Civil Procedure Essentials

Ann M. Anderson
Orientation for New Superior Court Judges
January 23, 2018

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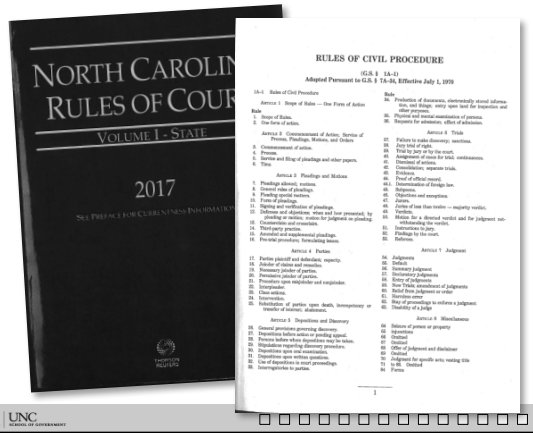
N.C. Rules of Civil Procedure
G.S. § 1A-1

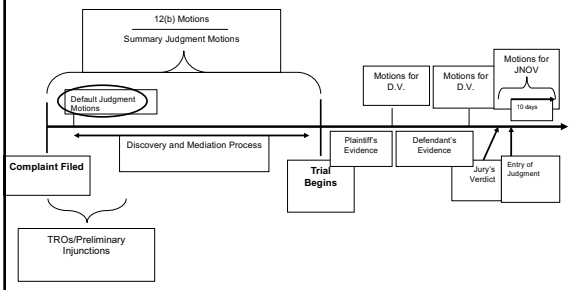
(and G.S. Chapter 1)



- Injunctive Relief – 65
- "Early" Dismissal Motions – 9(j), 12, 56
  - Voluntary Dismissals (Rule 41(a))
- Sanctions – 37 (Discovery); 11 (Papers)

- Judgment Before Case Goes to Jury (Directed Verdict) – 50 (and 41(b))
- Judgment/Relief Despite What Jury Said (JNOV, New Trial) – 50, 59
- Post-Judgment Relief – 60(b)

A Civil Case



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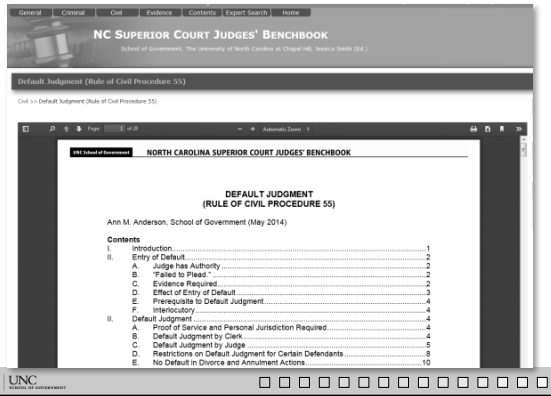
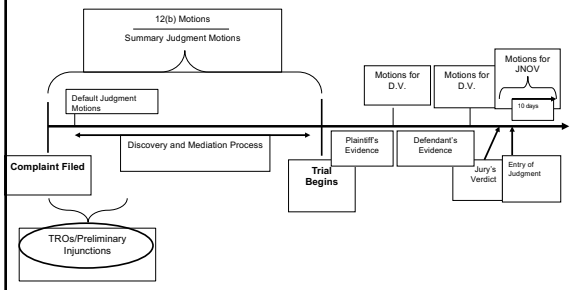


A Civil Case



Injunctions Rule 65

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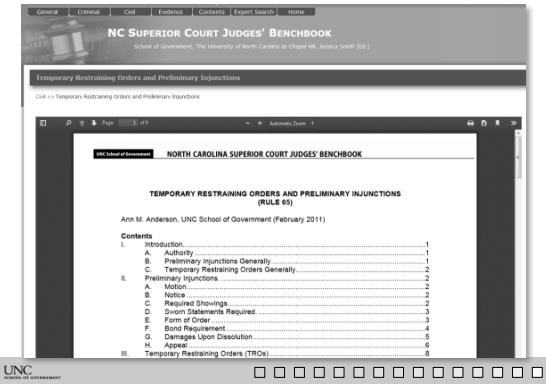

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TROs and Prelim. Injunctions

Provide a party some relief while the case is pending.

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

Little Lamb, Inc. v. Mary

Exercise 1

TROs

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

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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*

TROs

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

TROs

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

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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

Hearing:

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

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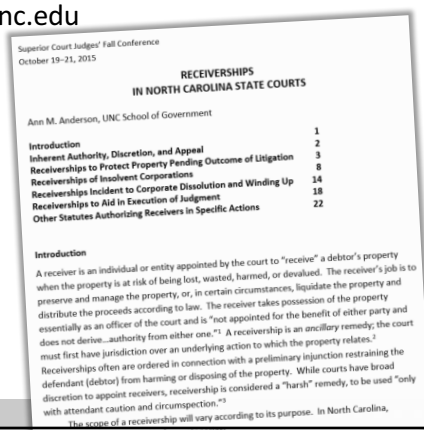

Superior Court Judges' Fall Conference
October 19–21, 2015

RECEIVERSHIPS IN NORTH CAROLINA STATE COURTS

Ann M. Anderson, UNC School of Government

Introduction

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

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

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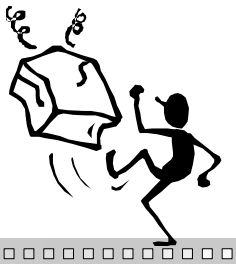
Motions to Dismiss Rule12(b)

(and 9(j))



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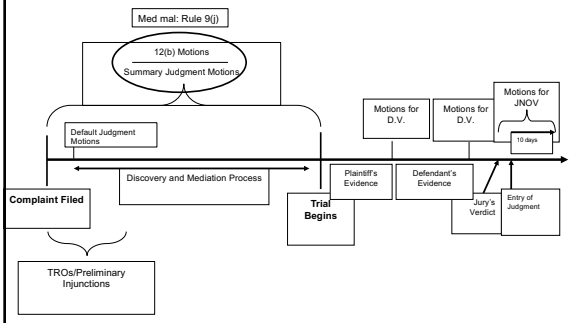

Motion to Dismiss – 9(j) (Med mal)

The Law:

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

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Motions to Dismiss – 9(j)

Complaint dismissed unless…

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

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

Motions to Dismiss – 9(j)

- Can't amend complaint per Rule 15 to comply with Rule 9(j). *Keith* (1998); *Thigpen* (N.C. 2002)
- Must dismiss complaint and refile under Rule 41(a). **But…**
  - Must comply with Rule 9(j) prior to expiration of original statute of limitation (or 120-day extension). *Fintchre* (2016), *Alston* (2016), *Keith* (1998)
  - Rule 41 does not extend period for compliance with Rule 9(j) beyond original statute of limitation. *McKoy* (2011); *Ford* (2008); *Barksdale* (2005); *Bass* (2003).

Vaughn v. Mashburn (N.C. App. Dec. 2016)

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Rule 9(j) before Oct. 1, 2011

Complaint dismissed unless…

(1) The pleading specifically asserts that the medical care has been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care; [or]

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

Rule 9(j) after Oct. 1, 2011

Complaint dismissed unless…

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

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Vaughn v. Mashburn (N.C. App. Dec. 2016)

Plaintiff obtained Rule 9(j) review from expert

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

Plaintiff moves to amend to correct Rule 9(j) language

Motion to amend denied as "futile" because s/lim had expired. Case dismissed.

Statute of limitations expires

Affirmed.
Based on *Fintchre* (2016), *Alston* (2016), *Keith* (1998)

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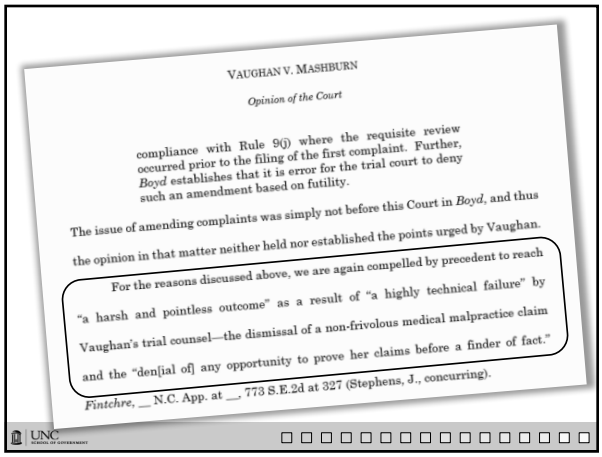


VAUGHAN V. MASHBURN

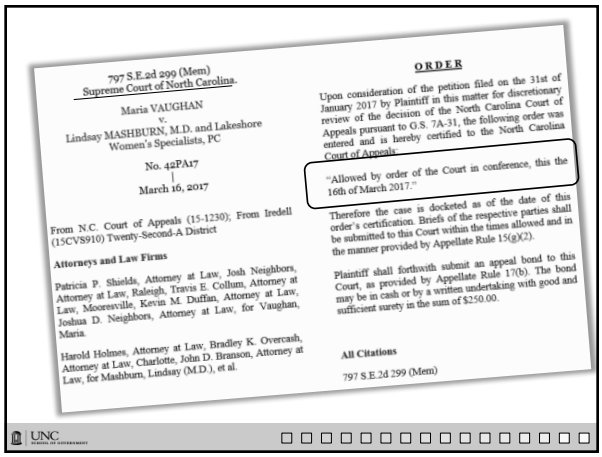
Opinion of the Court

compliance with Rule 9(j) where the requisite review occurred prior to the filing of the first complaint. Further, *Boyd* establishes that it is error for the trial court to deny such an amendment based on futility.

The issue of amending complaints was simply not before this Court in *Boyd*, and thus the opinion in that matter neither held nor established the points urged by Vaughan.

For the reasons discussed above, we are again compelled by precedent to reach "a harsh and pointless outcome" as a result of "a highly technical failure" by Vaughan's trial counsel—the dismissal of a non-frivolous medical malpractice claim and the "den[ial of] any opportunity to prove her claims before a finder of fact."

Fintchre, __ N.C. App. at __, 773 S.E.2d at 327 (Stephens, J., concurring).



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

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

No. 42PA17
|
March 16, 2017

From N.C. Court of Appeals (15-1230); From Iredell (15CVS910) Twenty-Second-A District

Attorneys and Law Firms

Patricia P. Shields, Attorney at Law, Josh Neighbors, Attorney at Law, Raleigh, Travis E. Collum, Attorney at Law, Mooresville, Kevin M. Duffan, Attorney at Law, Joshua D. Neighbors, Attorney at Law, for Vaughan, Maria.

Harold Holmes, Attorney at Law, Bradley K. Overcash, Attorney at Law, Charlotte, John D. Branson, Attorney at Law, for Mashburn, Lindsay (M.D.), et al.

ORDER

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

"Allowed by order of the Court in conference, this the 16th of March 2017."

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

Plaintiff shall forthwith submit an appeal bond to this Court, as provided by Appellate Rule 17(b). The bond may be in cash or by a written undertaking with good and sufficient surety in the sum of $250.00.

All Citations

797 S.E.2d 299 (Mem)

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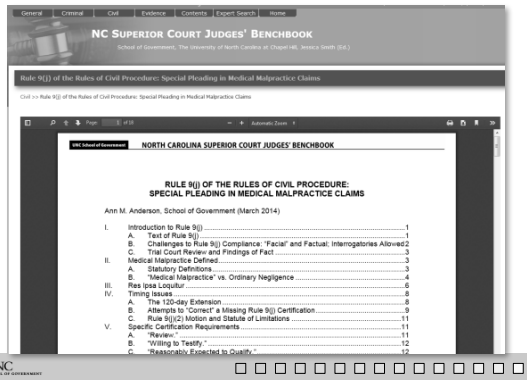

NC SUPERIOR COURT JUDGES' BENCHBOOK

School of Government, The University of North Carolina at Chapel Hill. Jessica Smith (Ed.)

Rule 9(j) of the Rules of Civil Procedure: Special Pleading in Medical Malpractice Claims

NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK

RULE 9(j) OF THE RULES OF CIVIL PROCEDURE:
SPECIAL PLEADING IN MEDICAL MALPRACTICE CLAIMS

Ann M. Anderson, School of Government (March 2014)

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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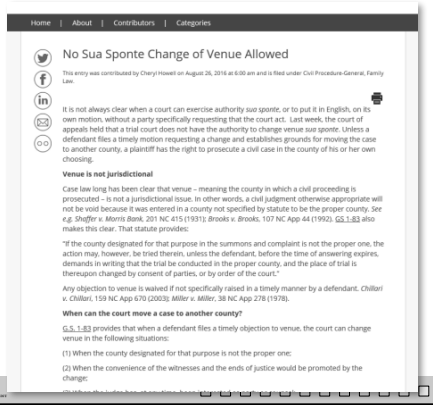
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No Sua Sponte Change of Venue Allowed

This entry was contributed by Cheryl Howell on August 26, 2016 at 6:00 am and is filed under Civil Procedure-General, Family Law.

It is not always clear when a court can exercise authority *suo sponte*, or to put it in English, on its own motion, without a party specifically requesting that the court act. Last week, the court of appeals held that a trial court does not have the authority to change venue *sua sponte*. Unless a defendant files a timely motion requesting a change and establishes grounds for moving the case to another county, a plaintiff has the right to prosecute a civil case in the county of his or her own choosing.

Venue is not jurisdictional

Case law long has been clear that venue – meaning the county in which a civil proceeding is prosecuted – is not a jurisdictional issue. In other words, a civil judgment otherwise appropriate will not be void because it was entered in a county not specified by statute to be the proper county. *See e.g. Shaffer v. Morris Bank*, 201 NC 415 (1931); *Brooks v. Brooks*, 107 NC App 44 (1992). GS 1-83 also makes this clear. That statute provides:

"If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court."

Any objection to venue is waived if not specifically raised in a timely manner by a defendant. *Chillari v. Chillari*, 159 NC App 670 (2003); *Miller v. Miller*, 38 NC App 278 (1978).

When can the court move a case to another county?

G.S. 1-83 provides that when a defendant files a timely objection to venue, the court can change venue in the following situations:

(1) When the county designated for that purpose is not the proper one;

(2) When the convenience of the witnesses and the ends of justice would be promoted by the change;

Motions to Dismiss - Consolidation

- If a party makes a 12(b) motion, it must include in that motion all other 12(b) defenses available to it at the time or it waives those defenses. 12(g).
- Not:
  - Rule 12(b)(6),
  - 12(b)(7) (necessary party); or
  - 12(b)(1) (subject matter jurisdiction). 12(h).

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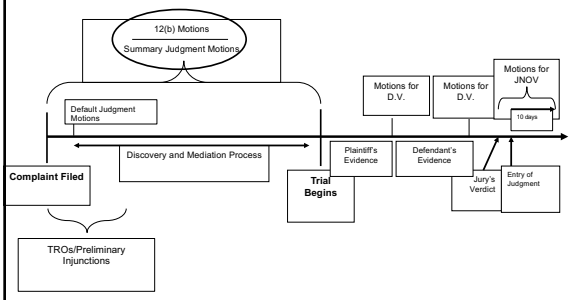
Rules 12(b)(6) & Summary Judgment (56)

A Civil Case



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

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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

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Little Lamb, Inc. v. Mary

Exercise 2

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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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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)

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S.J. – Contradictory Testimony

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

S.J. – Contradictory Testimony

18 April 2008 Depo:

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

A: "I don't think anybody can say that." … "One will never know if fundal pressure, given or not given, contributed."

S.J. – Contradictory Testimony

18 November 2008 Affidavit:

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

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S.J. – Contradictory Testimony

18 November 2008 Affidavit:

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

CONTRADICTORY

S.J. – Contradictory Testimony

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

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

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

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

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

S.J. – Contradictory Testimony

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

Issue: Did defendant sign a rejection form?

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

NOT CONTRADICTORY

Summary Judgment – Findings of Fact?

Rule 52(a)(2):

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

Summary Judgment – Findings of Fact?

Rule 52. Findings by the court

(a) Findings –

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

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

Summary Judgment – Findings of Fact?

BUT…

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

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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))

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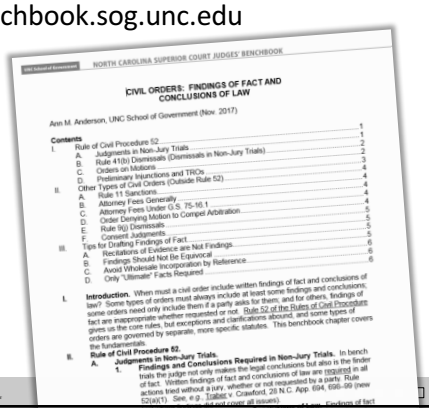
NORTH CAROLINA SUPERIOR COURT JUDGES' BENCHBOOK

CIVIL ORDERS: FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ann M. Anderson, UNC School of Government (Nov. 2017)

Contents

I. **Introduction.** When must a civil order include written findings of fact and conclusions of law? Some types of orders must always include at least some findings and conclusions, some orders need only include them if a party asks for them, and for others, findings of fact are inappropriate whether requested or not. Rule 52 of the Rules of Civil Procedure gives us the core rules, but exceptions and clarifications abound, and some types of orders are governed by separate, more specific statutes. This benchbook chapter covers the fundamentals.

II. **Rule of Civil Procedure 52.**

A. **Judgments in Non-Jury Trials.**

1. **Findings and Conclusions Required in Non-Jury Trials.** In bench trials the judge not only makes the legal conclusions but also is the finder of fact. Written findings of fact and conclusions of law are required in all actions tried without a jury, whether or not requested by a party. Rule 52(a)(1). See, e.g., Triplett v. Crawford, 28 N.C. App. 694, 695–99 (new

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Summary Judgment

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

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Voluntary Dismissals (Rule 41(a))

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Rule 41(a) Voluntary Dismissals

- A party may dismiss a claim *"at any time <u>before</u> the plaintiff rests"*

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

- Claim may be refiled within 1 year.

Rule 41(a) dismissal?

Allied Spectrum v. German Auto Ctr. (COA Nov. 2016)

- Summary judgment hearing.
- At end of argument, Plaintiff's counsel says, "*I have no further comments*."
- Trial court takes it under advisement and offers parties 1 day ("*if you choose*") to brief him on a particular matter.
- Next day, Plaintiff's counsel takes voluntary dismissal under Rule 41(a).
- Trial court deems dismissal ineffective, because Plaintiff's counsel had "rested." Granted s.j. for Defendant.

AFFIRMED

Majority: Plaintiff clearly rested summary judgment argument. Lost right to take Rule 41 dismissal.

Dissent: Trial court kept matter open by offering chance to present authorities; Plaintiff properly invoked "safety net."

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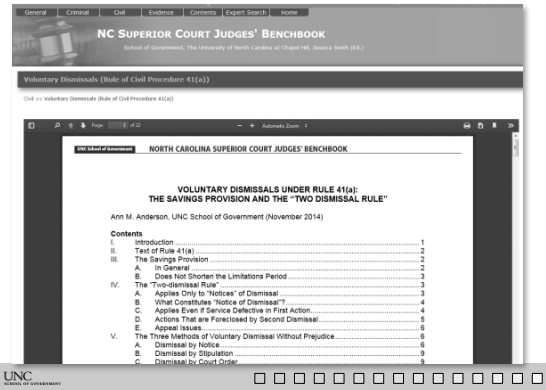

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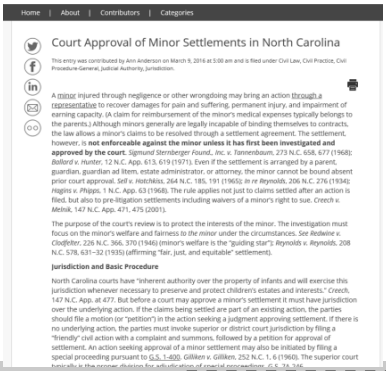

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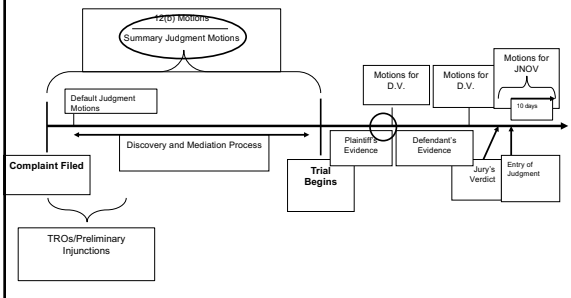

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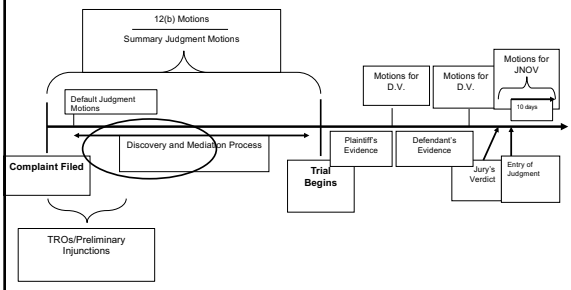
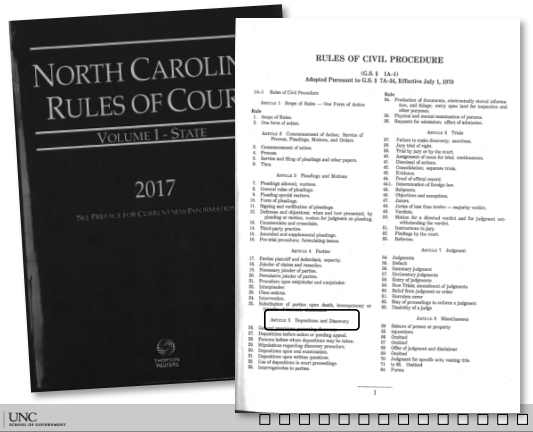
Sanctions

(Discovery, Rule 11)

A Civil Case





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.

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)

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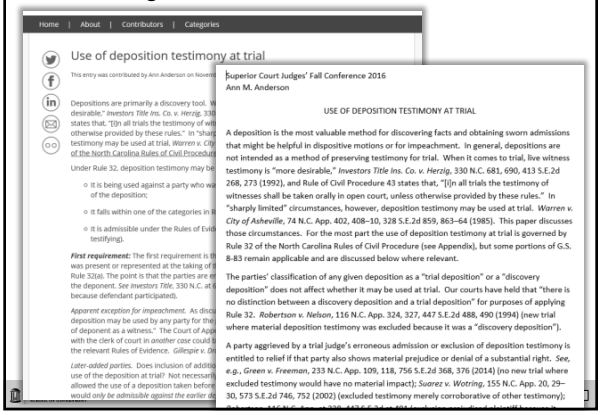

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Discovery: Tools for the Court

Rule 26: Protecting the Process and the Parties

- Court has power to:
  - Limit discovery to prevent abuse and undue burdens on parties. (b)(2)
  - Issue protective orders to prevent unnecessary disclosure of sensitive information. (c)
  - Order a discovery conference to set the parameters and plan of discovery. (f), (f1)
  - 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 responds to a request, but incompletely, evasively, or without candor.
- Sanctions

  When a party:
  1. Just simply didn't respond; or
  2. Didn't comply with prior order compelling discovery.

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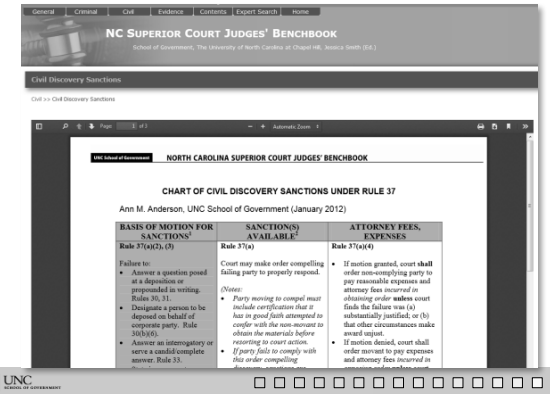

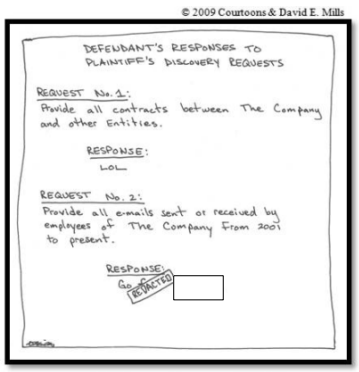

If discovery requests called for the initial response.

Little Lamb, Inc. v. Mary

Exercise 3

UNC SCHOOL OF GOVERNMENT

Discovery Sanctions

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

Discovery Sanctions

But…

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

"Lesser Sanctions"

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

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"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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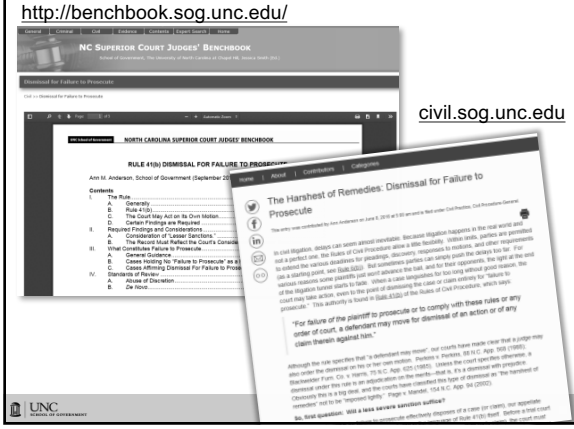

Attorney Fees as Sanction

- To determine amount of reasonable fee award, judge ***must make findings of fact regarding***:
  (1) time and labor expended by attorney;
  (2) skill required for the work;
  (3) customary fee for like work; and
  (4) experience and ability of attorney.

Gilchrist v. French, 169 N.C. App. 255 (2005).

Rule 11

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

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Rule 11 – "Other paper"

- The term "other paper", for purposes of Rule 11, does not include responses to discovery requests.
- "[A] motion under [Rule 26(g)] is the proper avenue for sanctioning such improper conduct."

Brooks v. Giesey, 334 N.C. 303, 318-19 (1993).

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)(2)
  - Issue protective orders to prevent unnecessary disclosure of sensitive information. (c)
  - Order a discovery conference to set the parameters and plan of discovery. (f), (f1)
  - Issue sanctions for violations of obligation to certify that requests made without improper intent. (g)

Rule 26(g)

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

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

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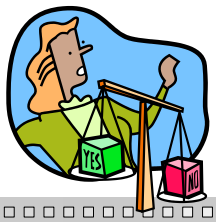
Rule 11 Sanctions

- Orders granting or denying sanctions should contain findings and conclusions to allow appellate review.
  - *Sholar, Lowry*

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



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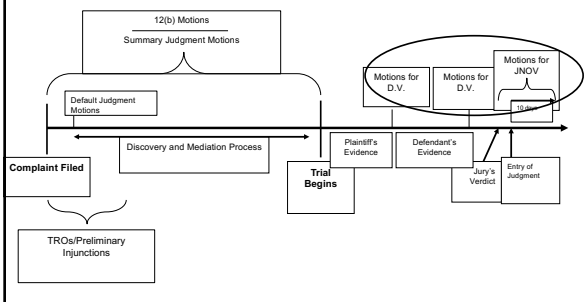

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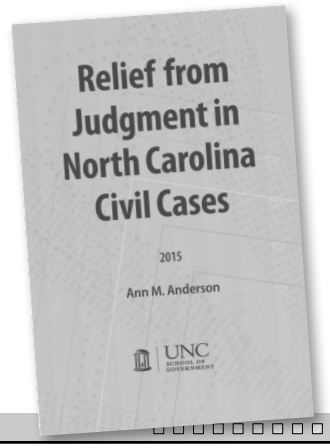

When is it appropriate to take the case away from the jury once trial is underway (and after verdict)?

Directed Verdict and New Trial

Directed Verdict after Plaintiff's Evidence → Directed Verdict After All Evidence → Judgment Notwithstanding the Verdict (JNOV) → 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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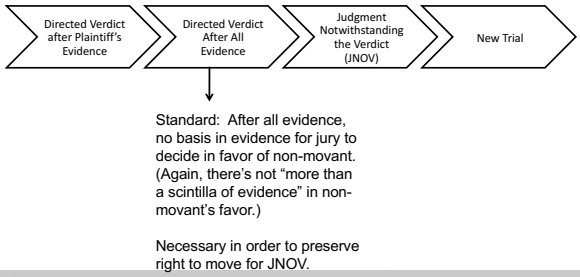
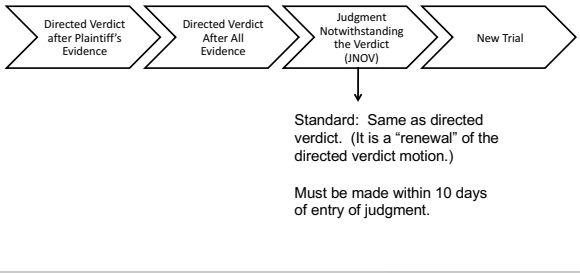
Directed Verdict and New Trial



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.

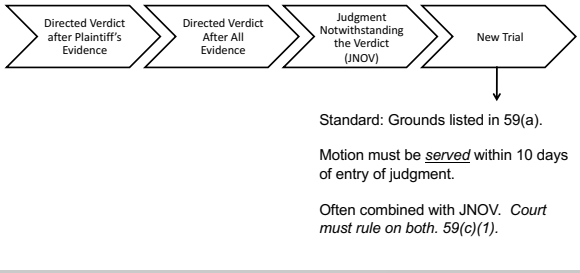
Directed Verdict and New Trial



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

Must be made within 10 days of entry of judgment.

Directed Verdict and New Trial



Standard: Grounds listed in 59(a).

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

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

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New trial grounds (59(a))

(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.

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Little Lamb, Inc. v. Mary

Exercise 4

UNC SCHOOL OF GOVERNMENT

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.)

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;

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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.

Combined JNOV/New Trial Motions

- When court grants JNOV, court must also rule conditionally on the new trial motion:
  - If new trial conditionally granted, and the COA reverses JNOV, new trial will proceed (unless Court of Appeals rules otherwise).
  - If new trial conditionally denied, movant may also appeal that denial.

Rule 50(c)(1).

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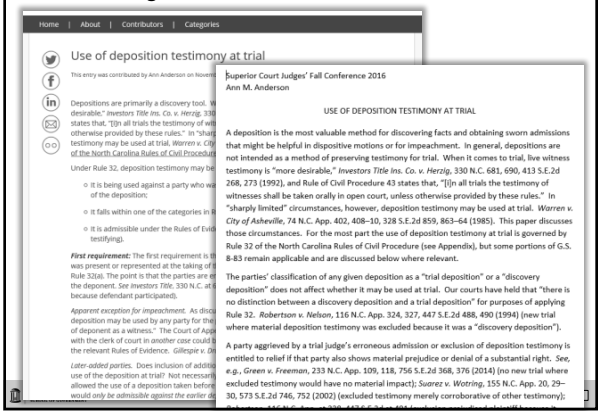

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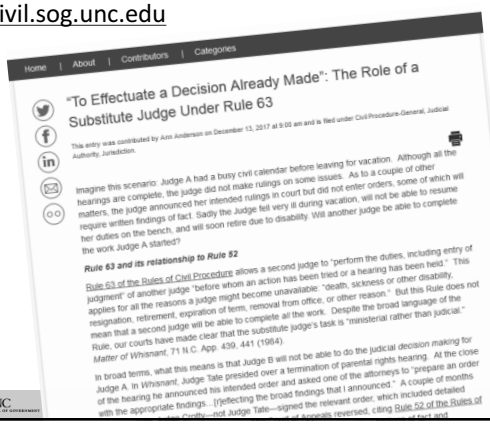

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"To Effectuate a Decision Already Made": The Role of a Substitute Judge Under Rule 63

This entry was contributed by Ann Anderson on December 13, 2017 at 9:00 am and is filed under Civil Procedure-General, Judicial Authority, Jurisdiction.

Imagine this scenario: Judge A had a busy civil calendar before leaving for vacation. Although all the hearings are complete, the judge did not make rulings on some issues. As to a couple of other matters, the judge announced her intended rulings in court but did not enter orders, some of which will require written findings of fact. Sadly the Judge fell very ill during vacation, will not be able to resume her duties on the bench, and will soon retire due to disability. Will another judge be able to complete the work Judge A started?

Rule 63 and its relationship to Rule 52

Rule 63 of the Rules of Civil Procedure allows a second judge to "perform the duties, including entry of judgment" of another judge "before whom an action has been tried or a hearing has been held." This applies for all the reasons a judge might become unavailable: "death, sickness or other disability, resignation, retirement, expiration of term, removal from office, or other reason." But this Rule does not mean that a second judge will be able to complete all the work. Despite the broad language of the Rule, our courts have made clear that the substitute judge's task is "ministerial rather than judicial." *Matter of Whisnant*, 71 N.C. App. 439, 441 (1984).

In broad terms, what this means is that Judge B will not be able to do the judicial decision making for Judge A. In *Whisnant*, Judge Tate presided over a termination of parental rights hearing. At the close of the hearing he announced his intended order and asked one of the attorneys to "prepare an order with the appropriate findings…[r]eflecting the broad findings that I announced." A couple of months

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Little Lamb, Inc. v. Mary

Exercise 5

UNC SCHOOL OF GOVERNMENT

What about bench trials?

Rule 41(b)

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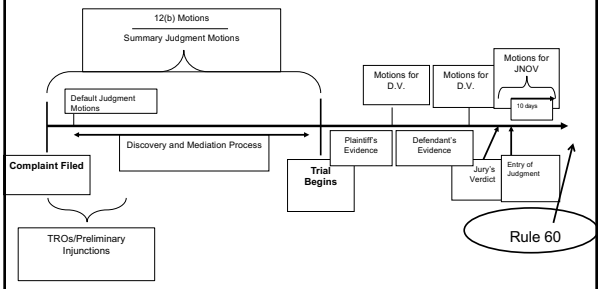
Bench Trials – Rule 41(b)

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

Relief from Judgment (Rule 60)

A Civil Case



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Rule 60(b)

- Relief from a "final judgment, order, or proceeding" for reasons relating to circumstances:

One Year

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time for new trial motion;

(3) Fraud, misrepresentation, or other misconduct of an adverse party;

Rule 60(b)

(4) Judgment is void;

(5) Judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or vacated, or it is no longer equitable that the judgment have prospective application; or

→ (6) Any other reason justifying relief from the operation of the judgment.

Little Lamb, Inc. v. Mary

Exercise 6

UNC SCHOOL OF GOVERNMENT

60(b)(6)

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

60(b)(6)

Requires:

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

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

60(b)(6)

- Cannot be used to circumvent requirements for 60(b)(1) to (b)(5).
  - For example: If argument is newly-discovered evidence, and more than 1 year has passed, cannot make same argument under (b)(6).

Bruton v. Sea Captain Prop., Inc., 96 N.C. App. 485 (1989).

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60(b)(6)

KEY POINTS:

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

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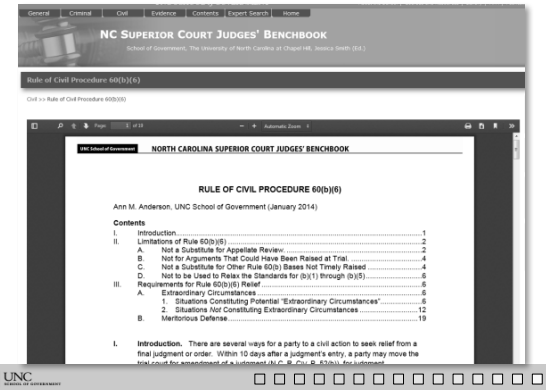

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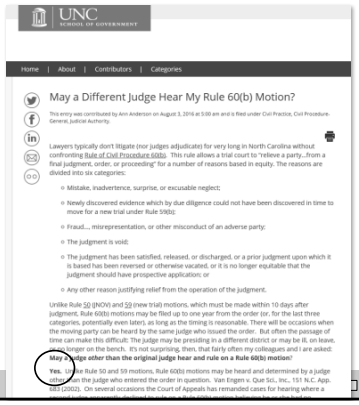

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Rule 60 – Effect of Appeal

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

SB 33 - Medical Liability: Bifurcation of Tort Trials

Rule 42(b)(3): In tort trials (not just med mal):

- Upon motion of a party
- Where plaintiff seeks more than $150,000.
- Court "shall" order separate trials of LIABILITY and COMPENSATORY DAMAGES.
  - Evidence must be separated. Same jury must decide both.
  - Court may order single trial "for good cause shown."

SB 33 - Medical Liability: Bifurcation of Tort Trials

- Bifurcation of compensatory and punitives is another issue:

G.S. 1D-30:

Liability & Compensatory Damages ⇨ Punitive Damages

G.S. 1D-30 & new Rule 42(b)(3) together:

Liability ⇨ Damages → Compensatory, Punitive

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