eyes on the contract that bears her signature, and you believe her. Is the contract enforceable?

Answer: No. This is an example of a contract in which there was no real consent—Miranda's signature was obtained by a trick, and so it is not a meaningful sign that she agreed to this contract.

Page 9 [Determining damages]: I buy a pure-bred puppy from Super Intelligent Pets. I tell the salesperson I want the smartest dog in the store, and he tells me about the special Doggy IQ Test that all their dogs must take before being matched with an equally-smart owner. I agree to pay $500 over a one-year period, with interest at 10%. I also agree that if SIP has to take me to court, I will pay an attorney fee of $200. After I take Einstein home, I discover he's dumb as dirt and I stop paying SIP. SIP sues me for breach of contract, and I counter-sue for breach of implied warranty of fitness for a particular purpose.

Assume you rule in favor of SIP and against me on my counterclaim. What will the damages consist of? [I'm not looking for a specific amount of money—just tell me in words what you'd be thinking about.]

Answer: SIP is entitled to whatever portion of $500 I haven't yet paid, with 10% interest up to the date of judgment. In addition, assuming SIP properly gave me notice of its intent to seek attorney fees, I will have to pay attorney fees, but only up to 15% of the outstanding balance.

Assume you rule against SIP and for me. How will you determine damages?

Answer: Damages on a breach of warranty claim are determined based on the difference between the fair market value of Einstein as warranted and as she actually is. It will be my burden to prove to you the current fair market value of a super-intelligent puppy of Einstein's breed and the FMV of an ordinary dog of that breed. I will be entitled to that amount, plus interest of 8% (the legal rate, which applies unless a contract specifies a different rate) from the date of breach (which in this case would be the same as the date of sale).

Table 1. Maximum Allowable Interest Rates on Loans in North Carolina

Type of Lender (Statute)	Amount Lent	Security	Interest Rate	Other Allowable Charges
Bank, credit union, savings and loans, and individual (G.S. 241.1, -10, 10.1)	$25,000 or less	Any property (but not home loan secured by first deed of trust)	Greater of 16% or noncompetitive rate for U.S. Treasury bills with six-month maturity plus 6%. Rate set monthly by N.C. Commissioner of Banks.	Late payment charge up to 4% of outstanding balance. Prepayment fee of 2% if prepaid within 3 years of 1st payment for contract loan. Greater of ¼% of 1% of balance or $50 for modification of loan.
Bank, credit union, savings and loans, and individual (G.S. 24-11)	Extension of credit on open-end credit or revolving credit charges.	Any property if monthly periodic rate is 1¼% or less. No property if rate is over 1¼%.	1½% per month (18% per year) on unpaid balance	Annual charge of no more than $24. Late payment fee of $5 for unpaid balance less than $100 and $10 for balance of $100 or more
Finance Company (G.S. 53-176, -177, -177.1, -180, -189, G.S. 25A-30)*	$25,000 or less	Any personal property	Prejudgment: Loan of $12,000 or less-33% per year on unpaid principal to $4,000, 24% on unpaid principal between $4,000 & $8,000, and 18% per year on the remainder. Loan of more than $12,000, 18% per year. Postjudgment: 8%	Processing fee not to exceed $30 for loans up to $3,000 and 1% for loans over $3000 but max. of $150. Late fee $18. Deferral charge of 1½% of amount deferred. Fee for purchase of insurance policy in lieu of recording. Electronic transaction fees charged by non-affiliate third party.

Penalties

Banks, credit unions, individuals: Knowingly charging greater rate of interest than allowable forfeits entire interest on loan and borrower may recover twice the amount of interest actually paid. (G.S. 24-2)

Finance companies: Violations of the North Carolina Consumer Finance Act (G.S. Ch. 53, Art. 15) is a class 1 misdemeanor. Also, contract is void unless violation is the result of accidental or bona fide error of computation. Lender has no right to collect or retain any principal or interest with respect to the loan. Borrower would have an action against the lender to recover any principal or interest paid. (G.S. 53-166)

*Note additional requirements for loans to certain military service members. (G.S. 53-180.1)

Table 2. Maximum Allowable Finance Charges on Sale of Consumer Goods or Services in North Carolina: G.S. 25A-14 THROUGH -15

Property Sold	Security Taken	Amount Financed	Allowable Finance Charge[1]	Other Allowable Charges
Any personal property or services to be used for personal household, family, or agricultural purposes	Property or property previously sold by seller to buyer in which seller has existing security interest	Less than $3,000 $3,000 or more	24% $5 minimum 18% $5 minimum	Damage to property; credit, life, accident insurance charges if comply with truth-in-lending Official fees paid by the seller for determining the existence or for perfecting, releasing, satisfying a security interest, or in lieu thereof, premiums for insurance to protect seller if not more than official fees charged
Motor vehicle 1 to 3 model years old[2] Motor vehicle 4 to 5 model years old Motor vehicle 6 model years old or older	Property sold or property previously sold by seller to buyer in which seller has existing security interest	$75,000 or less	Higher of 20% or amount allowable under personal property category (above) Higher of 26% or amount allowable under personal property category (above) 30%	Default charge for installment past due at least 10 days $18. Written, dated deferral agreement may provide for charge of 1½% of each installment for each month from date installment would have been due
Personal property to be affixed on real property	Real property to which property sold is affixed	$1,000 or more	16%	
Personal property on revolving charge account	Property sold or property previously sold by seller to buyer in which seller has existing security agreement for which case price is $100 or more.		1.5% per month (18% per year)	Damage to property; credit, life, accident insurance charges if comply with truth-in-lending. Late payment fee of $5 for unpaid balance less than $100 and $10 for balance of $100 or more

[1] Finance charge is the sum of all charges payable directly or indirectly by the buyer and imposed by the seller as an incident to the extension of credit. It includes interest, price differential, service charge, loan fee, finder's fee, appraisal report, investigation report, credit report, and any nonexcluded insurance fees. (G.S. 25A-8)
[2] A motor vehicle is one model year old on January 1 of the year following the designated year model of the vehicle.

Penalties (G.S. 25A-44)

1. If contract requires payment of not more than twice the permitted finance charge, seller cannot recover any finance charge, and seller is liable to buyer for twice the amount of finance charges already paid, plus reasonable attorneys' fees.
2. If contract requires payment of more than twice the permitted finance charge, contract is void. Buyer can keep the goods and seller is not entitled to recover anything.
3. If charges for authorized fees (default, etc.) are in excess of allowable rate, buyer can demand a refund in writing; if seller fails to refund excess within 10 days, seller is liable for three times the amount of overpaid fee.
4. Knowing and willful violation constitutes unfair and deceptive practice.

TAB:

DVPOs

ISSUING EX PARTE DVPOS

Ex Parte DVPOs—Bullet Points

What It Is & When It's Available

- Primary relief sought by plaintiff is protective order issued by DC enforceable by contempt or criminal law
- Ex parte DVPO is supplemental remedy sought by plaintiff for purpose of protection during interval between filing complaint/motion and DC hearing.
- Ex parte DVPO issued following hearing conducted in absence of defendant.
- Magistrates may issue ex parte DVPO if
  - ✓ Authorized by CDCJ
  - ✓ Court is not in session
  - ✓ No DCJ available within next four hours
- Ex parte DVPO expires at midnight of next day district court is in session.

Ultimate Legal Questions

Does it clearly appear from specific facts shown that there is a danger of acts of domestic violence against the plaintiff or minor child? If so, what relief is necessary to protect plaintiff/child from such acts?

Has an act of domestic violence in fact occurred?

Essential Elements

Requires plaintiff to prove

1) Relationship &
2) Act

Firearms

If plaintiff establishes right to relief, magistrate must inquire about firearms.

If any of 5 statutory factors are present, magistrate must order surrender of firearms.

Remedy

Magistrate must order defendant to refrain from further acts of DV, Magistrate may order additional relief necessary to protect the plaintiff/child.

Custody

Magistrate is prohibited from entering order related to temporary custody of minor children unless magistrate finds substantial risk of physical or emotional injury or sexual abuse.

Plaintiff must provide CV-609 (Affidavit as to Status of Minor Child)

Procedure

If no complaint has been filed with the clerk and the clerk's office is closed, magistrate has authority to accept complaint from plaintiff and issue a summons.

Find out how many copies of the order your office requires.

Provide plaintiff with copy of order and deliver copy to sheriff for service.

SOME BASIC INFORMATION ABOUT DOMESTIC VIOLENCE PROTECTIVE ORDERS[1]

G.S. Ch. 50B creates a special kind of civil action in which the relief sought is protection from injury by the defendant, in the form of a coercive order by a judge prohibiting the defendant from taking certain actions. If the defendant knowingly violates the order, he may be found in contempt of court for violation of a court order. T he defendant also may be found guilty of the crime of violating a DVPO.

A special kind of DVPO is available to a plaintiff who fears that she may be injured during the interval between filing the complaint and the time the hearing is held. What statistical fact suggests that this concern of plaintiffs is often well-founded?

_____

A person seeking a DVPO has the option of asking for an **ex parte DVPO** as well. An ex parte DVPO is a protective order already in place before the defendant learns that the victim has filed for a DVPO. An ex parte DVPO is issued following a hearing conducted in the absence of the defendant. What concern does this raise in your mind?

_____

Magistrates never issue final DVPOs, but in some counties magistrates are authorized to determine whether an ex parte DVPO should issue. Authorized magistrates may conduct hearings on requests for ex parte DVPOs only if (1) district court is not in session, and (2) no district court judge will be available to conduct the hearing for at least four hours.

Has your chief district court judge authorized magistrates to issue ex parte DVPO's?

___ Never
___ Only during conferences or other relatively rare occasions
___ Theoretically, but we are strongly urged to use criminal charges when possible
___ Yes

[1] This outline refers to the victim of domestic violence as "the plaintiff" or "she", and the perpetrator of domestic violence as "the defendant" or "he", but any of these terms may be inaccurate in a specific case. The terms are used consistently in order to avoid confusion and were chosen because they are accurate in the majority of cases. In fact, though, a significant minority of victims of domestic violence are male. And because a person may seek a DVPO either by filing a civil action or by filing a motion in an already-existent civil action, that person may be a plaintiff or a defendant.

An ex parte DVPO issued by a magistrate is valid until midnight of the next day district court is in session. A district court judge will conduct another ex parte hearing when court is back in session.

The "permanent" hearing on plaintiff's request for a DVPO is referred to as the "10 day hearing," After defendant is served with the complaint, a full hearing is conducted on whether plaintiff is entitled to a DVPO and, if so, what provisions the order should contain. The order entered by the district court judge after hearing the evidence is valid for up to one year and may be extended at the end of that time for up to two years.

A DVPO is available only to parties involved in a **type of personal relationship** specified in the statute. These relationships are:

--current or former spouses

--persons of the opposite sex who live together or have lived together

--parents and children,[2] and grandparents and grandchildren. NOTE: no DVPO may issue under this section against a child under the age of 16.

--persons having a child in common

--current or former household members

--persons who are or have been in a dating relationship.[3]

[2] Including those acting *in loco parentis* to a minor child.

[3] A dating relationship is defined as a relationship in which the parties are romantically involved over time and on a continuous basis over the course of the relationship.

Particular behavior qualifies as domestic violence only if the defendant:

-- tried to cause physical injury;

-- intentionally caused physical injury;

-- behaved in a way that caused the plaintiff, a member of her family, or a member of her household, to be afraid of imminent serious bodily injury;

-- behaved in a way that caused the plaintiff, a member of her family, or a member of her household, to be afraid that defendant will continue to torment or terrorize that person to such a degree that the person experiences significant mental suffering. This behavior must be intentional on the part of the defendant, and it must have no legitimate purpose.[4] The statute refers to this behavior as **harassment.**

-- committed any act defined as rape or sexual offense in GS 14-27.2 to 14-27.7.

_____

_____

If a magistrate determines that *it clearly appears* from *specific facts shown* that there is *danger of acts of domestic violence* against the plaintiff or a minor child, the magistrate *may* order any relief set out in GS 50B-3 that the magistrate finds is necessary to protect them from such acts. [Note, however, additional showing required for order related to child custody.]

If a magistrate finds that an act of domestic violence *did in fact occur* (i.e., the defendant committed one of the acts listed above against a person in a personal relationship protected by the statute), the magistrate *MUST* enter an order which at a minimum prohibits the defendant from committing any further acts of domestic violence.

And the magistrate must do one other thing as well: the magistrate must question the plaintiff about defendant's ownership or access to firearms. (Does the defendant have access? Does the defendant own or have access to ammunition? A permit to purchase firearms? A permit to carry a concealed firearm?)

_____

_____

The magistrate must ask about the information above in every case, but in some cases the magistrate is required to go further and specifically order the defendant to turn over to the sheriff all guns, ammunition, and permits within his custody or control. This order is mandatory if any of the following factors are present:

[4] The statute specifically states that this behavior may include, among other things, written communication, telephone calls (including voice mail), email, faxes, and pager messages.

1) The defendant has at some time in the past used or threatened to use a deadly weapon.

2) The defendant has a pattern of prior conduct involving the use or threatened use of violence with a firearm against people.

3) The defendant has made threats to seriously injure or kill the plaintiff or minor child.

4) The defendant has threatened suicide.

5) The defendant has inflicted serious injuries on the plaintiff or minor child.

_____

_____

_____

_____

_____

_____

The magistrate has authority to grant a wide range of additional relief to the plaintiff, depending on the particular circumstances of the case. These remedies are listed in GS 50B-3 and include

1) granting the plaintiff possession of the parties' shared residence, and ordering the defendant to leave the home;
2) determining which party has the right to possession of personal property during the time the order is effective, including possession of family pets; and
3) ordering the defendant to stay away from the plaintiff, as well as specific places such as the plaintiff's workplace and homes of family members.

_____

_____

_____

The magistrate is often asked to make a determination of temporary custody of minor children residing with one or both parties. The magistrate is explicitly prohibited by GS 50B-2(c)(1) from doing this, unless the magistrate finds that . . .

> . . . the child is exposed to a substantial risk of physical or emotional injury or sexual abuse.

If a magistrate makes this finding, s/he may then go on to order that the defendant stay away from the minor child, return the child to the plaintiff, or not remove the child from the plaintiff. In support of this order, the magistrate must make a formal finding that the order is necessary for the child's safety.

ANSWERING QUESTIONS ABOUT DVPO'S

Every magistrate should know the answers to the following questions, and those answers sometimes vary from one county to the next—and one magistrate to the next, depending on your personality, the shift you're working, and other circumstances. Magistrates should be guided by two fundamental principles in responding to these questions:

Providing information to citizens about the court system's response to domestic violence is an important part of your job;

and

You have a responsibility to be certain that the information you provide is accurate.

1. How do I get a DVPO?
2. How much does it cost?
3. What do I have to prove to get one?
4. What if the defendant violates the order?
5. How long will it last?
6. Can I get one for my kids and family too?
7. Do I need a lawyer to get one?
8. Is there anyone that can help me fill out the forms?
9. When will the defendant find out about it?

List other questions you've heard or can think of:

10. _____

11. _____

12. _____

In many counties, the clerk's office or local agency offering assistance to domestic violence has prepared brochures or other handouts providing victims with answers to these questions. In every case, the magistrate should be certain that the citizen is informed that **there are no court costs** associated with seeking a DVPO, and that an attorney is not necessary to access these services.

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence

N.C.G.S.A. Ch. 50B, Refs & Annos
Currentness

N.C.G.S.A. Ch. 50B, Refs & Annos, NC ST Ch. 50B, Refs & Annos
The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-1

§ 50B-1. Domestic violence; definition

Effective: December 1, 2015
Currentness

(a) Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

(1) Attempting to cause bodily injury, or intentionally causing bodily injury; or

(2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or

(3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33.

(b) For purposes of this section, the term “personal relationship” means a relationship wherein the parties involved:

(1) Are current or former spouses;

(2) Are persons of opposite sex who live together or have lived together;

(3) Are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16;

(4) Have a child in common;

(5) Are current or former household members;

(6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship.

(c) As used in this Chapter, the term "protective order" includes any order entered pursuant to this Chapter upon hearing by the court or consent of the parties.

Credits

Added by Laws 1979, c. 561, § 1. Amended by Laws 1985, c. 113, § 1; Laws 1987, c. 828; Laws 1987 (Reg. Sess., 1988), c. 893, §§ 1, 3; Laws 1995 (Reg. Sess., 1996), c. 591, § 1, eff. Oct. 1, 1996; S.L. 1997-471, § 1, eff. Dec. 1, 1997; S.L. 2001-518, § 3, eff. March 1, 2002; S.L. 2003-107, § 1, eff. May 31, 2003; S.L. 2009-58, § 5, eff. June 5, 2009; S.L. 2015-181, § 36, eff. Dec. 1, 2015.

N.C.G.S.A. § 50B-1, NC ST § 50B-1

The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-2

§ 50B-2. Institution of civil action; motion for emergency relief; temporary orders; temporary custody

Effective: June 18, 2021
Currentness

(a) Any person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person. Any aggrieved party entitled to relief under this Chapter may file a civil action and proceed pro se, without the assistance of legal counsel. The district court division of the General Court of Justice shall have original jurisdiction over actions instituted under this Chapter. Any action for a domestic violence protective order requires that a summons be issued and served. The summons issued pursuant to this Chapter shall require the defendant to answer within 10 days of the date of service. Attachments to the summons shall include the complaint, notice of hearing, any temporary or ex parte order that has been issued, and other papers through the appropriate law enforcement agency where the defendant is to be served. In compliance with the federal Violence Against Women Act, no court costs or attorneys' fees shall be assessed for the filing, issuance, registration, or service of a protective order or petition for a protective order or witness subpoena, except as provided in G.S. 1A-1, Rule 11.

(b) Emergency Relief.--A party may move the court for emergency relief if he or she believes there is a danger of serious and immediate injury to himself or herself or a minor child. A hearing on a motion for emergency relief, where no ex parte order is entered, shall be held after five days' notice of the hearing to the other party or after five days from the date of service of process on the other party, whichever occurs first, provided, however, that no hearing shall be required if the service of process is not completed on the other party. If the party is proceeding pro se and does not request an ex parte hearing, the clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served.

(c) Ex Parte Orders.--

(1) Prior to the hearing, if it clearly appears to the court from specific facts shown, that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the court may enter orders as it deems necessary to protect the aggrieved party or minor children from those acts.

(2) A temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the court finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse.

(3) If the court finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse, upon request of the aggrieved party, the court shall consider and may order the other party to (i) stay away from a minor child, or (ii) return a minor child to, or not remove a minor child from, the physical care of a parent or person in loco parentis, if the court finds that the order is in the best interest of the minor child and is necessary for the safety of the minor child.

(4) If the court determines that it is in the best interest of the minor child for the other party to have contact with the minor child or children, the court shall issue an order designed to protect the safety and well-being of the minor child and the aggrieved party. The order shall specify the terms of contact between the other party and the minor child and may include a specific schedule of time and location of exchange of the minor child, supervision by a third party or supervised visitation center, and any other conditions that will ensure both the well-being of the minor child and the aggrieved party.

(5) Upon the issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. A continuance shall be limited to one extension of no more than 10 days unless all parties consent or good cause is shown. The hearing shall have priority on the court calendar.

(6) If an aggrieved party acting pro se requests ex parte relief, the clerk of superior court shall schedule an ex parte hearing with the district court division of the General Court of Justice within 72 hours of the filing for said relief, or by the end of the next day on which the district court is in session in the county in which the action was filed, whichever shall first occur. If the district court is not in session in said county, the aggrieved party may contact the clerk of superior court in any other county within the same judicial district who shall schedule an ex parte hearing with the district court division of the General Court of Justice by the end of the next day on which said court division is in session in that county.

(7) Upon the issuance of an ex parte order under this subsection, if the party is proceeding pro se, the Clerk shall set a date for hearing and issue a notice of hearing within the time periods provided in this subsection, and shall effect service of the summons, complaint, notice, order and other papers through the appropriate law enforcement agency where the defendant is to be served.

<Text of (c1) eff. until Dec. 1, 2022.>

(c1) Ex Parte Orders by Authorized Magistrate.--The chief district court judge may authorize a magistrate or magistrates to hear any motions for emergency relief ex parte. Prior to the hearing, if the magistrate determines that at the time the party is seeking emergency relief ex parte the district court is not in session and a district court judge is not and will not be available to hear the motion for a period of four or more hours, the motion may be heard by the magistrate. If it clearly appears to the magistrate from specific facts shown that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the magistrate may enter orders as it deems necessary to protect the aggrieved party or minor children from those acts, except that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the magistrate finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse. If the magistrate finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse, upon request of the aggrieved party, the magistrate shall consider and may order the other party to stay away from a minor child, or to return a minor child to, or not remove a minor child from, the physical care of a parent or person in loco parentis, if the magistrate finds that the order is in the best interest of the minor child and is necessary for the safety of the minor child. If the magistrate determines that it is in the best interest of the minor child for the other party to have contact with the minor child or children, the magistrate shall issue an order designed to protect the safety and well-being of the minor child and the aggrieved party. The order shall specify the terms of contact between the other party and the minor child and may include a specific schedule of time and location of exchange of the minor child, supervision by a third party or supervised visitation center, and any other conditions that will ensure both the well-being of the minor child and the aggrieved party. An ex parte order entered under this subsection shall expire and the magistrate shall schedule an ex parte hearing before a district court judge by the end of the next day on which the district court is in session in the county in which the action was filed. Ex parte orders entered by the district court judge pursuant to this subsection shall be entered and scheduled in accordance with subsection (c) of this section.

<Text of (c1) eff. Dec. 1, 2022.>

(c1) Ex Parte Orders by Authorized Magistrate.--The chief district court judge may authorize a magistrate or magistrates to hear any motions for emergency relief ex parte. Prior to the hearing, if the magistrate determines that at the time the party is seeking emergency relief ex parte the district court is not in session and a district court judge is not and will not be available to hear the motion for a period of four or more hours, the motion may be heard by the magistrate. When the office of the clerk is closed and a magistrate has been authorized under this section to hear a motion for emergency relief ex parte, an authorized magistrate shall accept for filing a complaint alleging domestic violence and motion for emergency relief ex parte, note thereon the filing date, and the magistrate shall issue a summons. Any endorsement or alias and pluries summons pursuant to G.S. 1A-1, Rule 4(d) shall be issued by the clerk, assistant clerk, or deputy clerk of the court in the county in which the action is commenced. Any complaint and motion for emergency relief ex parte and any other documents accepted for filing under this section and any order entered by the magistrate shall be delivered to the clerk's office for processing as soon as that office is open for business. If it clearly appears to the magistrate from specific facts shown that there is a danger of acts of domestic violence against the aggrieved party or a minor child, the magistrate may enter orders as it deems necessary to protect the aggrieved party or minor children from those acts, except that a temporary order for custody ex parte and prior to service of process and notice shall not be entered unless the magistrate finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse. If the magistrate finds that the child is exposed to a substantial risk of physical or emotional injury or sexual abuse, upon request of the aggrieved party, the magistrate shall consider and may order the other party to stay away from a minor child, or to return a minor child to, or not remove a minor child from, the physical care of a parent or person in loco parentis, if the magistrate finds that the order is in the best interest of the minor child and is necessary for the safety of the minor child. If the magistrate determines that it is in the best interest of the minor child for the other party to have contact with the minor child or children, the magistrate shall issue an order designed to protect the safety and well-being of the minor child and the aggrieved party. The order shall specify the terms of contact between the other party and the minor child and may include a specific schedule of time and location of exchange of the minor child, supervision by a third party or supervised visitation center, and any other conditions that will ensure both the well-being of the minor child and the aggrieved party. An ex parte order entered under this subsection shall expire and the magistrate shall schedule an ex parte hearing before a district court judge by the end of the next day on which the district court is in session in the county in which the action was filed. Ex parte orders entered by the district court judge pursuant to this subsection shall be entered and scheduled in accordance with subsection (c) of this section.

(c2) The authority granted to authorized magistrates to award temporary child custody pursuant to subsection (c1) of this section and pursuant to G.S. 50B-3(a)(4) is granted subject to custody rules to be established by the supervising chief district judge of each judicial district.

(d) Pro Se Forms.--The clerk of superior court of each county shall provide to pro se complainants all forms that are necessary or appropriate to enable them to proceed pro se pursuant to this section. The clerk shall, whenever feasible, provide a private area for complainants to fill out forms and make inquiries. The clerk shall provide a supply of pro se forms to authorized magistrates who shall make the forms available to complainants seeking relief under subsection (c1) of this section.

(e) All documents filed, issued, registered, or served in an action under this Chapter relating to an ex parte, emergency, or permanent domestic violence protective order may be filed electronically.

Credits

Added by Laws 1979, c. 561, § 1. Amended by Laws 1985, c. 113, §§ 2, 3; Laws 1987 (Reg. Sess., 1988), c. 893, § 2; Laws 1989, c. 461, § 1; Laws 1994 (Ex. Sess.), c. 4, § 1, eff. May 1, 1994; S.L. 1997-471, § 2, eff. Dec. 1, 1997; S.L. 2001-518, § 4, eff. March 1, 2002; S.L. 2002-126, § 29A.6.(a), eff. Oct. 1, 2002; S.L. 2004-186, § 17.2, eff. Oct. 1, 2004; S.L. 2004-186, §

19.1, eff. Aug. 12, 2004; S.L. 2009-342, § 2, eff. Dec. 1, 2009; S.L. 2012-20, § 1, eff. Oct. 1, 2012; S.L. 2013-390, § 1, eff. Oct. 1, 2013; S.L. 2015-62, § 3(b), eff. Dec. 1, 2015; S.L. 2021-47, § 10(i), eff. June 18, 2021; S.L. 2022-47, § 4(a), eff. Dec. 1, 2022.

N.C.G.S.A. § 50B-2, NC ST § 50B-2

The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-3

§ 50B-3. Relief

Effective: December 1, 2019
Currentness

(a) If the court, including magistrates as authorized under G.S. 50B-2(c1), finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence. A protective order may include any of the following types of relief:

(1) Direct a party to refrain from such acts.

(2) Grant to a party possession of the residence or household of the parties and exclude the other party from the residence or household.

(3) Require a party to provide a spouse and his or her children suitable alternate housing.

(4) Award temporary custody of minor children and establish temporary visitation rights pursuant to G.S. 50B-2 if the order is granted ex parte, and pursuant to subsection (a1) of this section if the order is granted after notice or service of process.

(5) Order the eviction of a party from the residence or household and assistance to the victim in returning to it.

(6) Order either party to make payments for the support of a minor child as required by law.

(7) Order either party to make payments for the support of a spouse as required by law.

(8) Provide for possession of personal property of the parties, including the care, custody, and control of any animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.

(9) Order a party to refrain from doing any or all of the following:

a. Threatening, abusing, or following the other party.

b. Harassing the other party, including by telephone, visiting the home or workplace, or other means.

b1. Cruelly treating or abusing an animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.

c. Otherwise interfering with the other party.

(10) Award attorney's fees to either party.

(11) Prohibit a party from purchasing a firearm for a time fixed in the order.

(12) Order any party the court finds is responsible for acts of domestic violence to attend and complete an abuser treatment program if the program is approved by the Domestic Violence Commission.

(13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

(a1) Upon the request of either party at a hearing after notice or service of process, the court shall consider and may award temporary custody of minor children and establish temporary visitation rights as follows:

(1) In awarding custody or visitation rights, the court shall base its decision on the best interest of the minor child with particular consideration given to the safety of the minor child.

(2) For purposes of determining custody and visitation issues, the court shall consider:

a. Whether the minor child was exposed to a substantial risk of physical or emotional injury or sexual abuse.

b. Whether the minor child was present during acts of domestic violence.

c. Whether a weapon was used or threatened to be used during any act of domestic violence.

d. Whether a party caused or attempted to cause serious bodily injury to the aggrieved party or the minor child.

e. Whether a party placed the aggrieved party or the minor child in reasonable fear of imminent serious bodily injury.

f. Whether a party caused an aggrieved party to engage involuntarily in sexual relations by force, threat, or duress.

g. Whether there is a pattern of abuse against an aggrieved party or the minor child.

h. Whether a party has abused or endangered the minor child during visitation.

i. Whether a party has used visitation as an opportunity to abuse or harass the aggrieved party.

j. Whether a party has improperly concealed or detained the minor child.

k. Whether a party has otherwise acted in a manner that is not in the best interest of the minor child.

(3) If the court awards custody, the court shall also consider whether visitation is in the best interest of the minor child. If ordering visitation, the court shall provide for the safety and well-being of the minor child and the safety of the aggrieved party. The court may consider any of the following:

a. Ordering an exchange of the minor child to occur in a protected setting or in the presence of an appropriate third party.

b. Ordering visitation supervised by an appropriate third party, or at a supervised visitation center or other approved agency.

c. Ordering the noncustodial parent to attend and complete, to the satisfaction of the court, an abuser treatment program as a condition of visitation.

d. Ordering either or both parents to abstain from possession or consumption of alcohol or controlled substances during the visitation or for 24 hours preceding an exchange of the minor child.

e. Ordering the noncustodial parent to pay the costs of supervised visitation.

f. Prohibiting overnight visitation.

g. Requiring a bond from the noncustodial parent for the return and safety of the minor child.

h. Ordering an investigation or appointment of a guardian ad litem or attorney for the minor child.

i. Imposing any other condition that is deemed necessary to provide for the safety and well-being of the minor child and the safety of the aggrieved party.

If the court grants visitation, the order shall specify dates and times for the visitation to take place or other specific parameters or conditions that are appropriate. A person, supervised visitation center, or other agency may be approved to supervise visitation after appearing in court or filing an affidavit accepting that responsibility and acknowledging accountability to the court.

(4) A temporary custody order entered pursuant to this Chapter shall be without prejudice and shall be for a fixed period of time not to exceed one year. Nothing in this section shall be construed to affect the right of the parties to a de novo hearing under Chapter 50 of the General Statutes.

(a2) If the court orders that the defendant attend an abuser treatment program pursuant to G.S. 50B-3(a)(12), the defendant shall begin regular attendance of the program within 60 days of the entry of the order. When ordering a defendant to attend an abuser treatment program, the court shall also specify a date and time for a review hearing with the court to assess whether the defendant has complied with that part of the order. The review hearing shall be held as soon as practicable after 60 days from the entry of the original order. The date of the review shall be set at the same time as the entry of the original order, and the clerk shall issue a Notice of Hearing for the compliance review to be given to the defendant and filed with the court on the same day as the entry of the order. If a defendant is not present in court at the time the order to attend an abuser treatment program is entered and the Notice of Hearing for review is filed, the clerk shall serve a copy of the Notice of Hearing together with the service of the order. The plaintiff may, but is not required to, attend the 60-day review hearing.

(a3) At any time prior to the 60-day review hearing set forth in subsection (a2) of this section, a defendant who is ordered to attend an abuser treatment program may present to the clerk a written statement from an abuser treatment program showing that the defendant has enrolled in and begun regular attendance in an abuser treatment program. Upon receipt of the written statement, the clerk shall remove the 60-day review hearing from the court docket, and the defendant shall not be required to appear for the 60-day review hearing. The clerk shall also notify the plaintiff that the defendant has complied with the order and that no 60-day review hearing will occur.

<Text of (b) eff. until Dec. 1, 2022.>

(b) Protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year. The court may renew a protective order for a fixed period of time not to exceed two years, including an order that previously has been renewed, upon a motion by the aggrieved party filed before the expiration of the current order; provided, however, that a temporary award of custody entered as part of a protective order may not be renewed to extend a temporary award of custody beyond the maximum one-year period. The court may renew a protective order for good cause. The commission of an act as defined in G.S. 50B-1(a) by the defendant after entry of the current order is not required for an order to be renewed. Protective orders entered, including consent orders, shall not be mutual in nature except where both parties file a claim and the court makes detailed findings of fact indicating that both parties acted as aggressors, that neither party acted primarily in self-defense, and that the right of each party to due process is preserved. Protective orders entered pursuant to this Chapter expire at 11:59 P.M. on the indicated expiration date, unless specifically stated otherwise in the order.

<Text of (b) eff. Dec. 1, 2022.>

(b) Protective orders entered pursuant to this Chapter shall be for a fixed period of time not to exceed one year. The court may renew a protective order for a fixed period of time not to exceed two years, including an order that previously has been renewed, upon a motion by the aggrieved party filed before the expiration of the current order; provided, however, that a temporary award of custody entered as part of a protective order may not be renewed to extend a temporary award of custody beyond the maximum one-year period. The court may renew a protective order for good cause. If the hearing for a motion to renew a protective order is set on a date after which the current order will have expired, the court may temporarily renew the current order upon the ex parte application of the plaintiff for a fixed period of time not to extend beyond the date of the renewal hearing or 30 days from the date the current order is set to expire, whichever occurs first, absent the express written consent of both parties or their attorneys. This temporary renewal may not extend a temporary award of custody entered as part of a protective order beyond the maximum one-year period. If a temporary renewal is granted, and the defendant is not personally present in

court, the order shall be served on the defendant in the same manner as an ex parte order issued pursuant to G.S. 50B-2. If a temporary renewal is granted, the Clerk shall provide a copy to the sheriff. The commission of an act as defined in G.S. 50B-1(a) by the defendant after entry of the current order is not required for an order to be renewed.

Protective orders entered, including consent orders, shall not be mutual in nature except where both parties file a claim and the court makes detailed findings of fact indicating that both parties acted as aggressors, that neither party acted primarily in self-defense, and that the right of each party to due process is preserved.

Protective orders entered pursuant to this Chapter expire at 11:59 P.M. on the indicated expiration date, unless specifically stated otherwise in the order.

(b1) A consent protective order may be entered pursuant to this Chapter without findings of fact and conclusions of law if the parties agree in writing that no findings of fact and conclusions of law will be included in the consent protective order. The consent protective order shall be valid and enforceable and shall have the same force and effect as a protective order entered with findings of fact and conclusions of law.

(b2) Upon the written request of either party at a hearing after notice or service of process, the court may modify any protective order entered pursuant to this Chapter after a finding of good cause.

(c) A copy of any order entered and filed under this Article shall be issued to each party. Law enforcement agencies shall accept receipt of copies of the order issued by the clerk of court by electronic or facsimile transmission for service on defendants. In addition, a copy of the order shall be issued promptly to and retained by the police department of the city of the victim's residence. If the victim does not reside in a city or resides in a city with no police department, copies shall be issued promptly to and retained by the sheriff, and the county police department, if any, of the county in which the victim resides. If the defendant is ordered to stay away from the child's school, a copy of the order shall be delivered promptly by the sheriff to the principal or, in the principal's absence, the assistant principal or the principal's designee of each school named in the order.

(c1) When a protective order issued under this Chapter is filed with the Clerk of Superior Court, the clerk shall provide to the applicant an informational sheet developed by the Administrative Office of the Courts that includes:

(1) Domestic violence agencies and services.

(2) Sexual assault agencies and services.

(3) Victims' compensation services.

(4) Legal aid services.

(5) Address confidentiality services.

(6) An explanation of the plaintiff's right to apply for a permit under G.S. 14-415.15.

(d) The sheriff of the county where a domestic violence order is entered shall provide for prompt entry of the order into the National Crime Information Center registry and shall provide for access of such orders to magistrates on a 24-hour-a-day basis. Modifications, terminations, renewals, and dismissals of the order shall also be promptly entered.

Credits

Added by Laws 1979, c. 561, § 1. Amended by Laws 1985, c. 463, § 1; Laws 1994 (Ex. Sess.), c. 4, § 2, eff. May 1, 1994; Laws 1995, c. 527, § 1; Laws 1995, (Reg. Sess., 1996), c. 591, § 2, eff. Oct. 1, 1996; Laws 1995 (Reg. Sess., 1996), c. 742, § 42.1, eff. June 21, 1996; S.L. 1999-23, § 1, eff. Feb. 1, 2000; S.L. 2000-125, § 9, eff. Dec. 1, 2000; S.L. 2002-105, § 2, eff. Sept. 6, 2002; S.L. 2002-126, § 29A.6.(b), eff. Oct. 1, 2002; S.L. 2003-107, § 2, eff. May 31, 2003; S.L. 2004-186, §§ 17.3 to 17.5, eff. Oct. 1, 2004; S.L. 2005-343, § 2, eff. Oct. 1, 2005; S.L. 2005-423, § 1, eff. Oct. 1, 2005; S.L. 2007-116, § 3, eff. Oct. 1, 2007; S.L. 2009-425, § 1, eff. Aug. 5, 2009; S.L. 2013-237, § 1, eff. Oct. 1, 2013; S.L. 2015-176, § 1, eff. Aug. 5, 2015; S.L. 2017-92, § 2, eff. Oct. 1, 2017; S.L. 2019-168, §§ 1, 2(b), eff. Dec. 1, 2019; S.L. 2022-48, § 1, eff. Dec. 1, 2022.

N.C.G.S.A. § 50B-3, NC ST § 50B-3

The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-3.1

§ 50B-3.1. Surrender and disposal of firearms; violations; exemptions

Effective: December 1, 2011
Currentness

(a) Required Surrender of Firearms.--Upon issuance of an emergency or ex parte order pursuant to this Chapter, the court shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors:

(1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons.

(2) Threats to seriously injure or kill the aggrieved party or minor child by the defendant.

(3) Threats to commit suicide by the defendant.

(4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.

(b) Ex Parte or Emergency Hearing.--The court shall inquire of the plaintiff, at the ex parte or emergency hearing, the presence of, ownership of, or otherwise access to firearms by the defendant, as well as ammunition, permits to purchase firearms, and permits to carry concealed firearms, and include, whenever possible, identifying information regarding the description, number, and location of firearms, ammunition, and permits in the order.

(c) Ten-Day Hearing.--The court, at the 10-day hearing, shall inquire of the defendant the presence of, ownership of, or otherwise access to firearms by the defendant, as well as ammunition, permits to purchase firearms, and permits to carry concealed firearms, and include, whenever possible, identifying information regarding the description, number, and location of firearms, ammunition, and permits in the order.

(d) Surrender.--Upon service of the order, the defendant shall immediately surrender to the sheriff possession of all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant. In the event that weapons cannot be surrendered at the time the order is served, the defendant shall surrender the firearms, ammunitions, and permits to the sheriff within 24 hours of service at a time and place specified by the sheriff. The sheriff shall store the firearms or contract with a licensed firearms dealer to provide storage.

(1) If the court orders the defendant to surrender firearms, ammunition, and permits, the court shall inform the plaintiff and the defendant of the terms of the protective order and include these terms on the face of the order, including that the defendant is prohibited from possessing, purchasing, or receiving or attempting to possess, purchase, or receive a firearm for so long as the protective order or any successive protective order is in effect. The terms of the order shall include instructions as to how the defendant may request retrieval of any firearms, ammunition, and permits surrendered to the sheriff when the protective order is no longer in effect. The terms shall also include notice of the penalty for violation of G.S. 14-269.8.

(2) The sheriff may charge the defendant a reasonable fee for the storage of any firearms and ammunition taken pursuant to a protective order. The fees are payable to the sheriff. The sheriff shall transmit the proceeds of these fees to the county finance officer. The fees shall be used by the sheriff to pay the costs of administering this section and for other law enforcement purposes. The county shall expend the restricted funds for these purposes only. The sheriff shall not release firearms, ammunition, or permits without a court order granting the release. The defendant must remit all fees owed prior to the authorized return of any firearms, ammunition, or permits. The sheriff shall not incur any civil or criminal liability for alleged damage or deterioration due to storage or transportation of any firearms or ammunition held pursuant to this section.

(e) Retrieval.--If the court does not enter a protective order when the ex parte or emergency order expires, the defendant may retrieve any weapons surrendered to the sheriff unless the court finds that the defendant is precluded from owning or possessing a firearm pursuant to State or federal law or final disposition of any pending criminal charges committed against the person that is the subject of the current protective order.

(f) Motion for Return.--The defendant may request the return of any firearms, ammunition, or permits surrendered by filing a motion with the court at the expiration of the current order or final disposition of any pending criminal charges committed against the person that is the subject of the current protective order and not later than 90 days after the expiration of the current order or final disposition of any pending criminal charges committed against the person that is the subject of the current protective order. Upon receipt of the motion, the court shall schedule a hearing and provide written notice to the plaintiff who shall have the right to appear and be heard and to the sheriff who has control of the firearms, ammunition, or permits. The court shall determine whether the defendant is subject to any State or federal law or court order that precludes the defendant from owning or possessing a firearm. The inquiry shall include:

(1) Whether the protective order has been renewed.

(2) Whether the defendant is subject to any other protective orders.

(3) Whether the defendant is disqualified from owning or possessing a firearm pursuant to 18 U.S.C. § 922 or any State law.

(4) Whether the defendant has any pending criminal charges, in either State or federal court, committed against the person that is the subject of the current protective order.

The court shall deny the return of firearms, ammunition, or permits if the court finds that the defendant is precluded from owning or possessing a firearm pursuant to State or federal law or if the defendant has any pending criminal charges, in either

State or federal court, committed against the person that is the subject of the current protective order until the final disposition of those charges.

(g) Motion for Return by Third-Party Owner.--A third-party owner of firearms, ammunition, or permits who is otherwise eligible to possess such items may file a motion requesting the return to said third party of any such items in the possession of the sheriff seized as a result of the entry of a domestic violence protective order. The motion must be filed not later than 30 days after the seizure of the items by the sheriff. Upon receipt of the third party's motion, the court shall schedule a hearing and provide written notice to all parties and the sheriff. The court shall order return of the items to the third party unless the court determines that the third party is disqualified from owning or possessing said items pursuant to State or federal law. If the court denies the return of said items to the third party, the items shall be disposed of by the sheriff as provided in subsection (h) of this section.

(h) Disposal of Firearms.--If the defendant does not file a motion requesting the return of any firearms, ammunition, or permits surrendered within the time period prescribed by this section, if the court determines that the defendant is precluded from regaining possession of any firearms, ammunition, or permits surrendered, or if the defendant or third-party owner fails to remit all fees owed for the storage of the firearms or ammunition within 30 days of the entry of the order granting the return of the firearms, ammunition, or permits, the sheriff who has control of the firearms, ammunition, or permits shall give notice to the defendant, and the sheriff shall apply to the court for an order of disposition of the firearms, ammunition, or permits. The judge, after a hearing, may order the disposition of the firearms, ammunition, or permits in one or more of the ways authorized by law, including subdivision (4), (4b), (5), or (6) of G.S. 14-269.1. If a sale by the sheriff does occur, any proceeds from the sale after deducting any costs associated with the sale, and in accordance with all applicable State and federal law, shall be provided to the defendant, if requested by the defendant by motion made before the hearing or at the hearing and if ordered by the judge.

(i) It is unlawful for any person subject to a protective order prohibiting the possession or purchase of firearms to:

(1) Fail to surrender all firearms, ammunition, permits to purchase firearms, and permits to carry concealed firearms to the sheriff as ordered by the court;

(2) Fail to disclose all information pertaining to the possession of firearms, ammunition, and permits to purchase and permits to carry concealed firearms as requested by the court; or

(3) Provide false information to the court pertaining to any of these items.

(j) Violations.--In accordance with G.S. 14-269.8, it is unlawful for any person to possess, purchase, or receive or attempt to possess, purchase, or receive a firearm, as defined in G.S. 14-409.39(2), machine gun, ammunition, or permits to purchase or carry concealed firearms if ordered by the court for so long as that protective order or any successive protective order entered against that person pursuant to this Chapter is in effect. Any defendant violating the provisions of this section shall be guilty of a Class H felony.

(k) Official Use Exemption.--This section shall not prohibit law enforcement officers and members of any branch of the Armed Forces of the United States, not otherwise prohibited under federal law, from possessing or using firearms for official use only.

(l) Nothing in this section is intended to limit the discretion of the court in granting additional relief as provided in other sections of this Chapter.

Credits

Added by S.L. 2003-410, § 1, eff. Dec. 1, 2003. Amended by S.L. 2004-203, § 34(a), eff. Dec. 1, 2004; S.L. 2005-287, § 4, eff. Aug. 22, 2005; S.L. 2005-423, §§ 2, 3, eff. Oct. 1, 2005; S.L. 2011-183, § 40, eff. June 20, 2011; S.L. 2011-268, §§ 23, 24, eff. Dec. 1, 2011.

N.C.G.S.A. § 50B-3.1, NC ST § 50B-3.1

The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-4

§ 50B-4. Enforcement of orders

Effective: October 1, 2017
Currentness

(a) A party may file a motion for contempt for violation of any order entered pursuant to this Chapter. This party may file and proceed with that motion pro se, using forms provided by the clerk of superior court or a magistrate authorized under G.S. 50B-2(c1). Upon the filing pro se of a motion for contempt under this subsection, the clerk, or the authorized magistrate, if the facts show clearly that there is danger of acts of domestic violence against the aggrieved party or a minor child and the motion is made at a time when the clerk is not available, shall schedule and issue notice of a show cause hearing with the district court division of the General Court of Justice at the earliest possible date pursuant to G.S. 5A-23. The Clerk, or the magistrate in the case of notice issued by the magistrate pursuant to this subsection, shall effect service of the motion, notice, and other papers through the appropriate law enforcement agency where the defendant is to be served.

(b) Repealed by S.L. 1999-23, § 2, eff. Feb. 1, 2000.

(c) A valid protective order entered pursuant to this Chapter shall be enforced by all North Carolina law enforcement agencies without further order of the court.

(d) A valid protective order entered by the courts of another state or the courts of an Indian tribe shall be accorded full faith and credit by the courts of North Carolina whether or not the order has been registered and shall be enforced by the courts and the law enforcement agencies of North Carolina as if it were an order issued by a North Carolina court. In determining the validity of an out-of-state order for purposes of enforcement, a law enforcement officer may rely upon a copy of the protective order issued by another state or the courts of an Indian tribe that is provided to the officer and on the statement of a person protected by the order that the order remains in effect. Even though registration is not required, a copy of a protective order may be registered in North Carolina by filing with the clerk of superior court in any county a copy of the order and an affidavit by a person protected by the order that to the best of that person's knowledge the order is presently in effect as written. Notice of the registration shall not be given to the defendant. Upon registration of the order, the clerk shall promptly forward a copy to the sheriff of that county. Unless the issuing state has already entered the order, the sheriff shall provide for prompt entry of the order into the National Crime Information Center registry pursuant to G.S. 50B-3(d).

(e) Upon application or motion by a party to the court, the court shall determine whether an out-of-state order remains in full force and effect.

(f) The term “valid protective order,” as used in subsections (c) and (d) of this section, shall include an emergency or ex parte order entered under this Chapter.

(g) Notwithstanding the provisions of G.S. 1-294, a valid protective order entered pursuant to this Chapter which has been appealed to the appellate division is enforceable in the trial court during the pendency of the appeal. Upon motion by the aggrieved party, the court of the appellate division in which the appeal is pending may stay an order of the trial court until the appeal is decided, if justice so requires.

Credits

Added by Laws 1979, c. 561, § 1. Amended by Laws 1985, c. 113, § 4; Laws 1987, c. 739, § 6; Laws 1989, c. 461, § 2; Laws 1994 (Ex. Sess.), c. 4, § 3, eff. May 1, 1994; Laws 1995 (Reg. Sess., 1996), c. 591, § 3, eff. Oct. 1, 1996; S.L. 1999-23, §§ 2.1, 8; S.L. 2002-126, § 29A.6.(c), eff. Oct. 1, 2002; S.L. 2003-107, § 3, eff. May 31, 2003; S.L. 2009-342, § 4, eff. July 24, 2009; S.L. 2017-92, § 1, eff. Oct. 1, 2017.

N.C.G.S.A. § 50B-4, NC ST § 50B-4

The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-4.1

§ 50B-4.1. Violation of valid protective order

Effective: December 1, 2010
Currentness

(a) Except as otherwise provided by law, a person who knowingly violates a valid protective order entered pursuant to this Chapter or who knowingly violates a valid protective order entered by the courts of another state or the courts of an Indian tribe shall be guilty of a Class A1 misdemeanor.

(b) A law enforcement officer shall arrest and take a person into custody, with or without a warrant or other process, if the officer has probable cause to believe that the person knowingly has violated a valid protective order excluding the person from the residence or household occupied by a victim of domestic violence or directing the person to refrain from doing any or all of the acts specified in G.S. 50B-3(a)(9).

(c) When a law enforcement officer makes an arrest under this section without a warrant, and the party arrested contests that the out-of-state order or the order issued by an Indian court remains in full force and effect, the party arrested shall be promptly provided with a copy of the information applicable to the party which appears on the National Crime Information Center registry by the sheriff of the county in which the arrest occurs.

(d) Unless covered under some other provision of law providing greater punishment, a person who commits a felony at a time when the person knows the behavior is prohibited by a valid protective order as provided in subsection (a) of this section shall be guilty of a felony one class higher than the principal felony described in the charging document. This subsection shall not apply to convictions of a Class A or B1 felony or to convictions of the offenses set forth in subsection (f) or subsection (g) of this section.

(e) An indictment or information that charges a person with committing felonious conduct as described in subsection (d) of this section shall also allege that the person knowingly violated a valid protective order as described in subsection (a) of this section in the course of the conduct constituting the underlying felony. In order for a person to be punished as described in subsection (d) of this section, a finding shall be made that the person knowingly violated the protective order in the course of conduct constituting the underlying felony.

(f) Unless covered under some other provision of law providing greater punishment, any person who knowingly violates a valid protective order as provided in subsection (a) of this section, after having been previously convicted of two offenses under this Chapter, shall be guilty of a Class H felony.

(g) Unless covered under some other provision of law providing greater punishment, any person who, while in possession of a deadly weapon on or about his or her person or within close proximity to his or her person, knowingly violates a valid protective

order as provided in subsection (a) of this section by failing to stay away from a place, or a person, as so directed under the terms of the order, shall be guilty of a Class H felony.

(g1) Unless covered under some other provision of law providing greater punishment, any person who is subject to a valid protective order, as provided in subsection (a) of this section, who enters property operated as a safe house or haven for victims of domestic violence, where a person protected under the order is residing, shall be guilty of a Class H felony. A person violates this subsection regardless of whether the person protected under the order is present on the property.

(h) For the purposes of this section, the term "valid protective order" shall include an emergency or ex parte order entered under this Chapter.

Credits

Added by S.L. 1997-471, § 3. Amended by S.L. 1997-456, § 27, eff. Dec. 1, 1997; S.L. 1999-23, § 4, eff. Dec. 1, 1999; S.L. 2001-518, § 5, eff. March 1, 2002; S.L. 2007-190, § 1, eff. Dec. 1, 2007; S.L. 2008-93, § 1, eff. Dec. 1, 2008; S.L. 2009-342, § 5, eff. July 24, 2009; S.L. 2009-389, § 2, eff. July 31, 2009; S.L. 2010-5, § 1, eff. Dec. 1, 2010; S.L. 2015-91, § 3, eff. Dec. 1, 2015.

N.C.G.S.A. § 50B-4.1, NC ST § 50B-4.1

The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-4.2

§ 50B-4.2. False statement regarding protective order a misdemeanor

Currentness

A person who knowingly makes a false statement to a law enforcement agency or officer that a protective order entered pursuant to this Chapter or by the courts of another state or Indian tribe remains in effect shall be guilty of a Class 2 misdemeanor.

Credits
Added by S.L. 1999-23, § 5, eff. Dec. 1, 1999.

N.C.G.S.A. § 50B-4.2, NC ST § 50B-4.2
The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-5

§ 50B-5. Emergency assistance

Currentness

(a) A person who alleges that he or she or a minor child has been the victim of domestic violence may request the assistance of a local law enforcement agency. The local law enforcement agency shall respond to the request for assistance as soon as practicable. The local law enforcement officer responding to the request for assistance may take whatever steps are reasonably necessary to protect the complainant from harm and may advise the complainant of sources of shelter, medical care, counseling and other services. Upon request by the complainant and where feasible, the law enforcement officer may transport the complainant to appropriate facilities such as hospitals, magistrates' offices, or public or private facilities for shelter and accompany the complainant to his or her residence, within the jurisdiction in which the request for assistance was made, so that the complainant may remove food, clothing, medication and such other personal property as is reasonably necessary to enable the complainant and any minor children who are presently in the care of the complainant to remain elsewhere pending further proceedings.

(b) In providing the assistance authorized by subsection (a), no officer may be held criminally or civilly liable on account of reasonable measures taken under authority of subsection (a).

Credits

Added by Laws 1979, c. 561, § 1. Amended by Laws 1985, c. 113, § 5; S.L. 1999-23, § 6, eff. Dec. 1, 1999.

N.C.G.S.A. § 50B-5, NC ST § 50B-5

The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-5.5

§ 50B-5.5. Employment discrimination unlawful

Currentness

(a) No employer shall discharge, demote, deny a promotion, or discipline an employee because the employee took reasonable time off from work to obtain or attempt to obtain relief under this Chapter. An employee who is absent from the workplace shall follow the employer's usual time-off policy or procedure, including advance notice to the employer, when required by the employer's usual procedures, unless an emergency prevents the employee from doing so. An employer may require documentation of any emergency that prevented the employee from complying in advance with the employer's usual time-off policy or procedure, or any other information available to the employee which supports the employee's reason for being absent from the workplace.

(b) The Commissioner of Labor shall enforce the provisions of this section according to Article 21 of Chapter 95 of the General Statutes, including the rules and regulations issued pursuant to the Article.

Credits
Added by S.L. 2004-186, § 18.1, eff. Oct. 1, 2004.

N.C.G.S.A. § 50B-5.5, NC ST § 50B-5.5
The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-6

§ 50B-6. Construction of Chapter

Currentness

This Chapter shall not be construed as granting a status to any person for any purpose other than those expressly stated herein. This Chapter shall not be construed as relieving any person or institution of the duty to report to the department of social services, as required by G.S. 7B-301, if the person or institution has cause to suspect that a juvenile is abused or neglected.

Credits

Added by Laws 1979, c. 561, § 1. Amended by Laws 1985, c. 113, § 6; S.L. 1998-202, § 13(r), eff. July 1, 1998.

N.C.G.S.A. § 50B-6, NC ST § 50B-6

The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-7

§ 50B-7. Remedies not exclusive

Effective: December 1, 2019
Currentness

(a) The remedies provided by this Chapter are not exclusive but are additional to remedies provided under Chapter 50 and elsewhere in the General Statutes.

(b) Any subsequent court order entered supersedes similar provisions in protective orders issued pursuant to this Chapter.

Credits
Added by Laws 1979, c. 561, § 1. Amended by S.L. 2019-168, § 2(a), eff. Dec. 1, 2019.

N.C.G.S.A. § 50B-7, NC ST § 50B-7
The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-8

§ 50B-8. Effect upon prosecution for violation of § 14-184 or other offense against public morals

Currentness

The granting of a protective order, prosecution for violation of this Chapter, or the granting of any other relief or the institution of any other enforcement proceedings under this Chapter shall not be construed to afford a defense to any person or persons charged with fornication and adultery under G.S. 14-184 or charged with any other offense against the public morals; and prosecution, conviction, or prosecution and conviction for violation of any provision of this Chapter shall not be a bar to prosecution for violation of G.S. 14-184 or of any other statute defining an offense or offenses against the public morals.

Credits

Added by Laws 1979, c. 561, § 1. Amended by S.L. 2003-107, § 4, eff. May 31, 2003.

N.C.G.S.A. § 50B-8, NC ST § 50B-8

The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

West's North Carolina General Statutes Annotated
Chapter 50B. Domestic Violence (Refs & Annos)

N.C.G.S.A. § 50B-9

§ 50B-9. Domestic Violence Center Fund

Effective: July 1, 2022
Currentness

(a) The Domestic Violence Center Fund is established within the State Treasury. The fund shall be administered by the Department of Administration, North Carolina Council for Women and Youth Involvement, and shall be used to make grants to centers for victims of domestic violence and to The North Carolina Coalition Against Domestic Violence, Incorporated. This fund shall be administered in accordance with the provisions of the State Budget Act. The Department of Administration shall make quarterly grants to each eligible domestic violence center and to The North Carolina Coalition Against Domestic Violence, Incorporated. The Department of Administration shall send the contracts to grantees within 10 business days of the date the Current Operations Appropriations Act, as defined in G.S. 143C-1-1, is certified for that fiscal year.

(b) Each grant recipient shall receive the same amount. To be eligible to receive funds under this section, a domestic violence center must meet the following requirements:

(1) It shall have been in operation on the preceding July 1 and shall continue to be in operation.

(2) It shall offer all of the following services: a hotline, transportation services, community education programs, daytime services, and call forwarding during the night and it shall fulfill other criteria established by the Department of Administration.

(3) It shall be a nonprofit corporation or a local governmental entity.

(c) On or before September 1, the North Carolina Council for Women and Youth Involvement shall report on the quarterly distributions of the grants from the Domestic Violence Center Fund to the chairs of the House Appropriations Committee on General Government and the Senate Appropriations Committee on General Government and Information Technology and to the Fiscal Research Division. The report shall include the following:

(1) Date, amount, and recipients of the fund disbursements.

(2) Eligible programs which are ineligible to receive funding during the relative reporting cycle as well as the reason of the ineligibility for that relative reporting cycle.

Credits

Added by Laws 1991, c. 693, § 3. Amended by Laws 1991 (Reg. Sess., 1992), c. 988, § 1; S.L. 2017-57, § 31.2(a), eff. July 1, 2017; S.L. 2021-180, § 20.6(a), eff. July 1, 2021; S.L. 2022-74, § 20.1, eff. July 1, 2022.

N.C.G.S.A. § 50B-9, NC ST § 50B-9

The statutes and Constitution are current through S.L. 2022-75 of the 2022 Regular Session of the General Assembly, subject to changes made pursuant to direction of the Revisor of Statutes. Some statute sections may be more current; see credits for details.

End of Document

Court of Appeals rules that denying domestic violence protection to persons in same-sex dating relationships is unconstitutional

****After this entry was posted, the North Carolina Supreme Court affirmed the decision of the Court of Appeals in M.E. v. T.J. and left the holding of the Court of Appeals regarding samesex dating relationships undisturbed. M.E. v. T.J., 380 N.C. 539 (2022), affirming as modified, 275 N.C. App. 528 (2020).**

In this post on August 15, 2017, DVPOs for Same-Sex Dating Relationships?, my former colleague Jeff Welty discussed the constitutionality of G.S. 50B-1(b)(6) in light of recent rulings by the United States Supreme Court addressing the rights of same-sex couples and in light of a South Carolina appellate court ruling that providing domestic violence protection to persons in heterosexual dating relationships while denying protection to persons in same-sex dating relationships is unconstitutional. Like the South Carolina statute, N.C.G.S. 50B-1(b)(6) provides that while persons of the opposite sex in a dating relationship are eligible for a DVPO, persons of the same sex in a dating relationship are not eligible for protection. On December 31, 2020, in M.E. v. T.J., the North Carolina Court of Appeals held this provision unconstitutional as applied to deny a plaintiff protection from domestic violence simply because plaintiff and defendant had been in a same-sex dating relationship rather than a heterosexual relationship.

Definition of domestic violence

To obtain an ex parte DVPO, a plaintiff must establish there is a danger of acts of domestic violence at the time the request is made, G.S. 50B-2(c)(1), and to obtain a permanent DVPO, plaintiff must establish that an act of domestic violence occurred. G.S. 50B-3(a). G.S. 50B-1 defines domestic violence as one of the acts listed in G.S. 50B-1(a) committed by a person with whom plaintiff has or has had a personal relationship. Therefore, a plaintiff is entitled to protection pursuant to Chapter 50B only if the plaintiff can establish both a personal relationship with defendant and that defendant committed one of the specified acts against plaintiff or against a minor child residing with or in the custody or plaintiff. G.S. 50B-1(a).

Personal relationship is defined in G.S. 50B-1(b) and subsection 50B-1(b)(6) provides that personal relationship includes “persons of the opposite sex who are in a dating relationship or have been in a dating relationship.” Persons of the same sex who are in or have been in a dating relationship are not included in the definition of personal relationship. Therefore, persons who are in or have been in a same-sex dating relationship are not entitled to Chapter 50B protection unless those persons have one of the other personal relationships identified in G.S. 50B-1(b).

M.E. v. T.J.

Plaintiff M.E. filed a complaint seeking both an ex parte and a permanent DVPO pursuant to Chapter 50B alleging defendant T.J. had committed acts of domestic violence against her. Plaintiff alleged she had been in a dating relationship with defendant. The trial court denied plaintiff’s request for ex parte relief, stating in the order that although plaintiff’s allegations of violence were

"significant", the trial court could not grant the ex parte DVPO because plaintiff did not establish a relationship with defendant. While plaintiff and defendant had been in a dating relationship, they were of the same sex. Following the hearing on plaintiff's request for a permanent relief, the trial court entered an order denying plaintiff's request, stating in the order that:

"[P]laintiff has failed to state a claim upon which relief can be granted pursuant to the statute, due to the lack of statutorily defined personal relationship. …[H]ad the parties been of opposite genders, th[e] facts [presented] would have supported the entry of a Domestic Violence Protective Order (50B)."

Plaintiff appealed, arguing that the denial of her requests for both an ex parte DVPO and a permanent DVPO because she was in a same-sex relationship with defendant "violated her 14th Amendment and state constitutional rights to due process and equal protection of the laws." The court of appeals agreed, concluding that "[n]o matter the [level of constitutional] review applied, N.C.G.S. § 50B-1(b)(6) does not survive Plaintiff's due process and equal protection challenges under either the North Carolina Constitution or the Constitution of the United States."

The court of appeals held (emphasis added):

"We therefore reverse the trial court's denial of Plaintiff's complaint for a Chapter 50B DVPO, and remand for entry of an appropriate order under Chapter 50B. **The trial court shall apply N.C.G.S. § 50B-1(b)(6) as stating: "Are persons who are in a dating relationship or have been in a dating relationship." The holdings in this opinion shall apply to all those similarly situated with Plaintiff who are seeking a DVPO pursuant to Chapter 50B; that is, the "same-sex" or "opposite-sex" nature of their "dating relationships" shall not be a factor in the decision to grant or deny a petitioner's DVPO claim under the Act."**

Case No.

Court: General Court of Justice, District Court Division

County: **NORTH CAROLINA**

EX PARTE DOMESTIC VIOLENCE ORDER OF PROTECTION

G.S. 50B-2, -3, -3.1

PETITIONER/PLAINTIFF

First *Middle* *Last*

PETITIONER/PLAINTIFF IDENTIFIERS

Date Of Birth Of Petitioner

And/or on behalf of minor family member(s): *(List Name And DOB)*

Other Protected Persons/DOB:

VERSUS

RESPONDENT/DEFENDANT

First *Middle* *Last*

Relationship to Petitioner: ☐ spouse ☐ former spouse
☐ unmarried, of opposite sex, currently or formerly living together
☐ unmarried, have a child in common
☐ currently or formerly in dating relationship
☐ current or former household member
☐ parent ☐ grandparent ☐ child ☐ grandchild

Respondent's/Defendant's Address

RESPONDENT/DEFENDANT IDENTIFIERS

Sex	Race	DOB	HT	WT

Eyes	Hair	Social Security Number

Drivers License No.	State	Expiration Date

Distinguishing Features

CAUTION:
☐ Weapon Involved

THE COURT HEREBY FINDS THAT:

This matter was heard by the undersigned ☐ district court judge. ☐ magistrate. The court has jurisdiction over the subject matter.

Additional findings of this order are set forth on Page 2.

THE COURT HEREBY ORDERS THAT:

☐ The above named Respondent/Defendant shall not commit any further acts of domestic violence or make any threats of domestic violence (G.S. 50B-1).

☐ The above named Respondent/Defendant shall have no contact with the Petitioner/Plaintiff. No contact includes any defendant-initiated contact, except through an attorney, direct or indirect, by means such as telephone, personal contact, email, pager, gift-giving or telefacsimile machine. **[05]**

Additional terms of this order are as set forth on Pages 3 and 4.

The terms of this order shall be effective until _____ _____, _____

WARNINGS TO THE RESPONDENT/DEFENDANT:

This order shall be enforced, even without registration, by the courts of any state, the District of Columbia, and any U.S. Territory, and may be enforced by Tribal Lands (18 U.S.C. Section 2265). Crossing state, territorial, or tribal boundaries to violate this order may result in federal imprisonment (18 U.S.C. Section 2262).

This order will be enforced anywhere in North Carolina.

Only the Court can change this order. The plaintiff cannot give you permission to violate this order.

See additional warnings on Page 4.

(Over)

ADDITIONAL FINDINGS

1. As indicated by the check block under Respondent/Defendant's name on Page 1, the parties are or have been in a personal relationship.

☐ 2. That on *(date of most recent conduct)* _____ , the defendant

☐ a. ☐ attempted to cause ☐ intentionally caused bodily injury to ☐ the plaintiff ☐ the child(ren) living with or in the custody of the plaintiff

☐ b. placed in fear of imminent serious bodily injury ☐ the plaintiff ☐ a member of the plaintiff's family ☐ a member of the plaintiff's household

☐ c. placed in fear of continued harassment that rises to such a level as to inflict substantial emotional distress ☐ the plaintiff ☐ a member of plaintiff's family ☐ a member of plaintiff's household

☐ d. committed an act defined in G.S. 14- ☐ 27.21 (1st deg. rape) ☐ 27.22 (2nd deg. rape) ☐ 27.26 (1st deg. sexual off.) ☐ 27.27 (2nd deg. sexual off.) ☐ 27.33 (sexual battery) ☐ 27.31 (sexual activity by substitute parent) against ☐ the plaintiff ☐ a child(ren) living with or in the custody of the plaintiff by *(describe defendant's conduct)*

☐ 3. The defendant is in possession of, owns or has access to firearms, ammunition, and gun permits described below. *(Describe all firearms, ammunition, gun permits and give identifying number(s) if known, and indicate where defendant keeps firearms)*

☐ 4. The defendant

☐ a. ☐ used ☐ threatened to use a deadly weapon against the ☐ plaintiff ☐ minor child(ren) residing with or in the custody of the plaintiff

☐ b. has a pattern of prior conduct involving the ☐ use ☐ threatened use of violence with a firearm against persons

☐ c. made threats to seriously injure or kill the ☐ plaintiff ☐ minor child(ren) residing with or in the custody of the plaintiff

☐ d. made threats to commit suicide

☐ e. inflicted serious injuries upon the ☐ plaintiff ☐ minor child(ren) residing with or in the custody of the plaintiff in that *(state facts):*

☐ 5. The parties are the parents of the following child(ren) under the age of eighteen (18). The child(ren) are presently in the physical custody of the ☐ plaintiff. ☐ defendant. The plaintiff has submitted an "Affidavit As To Status Of Minor Child."

NOTE TO JUDGE: *A copy of AOC-CV-609 for each child must be attached to the order.*

Name	Sex	Date Of Birth	Name	Sex	Date Of Birth

☐ 6. The minor child(ren) is exposed to a substantial risk of physical or emotional injury or sexual abuse in that:

☐ 7. It is in the best interest of and necessary for the safety of the minor child(ren) ☐ that defendant stay away from the minor child(ren) ☐ that the defendant return the minor child(ren) to plaintiff ☐ and that the defendant not remove the minor child(ren) from plaintiff in that:

☐ 8. *(Check block only if plaintiff is entitled to physical care of child(ren).)* It is in the best interest of the minor child(ren) that defendant have contact with the minor child(ren) in that:

☐ 9. The ☐ defendant ☐ plaintiff is presently in possession of the parties' residence at _____

_____

(Over)

☐ 10. The ☐ defendant ☐ plaintiff is presently in possession of the parties' vehicle. *(describe vehicle)*

☐ 11. Other: *(specify)*

☐ 12. *(for magistrate only)* This matter was heard at a time when the district court was not in session and a district court judge was not available and would not be available for a period of four or more hours.

CONCLUSIONS

Based on these facts, the Court makes the following conclusions of law:

☐ 1. The defendant has committed acts of domestic violence against the plaintiff.

☐ 2. The defendant has committed acts of domestic violence against the minor child(ren) residing with or in the custody of the plaintiff.

☐ 3. It clearly appears that there is a danger of acts of domestic violence against the ☐ plaintiff. ☐ minor child(ren). [G.S. 50B-2(c)]

☐ 4. The minor child(ren) is exposed to a substantial risk of ☐ physical injury. ☐ emotional injury. ☐ sexual abuse. [G.S. 50B-2(c)]

☐ 5. The Court has jurisdiction under the Uniform Child Custody Jurisdiction And Enforcement Act.

☐ 6. It is in the best interest of and necessary for the safety of the minor child(ren) that the defendant ☐ stay away from the minor child(ren). ☐ (and) return the minor child(ren) to the physical care of the plaintiff. ☐ (and) not remove the minor child(ren) from the physical care of the plaintiff.

☐ 7. The defendant's conduct requires that he/she surrender all firearms, ammunition and gun permits. [G.S. 50B-3.1]

☐ 8. The plaintiff has failed to prove grounds for ex parte relief.

ORDER

It is ORDERED that:

☐ 1. the defendant shall not assault, threaten, abuse, follow, harass (by telephone, visiting the home or workplace or other means), or interfere with the plaintiff. A law enforcement officer shall arrest the defendant if the officer has probable cause to believe the defendant has violated this provision. **[01]**

☐ 2. the defendant shall not assault, threaten, abuse, follow, harass (by telephone, visiting the home or workplace or other means), or interfere with the minor child(ren) residing with or in the custody of the plaintiff. A law enforcement officer shall arrest the defendant if the officer has probable cause to believe the defendant has violated this provision. **[01]**

☐ 3. the defendant shall not threaten a member of the plaintiff's family or household. **[02]**

☐ 3a. the defendant shall not cruelly treat or abuse an animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.

☐ 4. the plaintiff is granted possession of, and the defendant is excluded from, the parties' residence described above and all personal property located in the residence except for the defendant's personal clothing, toiletries and tools of trade. **[03]**

☐ 5. any law enforcement agency with jurisdiction shall evict the defendant from the residence and shall assist the plaintiff in returning to the residence. **[08]**

☐ 6. the ☐ plaintiff **[08]** ☐ defendant **[08]** is entitled to get personal clothing, toiletries, and tools of trade from the parties' residence. A law enforcement officer shall assist the ☐ plaintiff ☐ defendant in returning to the residence to get these items.

☐ 6a. the plaintiff is granted the care, custody, and control of any animal owned, possessed, kept, or held as a pet by either party or minor child residing in the household.

☐ 7. the defendant shall stay away from the plaintiff's residence or any place where the plaintiff receives temporary shelter. A law enforcement officer shall arrest the defendant if the officer has probable cause to believe the defendant has violated this provision. **[04]**

☐ 8. the defendant shall stay away from the following places:

- ☐ a. the place where the plaintiff works. **[04].**
- ☐ b. any school(s) the child(ren) attend. **[04]**
- ☐ c. the place where the child(ren) receives day care. **[04]**
- ☐ d. the plaintiff's school. **[04]**
- ☐ e. Other: *(name other places)* **[04]** _____

The sheriff must deliver a copy of this order to the principal or the principal's designee at the following school(s): *(name schools)*

☐ 9. the plaintiff is granted possession and use of the vehicle described in Block No. 10 of the Findings on Page 3. **[08]**

☐ 10. The plaintiff is awarded temporary custody of the minor child(ren) *(Check any of a, b, or c that apply.)*

- ☐ a. and the defendant is ordered to stay away from the minor child(ren).
- ☐ b. and the defendant is ordered to immediately return the minor child(ren) to the care of the plaintiff.
- ☐ c. and the defendant is ordered not to remove the minor child(ren) from the care of the plaintiff.

(Over)

☐ 11. *(If No. 10 is checked and you are allowing visitation to defendant)* The defendant is allowed the following contact with the minor child(ren):

☐ 12. the defendant is prohibited from ☐ possessing or receiving **[07]** ☐ purchasing a firearm for the effective period of this Order **[07]** ☐ and the defendant's concealed handgun permit is suspended for the effective period of this Order. **[08]**
☐ The defendant is a law enforcement officer/member of the armed services and ☐ may ☐ may not possess or use a firearm for official use.

☐ 13. the defendant surrender to the Sheriff serving this order the firearms, ammunition, and gun permits described in Number 3 of the Findings on Page 2 of this Order and any other firearms and ammunition in the defendant's care, custody, possession, ownership or control. **NOTE TO DEFENDANT:** ***You must surrender these items to the serving officer at the time this Order is served on you. If the weapons cannot be surrendered at that time, you must surrender them to the sheriff within 24 hours at the time and place specified by the sheriff. Failure to surrender the weapons and permits as ordered or possessing, purchasing, or receiving a firearm, ammunition or permits to purchase or carry concealed firearms after being ordered not to possess firearms, ammunition or permits is a crime. See "Notice To Parties: To The Defendant" on Page 4 of this Order for information regarding the penalty for these crimes and instructions on how to request return of surrendered weapons.***

☐ 14. the request for Ex Parte Order is denied.

☐ 15. Other: *(specify)* **[08]**

Date	*Signature*	☐ *District Court Judge* ☐ *Designated Magistrate*

NOTE TO PLAINTIFF: *If the judge signs this Order and gives it to you, take it to the Clerk's office immediately. If the magistrate signs this Order and gives it to you, follow the magistrate's directions.*

NOTE TO CLERK: *Give or mail a copy of this Order to the plaintiff and to the appropriate local law enforcement agency. Send copies to sheriff with Notice Of Hearing, Complaint and Summons for service on defendant. Send extra copies to the sheriff if required to deliver copy(ies) to the child(ren)'s school.*

NOTICE TO PARTIES

TO THE DEFENDANT:

1. **If this Order prohibits you from possessing, receiving or purchasing a firearm and you violate or attempt to violate that provision, you may be charged with a Class H felony pursuant to North Carolina G.S. 14-269.8 and may be imprisoned for up to 39 months.**
2. **If you have been ordered to surrender firearms, ammunition, and gun permits and you fail to surrender them as required by this Order, or if you failed to disclose to the Court all information requested about possession of these items or provide false information about any of these items you may be charged with a Class H felony and may be imprisoned for up to 39 months.** If you surrendered your firearms, ammunition, and permits, you may file a motion for the return of weapons with the clerk of court in the county in which this Order was entered when the protective order is no longer in effect, except if at the time this Order expires criminal charges, in either state or federal court, are pending against you alleged to have been committed against the person who is protected by this order, you may not file for return of the firearms until final disposition of the criminal charges. The form, "Motion For Return Of Weapons Surrendered Under Domestic Violence Protective Order" AOC-CV-319, is available from the clerk of court's office. The motion must be filed **not later than 90 days after the expiration of the Order that requires you to surrender the firearms or if you have pending criminal charges alleged to have been committed against the person who is protected by the domestic violence protection order, the motion must be filed not later than 90 days after final disposition of the criminal charges.** At the time you file the motion, the clerk will schedule a hearing before the district court for a judge to determine whether to return the weapons to you. The sheriff cannot return your weapons unless the Court orders the sheriff to do so. You must pay the sheriff's storage fee before the sheriff returns your weapons. If you fail to file a motion for return of the weapons within 90 days after the expiration of this Order, or the final disposition of criminal charges pending at the time this Order expired, or if you fail to pay the storage fees **within 30 days after the Court enters an order to return your weapons**, the sheriff may seek an order from the Court to dispose of your weapons.

TO THE PLAINTIFF:

1. You should keep a copy of this order on you at all times and should make copies to give to your friends and family. If you move to another county or state, you may wish to give a copy to the law enforcement agency where you move, but you are not required to do so.
2. The court or judge is the only one that can make changes to this order. If you wish to change any of the terms of this order, you must come back into court to have the judge modify the order.
3. If the defendant violates any provision of this order, you may call a law enforcement officer or go to a magistrate to charge the defendant with the crime of violating a protective order. You also may go to the Clerk of Court's office in the county where the protective order was issued and ask to fill out form AOC-CV-307, Motion For Order To Show Cause Domestic Violence Protective Order, to have an order issued for the defendant to appear before a district court judge to be held in contempt for violating the order.

Name Of Defendant	File No.

CERTIFICATION

I certify this order is a true copy.

Date	Signature Of Clerk	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk of Superior Court

RETURN OF SERVICE

NOTE: *To be used when Magistrate issues ex parte protective order and order will be served on defendant separate from the complaint and civil summons. If complaint and summons are served with order, return on summons covers order.*

I certify that this Ex Parte Domestic Violence Order of Protection was received and served as follows:

Date Served	Time Served ☐ AM ☐ PM	Name Of Defendant

☐ By delivering to the defendant named above a copy of the order.

☐ By leaving a copy of the order at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein.

Name And Address Of Person With Whom Copies Left

☐ Other manner of service on the defendant *(specify)*

☐ Defendant WAS NOT served for the following reason.

Date Received	Signature Of Deputy Sheriff Making Return
Date Of Return	Name Of Deputy Sheriff Making Return (type or print)
	County Of Sheriff

INSTRUCTIONS FOR DOMESTIC VIOLENCE FORMS

FORMS YOU NEED TO FILL OUT:

I. Complaint And Motion For Domestic Violence Protective Order (AOC-CV-303)

1. You will need three (3) copies of this form.
2. Fill in:
   (a) Name of county;
   (b) Plaintiff's name - you are the plaintiff;
   (c) Defendant's name and address - a defendant is a spouse, former spouse, person of the opposite sex with whom you live or have lived, your child or grandchild who is at least 16 years old, the mother or father of your child, a current or former household member, or a person that you are dating or have dated;
   (d) Check the blocks and fill in the blanks that apply to you. If you are afraid of additional acts of domestic violence and you want the judge/magistrate to act immediately, check block #2 at the bottom of page 2, asking for an Ex Parte Order. A request for an Ex Parte Order will be heard soon and without giving notice to the defendant. If a magistrate hears your request for ex parte relief, the magistrate's order is only good for a short period of time and a second temporary Ex Parte Order must be issued by the judge. If the judge issues the temporary Ex Parte Order, another hearing will be held after the defendant is given notice. If no Ex Parte Order is entered, a hearing will still be held after the defendant is given notice;
   (e) Date and sign the complaint on the back;
   (f) In some counties you may be able to take it to the magistrate's office on weekends and evenings.
3. If you or the defendant is under the age of eighteen (18) and not married, you must ask the clerk for the form to appoint a guardian ad litem (AOC-CV-318).

II. Notice Of Hearing On Domestic Violence Protective Order (AOC-CV-305)

1. You will need three (3) copies of this form.
2. Fill in:
   (a) Name of county;
   (b) Plaintiff's name;
   (c) Defendant's name and address.
3. **DO NOT** fill out the remainder of this form.

III. Ex Parte Domestic Violence Order Of Protection (AOC-CV-304)

1. You will need only one (1) copy of this form.
2. Fill in:
   (a) Name of county;
   (b) Plaintiff's name;
   (c) Defendant's name and address.
3. **DO NOT** fill out the remainder of this form.

IV. Civil Summons Domestic Violence (AOC-CV-317)

1. You will need three (3) copies of this form.
2. Fill in:
   (a) Name of county;
   (b) Plaintiff's name and address. You may give an address where you want your mail to go, not necessarily where you are staying;
   (c) Defendant's name and address *(under the block designated "Defendant")*;
   (d) Defendant's name and address again in the block designated "Name and Address of Defendant."
3. **DO NOT** fill out the remainder of this form.

(Over)

V. Identifying Information About Defendant Domestic Violence Action (AOC-CV-312)

1. You will need only one (1) copy of this form.
2. Fill in all the information that you know. Be as complete and accurate as you can.
3. Leave blank any portion for which you do not have the information.
4. You may either:
   (a) turn in the completed form to the clerk or magistrate with the other papers, or
   (b) keep the form, get the needed information, and turn in the completed form to the judge or magistrate at the hearing.

VI. Affidavit As To Status Of Minor Child (AOC-CV-609)

1. You **do not** need this form unless you are asking for temporary custody of the children.
2. You will need one (1) copy of this form for each minor child.
3. You must attach the completed form to the Complaint and give it to the clerk or magistrate with the other papers:
   (a) turn in the completed form to the clerk or magistrate with the other papers, or
   (b) keep the form, get the needed information, and turn in the completed form to the judge or magistrate at the hearing.

TAKE ALL FORMS TO THE CLERK/MAGISTRATE FOR FURTHER DIRECTIONS.

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
District Court Division

Name Of Plaintiff	CIVIL SUMMONS DOMESTIC VIOLENCE ☐ ALIAS AND PLURIES SUMMONS
Address	
City, State, Zip	
VERSUS	G.S. 50B-2(a)
Name Of Defendant	Date Original Summons Issued
	Date(s) Subsequent Summons(es) Issued

To The Defendant Named Below:

Name And Address Of Defendant

A Civil Action Has Been Commenced Against You!

You are notified to appear and answer the complaint of the plaintiff as follows:

1. Serve a copy of your written answer to the complaint upon the plaintiff or plaintiff's attorney within ten (10) days after you have been served. You may serve your answer by delivering a copy to the plaintiff or by mailing it to the plaintiff's last known address; and

2. File the original of the written answer with the Clerk of Superior Court of the county named above.

If you fail to answer the complaint, the plaintiff will apply to the Court for the relief demanded in the complaint.

Name And Address Of Plaintiff's Attorney (if none, Address Of Plaintiff)	Date Issued	Time ☐ AM ☐ PM
	Signature	
	☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court ☐ Designated Magistrate	

☐ **ENDORSEMENT**
This Summons was originally issued on the date indicated above and returned not served. At the request of the plaintiff, the time within which this Summons must be served is extended sixty (60) days.

Date Of Endorsement	Time ☐ AM ☐ PM
Signature	
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court	

(Over)

RETURN OF SERVICE

I certify that this Summons and a copy of the complaint ☐ and a copy of the ex parte order were received and served as follows:

DEFENDANT

Date Served	*Time Served* ☐ AM ☐ PM	*Name Of Defendant*

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing within.

Name And Address Of Person With Whom Copies Left

	Date Accepted	*Signature*
☐ Acceptance of service. Summons and complaint ☐ and ex parte order received by: ☐ Defendant. ☐ Other: *(type or print name)*		

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

Service Fee Paid	*Signature Of Deputy Sheriff Making Return*
$	
Date Received	*Name Of Sheriff (type or print)*
Date Of Return	*County Of Sheriff*

Tab: Understanding DV

UNDERSTANDING DOMESTIC VIOLENCE

Case Study

I have been married to my husband for ten years. I became pregnant with my first child shortly after we were married. We now have three children, ages nine, seven and six. Even from the beginning, my husband has made all of the decisions for our family. He told me that my job was to be a good wife—to take care of the children and to cook and clean for him.

The first time he hit me was when I was pregnant with my first child. We had come home from my mother's house and he was angry about something. I think I had forgotten to buy a kind of food item that he wanted, and then he slapped me. I thought it was just an isolated event. I never thought he would do it again.

Since then, he has hit, kicked, choked, slapped and burned me. He does not hurt me physically that often, though, maybe only once a month. Mainly, when I do something he doesn't like, such as visiting my mother or talking on the phone to a friend, he calls me a prostitute and other bad names, and tells me that he will take the children and go to his mother's home if I am not a good wife. He refuses to let me take a job, even though all of our children are in school, and I would be qualified for many different kinds of jobs. He does not let me have any money, except for a little for grocery shopping.

He is very jealous and possessive. A few months ago, he became very angry because I was late getting home from the store. He accused me of seeing another man and punched a hole in the door between the kitchen and the living room. My sons were there and saw this, and he yelled at them to go to their rooms. I recently overheard him talking to my seven-year-old son. He was asking if my son ever saw me talking to "other men." He told my son that I was crazy and that my son should watch me and tell him if I did anything strange.

Another time, we went to a party given by a friend of his from work. I met the wife of one of the people my husband works with. We spent a long time talking. After some time, my husband came up to me, grabbed my arm so tightly it hurt and left bruises, and whispered in my ear, "We're leaving." Just by the look he gave me, I knew he was angry that I spent so much time talking with the woman, and that he would likely beat me when we got home. When we got home, he smashed a framed picture I have of myself with a group of my friends at the university, before I was married, by throwing it at the wall near where I was standing. He told me that I "knew" what would happen if I continued to disobey him.

A few months ago, my husband came home late with friends and made me get up to cook them food. He started joking with his friends about how much I weighed, and that I was like all other women who let themselves go once they got married. He called me many bad names. After his friends left, he woke me up again and forced me to have sex with him, even though I didn't want to and was feeling sick.

Recently, I tried to talk to my husband about the abuse. He got very angry. He said he doesn't hurt me any more than is to be expected of a husband and that in fact he thinks that he is too nice to me. He said that if he did happen to be a bit harsh with me sometimes, it was my fault anyway for not being a good wife and letting myself become so unattractive.

I love my husband, but I do not think I can continue to live with him. He has threatened to kill me, the children, and himself if I leave him, and I don't have anywhere to go. I don't have a job or any money, and would not be able to find another place to stay even if I did leave.

This scenario is fictional. Some aspects of the scenario are based on descriptions of domestic violence contained in reports by Minnesota Advocates For Human Rights, available at http://www.mnadvocates.org; the Domestic Violence Centre, available at http://www.dvc.org.nz; and the Family Violence Prevention Fund, available at http://www.fvpf.org.

Do's and Don'ts of Handling Domestic Violence Victims

DO	DON'T
• Explain the services available in a simple and direct manner.	• Assume that battered women know about their options and the services available.
• Prioritize the victim's needs.	• Overload the victim with services and decisions.
• Express concern for their safety and that of their children. Empower the victim with information that increases their choices.	• Ever ask the victim why they stay. This is a shaming remark, which insinuates the victim is at fault. Leaving does not always solve the problem.
• Be aware of your own attitude, experiences and reactions to abuse. It is appropriate to disagree with the victim's behavior and/or attitude while remaining objective, empathetic and understanding.	• Impose your own values and make quick judgments. Your reaction to the victim's responses will be communicated strongly.
• Help the victim understand the danger and repetitiveness of the violence.	• Expect the victim to exaggerate or invent the violence.
• Encourage the victim to take small steps, which will promote independence and build self-confidence.	• Try to rescue the victim.
• Take into consideration cultural values and beliefs.	• Lump all victims into one category.
• Challenge any efforts on the victim's part to justify the abuse through religion.	• Reject the woman's religion or ignore references to religious beliefs.
• Convey fears for the victim's safety and respect their reasons for staying. Separation from the abuser can be the most dangerous time for the victim.	• Convey disappointment if the victim chooses to stay. This can elicit feelings of failure and worthlessness.
• Define your role as a court official; be realistic about what you can and cannot do with regards to the relationship.	• Get caught up in the role of marriage counselor, mediator and/or referee.
• Recognize that the victim's reactions and responses may change frequently and be unpredictable. Reactions will range from resistance to cooperation.	• Become cynical with the victim's failure to take the action or respond the way you believe they should. Your frustration can result in victim blaming and impact your ability to intervene effectively.
• Express your concerns if the situation is lethal and take appropriate action.	• Ignore or minimize the potential dangerousness of the situation.
• Be patient and honest with the victim.	• Expect instant decision-making by the victim or contribute to unrealistic expectations.
• Emphasize the abuser's responsibility for his/her own choices.	• Let the victim blame themselves or other factors for the abuse.
• Expect the "honeymoon" period to emerge following an abusive episode.	• Delay in responding to a reported incident of violence. Timing is a key factor in gathering evidentiary information.
• Challenge the victim's explanation of the incident and openly ask if their partner is hurting them. The approach must be sensitive and not threatening in nature.	• Accept unexplained injuries accompanied by implausible reasons.
• Be honest with the victim, especially about confidentiality issues.	• Make a promise you can't keep.

DOMESTIC ABUSE INTERVENTION PROJECT

202 East Superior Street
Duluth, Minnesota 55802
218-722-2781
www.duluth-model.org

Power and Control Wheel Enactments

Power and Control

Abusers believe they have a right to control their partners by:

- Telling them what to do and expecting obedience
- Using force to maintain power and control over partners
- Feeling their partners have no right to challenge their desire for power and control
- Feeling justified making the victim comply
- Blaming the abuse on the partner and not accepting responsibility for wrongful acts.

The characteristics shown in the wheel are examples of how this power and control are demonstrated and enacted against the victim.

Isolation

- Limiting outside involvement
- Making another avoid people/friends/family by deliberately embarrassing or humiliating them in front of others
- Expecting another to report every move and activity
- Restricting use of the car
- Moving residences

Emotional Abuse

- Putting another down/name-calling
- Ignoring or discounting activities and accomplishments
- Withholding approval or affection
- Making another feel as if they are crazy in public or through private humiliation
- Unreasonable jealousy and suspicion
- Playing mind games

Economic Abuse

- Preventing another from getting or keeping a job
- Withholding funds
- Spending family income without consent and/or making the partner struggle to pay bills
- Not letting someone know of or have access to family/personal income
- Forcing someone to ask for basic necessities

Intimidation

- Driving recklessly to make another feel threatened or endangered
- Destroying property or cherished possessions
- Making another afraid by using looks/actions/gestures
- Throwing objects as an expression of anger to make another feel threatened
- Displaying weapons

Using Children or Pets

- Threatening to take the children away
- Making the partner feel guilty about the children
- Abusing children or pets to punish the partner
- Using the children to relay messages

Power and Control Wheel Enactments

Using Privilege

- Treating another like a servant
- Making all the big decisions
- Being the one to define male and female roles
- Acting like the master or queen of the castle

Sexual Abuse

- Sex on demand or sexual withholding
- Physical assaults during sexual intercourse
- Spousal rapes or non-consensual sex
- Sexually degrading language
- Denying reproductive freedom

Threats

- Threats of violence against significant third parties
- Threats to commit physical or sexual harm
- Threats to commit property destruction
- Threats to commit suicide or murder

Physical Abuse

- Biting/scratching
- Slapping/punching
- Kicking/stomping
- Throwing objects at another
- Locking another in a closet or utilizing other confinement
- Sleep interference and/or deliberately exhausting the partner with unreasonable demands and lack of rest
- Deprivation of heat or food
- Shoving another down steps or into objects
- Assaults with weapons such as knives/guns/other objects

CARING FOR YOU

SELF-CARE SUGGESTIONS

BE AWARE

Be upfront about how you're doing. Despite your best efforts, you may find yourself experiencing symptoms or signs of stress.

Signs of Stress

Irritation or Anger	Trouble Concentrating
Anxious/Nervous	Sad or Depressed
Overwhelmed	Lack of Motivation
Lack of Energy	Feeling Uncertain
Trouble Sleeping	Denial

Work-Related Factors

Concern of Exposure
Personal & Family Needs
Managing New Duties
Guilt
Adapting to New Processes/ Technologies/Work space

BE ENGAGED

Here are some ways to take care of you, to de-stress.

Body	Mind	Spirit
Sleep	Purpose	Draw on Your Belief System
Physical Activity/Exercise	Routine	Set Priorities
Eating Healthy	Stay busy	Make Connections
Avoid Tobacco/Alcohol/Drugs	Limit Media	Support Others
Relax & Recharge	Positive Thoughts	
	Remember You Matter	

GET HELP

When these signs and symptoms last for several days, make you miserable, or cause problems in your daily life, it's time to ask for help.

Employee Assistance Program (EAP)

Deer Oaks EAP Services	
Phone Number	866-327-2400
Website	deeroakseap.com
User & Password	NCAOC

North Carolina Resources

NC 2-1-1	Simply Dial 2-1-1
NC HopeLine	877-235-4525

National Suicide Prevention Lifeline

800-273-8255

juno.nccourts.org/human-resources/employee-assistance-program

CARING FOR YOU

SELF-CARE SUGGESTIONS

No one alive today has lived through a time like this COVID-19 pandemic. **Everyone** is affected in some way, and everyone is subject to stressors at a time like this. Stressors can come from anywhere and everywhere. For example, being overworked; having no work; being isolated; having too much family time with no breathing room; feeling anxious about having to deal with the public; having personal or family health concerns; money concerns; and loss of hope for the future are all potential sources of stress. African Americans, and other friends and colleagues of color, are faced with the compounded stressors of health disparities and structural inequities. Everyone is different, but no one is immune. Even the people who cheerfully say, "I'm fine," are affected, as well.

During this time, it helps to remember two things. First, the justice system will survive and come through this pandemic, hopefully as a stronger and more equitable institution. Second, your role in making that happen is critical; the work you do matters. It helps us preserve a system of justice that everyone counts on, whether they use it or not. Thank you for doing this work.

Whatever your personal situation, you should be engaging in some self-care. There are many aspects of this situation that cannot be controlled. Practicing self-care is not one of them.

During this pandemic, it is critical that you recognize what stress looks like, take steps to build your resilience and manage job stress, and know where to go if you need additional help. In addition to increased stress, anxiety, fear, sadness, and loneliness are common. And mental health disorders, including anxiety and depression, can develop or worsen.

This document provides some strategies to help promote resiliency and wellness. The material is based on documents prepared by the Mayo Clinic and the Centers for Disease Control and Prevention (CDC). Links to materials from both sources, as well as other helpful resources, are included.

COMMON SIGNS OF STRESS

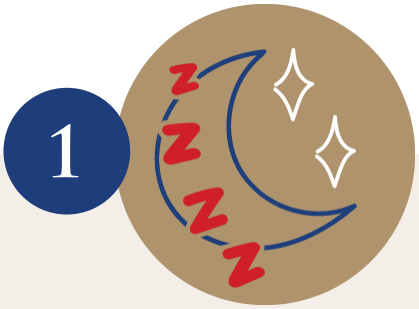
- Feeling irritation, anger, or being in denial
- Feeling uncertain, nervous, or anxious
- Lacking motivation
- Feeling tired, overwhelmed, or burned out
- Feeling sad or depressed
- Having trouble sleeping
- Having trouble concentrating

WORK-RELATED STRESS FACTORS

- Concern about the risk of being exposed to COVID-19 at work
- Need to take care of new personal and family needs while working
- Managing new duties
- Lack of access to the safety equipment
- Feeling that you are not doing your part or guilt because others have to be on frontlines
- Having to learn new technologies
- Adapting to a different workspace and/or work schedule

Suggestions for Self Care

TAKE CARE OF **YOUR BODY**



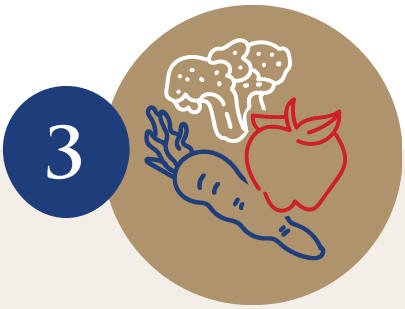
GET ENOUGH SLEEP.

Go to bed and get up at the same times each day. Stick close to your typical schedule, even if you're staying at home.

LIMIT SCREEN TIME.

Turn off electronic devices for some time each day, including 30 minutes before bedtime.

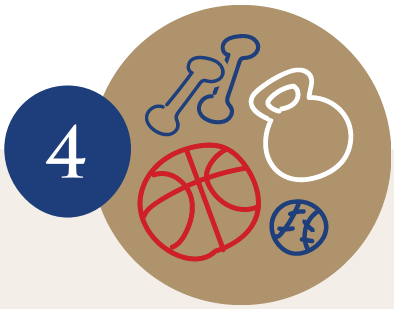
Make a conscious effort to spend less time in front of a screen — television, tablet, computer, and phone.



EAT HEALTHY.

Choose a well-balanced diet. Avoid loading up on junk food and refined sugar.

Limit caffeine as it can aggravate stress and anxiety.



PARTICIPATE IN REGULAR PHYSICAL ACTIVITY.

Regular physical activity and exercise can help reduce anxiety and improve mood.

Find an activity that includes movement, such as dance or exercise apps. Get outside in an area that makes it easy to maintain social and physical distancing. It can be as simple as walking.

Suggestions for Self Care

TAKE CARE OF **YOUR BODY**

AVOID TOBACCO, ALCOHOL AND DRUGS.

Because COVID-19 affects the lungs, the risk to smokers and vapers is increased.

Using alcohol to try to cope can make matters worse and reduce your coping skills.

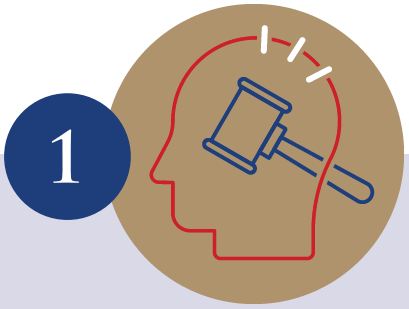
Avoid taking drugs to cope, unless your doctor prescribed medications for you.

RELAX AND RECHARGE.

Set aside time for yourself. Even a few minutes of quiet time can be refreshing and help to quiet your mind and reduce anxiety. Many people benefit from practices such as deep breathing, tai chi, yoga, or meditation.

Soak in a bubble bath, listen to music, or read or listen to a book — whatever helps you relax. Select a technique that works for you and practice it regularly. There are many sources online for meditation to assist you in starting some of these practices.

TAKE CARE OF **YOUR MIND**



REMEMBER THE REASONS YOU WORK IN THE JUSTICE SYSTEM.

The work you do is vital to the functioning of our state. Without a justice system, a democracy cannot function. The importance of your work hasn't changed. And this crisis will end.

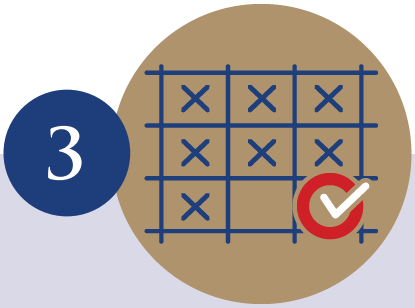
What you do matters, no matter how stressful it is right now; it is helpful to remind yourself of that.

LIMIT EXPOSURE TO NEWS MEDIA.

Constant news about COVID-19 from all types of media can heighten fears about the disease. Limit social media that may expose you to rumors and false information. Limit reading, hearing, or watching other news, but keep up to date on national and local recommendations. Look for reliable sources of authority such as the NC DHHS or the CDC.

Suggestions for Self Care

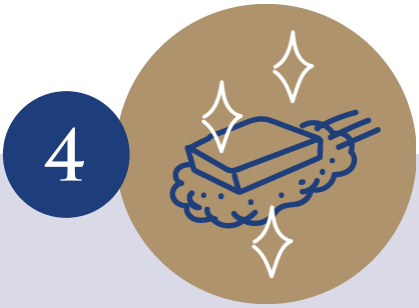
TAKE CARE OF **YOUR MIND**



KEEP YOUR REGULAR ROUTINE.

Maintaining a regular schedule is important to your mental health. In addition to sticking to a regular bedtime routine, keep consistent times for meals, bathing and getting dressed, work or study schedules, and exercise.

Set aside time for activities you enjoy. Predictability can make you feel more in control.



STAY BUSY.

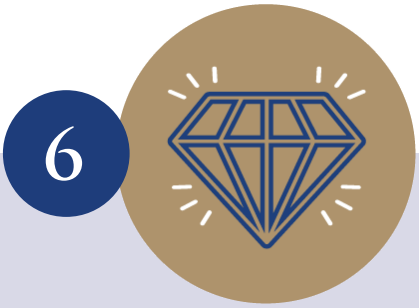
A distraction can get you away from the cycle of negative thoughts that feed anxiety and depression.

Enjoy hobbies that you can do at home, identify a new project, or clean out that infamous closet or drawer.

USE YOUR MORAL COMPASS OR SPIRITUAL LIFE FOR SUPPORT.

If you are part of a faith community or tradition, seek out the sources of comfort and support it provides.

If you draw strength from a belief system, let it bring you comfort during difficult times.



FOCUS ON POSITIVE THOUGHTS.

Choose to focus on the positive things in your life, instead of dwelling on how bad you feel.

Consider starting each day by listing things you are thankful for. Ask yourself, “What else is true?” Maintain a sense of hope, work to accept changes as they occur, and try to keep problems in perspective.

Suggestions for Self Care

TAKE CARE OF **YOUR MIND**

SET PRIORITIES.

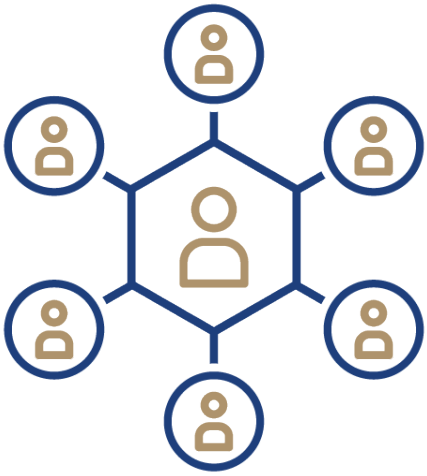
Don't become overwhelmed by your to-do list. Set reasonable and achievable goals each day.

Give yourself credit for positive steps and recognize that some days will be better than others.

CONNECT WITH OTHERS

MAKE CONNECTIONS.

If you need to stay at home and distance yourself from others, avoid social isolation. Find time each day to make virtual connections by email, texts, phone, or FaceTime or similar apps. If you're working remotely from home, ask your co-workers how they're doing and share coping tips. Enjoy virtual socializing and talking to those in your home.



DO SOMETHING FOR OTHERS.

Find purpose in helping the people around you. For example, email, text, or call to check on your friends, family members, and neighbors — especially those who are elderly. If you know someone who can't get out, ask if there's something needed, such as groceries or a prescription picked up, for instance. But be sure to follow guidelines on social distancing and group meetings.

SUPPORT A FAMILY MEMBER OR FRIEND.

If a family member or friend needs to be isolated for safety reasons or gets sick and needs to be quarantined, come up with ways to stay in contact—electronically, by phone, or by mail.

Suggestions for Self Care

GET HELP IF YOU NEED IT

Despite your best efforts, you may find yourself feeling helpless, sad, angry, irritable, hopeless, anxious, or afraid. You may have trouble concentrating on typical tasks, changes in appetite, body aches and pains, or difficulty sleeping, or you may struggle to face routine chores.

When these signs and symptoms last for several days in a row, make you miserable, and cause problems in your daily life so that you find it hard to carry out normal responsibilities, it's time to ask for help.

Hoping mental health problems such as anxiety or depression will go away on their own can lead to worsening symptoms.

If you have concerns or if you experience worsening of mental health symptoms, ask for help when you need it, and be upfront about how you're doing. To get help you may want to:

Contact the Employee Assistance Program provided by the Administrative Office of the Courts through Deer Oaks EAP Services, available 24 hours a day, seven days a week. Contact information is provided below.

Call or use social media to contact a close friend or loved one — even though it may be hard to talk about your feelings.

Contact a minister, spiritual leader, or someone in your faith community.

Call your primary care provider or mental health professional to ask about appointment options to talk about your anxiety or depression and get advice and guidance.

Contact organizations such as the National Alliance on Mental Illness (NAMI) or the Substance Abuse and Mental Health Services Administration (SAMHSA) for help and guidance.

FURTHER INFORMATION

In the United States, call the **National Suicide Prevention Lifeline at 1-800-273-TALK (1-800-273-8255)** or use its webchat at suicidepreventionlifeline.org/chat.

If you're feeling suicidal or thinking of hurting yourself, seek help. Contact your primary care provider or a mental health professional. Or call a suicide hotline.

Continue your self-care strategies.
Sometimes symptoms may take as long as 9-12 months to show up after the initial event

And, stress won't disappear from your life when the health crisis of COVID-19 ends.

Self-care is a life-long activity.

Centers for Disease Control and Prevention (CDC)
cdc.gov/coronavirus/2019-ncov/community/mental-health-non-healthcare.html

https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html

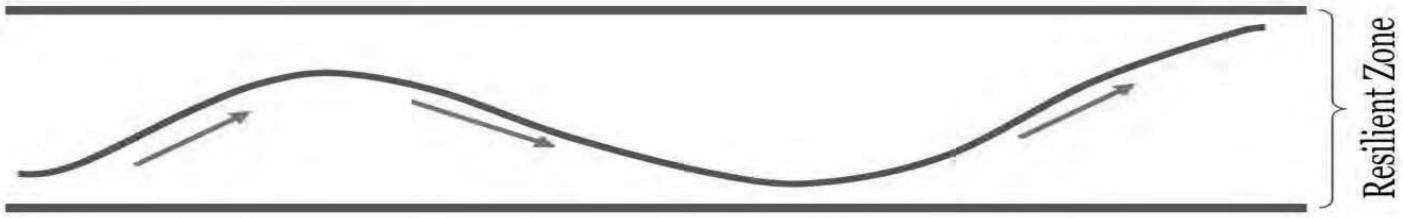
Mayo Clinic
mayoclinichealthsystem.org/hometown-health/speaking-of-health/self-care-tips-during-the-COVID-19-pandemic

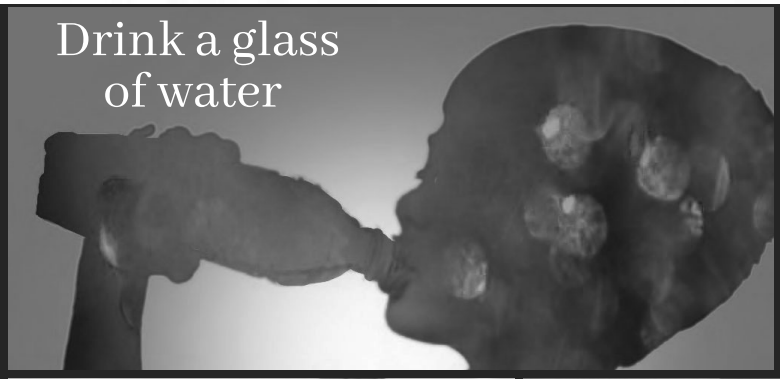
NCAOC Employee Assistance Program (EAP)
juno.nccourts.org/human-resources/employee-assistance-program

Administered by Deer Oaks EAP Services. In addition to website resources, in-person consultation is available 24 hours a day, seven days a week for Judicial Branch employees.

American Bar Association (ABA) Lawyer Assistance Program
americanbar.org/groups/lawyer_assistance/resources/COVID-19--mental-health-resources/

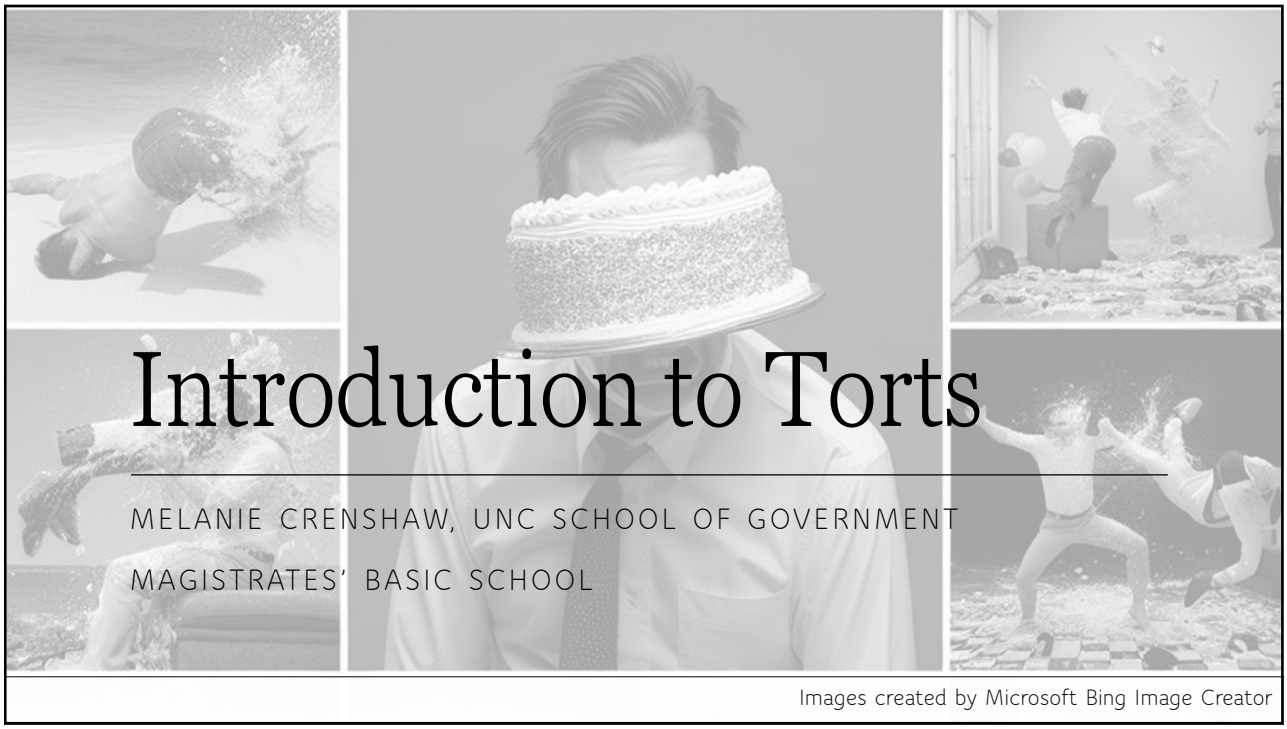
Help Now!





Tab:
Torts

TORTS



Introduction to Torts

MELANIE CRENSHAW, UNC SCHOOL OF GOVERNMENT

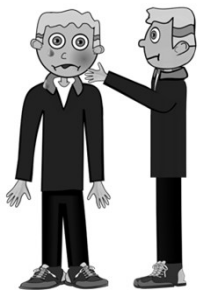
MAGISTRATES' BASIC SCHOOL

Images created by Microsoft Bing Image Creator

1

What is a tort?

THIS



NOT THIS

2

A tort is a civil wrong.

Torts are divided into two big classes: intentional and negligent. (Also note "strict liability")

Most – but not all – intentional torts involve behavior that is also a crime.

The same action may be both a crime and a tort. (Remember the rule: "either, neither, or both.")

Each intentional tort has different essential elements (just like a crime does).

3

There are LOTS of intentional torts. And they each have their own essential elements.

Assault

Battery

False Imprisonment

Conversion

Trespass to Real Property

Trespass to Personal Property (aka Trespass to Chattel)

Fraud

Unfair or deceptive trade practices

Defamation (Libel & Slander)

Criminal Conversation

Alienation of Affection

Abuse of Process

Malicious Prosecution

Wrongful Discharge

Destruction of property

Intentional Infliction of Emotional Distress

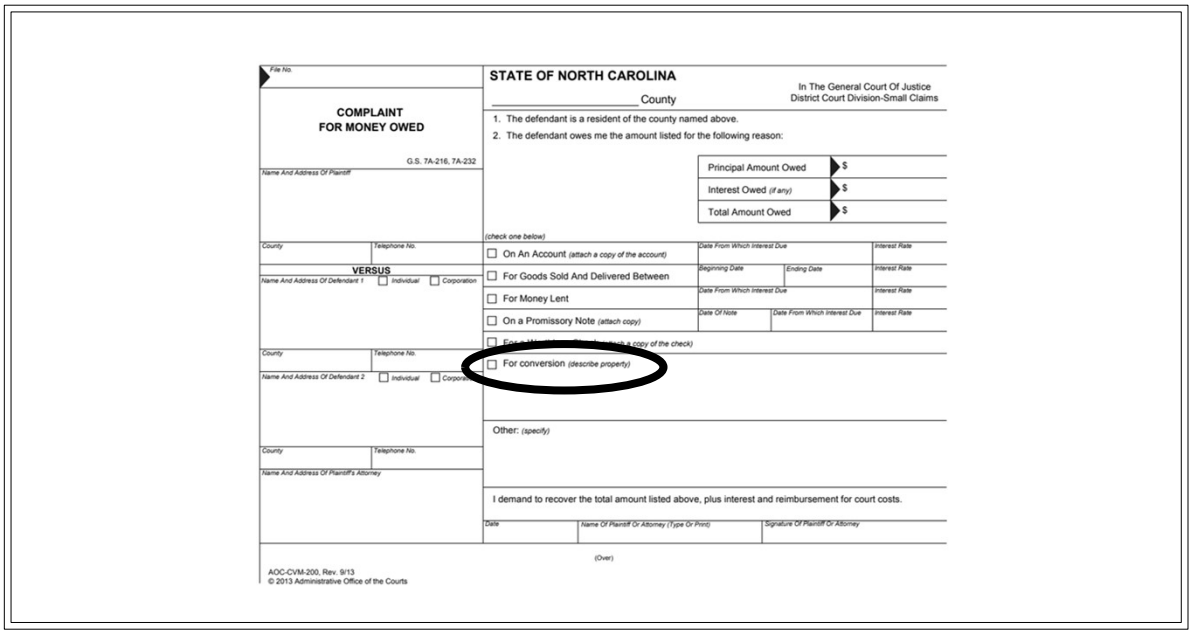
4

Intentional Torts

Plaintiff must prove:

1. **Defendant committed an act,**
2. **With intent to commit the act, and**
3. **The act caused harm to Plaintiff.**

5



File No.

COMPLAINT FOR MONEY OWED

G.S. 7A-216, 7A-232

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of Defendant 1 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Defendant 2 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

1. The defendant is a resident of the county named above.
2. The defendant owes me the amount listed for the following reason:

Principal Amount Owed	$
Interest Owed *(if any)*	$
Total Amount Owed	$

(check one below)

☐ On An Account *(attach a copy of the account)*	Date From Which Interest Due		Interest Rate
☐ For Goods Sold And Delivered Between	Beginning Date	Ending Date	Interest Rate
☐ For Money Lent	Date From Which Interest Due		Interest Rate
☐ On a Promissory Note *(attach copy)*	Date Of Note	Date From Which Interest Due	Interest Rate
☐ [illegible] *(attach a copy of the check)*			
☐ For conversion *(describe property)*			

Other: *(specify)*

I demand to recover the total amount listed above, plus interest and reimbursement for court costs.

Date | Name Of Plaintiff Or Attorney (Type Or Print) | Signature Of Plaintiff Or Attorney

(Over)

AOC-CVM-200, Rev. 9/13
© 2013 Administrative Office of the Courts

6

CONVERSION

ESSENTIAL ELEMENTS

1. Plaintiff=Owner or Lawful Possessor
2. Defendant wrongfully took or wrongfully retained property after demand
3. FMV of property at time it was taken or retained

7

ASSAULT AND BATTERY

ASSAULT-ESSENTIAL ELEMENTS

1. Defendant, by an intentional act or display of force or violence, threatened the plaintiff with imminent bodily harm.
2. The act caused the plaintiff to have a reasonable apprehension that harmful or offensive contact was imminent.

BATTERY-ESSENTIAL ELEMENTS

1. Defendant intentionally caused bodily contact with the Plaintiff.
2. The bodily contact actually offended a reasonable sense of personal dignity or caused physical pain and injury.
3. The bodily contact occurred without the plaintiff's consent.

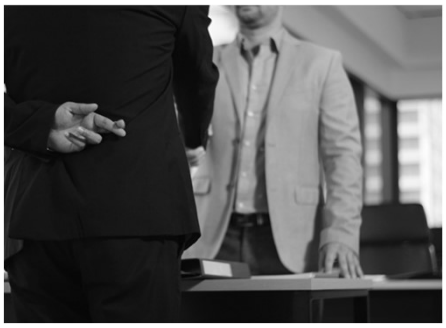
8

UNFAIR OR DECEPTIVE PRACTICES

ESSENTIAL ELEMENTS

1. **Unfair or deceptive act or practice**
2. **Act or practice affects commerce**
3. **Actual injury to Plaintiff**

NCGS 75-1.1



9

Traditional Negligence Analysis

Did defendant have a duty of reasonable care to the plaintiff?

Did defendant breach that duty (i.e., was defendant negligent)?

Was defendant's negligence the proximate and actual cause of injury to plaintiff or plaintiff's property?

What damages did plaintiff suffer?

10

ELEMENTS OF NEGLIGENCE

1. Duty=exercise amount of care that would be taken by a reasonably prudent person under the same or similar circumstances
2. Breach=violates duty standard
3. Causation
   a) Actual=but for defendant's negligence, plaintiff would not have been injured
   b) Proximate=defendant should have foreseen plaintiff might be harmed if defendant did not exercise reasonable care
4. Damages=actual physical injury or property damage or out-of-pocket loss

11

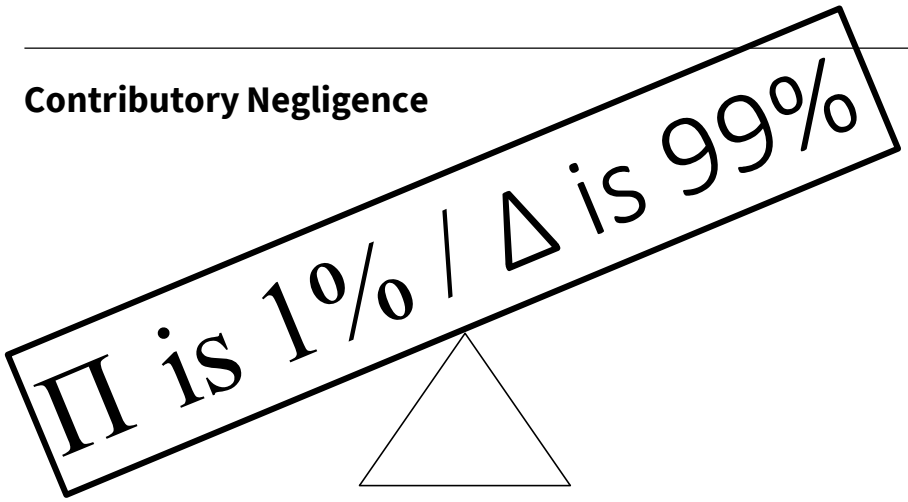
Test for negligence

What would a reasonably prudent person, acting with due care and diligence, do under the same circumstances?

12

Most common defense

Contributory Negligence



13

But Wait…Don't Forget About Last Clear Chance

- **An exception to Contributory Negligence**
- **Applies if plaintiff can prove:**
  1. **Plaintiff's negligence put plaintiff in a position of peril from which plaintiff could not escape;**
  2. **Defendant knew, or by the exercise of reasonable care should have recognized, the plaintiff's position of peril and inability to escape from it;**
  3. **Defendant had the time and the means to avoid injuring the plaintiff and failed to use reasonable care to do so; and**
  4. **That failure proximately caused plaintiff's injury or damage.**

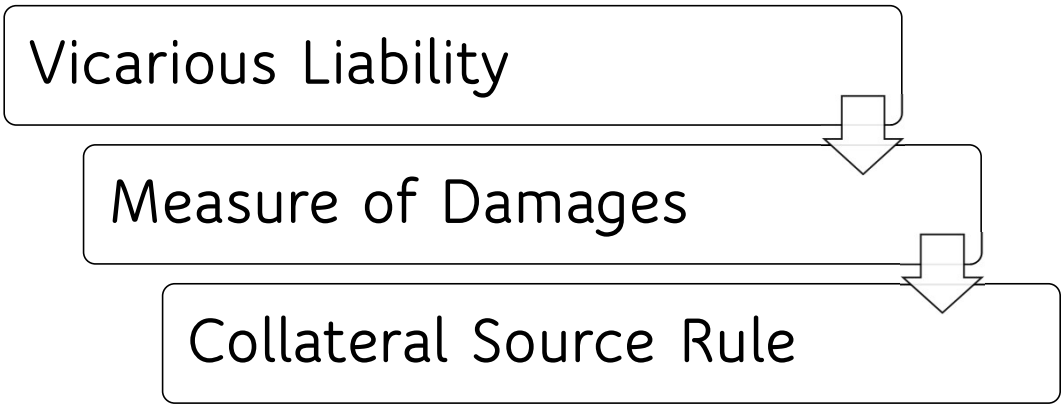
14

Statute of Limitations

CAUSE OF ACTION	STATUTE OF LIMITATION
NEGLIGENCE	3 YEARS
MOST INTENTIONAL TORTS	3 YEARS
LIBEL AND SLANDER	1 YEAR

15

Three last things to remember:



16

Vicarious liability, aka "When I die, I hope it's because I got hit by a Walmart truck."

17

Vicarious Liability

- **Liability based not on a person's own wrongdoing, but rather on that person's relationship to the wrongdoer**
- **Parents are liable for the willful and intentional torts of their children up to $2,000 (G.S. 1-538.1)**
- **Employer may be responsible for acts of employees**
- **Owner of a car may be responsible for acts of driver**

18

MEASURE OF DAMAGES

- COMPENSATORY DAMAGES
  - Effort to make plaintiff whole
  - Personal injury damages include medical expenses, pain and suffering and lost wages
  - Damage to property damages include diminution in value and intrinsic value
- PUNITIVE DAMAGES
  - Only for intentional torts
  - Clear and convincing evidence
  - Willful and wanton, fraudulent, or malicious tortious conduct
- PRE-JUDGMENT INTEREST

19

Collateral Source Rule, aka "My church didn't hold a fundraiser for YOU!"

20

Collateral Source Rule

- **Wrongdoer's liability should not be reduced by compensation plaintiff receives from an independent source**
- **Defendant prohibited from even introducing evidence that plaintiff has received payment from some other source**

21

The Last Course

❖Torts include both intentional acts and negligence.

❖When analyzing a torts claim, listen for evidence to prove each essential element of the claim.

❖Don't forget about the rules about contributory negligence, vicarious liability, and collateral sources.

22

Tort Law Summary for Small Claims Magistrates

1. A tort is a "civil wrong." It may be intentional or negligent behavior. A criminal charge is intended to protect society as a whole from conduct judged to be criminal, but civil liability for a tort is intended to recompense the victim for wrong done to him or her.

2. **Intentional torts** require the plaintiff to prove (1) that the defendant committed an act, (2) that he or she did so intentionally, and (3) that the act caused the plaintiff harm. It is important to note that the defendant only has to intend the act not that the defendant intended the resultant harm.

   How many intentional torts can you list? _____
   _____
   _____
   _____
   _____
   _____

3. AOC-CVM 200, a *Complaint for Money Owed*, is the appropriate form for a tort action. Unless the action is one for conversion, the specific tort (that is, the wrong complained of) should be listed in the "Other" section.

4. **Conversion** is one of the intentional torts often heard in small claims court. The essential elements of an action for conversion are:
   1) The plaintiff owns the property, or is a lawful possessor entitled to immediate possession;
   2) The defendant either wrongfully took the property, or wrongfully retained the property after a demand for its return; and
   3) The FMV of the property at the time it was wrongfully taken or retained.

5. **Assault and battery** are two separate intentional torts requiring different elements, although they are often spoken of as one. The torts of assault and battery should not be confused with criminal assault which encompasses aspects of both assault and battery. The essential elements of **assault** are:
   1) Defendant, by an intentional act or display of force or violence, threatened the plaintiff with imminent bodily harm.
   2) The act caused the plaintiff to have a reasonable apprehension that harmful or offensive contact was imminent.

   The essential elements of **battery** are:
   1) Defendant intentionally caused bodily contact with the Plaintiff.

2) The bodily contact actually offended a reasonable sense of personal dignity or caused physical pain and injury.
3) The bodily contact occurred without the plaintiff's consent.

6. An intentional tort that you may see more of is **unfair or deceptive practices** (GS 75-1.1). This law prohibits "unfair or deceptive acts or practices in or affecting commerce."

   A. The essential elements of this tort are:
      1) The defendant committed an unfair or deceptive act or practice;[1]
      2) The act or practice was in or affecting commerce; and
      3) The act caused actual injury to the plaintiff.

   B. A plaintiff who proves liability for this tort is entitled to **triple damages** (which is the amount in controversy). In addition, the plaintiff is entitled to recover a reasonable **attorney fee** if the court finds that the defendant's act was willful and that the defendant had without good reason refused to "fully resolve the matter." GS 75-16.1.

7. The second broad category of torts consists of actions asserting that the defendant was **negligent.** The law says that a person who fails to use reasonable to care to avoid causing foreseeable injury to another is responsible for compensating the injured person for damages caused by his or her conduct. Whether conduct is negligent is determined by whether a reasonable person in the same circumstances would have behaved differently. In making this determination, one doctrine the judge may consider is the **sudden emergency doctrine**: this doctrine simply means that a person suddenly confronted with an emergency not of his own making is not necessarily held to the same level of care as a person under circumstances allowing ample time for thoughtful consideration—the time and circumstances should be taken into consideration.

   The elements of a negligence claim are:
   1. Duty=exercise amount of care that would be taken by a reasonably prudent person under the same or similar circumstances
   2. Breach=violates duty standard
   3. Causation

[1] "A trade practice is "unfair," as required to recover for an unfair and deceptive trade practice, when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. " Walker v. Fleetwood Homes of North Carolina, Inc., 653 S.E.2d 393 (N.C. 2007)." A party is guilty of an unfair act or practice when it engages in conduct which amounts to an inequitable assertion of its power or position. Pittmann v. Hyatt Coin & Gun, Inc., 735 S.E.2d 856 (N.C. Ct. App. 2012).

a) Actual=but for defendant's negligence, plaintiff would not have been injured
b) Proximate=defendant should have foreseen plaintiff might be harmed if defendant did not exercise reasonable care

4. Damages=actual physical injury or property damage or out-of-pocket loss

8. The most common defense to a tort action is **contributory negligence**. If the plaintiff's own negligence contributed to the injury, even in the slightest degree, the defendant is excused from liability. An exception to the rule about contributory negligence is the doctrine of **last clear chance**: this doctrine arises when the defendant could or should have recognized the plaintiff's perilous position, had the opportunity to act to avoid harm, and failed to do so.

9. The measure of damages in a tort action may be of two types: compensatory and punitive.

A. **Compensatory damages** are an effort to make the plaintiff "whole," or in other words to come as close as possible to putting the plaintiff in the position s/he would have occupied had the injury not occurred.

1) If the plaintiff has suffered personal injury, the typical damage items are medical expenses, pain and suffering, and lost wages.
2) If the action involves damage to property, there are two possible measures of damages: diminution in value (difference in FMV of property before and after injury, sometimes indicated by cost of repair) and intrinsic value (for property without market value—defined as value to owner).

B. **Punitive damages** are awardable only in actions for intentional torts and only if plaintiff proves by clear and convincing evidence that defendant's tortious conduct was willful and wanton, fraudulent, or malicious.

C. **Pre-judgment interest** in a tort action is calculated beginning on the date the action is filed. Notice this is a different rule than the rule for contract actions (in which pre-judgment interest begins to run at date of breach).

10. Miscellaneous

A. **Acts of children**

1) Negligence: Children under 7 are incapable of negligence. Children 7-14 are presumed incapable, rebuttable by showing child failed to use reasonable care compared to other children of comparable age.

2) Intentional torts: Parents are responsible for up to $2000 worth of damages under GS 1-538 .1 unless custody has been removed or altered. See Small Claims Law by Brannon, p. 116.
3) Parents may also be responsible for their own independent tort of negligent supervision.

B. **Acts of animals**
1) The owner or keeper of a vicious animal is responsible for injury caused by vicious behavior of animal if owner/keeper had knowledge. "Vicious" in this context means dangerous to others, not ill-tempered or malicious. NOTE: Unclear whether this is a strict liability rule in NC.
2) Negligent failure to control animal.
3) Violation of a safety statute.
4) GS 67-4.1 (Dangerous Dog Statute)

C. Negligence actions against **bailee** (e.g., dry cleaner). Plaintiff is not required to demonstrate specific act of negligence, but rather that property was damaged while in possession of bailee. Burden then shifts to defendant to show absence of negligence.

D. **Negligence per se**. Violation of safety statute relieves plaintiff of requirement of showing defendant behaved negligently.

E. **Vicarious liability**. One person is held legally responsible for negligent (and sometimes intentional) acts of another. Examples include parent/child (discussed above), employer/employee, owner of car present when driver behaves negligently, and owner of car pursuant to Family Purpose Doctrine.

F. **Collateral source rule.** The fact that plaintiff has received compensation for damages from some other source (such as his or her own insurance company or employer) may not be used to reduce damages paid by defendant.

Torts Review Questions

1. In order to be held liable for an intentional tort, the defendant has to intend to harm the plaintiff when the defendant commits the act.

   TRUE FALSE

2. Dawson is attempting to repossess a car belonging to Holloway that was parked in front of a laundromat. Holloway comes out of the laundromat before Dawson hooks up the car; Holloway gets in the car, holding her infant son, and her niece gets in the back seat. As she attempts to start the car, Dawson points a gun at Holloway and reaches his other hand into the window to try to grab the keys. In the process, Dawson's elbow touches the infant's back. The niece testifies that she saw the gun pointed at her aunt and she was afraid both she and her aunt would be shot. What intentional torts did Dawson commit?

   Against Holloway _____

   Against Niece_____

   Against Infant Son_____

3. Hank is suing his neighbor Tom for conversion of Hank's dog. Hank testifies that he asked Tom to take care of his poodle, Cynthia, while he went on the Kiss Kruise from October 24 to November 3. Hank says he has owned Cynthia for 3 years, since his ex-girlfriend gave her to him as a break-up gift. When he returned from the Kruise, Hank says, Tom refused to return Cynthia. Tom testifies that Hank did ask him to take care of Cynthia and that Cynthia is thriving and happy with him and that Hank wasn't taking adequate care of Cynthia. Tom has brought "before and after" pictures to demonstrate how much perkier Cynthia looks now. If you find in favor of Hank, what is the measure of damages? What evidence would you consider in calculating the damages?

   _____

   _____

   _____

   _____

   _____

4. Which of the following would be considered a negligent cause of action? Circle the best answer.
    a. A person falls through a broken floorboard at a dance club that the owner of the club was aware of and did not repair because of the cost.
    b. A person slips on a banana peel in a grocery store that was dropped by another customer within 15 seconds before the person slipped.
    c. A person wants to sue the college he attended because he cannot get a good job with his degree.
    d. A person wants to sue the local pizza restaurant for not warning him about the nutritional information in his favorite Meaty Man's Pizza.

5. Establishing that the tort of negligence has been committed requires four requirements to be met. Which one of the following is NOT a requirement?
    a. The defendant must intend to harm the plaintiff.
    b. The defendant must owe the plaintiff a duty of care.
    c. The loss sustained by the plaintiff must not be too remote.
    d. The defendant's breach of duty must cause the plaintiff damages.

6. Paul was traveling on Highway 42 at the posted rate of speed, when he approached an intersection where David was slowing down but did not stop, and David then pulled into Paul's lane of traffic. Paul jerked the wheel to try to avoid a head-on collision with the rear of David's truck rather than slamming on the brakes. If Paul sues David for negligence, who will likely prevail? _____

    Paul learns that when David was operating the truck, he was employed by D & H Trucking, LLC, and David was on his way to a jobsite for D & H at the time of the accident. If Paul also sues D & H Trucking, LLC for negligence, what is the name of D & H's liability?

    _____

    If David offers proof that the stop sign was at a spot where the highway curved, limiting visibility, and that Paul was traveling 15 mph over the posted rate of speed, what is the name for the defense David is raising? _____

    Paul offers evidence of the cost of the damage to his vehicle as well as evidence of medical bills for his physical injuries. In addition to compensatory damages, Paul is also seeking damages for pain and suffering. Can Paul recover for his pain and suffering if he is unable to offer concrete proof? _____

Tab:
Personal Property

ACTIONS TO RECOVER PERSONAL PROPERTY

Actions To Recover Possession of Personal Property

1

A Look Back

John buys a 14-year-old car with lots of mileage from Fast Eddie's Used Cars. He pays cash, buckles up, and makes it almost all the way home before the car simply stops running. He sues FE for a complete refund. FE defends, saying he (1) never said the car would work, and (2) the car had a huge "AS IS" sticker on the windshield.

Do you rule in favor of John?

2

A Look Back

Sam buys a car from John, signing a written contract agreeing to pay $500 now and $2000 in six months. John sues for $500, testifying that Sam made one payment of $1500, but that he never paid the final $500. Sam wants to testify that three months after he signed the agreement, the parties agreed that John would knock $500 off the purchase price if Sam made a $1500 payment immediately. Does the parol evidence rule prohibit your consideration of this evidence?

3

ACTIONS TO RECOVER PERSONAL PROPERTY

Same remedy, two different kinds of lawsuits

4

Classification Activity

Non-secured party/property owner?

"He took my property!"

Secured party?

"She defaulted!"

5

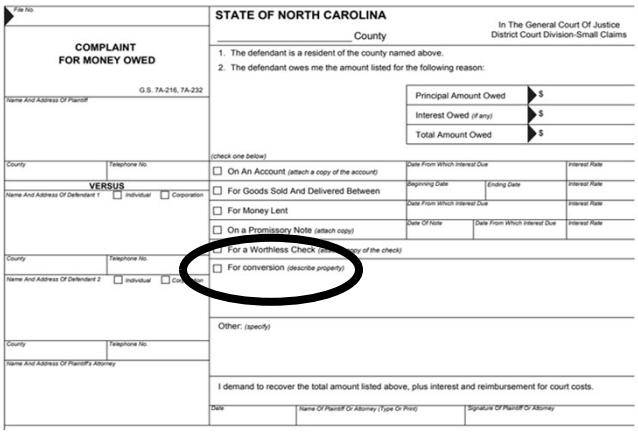
Two Wrongs, Each With Two Remedies

Wrong Done	Remedy Sought	Governing Law
Δ has property belonging to me **(Tort)**	$ (conversion) Recovery of property (+$) *	Mostly case law
Δ bought property from me & failed to pay for it. **(Breach of contract)**	$ Recovery of property	UCC-Art. 2 (GS Ch. 25), RISA (GS Ch. 25A) UCC-Art. 9 (GS Ch. 25), RISA (GS Ch. 25A)

*Maybe also criminal prosecution

6

AOC-CVM-200-Conversion



File No.

COMPLAINT FOR MONEY OWED

G.S. 7A-216, 7A-232

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of Defendant 1 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Defendant 2 ☐ Individual ☐ Co

County | Telephone No.

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

1. The defendant is a resident of the county named above.
2. The defendant owes me the amount listed for the following reason:

Principal Amount Owed	$
Interest Owed (if any)	$
Total Amount Owed	$

(check one below)

☐ On An Account (attach a copy of the account)	Date From Which Interest Due		Interest Rate
☐ For Goods Sold And Delivered Between	Beginning Date	Ending Date	Interest Rate
☐ For Money Lent	Date From Which Interest Due		Interest Rate
☐ On a Promissory Note (attach copy)	Date Of Note	Date From Which Interest Due	Interest Rate
☐ For a Worthless Check (attach copy of the check)			
☐ For conversion (describe property)			

Other: (specify)

I demand to recover the total amount listed above, plus interest and reimbursement for court costs.

Date | Name Of Plaintiff Or Attorney (Type Or Print) | Signature Of Plaintiff Or Attorney

7

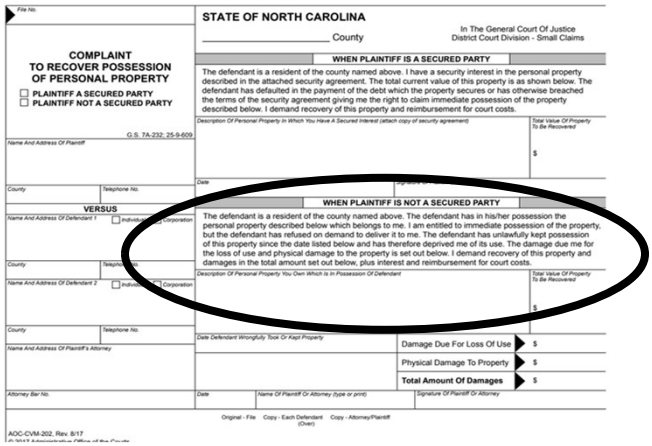
Action for Conversion
Remedy Sought: "Forced Sale" ($)

Essential Elements

- Plaintiff is the owner (or legal possessor) of property.
- Property was wrongfully taken or wrongfully retained.
- Defendant is person who wrongfully took or retained property.
- Remedy is fair market value of property at time wrongfully taken or retained, plus interest at 8% from that date until paid.

8

AOC-CVM-202-Non-Secured Party



File No.

COMPLAINT TO RECOVER POSSESSION OF PERSONAL PROPERTY

☐ PLAINTIFF A SECURED PARTY
☐ PLAINTIFF NOT A SECURED PARTY

G.S. 7A-232; 25-9-609

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of Defendant 1 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Defendant 2 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Plaintiff's Attorney

Attorney Bar No.

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division - Small Claims

WHEN PLAINTIFF IS A SECURED PARTY

The defendant is a resident of the county named above. I have a security interest in the personal property described in the attached security agreement. The total current value of this property is as shown below. The defendant has defaulted in the payment of the debt which the property secures or has otherwise breached the terms of the security agreement giving me the right to claim immediate possession of the property described below. I demand recovery of this property and reimbursement for court costs.

Description Of Personal Property In Which You Have A Secured Interest (attach copy of security agreement) | Total Value Of Property To Be Recovered

$

Date

WHEN PLAINTIFF IS NOT A SECURED PARTY

The defendant is a resident of the county named above. The defendant has in his/her possession the personal property described below which belongs to me. I am entitled to immediate possession of the property, but the defendant has refused on demand to deliver it to me. The defendant has unlawfully kept possession of this property since the date listed below and has therefore deprived me of its use. The damage due me for the loss of use and physical damage to the property is set out below. I demand recovery of this property and damages in the total amount set out below, plus interest and reimbursement for court costs.

Description Of Personal Property You Own Which Is In Possession Of Defendant | Total Value Of Property To Be Recovered

$

Date Defendant Wrongfully Took Or Kept Property

Damage Due For Loss Of Use $

Physical Damage To Property $

Total Amount Of Damages $

Date | Name Of Plaintiff Or Attorney (type or print) | Signature Of Plaintiff Or Attorney

Original - File Copy - Each Defendant Copy - Attorney/Plaintiff (Over)

AOC-CVM-202, Rev. 8/17

9

Action for Conversion
Remedy Sought: Recover Possession of Non-Secured Property

Essential Elements

- Plaintiff is the owner (or legal possessor) of property.
- Property was wrongfully taken or wrongfully retained.
- Defendant is in possession of the property.
- Remedy is return of the property and damages for physical damage to property and loss of use.

10

FAQs

- Which remedy should π seek?
  - π can seek either or both.
- Can π change her mind at trial?
  - π can amend complaint at trial, but careful of notice if Δ is not present!
- What if π fills out complaint wrong?
  - π can correct errors by amending complaint at trial, but careful of notice if Δ is not present!

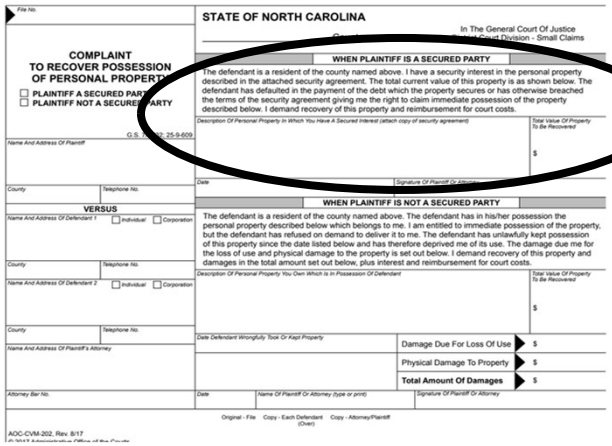
11

Action by Secured Party

ACTIVITY:
LEARNING THE LINGO

12

AOC-CVM-202-Secured Party



STATE OF NORTH CAROLINA

In The General Court Of Justice
District Division - Small Claims

COMPLAINT
TO RECOVER POSSESSION
OF PERSONAL PROPERTY

☐ PLAINTIFF A SECURED PARTY
☐ PLAINTIFF NOT A SECURED PARTY

G.S. 7A-210; 25-9-609

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of Defendant 1 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Defendant 2 ☐ Individual ☐ Corporation

County | Telephone No.

Name And Address Of Plaintiff's Attorney

Attorney Bar No.

WHEN PLAINTIFF IS A SECURED PARTY

The defendant is a resident of the county named above. I have a security interest in the personal property described in the attached security agreement. The total current value of this property is as shown below. The defendant has defaulted in the payment of the debt which the property secures or has otherwise breached the terms of the security agreement giving me the right to claim immediate possession of the property described below. I demand recovery of this property and reimbursement for court costs.

Description Of Personal Property In Which You Have A Secured Interest (attach copy of security agreement) | Total Value Of Property To Be Recovered

$

Date | Signature Of Plaintiff Or Attorney

WHEN PLAINTIFF IS NOT A SECURED PARTY

The defendant is a resident of the county named above. The defendant has in his/her possession the personal property described below which belongs to me. I am entitled to immediate possession of the property, but the defendant has refused on demand to deliver it to me. The defendant has unlawfully kept possession of this property since the date listed below and has therefore deprived me of its use. The damage due me for the loss of use and physical damage to the property is set out below. I demand recovery of this property and damages in the total amount set out below, plus interest and reimbursement for court costs.

Description Of Personal Property You Own Which Is In Possession Of Defendant | Total Value Of Property To Be Recovered

$

Date Defendant Wrongfully Took Or Kept Property

Damage Due For Loss Of Use $

Physical Damage To Property $

Total Amount Of Damages $

Date | Name Of Plaintiff Or Attorney (type or print) | Signature Of Plaintiff Or Attorney

Original - File Copy - Each Defendant Copy - Attorney/Plaintiff
(Over)

AOC-CVM-202, Rev. 8/17

13

Recover Possession Secured Party

- Plaintiff is seller of goods on credit or lender of money.
- Valid security agreement.
- Security interest in property sought to be recovered (collateral).
- Debtor defaulted in payment.
- Remedy is possession of the property.
  - All property listed as security if purchased at one time
  - Otherwise apply RISA FIFO Rule, if applicable

14

Valid Security Agreement

- In writing.
- Contains a description of property that secures underlying debt/obligation.
- Indicates an intention to create a security agreement.
- Authenticated by the debtor.
- If consumer credit contract, dated.

15

Lawsuit #1: Action to Recover Possession of Personal Property-π Is A Secured Party

- SP may repossess if no breach of peace otherwise must sue for possession
- SP sues for possession of collateral subject to security interest (NOTE: if there is no valid security agreement, π can't sue as SP, possible breach of contract case for $)
- After repossession, SP may sell or keep, except consumer goods where 60% of debt paid-SP must sell w/in 90 days

16

Statutory Requirements for Sale Commercially Reasonable Manner

- Reasonable efforts to obtain best price
- Considerations include time, place, price obtained for goods, amount of publicity
- May require SP to make reasonable efforts to prepare property for sale
- Debtor is entitled to notice of sale
- Debtor has right to redeem at any point prior to sale

17

Likely lawsuit #2: Action for the deficiency

- Debtor has paid $1000 toward $5000 debt, leaving an unpaid balance of $4000.
- Secured party sells vehicle for $3000.
- After deducting $200 for expenses, $2800 goes to SP, decreasing balance due to $1200.
- SP brings action for money owed for $1200. Debtor may defend by challenging CRM of sale.

18

Alternate version of lawsuit #2

- Debtor has paid $4000 toward $4500 debt, leaving an unpaid balance of $500.
- Secured party sells vehicle for $1000.
- After deducting $200 for expenses, $500 goes to SP to pay off debt, and $300 is returned to Debtor.
- Debtor sues, challenging sale based on statutory requirement that sale be conducted in CRM. If CR sale would have yielded $3000, Debtor entitled to damages in amount of $2000 +.

19

Note well:

- Damage calculation for tort depends on whether π wants $ (forced sale) or return of property.
- For secured party, valid SA is a BIG DEAL.
- Self-help repo allowed if no breach of peace.
- RISA rule for allocation of payment-FIFO
- Amount of debt not relevant in SP action for property.
- After repossession, sale must be conducted in commercially reasonable manner

20

RISA Rule for Allocation of Payment

- 8/5/20 chair $500

- 2/15/21 couch $1,000

- 8/23/21 dining room set $2,500
- Defaults on 11/1/21.

21

RISA Rule for Allocation of Payment

- All purchases from same seller, with each new contract consolidated with old. Monthly payments of $85 ($15 ☞ interest).
- Each month's $70 payment toward principal must be allocated to chair = FIFO.

22

Payment Breakdown

- 8/20 $70 toward principal
- 9/20 $140
- 10/20 $210
- 11/20 $280
- 12/20 $350
- 1/21 $420
  (Bought Couch)
- 2/21 $490
- 3/21 $560

Chair now paid off, with balance on couch of $1000-$60

23

Actions to Recover Personal Property

Final Problems

24

Final Takeaways

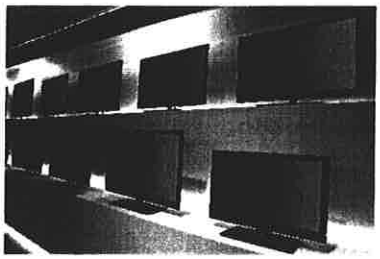
- Secured or Non-Secured Party
- Valid Security Agreement
- FIFO
- Commercially Reasonable Sale

25

Actions to Recover Personal Property

Forms: AOC-CVM-202 Complaint to Recover Possession of Personal Property

AOC-CVM-400 Judgment in Action to Recover Money or Personal Property



"He took my dog!"

- I'm the owner or legal possessor.
- He wrongfully (1) took, or (2) retained my dog.

"He missed a payment, and we want out collateral."

- He agreed that we could repo the property if he missed a payment.
- He missed a payment.

These are two entirely different lawsuits. Only the remedy is the same.

SOG/DGL/2014/MYC/2023

Introductory Activity

Assume that in each of the fact situations below the plaintiff seeks the remedy of recovering personal property. The plaintiff probably could also file an action for money damages – and might also be able to establish probable cause for a criminal charge – but neither of those are before you for this activity.

If the plaintiff should file as a property owner, write PO in the blank. If the plaintiff should file as a secured party, write SP in the blank.

_____ Plaintiff is suing her former roommate to recover possession of her iPad.

_____ Plaintiff is suing his ex-spouse to recover possession of the quilt he inherited fromhis grandmother.

_____ Plaintiff is suing a debtor who borrowed money from plaintiff and put up a boat ascollateral.

_____ Plaintiff is suing the person who bought her car after the buyer failed to make the final payment.

_____ A tenant is suing his landlord to recover the furniture he left behind when he wasevicted.

_____ A furniture store is suing a customer to recover furniture sold on the installment plan after the customer defaults.

Activity

Secured Transactions: Learning the Lingo

Friendly Furniture sells bedroom furniture, and Connie Consumer would like to purchase some. Connie doesn't have the money to pay the entire purchase price, though. So FF offers to sell her the furniture on an installment plan—in other words, to "finance" her purchase. Of course, there's a possibility that Connie will take the furniture but not finish paying for it. If that happened, FF could certainly sue Connie for breach of contract. But there's a good chance that Connie might turn out to be "judgment-proof," and even if she isn't, it would involve a lot of effort and expense on FF's part to collect. An alternative, which helps FF feel more secure, and thus more interested in selling to low-income customers, is for FF and Connie to enter into another contract saying that if Connie misses a payment, FF can repossess the furniture. FF doesn't even have to come to court, unless its effort to retrieve the furniture might cause a breach of the peace.

As you know, a business deal is often referred to as a transaction, and this special type of two-contracts-in-one is called a_____. To create a secured transaction, the debtor must sign a written, dated_____that describes the property involved specifically enough so that it may be identified. The parties to this agreement are Connie, the *debtor,* and FF, the_____. The property that secures the transaction is called_____.

Rather than saying that FF and Connie entered into a security agreement in which FF obtained the right to repossess the collateral if Connie doesn't pay, it's easier to simply say that FF tooka _____ _____ in the property. The legal term for Connie's failure to pay, which triggers FF's right to repossess, is_____.

The rules about what FF does after repossessing the property are complex. If FF sells the property, it is required to conduct the sale in a_____manner. Any amount still owing after the sale is called a_____, and FF's lawsuit seeking that amount is an *action on the deficiency.*

Word Bank

commercially reasonable

SECURITY AGREEMENT

COLLATERAL

Security interest

DEFICIENCY

Secured party

default

SECURED TRANSACTION

Actions to Recover Personal Property

By a non-secured party

Conversion (Forced Sale) Essential Elements:

- Plaintiff is the owner (or person entitled to possession).
- Defendant wrongfully took or retained property.
- Wrongful retention requires demand for return, even if the due date is specified.
- Fair Market Value (Plaintiff's opinion testimony is sufficient.)

Action to Recover Personal Property Essential Elements:

- Plaintiff is the owner (or person entitled to possession).
- Property was wrongfully taken or retained.
- Defendant has possession of the property. (If not, plaintiff may amend complaint to seek money damages for conversion.)

Damages necessary to return the plaintiff to original position:

1. Return of property,
2. Compensation for injury to the property, and
3. Costs associated with loss of use.

Claim and delivery: ancillary remedy sought by plaintiff from clerk of superior court to take immediate possession of property pending trial; rare in small claims. Clerk does not decide ownership, and plaintiff must still prove elements of conversion or action to recover personal property.

By a secured party

Essential Elements:

- Plaintiff is a secured party (SP) and is either a lender of money (L) or a seller of goods on credit (S).
- Valid security agreement
    - Authenticated by debtor.
    - Description of property sufficient to allow identification.
    - Writing sufficient to indicate intention to create a security interest.
    - If *consumer credit*, must be dated.
- Security interest in property sought to be recovered (collateral).
- Debtor defaulted in manner triggering right to repossess.

SOG/DGL/2014/MYC/2023

Consumer Credit Sale Definition (G.S. 25A-2):

1. Seller is one who in ordinary course of business regularly extends credit,
2. Buyer is a natural person,
3. Goods or services are purchased primarily for a personal, family, household, or agricultural purpose,
4. The debt is payable in installments, or a finance charge is imposed, and
5. The amount financed does not exceed $75,000.

Retail Installment Sales Act (G.S. Ch. 25A)

A seller in a consumer credit sale is allowed to take a security interest only in:

- Collateral (the property sold)
- Previous purchases not yet paid off
- Personal property to which goods are installed if amount financed > $300
- Real property to which goods are affixed if amount financed is > $1,000
- Motor vehicle to which repairs are made if amount financed >$100
- Property sold for use in agricultural business

Security interest taken in property other than that listed above is void.

First In First Out (FIFO) Rule applies to allocation of payment to collateral purchased from same seller over time. Seller has burden of proof on proper allocation.

RISA applies only to sellers. For loans, federal regulation provides a security interest in household goods other than *purchase money security interest* in unfair trade practice. *Purchase money security interest* is interest taken in property purchased with money obtained from loan.

Secured Party's rights on buyer's default

SP can elect to sue for money or repossession, not required to repossess.

May repossess without court order if no breach of peace.

Effect of breach of peace is to render repossession wrongful. Consequences or wrongful repossession are that SP may be liable for conversion, civil trespass, or even criminal charges.

Factors relevant to whether repossession caused breach of peace:

- Location
- Debtor's express or constructive consent
- Reactions of third parties
- Type of premises entered
- Use of deception by creditor

What happens after repossession

Generally, SP has option of sale or keeping goods in full satisfaction of debt.

Debtor must agree to decision not to sell, either by signing agreement or by failing to object to notice of intent to keep within 20 days.

Consumer goods where 60% of debt paid: SP must sell property within 90 days.

Sale of repossessed property

Statute requires notice to debtor of sale, and notice must be given in commercially reasonable manner, in terms of timing, content, and manner in which it is sent.

Consumer goods: G.S. 25-9-614 spells out required contents of notice.

Debtor has right to redeem property at any point prior to sale. Amount owed, expenses, and attorney's fees (if Security Agreement provides) required for redemption.

Effect of acceleration clause: Debtor must pay full amount of debt to redeem property.

Commercially reasonable sales

Sale must be conducted in commercially reasonable manner "in every respect."

Whether a sale meets the commercially reasonable manner standard depends on the facts. The guiding principle is whether reasonable efforts were made to obtain the best price.

Whether sale is commercially reasonable may include consideration of time, place, price obtained for goods, amount of publicity of sale, and other applicable factors.

May require seller to make reasonable efforts to prepare property for sale.

Seller may elect public sale (auction, with notice to general public) or private sale (all others). Seller is allowed to purchase only at public sale unless fair price is capable of objective determination.

Post-Sale

Proceeds allocated in order to

1. Expenses,
2. Debt to seller,
3. Debt to other secured parties, and
4. Surplus to defendant.

Consumer goods: Seller must provide written accounting to debtor.

Action for deficiency

If proceeds from sale are insufficient for expenses and debt to seller, seller may bring action for money owed ("action for deficiency").

Essential Elements:

- Seller gave debtor proper written notice of disposition of property,
- Sale was conducted in commercially reasonable manner, and
- Amount of remaining debt.

Defense:

In action for deficiency, the most likely defense will be that the seller did not conduct the sale in a commercially reasonable manner.

Failure to conduct a commercially reasonable sale creates a rebuttable presumption that the value of the property was at least equivalent to the amount of the debt.

Rights of Third Parties

Secured party may be able to repossess property from third parties if the secured party has a *perfected* security interest.

Perfection may occur in four ways:

- By filing a financing statement with the Secretary of State.
- A purchase money security interest is automatically perfected.
- In the case of motor vehicles, by filing a lien with DMV.
- Creditor retains possession of property (e.g. , pawnbroker).

Priority rules for perfected security interests:

- Purchase money security interest prevails over all others.
- First to perfect wins otherwise.
- Perfected interest wins over unperfected interest.

Special rule for consumer goods

A "good faith purchaser" (GFP) of consumer goods who purchases from a buyer takes free of a security interest in the goods if:

- The GFP did not know there was a security interest in the goods;
- The GFP paid for the goods;
- The goods were for the GFP's personal, household or family purposes; and
- The GFP bought the goods before a financing statement was filed.

Actions to Recover Personal Property Problems

1. Womble Furniture Co. filed this small claims action to recover a dining room table, six chairs, one couch, a cocktail table and an upholstered wing chair sold to the defendant. At trial, Womble introduces a written security agreement signed on April 5, 2020, in which defendant agreed that the items listed would be collateral for the extension of credit for their purchase on that day from Womble. Womble indicates that the defendant defaulted on March 1, 2021, and asks for judgment to recover all of the items listed. Defendant admits he's missed a payment or two but argues that he only owes $300, and the items Womble seeks to recover are worth more than $300. He wants you to limit your judgment to recover only the dining room table and chairs, since those items alone are worth more than $300.How do you rule? Give your reasons.

2. Fantastic Furniture Co. brings an action to recover possession of a dining room set sold to Samuel and Letitia Sand. At trial the manager of Fantastic Furniture Co. testifies that he sold the furniture, and that the Sands entered into an oral agreement to use furniture as collateral for the debt. He then introduces his account record, which shows a default by the Sands. How do you rule and why?

3. ABC Appliance Co., a secured party, brings an action to recover possession of a refrigerator against Simon Sampler. The magistrate entered a judgment in favor of ABC Appliance Co. Two months later ABC Appliance Co. brings an action to recover the deficiency indebtedness. Simon Sampler argues that he shouldn't have to pay because ABC Appliance Co. didn't sell the fridge in a way most likely to bring a good price. At the trial ABC Appliance Co. proves that upon recovering the refrigerator, it sold it to an employee for $150. ABC Appliance Co. proves that $200 was owed on the debt when the refrigerator was repossessed, and that the company's expenses in selling the refrigerator were $50. ABC Appliance Co. asks for a judgment of $100. Simon Sampler says that ABC Appliance gave him notice by calling him two hours before the sale was to take place, and that selling it to an employee is shady. How do you rule and why on ABC's claim?

4. Abe Barker calls Sam's Heating and Cooling and asks to have them deliver and install a Window unit. Sam's Heating and Cooling comes out to his house, installs the unit, and then sends a bill to Barker for $700, the cost of the unit and installation. Barker does not pay the bill; Sam's Heating and Cooling brings an action to recover possession of the air conditioning unit. At the trial Sam's proves the facts stated above; Barker is not present. If Sam's sues as a property owner, how do you rule and why? If Sam's sues as a secured party, how do you rule and why?

5. Easy Credit Appliance Co. filed a civil action on July 1, 2020, to recover a refrigerator purchased on June 1, 2014; a clothes dryer purchased on June 1, 2015; a VCR purchased on June 1, 2016; a television set purchased on June 1, 2017, and a washing machine purchase on June 1,2018. As each item was purchased, the buyer signed a security agreement listing the item just purchased and all the items previously purchased as security for the debt. The buyer defaulted on his payments on March 5, 2020. Easy Credit is asking for a judgment to repossess all of the items listed as collateral. The defendant argues that he has been paying $75 on the contract since 2014, so he must have paid off some of the items by now. How do you rule? What is the name of the consumer protection law that governs your ruling?

Tab:
Marriage

MARRIAGE

OUTLINE ON PERFORMING MARRIAGES

I. Getting Married in North Carolina

A. Applicable statute: GS Ch. 51.

B. Registers of Deed are responsible for determining eligibility to marry, manifested by issuance of marriage license.

C. Common law marriages are not recognized.

D. The only people authorized to perform a valid marriage are (1) an ordained minister of any religious denomination, (2) a minister authorized by a church, or (3) a magistrate;

II. Pre-Ceremony Checklist: Verify

A. Names on license match names of person standing before you.

B. Marriage license issued within last 60 days.

C. License is signed by Register of Deeds of any county in North Carolina.

D. Couple is prepared to pay $50 fee.

E. Presence of at least two witnesses to ceremony capable of (1) signing their name and (2) relating and understanding what they observe.

III. Marriage Ceremony

A. Couple must orally consent to take each other as spouses, freely, seriously and plainly.

B. Must be in the presence of each other and authorized officiant.

C. Officiant must declare such persons to be married.

IV. Fees and certificates

A. A $50.00 fee is collected by the magistrate for performing marriage ceremony. No other fee may be taken. Can attend the reception.

B. Fee goes to clerk of court in magistrate's county.

C. The magistrate must fill out and sign <u>both</u> copies of the certificate and <u>return both</u> copies to register of deeds in issuing county within 10 days. Failure to do so subjects magistrate to $200 penalty.

D. An officiant who performs a marriage without a valid license or fails to return the license to the Register of Deeds within 10 (ten) days "shall forfeit and pay two hundred dollars ($200.00) to any person who sues therefore, and shall also be guilty of a Class 1 misdemeanor." GS 51-7.

NOTE: There is no specific procedure for "returning" marriage certificates to an out-of-county register of deeds. While mailing the certificate by first class mail is permissible, a magistrate is advised to make a copy for their records with a notation of the date mailed.

Review Questions on Marriage

1. A magistrate can legally perform a marriage anywhere in the state of North Carolina.

   True False

2. A couple who want a civil marriage ceremony—as opposed to a religious ceremony—have no alternative but to be married by a magistrate.

   True False

3. An eight-year-old child may serve as a legal witness in a marriage ceremony.

   True False

4. A magistrate should verify that both parties are of legal age or otherwise meet the legal requirements of eligibility before performing a marriage ceremony.

   True False

5. A magistrate may not accept any money other than the $50 fee for performing a marriage unless the magistrate has left the office and traveled to the ceremony. In that case, the magistrate may accept reimbursement of expenses.

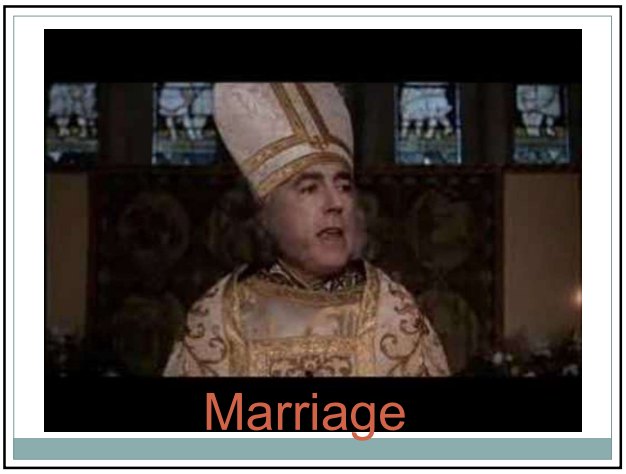
   True False

6. At the completion of the ceremony the magistrate should provide one copy of the marriage license to the couple and return the other to the Register of Deeds office in the county in which the ceremony was performed.

   True False

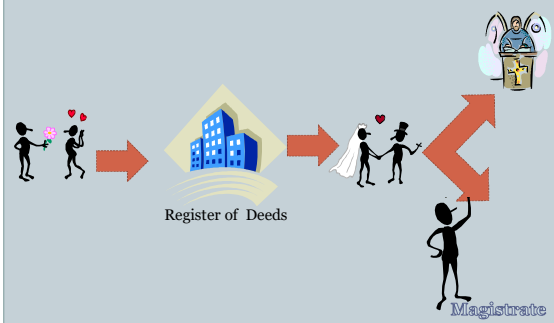
7. A marriage license is good for one year.

   True False



1

The Path to Marital Bliss



2

Officiant

- A magistrate is the only option for a civil (non-religious) ceremony
- No other government official is authorized to conduct a marriage ceremony

3

Before the Ceremony

Marriage License

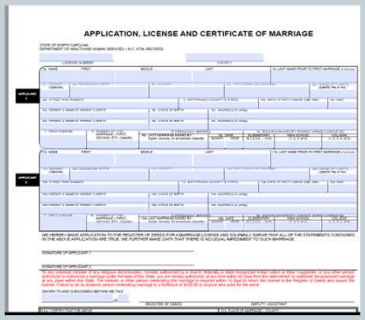
Name of Applicant #1:

Name of Applicant #2:

Date: Signed by ROD:

4

Check to be sure it's signed . . .

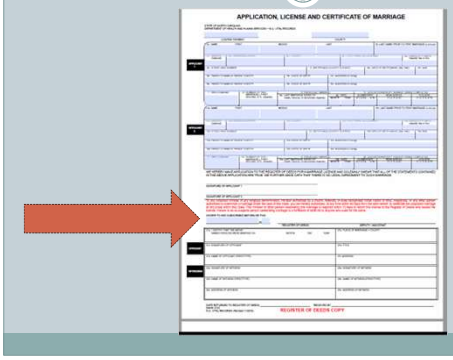


5

. . . and that it hasn't expired.

6

Expiration date?



7

Before the Ceremony

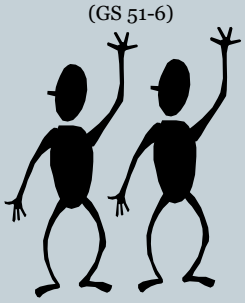
Marriage License

Name of Applicant #1

Name of Applicant #2

Date: Signed by ROD:

2 Witnesses?
(GS 51-6)



8

Witnesses

- Q: Can children under the age of seven serve as witnesses to a marriage?

- To serve as a witness, a person must be capable of testifying that he or she was present at the ceremony and of signing the certificate. Thus being a minor does not prevent a person from being a witness, so long as the person can understand and remember what they observe.

9

Before the Ceremony

10

You perform the ceremony, but when you request payment of the $50 fee, the couple tells you that they have only $10 between them. What do you do?

11

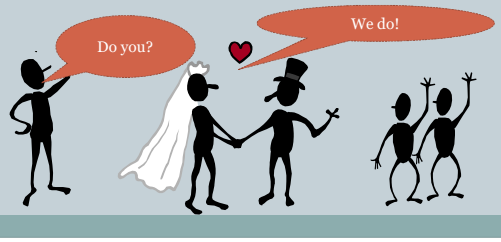
Before the Ceremony: Summing Up

- Check names to be sure they match those on license.
- Check to be sure license is filled out and signed by ROD.
- Check to be sure license was issued within 60 days.
- Verify presence of two witnesses.
- Collect $50 (first).

12

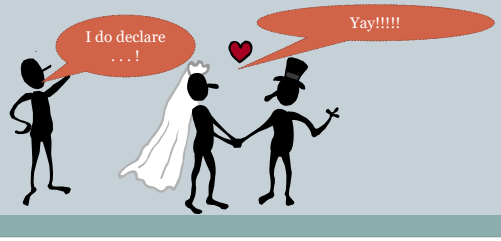
The Ceremony
GS 51-1

Parties must express consent to marry "freely, seriously, & plainly," in the presence of each other, and in the presence of the magistrate.



13

Officiant must declare parties to be married.



14

Discussion

If parties present a valid marriage license, are accompanied by two competent witnesses, and are prepared to pay the fee, are there any circumstances under which you might nevertheless refuse to marry them?

15

If a magistrate has reason to believe that either of the parties is not capable of "freely, seriously, and plainly" consenting to the marriage, the magistrate should refuse to perform the ceremony.

Examples are intoxication and coercion.

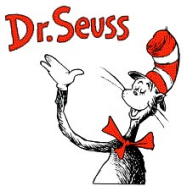
16

What do you say? . . .

Pastor: Then if you'll take her as your wife,
And if you'll love her all your life,
And if you'll have, and if you'll hold,
From now until the stars grow cold,
And if you'll love through good and bad,
And whether you're happy or sad,
And love in sickness, and in health,
And when you're poor, and when in wealth,
And if you'll love with all your heart,
From now until death do you part,
Yes, if you'll love her through and through,
Please answer with these words:

Bride and Groom: I DO!

Pastor: You're married now! So kiss the bride,
But please, do keep it dignified.



17

What do you say?.....

So long as a ceremony meets the statutory requirements requiring each person to agree to be married and gives you an opportunity to declare that they are married, the particular words do not matter from a legal point of view.

18

Where do you perform the ceremony?.....

Is a magistrate required to climb a mountain to perform a marriage?

Must a magistrate learn to skydive to perform a marriage?

Maybe learn to scuba dive?

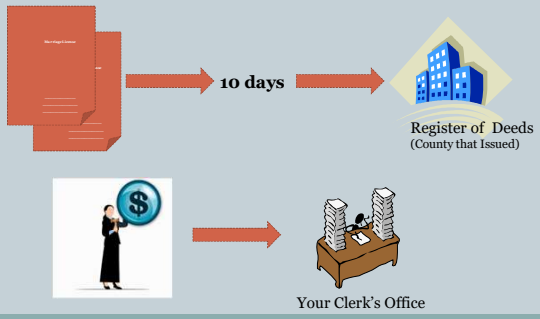
19

20

After the Ceremony

21

After the Ceremony



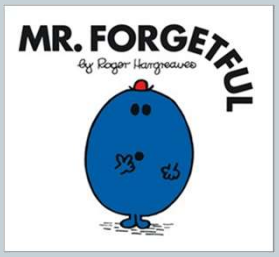
22

Example: A couple from Hoke County asks you, a magistrate in Lee County, if you would be willing to marry them in beautiful Richmond County, at the Rockingham Speedway. The license was issued Cumberland County.

23

What if I forget?

What is the consequence of failing to return the license, returning an unsigned certificate, or marrying a couple without a license?



24

What if you forget?

1. The marriage is invalid.
2. The marriage is voidable– that is, it might be declared invalid if challenged.
3. The marriage is valid, but the magistrate must pay a $200 fine.

25

FAQs

Q: What is the consequence of failing to return the license, or marrying a couple without a license?

$200 Fine
Class 1 Misd.
GS 51-7

26

Happily Ever After

- Check and double check your paperwork.
- Give each party a chance to consent and make your declaration.
- Collect the $50 fee and return it to your clerk.
- Return the marriage license to the Register of Deeds that issued it…or else.

27

Tab:
Forms

FORMS

STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Plaintiff(s)	**AFFIDAVIT OF SERVICE OF PROCESS BY** ☐ **REGISTERED MAIL** ☐ **CERTIFIED MAIL** ☐ **DESIGNATED DELIVERY SERVICE** G.S. 1-75.10(a)(5), (a)(6); 1A-1, Rule 4(j2)
VERSUS	
Name Of Defendant	

I, the undersigned, did mail by ☐ registered mail (return receipt requested), ☐ certified mail (return receipt requested), ☐ designated delivery service (delivery receipt requested),

a copy of the summons and complaint ☐ and other document(s) *(list)* _____

_____

in the above captioned action to *(name of person to be served)* _____,

addressed as follows: _____

_____

_____

_____

Further, that copies of the summons and complaint ☐ and the above listed other document(s) *(check, if applicable)* were in fact received by the defendant on *(date of receipt)* _____, as evidenced by the attached original receipt.

(Attach original receipt or electronic proof of signature confirmation to this affidavit.)

SWORN/AFFIRMED AND SUBSCRIBED TO BEFORE ME		*Signature Of Plaintiff/Attorney*
Date	*Signature Of Person Authorized To Administer Oaths*	*Name (type or print)*
Title Of Person Authorized To Administer Oaths		
☐ *Notary*	*Date My Commission Expires*	
SEAL	*County Where Notarized*	

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice
District Court Division - Small Claims

Plaintiff(s)

VERSUS

Defendant(s)

MAGISTRATE SUMMONS

☐ **ALIAS AND PLURIES SUMMONS (ASSESS FEE)**

G.S. 1A-1, Rule 4; 7A-217, -232

Date Original Summons Issued

Date(s) Subsequent Summons(es) Issued

TO

Name And Address Of Defendant 1

Telephone No. Of Defendant 1

TO

Name And Address Of Defendant 2

Telephone No. Of Defendant 2

IMPORTANT! You have been sued! These papers are legal documents, DO NOT throw these papers out! You may want to talk with a lawyer about your case as soon as possible, and, if needed, speak with someone who reads English and can translate these papers!

¡IMPORTANTE! ¡Se ha entablado un proceso civil en su contra! Estos papeles son documentos legales. ¡NO TIRE estos papeles!
¡Puede querer consultar con un abogado lo antes posible acerca de su caso y, de ser necesario, hablar con alguien que lea inglés y que pueda traducir estos documentos!

A Small Claim Action Has Been Commenced Against You!

You are notified to appear before the magistrate at the specified date, time, and location of trial listed below. You will have the opportunity at the trial to defend yourself against the claim stated in the attached complaint.

You may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court at any time before the time set for trial.

If you fail to appear and defend against the proof offered, the magistrate may enter a judgment against you.

Date Of Trial	*Time Of Trial* ☐ AM ☐ PM	*Location Of Court*

Name And Address Of Plaintiff Or Plaintiff's Attorney

Date Issued

Signature

☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

(Over)

RETURN OF SERVICE

I certify that this summons and a copy of the complaint were received and served as follows:

DEFENDANT 1

Date Served	*Time Served*	*Name Of Defendant*
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein, who is named below.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copy Left (if corporation, give title of person copy left with)

	Date Accepted	*Signature*
☐ Acceptance of service. Summons and complaint received by: ☐ Defendant 1. ☐ Other: *(type or print name)*		

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

DEFENDANT 2

Date Served	*Time Served*	*Name Of Defendant*
	☐ AM ☐ PM	

☐ By delivering to the defendant named above a copy of the summons and complaint.

☐ By leaving a copy of the summons and complaint at the dwelling house or usual place of abode of the defendant named above with a person of suitable age and discretion then residing therein, who is named below.

☐ As the defendant is a corporation, service was effected by delivering a copy of the summons and complaint to the person named below.

Name And Address Of Person With Whom Copy Left (if corporation, give title of person copy left with)

	Date Accepted	*Signature*
☐ Acceptance of service. Summons and complaint received by: ☐ Defendant 2. ☐ Other: *(type or print name)*		

☐ Other manner of service *(specify)*

☐ Defendant WAS NOT served for the following reason:

FOR USE IN SUMMARY EJECTMENT CASES ONLY:

☐ Service was made by mailing by first class mail a copy of the summons and complaint to the defendant(s) and by posting a copy of the summons and complaint at the following premises:

Date Served	*Name(s) Of The Defendant(s) Served By Posting*

Address Of Premises Where Posted

Service Fee	*Signature Of Deputy Sheriff Making Return*
$	
Date Received	*Name Of Deputy Sheriff Making Return (type or print)*
Date Of Return	*County Of Sheriff*

File No.

COMPLAINT FOR MONEY OWED

G.S. 7A-216, 7A-232

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division - Small Claims

Spoken Language Court Interpreter Needed For Any Party, Victim, Or Witness? (If Yes, identify person(s) and language(s). Interpreters provided for all court proceedings at no cost.) ☐ No ☐ Yes: *(explain)*

Name And Address Of Plaintiff

County | *Telephone No.*

VERSUS

Name And Address Of Defendant 1 ☐ *Individual* ☐ *Corporation*

County | *Telephone No.*

Name And Address Of Defendant 2 ☐ *Individual* ☐ *Corporation*

County | *Telephone No.*

Name And Address Of Plaintiff's Attorney

1. The defendant is a resident of the county named above.
2. The defendant owes me the amount listed for the following reason:

Principal Amount Owed	$
Interest Owed *(if any)*	$
Total Amount Owed	$

(check one below)

☐ On An Account *(attach a copy of the account)*	*Date From Which Interest Due*		*Interest Rate*
☐ For Goods Sold And Delivered Between	*Beginning Date*	*Ending Date*	*Interest Rate*
☐ For Money Lent	*Date From Which Interest Due*		*Interest Rate*
☐ On a Promissory Note *(attach copy)*	*Date Of Note*	*Date From Which Interest Due*	*Interest Rate*

☐ For a Worthless Check *(attach a copy of the check)*

☐ For Conversion *(describe property)*

Other: *(specify)*

I demand to recover the total amount listed above, plus interest and reimbursement for court costs.

Attorney Bar No.	*Date*	*Name Of Plaintiff Or Attorney (type or print)*	*Signature Of Plaintiff Or Attorney*

(Over)

AOC-CVM-200, Rev. 7/24

INFORMATION FOR THE PLAINTIFF AND DEFENDANT

The clerk or magistrate cannot advise you about your case or assist you in completing this form.
If you have any questions, you should consult an attorney.
The North Carolina Judicial Branch provides information on small claims actions at
www.nccourts.gov/help-topics/lawsuits-and-small-claims.

1. The PLAINTIFF must file a small claim action in the county where at least one of the defendants resides.
2. The PLAINTIFF cannot sue in small claims court for more than $10,000.00 excluding interest and costs. This amount may be lower, depending on local judicial order. If the amount is lower, it may be an amount determined by the chief district court judge of the judicial district.
3. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses.
4. If the defendant is a corporation, the plaintiff must sue in the complete corporate name. If the business is not a corporation, the plaintiff must determine the owner's name and sue the owner.
5. The PLAINTIFF may serve each defendant, who is a natural person, by:
   - the sheriff delivering a copy of the summons and complaint to the defendant(s) after payment of the service fee;
   - the sheriff leaving copies of the summons and complaint at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion residing therein after payment of the service fee;
   - mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee;
   - mailing a copy of the summons and complaint by signature confirmation as provided by the United States Postal Service, addressed to the party to be served, and delivering to the addressee; or
   - depositing with a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2) a copy of the summons and complaint, addressed to the party to be served, delivering to the addressee, and obtaining a delivery receipt.

   If certified or registered mail is used, the plaintiff must prepare and file a sworn statement, such as the AOC-CV-105, with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing proof of service in accordance with G.S. 1A-1, Rule 4(j2).
6. The PLAINTIFF may serve each defendant, who is not a natural person (e.g. corporation, partnership, government entity) by methods provided in G.S. 1A-1, Rule 4(j).
7. If the defendant is a natural person under a disability (e.g., minor, incompetent adult), the PLAINTIFF must comply with G.S. 1A-1, Rule 4(j)(2).
8. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. A plaintiff, who is unable to pay advance court costs, may apply to sue as an indigent pursuant to G.S. 1-110(a). In the event that judgment is entered in favor of the plaintiff, court costs may be charged against the defendant.
9. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear before the magistrate to assert the defendant's defense.
10. Whether or not an answer is filed, the PLAINTIFF must appear before the magistrate.
11. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is rendered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is rendered. If notice is given in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within twenty (20) days after the judgment is rendered (ten (10) days in summary ejectment cases). If the appealing party petitions to appeal as an indigent and is denied, the party shall have an additional five days to perfect the appeal by paying the court costs.
12. This form is supplied in order to expedite the handling of small claims. It is designed to cover the most common claims.

File No.

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division - Small Claims

COMPLAINT
IN SUMMARY EJECTMENT

G.S. 7A-216, 7A-232; Ch. 42, Arts. 3 and 7

Spoken Language Court Interpreter Needed For Any Party, Victim, Or Witness? (If Yes, identify person(s) and language(s). Interpreters provided for all court proceedings at no cost.) ☐ No ☐ Yes: *(explain)*

1. The defendant is a resident of the county named above.
2. The defendant entered into possession of premises described below as a lessee of plaintiff.

Description Of Premises (include location and address)

☐ *Conventional*
☐ *Public Housing*
☐ *Section 8*

Rate Of Rent (Tenant's Share)	*Date Rent Due*	*Date Lease Ended*	*Type Of Lease*
$ per ☐ *Month* ☐ *Week*			☐ *Oral* ☐ *Written*

3. ☐ The defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the 10-day grace period before filing the complaint.
   ☐ The lease period ended on the above date and the defendant is holding over after the end of the lease period.
   ☐ The defendant breached the condition of the lease described below for which re-entry is specified.
   ☐ Criminal activity or other activity has occurred in violation of G.S. 42-63 as specified below.

Description Of Breach/Criminal Activity (give names, dates, places and illegal activity)

4. The plaintiff has demanded possession of the premises from the defendant, who has refused to surrender it, and the plaintiff is entitled to immediate possession.
5. The defendant owes the plaintiff the following:

Description Of Any Property Damage

Amount Of Damage (if known)	*Amount Of Rent Past Due*	*Total Amount Due*
$	$	$

6. I demand to be put in possession of the premises and to recover the total amount listed above and daily rental until entry of judgment plus interest and reimbursement for court costs.

Date	*Name Of Plaintiff/Attorney/Agent (type or print)*	*Signature Of Plaintiff/Attorney/Agent*

Name And Address Of Plaintiff

County	*Telephone No.*

VERSUS

Name And Address Of Defendant 1 ☐ *Individual* ☐ *Corporation*

County	*Telephone No.*

Name And Address Of Defendant 2 ☐ *Individual* ☐ *Corporation*

County	*Telephone No.*

Name And Address Of Plaintiff's Attorney Or Agent

Attorney Bar No.

CERTIFICATION WHEN COMPLAINT SIGNED BY AGENT OF PLAINTIFF

I certify that I am an agent of the plaintiff and have actual knowledge of the facts alleged in this Complaint.

Date	*Name Of Agent (type or print)*	*Signature Of Agent*

(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

THE CLERK OR MAGISTRATE CANNOT ADVISE YOU ABOUT YOUR CASE OR ASSIST YOU IN COMPLETING THIS FORM. IF YOU HAVE ANY QUESTIONS, YOU SHOULD CONSULT AN ATTORNEY.

1. The PLAINTIFF must file a small claim action in the county where at least one of the defendants resides.
2. The PLAINTIFF cannot sue in small claims court for more than $10,000.00 excluding interest and costs unless further restricted by court order.
3. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses. The plaintiff must determine if the defendant is a corporation and sue in the complete corporate name. If the business is not a corporation, the plaintiff must determine the owner's name and sue the owner.
4. The PLAINTIFF may serve the defendant(s) by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served or by paying the costs to have the sheriff serve the summons and complaint. If certified or registered mail is used, the plaintiff must prepare and file a sworn statement with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing that the letter was accepted.
5. In filling out number 2 of the complaint in subsidized housing (e.g., Section 8, voucher, housing authority), the landlord should include in the "Rate Of Rent" box only that portion of the rent that the tenant pays directly to the landlord.
6. In filling out number 3 in the complaint, if the landlord is seeking to remove the tenant for failure to pay rent when there is no written lease, the first block should be checked. (Defendant failed to pay the rent due on the above date and the plaintiff made demand for the rent and waited the ten (10) day grace period before filing the complaint.) If the landlord is seeking to remove the tenant for failure to pay rent when there is a written lease with an automatic forfeiture clause, the third block should be checked. (The defendant breached the condition of the lease described below for which re-entry is specified.) And "failure to pay rent" should be placed in the space for description of the breach. If the landlord is seeking to evict tenant for violating some other condition in the lease, the third block should also be checked. If the landlord is claiming that the term of the lease has ended and the tenant refuses to leave, the second block should be checked. If the landlord is claiming that criminal activity occurred, the fourth block should be checked and the conduct must be described in space provided.
7. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. In the event that judgment is rendered in favor of the plaintiff, court costs may be charged against the defendant.
8. The PLAINTIFF must appear before the magistrate to prove his/her claim.
9. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear before the magistrate to assert the defendant's defense.
10. Requests for continuances of cases before the magistrate may be granted for good cause shown and for no more than five (5) days per continuance unless the parties agree otherwise.
11. The magistrate will render judgment on the date of hearing unless the parties agree otherwise, or the case is complex as defined in G.S. 7A-222, in which case the decision is required within five (5) days.
12. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is entered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is entered. If notice is given in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within ten (10) days after the judgment is entered. If the appealing party applies to appeal as an indigent, and that request is denied, that party has an additional five (5) days to pay the court costs for the appeal.
13. If the defendant appeals and wishes to remain on the premises the defendant must also post a stay of execution bond within ten (10) days after the judgment is entered. In the event of an appeal by the tenant to district court, the landlord may file a motion to dismiss that appeal under G.S. 7A-228(d). The court may decide the motion without a hearing if the tenant fails to file a response within ten (10) days of receipt of the motion.
14. Upon request of the tenant within seven (7) days of the landlord being placed in lawful possession, the landlord shall release any personal property of the tenant. If, after being placed in lawful possession by execution of a writ, the landlord has offered to release the tenant's property and the tenant fails to retrieve such property during the landlord's regular business hours within seven (7) days after execution of the writ, the landlord may throw away, dispose of, or sell the property in accordance with the provisions of G.S. 42-25.9(g). If sold, the landlord must disburse any surplus proceeds to the tenant upon request within seven (7) days of the sale. If the total value of the property is less than $500.00, it is deemed abandoned five (5) days after execution unless the tenant requests, prior to expiration of the five-day period, release of the property to the tenant, in which case the landlord shall release possession of the property to the tenant during regular business hours or at a time agreed upon.
15. This form is supplied in order to expedite the handling of small claims. It is designed to cover the most common claims.

AOC-CVM-201, Side Two, Rev. 7/24

File No.

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division - Small Claims

COMPLAINT TO RECOVER POSSESSION OF PERSONAL PROPERTY

☐ PLAINTIFF A SECURED PARTY
☐ PLAINTIFF NOT A SECURED PARTY

G.S. 7A-232; 25-9-609

Spoken Language Court Interpreter Needed For Any Party, Victim, Or Witness? (If Yes, identify person(s) and language(s). Interpreters provided for all court proceedings at no cost.) ☐ No ☐ Yes: *(explain)*

Name And Address Of Plaintiff

County | *Telephone No.*

VERSUS

Name And Address Of Defendant 1 ☐ *Individual* ☐ *Corporation*

County | *Telephone No.*

Name And Address Of Defendant 2 ☐ *Individual* ☐ *Corporation*

County | *Telephone No.*

Name And Address Of Plaintiff's Attorney

Attorney Bar No.

WHEN PLAINTIFF IS A SECURED PARTY

The defendant is a resident of the county named above. I have a security interest in the personal property described in the attached security agreement. The total current value of this property is as shown below. The defendant has defaulted in the payment of the debt which the property secures or has otherwise breached the terms of the security agreement giving me the right to claim immediate possession of the property described below. I demand recovery of this property and reimbursement for court costs.

Description Of Personal Property In Which You Have A Secured Interest (attach copy of security agreement)

Total Value Of Property To Be Recovered

$

Date | *Signature Of Plaintiff Or Attorney*

WHEN PLAINTIFF IS NOT A SECURED PARTY

The defendant is a resident of the county named above. The defendant has in his/her possession the personal property described below which belongs to me. I am entitled to immediate possession of the property, but the defendant has refused on demand to deliver it to me. The defendant has unlawfully kept possession of this property since the date listed below and has therefore deprived me of its use. The damage due me for the loss of use and physical damage to the property is set out below. I demand recovery of this property and damages in the total amount set out below, plus interest and reimbursement for court costs.

Description Of Personal Property You Own Which Is In Possession Of Defendant

Total Value Of Property To Be Recovered

$

Date Defendant Wrongfully Took Or Kept Property

Damage Due For Loss Of Use	$
Physical Damage To Property	$
Total Amount Of Damages	$

Date | *Name Of Plaintiff Or Attorney (type or print)* | *Signature Of Plaintiff Or Attorney*

Original - File Copy - Each Defendant Copy - Attorney/Plaintiff

(Over)

AOC-CVM-202, Rev. 7/24

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

THE CLERK OR MAGISTRATE CANNOT ADVISE YOU ABOUT YOUR CASE OR ASSIST YOU IN COMPLETING THIS FORM. IF YOU HAVE ANY QUESTIONS, YOU SHOULD CONSULT AN ATTORNEY.

1. The PLAINTIFF must file a small claim action in the county where at least one of the defendants resides.

2. The PLAINTIFF cannot sue in small claims court to recover property worth more than $10,000.00. This amount may be lower, depending on local judicial order. If the amount is lower, it may be any amount between $5,000.00 and $10,000.00, as determined by the chief district court judge of the judicial district.

3. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses. The plaintiff must determine if the defendant is a corporation and sue in the complete corporate name. If the business is not a corporation, the plaintiff must determine the owner's name and sue the owner.

4. The PLAINTIFF may serve the defendant(s) by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served or by paying the costs to have the sheriff serve the summons and complaint. If certified or registered mail is used, the plaintiff must prepare and file a sworn statement with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing that the letter was accepted.

5. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. In the event that judgment is rendered in favor of the plaintiff, court costs may be charged against the defendant.

6. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear before the magistrate to assert the defendant's defense.

7. Whether or not an answer is filed, the PLAINTIFF must appear before the magistrate.

8. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is entered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is entered. If notice is given in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within twenty (20) days after the judgment is entered. A defendant who appeals also must post a bond to stay execution of the judgment within ten (10) days after the judgment is entered.

9. This form is supplied in order to expedite the handling of small claims. It is designed to cover the most common claims.

File No.

COMPLAINT TO ENFORCE POSSESSORY LIEN ON MOTOR VEHICLE

G.S. 7A-211.1; 20-77(d); 44A-2(d), 44A-4(b), (e)

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division - Small Claims

Spoken Language Court Interpreter Needed For Any Party, Victim, Or Witness? (If Yes, identify person(s) and language(s). Interpreters provided for all court proceedings at no cost.) ☐ No ☐ Yes: *(explain)*

Name And Address Of Plaintiff

County	*Telephone No.*

VERSUS

Name And Address Of Defendant 1

County	*Telephone No.*

Name And Address Of Defendant 2

County	*Telephone No.*

Name And Address Of Plaintiff's Attorney

Attorney Bar No.

1. The lien claimed arose in the county named above.

2a. ☐ I repair, service, tow or store motor vehicles in the ordinary course of business.

b. ☐ I am an operator of a place of business for garaging or parking motor vehicles for the public and the motor vehicle listed below has remained unclaimed for at least 10 days.

c. ☐ I am a landowner on whose property the motor vehicle listed below has been abandoned for at least 30 days. The property was not left by a tenant. [G.S. 42-25.9(g); 44A-2(e2)]

3. I came into possession of the motor vehicle described on the date shown below, am in possession of the vehicle, and claim a possessory lien on this vehicle for the amounts indicated below plus storage at the rate indicated from this date until the lien is satisfied.

Make/Year Of Vehicle

ID Number	Repairs	$
Date Of Possession	Towing	$
Date Storage Began	Storage Cost to Date	$
Date Notice Of Unclaimed Vehicle Given	Vehicle Rental	$
(Plus Storage At $ _____ Per Day Until Sold)	**Total Lien Claimed To Date**	$

4. The defendants are the registered owner of the vehicle and the known secured party(ies).

5. I gave notice of an unclaimed vehicle to the Division of Motor Vehicles on the date listed above.

6. I have given notice to the North Carolina Division of Motor Vehicles that a lien is asserted, and sale is proposed for the above described motor vehicle.

I demand that this Court declare the lien valid and enforceable by sale and order that the North Carolina Division of Motor Vehicles transfer title to the person who purchases at the sale upon proof that proper notice of sale has been given.

Date	*Name Of Plaintiff Or Attorney (type or print)*	*Signature Of Plaintiff Or Attorney*

(Over)

INSTRUCTIONS TO PLAINTIFF OR DEFENDANT

**THIS FORM IS SUPPLIED IN ORDER TO EXPEDITE THE HANDLING OF SMALL CLAIMS.
IT IS DESIGNED TO COVER THE MOST COMMON CLAIMS. QUESTIONS ABOUT THE ADEQUACY OF THIS FORM OR WHETHER IT IS THE APPROPRIATE FORM TO BE USED SHOULD BE ADDRESSED TO AN ATTORNEY.**

1. Before filing this Complaint, you must have filed certain forms with the Division of Motor Vehicles. Contact your local Division of Motor Vehicles office.

2. The PLAINTIFF must file a small claim action in the county where the claim arose (i.e., where the motor vehicle was repaired, towed or stored).

3. The PLAINTIFF cannot sue in small claims court for more than $10,000.00. This amount may be lower, depending on local judicial order. If the amount is lower, it may be any amount between $5,000.00 and $10,000.00, as determined by the chief district court judge of the judicial district.

4. The registered owner of the vehicle and any secured parties listed with the Division of Motor Vehicles must be made defendants in the case. The PLAINTIFF must show the complete name and address of the defendant to ensure service on the defendant. If there are two defendants and they reside at different addresses, the plaintiff must include both addresses. The plaintiff must determine if the defendant is a corporation and sue in the complete corporate name. If the business is not a corporation, the plaintiff must determine the owner's name and sue him/her.

5. The PLAINTIFF may serve the defendant(s) by mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, addressed to the party to be served or by paying the costs to have the sheriff serve the summons and complaint. If certified or registered mail is used, the plaintiff must file a sworn statement with the Clerk of Superior Court proving service by certified mail and must attach to that statement the postal receipt showing that the letter was accepted. If the name or address of the vehicle owner cannot be determined, service by publication is authorized. In that case plaintiff may want to consult an attorney.

6. The PLAINTIFF must pay advance court costs at the time of filing this Complaint. In the event that judgment is rendered in favor of the plaintiff, court costs may be charged against the defendant.

7. The DEFENDANT may file a written answer, making defense to the claim, in the office of the Clerk of Superior Court. This answer should be accompanied by a copy for the plaintiff and be filed no later than the time set for trial. The filing of the answer DOES NOT relieve the defendant of the need to appear before the magistrate to assert the defendant's defense.

8. Whether or not an answer is filed, the PLAINTIFF must appear before the magistrate.

9. The PLAINTIFF or the DEFENDANT may appeal the magistrate's decision in this case. To appeal, notice must be given in open court when the judgment is rendered, or notice may be given in writing to the Clerk of Superior Court within ten (10) days after the judgment is rendered. If notice is given in writing, the appealing party must also serve written notice of appeal on all other parties. The appealing party must PAY to the Clerk of Superior Court the costs of court for appeal within twenty (20) days after the judgment is rendered.

AOC-CVM-203, Side Two, Rev. 7/24

File No.

Film No.

Judgment Docket Book And Page No.

JUDGMENT IN ACTION TO RECOVER MONEY OR PERSONAL PROPERTY

G.S. 7A-210(2), 7A-224

Name And Address Of Plaintiff

County | Telephone No.

VERSUS

Name And Address Of Defendant 1

County | Telephone No.

Name And Address Of Defendant 2

County | Telephone No.

Name And Address Of Plaintiff's Attorney

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of trial.

FINDINGS

The Court finds that:

☐ the plaintiff has proved the case by the greater weight of the evidence.

☐ the plaintiff has failed to prove the case by the greater weight of the evidence.

the defendant(s) ☐ was ☐ was not present at trial.

☐ the case involves a breach of contract and the date of breach is: _____.

☐ the contract provides for pre-judgment interest on damages for breach at the rate of _____% and/or post-judgment interest at the rate of _____%.

☐ the contract does not provide a specific pre-judgment interest rate.

☐ the contract does not provide a specific post-judgment interest rate.

☐ Other:

ORDER

It is ORDERED that:

☐ the plaintiff recover possession of the personal property described in the complaint.

☐ the plaintiff recover possession of the personal property listed below:

☐ the plaintiff recover nothing of the defendant(s) and that this action be dismissed with prejudice.

☐ *(for breach of contract cases)* the plaintiff recover of the defendant(s) the following principal sum plus interest on the principal from the date of breach to the date of judgment (1) at the rate provided in the contract, as found above; or (2) at the legal rate. In addition, the principal shall bear interest from the date of judgment until the judgment is satisfied (1) at the rate provided in the contract, as found above; or (2) at the legal rate.

☐ *(for tort cases)* the plaintiff recover of the defendant(s) the following principal sum, plus interest at the legal rate from the date the action was instituted until judgment is satisfied.

☐ Other: *(specify)*

☐ Costs of this action are taxed to the ☐ plaintiff. ☐ defendant.

Principal Sum Of Judgment	$	*Name Of Judgment Debtor(s) From Whom Amount Recovered*
Pre-judgment Interest Not Included In Principal	$	☐ Judgment Announced And Signed In Open Court
Attorney's Fees Or Other Damages *(when appropriate)*	$	*Date* / *Signature Of Magistrate*
TOTAL AMOUNT	$	*Name Of Party Announcing Appeal In Open Court*

CERTIFICATION

NOTE: *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.*
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date | *Signature Of Magistrate*

AOC-CVM-400, Rev. 2/12

File No.	Abstract No.
Scan No.	Judgment Docket Book And Page No.

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division - Small Claims

JUDGMENT IN ACTION FOR SUMMARY EJECTMENT

G.S. 7A-210(2), 7A-224; 42-30

This action was tried before the undersigned on the cause stated in the complaint. Except as may be indicated below, the record shows that the defendant(s) was given proper notice of the nature of the action and the date, time and location of trial.

FINDINGS

The Court finds that:

1. a. Defendant 1 ☐ was ☐ was not present, and ☐ was served ☐ personally (Rule 4) ☐ by posting. ☐ was not served.
   b. Defendant 2 ☐ was ☐ was not present, and ☐ was served ☐ personally (Rule 4) ☐ by posting. ☐ was not served.
2. ☐ a. the plaintiff has proved the case by the greater weight of the evidence.
   ☐ b. the plaintiff has failed to prove the case by the greater weight of the evidence.
   ☐ c. the plaintiff requested and was entitled to a judgment for possession based on the pleading.
3. ☐ a. there is no dispute as to the amount of rent in arrears, and the amount is $ _____.
   ☐ b. there is an actual dispute as to the amount of rent in arrears. The defendant(s) claims the amount of rent in arrears is $ _____, and this amount is the undisputed amount of rent in arrears.
4. other:

Name And Address Of Plaintiff

County | *Telephone No.*

VERSUS

Name And Address Of Defendant 1

County | *Telephone No.*

Name And Address Of Defendant 2

County | *Telephone No.*

Name And Address Of Plaintiff's Attorney

Name And Address Of Defendant's Attorney

ORDER

It is ORDERED that:

☐ 1. the defendant(s) be removed from and the plaintiff be put in possession of the premises described in the complaint.
☐ 2. this action be dismissed with prejudice.
☐ 3. this action be dismissed with prejudice because the defendant(s) tendered the rent due and the court costs of this action.
☐ 4. the plaintiff recover rent of the defendant(s) in the amount and at the rate listed below, plus other damages in the amount indicated. The plaintiff is also entitled to interest on the total principal sum from this date until the judgment is paid.
☐ 5. at the request of the plaintiff, the claim for money damages is severed from the claim for possession and is not determined by this Judgment.
☐ 6. other: *(specify)*

☐ 7. costs of this action are taxed to the ☐ plaintiff. ☐ defendant(s).

Rate Of Rent (Tenant's Share)	*Amt. Of Rent In Arrears (Owed To Date)*	
$ per ☐ Mo. ☐ Wk.	$	☐ Judgment Announced And Signed In Open Court
Amount Of Other Damages $	*Date*	*Signature Of Magistrate*
TOTAL AMOUNT $		*Name Of Party Announcing Appeal In Open Court*

CERTIFICATION

(**NOTE:** *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.)*
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date	*Signature Of Magistrate*

AOC-CVM-401, Rev. 3/19

File No.

Film No.

STATE OF NORTH CAROLINA

_____ County

In The General Court Of Justice
District Court Division-Small Claims

JUDGMENT IN ACTION ON POSSESSORY LIEN ON MOTOR VEHICLE

G.S. 44A-4

This action was tried before the undersigned on the cause stated in the complaint. The record shows that the defendant was given proper notice of the nature of the action and the date, time and location of trial.

Name And Address Of Plaintiff

County | *Telephone No.*

VERSUS

Name And Address Of First Defendant

County | *Telephone No.*

Name And Address Of Second Defendant

County | *Telephone No.*

Name And Address Of Plaintiff's Attorney

FINDINGS

The Court finds that:

☐ 1. the plaintiff has failed to prove the case by the greater weight of the evidence.

☐ 2. the plaintiff ☐ repairs, services, tows or stores motor vehicles in the ordinary course of business ☐ is the operator of a place of business for garaging or parking vehicles ☐ is a landowner on whose property the vehicle listed was abandoned and the plaintiff came into possession of the motor vehicle on the date shown below, is still in possession, and has a valid enforceable lien against the motor vehicle for the amount indicated, plus storage at the rate below from the date of this Judgment until the lien is satisfied.

3. the defendant(s) ☐ was ☐ was not present at trial.

4. The lienor has given proper notice to the North Carolina Division of Motor Vehicles that a lien is asserted and sale is proposed for the vehicle.

Make/Year Of Vehicle	Repairs $
	Towing $
ID Number	Storage Cost to Date $
Date Of Possession	Vehicle Rental $
(Plus Storage @ $ Per Day Until Sold)	**Total Lien Claimed To Date** $ 0.00

ORDER

It is ORDERED that:

☐ the plaintiff recover nothing of the defendant and that this action be dismissed with prejudice.

☐ the lien is valid and enforceable by sale and the Division of Motor Vehicles shall transfer title to the person who purchases at the sale upon proof that proper notice of sale has been given.

☐ Judgment Announced And Signed In Open Court

Name Of Party Announcing Appeal In Open Court	*Date*	*Signature Of Magistrate*

CERTIFICATION

(**NOTE:** *To be used when magistrate does not announce and sign this Judgment in open court at the conclusion of the trial.*)
I certify that this Judgment has been served on each party named by depositing a copy in a post-paid properly addressed envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service.

Date	*Signature Of Magistrate*

STATE OF NORTH CAROLINA

_____ County

File No.

Judgment Abstract No.

Date Judgment Filed

In The General Court Of Justice
☐ District ☐ Superior Court Division

Name Of Judgment Creditor (Plaintiff)

VERSUS

Name Of Judgment Debtor (Defendant)

MOTION TO CLAIM EXEMPT PROPERTY (STATUTORY EXEMPTIONS)

(Use If Judgment Filed On Or After Jan. 1, 2006)

G.S. 1C-1603(c)

NOTE TO JUDGMENT DEBTOR: *The Clerk of Superior Court cannot fill out this form for you. If you need assistance, you should talk with an attorney.*
JUDGMENT DEBTOR NOTICE OF RIGHTS: *(a) You have the right to retain an interest in certain property free from collection efforts by the judgment creditor. (b) To preserve that right, you are required to respond to the notice by filing a motion or petition to claim exempt property, including a schedule of assets that are claimed as exempt, no later than 20 days after you receive the notice, and you must also mail or take a copy to the judgment creditor at the address provided in the notice. (c) You have the option to request a hearing to claim exemptions rather than filing a schedule of assets. (d) You may have exemptions under State and federal law that are in addition to those listed on the form for the debtor's statement that is included with the notice, such as Social Security benefits, unemployment benefits, workers' compensation benefits, and earnings for your personal services rendered within the last 60 days. (e) There is a procedure for challenging an attachment or levy on your property. (f) You may wish to consider hiring an attorney. (g) Failure to respond within the required time results in the loss of statutory rights.*

I, the undersigned, move to set aside the property claimed below as exempt.

1. I am a citizen and resident of _____.
2. ☐ a. I am married to _____.
   ☐ b. I am not married.
3. My current address is _____.
4. The following persons are dependent on me for support:

Name(s) Of Person(s) Dependent On Me	Age	Relationship

5. I wish to claim as exempt *(keep from being taken)* my interest in the following real or personal property, or in a cooperative that owns property, that I use as a residence. I also wish to claim my interest in the following burial plots for myself or my dependents. I understand that my total interest claimed in the residence and burial plots may not exceed $35,000.00, except that if I am unmarried and am 65 years of age or older, I am entitled to claim a total exemption in the residence and burial plots not to exceed $60,000.00, so long as the property was previously owned by me as a tenant by the entireties or as a joint tenant with rights of survivorship, and the former co-owner of the property is deceased.

Street Address Of Residence

County Where Property Located	*Township*	*No. By Which Tax Assessor Identifies Property*

Legal Description (Attach a copy of your deed or other instrument of conveyance or describe property in as much detail as possible. Attach additional sheets if necessary.)

☐ I am unmarried and 65 years of age or older and this property was previously owned by me as a tenant by entireties or as a joint tenant with rights of survivorship and the former co-owner of the property is deceased.

Name(s) Of Owner(s) Of Record Of Residence	*Estimated Value Of Residence (What You Think You Could Sell It For)*
	$

(Over)

Amount Of Lien(s) And Name(s) And Address(es) Of Lienholder(s): *(How Much Money Is Owed On The Property And To Whom)*	**Current Amount Owed**
	$
	$
Location Of Burial Plots Claimed	*Value Of Burial Plots Claimed* $

6. I wish to claim the following personal property, consisting of household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments, as exempt from the claims of my creditors *(in other words, keep them from being taken from me).* These items of personal property are held primarily for my personal, family, or household use.

   I understand that I am entitled to personal property worth the sum of $5,000.00. I understand I am also entitled to an additional $1,000.00 for each person dependent upon me for support, but not to exceed $4,000.00 for dependents. I further understand that I am entitled to this amount after deducting from the value of the property the amount of any valid lien or security interest. Property purchased within ninety (90) days of this proceeding may not be exempt. *(Some examples of household goods would be TVs, appliances, furniture, clothing, radios, record players.)*

Item Of Property	**Fair Market Value** *(What You Could Sell It For)*	**Amount Of Lien Or Security Interest** *(Amount Owed On Property)*	**Name(s) Of Lienholder(s)** *(To Whom Money Is Owed)*	**Value Of Debtor's (Defendant's) Interest** *(Fair Market Value Less Amount Owed)*
	$	$		$
	$	$		$
	$	$		$

7. I wish to claim my interest in the following motor vehicle as exempt from the claims of my creditors. I understand that I am entitled to my interest in one motor vehicle worth the sum of $3,500.00 after deduction of any valid liens or security interests. I understand that a motor vehicle purchased within ninety (90) days of this proceeding may not be exempt.

Make And Model	*Year*	*Name Of Title Owner Of Record*
Fair Market Value (What You Could Sell It For) $		*Name(s) Of Lienholder(s) Of Record (Person(s) To Whom Money Is Owed)*
Amount Of Liens (Amount Owed) $		*Value Of Debtor's (Defendant's) Interest (Fair Market Value Less Amount Owed)* $

8. *(This item is to claim any other property you own that you wish to exempt.)* I wish to claim the following property as exempt because I claimed residential real or personal property as exempt that is worth less than $35,000.00, or I made no claim for a residential exemption under section (5) above. I understand that I am entitled to an exemption of up to $5,000.00 on any property only if I made no claim under section (5) or a claim that was less than $35,000.00 under Section (5). I understand that I am entitled to claim any unused amount that I was permitted to take under section (5) up to a maximum of $5,000.00 in any property. *(Examples: If you claim $34,000 under section (5), $1,000 allowed here; if you claim $30,000 under section (5), $5,000 allowed here; if you claim $35,000 under section (5), no claim allowed here.)* I further understand that the amount of my claim under this section is after the deduction from the value of this property of the amount of any valid lien or security interests and that tangible personal property purchased within ninety (90) days of this proceeding may not be exempt.

Item Of Personal Property Claimed	**Fair Market Value**	**Amount Of Lien(s)**	**Name(s) Of Lienholder(s)**	**Value Of Debtor's (Defendant's) Interest**
	$	$		$
	$	$		$
	$	$		$
	$	$		$

(Over)

VERSUS	File No.	
Name Of Judgment Creditor (Plaintiff)	Judgment Abstract No.	Date Judgment Filed

Real Property Claimed (I understand that if I wish to claim more than one parcel, I must attach additional pages setting forth the following information for each parcel claimed as exempt.)

Street Address		Estimated Value Of Property (What You Could Sell It For) $
County Where Property Located	Township	No. By Which Tax Assessor Identifies Property

Description (Attach a copy of your deed or other instrument of conveyance or describe the property in as much detail as possible.)

Name And Address Of Lienholder	Current Amount Owed $
Name And Address Of Lienholder	Current Amount Owed $

(Attach additional sheets for more lienholders.)

9. I wish to claim the following items of health care aid *(wheelchairs, hearing aids, etc.)* necessary for ☐ myself ☐ my dependents.

Item	Purpose

10. I wish to claim the following implements, professional books, or tools (not to exceed $2,000.00), of my trade or the trade of my dependent. I understand such property purchased within ninety (90) days of this proceeding may not be exempt.

Item	Estimated Value *(What You Could Sell It For)*	What Business Or Trade Used In
	$	
	$	
	$	

11. I wish to claim the following life insurance policies whose sole beneficiaries are my spouse and/or my children as exempt.

Name Of Insurer	Policy Number	Beneficiary(ies)

12. I wish to claim as exempt the following compensation that I received or to which I am entitled for the personal injury of myself or a person upon whom I was dependent for support, including compensation from a private disability policy or an annuity, or compensation that I received for the death of a person upon whom I was dependent for support. I understand that this compensation is not exempt from claims for funeral, legal, medical, dental, hospital or health care charges related to the accident or injury that resulted in the payment of the compensation to me. *(Add additional sheets if more than one amount of compensation.)*

Amount Of Compensation $	Method Of Payment: Lump Sum or Installments (If Installments, state amount, frequency, and duration of payments.)
Location/Source Of Compensation	

13. I wish to claim my individual retirement accounts, including Roth accounts, and individual retirement annuities (IRAs) that are listed below.

Name Of Custodian Of IRA Account	Type Of Account	Account Number
Name Of Custodian Of IRA Account	Type Of Account	Account Number
Name Of Custodian Of IRA Account	Type Of Account	Account Number
Name Of Custodian Of IRA Account	Type Of Account	Account Number

(Over)

14. I wish to claim the following funds I hold in a college savings plan that is qualified under section 529 of the Internal Revenue Code, not to exceed $25,000.00. I understand that the plan must be for my child and must actually be used for the child's college expenses. I understand that I may not exempt any funds I placed in this account within the preceding 12 months, except to the extent that any contributions were made in the ordinary course of my financial affairs and were consistent with my past pattern of contributions.

College Saving Plan	Account Number	Value	Name(s) Of Child(ren) Beneficiaries
		$	
		$	

15. I wish to claim the following retirement benefits to which I am entitled under the retirement plans of other states and governmental units of other states. I understand that these benefits are exempt only to the extent these benefits are exempt under the law of the state or governmental unit under which the benefit plan was established.

State/Governmental Unit	Name Of Retirement Plan	Identifying Number

16. I wish to claim as exempt any alimony, support, separate maintenance, or child support payments or funds that I have received or that I am entitled to receive. I understand that these payments are exempt only to the extent that they are reasonably necessary for my support or for the support of a person dependent on me for support.

Type Of Support	Person Paying Support	Amount Of Support	Location Of Funds
		$	
		$	
		$	

17. The following is a complete listing of my property which I do **NOT** claim as exempt.

Item	Location	Estimated Value
		$
		$
		$

18. I certify that the above statements are true.

Date	*Signature Of Judgment Debtor/Attorney For Debtor (Defendant)*

CERTIFICATE OF SERVICE

19. A copy of this Motion was served on the judgment creditor (plaintiff) by: ☐ delivering a copy to the judgment creditor (plaintiff) personally ☐ delivering a copy to _____, the judgment creditor's attorney. ☐ depositing a copy of this Motion in a post-paid, properly-addressed envelope in a post office, addressed to the judgment creditor (plaintiff) at the address shown on the notice of rights served on me. ☐ depositing a copy of this motion in a post-paid, properly-addressed envelope in a post office, addressed to the judgment creditor's (plaintiff's) attorney at the following address: _____.

Date	*Address And Phone Number Of Attorney For Debtor (Defendant)*
Signature Of Judgment Debtor/Attorney For Debtor (Defendant)	

STATE OF NORTH CAROLINA

_____ County

File No.

Film No.

In The General Court Of Justice

☐ District ☐ Superior Court Division ☐ Small Claims

Name Of Plaintiff/Petitioner	**ORDER**
VERSUS	
Name Of Defendant/Respondent	

☐ DISMISSAL ☐ With Prejudice ☐ Without Prejudice

This action is dismissed for the following reason:

☐ The plaintiff elected not to prosecute this action and has moved for dismissal.

☐ Neither the plaintiff, nor the defendant appeared on the scheduled trial date.

☐ The plaintiff failed to appear on the scheduled trial date; the defendant did appear on that date and has moved to dismiss this action.

☐ Other:

☐ DISCONTINUANCE [G.S. 1A-1, Rule 4(e)]

The defendant has never been served in this action, and more than ninety (90) days have elapsed since the last summons was issued.

☐ CONTINUANCE

The trial of this action is continued to the following date and time on motion of the

☐ Plaintiff

☐ Defendant

☐ Judge or Magistrate

☐ Other: *(specify)*

Date Of New Trial	*Time Of New Trial* ☐ AM ☐ PM	*Location Of New Trial*

☐ BANKRUPTCY

It is ordered that this action be removed from the active calendar and placed on inactive status because a petition for bankruptcy has been filed staying this proceeding. This action may be reinstated if the claim is not resolved in the U.S. Bankruptcy or District Courts.

Date	*Signature*	☐ *Judge* ☐ *Magistrate* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

AOC-G-108, Rev. 11/02

STATE OF NORTH CAROLINA

_____ County

File No.

In The General Court Of Justice

Name And Address Of Plaintiff	**SERVICEMEMBERS CIVIL RELIEF ACT DECLARATION**
VERSUS	
Name And Address Of Defendant	G.S. Ch. 127B, Art. 4; 50 U.S.C. 3901 to 4043

NOTE: *Though this form may be used in a Chapter 45 Foreclosure action, it is not a substitute for the certification that may be required by G.S. 45-21.12A.*

DECLARATION

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

1. As of the current date: *(check one of the following)*
   - ☐ a. I have personal knowledge that the defendant named above is in military service.*
   - ☐ b. I have personal knowledge that the defendant named above is **not** in military service.*
   - ☐ c. I am unable to determine whether the defendant named above is in military service.*
2. As of the current date, I ☐ have ☐ have not received a copy of a military order from the defendant named above relating to State active duty as a member of the North Carolina National Guard or service similar to State active duty as a member of the National Guard of another state. *See* G.S. 127B-27 and G.S. 127B-28(b).
3. I ☐ used ☐ did not use the Servicemembers Civil Relief Act Website (https://scra.dmdc.osd.mil/) to determine the defendant's federal military service.
   ☐ The results from my use of that website are attached.
   (**NOTE:** *The Servicemembers Civil Relief Act Website is a website maintained by the Department of Defense (DoD). If DoD security certificates are not installed on your computer, you may experience security alerts from your internet browser when you attempt to access the website. Members of the North Carolina National Guard under an order of the Governor of this State and members of the National Guard of another state under an order of the governor of that state will **not** appear in the SCRA Website database.*)
4. The following facts support my statement as to the defendant's military service: *(State how you know the defendant is or is not in the military. Be specific.)*

***NOTE:** *The term "military service" includes the following: active duty service as a member of the United States Army, Navy, Air Force, Marine Corps, Space Force, or Coast Guard; service as a member of the National Guard under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days for purposes of responding to a national emergency; active service as a commissioned officer of the Public Health Service or of the National Oceanic and Atmospheric Administration; any period of service during which a servicemember is absent from duty on account of sickness, wounds, leave, or other lawful cause. 50 U.S.C. 3911(2). The term "military service" also includes the following: State active duty as a member of the North Carolina National Guard under an order of the Governor pursuant to Chapter 127A of the General Statutes, for a period of more than 30 consecutive days; service as a member of the National Guard of another state who resides in North Carolina and is under an order of the governor of that state that is similar to State active duty, for a period of more than 30 consecutive days. G.S. 127B-27(3) and G.S. 127B-27(4).*

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct.

Date	*Signature Of Declarant*	*Name Of Declarant (type or print)*

NOTE TO COURT: ***Do not proceed to enter judgment in a non-criminal case in which the defendant has not made an appearance until a Servicemembers Civil Relief Act affidavit or declaration (whether on this form or not) has been filed, and if it appears that the defendant is in military service, do not proceed to enter judgment until such time that you have appointed an attorney to represent him or her.***

(Over)

AOC-G-250, Rev. 4/24

Information About Servicemembers Civil Relief Act Affidavits And Declarations

1. Plaintiff to file affidavit/declaration

In any civil action or proceeding, including any child custody proceeding, in which the defendant does not make an appearance, the court, before entering judgment for the plaintiff, shall require the plaintiff to file with the court an affidavit—

(A) stating whether or not the defendant is in military service and showing necessary facts to support the affidavit; or

(B) if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service.

50 U.S.C. 3931(b)(1).

2. Appointment of attorney to represent defendant in military service

If in a civil action or proceeding in which the defendant does not make an appearance it appears that the defendant is in military service, the court may not enter a judgment until after the court appoints an attorney to represent the defendant. If an attorney appointed to represent a service member cannot locate the service member, actions by the attorney in the case shall not waive any defense of the service member or otherwise bind the service member. 50 U.S.C. 3931(b)(2). State funds are not available to pay attorneys appointed pursuant to the Servicemembers Civil Relief Act. To comply with the federal Violence Against Women Act and in consideration of G.S. 50B-2(a), 50C-2(b), and 50D-2(b), plaintiffs in Chapter 50B, Chapter 50C, and Chapter 50D proceedings should not be required to pay the costs of attorneys appointed pursuant to the Servicemembers Civil Relief Act. Plaintiffs in other types of actions and proceedings may be required to pay the costs of attorneys appointed pursuant to the Servicemembers Civil Relief Act. The allowance or disallowance of the ordering of costs will require a case-specific analysis.

3. Defendant's military status not ascertained by affidavit/declaration

If based upon the affidavits filed in such an action, the court is unable to determine whether the defendant is in military service, the court, before entering judgment, may require the plaintiff to file a bond in an amount approved by the court. If the defendant is later found to be in military service, the bond shall be available to indemnify the defendant against any loss or damage the defendant may suffer by reason of any judgment for the plaintiff against the defendant, should the judgment be set aside in whole or in part. The bond shall remain in effect until expiration of the time for appeal and setting aside of a judgment under applicable Federal or State law or regulation or under any applicable ordinance of a political subdivision of a State. The court may issue such orders or enter such judgments as the court determines necessary to protect the rights of the defendant under this Act. 50 U.S.C. 3931(b)(3).

4. Satisfaction of requirement for affidavit/declaration

The requirement for an affidavit above may be satisfied by a statement, declaration, verification, or certificate, in writing, subscribed and certified or declared to be true under penalty of perjury. 50 U.S.C. 3931(b)(4). The presiding judicial official will determine whether the submitted affidavit is sufficient.

5. Penalty for making or using false affidavit/declaration

A person who makes or uses an affidavit permitted under 50 U.S.C. 3931(b) (or a statement, declaration, verification, or certificate as authorized under 50 U.S.C. 3931(b)(4)) knowing it to be false, shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both. 50 U.S.C. 3931(c).

STATE OF NORTH CAROLINA

File No.	Scan No.(s) (official use only)

_____ County

In The General Court Of Justice
☐ Small Claims ☐ District ☐ Superior Court Division

Name And Address Of Plaintiff	**WRIT OF POSSESSION REAL PROPERTY**
VERSUS	G.S. 1-313(4), 42-36.2
Name And Address Of Defendant 1	*Name And Address Of Defendant 2*

To The Sheriff Of _____ County:

A judgment in favor of the plaintiff was rendered in this case for the possession of the real property described below and you are commanded to remove the defendant(s) from, and put the plaintiff in possession of, those premises.

Description Of Property (include location)

Date Of Judgment	*Date Writ Issued*
	Signature
	☐ *Deputy CSC* ☐ *Assistant CSC* ☐ *Clerk Of Superior Court*

(Over)

AOC-CV-401, Rev. 8/17

RETURN

☐ 1. This Writ Of Possession was served as follows:

- ☐ a. By removing the defendant(s) from the premises and putting the plaintiff in possession after giving notice of removal to the defendant(s) as required by law.
- ☐ b. By removing the defendant(s) from the premises and putting the plaintiff in possession after giving notice of removal to the defendant(s) as required by law. The defendant's(s') property was taken to the warehouse listed below for storage.
- ☐ c. By giving notice of removal to the defendant(s) as required by law and by leaving the defendant's(s') property on the premises and locking the premises in accordance with the written request of the plaintiff which is attached.
- ☐ d. By locking the premises after the undersigned sheriff received a signed statement from the landlord or the landlord's authorized agent, stating that the tenant's property can remain on the premises. *(attach signed statement)*

☐ 2. The undersigned sheriff received a signed statement from the landlord or the landlord's authorized agent, stating that the landlord does not want to eject the tenant because the tenant has paid all court costs charged to him/her and has satisfied his/her indebtedness to the landlord. As a result, this Writ Of Possession is being returned unexecuted. *(attach signed statement)*

☐ 3. I have failed to remove the defendant(s) from the premises for the following reason:

- ☐ a. The plaintiff verbally requested that the Writ be returned because the defendant(s) satisfied the obligation to the plaintiff.
- ☐ b. The plaintiff failed to advance the expenses of removal and one month's storage after being asked to do so.
- ☐ c. Other: *(specify)*

Name And Address Of Warehouse

Fee Paid $			*Signature Of Deputy Sheriff Making Return*
Fee Paid By (type or print)			*Name Of Deputy Sheriff Making Return (type or print)*
Date Received	*Date Executed*	*Date Returned*	*County Of Deputy Sheriff Making Return*

AOC-CV-401, Side Two, Rev. 8/17

Tab: Notes

NOTES