

Civil Procedure Essentials for New Superior Court Judges

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Orientation for New Superior Court Judges
Presented by Don Bridges

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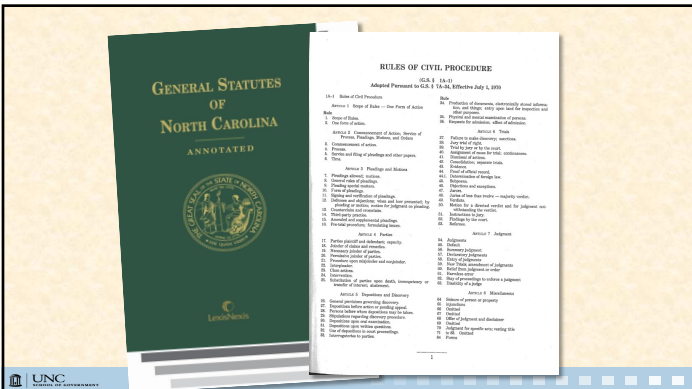
N.C. Rules of Civil Procedure G.S. § 1A-1

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(and G.S. Chapter 1)



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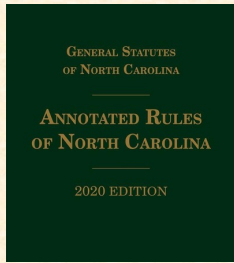
**GENERAL STATUTES
OF
NORTH CAROLINA
ANNOTATED**

RULES OF CIVIL PROCEDURE
G.S. § 1A-1
Adopted Pursuant to G.S. § 1A-1, Effective July 1, 1999

1.1. Scope of Rules — The Part of Article 1.
1.2. Title of Rules.
1.3. Purpose of Rules.
1.4. Application of Rules.
1.5. Construction of Rules.
1.6. Amendments to Rules.
1.7. Rules of Evidence.
1.8. Rules of Criminal Procedure.
1.9. Rules of Appellate Procedure.
1.10. Rules of Admiralty and Maritime Procedure.
1.11. Rules of Arbitration.
1.12. Rules of Dispute Resolution.
1.13. Rules of Professional Responsibility.
1.14. Rules of Judicial Administration.
1.15. Rules of Public Access to the Courts.
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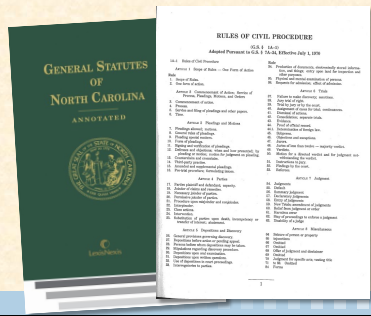
Other Sources



- General Rules of Practice and Procedure for the Superior and District Court
- Local Rules adopted by Chief Judge

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WHY?

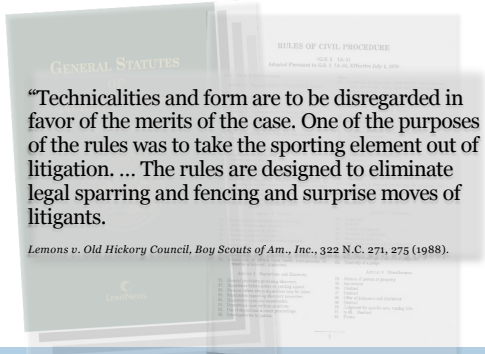


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“[I]t is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities.”


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

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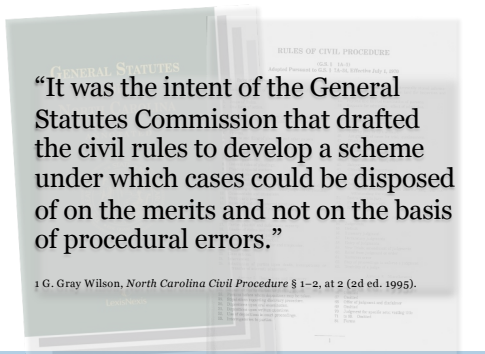


“Technicalities and form are to be disregarded in favor of the merits of the case. One of the purposes of the rules was to take the sporting element out of litigation. ... The rules are designed to eliminate legal sparring and fencing and surprise moves of litigants.”

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




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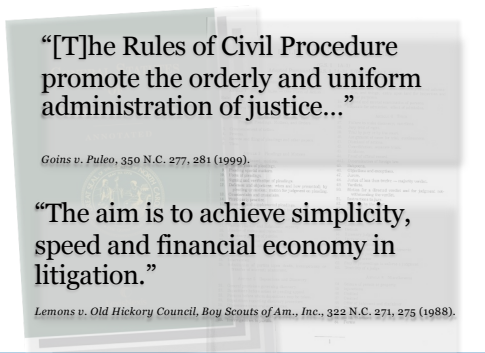


“It was the intent of the General Statutes Commission that drafted the civil rules to develop a scheme under which cases could be disposed of on the merits and not on the basis of procedural errors.”

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



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“[T]he Rules of Civil Procedure promote the orderly and uniform administration of justice...”

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

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

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



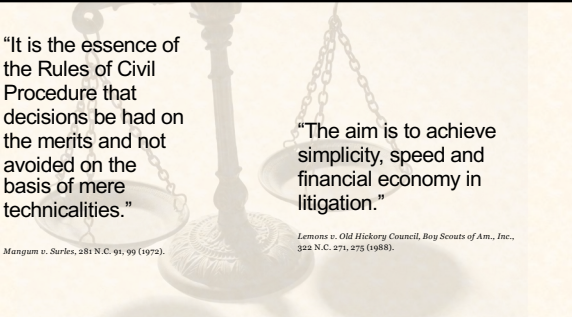
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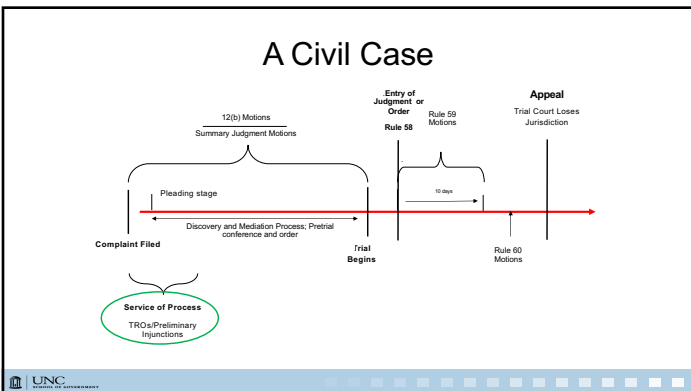
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- Initiation and Pleadings – 3, 7, 8, 12
- Injunctive Relief – 65
- Service – 4
- “Early” Resolutions – 12, 56
 - Voluntary Dismissals (Rule 41(a))
- Discovery – 26-37
- Directed Verdict & JNOV – 50, 59
- Post-Judgment Relief – 60(b)

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Initiation & Pleadings



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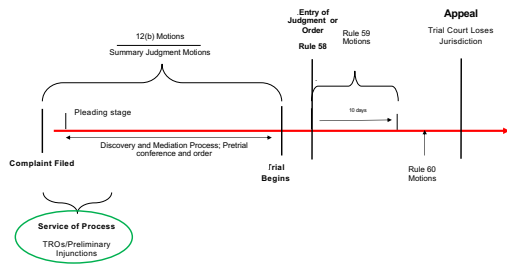
GS 1A, Rule 3

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



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A Civil Case



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contributory negligence, a party may serve a reply alleging last clear chance. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer.

(b) **Motions** and other papers. -

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial or at a session at which a cause is on the calendar for that session, ~~shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.~~ The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

GS 1A, Rule 8. General rules of pleadings.

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

- (1) **A short and plain statement of the claim** sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved **showing that the pleader is entitled to relief, and**
- (2) **A demand for judgment for the relief** to which he deems himself entitled.

DID YOU KNOW?


Self test

- Defendant files her Answer 40 days after being served with process
- Plaintiff argues the Answer must be disregarded because it was filed too late
- Is Plaintiff correct?
 1. Yes
 2. No

GS 1A, Rule 12. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on pleading.

(a) (1) When Presented. - A defendant shall serve his answer within **30 days after service of the summons and complaint** upon him.

*****Defendant can file an Answer at any time until entry of default by clerk.*****
Peebles v. Moore, 302 NC 351 (1981)




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GS 1A, Rule 8. General rules of pleadings.

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

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


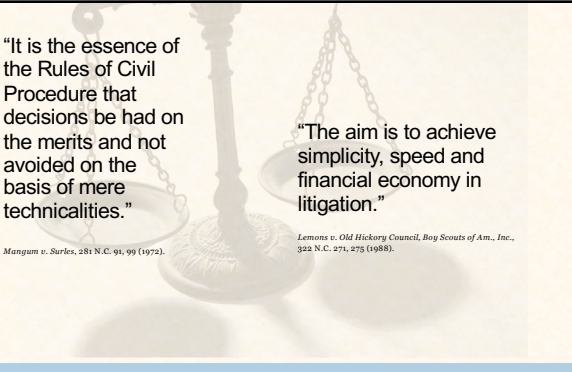


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"It is the essence of the Rules of Civil Procedure that decisions be had on the merits and not avoided on the basis of mere technicalities."

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

Mangum v. Surles, 281 N.C. 91, 99 (1972).
Lemons v. Old Hickory Council, Boy Scouts of Am., Inc., 302 N.C. 471, 475 (1988).



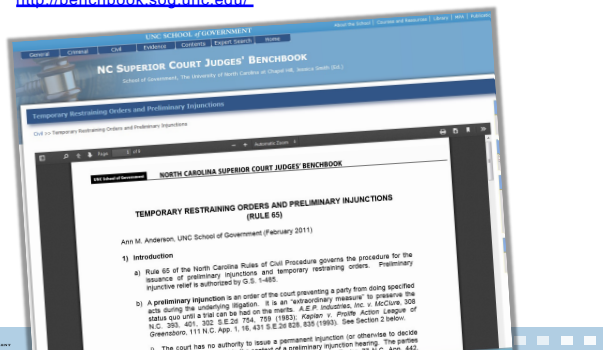
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TROs and Preliminary Injunctions Rule 65



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



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DID YOU KNOW?

Self test

- A Rule 65 TRO and preliminary injunction are forms of temporary, **ancillary** relief. This means they:
 1. Will dissolve if the case is dismissed
 2. Are not final orders/adjudications
 3. Cannot be granted unless plaintiff has stated a separate civil cause of action
 4. All of the above

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TROs and Injunctions

Provide a party some relief while the case is pending.

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

It's always Ancillary!

- No such thing as a stand-alone Rule 65 claim for injunctive relief
- Remedy attached to a claim or cause of action

Rule 65 TROs

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

TROs Without Notice

- Often requested, rarely granted
- Reserved for clear emergencies (consider your own definition of “emergency”
 - Establish some hurdles to test the seriousness
- What harm will result by taking the time to notify opposing party and allow them to appear?
- Sometimes it is better simply to listen to Nancy Reagan and “Just Say No!”

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TROs

- Bond exceptions:
 - State, county municipality, officer
 - Domestic contexts:
 - Support, alimony, custody, separation, divorce b/b, abs. divorce where “enjoin[s] defendant spouse from interfering with, threatening, or molesting plaintiff during [the action].”
 - Where the TRO will not harm defendant, plaintiff has considerable available assets [rare].
 - To preserve court’s jurisdiction.

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TROs

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

Rule 3. Commencement of action.
(a) A civil action is commenced by filing a complaint with the court. The clerk shall enter the date of filing on the original complaint, and such entry shall be prima facie evidence of the date of filing.

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TROs

Must:

- Define the injury and state why it is irreparable
- State exact time of expiration
- State why it was entered without notice
- Set forth the reasons for issuance
- Be *specific* in terms
- Describe, in reasonable detail, the act or acts enjoined or restrained.
 - “Not by reference to the complaint or other document.”

TRO Practical Pointers

- The TRO must also set a date and time (within the 10 day life of the TRO) for a hearing upon a Preliminary Injunction
- If possible, order that the Hearing on Preliminary Injunction come before you, since you signed the TRO.
- If you set P.I. hearing before another judge, show that judge the courtesy of a telephone call to advise of the case.

TROs

- Cannot exceed 10 days.
 - Expire automatically unless extended for good cause.
 - May not be extended for longer than 10 days without consent of other party.
- Restrained party may move for dissolution. Hearing on 2 days' notice.

Preliminary Injunction

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



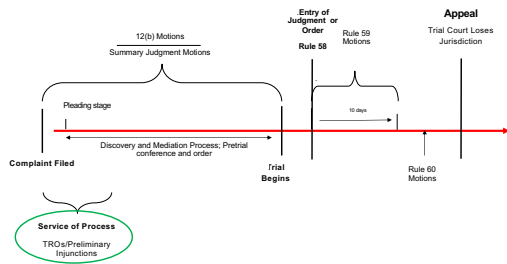
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A Civil Case



Service of Process

Rule 4



Service of Process

- Action commences upon filing of complaint. Court obtains jurisdiction over **the case**. Rule 3.
- Court obtains personal jurisdiction **over defendant** with proper service of summons. G.S. § 1-75; Rule 4.
 - Unless service is waived.

AOC-CV-100

STATE OF NORTH CAROLINA

County _____

In the General Court of Justice
 District _____
 Superior Court Division _____

Name of Plaintiff _____
 Address _____
 City, State, Zip _____

CIVIL SUMMONS
 ALIAS AND FIDELITY'S SUMMONS (ASSESS FEE)

VERSUS

Name of Defendant(s) _____
(Date Original Summons Issued) G.S. 1A-1, Rules 3 and 4
(Date Subsequent Summons Issued)

To Each Of The Defendant(s) Named Below:
 Name And Address Of Defendant 1 _____
 Name And Address Of Defendant 2 _____

IMPORTANT! You have been sued! These papers are legal documents. **DO NOT** throw these papers out! You have to respond within 30 days. 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 establecido un proceso civil en su contra! Estos papeles son documentos legales. **NO TIENE** estos papeles!
 Tiene que contestar a más tardar en 30 días. Puede querer consultar con un abogado lo antes posible acerca de su caso y, de ser necesario, hablar con alguien que lee inglés y que pueda traducir estos documentos!

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 thirty (30) 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.

Form AOC-CV-100 (Rev. 1/15) (Form AOC-CV-100) (Form AOC-CV-100) (Form AOC-CV-100)

Rule 4: Service of Process - Methods

- Categories of defendant:
 - ★ Natural Person (j)(1),
 - Natural Person Under Disability (j)(2),
 - the State (j)(3),
 - Agency of State (j)(4),
 - County or City (j)(5),
 - Corporation (j)(6),
 - Partnership (j)(7)
 - Other Association or its Officers (j)(8); or
 - Foreign States (j)(9)

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Service of Process - Methods

- Categories of defendant:
 - ★ Natural Person (j)(1),
- Methods:**
- Personal service to the individual or to her home (very common) or to her designated agent.
 - Registered or certified mail, r.r.r.
 - Designated delivery service (Fed Ex or UPS)
 - USPS signature confirmation delivery
 - Publication, if can't be served by another method after due diligence. (j1)
 - Attorney may accept service on D's behalf. (j5)

"delivering to the addressee"

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"Delivering to the addressee"

Hamilton v. Johnson, 228 NC App 372 (2013)

- Fed ex delivery to Lateef Johnson. Signed for by "KKPOINI," the building concierge. No evidence Johnson actually received it.
- Court of Appeals: No evidence that "KKPOINI" was agent authorized to accept. Not sufficient "delivery to the addressee."

Washington v. Cline, 233 NC App 412 (2014)

- Fed ex delivery to D's home and left at her doorstep.
- "Delivery to addressee" requirement met because Ps proved (under GS 1-75.10) that D had actually received the package.



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Deadlines for Service

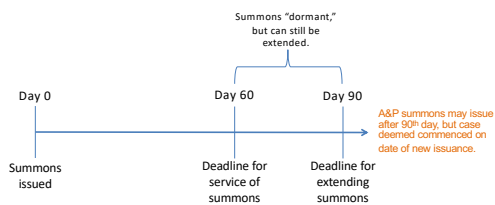
60 days: Time allowed for service after summons is issued. Rule 4(c).

- If service cannot be made by the end of the 60th day, the original summons must be extended.
 - Alias and pluries summons or endorsement.
- After 60 days unserved, the summons is “dormant”. Can still be extended. Rule 4(d).

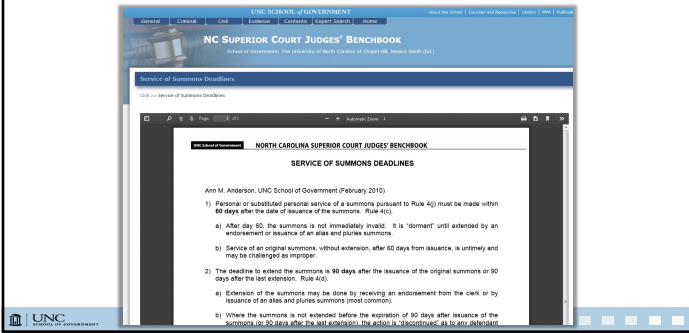
Deadlines for Service

90 days: Time allowed from issuance in which plaintiff must get extension of time to serve summons. Rule 4(d).

- If not, action DISCONTINUED as to defendant not served;
- A new alias and pluries can issue, “but, as to such defendant, the action shall be deemed to have commenced on the date of such issuance or endorsement.” Rule 4(e).



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



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DID YOU KNOW?

Self test

- You're on the 2nd full day of trial with both parties participating when defense counsel moves to dismiss, telling you he just discovered the summons was dormant at the time it was served upon defendant.
- Do you dismiss?
 1. Yes
 2. No



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A "general appearance" waives arguments as to proper Rule 4 service.



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Service of Process

§ 1-75.3. Jurisdictional requirements for judgments against persons[.]

(b) Personal Jurisdiction. - A court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in G.S. 1-75.4 or G.S. 1-75.7 and in addition either:

- (1) Personal service or substituted personal service of summons, or service of publication of a notice of service of process is made upon the defendant pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure; or
- (2) Service of a summons is dispensed with under the conditions in G.S. 1-75.7.

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Service of Process

§ 1-75.3. Jurisdictional requirements for judgments against persons[.]

(b) Personal Jurisdiction. - A court of this State having jurisdiction of the subject matter may render a judgment against a party personally only if there exists one or more of the jurisdictional grounds set forth in G.S. 1-75.4 or G.S. 1-75.7 and in addition either:

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- (2) Service of a summons is dispensed with under the conditions in G.S. 1-75.7.

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“General appearance”

§ 1-75.7. Personal jurisdiction - Grounds for without service of summons.

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

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

Filing an answer that does not contest jurisdiction, filing motion for change of venue, appearing in court, etc.

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See Rule 12, NC RCP

- Note Rule 12(h)-Waiver and preservation of certain defenses—a defense of lack of jurisdiction over the person, insufficiency of process or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g) [consolidation with other motions or defenses] or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

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General Appearance

- If a party appears in an action without contesting the personal jurisdiction of the court over him, then he has made a general appearance, thereby waiving any objection to insufficiency of process or service of process.
- Note: lack of subject matter jurisdiction can be raised at any time, even on appeal. Certain defenses are jurisdictional, for example, governmental immunity.
 - If you deny a MTD based on such a defense, the Defendant is entitled to an immediate appeal as a matter of right.

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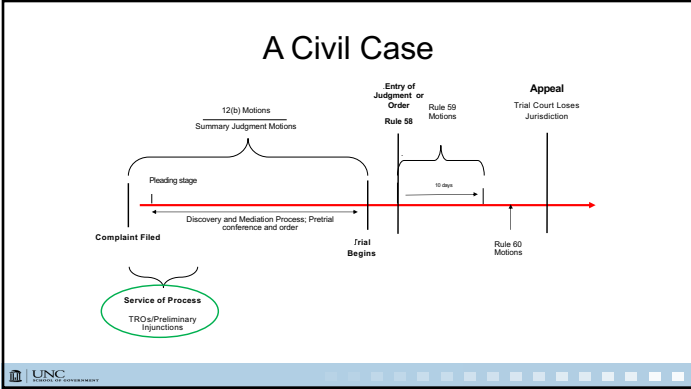
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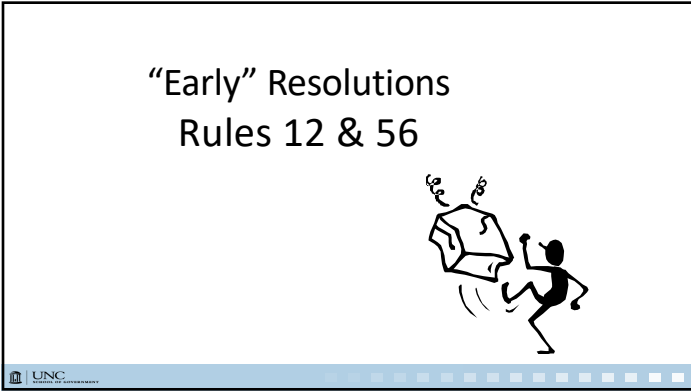
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Lemons v. Old Hickory Council, Boy Scouts of Am., Inc., 322 N.C. 471, 475 (1988).

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- ### Motions to Dismiss – 12(b)
- (1) Lack of subject matter jurisdiction
 - (2) Lack of personal jurisdiction
 - (3) Improper venue
 - (4) Insufficiency of process
 - (5) Insufficiency of service of process
 - (6) Failure to state a claim upon which relief can be granted.
 - (7) Failure to join a necessary party.
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12(b)(6)

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

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

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

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Raising an affirmative defense *sua sponte*

Unifund CCR, LLC v. Francois



Ms. Francois incurred card debt in May 2013.

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

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

COA: REVERSED.

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

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Venue: *Sua sponte* change?

civil.sog.unc.edu

The screenshot shows a blog post with a title "No Sua Sponte Change of Venue Allowed" circled in red. The post text discusses the court's authority to change venue *sua sponte* and references several cases: *Shaffer v. Morris Bank*, *Brooks v. Brooks*, and *GS-1-83*.

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Motions to Dismiss

- Lack of service
- Insufficiency of Service
- Lack of jurisdiction
- Failure to state a claim-12(b)(6)

Motions to Dismiss

- Note the difference between a Motion to Dismiss under Rule 12(b)(6) and a Motion for Summary Judgment under Rule 56
- MTD usually comes at an early stage in the proceedings;
- MSJ usually is filed after the completion of Discovery, *and...*

12(b)(6) and Summary Judgment Comparison

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

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

Motion for Summary Judgment (56)

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

Motions to Dismiss

- Because the Plaintiff's allegations are accepted as true, most Complaints will survive a 12(b)(6) Motion
- Exceptions- when a plaintiff:
 - Asserts a claim that does not exist under the law
 - Pleads a claim that NC courts do not recognize (e.g., civil conspiracy, strict liability in products liability case)
- Cases requiring special pleading; See Rule 9:

Rule 9: Pleading Special Matters

- Rule 9(b): "the circumstances constituting fraud, duress or mistake shall be stated with particularity..."
- Rule 9(g): When items of special damage are claimed each shall be averred; *and*
- Rule 9(j): Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:

Rule 9(j) Requirements

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

Summary Judgment – 56

1. Summary judgment motions ask the court to examine the record and determine whether any genuine issues of material fact exist for a jury to decide.

2. Standard: Court “shall” grant a motion for summary judgment if “there is no genuine issue of material fact” as shown by “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any.”

Summary Judgment

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

Summary Judgment

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

56(e)

S.J. – Contradictory Testimony

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

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

Summary Judgment – Findings of Fact?

Rule 52(a)(2):

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

Summary Judgment – Findings of Fact?

Rule 52. Findings by the court

(a) Findings –

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

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

Summary Judgment – Findings of Fact?

BUT...

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



Summary Judgment – Findings of Fact?

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



Summary Judgment – Findings of Fact?

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

Summary Judgment – Findings of Fact?

“By making findings of fact on summary judgment, the trial court demonstrates to the appellate courts a fundamental lack of understanding of the nature of summary judgment proceedings.” – *War Eagle* (2010)

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

Summary Judgment

- Court may grant summary judgment against *moving* party.
- May be done on court’s own motion.
– *Carriker, ASP*

Voluntary Dismissals (Rule 4)



Rule 41(a) Voluntary Dismissals

- A party may dismiss a claim “*at any time before the plaintiff rests*”

“Resting” a summary judgment argument counts! *Troy*, 126 N.C. App. 213 (1997)

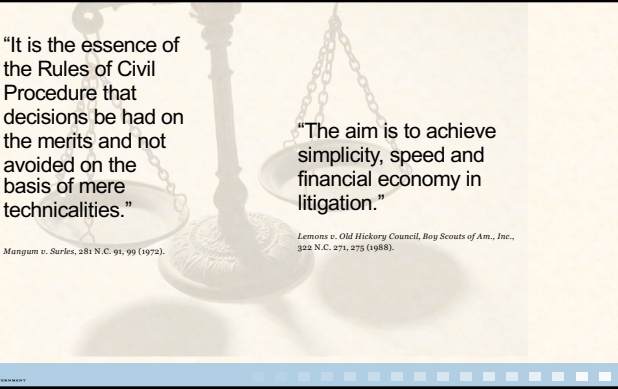
- Claim may be refiled within 1 year.



Involuntary Dismissals

- Rule 41(b): almost all involuntary dismissals are adjudications on the merits (meaning with prejudice) unless the court specifically states otherwise
- Exceptions:
 - Dismissal for improper venue
 - Dismissal for failure to join necessary party
 - Dismissal for lack of jurisdiction

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



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

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

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

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

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Entry of Default and Default Judgment

- Clerk enters the Entry of Default
- Judge enters Default Judgment, subject to exceptions (sum certain, e.g.)
- Things to look for before signing:
 - Adequate service of process
 - Has time expired without an extension or responsive pleading?

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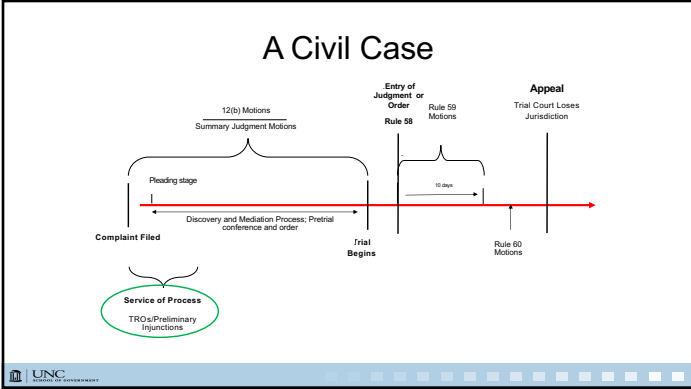
Setting Aside Defaults and Default Judgments

Two different standards:

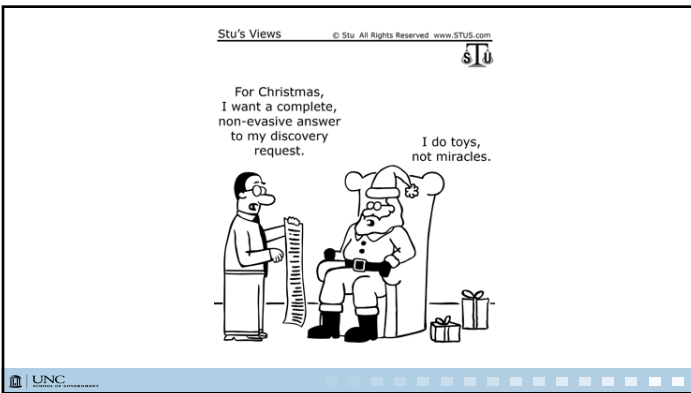
- Motion to Set Aside a Default: Rule 55(d): for *good cause shown*...
- Motion to Set Aside a Default Judgment: Rule 60(b)-
 - Mistake, inadvertence, surprise, or *excusable neglect*...
 - Usually requires showing that Defendant has a meritorious defense to the action...

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Discovery Parameters

Rule 26 allows discovery of information:

- Relevant to the subject matter of the case;
- Admissible or “reasonably calculated to lead to the discovery of admissible evidence”;
- Not privileged;
 - All traditional privileges: spousal, confessional, attorney-client
- Not attorney work product.

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Discovery Methods

- Depositions (Rules 30-32)
- Interrogatories (Rule 33)
- Requests for Production of Documents (Rule 34)
- Physical and Mental Examination of Persons (Rule 35)
- Requests for Admission (Rule 36)
- Subpoenas (Rule 45)

Discovery: Tools for the Court

Rule 26: Protecting the Process and the Parties

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

Discovery Sanctions

Rule 37: Enforcing the Rules

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

Discovery Sanctions

- Within the sound discretion of the trial court.
- Reviewed for abuse of discretion.

– *Baker v. Charlotte Motor Speedway, Inc.*, 180 N.C. App. 296, 299 (2006).

Discovery Sanctions- A Common Mistake

- Within the sound discretion of the trial court: any sanction must weighed, taking into account the nature of the violation.
- The sanction cannot be pre-determined
- Do not enter a self-executing order.

Discovery Sanctions

But...

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

“Lesser Sanctions”

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

“Lesser Sanctions”

- Sample language:

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

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

“Lesser Sanctions”

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

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

“Lesser Sanctions”

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

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

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NC SUPERIOR COURT JUDGES' BENCHBOOK
School of Government, The University of North Carolina at Chapel Hill, January 2012

Civil Discovery Sanctions
Civil Discovery Sanctions

CHART OF CIVIL DISCOVERY SANCTIONS UNDER RULE 37
Ann M. Anderson, UNC School of Government (January 2012)

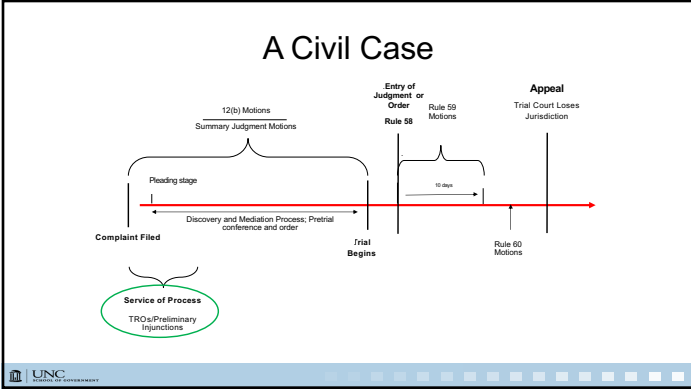
BASES OF MOTION FOR SANCTIONS ¹ Rule 37(a), (b)	SANCTIONS AVAILABLE ² Rule 37(c)	ATTORNEY FEES, EXPENSES Rule 37(d)(4)
Failure to: <ul style="list-style-type: none">Answer a question posed at a deposition or proffered in writing. Rule 37(b)(1).Designate a person to be deposed on behalf of corporate party. Rule 37(b)(2).Answer an interrogatory or serve a written request. Rule 37(b)(3).Stipulate to responses to request for inspection/production that	Compelling a party to properly respond. <ul style="list-style-type: none">Party moving to compel must include verification that it has in good faith attempted to confer with the non-moving party to resolve the matter before seeking to court action.If party fails to comply with also order compelling discovery, sanctions are available under Rule 37(d)(2). See section	<ul style="list-style-type: none">If motion granted, court shall order noncomplying party to pay reasonable expenses and attorney fees incurred in obtaining order unless court finds the failure was (a) substantially justified, or (b) that other circumstances make award unjust.If motion denied, court shall order movant to pay expenses and attorney fees incurred in opposing order unless court finds the failure was (a) substantially justified, or (b)

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

Lemons v. Old Hickory Council, Boy Scouts of Am., Inc., 322 N.C. 471, 475 (1988).



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Jury Selection Process

- Note that the procedure is different in civil and criminal.
 - See GS 15A- 1214: State always gets the first crack at newly seated jurors, Defendant must exercise all challenges to each batch before new jurors are called.
 - This statute does not apply in civil cases.
 - Consider having each party pass a full box to the opponent.

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How Many Jurors to Seat?

- Presumptive number is 12, but the parties can stipulate to a smaller group (rarely occurs)
- Parties can stipulate to a non-unanimous jury in a civil case (I never saw this happen)
- Alternate Jurors?
 - “Usual Stipulation” - parties may agree to be bound by a unanimous verdict of 10 or more jurors in lieu of alternates.
 - Becoming more rare, especially in significant cases- you cannot force this stipulation

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Handling Exhibits

- Similar to the procedure in Criminal court, e.g.,
 - A Defendant not offering evidence may waive the right to first and last jury argument by careless handling of an exhibit, even if not formally offered into evidence.
- BUT- there is a different rule in civil cases for allowing exhibits into the Jury Deliberation Room:
 - See G.S. 1-181.2- for civil cases only-
 - Conduct the jury back into the courtroom;
 - Follow the statute carefully;
 - Articulate that your decision is made *in the exercise of discretion*.

113

Jury Instructions

- How does civil differ from criminal?

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Civil Jury Instructions

- In a criminal case, the jury decides on a verdict;
- In a civil case, the jury answers a number of specific questions, called Issues.
- “What are the Issues for the Jury in this case?”
- Your verdict sheet (and Jury Instructions) should include a roadmap for the Jury on where to go, depending upon the answers to each Issue.

115

Jury Issues

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

If you answer Issue # 1 "No," do not consider any other issue; if you answer Issue #1 "Yes," then proceed to Issue 2.

2. Did the Plaintiff, by his own negligence, contribute to his own injury?

Answer: _____

If you answer Issue # 2 "No," then go to Issue 4; if you answer Issue # 2 "Yes," then proceed to Issue 3.

3. Did the Defendant have the last clear chance to avoid injuring the Plaintiff?

Answer: _____

If you answer Issue # 3 "No," do not consider Issue #4; if you answer Issue #3 "Yes," then proceed to #4.

4. What amount is the Plaintiff entitled to recover from the Defendant for his personal injuries? Answer: \$_____.



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Entering Judgment

- Prepare (or direct the prevailing attorney to prepare) a written judgment that recites the Jury Issues and Answers, with an Order directing the relief granted.
- Interest:
 - Statutory rate from entry of judgment
 - Pre-judgment interest? (in certain cases).



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Entering Judgment

- Be mindful of the issue of costs:
 - Costs shall be taxed against either party, or apportioned among the parties, in the discretion of the court. G.S. 6-21.
 - If there is any dispute as to taxable costs, schedule a hearing, consider arguments and follow the statute. G.S. 7A-305(d).
 - Attorney fees may be awarded only when specifically authorized by statute. See generally G.S. 6-21, G.S. 6-21.1 and G.S. 6-21.2.



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



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Directed Verdict and New Trial



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

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Directed Verdict and New Trial

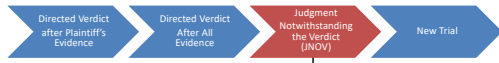


Standard: After all evidence, no basis in evidence for jury to decide in favor of non-movant. (Again, there's not "more than a scintilla of evidence" in non-movant's favor.)

Necessary in order to preserve right to move for JNOV.

126

Directed Verdict and New Trial



Standard: Same as directed verdict. (It is a "renewal" of the directed verdict motion.)
Must be made within 10 days of entry of judgment.

127

Directed Verdict and New Trial



Standard: Grounds listed in 59(a).
Motion must be seped within 10 days of entry of judgment.
Often combined with JNOV. Court must rule on both. 59(c)(1).

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Decision Chart

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

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

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JNOV and Punitive Damages

JNOV standard:

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

JNOV and Punitive Damages

JNOV on a punitive damages verdict:

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

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

JNOV and Punitive Damages

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

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

JNOV and Punitive Damages

§ 1D-50. Judicial review of award.

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

133

Rule 59(a) grounds

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

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

"against the greater weight of the evidence"

of the court;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

134

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- (8) Error in law occurring at the trial and objected to by the party making the motion; or
- (9) Any other reason heretofore recognized as grounds for new trial.

ALSO: Must have been materially prejudicial error.

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

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

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

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

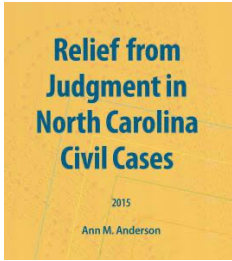
Lemons v. OM Hickory Council, Boy Scouts of Am., Inc., 322 N.C. 271, 275 (1988).

DID YOU KNOW?

Self test

- About a month after you entered judgment in a case, you discover you made a legal error.
- Can you fix it?
 1. Yes
 2. No

Post-judgment motions



- Rule 59
- Rule 60

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Rule 59: within 10 days of entry of judgment/order

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

• On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

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Rule 59

- (d) On initiative of court. - Not later than 10 days after entry of judgment the court of its own initiative, on notice to the parties and hearing, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.
- (e) Motion to alter or amend a judgment. - A motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment.

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Relief from Judgment Rule 60



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Rule 60(b)

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

One Year

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Rule 60(b)

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

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60(b)(6)

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

60(b)(6)

Requires:

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

Englity Corp. v. Nell, 258 N.C. App. 402, 407 (2018) (citing *Gibby v. Lindsey*, 149 N.C. App. 470 (2002); *Oxford Plastics v. Goodson*, 74 N.C. App. 256 (1985)).

60(b)(6)

- Cannot be used to circumvent requirements for (b)(1) to (b)(5).

— *E.g.*, if argument is newly-discovered evidence ((b)(2)), and more than 1 year has passed, cannot argue under (b)(6).

Bruton v. Sea Captain Prop., Inc., 96 N.C. App. 485, 386 S.E.2d 58 (1989).

60(b)

KEY LIMITATION:

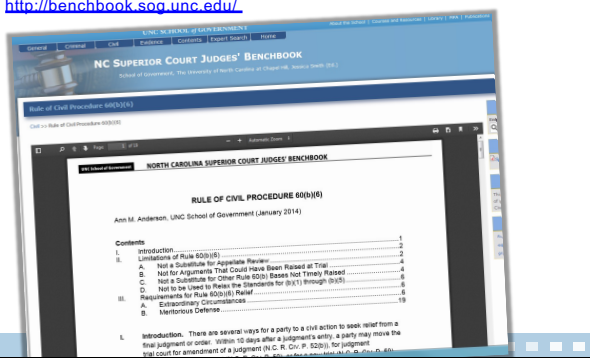
- **NOT** to be used to correct errors of law.

Roark v. Yandle, 2022-NC-292, ¶ 21; *Jackson v. Jackson*, 273 N.C. App. 305 (2020); *Catawba Valley Bank v. Porter*, 188 N.C. App. 326 (2008); *Hagwood v. Odom*, 88 N.C. App. 513 (1988).

- **NOT** a substitute for appellate review or motions for new trial. *Id.*; *Jenkins v. Richmond Cty.*, 118 N.C. App. 166 (1995).

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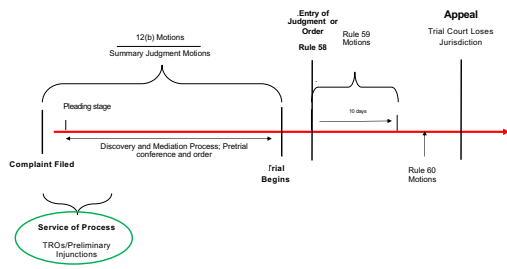
150

DID YOU KNOW?

Self test

- After you enter judgment, plaintiff files notice of appeal
- Plaintiff then files a Rule 60(b)(3) motion, asserting defendant committed fraud upon the court during the trial
- Can you rule on the Rule 60 motion?
 - Yes
 - No
 - Kind of.....

A Civil Case



Effect of appeal

- Once appeal is filed, trial court divested of all jurisdiction relating to the claim/matter on appeal.
 - *Sink v. Easter*, 288 N.C. 183 (1975).
- If an appeal is withdrawn, dismissed, or deemed abandoned, jurisdiction is regained.
 - *Estrada v. Jaques*, 70 N.C. App. 627, 638, 321 (1984); *McGinnis v. McGinnis*, 44 N.C. App. 381, 385 (1980)
- While appeal pending, trial court may conditionally determine how it would rule on Rule 60(b) motion.
 - *Hall v. Cohen*, 177 N.C. App. 456 (2006).

Motions to Dismiss

- Lack of service
- Insufficiency of Service
- Lack of jurisdiction
- Failure to state a claim-12(b)(6)

See Rule 12, NC RCP

- Note Rule 12(h)-Waiver and preservation of certain defenses—a defense of lack of jurisdiction over the person, insufficiency of process or insufficiency of service of process is waived (i) if omitted from a motion in the circumstances described in section (g) [consolidation with other motions or defenses] or (ii) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

General Appearance

- If a party appears in an action without contesting the jurisdiction of the court over him, then he has made a general appearance, thereby waiving any objection to insufficiency of process or service of process.
- Note: lack of subject matter jurisdiction can be raised at any time, even on appeal. Certain defenses are jurisdictional, for example, governmental immunity.
- If you deny a MTD based on such a defense, the Defendant is entitled to an immediate appeal as a matter of right.

Jury Selection Process

- Note that the procedure is different in civil and criminal.
 - See GS 15A- 1214: State always gets the first crack at newly seated jurors, Defendant must exercise all challenges to each batch before new jurors are called.
 - This statute does not apply in civil cases.
 - Consider having each party pass a full box to the opponent.

How Many Jurors to Seat?

- Presumptive number is 12, but the parties can stipulate to a smaller group (rarely occurs)
- Parties can stipulate to a non-unanimous jury in a civil case (I never saw this happen)
- Alternate Jurors?
 - “Usual Stipulation” - parties may agree to be bound by a unanimous verdict of 10 or more jurors in lieu of alternates.
 - Becoming more rare, especially in significant cases- you cannot force this stipulation

Opening Statements

- Court may allow opening statements and impose time limits in the exercise of discretion. See Rule 12 of the Rules of Practice.
- Rule 12 also includes other helpful pointers:
 - When to stand, when to sit;
 - When to remain at counsel tables or approach the witness;
 - Yield gracefully to the rulings of the court.

Entry of Default and Default Judgment

- Clerk enters the Entry of Default
- Judge enters Default Judgment, subject to exceptions (sum certain, e.g.)
- Things to look for before signing:
 - Adequate service of process
 - Has time expired without an extension or responsive pleading?

Setting Aside Defaults

- See Rule 55, Rule 59 and Rule 60
- Note the difference in standards:
 - Excusable neglect
 - Specified grounds, coupled with “meritorious defense.”

Motion to Dismiss- Rule 12(b)(6)

- Failure to state a claim for which relief can be granted
- Allegations in the Complaint are accepted as being true for purposes of the determination;
- Granted only if Complaint states no legally cognizable claim, e.g.:
 - Complaint shows that S/L has already expired;
 - Pleads a claim that doesn't exist;
 - Pleads a claim that NC courts don't recognize, e.g., a free standing claim for “Civil Conspiracy.”

Handling Exhibits

- Similar to the procedure in Criminal court, e.g.,
 - A Defendant not offering evidence may waive the right to first and last jury argument by careless handling of an exhibit, even if not formally offered into evidence.
- BUT- there is a different rule in civil cases for allowing exhibits into the Jury Deliberation Room:
 - See G.S. 1-181.2- for civil cases only-
 - Conduct the jury back into the courtroom;
 - Follow the statute carefully;
 - Articulate that your decision is made *in the exercise of discretion*.

Jury Instructions

- How does civil differ from criminal?

Civil Jury Instructions

- In a criminal case, the jury decides on a verdict;
- In a civil case, the jury answers a number of specific questions, called Issues.
- “What are the Issues for the Jury in this case?”
- Your verdict sheet (and Jury Instructions) should include a roadmap for the Jury on where to go, depending upon the answers to each Issue.

Jury Issues

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

If you answer Issue # 1 "No," do not consider any other issue; if you answer Issue #1 "Yes," then proceed to Issue 2.

2. Did the Plaintiff, by his own negligence, contribute to his own injury?

Answer: _____

If you answer Issue # 2 "No," then go to Issue 4; if you answer Issue # 2 "Yes," then proceed to Issue 3.

3. Did the Defendant have the last clear chance to avoid injuring the Plaintiff?

Answer: _____

If you answer Issue # 3 "No," do not consider Issue #4; if you answer Issue #3 "Yes," then proceed to #4.

4. What amount is the Plaintiff entitled to recover from the Defendant for his personal injuries? Answer: \$_____.



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Entering Judgment

- Prepare (or direct the prevailing attorney to prepare) a written judgment that recites the Jury Issues and Answers, with an Order directing the relief granted.
- Interest:
 - Statutory rate from entry of judgment
 - Pre-judgment interest? (in certain cases).



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Entering Judgment

- Be mindful of the issue of costs:
 - Costs shall be taxed against either party, or apportioned among the parties, in the discretion of the court. G.S. 6-21.
 - If there is any dispute as to taxable costs, schedule a hearing, consider arguments and follow the statute. G.S. 7A-305
 - Attorney fees may be awarded only when specifically authorized by statute. See generally G.S. 6-21, G.S. 6-21.1 and G.S. 6-21.2.



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QUESTIONS?

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