MEDICAL MALPRACTICE SESSION: JURY SELECTION AND OTHER ISSUES

JUNE 2023 SUPERIOR COURT JUDGES' CONFERENCE

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OVERVIEW

It is impractical and would be almost impossible to have legislation and rules governing all questions that may arise in the trial of a case. Unexpected developments, especially in the field of procedure, frequently occur. When there is no statutory provision or well recognized rule applicable, the presiding judge is empowered to exercise his discretion in the interest of efficiency, practicality and justice. Shute v. Fisher, 270 N. C. 247, 253, 154 S. E. 2d 75 (1967).

In the administration of justice in this jurisdiction, it is a recognized procedural rule that the basic manner in which a trial is conducted rests in the discretion of the trial judge. Clark v. Dickstein, 92 N. C. App. 207, 374 S. E. 2d 142 (1988).

1. Use of Questionnaires for Jury Selection.

In criminal cases, case law seems to hold that the use of questionnaires and the form of the questions posed are within the discretion of the trial judge. See State v. Fisher, 336 N. C. 689, 445 S. E. 2d 866 (1994); State v. Blakeney, 352 N. C. 287, 531 S. E. 2d 799 (2000).

2. Can a defendant require the plaintiff to bring the injured person to jury selection to facilitate questioning about juror sympathy for injured party?

3. Neutral Jury Introduction.

When prospective jurors are being questioned by counsel in the selection of a jury to try a pending action, it is essential that they be informed as to the nature and purpose of the cause to the end that counsel may ascertain whether they, or any one of them, have information, or have formed an opinion, which might disqualify them or prompt counsel to exercise their right of challenge. At times this necessitates the statement of facts which may, at least on the surface, appear to be prejudicial to the adversary parties. Even so, it is a necessary preliminary part of a trial by jury. Karpf v. Adams, 237 N. C. 106, 74 S. E. 2d 325 (1953).

N. C. Gen. Stat. 15A-1213 outlines certain requirements for informing prospective jurors about the case. There does not appear to be a similar statute for civil cases.

Should you use the term "medical malpractice?"

Provide a sample version of one.

4. Advising jurors of the anticipated length of the trial and resulting hardship issues.

5. Who handles hardship questioning and how do you do it?

6. Right to Question Jurors.

N. C. Gen. Stat. 9-15(a) provides that "(t)he court, and any party to an action, or his counsel of record, shall be allowed, in selecting the jury to make direct and oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror…" By statute and by case law, any party to an action, whether civil or criminal, is entitled to inquire into the fitness and competency of any prospective juror. State v. Wood, 20 N. C. App. 267, 269, 201 S. E. 2d 231 (1973).

7. Purposes of Questioning of Jurors.

The voir dire examination of prospective jurors serves a dual purpose: (1) to ascertain whether grounds exist for a challenge for cause; and (2) to enable counsel to exercise intelligently the peremptory challenges allowed by law. In re Worrell, 35 N. C. App. 278, 241 S. E. 2d 343 (1978).

"In order to 'exercise intelligently…their challenges for cause,' defendants typically may inquire into prospective jurors' morals, attitudes, and beliefs during voir dire, provided that the inquiry is relevant to a subject at issue at trial." State v. Crump, 376 N. C. 375, 851 S. E. 2d 904, 911 (2020).

8. Matter of Discretion.

"…the manner and extent of the inquiry is a matter committed largely to the discretion of the trial judge and is subject to his close supervision. State v. Denny, 294 N. C. 294, 296, 240 S. E. 2d 437 (1978) (such discretion is properly exercised when the trial court prohibits ambiguous or confusing hypothetical questions.)

The trial court has broad discretion in the voir dire selection of jurors. State v. Wood, 20 N. C. App. 267, 269, Pence v. Pence, 8 N. C. App. 484, 174 S. E. 2d 860 (1970).

9. Order of Questioning.

The plaintiff passes 12 jurors to the defense. The defense then exercises three peremptory challenges. Who questions the three new prospective jurors? Does the defendant question them first or do they go back to the plaintiff?

Ask for a show of hands indicating how the judges present do it. Always back to the plaintiff vs. back and forth between the parties.

N. C. Gen. Stat. 15A-1214(f) provides that the State questions replacement jurors and passes them before they are tendered to a defendant.

10. Individual Voir Dire.

There is no statutory provision for individual voir dire in civil cases.

N. C. Gen. Stat. 15A-1214(j) provides for individual voir dire in capital cases. Whether to allow individual voir dire in non-capital criminal cases is in the discretion of the trial court. State v. Artis, 316 N. C. 507, 342 S. E. 2d 847 (1986); State v. Ysaguire, 309 N. C. 780, 309 S. E. 2d 436

(1983). In State v. Roache, 358 N. C. 243, 274, 595 S. E. 2d 381 (2004), the Supreme Court observed that nothing in its opinion "should be interpreted to infringe upon the trial court's inherent authority to permit individual voir dire as to specific sensitive issues in any given case."

It seems likely that a judge in a civil case has the discretion to allow individual voir dire in general or only on specific sensitive issues in the particular case.

11. Do you pick alternate jurors?

N. C. Gen. Stat. 9-18(a) provides "(w)henever the presiding judge deems it appropriate, one or more alternate jurors may be selected in the same manner as the regular trial jurors in the case."

12. Peremptory Challenges for Alternates.

N. C. Gen. Stat. 9-18(a) further provides "each party shall be entitled to two peremptory challenges as to each such alternate juror, in addition to any unexpended challenges the party may have after the selection of the regular trial panel."

13. Procedure for selecting more than one alternate jurors.

14. Trying to avoid selecting alternates.

Rule 48 of the North Carolina Rules of Civil Procedure provides that "the parties may stipulate that the jury shall consist of any number less than 12…"

15. Multiple Defendants—ordering of questioning/striking by the defendants.

N. C. Gen. Stat. 15A-1214(e) provides that "(t)he judge in his discretion must determine the order of examination among multiple defendants."

16. Multiple Defendants—Allocation of peremptory challenges.

There is no allocation among defendants in a criminal case because the challenges are assigned to each defendant. See N. C. Gen. Stat. 15A-1217(a) and (b).

17. Multiple Defendants with antagonistic defenses.

N. C. Gen. Stat. 9-20(a) provides that "when there are two or more defendants in a civil action, the presiding judge, if it appears that there are antagonistic interests between the defendants, may in the judge's discretion apportion among the defendants the challenges now allowed by law, or the judge may increase the number of challenges to not exceeding six for each defendant or class of defendants representing the same interest."

N. C. Gen. Stat. 9-20(b) creates a similar rule for antagonistic plaintiffs.

18. Multiple Defendants—Evening up.

N. C. Gen. Stat. 9-20(c) provides that "whenever a judge exercises the discretion authorized by subsection (a) or (b) of this section to increase the number of challenges for either the plaintiffs or defendants, the judge may, in the judge's discretion, increase the number of challenges for the opposing side, not to exceed the total number given to the other side."

19. Motions in Limine—Subject Areas Addressed

These motions frequently address not only evidentiary matters but also the conduct of jury voir dire and the scope of opening and closing arguments. Typically, they are heard prior to the beginning of jury selection.

20. Motions in Limine—Enforceability of Requests

At times, it is difficult to enforce common requests. For instance, a party may seek to exclude any evidence not disclosed in discovery or any expert opinions not disclosed in either expert designations or depositions. It is difficult to police these motions if you haven't read or studied the entirety of the discovery.

21. Motions in Limine—Provisionally Allowed.

At times it isn't possible to accurately determine how to rule on a particular evidentiary issue without getting a better grasp of the case or without developing a clearer understanding of the actual issue. I will "provisionally allow" the motion which means that jurors cannot be questioned about the issue in voir dire and the subject cannot be mentioned in opening statements. When the party desires to offer the evidence, counsel is instructed to request to be heard outside the presence of the jury and the necessary testimony can be offered to frame the issue for a ruling on admissibility.

22. Motions in Limine—Timing Tip

Many times, one party will file a motion in limine on a particular issue and the other party has no intention of making the argument at issue or in offering the evidence in dispute. It may be possible to triage the lengthy list in an omnibus motion in limine by asking the party defending the motion to identify the actual portions of the motion that are in dispute rather than slogging through them one after another.

23. Motions in Limine—How to Enforce Your Ruling?

Objections to excluded evidence or improper arguments can be sustained. When a jury is instructed to disregard improperly admitted testimony, the presumption is that it will disregard the testimony. Erler v. Aon Risks Services, Inc., 141 N. C. App. 312, 540 S. E. 2d 65 (2000). A jury is presumed to follow the court's instructions. Nunn v. Allen, 154 N. C. App. 523, 574 S. E. 2d 35 (2002); Fidelity Bank v. Garner, 52 N. C. App. 60, 277 S. E. 2d 811 (1981).

What else can you do to enforce the ruling on a motion in limine?

A judge may declare a mistrial. A judge may declare "a mistrial when necessary to prevent the defeat of justice or in the furtherance of justice." Thompson v. Town & Country Construction Co., 39 N. C. App. 240, 241, 249 S. E. 2d 810 (1978). "The trial judge is clothed with this power because of his (or her) learning and integrity." Thompson, 39 N. C. App. at 241(parenthetical deemed appropriate). "The law intends that the judge will exercise it to further the ends of justice." Id. The causes for which a mistrial may be ordered are varied and within the discretion of the Court. Musgrave v. Mutual Savings & Loan Assn., 5 N. C. App. 439, 168 S. E. 2d 497

(1969). It may be necessary to prevent injustice as where…there has been an improper remark or expression of opinion by the court or abuse of privilege by counsel. Id. at 442-443.

The Court may also order a new trial. Rule 59(a) of the Rules of Civil Procedure provides that a new trial may be granted on the grounds of any irregularity by which any party was prevented from having a fair trial or misconduct of the prevailing party. See Corwin v. Dickey, 91 N. C. App. 725, 373 S. E. 2d 149 (1988) (Failure to order a new trial was an abuse of discretion due to improper closing argument). "When we can see that the appellant has been really injured in such case, we will always order a new trial." Driver v. Edwards, 251 N. C. 650, 112 S. E. 2d 98 (1960).

A party or attorney can be held in contempt for willful disobedience of a court's lawful "order, directive or instruction." N. C. Gen. Stat. 5A-11(a)(3). See State v. Okwara, 223 N. C. App. 166, 733 S. E. 2d 576 (2012).

LET'S TALK ABOUT SOME COMMON QUESTIONS OR ISSUES OFTEN RAISED IN MOTIONS IN LIMINE OR IN VOIR DIRE QUESTIONING.

24. Common Issue—Insurance

Rule 411 of the Rules of Evidence provides that "(e)vidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully." There is an exception when evidence of insurance is offered to show agency, ownership, or control or the bias or prejudice of a witness.

During the trial of a case, it is improper to mention insurance in either a positive or a negative manner. Scallon v. Hooper, 57 N. C. App. 551, 556, 293 S. E. 2d 843 (1982).

I can imagine proper ways to discuss it during voir dire. For example, does the juror handle, evaluate or adjust claims as part of their normal work activities?

It is also a subject that jurors frequently mention in responding to questions.

25. Common Issue—Settlement Negotiations

Rule 408 of the Rules of Evidence states that "(e)vidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount." Furthermore, Rule 408 provides that "(e)vidence of conduct or evidence of statements made in compromise negotiations is likewise not admissible." There are exceptions for evidence offered to prove bias or prejudice of a witness, rebutting a contention of delay or showing an effort to obstruct an investigation or prosecution.

Evidence of the dismissal of a separate lawsuit against a different defendant in a medical malpractice case was held inadmissible. Cates v. Wilson, 83 N. C. App. 448, 350 S. E. 2d 898, modified, 321 N. C. 1, 361 S. E. 2d 734 (1987).

26. Common Issue—Payment of Medical and Other Expenses.

Rule 409 of the Rules of Evidence provides that "(e)vidence of furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury is not admissible to prove liability for the injury." Rule 413 of the Rules of Evidence provides that "(s)tatements by a health care provider apologizing for adverse outcomes in medical treatment, offers to undertake corrective or remedial treatment or actions, and gratuitous acts to assist affected persons shall not be admissible to provide negligence or culpable conduct by a health care provider…"

27. Common Issue—Employment by defendant hospital or healthcare provider.

An employee of a defendant is not a competent and qualified juror. Oliphant v. Atlantic Coastline RR Co. 171 N. C. 303, 88 S. E. 425 (1916). It is very generally held that an employee is an incompetent juror for the trial of a cause involving the rights or interests of the employer. Blevins v. Erwin Cotton Mills, 150 N. C. 493, 64 S. E. 428 (1909).

28. Common Issue—Juror's Contact with defendant physician or practice.

In Edmundson v. Lawrence, 187 N. C. App. 799, 653 S.E. 2d 922 (2007), the Court of Appeals considered a challenge for cause because the juror's three children were treated by the practice where the defendant physician worked. The juror himself had no contact with the defendant's practice. The challenge for cause was properly denied when the juror assured the court that he would be able to fairly scrutinize their testimony.

29. Common Issue—Juror's Pending Lawsuit.

N. C. Gen. Stat. 9-15(c) provides that "in civil cases, if any juror has a suit pending and at issue in the court in which he is serving, he may be challenged for cause, and he shall be withdrawn from the trial panel, and he may be withdrawn from the venire in the discretion of the presiding judge."

30. Common Issue—Criticisms/Safety/Standard of Care.

31. Common Issue—Mention of a proposed amount of damages in voir dire.

There is a need to determine whether jurors can apply the legal rules instead of imposing their own arbitrary rules or a cap on damages.

32. Common Issue-- The Effect of the Case on the Parties.

"In a court of justice neither the wealth of one party nor the poverty of the other should be permitted to affect the administration of the law." Scallon v. Hooper, 57 N. C. App. 551, 556. "The wealth or poverty of the defendant is not an issue. Id. At 557.

Evidence of a defendant's wealth is ordinarily inadmissible in all cases where compensatory damages alone are recoverable. Lutz Industries, Inc. v. Dixie Home Stores, 242 N. C. 332, 88 S. E. 2d 333 (1955).

Statement by counsel, "can you imagine what a law jury verdict would do to that family" was clearly improper. Watson v. White, 309 N. C. 498, 308 S. E. 2d 268 (1983).

33. Common Issue—Golden Rule Arguments.

"We believe that in personal injury cases, as in criminal cases, a closing argument in which the jury is asked to put itself in the position of the injured party is improper." Fox-Kirk v. Hannon, 142 N. C. App. 267, 542 S. E. 2d 346 (2001).

34. Common Issue—Collateral Sources.

"This rule provides that evidence of a plaintiff's receipt of benefits for his or her injury or disability from sources collateral to defendant generally is not admissible. These benefits include payments from both public and private sources. This rule gives force to the public policy which prohibits a tortfeasor from reducing 'his own liability for damages by the amount of compensation the injured party receives from an independent source." Badgett v. Davis, 104 N. C. App. 760, 763, 411 S. E. 2d 200 (1991).

35. Common Issue—Experience with or Knowledge of Medical Condition at Issue.

36. Common Issue—Post-Covid View of Medical Expertise in light of mask, vaccination and alternative treatment options disputes.

37. Common Issue—Good/Bad Experiences with Medical Care.

38. Common Issue--Stakeout Questions.

What is a stakeout question? "A stakeout question asks a juror to pledge himself or herself to a future course of action by asking what verdict the prospective juror would render, or how they would be inclined to vote, under a given state of facts. Haarhuis v. Cheek, 255 N. C. App. 471, 805 S. E. 2d 720 (2017).

Counsel may not pose hypothetical questions, designed to elicit in advance what the juror's decision will be under a certain state of evidence or upon a given state of facts. Such questions tend to stake out the juror and cause him to pledge himself to a future course of action. This the law neither contemplates nor permits. State v. Vinson, 287 N. C. 326, 215 S. E. 2d 60 (1975).

39. Taking Expert Witnesses Out of Order

Rule 611(a) of the Rules of Evidence provides that "(t)he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment."

A trial court, in the exercise of the court's discretion, may interrupt other testimony to take an expert witness' testimony out of order. State v. Snyder, 3 N. C. App. 114, 164 S. E. 2d 42 (1968) (The State was permitted to interrupt the testimony of the mother in a criminal child support case to allow a doctor to testify out of order to minimize the inconvenience to the doctor).

40. Exhibit Notebooks—Handling exhibits that have not been admitted yet.

41. Handling Alternates once the Jury has begun deliberating.

N. C. Gen. Stat. 9-18 provides that "(a)n alternate juror…shall be discharged upon the final submission of the case to the jury." "If before that time any juror dies, becomes incapacitated or disqualified or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel."

Rule 42(b(3) of the Rules of Civil Procedure provides that in "an action in tort wherein plaintiff seeks damages exceeding $150,000, the court shall order separate trials for the issue of liability and the issue of damages unless the court for good cause shown orders a single trial." It is likely that many medical malpractice trials will be bifurcated, and the alternates will need to be retained for a potential second phase on damages.

The alternate juror substitution rule in Session Law 2021-94 does not apply to civil cases.

Our Constitution declares that in all controversies at law respecting property, the ancient mode of trial by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable. It may be said, if 13 concur in a verdict, 12 must necessarily have given their assent. But any innovation amounting in the least degree to a departure from the ancient mode, may cause a departure in other instances, and in the end, endanger or pervert this excellent institution from its usual course; therefore, no such innovation should be permitted. Whitehurst v. Davis, 3 N. C. 272 (1800).