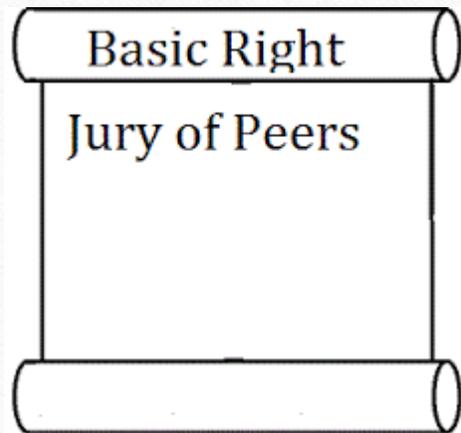


Jury Trials in
Civil District
Court--
Perspectives
from the bench
& bar

2018 NCDJC Summer Conference

Presenters: District Court Judge Becky
Tin, Attorney Walter Burton and
Attorney William Corbett





Right to Jury Trial—Constitutional

- N.C. Constitution, Article I Section 25: 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 shall remain sacred and inviolable.
- This Constitutional provision preserves the right to trial by jury in civil cases where the prerogative for trial by jury existed at common law or by statute at the time the NC Constitution was adopted in 1868.

Statutory Right to

A hand holding a blue marker is writing the words "JURY TRIAL" in blue capital letters on a white surface. A horizontal blue line is drawn underneath the text. The hand is positioned at the end of the line, as if just finishing the underlining.

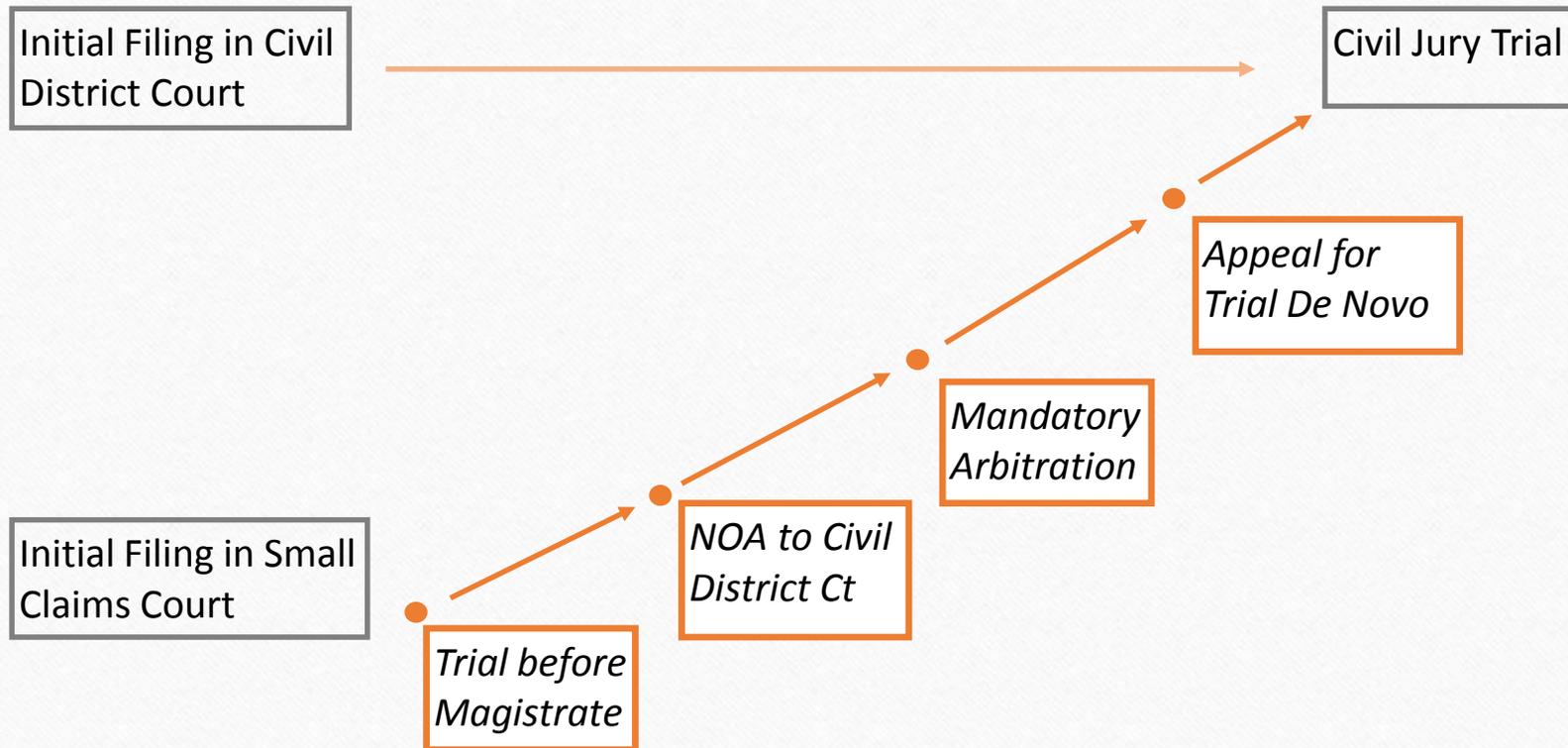
JURY TRIAL

-
- The legislature has expanded the right to jury trial to other causes of action by statute, beyond what is protected by the Constitution
 - For example, parties have a statutory right to trial by jury in actions determining incompetence; allegations of marital misconduct in an alimony claim; summary ejectment actions on appeal from the magistrate; and to establish the contents of a will where the original was destroyed.

If in doubt as to whether party has right to a jury trial...

- Look through the pattern jury instructions; if instructions are included for the cause of action(s) alleged, then the party is entitled to trial by jury;
- If you can't find it in the pattern instructions, do further case law and statutory research;
- Refer to DC Judge Rebecca Knight's manuscript, *The Right to a Jury Trial in Civil Actions in N.C.*, found on the SOG website that deals with whether a particular cause of action entitles a party to trial by jury;
- If all else fails, ask Cheryl Howell or Dona Lewandowski.

Two Paths to Jury Trial in Civil District Court



How to demand a jury trial in cases initiated in district court

- NC Rules of Civ. Pro. 38 provides that a demand for jury trial may be made at any time after the commencement of the action but no later than 10 days after service of the last pleading by serving a written demand for jury trial upon the opposing party.
- Failure to properly serve and file a demand for jury trial within 10 days after service of last pleading may result in waiver; trial judge retains discretion.
- A properly exercised demand for jury trial can only be withdrawn with the consent of the parties who have pleaded or otherwise appeared in the action either by written or oral stipulation made in open court.
- Parties may not waive jury trial of contested issues where statute requires jury trial; e.g. in a caveat proceeding, *Matter of Dunn*, 129 N.C. App. 321 (1998).

How to demand a jury trial in cases initiated in small claims court

- A party may request a jury trial when appealing from a small claims judgment by *filing and serving a copy of written notice of appeal with jury trial requested within 10 days after entry of judgment*;
- Any appellee desiring a jury on the trial de novo must serve written notice on all parties and on the clerk of superior court within 10 days after receipt of an appellant's Notice of Appeal from a small claims judgment or within 10 days after appellant orally entered notice of appeal in small claims

Pre-Trial Requirements for Jury Trial Cases

- Require a *Pre-Trial Conference* with or without judge if practicable in your jurisdiction;
- Require parties/counsel to file and serve on opposing party/counsel and presiding judge a *Pretrial Memorandum* and *Motions in Limine* three business days prior to the session that case is set for trial;
- *Pretrial Memorandum* should include a list of all witnesses and identify any expert witnesses; a list identifying all exhibits the party intends to offer, along with copies of all exhibits that can be practicably photocopied as attachments, and/or an affirmation that the party has made all exhibits available to opposing party for viewing; a list of proposed issues to be submitted to the jury; and proposed jury instructions;
- Include pre-trial requirements for jury trials in your jurisdiction's local rules and on back of trial notices mailed to parties/attorneys

Did party properly demand & preserve right to jury trial?

- Did party comply with NC Rule Civ P 38 in demanding jury trial if case is a general civil action;
- Did party comply with requirements to *serve and file* NOA and jury trial demand within 10 days of entry of magistrate's judgement if case originated in small claims;
- Did party comply with pretrial requirements contained in local rules and printed clearly on hearing notices regarding preparation and service of pretrial memo and providing opposing side access to exhibits prior to trial; if not, opposing party may move to strike jury trial on basis of failure to provide mandatory discovery and violation of local rules;
- All of the above *may* support finding by court that party did not properly demand or preserve right to jury trial;
- If party is self-represented, query whether party and opposing side would consent to waiving request for jury trial; explain that judge can remove some evidentiary roadblocks if case is tried as bench trial but judge cannot do same during jury trial because of likelihood that jury could misinterpret judge's actions as favoring the self represented party;

Motions in Limine & Other Preliminary Matters



- Call the case
- Rule on *Motions in Limine* prior to bringing in jury pool
- Establish whether counsel stipulates to admission of opposing side's exhibits and if not, why not
- Ask attorneys/parties if they consent to a unanimous verdict of no less than ten jurors so that alternates need not be selected
- Except in actions where jury is by statute, parties may stipulate that jury shall consist of any number less than 12 or that verdict of stated majority shall be binding



Consider Alternatives to 12-person jury and 8 peremptory challenges per side

Preparing for the Voir Dire



- Convene jury pool
- Introductory Remarks to Jury Pool (standard intro remarks in bench book; sample intro remarks used in Mecklenburg County in handout materials);
- Identify case, summarize issues, introduce courtroom personnel, parties and their attorneys; seat first 12; court may ask initial qualification questions and/or hand questioning over to attorneys/parties;

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"Let me get this straight. You committed the crime to get out of jury duty?"

Handling Juror Excuses

- Jury pool applications for deferral or excuse have already been prescreened and handled per Chief's policy
- Presiding judge retains discretion; be familiar with Chief's policy
- *Judge must excuse jurors who are disqualified pursuant to NCGS 9-3 (not US citizen; not resident of NC; not resident of county for which juror was summoned; under 18 years of age; convicted felon and citizenship rights have not been restored; served on jury within past two years; cannot hear or speak English language and accommodations, if requested, would not sufficiently ameliorate communication gap;*
- *Judge may excuse jurors with permanent physical or mental condition or 72 years of age or older;*

Juror “*May*” Qualify for Deferral from Jury Duty for the following reasons:

- Vacation plans (query whether plans were made *AFTER* receiving summons);
- Travel plans (query whether plans were made *AFTER* receiving summons);
- Unavoidable Work requirements (why is this juror’s situation different from other jurors’ work requirements);
- Educational considerations such as attending school out-of-state or out-of-county;
- Childcare/eldercare responsibilities (query whether another adult could handle responsibilities during this trial); or
- Personal Hardship;

VOIR DIRE

General Rule: 12-person jury; 2 alternates;
each side has 8 peremptory challenges (if multiple parties, 8 challenges apportioned
or as many as 6 each); each side has 2 peremptory challenges for each alternate
selected plus any peremptory challenges remaining.



VOIR DIRE is designed to Select Impartial Jury



- Voir Dire serves a dual purpose:
- (1) to ascertain whether grounds exist for challenge for cause and to
- (2) enable counsel to exercise intelligently the peremptory challenges allowed by law;
- *In re Will of Worrell*, 35 N.C.App.278 (1978); see also *Simmons v Parkinson*, 119 N.C.App. 424, 458 S.E.2d 726, 728 (1974);
- *NC Rule Civ P 47 and Chapter 9 of the NC Gen Statutes*

Possible “For Cause” Challenges



- Juror lacks qualifications required by NCGS 9-3;
- Juror has suit pending in court where juror is called to serve, NCGS 9-25(c);
- Juror is incapable by reason of mental or physical infirmity that cannot be adequately accommodated;
- Family, business, employment or other significant connection between juror and someone involved in case;
- Juror prejudice or opinion renders juror incapable of rendering a fair and impartial verdict;
- Any other cause that would render juror unable to render a fair and impartial verdict;



MECHANICS OF JURY SELECTION

- **General Rule: Plaintiff submits panel of 12 to defendant each time.** (in many districts, plaintiff passes 12, defendant excuses some and selects replacements; replacements are passed to plaintiff; plaintiff excuses some and selects other replacements who are passed to defendant until both sides have passed on full panel);
- **General Rule:** once Plaintiff/Defendant questions panel, exercises peremptory challenges and replacements have been called up by clerk, plaintiff/defendant is deemed to have passed on remaining jurors on panel such that questioning will be limited to replacements;
- **Clerk empanels jury***use caution;**
- **Explain stages of trial** (sample remarks used in Mecklenburg County explaining stages of trial, evidence and objections are in handout materials)

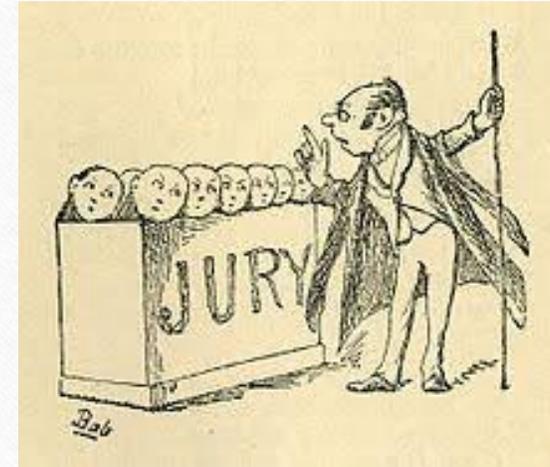
Opening Statements/Closing Arguments

- **Opening Statements:** At any time before presentation of evidence, each party may make an opening statement subject to time and scope limitations imposed by Court.
- **Closing Arguments:** If no evidence is introduced by defendant, right to open and close the argument to the jury shall belong to her; if a question arises as to which party has the final argument, the court shall decide and its decision shall be final. If there are multiple defendants and any defendant introduces evidence, then closing argument belongs to plaintiff unless trial judge orders otherwise.
- *See Rules 9 & 10, General Rules of Practice.*



Impermissible Arguments; Judge may intervene without objection

- Calling witness/party/lawyer a liar
- Reading facts/decision of other cases and arguing that jury should reach same conclusion because facts are analogous
- References to insurance
- Wealth or poverty of parties (unless relevant to dispute; i.e. punitive damages)
- Matters outside the record
- Impugning character and motives by personal attack not based upon evidence
- Curative Instruction—judge should plainly and unequivocally instruct jury not to consider the improper argument



Trial Issues

- Expert witness Testimony (*Ward v Wentz*, 20 N.C. App. 229)
- “Hearsay” Within Police Reports
- Police Officer’s “opinion” about how accident occurred; speed of vehicles; etc.
- Admissibility of medical records
- Rule 414 Medical Charges (*Gillikin v Burbage*, 263 NC 317)

NC Rules of Evidence 414: Evidence of Medical Expenses

Evidence offered to prove past medical expenses shall be limited to evidence of the amounts actually paid to satisfy the bills that have been satisfied, regardless of the source of payment, and evidence of the amounts actually necessary to satisfy the bills that have been incurred but not yet satisfied. This rule does not impose upon any party an affirmative duty to seek a reduction in billed charges to which the party is not contractually entitled. (2011-283, s. 1.1; 2011-317, s. 1.1.)

Constructing the Charge

- Require parties/counsel to submit requested instructions by start of trial
- Make friends with NC Pattern Jury Instructions
- Tailor instructions during trial and tell jury that you are working on jury instructions to expedite the proceedings
- Provide counsel with a copy of draft instructions
- At close of evidence (or earlier time) conduct a charge conference
- If counsel or party requests a specific (not pattern) instruction that is a correct statement of law and supported by the evidence, court need not adopt precise language, but must give the instruction in substance





Instructing the Jury



- If judge states the parties' contentions, equal weight and equal emphasis must be given to both sides;
- Judge should not give opinion as to whether a fact has been sufficiently proven;
- NC Rule Civ. P. 51(a) provides that the judge need not summarize or recapitulate the evidence nor explain application of the law to the evidence; i.e. it is safer to avoid those slippery slopes;
- Do not suggest that more weight should be attached to one side's evidence vs the other or identify discrepancies or conflicts in a witness's testimony or note that one witness's testimony corroborated that of another;
- *Do not ad lib*

After the Charge



- At the conclusion of the charge, out of presence of jury and before deliberations begin, counsel shall be given opportunity to object on record to charge;
- Send verdict sheet into jury room **ONLY** after jurors indicate a foreperson has been selected;
- Upon request by jury, Court may only allow exhibits to be sent to jury room ***IF*** both sides consent;
- Reach consensus with counsel on how to respond to jury requests for re-instruction and other questions; if consensus cannot be reached, judge makes the call;



; I mean, Deadlock

- Give standard dynamite charge (NC Pattern Instruction 150.50 attached);
- Give personal dynamite charge but probably best not to mention wasted time, jury, and court resources; such is reversible error in criminal trials and may or may not withstand appellate scrutiny in civil trials;
- Ask for count from foreperson;
- See if counsel will agree to a verdict of less than 12 based upon count;

Taking the Verdict

- Ask foreperson to stand & ask if jury has reached unanimous verdict;
- Ask if foreperson has recorded verdict & signed & dated verdict sheet;
- Ask foreperson to hand verdict sheet to deputy;
- Review verdict sheet to see if it is complete and accurate and if so, hand to clerk, asking clerk to take the verdict;
- Clerk takes verdict then asks jurors to raise right hands if this is still their verdict;
- Ask counsel if there are further matters requiring presence of jury;
- If requested, have clerk poll jury;
- Thank jurors for service and release with closing instructions;
- DO NOT make comment on the verdict in presence of jurors;



Inconsistent Verdict

- Verdict is only taken by clerk if accepted by judge;
- It is duty of Judge to check form and substance of verdict sheet;
- Where jury's findings are inconsistent, judge may give additional instructions and direct jurors to retire again to bring in proper verdict but may not tell jurors what their verdict should be;
- Where a special finding of fact on verdict sheet is inconsistent with general verdict, the former controls and judge shall give judgment accordingly; NC Rule Civ. P 49(d);
- Judge may vacate an answer on verdict sheet if extraneous;
- Judge can resubmit all issues or only inconsistent ones;



Entering Judgment

- Direct prevailing party to prepare the judgment in accordance with the verdict;
- Ask if there are any remaining issues to be heard; i.e. motions for attorney fees or judgment notwithstanding verdict;
- If yes, hear motions at close of jury trial or as soon thereafter as possible;
- Direct prevailing party to prepare judgment in accordance with findings/ruling on motions;

Post Trial Issues

- Rule 68 Offer of judgment
- NCGS 6-21.1 Attorney Fees
- Statutory Costs

NC Rule Of Civil Procedure 68

- (a) Offer of judgment – At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted within 10 days after its service shall be deemed withdrawn and evidence of the offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.
- (b) Conditional offer of judgment for damages – A party defending against a claim arising in contract or quasi contract may, with his responsive pleading, serve upon the claimant an offer in writing that if he fails in his defense, the damages shall be assessed at a specified sum; and if claimant signifies his acceptance thereof in writing within 20 days of the service of such offer, and on the trial prevails, his damages shall be assessed accordingly. If the claimant does not accept the offer, he must prove his damages as if the offer had not been made. If the damages assessed in the claimant's favor do not exceed the sum stated in the offer, the party defending shall recover the costs in respect to the question of damages (1967, c. 954, s. 1.)

NCGS 6-21.1 Allowance of Counsel Fees as Part of Costs in Certain Cases

- (a) In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company in which the insured or beneficiary is the plaintiff, instituted in a court of record, upon findings by the court (i) that there was an unwarranted refusal by the defendant to negotiate or pay the claim which constitutes the basis of such suit, (ii) that the amount of damages recovered is twenty-five thousand dollars (\$25,000) or less, and (iii) that the amount of damages recovered exceeded the highest offer made by the defendant no later than 90 days before the commencement of trial, the presiding judge may, in the judge's discretion, allow a reasonable attorneys' fees to the duly licensed attorneys representing the litigant obtaining a judgment for damages in said suit, said attorneys' fees to be taxed as a part of the court costs. The attorneys' fees so awarded shall not exceed ten thousand dollars (\$10,000).
- (b) When the presiding judge determines that an award of attorneys' fees is to be made under this statute, the judge shall issue a written order including findings of fact detailing the factual basis for the finding of an unwarranted refusal to negotiate or pay the claim, and setting forth the amount of the highest offer made 90 days or more before the commencement of trial, and the amount of damages recovered, as well as the factual basis and amount of any such attorneys' fees to be awarded. (1959, c. 688; 1963, c. 1193; 1967, c. 927; 1969, c. 786; 1979, c. 401; 1985 (Reg. Sess., 1986), c. 976; 2011-283, s. 3.1; 2011-317, s. 1.1; 2013-159, s. 5.)

Judge Tin and the School of Government want to thank Mr. Burton and Mr. Corbett for donating their time and sharing their expertise at this jury trial presentation.

