THE GENERAL STATUTES OF NORTH CAROLINA

1985 CUMULATIVE SUPPLEMENT

Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

Under the Direction of
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Volume 1A, Part II

Chapters 1A to 1C

1983 Replacement

Annotated through 329 S.E.2d 896. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume.

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Preface

This Cumulative Supplement to Replacement Volume 1A, Part II contains the general laws of a permanent nature enacted by the General Assembly through the 1985 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1985 Regular Session affecting Chapters 1A through 1C of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 313, p. 337.
North Carolina Court of Appeals Reports through Volume 73, p. 335.
South Eastern Reporter 2nd Series through Volume 329, p. 896.
Federal Reporter 2nd Series through Volume 761, p. 712.
Federal Supplement through Volume 607, p. 1490.
Federal Rules Decisions through Volume 105, p. 250.
Bankruptcy Reports through Volume 48, p. 873.
Supreme Court Reporter through Volume 105, p. 2370.
North Carolina Law Review through Volume 63, p. 809.
Wake Forest Law Review through Volume 20, p. 540.
Campbell Law Review through Volume 7, p. 298.
Duke Law Journal through 1983, p. 1142.
North Carolina Central Law Journal through Volume 14, p. 680.
Opinions of the Attorney General.

The General Statutes of North Carolina

1985 Cumulative Supplement

VOLUME 1A, PART II

Chapter 1A.

Rules of Civil Procedure.

§ 1A-1. Rules of Civil Procedure.

Editor's Note. —
The official Comments printed under the individual Rules in this Chapter have been printed by the publisher as received, without editorial change. However, official Comments have not been received in conjunction with all amendments to the Rules, and therefore, subsequent amendments to the Rules may not be reflected in some instances.

Legal Periodicals. — For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

ARTICLE 1.

Scope of Rules—One Form of Action.

Rule 1. Scope of rules.

Legal Periodicals. — For survey of 1982 law on civil procedure, see 61 N.C.L. Rev. 991 (1983).

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

Applicability of Rules. — The North Carolina Rules of Civil Procedure do not apply to actions brought pursuant to the provisions of §§ 128-16 through 128-20. State ex rel. Leonard v. Huskey, 65 N.C. App. 550, 309 S.E.2d 726 (1983).

Condemnation proceedings by the State have been held to be civil actions

to which the Rules of Civil Procedure apply. In actions by private condemnors, however, a separate procedure is specified and that procedure is the exclusive means by which private condemnors may condemn land. Unless specifically noted, neither the Rules of Civil Procedure nor the statutes governing special proceedings apply. VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

Because condemnation is a special proceeding, the Rules of Civil Procedure do not apply to allow issues outside the pleadings to be tried by consent of the parties. Though it is sometimes possible to convert special proceedings to civil actions, the situations where that is true are limited and are governed by statute. Vepco v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

Applied in Campbell v. City of Greensboro, 70 N.C. App. 252, 319 S.E.2d 323 (1984).

Cited in Sides v. Duke Hosp., — N.C. App. —, 328 S.E.2d 818 (1985).

Rule 2. One form of action.

CASE NOTES

I. IN GENERAL.

Application of Section. — The argument that the general rule establishing one form of action requires that a lien be enforced by commencing an action under this rule, overlooks the familiar rule of construction that a particular statute controls a general one with reference to the same subject matter. For example, section 44A-13(a) specifically directs that a lien against property vested in a trustee in bankruptcy shall be enforced in accordance with the orders of the bankruptcy court. Therefore, section 44A-13(a) controls over this rule. RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

ARTICLE 2.

Commencement of Action; Service of Process, Pleadings, Motions, and Orders.

Rule 3. Commencement of action.

CASE NOTES

I. IN GENERAL.

Due process requires that a party be properly notified of the proceeding against him. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

This rule requires only filing of the complaint, not service, within the 20-day period. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, — N.C. —, 325 S.E.2d 484 (1985).

The delayed service of complaint does not constitute a link in the chain of process. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, — N.C. —, 325 S.E.2d 484 (1985).

Applied in White v. Graham, — N.C. App. —, 325 S.E.2d 497 (1985); Adams v. Brooks, — N.C. App. —, 327 S.E.2d 19 (1985); Smith v. Starnes, — N.C. App. —, 328 S.E.2d 20 (1985).

Cited in Roshelli v. Sperry, 63 N.C. App. 509, 305 S.E.2d 218 (1983); Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786 (1984); Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984); Estrada v. Burnham, — N.C. App. —, 328 S.E.2d 611 (1985); Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

II. COMMENCEMENT BY ISSUANCE OF SUMMONS.

In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

The order under this rule extending time for filing the complaint need not be served with each subsequent

summons to constitute effective process. Rule 4 does ordinarily require the service of the summons and the complaint together. By extension, then, service "in accordance with the provisions of Rule 4" would require service of the summons and order together. However, to continue to slavishly apply this rule long after filing of the complaint would entirely ignore the purpose of the rules and the functions of the various forms of process. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, — N.C. —, 325 S.E.2d 484 (1985).

An alias or pluries summons is not ineffective where it does not refer back to the process next preceding it, the delayed service of complaint, but referred instead to the original summons. The General Assembly, by adopting a less stringent standard of service for complaints filed under the late-filing provisions of this rule, clearly did not intend the delayed service of the complaint to be a link in the chain of process. This is especially true in light of the fact that the present option of service by mail for the late complaint constitutes a departure from the former practice requiring formal service. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, — N.C. —, 325 S.E.2d 484 (1985).

Effect of Fatally Defective Summons. — Where an action is filed in one county and summons issues directing defendant to appear and answer in another county, the summons is fatally defective. A fatally defective summons is incapable of conferring jurisdiction. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

Rule 4. Process.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Due process requires that a party be properly notified of the proceeding against him. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

The purpose of service, etc. —

A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, it has fulfilled its purpose. Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983), rev'd on other grounds, 311 N.C. 536, 319 S.E.2d 912 (1984).

The primary purpose of Rule 4, etc. —

The purpose behind 1A-1, Rule 4 and § 1-52(5) is to give notice to the party against whom an action is commenced within a reasonable time after the accrual of the cause of action. Adams v. Brooks, — N.C. App. —, 327 S.E.2d 19 (1985).

Compliance with Statutory Requirements, etc. —

In order for a summons to serve as proper notification, it must be issued and served in the manner prescribed by statute. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

Failure to serve process in the manner prescribed by statute makes the service invalid, even though a defendant has actual notice of the lawsuit. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984). But see Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

When service of process is made pursuant to the forum state's law, both the service of process requirements and the personal jurisdiction requirements of state law must be met. Waller v. Butkovich, 584 F. Supp. 909 (M.D.N.C. 1984).

Although actual notice given in a manner other than that prescribed by statute cannot supply constitutional validity, if it names the parties in such terms that every intelligent person understands who is meant, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Where summons is not served, etc. —

Though an action in which the summons is unserved can continue in existence beyond 30 days after the date the summons was issued, for it to do so two things must happen according to sections (c) and (d) of this rule. First, the unserved original summons must be returned to the court by the officer it was delivered to with an explanation as to why it was not served. Second, the original summons must be supplemented by either a timely endorsement thereto or a timely sued out alias or pluries summons. Smith v. Starnes, — N.C. App. —, 328 S.E.2d 20 (1985).

A summons must be served within 30 days after the date of the issuance of the summons. However, the failure to make service within the time allowed does not invalidate the summons. The action may continue to exist as to the unserved defendant by two methods. First, within 90 days after the issuance of the summons or the date of the last prior endorsement, the plaintiff may secure an endorsement upon the original summons for an extension of time within which to complete service of process. Secondly, the plaintiff may sue out an alias or pluries summons at any time within 90 days after the date of issue of the last preceding summons in the chain of summonses or within 90 days of the last prior endorsement. If the 90-day period expires without the summons being served within the first 30 days or revived within the remaining 60 days, the action is discontinued. If a new summons is issued, it begins a new action. County of Wayne ex rel. Williams v. Whitley, — N.C. App. —, 323 S.E.2d 458 (1984).

Civil Actions Against State. — A civil action may be continued in existence against any defendant by suing out alias summons within 90 days of the last preceding summons. No special attention to this rule appears for suits against the state. The state, once it has consented to suit, occupies the same position as any other litigant. Barrus Constr. Co. v. North Carolina Dep't of Transp., — N.C. App. —, 324 S.E.2d 1 (1984).

In personam jurisdiction can be obtained over a defendant through service of process by publication within 90 days of the issuance of the original summons, but before any issuance of an alias or pluries summons. County of Wayne ex rel. Williams v. Whitley, — N.C. App. —, 323 S.E.2d 458 (1984).

Five Day Time Limit, etc. —

Where a complaint has been filed and proper summons does not issue within the five days allowed under this rule, the action is deemed never to have commenced. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

Although section (a) is clear and unambiguous in its requirement that upon the filing of the complaint, summons shall be issued forthwith, and in any event, within five days, the North Carolina Supreme Court has recognized that a properly issued and served second summons can revive and commence a new action on the date of its issuance. Stokes v. Wilson & Redding Law Firm, — N.C. App. —, 323 S.E.2d 470 (1984).

Under section (a) of this section, a summons must be issued within five days of the filing of the complaint. Where a complaint has been filed and a proper summons does not issue within the five days allowed under the rule, the action is deemed never to have commenced. County of Wayne ex rel. Williams v. Whitley, — N.C. App. —, 323 S.E.2d 458 (1984).

Mistake in Name of Party, etc. — If the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, or even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any stage of the suit. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Substitution in the case of a misnomer is not considered a substitution of new parties but merely a correction in the description of the party or parties actually served. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Deletion of "P.A." at end of law firm's name is a correction in the description of a party actually served instead of a substitution of new parties. Certainly the misdescription of the law firm as a "P.A." did not leave in doubt the identity of the party intended to be sued. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

The order under Rule 3 extending time for filing the complaint need not be served with each subsequent summons to constitute effective process. This rule does ordinarily require the service of the summons and the complaint together. By extension, then, service "in accordance with the provisions of Rule 4" would require service of the summons and order together. However,

to continue to slavishly apply this rule long after filing of the complaint would entirely ignore the purpose of the rules and the functions of the various forms of process. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, — N.C. —, 325 S.E.2d 484 (1985).

Rule 3 requires only filing of the complaint, not service, within the 20-day period. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, — N.C. —, 325 S.E.2d 484 (1985).

The delayed service of complaint does not constitute a link in the chain of process. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, — N.C. —, 325 S.E.2d 484 (1985).

An alias or pluries summons is not ineffective where it does not refer back to the process next preceding it, the delayed service of complaint, but referred instead to the original summons. The General Assembly, by adopting a less stringent standard of service for complaints filed under the late-filing provisions of Rule 3, clearly did not intend the delayed service of the complaint to be a link in the chain of process. This is especially true in light of the fact that the present option of service by mail for the late complaint constitutes a departure from the former practice requiring formal service. Childress v. Forsyth County Hosp. Auth., 70 N.C. App. 281, 319 S.E.2d 329 (1984), cert. denied, — N.C. —, 325 S.E.2d 484 (1985).

Applied in In re Annexation Ordinance No. 1219, 62 N.C. App. 588, 303 S.E.2d 380 (1983); House of Raeford Farms, Inc. v. Brooks, 63 N.C. App. 106, 304 S.E.2d 619 (1983); Bush v. BASF Wyandotte Corp., 64 N.C. App. 41, 306 S.E.2d 562 (1983); DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984); Lessard v. Lessard, 68 N.C. App. 760, 316 S.E.2d 96 (1984); Blackwell v. Massey, 69 N.C. App. 240, 316 S.E.2d 350 (1984); Drummond v. Cordell, — N.C. App. —, 324 S.E.2d 301 (1985); White v. Graham, — N.C. App. —, 325 S.E.2d 497 (1985); VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

Cited in Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786 (1984); Estrada v. Burnham, — N.C. App. —, 328 S.E.2d 611 (1985).

II. PERSONAL SERVICE ON NATURAL PERSONS.

A. In General.

The purpose of section (d) of this rule is only to keep the action alive by means of an endorsement on the original summons or by issuance of an alias or pluries summons in situations where the original, properly directed summons was not yet served. Roshelli v. Sperry, 63 N.C. App. 509, 305 S.E.2d 218, cert. denied, 309 N.C. 633, 308 S.E.2d 716 (1983).

The service of process requirements of section (j) of this rule are mandatory. Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983), rev'd on other grounds, 311 N.C. 536, 319 S.E.2d 912 (1984).

Where an action is filed in one county and summons demands appearance in another county, such summons is fatally defective. A fatally defective summons is incapable of conferring jurisdiction. Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

Where individuals are doing business as a partnership under a firm name, such firm is described in an action as a corporation, and process is served on a member of the partnership, members of the partnership may be substituted by amending the process and allowing the pleading to be amended. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Where defendant was personally served with a summons, although that summons was addressed to another defendant, the caption of which listed his name first among the defendants being sued, and in fact his name appeared twice in the caption as he was named both individually and as a part of the law firm. Any person served in this manner would make further inquiry personally or through counsel if he had any doubt that he was being sued and would be required to answer the complaint when it was filed, which would have revealed the existence of a summons directed to him and purporting on its face to have been served upon him and would have established his duty to appear and answer. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

C. Service by Registered or Certified Mail.

The language of paragraph (j)(1)(c) and subdivision (j)(9) of this rule

makes no reference to home or office; it requires simply that a complaint sent by certified mail be addressed to the party to be served, and be delivered to the addressee only. Waller v. Butkovich, 584 F. Supp. 909 (M.D.N.C. 1984).

IV. SERVICE ON CORPORATIONS.

To Whom Process May Be Delivered, etc. —

When the name of the defendant is sufficiently stated in the caption of the summons and in the complaint, such that it is clear that the corporation, rather than the officer or agent receiving service, is the entity being sued, the summons, when properly served upon an officer, director or agent is adequate to bring the corporate defendant within the trial court's jurisdiction. Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983), rev'd on other grounds, 311 N.C. 536, 319 S.E.2d 912 (1984).

Amendment of Process to Change Party from Corporation to Individual. — In general, courts are more reluctant to permit amendment of process or pleadings to change a description of a party as an individual or partnership to that of a corporation than they are to permit amendment to change the description of a party as a corporation to that of an individual or partnership, because of the prescribed statutory method of serving a corporation. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

Determining Party, etc. —

Where although the proper defendant in the case was misnamed in the captions on the summons and complaint as Inter-Regional Financial Group Leasing Company (an apparently nonexisting company), the summons was properly directed to IFG Leasing Company and that is the enterprise that copies of the summons and complaint were properly served on three times, the misstatement of defendant's name in the captions was a harmless misnomer and without jurisdictional significance, and the court did not err in permitting the misnomer to be corrected by appropriate amendments. Paramore v. Inter-Regional Fin. Group Leasing Co., 68 N.C. App. 659, 316 S.E.2d 90 (1984).

V. SERVICE BY PUBLICATION.

Service of process by publication is in derogation, etc. —

Statutes authorizing substituted service of process, service of publication, or other particular methods of service are in derogation of the common law, are strictly construed, and must be followed with particularity. Hunter v. Hunter, 69 N.C. App. 659, 317 S.E.2d 910 (1984).

Service by publication, begun more than 90 days after the last alias and pluries summons, will not revive an otherwise discontinued action. County of Wayne ex rel. Williams v. Whitley, — N.C. App. —, 323 S.E.2d 458 (1984).

VI. AMENDMENT OF SUMMONS.

An amended summons which adds a new party-defendant must be served upon each of the defendants. Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983), rev'd on other grounds, 311 N.C. 536, 319 S.E.2d 912 (1984).

VII. DISCONTINUANCE AND EXTENSIONS.

The words "not served" in subdivision (d) do not contemplate a lack of service because plaintiff made no effort to obtain service. Rather, "not served" means that plaintiff must have taken some action to obtain service which was not successful. Adams v. Brooks, — N.C. App. —, 327 S.E.2d 19 (1985).

A discontinuance breaks the chain of summonses and a summons endorsed more than 90 days after the issuance of the original summons does not relate back to the original date of filing of the complaint. In re Searle, — N.C. App. —, 327 S.E.2d 315 (1985).

Extensions, Generally. — Subdivision (c) of this rule requires that service of process occur within 30 days after the issuance of the summons. The validity of the summons for service of process may be extended under subdivision (d) of this rule by endorsement of the original summons or issuance of an alias or pluries summons within 90 days of the issuance or last prior endorsement of the original summons. As long as this chain of summonses is maintained, the service of summons will relate back to the original date of issuance. In re Searle, — N.C. App. —, 327 S.E.2d 315 (1985).

Rule 5. Service and filing of pleadings and other papers.

(d) *Filing.* — All pleadings subsequent to the complaint shall be filed with the court. All other papers required to be served upon a party, including requests for admissions, shall be filed with the court either before service or within five days thereafter, except that depositions, interrogatories, requests for documents, and answers and responses to those requests may not be filed unless ordered by the court or until used in the proceeding. The party taking a deposition or obtaining material through discovery is responsible for its preservation and delivery to the court if needed or so ordered. With respect to all pleadings and other papers as to which service and return has not been made in the manner provided in Rule 4, proof of service shall be made by filing with the court a certificate either by the attorney or the party that the paper was served in the manner prescribed by this rule, or a certificate of acceptance of service by the attorney or the party to be served. Such certificate shall show the date and method of service or the date of acceptance of service.

(1967, c. 954, s. 1; 1971, c. 538; c. 1156, s. 2.5; 1975, c. 762, s. 1; 1983, c. 201, s. 1; 1985, c. 546.)

Only Part of Rule Set Out. — As the rest of the rule was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective July 1, 1985, inserted "including requests for admissions" in the second sentence of subsection (d).

Rule 6. Time.

CASE NOTES

I. IN GENERAL.

The 30-day provision in Rule 41(d) should not be read in conjunction with section 6(b) of this rule. Sanford v. Starlite Disco, Inc., 66 N.C. App. 470, 311 S.E.2d 67 (1984).

Applied in Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190 (1983).

Stated in Raintree Homeowners Ass'n v. Raintree Corp., 62 N.C. App. 668, 303 S.E.2d 579 (1983).

Cited in G & M Sales of E.N.C., Inc. v. Brown, 64 N.C. App. 592, 307 S.E.2d 593 (1983); Elmore v. Elmore, 67 N.C. App. 661, 313 S.E.2d 904 (1984); Miller v. Ruth's of N.C., Inc., 69 N.C. App. 672, 318 S.E.2d 2 (1984).

IV. SERVICE OF MOTION AND AFFIDAVITS.

Service of Affidavits Supporting Summary, etc. —

Section (d) of this rule requires that an affidavit in support of a Rule 56 motion be served with the motion at least 10 days prior to hearing. The trial court may exercise its discretionary powers under section (b) of this rule to order the time within which to file and serve the affidavits enlarged if the request is made prior to making the motion for summary judgment. If the request is made after the motion for summary judgment has been served, there must be a showing of excusable neglect. Gillis v. Whitley's Disct. Auto Sales, Inc., 70 N.C. App. 270, 319 S.E.2d 661 (1984).

V. ADDITIONAL TIME AFTER SERVICE BY MAIL.

Section (e) does not apply to appeals from an Employment Security Commission adjudicator, so as to give the appealing party, in addition to the 10-day period prescribed by § 96-15(b)(2), three additional days within which to file an appeal. Smith v. Daniels Int'l, 64 N.C. App. 381, 307 S.E.2d 434 (1983).

ARTICLE 3.

Pleadings and Motions.

Rule 7. Pleadings allowed; form of motions.

Legal Periodicals. —
For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

The only effect and purpose of subdivision (d) of this rule is to eliminate the former practice of introducing cases to the jury by reading the pleadings; it is not concerned with the admissibility of evidence, one of the basic principles of which, under the adversary system of litigation, is that anything a litigant says about his case, if relevant and not otherwise rendered inadmissible, can be put in evidence against him. Stilwell v. Walden, 70 N.C. App. 543, 320 S.E.2d 329 (1984).

Applied in Towery v. Anthony, 68 N.C. App. 216, 314 S.E.2d 570 (1984).

Stated in Chappell v. Redding, 67 N.C. App. 397, 313 S.E.2d 239 (1984).

Cited in Beard v. Pembaur, 68 N.C. App. 52, 313 S.E.2d 853 (1984).

II. PLEADINGS.

The function of a reply is to deny the new matter alleged in the answer or affirmative defenses which the plaintiff does not admit. A reply may not state a cause of action. Other matters within a reply outside of this scope may properly be stricken on motion. Miller v. Ruth's of N.C., Inc., 69 N.C. App. 153, 316 S.E.2d 622, cert. denied, 312 N.C. 494, 322 S.E.2d 557 (1984).

Until pleading is withdrawn or changed with court's approval, it is a binding judicial admission of any fact stated therein; and that the pleading was signed only by the lawyer makes no difference, unless it is made to appear that the party's attorney acted without authority, of which there was no suggestion in this instance. Stilwell v. Walden, 70 N.C. App. 543, 320 S.E.2d 329 (1984).

Rule 8. General rules of pleadings.

Legal Periodicals. —
For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

For survey of 1983 law on civil procedure, see 62 N.C.L. Rev. 1107 (1984).

CASE NOTES

I. IN GENERAL.

Applied in Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983); Coastal Chem. Corp. v. Guardian Indus., Inc., 63 N.C. App. 176, 303 S.E.2d 642 (1983); Phillips v. Grand Union Co., 64 N.C. App. 373, 307 S.E.2d 205 (1983); Hendrix v. Hendrix, 67 N.C. App. 354, 313 S.E.2d 25 (1984); Norlin Indus., Inc. v. Music Arts, Inc., 67 N.C. App. 300, 313 S.E.2d 166 (1984); Carter v. Carr, 68 N.C. App. 23, 314 S.E.2d 281 (1984); Towery v. Anthony, 68 N.C. App. 216, 314 S.E.2d 570 (1984); Starling v. Sproles, 69 N.C. App. 598, 318 S.E.2d 94 (1984); Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984); Isenhour v. Isenhour, — N.C. App. —, 323 S.E.2d 369 (1984).

Stated in Hull v. Floyd S. Pike Elec. Contractor, 64 N.C. App. 379, 307 S.E.2d 404 (1983); Chappell v. Redding, 67 N.C. App. 397, 313 S.E.2d 239 (1984); Hawkins v. State Capital Ins. Co., — N.C. App. —, 328 S.E.2d 793 (1985).

Cited in Beard v. Pembaur, 68 N.C. App. 52, 313 S.E.2d 853 (1984).

II. PLEADINGS, GENERALLY.

Sufficiency of Pleading, etc. —

In accord with 2nd paragraph in original. See Huff v. Chrismon, 68 N.C. App. 525, 315 S.E.2d 711, cert. denied, 311 N.C. 756, 321 S.E.2d 134 (1984); Brad Ragan, Inc. v. Callicut Enters., Inc., — N.C. App. —, 326 S.E.2d 62 (1985).

A party is not required to plead evidence. Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

Under the "notice theory of pleading" a complainant must state a claim sufficient to enable the adverse party to understand the nature of the claim, to answer, and to prepare for trial. Ipock v. Gilmore, — N.C. App. —, 326 S.E.2d 271 (1985).

Under the notice theory of pleading, a complaint need no longer allege facts or elements showing aggravating circumstances which would justify an award of punitive damages. Huff v. Chrismon, 68 N.C. App. 525, 315 S.E.2d 711, cert. denied, 311 N.C. 756, 321 S.E.2d 134 (1984).

There is no conflict between Federal Rule 8 and section (a)(2). Richards & Assocs. v. Boney, 604 F. Supp. 1214 (E.D.N.C. 1985).

Purpose of Subsection (a)(2). —

In accord with original. See Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983); Biggs v. Cumberland County Hosp. Sys., 69 N.C. App. 547, 317 S.E.2d 421 (1984).

Provisions of section (a)(2) of this rule relating to professional malpractice actions was enacted to reduce the believed impact of pretrial publicity about medical malpactice cases, and for no other purpose. It has no bearing on the damages that a victim of medical negligence is entitled to recover, as the long-standing rule that damges in this state are governed by the evidence presented, rather than the claim made for relief, still abides except in cases of default. Nor does this provision curtail the rights that counsel in this State have long had to argue the facts in evidence and all reasonable inferences drawable therefrom. Biggs v. Cumberland County Hosp. Sys., 69 N.C. App. 547, 317 S.E.2d 421 (1984).

The General Assembly enacted section (a)(2) of this rule in response to what has been called a national medical malpractice crisis brought on by increasing numbers of malpractice suits and resultant sharply rising malpractice insurance rates. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

The North Carolina General Assembly enacted section (a)(2) of this rule, to respond to a national medical malpractice crisis and the adverse publicity which sometimes accompanies frivolous or exorbitant claims. Richards & Assocs. v. Boney, 604 F. Supp. 1214 (E.D.N.C. 1985).

Section (a)(2), though procedural, is intimately bound up with a substantive state policy. Richards & Assocs. v. Boney, 604 F. Supp. 1214 (E.D.N.C. 1985).

Penalty for violation of Section (a)(2), etc. —

Although the North Carolina Supreme Court has never decided what sanctions are appropriate for parties who violate section (a)(2) of this rule, decision in other jurisdictions favor penalties less harsh than dismissal. Stokes v. Wilson & Redding Law Firm, — N.C. App. —, 323 S.E.2d 470 (1984).

Dismissal for a violation of section (a)(2) of this rule is not always the best sanction available to the trial court and is certainly not the only sanction available. Although an action may be dismissed under Rule 41(b) for a plaintiff's failure to comply with section (a)(2) of this rule this extreme sanction is to be applied only when the trial court determines that less drastic sanctions will not suffice. Harris v. Maready, 311 N.C. 536, 319 S.E.2d 912 (1984).

As to use of the Rule 41(b) power of dismissal as a sanction for violation of Rule 8(a)(2) provision as to pleading of malpractice damages. Schell v. Coleman, 65 N.C. App. 91, 308 S.E.2d 662 (1983), appeal dismissed and cert. denied, 311 N.C. 763, 321 S.E.2d 145 (1984).

A motion for a more definite statement is the most purely dilatory of all the motions available under the Rules of Civil Procedure, and should not be granted so long as the pleading meets the requirements of 1A-1, Rule 8 and/or Rule 9 and fairly notifies the opposing party of the nature of the claim. Fisher v. Lamm, 66 N.C. App. 249, 311 S.E.2d 61 (1984).

III. AFFIRMATIVE DEFENSES.

Failure to plead an affirmative defense ordinarily results in waiver thereof. The parties may, however, still try the issue by express or implied consent. Nationwide Mut. Ins. Co. v. Edwards, 67 N.C. App. 1, 312 S.E.2d 656, rev'd on other grounds, 311 N.C. 170, 316 S.E.2d 298 (1984).

Illegality is an affirmative defense, etc. —

In accord with original. See Collins v. Davis, 68 N.C. App. 588, 315 S.E.2d 759, aff'd, 312 N.C. 324, 321 S.E.2d 892 (1984).

And May Be Heard for First Time, etc. —

Unpled affirmative defenses may be heard for the first time on motion for summary judgment even though not asserted in the answer at least where both parties are aware of the defense. Gillis v. Whitley's Disct. Auto Sales, Inc., 70 N.C. App. 270, 319 S.E.2d 661 (1984).

Defenses Raised in Hearing, etc. —

In accord with original. See C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 66 N.C. App. 170, 310 S.E.2d 615 (1984).

Payment is an affirmative defense and as such it must be pleaded by the party asserting it. The general rule is that the burden of showing payment must be assumed by the party interposing it. Shaw v. Shaw, 63 N.C. App. 775, 306 S.E.2d 506 (1983).

Payment is an affirmative defense which must be established by the party claiming its protection. Where the creditor's evidence establishes an existing indebtedness and nonpayment, and the debtor offers no competent evidence in support of his defense of payment, summary judgment or directed verdict for the creditor is properly granted. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, cert. denied as to additional issues, 312 N.C. 495, 322 S.E.2d 558 (1984).

Rule 9. Pleading special matters.

CASE NOTES

VIII. Pleading and Practice.

I. IN GENERAL.

The pleading with particularity required by section (b) of this rule is complemented by 1A-1, Rule 15(b). Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

Applied in Plemmons v. City of Gastonia, 62 N.C. App. 470, 302 S.E.2d 905 (1983); Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983); Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298 (1984).

Cited in African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983).

III. FRAUD, DURESS, MISTAKE, ETC.

Actual fraud and constructive fraud satisfy the particularity requirement in varying ways. Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

The very nature of constructive fraud defies specific and concise allegations. This particularity requirement may be met by alleging facts and circumstances (1) which created the relation of trust and confidence, and (2) which led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff. Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

VIII. PLEADING AND PRACTICE.

A motion for a more definite statement is the most purely dilatory of all the motions available under the Rules of Civil Procedure, and should not be granted so long as the pleading meets the requirements of 1A-1, Rule 8 and/or Rule 9 and fairly notifies the opposing party of the nature of the claim. Fisher v. Lamm, 66 N.C. App. 249, 311 S.E.2d 61 (1984).

Where the opposing party does not object to evidence outside the issues raised by the pleadings, the issue is tried with his implied consent. Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

Rule 11. Signing and verification of pleadings.

CASE NOTES

I. IN GENERAL.

Applied in Bush v. BASF Wyandotte Corp., 64 N.C. App. 41, 306 S.E.2d 562 (1983).

Rule 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on pleading.

Legal Periodicals. —
For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

No appeal lies as a matter of right from denial of a motion under section (d). Raines v. Thompson, 62 N.C. App. 752, 303 S.E.2d 413 (1983).

Applied in North Carolina ex rel. Horne v. Chafin, 309 N.C. 813, 309 S.E.2d 239 (1983); Styleco, Inc. v. Stoutco, Inc., 62 N.C. App. 525, 302 S.E.2d 888 (1983); Monte Enters., Inc. v. Kavanaugh, 62 N.C. App. 541, 303 S.E.2d 194 (1983); Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983); Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983); Pearce v. American Defender Life Ins. Co., 62 N.C. App. 661, 303 S.E.2d 608 (1983); Snuggs v. Stanly County Dep't of Pub. Health, 63 N.C. App. 86, 303 S.E.2d 646 (1983); Phillips v. Grand Union Co., 64 N.C. App. 373, 307 S.E.2d 205 (1983); G & M Sales of E.N.C., Inc. v. Brown, 64 N.C. App. 592, 307 S.E.2d 593 (1983); Small v. Britt, 64 N.C. App. 533, 307 S.E.2d 771 (1983); Population Planning Assocs. v. Mews, 65 N.C. App. 96, 308 S.E.2d 739 (1983); Martin Marietta Corp. v. Forsyth County Zoning Bd. of Adjustment, 65 N.C. App. 316, 309 S.E.2d 523 (1983); Snuggs v. Stanly County Dep't of Pub. Health, 310 N.C. 739, 314 S.E.2d 528 (1984); Presbyterian Hosp. v. McCartha, 66 N.C. App. 177, 310 S.E.2d 409 (1984); Oates v. Jag, Inc., 66 N.C. App. 244, 311 S.E.2d 369 (1984); Payne v. North Carolina Farm Bureau Mut. Ins. Co., 67 N.C. App. 692, 313 S.E.2d 912 (1984); DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984); Bradbury v. Cummings, 68 N.C. App. 302, 314 S.E.2d 568 (1984); Hudson v. All Star Mills, Inc., 68 N.C. App. 447, 315 S.E.2d 514 (1984); Lowder ex rel. Doby v. Doby, 68 N.C. App. 491, 315 S.E.2d 517 (1984); Lowder v. Rogers, 68 N.C. App. 507, 315 S.E.2d 519 (1984); Lowder v. Lowder, 68 N.C. App. 505, 315 S.E.2d 520 (1984); Forbes Homes, Inc. v. Trimpi, 70 N.C. App. 614, 320 S.E.2d 328 (1984); Walker v. Santos, 70 N.C. App. 623, 320 S.E.2d 407 (1984); Jackson v. Bumgardner, 71 N.C. App. 107, 321 S.E.2d 541 (1984); Lindley Chem., Inc. v. Hartford Accident & Indem. Co., 71 N.C. App. 400, 322 S.E.2d 185 (1984); Miller v. Henderson, 71 N.C. App. 366, 322 S.E.2d 594 (1984); Johnston v. Gaston County, — N.C. App. —, 323 S.E.2d 381 (1984); Stokes v. Wilson & Redding Law Firm, — N.C. App. —, 323 S.E.2d 470 (1984); Schneider v. Brunk, — N.C. App. —, 324 S.E.2d 922 (1985); Northwestern Bank v. Gladwell, — N.C. App. —, 325 S.E.2d 37 (1985); Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., — N.C. —, 328 S.E.2d 274 (1985).

Stated in Towery v. Anthony, 68 N.C. App. 216, 314 S.E.2d 570 (1984); Southland Assocs. Realtors v. Miner, — N.C. App. —, 326 S.E.2d 107 (1985).

Cited in Leonard v. Johns-Manville Sales Corp., 309 N.C. 91, 305 S.E.2d 528 (1983); Hutchens v. Hankins, 63 N.C. App. 1, 303 S.E.2d 584 (1983); Consolidated Systems v. Granville Steel Corp., 63 N.C. App. 485, 305 S.E.2d 57 (1983); African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983); Henry v. Deen, 310 N.C. 75, 310

S.E.2d 326 (1984); Renwick v. News & Observer Publishing Co., 310 N.C. 312, 312 S.E.2d 405 (1984); Fisher v. Lamm, 66 N.C. App. 249, 311 S.E.2d 61 (1984); Freeman v. SCM Corp., 66 N.C. App. 341, 311 S.E.2d 75 (1984); Adams v. Nelsen, 67 N.C. App. 284, 312 S.E.2d 896 (1984); Black v. Littlejohn, 67 N.C. App. 211, 312 S.E.2d 909 (1984); Moretz v. Northwestern Bank, 67 N.C. App. 312, 313 S.E.2d 8 (1984); Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Brown v. Averette, 68 N.C. App. 67, 313 S.E.2d 865 (1984); Stanback v. Westchester Fire Ins. Co., 68 N.C. App. 107, 314 S.E.2d 775 (1984); Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786 (1984); Howard v. Ocean Trail Convalescent Center, 68 N.C. App. 494, 315 S.E.2d 97 (1984); Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984); Huff v. Chrismon, 68 N.C. App. 525, 315 S.E.2d 711 (1984); Alamance County Hosp. v. Neighbors, 68 N.C. App. 771, 315 S.E.2d 779 (1984); Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 316 S.E.2d 59 (1984); Freeman v. SCM Corp., 311 N.C. 294, 316 S.E.2d 81 (1984); Lessard v. Lessard, 68 N.C. App. 760, 316 S.E.2d 96 (1984); Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984); Murphy v. McIntyre, 69 N.C. App. 323, 317 S.E.2d 397 (1984); Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692 (1984); Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984); Perry v. Cullipher, 69 N.C. App. 761, 318 S.E.2d 354 (1984); Square D. Co. v. C.J. Kern Contractors, 70 N.C. App. 30, 318 S.E.2d 527 (1984); DesMarais v. Dimmette, 70 N.C. App. 134, 318 S.E.2d 887 (1984); J.M. Thompson Co. v. Doral Mfg. Co., — N.C. App. —, 324 S.E.2d 909 (1985); Black v. Littlejohn, — N.C. —, 325 S.E.2d 469 (1985); Sperry Corp. v. Patterson, — N.C. App. —, 325 S.E.2d 642 (1985); Forbes Homes, Inc. v. Trimpi, — N.C. —, 326 S.E.2d 30 (1985); Boston v. Webb, — N.C. App. —, 326 S.E.2d 104 (1985); Ratton v. Ratton, — N.C. App. —, 327 S.E.2d 1 (1985); Pittman v. Pittman, — N.C. App. —, 327 S.E.2d 8 (1985); Adams v. Nelson, — N.C. —, 329 S.E.2d 322 (1985); Rorrer v. Cooke, — N.C. —, 329 S.E.2d 355 (1985); Thompson v. Newman, — N.C. App. —, 328 S.E.2d 597 (1985); Estrada v. Burnham, — N.C. App. —, 328 S.E.2d 611 (1985); Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985); Sides v. Duke Hosp., — N.C. App. —, 328 S.E.2d 818 (1985).

IV. SUBJECT MATTER JURISDICTION.

The question of subject matter jurisdiction may be raised at any point in a proceeding under the Uniform Child Custody Jurisdiction Act, and such jurisdiction cannot be conferred by waiver, estoppel or consent. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

The district courts of this State do undoubtedly possess general subject matter jurisdiction over child custody disputes. Such matters are in no wise reserved by the Constitution or laws of North Carolina to the exclusive consideration of another tribunal. Therefore the real question under the Uniform Child Custody Jurisdiction Act is whether jurisdiction is properly exercised according to the statutory requirements in a particular case. Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

V. PERSONAL JURISDICTION.

A general appearance will waive the right to challenge personal jurisdiction only when it is made prior to the proper filing of a section (b)(2) motion contesting jurisdiction over the person. Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

Right to Challenge, etc. —

Where defendant's initial action was the filing of a motion which, inter alia, sought dismissal pursuant to section (b)(2) of this rule for lack of jurisdiction over his person, a subsequent general appearance would not have waived his right to challenge personal jurisdiction. Hall v. Hall, 65 N.C. App. 797, 310 S.E.2d 378 (1984).

An appeal lies immediately from refusal by the trial court to dismiss a cause for want of jurisdiction over the person where the motion is made pursuant to section (b)(2) of this rule. Chamberlin v. Chamberlin, 70 N.C. App. 474, 319 S.E.2d 670, cert. denied, 312 N.C. 621, 323 S.E.2d 921 (1984).

IX. FAILURE TO STATE CLAIM.

A. In General.

The only purpose of Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed. In deciding such a motion the trial court is to treat the allegations of the pleading it challenges as true. Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984).

The essential question on a Rule 12(b)(6) motion, is whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory. Barnaby v. Boardman, 70 N.C. App. 299, 318 S.E.2d 907, cert. granted, 312 N.C. 621, 323 S.E.2d 921 (1984).

Motion to dismiss is the usual, etc.—

In accord with 4th paragraph in original. See Vinson v. McManus, 68 N.C. App. 763, 316 S.E.2d 98 (1984).

The motion to dismiss under section (b)(6) of this rule tests the sufficiency of the complaint to state a claim for relief. Hendrix v. Hendrix, 67 N.C. App. 354, 313 S.E.2d 25 (1984).

A Rule 12(b)(6) motion tests the legal sufficiency of the claim. The rules regarding the sufficiency of a complaint to withstand such a motion are equally applicable to a claim for relief presented in a counterclaim by the defendant. A counterclaim is sufficient to withstand the motion where no insurmountable bar to recovery on the claim appears on its face. Thus, the question becomes whether the counterclaim states a claim upon which relief can be granted on any theory. Chrysler Credit Corp. v. Rebhan, 66 N.C. App. 255, 311 S.E.2d 606 (1984).

Allegations Treated as True. —

In accord with 3rd paragraph in original. See Ruffin v. Contractors & Materials, — N.C. App. —, 316 S.E.2d 353 (1984).

But Not to Defective Statement of Good Claim. —

Under the notice theory of pleading of the Rules of Civil Procedure a complaint should not be dismissed merely because it amounts to a defective statement of a good cause of action. Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354, cert. denied, 311 N.C. 758, 321 S.E.2d 136 (1984).

Upon Which Relief Can Be Granted Under Some Theory. —

For purposes of a motion to dismiss, the allegations in the complaint must be treated as true, and the complaint is sufficient if it supports relief on any theory. Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354, cert. denied, 311 N.C. 758, 321 S.E.2d 136 (1984).

Test for Sufficiency of Complaint. —

A section (b)(6) of this rule motion operates to test the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted. However, if the complaint discloses an unconditional affirmative defense which defeats the asserted claim, the motion will be granted and the action dismissed. Skinner v. E.F. Hutton & Co., 70 N.C. App. 517, 320 S.E.2d 424, cert. granted as to additional issues, 312 N.C. 623, 323 S.E.2d 924 (1984).

Under the "notice theory of pleading," a statement of a claim can withstand a motion to dismiss if it gives the other party notice of the nature and basis of the claim sufficient to enable the party to answer and prepare for trial. Barnaby v. Boardman, 70 N.C. App. 299, 318 S.E.2d 907, cert. granted, 312 N.C. 621, 323 S.E.2d 921 (1984).

Dismissal Is Precluded, etc. —

A complaint is deemed sufficient to withstand a motion to dismiss under this rule where no insurmountable bar to recovery appears on the face of the complaint and the complaint's allegations give adequate notice of the nature and extent of the claim. Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 304 S.E.2d 593 (1983), rev'd on other grounds, 310 N.C. 312, 312 S.E.2d 405, cert. denied, 310 N.C. 749, 315 S.E.2d 704, — U.S. —, 105 S. Ct. 187, 83 L. Ed. 2d 121 (1984).

And a complaint should not be dismissed unless, etc. —

In accord with 1st paragraph in original. See Ruffin v. Contractors & Materials, 69 N.C. App. 174, 316 S.E.2d 353 (1984).

In accord with 2nd paragraph in original. See Renwick v. News & Observer Publishing Co., 63 N.C. App. 200, 304 S.E.2d 593 (1983), rev'd on other grounds, 310 N.C. 312, 312 S.E.2d 405, cert. denied, 310 N.C. 749, 315 S.E.2d 704, — U.S. —, 105 S. Ct. 187, 83 L. Ed. 2d 121 (1984); Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983), cert. denied, 310 N.C. 476, 312 S.E.2d 882 (1984); Hull v. Floyd S. Pike Elec. Contractor, 64 N.C. App. 379, 307 S.E.2d 404 (1983); Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984); Briggs v. Rosenthal, — N.C. App. —, 327 S.E.2d 308 (1985).

A claim for relief should not be dismissed unless it appears beyond doubt that the party is entitled to no relief under any state of facts which could be presented in support of the claim. Barnaby v. Boardman, 70 N.C. App. 299, 318

S.E.2d 907, cert. granted, 312 N.C. 621, 323 S.E.2d 921 (1984).

An order granting a motion to dismiss is erroneous if the complaint, liberally construed, shows no insurmountable bar to recovery, as dismissal is generally precluded unless plaintiff can prove no set of facts to support the claim for relief. Jenkins v. Wheeler, 69 N.C. App. 140, 316 S.E.2d 354, cert. denied, 311 N.C. 758, 321 S.E.2d 136 (1984).

A motion to dismiss pursuant to section (b)(6) of this rule is properly granted when the complaint affirmatively discloses to a certainty that even if the facts alleged therein were true, the plaintiff would be entitled to no relief. Plemmons v. City of Gastonia, 62 N.C. App. 470, 302 S.E.2d 905, cert. denied, 309 N.C. 322, 307 S.E.2d 165, 166 (1983).

Or Where Complaint Discloses, etc.—

In accord with original. See Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983), cert. denied, 310 N.C. 476, 312 S.E.2d 882 (1984).

The only times when dismissal is proper, etc. —

In accord with 1st paragraph in original. See Hull v. Floyd S. Pike Elec. Contractor, 64 N.C. App. 379, 307 S.E.2d 404 (1983).

An order denying a motion under subsection (b)(6), etc. —

No appeal lies as a matter of right from the denial of a subsection (b)(6) motion. Raines v. Thompson, 62 N.C. App. 752, 303 S.E.2d 413 (1983).

Rules Applicable to Counterclaims. — The rules regarding the sufficiency of a complaint to withstand a motion to dismiss pursuant to section (b)(6) of this rule, for failure to state a claim upon which relief can be granted, are equally applicable to a claim for relief by a defendant in a counterclaim. Barnaby v. Boardman, 70 N.C. App. 299, 318 S.E.2d 907, cert. granted, 312 N.C. 621, 323 S.E.2d 921 (1984).

Appeal of Dismissal. — When an action is dismissed with leave to amend, the proceeding is still pending and the plaintiff has no right to appeal such a dismissal interlocutory in nature. When the court allows amendment by the plaintiffs, relief in the trial court has not been entirely denied and appeal is premature. Day v. Coffey, 68 N.C. App. 509, 315 S.E.2d 96, cert. denied, 312 N.C. 82, 321 S.E.2d 894 (1984).

B. Conversion of Motion to Dismiss to Summary Judgment Motion.

Notice required in situations where subsection (b)(6) motion is treated as a motion for summary judgment is procedural rather than constitutional. As such, the proper action for counsel to take is to request a continuance or additional time to produce evidence. Objections to timeliness are therefore not germane in such situations and the trial court has discretion, provided the opposing party has a "reasonable opportunity" to present pertinent material, to take and consider affidavits in support of a converted Rule 12(b)(6) motion. By participating in the hearing and failing to request a continuance or additional time to produce evidence, a party waives his right to this procedural notice. Raintree Homeowners Ass'n v. Raintree Corp., 62 N.C. App. 668, 303 S.E.2d 579, cert. denied, 309 N.C. 462, 307 S.E.2d 366 (1983).

When Motion to Dismiss Converted to Summary, etc. —

Where the record contains affidavits and indicates that the trial judge, in addition to considering the pleadings and attached exhibits, also heard counsel for both parties and considered briefs submitted by both parties, the motion for judgment on the pleadings (Rule 12(c)) must be considered as though it was made under Rule 56. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

Where matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment under Rule 56. DeArmon v. B. Mears Corp., — N.C. —, 325 S.E.2d 223 (1985).

Summary judgment, like judgment on the pleadings, is appropriately granted only where no disputed issues of fact have been presented and the undisputed facts show that any party is entitled to judgment as a matter of law. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

XI. MOTION FOR JUDGMENT ON THE PLEADINGS.

Movant Must Prove Entitlement to, etc.

In accord with 1st paragraph in original volume. See Minor v. Minor, 70 N.C.

App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

Evidence to Be Considered by Trial Judge. — In a motion for judgment on the pleadings the trial judge is to consider only the pleadings and any attached exhibits, which become part of the pleadings. No evidence is to be heard, and the trial judge is not to consider statements of fact in the briefs of the parties or the testimony of allegations by the parties in different proceedings. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

XII. MOTION FOR MORE DEFINITE STATEMENT.

Motion for a more definite, etc. — In accord with original. See Fisher v. Lamm, 66 N.C. App. 249, 311 S.E.2d 61 (1984).

XIII. MOTION TO STRIKE.

The purpose of section (f) of this rule is to avoid expenditure of time and resources before trial by removing spurious issues, whether introduced by original or amended complaint. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Section (f) of this rule allows the court to strike improper allegations from any pleading. Although the reported cases do not address application of section (f) of this rule to allegations added under Rule 15, the latter rule clearly governs pleadings practice, and motions to strike logically are available to test amended as well as original complaints. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Rule 13. Counterclaim and crossclaim.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Applied in Small v. Britt, 64 N.C. App. 533, 307 S.E.2d 771 (1983); Cyclone Roofing Co. v. David M. LaFave Co., 67 N.C. App. 278, 312 S.E.2d 709 (1984); Mid-South Constr. Co. v. Wilson, 71 N.C. App. 445, 322 S.E.2d 418 (1984).

Cited in Moretz v. Northwestern Bank, 67 N.C. App. 312, 313 S.E.2d 8 (1984).

II. COUNTERCLAIMS.

Section (a) of this rule, etc. — Section (a) is a tool designed to further judicial economy. The tool should not be used to combine actions that, despite their origin in a common factual background, have no logical relationship to each other. Winston-Salem Joint Venture v. Cathy's Boutique, Inc., — N.C. App. —, 325 S.E.2d 286 (1985).

In order to find that an action must be filed as a compulsory counterclaim pursuant to subdivision (a), a court must first find a logical relationship between the factual backgrounds of the two claims. In addition, the court must find a logical relationship between the nature of the actions. Winston-Salem Joint Venture v. Cathy's Boutique, Inc., — N.C. App. —, 325 S.E.2d 286 (1985).

A counterclaim is in the nature of an independent proceeding and is not automatically determined by a ruling in the principal claim. Brooks v. Gooden, 69 N.C. App. 701, 318 S.E.2d 348 (1984).

Plaintiff insurer's recovery against defendant for intentional damage to property could not be offset by defendant's claim for child support owed to her by the insured, where defendant's counterclaim for child support was a compulsory counterclaim in an earlier action. North Carolina Farm Bureau Mut. Ins. Co. v. Balfour, 62 N.C. App. 580, 302 S.E.2d 922 (1983).

Rule 14. Third-party practice.

Legal Periodicals. —
For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

Applied in Wolfe v. Wolfe, 64 N.C. App. 249, 307 S.E.2d 400 (1983).

Rule 15. Amended and supplemental pleadings.

Legal Periodicals. —
For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

For survey of 1983 law on civil procedure, see 62 N.C.L. Rev. 1107 (1984).

CASE NOTES

I. IN GENERAL.

The pleading with particularity required by 1A-1, Rule 9(b) is complemented by section (b) of this rule. Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

This rule contemplates liberality, etc. —
The Rules of Civil Procedure permit a liberal use of amendments to a party's theory of recovery. Taylor v. Gillespie, 66 N.C. App. 302, 311 S.E.2d 362, cert. denied, 310 N.C. 748, 315 S.E.2d 710 (1984).

And amendments should always, etc. —
This rule allows issues to be raised by liberal amendments to pleadings, and, in some cases, by the evidence, the effect of the rule being to allow amendment by implied consent to change the legal theory of the cause of action so long as the opposing party has not been prejudiced in presenting his case. Taylor v. Gillespie, 66 N.C. App. 302, 311 S.E.2d 362, cert. denied, 310 N.C. 748, 315 S.E.2d 710 (1984).

Burden of Party Objecting, etc. —
The party opposing an amendment carries the burden of demonstrating prejudice. They argue simply that the opposing party waited more than three years to amend and thereby unfairly surprised them with his new allegations of negligence. In a complicated medical malpractice case such as this one, and particularly where discovery has been hotly contested and important evidence turns up missing, merely showing delay beyond the statutory period will not suffice as evidence of prejudice. To hold otherwise would negate the very policies embodied in this rule, i.e., liberal allowance of amendments, and availability of relation back, to ensure that controversies are decided on the merits. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

The party who objects to the amendment has the burden of proving prejudice. Peed v. Peed, — N.C. App. —, 325 S.E.2d 275 (1985).

For amendment to be proper under this rule, there must be evidence of an unpleaded issue introduced without objection, and it must appear that the parties understood, or at least reasonably should have understood, that the evidence was aimed at an issue not expressly pleaded. Yet, even when the evidence is objected to on the grounds that it is not within the issues raised by the pleadings, the court will freely allow amendments to present the merits of the case when the objecting party fails to satisfy the court that he would be prejudiced in the trial on its merits. Peed v. Peed, — N.C. App. —, 325 S.E.2d 275 (1985).

Consent Presumed Absent Objection, etc. —
Where a party offers evidence at trial which introduces a new issue and there is no objection by the opposing party, the opposing party is viewed as having consented to the admission of the evidence and the pleadings are deemed amended to include the new issue. Byrd v. Byrd, 62 N.C. App. 438, 303 S.E.2d 205 (1983).

Where defendant did not object to the introduction of certain evidence the pleadings were amended by implication.

Formal permission of the court was not required, although the better practice is that the party benefitted should move to amend the pleadings to reflect the theory of recovery. By failing to make timely objection to the introduction of the evidence at variance with the pleadings, defendant waived his right to assert such ground on appeal. Taylor v. Gillespie, 66 N.C. App. 302, 311 S.E.2d 362, cert. denied, 310 N.C. 748, 315 S.E.2d 710 (1984).

Where the opposing party does not object to evidence outside the issues raised by the pleadings, the issue is tried with his implied consent. Benfield v. Costner, 67 N.C. App. 444, 313 S.E.2d 203 (1984).

A formal amendment is needed only when evidence is objected to at trial as not within the scope of the pleadings. Taylor v. Gillespie, 66 N.C. App. 302, 311 S.E.2d 362, cert. denied, 310 N.C. 748, 315 S.E.2d 710 (1984).

Under certain circumstances a pleading may be deemed amended by implication when evidence outside the scope of the pleading has been received without objection, which evidence constitutes a substantial feature of a case; in such situation no formal amendment of the pleading is required. Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

Unless Evidence Also Relevant to Support Issue Raised by Pleadings. — Under North Carolina's "notice theory of pleading," a trial proceeds on the issues raised by the pleadings unless the pleadings are amended. If an issue not raised by the pleadings is tried by the "implied consent" of the parties, the pleadings are deemed amended. When, however, the evidence used to support the new issue would also be relevant to support the issue raised by the pleadings, the defendant has not been put on notice of plaintiff's new or alternate theory. Gilbert v. Thomas, 64 N.C. App. 582, 307 S.E.2d 853 (1983).

The trial court has broad discretion, etc.

Rulings on motions to amend after the expiration of the statutory period are within the discretion of the trial court; that discretion is clearly not abused when granting the motion would be a futile gesture. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

A motion to amend a pleading, made more than 30 days after the original pleading is served is addressed to the discretion of the trial court. Norlin Indus., Inc. v. Music Arts, Inc., 67 N.C. App. 300, 313 S.E.2d 166, cert. denied, 311 N.C. 403, 319 S.E.2d 273 (1984).

Courts' Ruling Not Reviewable Absent Showing of Abuse. —

In accord with 5th paragraph in original. See Doub v. Doub, 68 N.C. App. 718, 315 S.E.2d 732, cert. granted, 311 N.C. 754, 321 S.E.2d 131 (1984); Mauney v. Morris, — N.C. App. —, 327 S.E.2d 248 (1985).

Motions to Strike Are Available to Test Amended Complaints. — Rule 12(f) allows the court to strike improper allegations from any pleading. Although the reported cases do not address application of Rule 12(f) to allegations added under this rule, the latter rule clearly governs pleadings practice, and motions to strike logically are available to test amended as well as original complaints. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Use of Allegations Not Denied until Amendment of Answer as Evidential Admissions. — Allegations in a complaint not initially denied by answer, but subsequently denied in an amended answer, may constitute evidential admissions, reflecting something which a party has once said. However, to take advantage of evidential admissions, the opponent must introduce them into evidence. The introduction of "all the admissions of record" does not place this evidence before the jury at trial in the sense of drawing the jury's attention to the specific allegations of the complaint and the specific answers thereto. Watson v. White, 309 N.C. 498, 308 S.E.2d 268 (1983).

Applied in FMS Mgt. Systems v. Thomas, 65 N.C. App. 561, 309 S.E.2d 697 (1983); Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984); Federated Mut. Ins. Co. v. Hardin, 67 N.C. App. 487, 313 S.E.2d 801 (1984); Bryant v. Nationwide Mut. Fire Ins. Co., 67 N.C. App. 616, 313 S.E.2d 803 (1984); Degree v. Degree, — N.C. App. —, 325 S.E.2d 36 (1985); Griffin v. Baucom, — N.C. App. —, 328 S.E.2d 38 (1985).

Cited in Wright v. Commercial Union Ins. Co., 63 N.C. App. 465, 305 S.E.2d 190 (1983); Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983); VEPCO v. Tillett, — N.C. App. —, 327 S.E.2d 2 (1985).

II. AMENDMENTS TO CONFORM TO EVIDENCE.

Purpose in adopting section (b), etc. —

Section (b) represents a departure from the former strict code doctrine of variance by allowing issues to be raised by liberal amendments to pleadings, and in some cases, by the evidence. Peed v. Peed, — N.C. App. —, 325 S.E.2d 275 (1985).

Amendment to Conform to Evidence, etc. —

It is not error to allow an amendment to conform made late in the trial, even after the jury arguments. Peed v. Peed, — N.C. App. —, 325 S.E.2d 275 (1985).

Failure to plead an affirmative defense ordinarily results in waiver thereof. However, the parties may still try the issue by express or implied consent. Nationwide Mut. Ins. Co. v. Edwards, 67 N.C. App. 1, 312 S.E.2d 656 (1984).

III. RELATION BACK OF AMENDMENTS.

Criteria for Determining Whether, etc. —

The decisive test for relation back remains notice in the original pleading of the transactions or occurrences to be proved pursuant to the amended pleading. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

IV. SUPPLEMENTAL PLEADINGS.

Supplemental Pleading Not a Matter, etc. —

Supplemental pleadings may be allowed upon a party's motion in the trial court's discretion, not as a matter of right, upon terms as are just. Miller v. Ruth's of N.C., Inc., 69 N.C. App. 153, 316 S.E.2d 622, cert. denied, 312 N.C. 494, 322 S.E.2d 557 (1984).

Motions to allow supplemental pleadings should be freely granted unless their allowance would impose a substantial injustice upon the opposing party. Miller v. Ruth's of N.C., Inc., 69 N.C. App. 153, 316 S.E.2d 622, cert. denied, 312 N.C. 494, 322 S.E.2d 557 (1984).

Rule 16. Pre-trial procedure; formulating issues.

CASE NOTES

Applied in Gilbert v. Thomas, 64 N.C. App. 582, 307 S.E.2d 853 (1983); State v. Forehand, 67 N.C. App. 148, 312 S.E.2d 247 (1984).

Cited in Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814 (1984).

ARTICLE 4.

Parties.

Rule 17. Parties plaintiff and defendant; capacity.

Legal Periodicals. —

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

I. IN GENERAL.

Applied in Dobbins v. Paul, 71 N.C. App. 113, 321 S.E.2d 537 (1984).

Stated in Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984); L. Richardson Mem. Hosp. v. Allen, — N.C. App. —, 325 S.E.2d 40 (1985).

II. REAL PARTY IN INTEREST.

A real party in interest, etc. —

In accord with original. See Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

And who by substantive law, etc. —

In accord with original. See Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

Absence of the real party in inter-

est did not constitute a "fatal defect" where the opposing party failed to show real prejudice in not having had the real party joined at the original trial. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

In a bank merger, the surviving bank or its transferee has the legal right to enforce a claim because the surviving bank succeeds to the merged bank's holder status by operation of law. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

Rule 19. Necessary joinder of parties.

CASE NOTES

I. IN GENERAL.

Who Are Necessary Parties. —

In accord with 4th paragraph in original. See Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983), cert. denied and appeal dismissed, 310 N.C. 476, 312 S.E.2d 882 (1984).

Court Should Correct Defect, etc.—

When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action. Any such defect should be corrected by the trial court ex mero motu in the absence of a proper motion by a competent person. White v. Pate, 308 N.C. 759, 304 S.E.2d 199 (1983).

Absence of the real party in interest did not constitute a "fatal defect" where the opposing party failed to show real prejudice in not having had the real party joined at the original trial. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

Rule 20. Permissive joinder of parties.

CASE NOTES

I. IN GENERAL.

Stated in Akzona, Inc. v. American Credit Indem. Co., 71 N.C. App. 498, 322 S.E.2d 623 (1984).

Rule 21. Procedure upon misjoinder and nonjoinder.

CASE NOTES

Cited in Alamance County Hosp. v. Neighbors, 68 N.C. App. 771, 315 S.E.2d 779 (1984).

Rule 23. Class actions.

Legal Periodicals. — For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

CASE NOTES

I. IN GENERAL.

Applied in Perry v. Cullipher, 69 N.C. App. 761, 318 S.E.2d 354 (1984).

Rule 24. Intervention.

CASE NOTES

I. IN GENERAL.

An intervenor is as much a party to the action as the original parties are and has rights equally as broad. Leonard E. Warner, Inc. v. Nissan Motor Corp., in U.S.A., 66 N.C. App. 73, 311 S.E.2d 1 (1984).

Owner of garage and wrecker service, with whom sheriff contracted to store certain cars levied on pursuant to court order, was a legal possessor, and under § 44A-2(d) had a lien on the cars from the time he began towing them away; such lien was enforceable under the explicit language of § 1-440.43 and § 1A-1, Rule 24, by intervention. Case v. Miller, 68 N.C. App. 729, 315 S.E.2d 737 (1984).

Applied in Thompson v. Thompson, 70 N.C. App. 147, 319 S.E.2d 315 (1984); Thompson v. Thompson, — N.C. —, 328 S.E.2d 288 (1955).

Rule 25. Substitution of parties upon death, incompetency or transfer of interest; abatement.

CASE NOTES

I. IN GENERAL.

Subsection (d) of this section is merely a procedural rule; substantive law governs its application. Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984).

Stated in Elmore v. Elmore, 67 N.C. App. 661, 313 S.E.2d 904 (1984).

ARTICLE 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

(a) *Discovery methods.* — Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) *Discovery scope and limits.* — Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. — Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for

objection that the examining party has knowledge of the information as to which discovery is sought.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(2) Insurance Agreements. — A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation; Materials. — Subject to the provisions of subsection (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (i) a written statement signed or otherwise adopted or approved by the person making it, or (ii) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation; Experts. — Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

a. 1. A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

2. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)c [(b)(4)b] of this rule, concerning fees and expenses as the court may deem appropriate.

b. Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivision (b)(4)a2 of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)a2 of this rule the court may require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(f) *Discovery conference.* — At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court may do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;
(2) A proposed plan and schedule of discovery;
(3) Any limitations proposed to be placed on discovery;
(4) Any other proposed orders with respect to discovery; and
(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any; and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(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 his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection and that to the best of his knowledge, information, and belief 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. (1967, c. 954, s. 1; 1971, c. 750; 1975, c. 762, s. 2; 1985, c. 603, ss. 1-4.)

Only Part of Rule Set Out. — As the rest of the rule was not affected by the amendment, is it not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable, insofar as just and practicable, to pending litigation, deleted the second sentence of section (a), which read "Unless the court orders otherwise under section (c) of this rule, the frequency of use of these methods is not limited," rewrote the catchline to section (b), which read "Scope of discovery," rewrote subsection (b)(1), and added new sections (f) and (g).

CASE NOTES

I. IN GENERAL.

The purpose and intent of this rule is to prevent a party who has discoverable information from making evasive, incomplete, or untimely responses to requests for discovery. Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

The trial court has express authority under Rule 37, to impose sanctions on a party who balks at discovery requests. Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

The imposition of sanctions under Rule 37 for failure to comply with section (e) of this rule is within the sound discretion of the trial judge. Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983), cert. denied, 310 N.C. 631, 315 S.E.2d 697, 698 (1984).

Seasonable Supplemental Responses. — Defendant's supplemental response to interrogatories was not rendered "seasonable" within the meaning and intent of section (e)(1) of this rule, by the mere fact that there was no occasion for imposition of sanctions for failing to respond to discovery request with due diligence and good faith. Green ex

rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Supplemental answers to interrogatories are not seasonable when the answers are made so close to the time of trial that the party seeking discovery thereby is prevented from preparing adequately for trial, even with the exercise of due diligence. Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983), cert. denied, 310 N.C. 631, 315 S.E.2d 697, 698 (1984); Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

As to Pretrial Discovery at Common Law for Criminal or Civil Litigants, see News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

No right of inspection of public documents existed at common law when inspection was sought merely to satisfy curiosity. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

Statutes have now replaced former equitable rights of discovery and bills of discovery in equity have been abolished. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

Civil discovery is now governed by statute. The Supreme Court of the United States has indicated that rules governing discovery in civil cases are a matter of legislative grace. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

Civil litigants enjoy no absolute right to discovery of documents in the hands of others. News & Observer Publishing Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E.2d 133 (1984).

Court Permitted Further Discovery. — Where in response to plaintiffs' interrogatories concerning the facts and opinions to which each of defendant's experts would testify, and the grounds therefor, defendant responded with the same standardized statement for each of his expert witnesses which was largely a disclaimer of defendant's negligence, the court acted within its discretion in permitting further discovery. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Applied in Industrotech Constructors, Inc. v. Duke Univ., 67 N.C. App. 741, 314 S.E.2d 272 (1984); Alford v. Shaw, — N.C. App. —, 324 S.E.2d 878 (1985).

Cited in In re City of Durham Annexation Ordinance No. 5791, 66 N.C. App. 472, 311 S.E.2d 898 (1984).

II. SCOPE OF DISCOVERY GENERALLY.

Orders regarding matters of discovery, etc. —

In accord with original. See Ritter v. Kimball, 67 N.C. App. 333, 313 S.E.2d 1 (1984).

The goal of the discovery rules is to facilitate the disclosure, prior to trial, of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of basic issues and facts to go to trial. Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983), cert. denied, 310 N.C. 631, 315 S.E.2d 697, 698 (1984).

Though discovery in annexation proceedings is not altogether forbidden, its scope is necessarily limited by the nature of the proceeding. Campbell v. City of Greensboro, 70 N.C. App. 252, 319 S.E.2d 323, cert. denied and appeal dismissed, 312 N.C. 492, 322 S.E.2d 553 (1984).

Where witness was both a fact and expert (doctor) witness such witness could be deposed without a court order and his testimony could only be limited by objection during the deposition if he was questioned regarding his expert opinion. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

IV. TRIAL PREPARATION.

Inadequate Time to Prepare Response Grounds for Continuance. — In malpractice action defendant's supplemental response to plaintiffs' interrogatories, and plaintiffs' deposing of the new expert defense witness disclosed thereby a little over one day before trial began came too close to trial time to allow plaintiffs adequate time to prepare a response to the newly disclosed information; thus trial court erred in refusing to grant plaintiffs' motion for continuance. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

V. PROTECTIVE ORDERS.

The trial judge's order, etc. —

The trial judge does not have unlimited authority to issue a protective order. An order under section (c) of this rule is, however, discretionary, and is reviewable only for abuse of discretion. Williams v. State Farm Mut. Auto. Ins. Co., 67 N.C. App. 271, 312 S.E.2d 905 (1984); Ritter v. Kimball, 67 N.C. App. 333, 313 S.E.2d 1 (1984).

Award of expenses in malpractice case against defendant was justified under section (c) of this rule because defendant's motion to quash was denied and under Rule 37(a)(4) because plaintiffs' motion to compel was granted. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Rule 30. Depositions upon oral examination.

CASE NOTES

I. IN GENERAL.

Where witness was both a fact and an expert witness he could be deposed without a court order and his testimony could only be limited by objection during the deposition if he was questioned regarding his expert opinion. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Applied in Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190 (1983).

Rule 32. Use of depositions in court proceedings.

CASE NOTES

Use of Depositions at Trial Stage Limited. —

In accord with original. See Warren v. City of Asheville, — N.C. App. —, 328 S.E.2d 859 (1985).

Generally, testimony by deposition is less desirable than oral testimony, and it should ordinarily be used as a substitute only if the witness is not available to testify in person. Warren v. City of Asheville, — N.C. App. —, 328 S.E.2d 859 (1985).

Use of Party's Deposition under Section (a)(3). — While under subdivisions (2) and (9) of § 8-83 the presence of a witness in court is a proper basis for excluding the witness's deposition, it is no basis for excluding the deposition of a party, which section (a)(3) of this rule makes useable without restriction, if it is otherwise admissible under the rules of evidence. Stilwell v. Walden, 70 N.C. App. 543, 320 S.E.2d 329 (1984).

Where depositions were only offered for corroborative purposes, the trial court did not err in admitting them. Hart v. Hart, — N.C. App. —, 327 S.E.2d 631 (1985).

Applied in Holbrooks v. Duke Univ., Inc., 63 N.C. App. 504, 305 S.E.2d 69 (1983); In re City of Durham Annexation Ordinance No. 5791, 66 N.C. App. 472, 311 S.E.2d 898 (1984).

Rule 34. Production of documents and things and entry upon land for inspection and other purposes.

CASE NOTES

I. IN GENERAL.

The purpose of this rule is to prevent litigants from engaging in mere fishing expeditions to discover evidence or using the rule for harassment purposes. Williams v. State Farm Mut. Auto. Ins. Co., 67 N.C. App. 271, 312 S.E.2d 905 (1984).

As to what constituted, etc. —

When a party requests production of documents under this rule, he must show good cause, which includes the elements of necessity and relevance. Williams v. State Farm Mut. Auto. Ins. Co., 67 N.C. App. 271, 312 S.E.2d 905 (1984).

A mere statement that an examina-

tion is material and necessary is not sufficient to support a production order. Williams v. State Farm Mut. Auto. Ins. Co., 67 N.C. App. 271, 312 S.E.2d 905 (1984).

Rule 35. Physical and mental examination of persons.

CASE NOTES

Stated in Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983).

Rule 36. Requests for admission; effect of admission.

CASE NOTES

It is no longer necessary, etc. — In accord with original. See Southland Assocs. Realtors v. Miner, 62 N.C. App. 126, 308 S.E.2d 773 (1983).

Where a party deliberately destroys, alters or creates a false document to subvert an adverse party's investigation of his right to seek a legal remedy, and injuries are pleaded and proven, a claim for the resulting increased costs of the investigation will lie. Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984).

A trial judge may allow withdrawal of an admission. Whitley v. Coltrane, 65 N.C. App. 679, 309 S.E.2d 712 (1983).

Facts admitted by one defendant are not binding on a codefendant. Barclays Am. Fin., Inc. v. Haywood, 65 N.C. App. 387, 308 S.E.2d 921 (1983).

Cited in McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984); Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849 (1984).

Rule 37. Failure to make discovery; sanctions.

(b) *Failure to comply with order. —*

(1) Sanctions by Court in County Where Deposition Is Taken. — If a deponent fails to be sworn or to answer a question after being directed to do so by a judge of the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action Is Pending. — If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f) a judge of the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

a. An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

b. An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

c. An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

d. In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

e. Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in subdivisions a, b, and c of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(e), (f) Reserved for future codification purposes.

(g) *Failure to participate in the framing of a discovery plan.* — If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure. (1967, c. 954, s. 1; 1973, c. 827, s. 1; 1975, c. 762, s. 2; 1985, c. 603, ss. 5-7.)

Only Part of Rule Set Out. — As the rest of the rule was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, and applicable, insofar as just and practicable, to pending litigation, inserted "or if a party fails to obey an order entered under Rule 26(f)" in the first sentence of section (b)(2), changed the indentation of the paragraph following paragraph (b)(2)e, and added section (g).

CASE NOTES

Default as Sanction for Failure, etc. —

In accord with original. See Adair v. Adair, 62 N.C. App. 493, 303 S.E.2d 190, cert. denied, 309 N.C. 319, 307 S.E.2d 162 (1983).

Where a party deliberately destroys, alters or creates a false document to subvert an adverse party's investigation of his right to seek a legal remedy, and injuries are pleaded and proven, a claim for the resulting increased costs of the investigation will lie. Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984).

The imposition of sanctions under Rule 37 for failure to comply with Rule 26(e) is within the sound discretion of the trial judge. Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983), cert. denied, 310 N.C. 631, 315 S.E.2d 697, 698 (1984).

In addition to its inherent authority to regulate trial proceedings, the trial court has express authority under this rule to impose sanctions on a party who balks at discovery requests. Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Sanction Overturned Only, etc. —

The choice of sanctions under this rule lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion. Routh v. Weaver, 67 N.C. App. 426, 313 S.E.2d 793 (1984).

Defendant's supplemental response to interrogatories was not rendered "seasonable" within the meaning and intent of Rule 26(e)(1), by the mere fact that there was no occasion for imposition of sanctions for failing to respond to discovery request with due diligence and good faith. Green ex rel. Green v. Maness, 69 N.C. App. 292, 316 S.E.2d 917, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Award of expenses in malpractice case against defendant was justified under Rule 26(c) because defendant's motion to quash was denied and under section (a)(4) of this rule because plaintiffs' motion to compel was granted. Green ex rel. Green v. Maness, 69 N.C. App. 403, 316 S.E.2d 911, cert. denied, 312 N.C. 621, 323 S.E.2d 922 (1984).

Applied in FMS Mgt. Systems v. Thomas, 65 N.C. App. 561, 309 S.E.2d 697 (1983); Carrigan v. Shenandoah Transplants of N.C., Inc., — N.C. App. —, 325 S.E.2d 6 (1985).

Stated in Wade v. Wade, — N.C. App. —, 325 S.E.2d 260 (1985); Wilson v. Wilson, — N.C. App. —, 325 S.E.2d 668 (1985).

Cited in Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984).

Article 6.

Trials.

Rule 38. Jury trial of right.

CASE NOTES

Trial court has discretion to grant a jury trial, etc. —

The denial of a belated demand for a jury trial is within the discretion of the judge. Arney v. Arney, 71 N.C. App. 218, 321 S.E.2d 472 (1984).

Applied in Roberson v. Roberson, 65 N.C. App. 404, 309 S.E.2d 520 (1983); Williams & Michael, P.A. v. Kennamer, 71 N.C. App. 215, 321 S.E.2d 514 (1984).

Rule 39. Trial by jury or by the court.

CASE NOTES

Applied in Phillips v. Phillips, — N.C. App. —, 326 S.E.2d 57 (1985).

Rule 40. Assignment of cases for trial; continuances.

(b) No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require. Good cause for granting a continuance shall include those instances when a party to the proceeding, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly. (1967, c. 954, s. 1; 1969, c. 895, s. 9; 1985, c. 603, s. 8.)

Only Part of Rule Set Out. — As the rest of the rule was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective July 4, 1985, added the third sentence of section (b).

CASE NOTES

I. IN GENERAL.

Stated in Moon v. Central Bldrs., Inc., 65 N.C. App. 793, 310 S.E.2d 390 (1984).

III. CONTINUANCES.

But continuances are not favored. —

Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice. Doby v. Lowder, — N.C. App. —, 324 S.E.2d 26 (1984).

Rule 41. Dismissal of actions.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

For survey of 1983 law on civil procedure, see 62 N.C.L. Rev. 1107 (1984).

CASE NOTES

I. IN GENERAL.

Authority to Determine, etc. —

The authority to determine whether the nonmoving party in any action should be permitted to commence a new action has been vested in the trial judge under section (b). The exercise of such power lies within the trial court's sound discretion and will not be disturbed on appeal in the absence of a showing of abuse of discretion. Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

Function of the trial judge as trier of the facts is to evaluate the evidence without any limitation as to inferences favorable to plaintiff. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

Applied in Hilton v. Howington, 63 N.C. App. 717, 306 S.E.2d 196 (1983); Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983); Martin Marietta Corp. v. Forsyth County Zoning Bd. of Adjustment, 65 N.C. App. 570, 309 S.E.2d 523 (1983); Davidson & Jones, Inc. v. North Carolina Dep't of Admin., 69 N.C. App. 563, 317 S.E.2d 718 (1984); Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984); Stokes v. Wilson & Redding Law Firm, — N.C. App. —, 323 S.E.2d 470 (1984); Metcalf v. McGuinn, — N.C. App. —, 327 S.E.2d 51 (1985); Northwestern Bank v. Rash, — N.C. App. —, 327 S.E.2d 302 (1985); Smith v. Starnes, — N.C. App. —, 328 S.E.2d 20 (1985).

Cited in Cassidy v. Cheek, 308 N.C. 670, 303 S.E.2d 792 (1983); Copy Prods., Inc. v. Randolph, 62 N.C. App. 553, 303 S.E.2d 87 (1983); Harris v. Maready, 64 N.C. App. 1, 306 S.E.2d 799 (1983); Norman v. Royal Crown Bottling Co., 64 N.C. App. 200, 306 S.E.2d 828 (1983); Jones v. Allred, 64 N.C. App. 462, 307 S.E.2d 578 (1983); Butler Serv. Co. v. Butler Serv. Group, Inc., 66 N.C. App. 132, 310 S.E.2d 406 (1984); Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Jackson v. Jackson, 68 N.C. App. 499, 315 S.E.2d 90 (1984); Howard v. Ocean Trail Convalescent Center, 68 N.C. App. 494, 315 S.E.2d 97 (1984); Jerson v. Jerson, 68 N.C. App. 738, 315 S.E.2d 522 (1984); Dixie Chem. Corp. v. Edwards, 68 N.C. App. 714, 315 S.E.2d 747 (1984); Herrell v. Adcock, 69 N.C. App. 222, 316 S.E.2d 347 (1984); In re City of Durham Annexation Ordinance Numbered 5991 for Area A, 69 N.C. App. 77, 316 S.E.2d 649 (1984); Warren v. Guttanit, Inc., 69 N.C. App. 103, 317 S.E.2d 5 (1984); Kabatnik v. Westminster Co., — N.C. App. —, 323 S.E.2d 398 (1984).

II. VOLUNTARY DISMISSAL.

Section (a) of this rule does not require that plaintiff attempt service upon defendant before plaintiff can voluntarily dismiss his action, nor limit the reasons why plaintiff may take a voluntary dismissal. Estrada v. Burnham, — N.C. App. —, 328 S.E.2d 611 (1985).

No Court Action Required. — Subdivision (a)(1) of this rule clearly does not require court action, other than ministerial record-keeping functions, to effect a dismissal. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

Plaintiff's voluntary dismissal of a prior action is a final termination, etc. —

Where plaintiff takes a voluntary dismissal pursuant to subsection (a)(1) of this rule, no suit is pending thereafter on which the court can make a final order. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

Institution of New Claim Allowed, etc. —

Once an action is timely filed, the giving of a notice of voluntary dismissal gives plaintiff an extension of time beyond the general statute of limitations and allows plaintiff an additional year from the date the notice was given to refile an action based on the same claim. Estrada v. Burnham, — N.C. App. —, 328 S.E.2d 611 (1985).

By timely filing complaint, having summons issued, and taking voluntary dismissal without prejudice, plaintiff tolled the statute of limitations and effectively obtained a one-year extension within which to commence a new action based on the same claim pursuant to subsection (a)(1) of this rule. Estrada v. Burnham, — N.C. App. —, 328 S.E.2d 611 (1985).

Defendant Not Granted Voluntary Dismissal Absent Counterclaim. — There is no rule, statute, or case which grants a defendant the right to take a voluntary dismissal, whether with or without prejudice, unless the party-defendant taking the dismissal has a pleading which contains a counterclaim, crossclaim, or third-party claim. Department of Transp. v. Combs, 71 N.C. App. 372, 322 S.E.2d 602 (1984).

III. INVOLUNTARY DISMISSAL.

A. In General.

Section (b) means that the court may not dismiss an action ex mero motu for failure to prosecute. Simmons v. Tuttle, 70 N.C. App. 101, 318 S.E.2d 847 (1984).

When Involuntary Dismissal under Section (b) Is Without Prejudice. — Ordinarily, an involuntary dismissal under section (b) of this rule operates as an adjudication upon the merits and ends the lawsuit. However, the rule sets forth specific exceptions to this proposition, and as to these grounds, an order of involuntary dismissal is not rendered on the merits and may not constitute a dismissal with prejudice. Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

Power of Trial Judge to Order Dismissal without Prejudice. — The major exception to the general proposition that an involuntary dismissal under section (b) of this rule operates as a final adjudication is found in the power lodged by section (b) in the trial judge to specifically order that the dismissal is without prejudice and, therefore, not an adjudication on the merits. Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

The authority to determine in which cases it is appropriate to allow the nonmovant to commence a new action has been vested by section (b) of this rule in the trial judge and is no longer strictly controlled by statute as it was under former rules of practice. Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

Although this rule does not expressly provide an option for the court to examine the quality of the nonmoving party's evidence and then decline to make a ruling on the merits although granting the moving party's motion for involuntary dismissal, this authority is encompassed within the rule's otherwise unqualified grant of authority to the trial court to dismiss an action on terms by specifying that its order of dismissal is "without prejudice." Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

Review of Order Authorizing Dismissal without Prejudice. — The trial court's authority to order an involuntary dismissal without prejudice is exercised in the broad discretion of the trial court and the ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion. Whedon v. Whedon, — N.C. —, 328 S.E.2d 437 (1985).

Involuntary Dismissal May Be Used to Sanction Disobedient Parties. — The power to sanction disobedient parties, even to the point of dismissing their actions or striking their defenses, did not originate with this rule. It is long-standing and inherent. For courts to function properly, it could not be otherwise. Minor v. Minor, 62 N.C. App. 750, 303 S.E.2d 397 (1983).

Use of power of dismissal as sanction for violation of Rule 8(a)(2) provision as to pleading of malpractice damages. See Schell v. Coleman, 65 N.C. App. 91, 308 S.E.2d 662 (1983), appeal dismissed and cert. denied, 311 N.C. 763, 321 S.E.2d 145 (1984).

Surplusage in Order. — It was the trial court's duty, when presented with plaintiff's motion for an involuntary dismissal of defendant's request for attorneys' fees, to examine the quality of de-

fendant's evidence and make a ruling on the merits; this the trial court did, denying defendant's motion. The additional language in the order indicating that the motion for appellate attorneys' fees was dismissed without prejudice was without legal effect and would be regarded as mere surplusage. Whedon v. Whedon, 68 N.C. App. 191, 314 S.E.2d 794, cert. granted, 311 N.C. 769, 321 S.E.2d 158 (1984).

Dismissal at Close of Evidence. — Section (b) of this rule does not specifically provide for involuntary dismissal at the close of all the evidence. However, where such a motion is made and ruled upon and the court has made findings as required by Rule 52, the judgment entered will be treated as a judgment on the merits. African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 649 (1984).

B. Failure to Prosecute or to Comply with Rules or Orders.

Question Raised by Section (b). — In accord with 1st paragraph in original. See Barnhill v. Barnhill, 68 N.C. App. 697, 315 S.E.2d 548 (1984).

C. Failure to Show Right to Relief.

Motion Treated as for Directed Verdict. — It is permissible for motions made under section (b) of this rule at the close of plaintiff's evidence in jury trials to be treated as motions for directed verdict under Rule 50(a). Sample v. Morgan, 311 N.C. 717, 319 S.E.2d 607 (1984).

Court May Determine Facts, etc. — In accord with 2nd paragraph in original. See Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

Section (b) of this rule permits the trial judge to weigh the evidence, to find facts against the movant, and to sustain respondents' motion at the conclusion of the movant's evidence. In re Foreclosure of Deed of Trust, 63 N.C. App. 744, 306 S.E.2d 475, cert. denied, 309 N.C. 820, 310 S.E.2d 358 (1983).

Despite Plaintiff's Prima Facie Case. —

In accord with original. See Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

At the close of the movant's evidence, the judge may grant judgment against the movant on the basis of facts as he determines them to be. This is true even where the movant has made out a prima facie case which would withstand a motion for directed verdict for the respondent in a jury trial. In re Foreclosure of Deed of Trust, 63 N.C. App. 744, 306 S.E.2d 475, cert. denied, 309 N.C. 820, 310 S.E.2d 358 (1983).

But Court Is Not Compelled, etc. — Under section (b) of this rule, the judge is not required to rule on the motion at the close of the plaintiff's evidence and may decline to render any judgment until the close of all the evidence. African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983), cert. denied, 310 N.C. 308, 312 S.E.2d 649 (1984).

No Provision Made for Section (b), etc. —

Section (b) of this rule provides for a motion for dismissal at the close of plaintiff's evidence; it does not provide for such motion at the close of all the evidence. Menzel v. Metrolina Anesthesia Assocs., 66 N.C. App. 53, 310 S.E.2d 400 (1984).

There is little point in a motion for dismissal at the close of all the evidence, since at that stage the judge will determine the facts in any event. Menzel v. Metrolina Anesthesia Assocs., 66 N.C. App. 53, 310 S.E.2d 400 (1984).

Findings and Conclusions, etc. —

If the court grants a motion under section (b) of this rule, the rule requires the judge to make findings of fact in accordance with Rule 52(a). Such findings are intended to aid the appellate court by affording it a clear understanding of the basis of the trial court's decision, and to make definite what was decided for purpose of res judicata and estoppel. Finally, the requirement of findings should evoke care on the part of the trial judge in ascertaining the facts. In re Lowery, 65 N.C. App. 320, 309 S.E.2d 469 (1983).

Conclusive Effect on Appeal, etc. —

Where the trial judge's findings are supported by the evidence and those findings in turn support his conclusions of law, they are binding on appeal. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

The findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if, arguendo, there is evidence to the contrary. The trial court's judgment therefore must be granted the same deference as a jury verdict. Lumbee River Elec. Membership Corp. v. City of Fayetteville, 309 N.C. 726, 309 S.E.2d 209 (1983).

IV. COSTS.

The object of this statutory rule is clearly to provide superior and district courts with authority for the efficient collection of costs in cases in which voluntary dismissals are taken; therefore, the filing of notice of dismissal, while it may terminate adversary proceedings in the case, does not terminate the court's authority to enter orders apportioning and taxing costs. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

The language of section (d) constitutes a mandatory directive, etc. — In accord with original. See Sanford v. Starlite Disco, Inc., 66 N.C. App. 470, 311 S.E.2d 67 (1984).

The 30-day provision in section (d) should not be read in conjunction with Rule 6(b) which provides for an enlargement of the time within which to take a given action, and that the court erred in not considering plaintiff's alleged excusable neglect as an explanation for his late payment of the costs. Sanford v. Starlite Disco, Inc., 66 N.C. App. 470, 311 S.E.2d 67 (1984).

Correction of order. — The trial court's failure to allow and tax costs could be considered an oversight or omission in its order, and since the substantive rights of the parties were not affected thereby, the court had authority under Rule 60(a) to correct such inadvertent omission. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

Authority of Superior Court Clerk. — Although a voluntary dismissal is not per se a final judgment, the clerk of superior court has authority to tax costs against a plaintiff who takes a dismissal; in fact, the clerk is ordinarily the proper official to tax such costs. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

Clerk Has No Authority to Order Compensation for Survey. — Where in an action involving a boundary dispute a survey has been ordered and made, and the trial judge has failed to order compensation, the clerk has no authority to do so. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

Rule 42. Consolidation; separate trials.

CASE NOTES

III. SEPARATE TRIALS.

The trial judge has discretion to sever issues for trial in order to further convenience or avoid prejudice. On remand, if the trial judge exercises such discretion, it is recommended that he enter findings and conclusions that will establish the appropriateness of severance. Vance Trucking Co. v. Phillips, 66 N.C. App. 269, 311 S.E.2d 318, cert. denied, 311 N.C. 309, 317 S.E.2d 907 (1984).

Rule 43. Evidence.

CASE NOTES

IV. RECORD OF EXCLUDED EVIDENCE.

The trial judge should be loath to deny an attorney his right to have an excluded answer placed in the record, because the appellate division may not concur in his judgment that the proffered testimony is clearly inadmissible. Nix v. Allstate Ins. Co., 68 N.C. App. 280, 314 S.E.2d 562 (1984).

Exclusion Based on Claim of Privilege. — Normally, excluded evidence must be placed in the record if offered, "unless it clearly appears ... that the witness is privileged." If the exclusion is based upon a claim of privilege, disclo-

sure of the answer should not be required, as it would in some sense destroy the very privilege ostensibly recognized. Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984).

Or Where Evidence Is Clearly, etc. —

While section (c) of this rule requires the trial court, upon request, to allow the insertion of excluded evidence in the record, the trial judge is not required to allow insertion of an answer in the record if it clearly appears that the proffered testimony is not admissible on any grounds. Nix v. Allstate Ins. Co., 68 N.C. App. 280, 314 S.E.2d 562 (1984).

Rule 44. Proof of official record.

CASE NOTES

Authentication of Copy. — Minutes of a meeting of the Joint Appropriations Expansion Budget Committee on Education were properly admitted although they were not admitted into evidence through the legislative librarian, where the minutes were introduced through an administrative officer for the General Assembly and custodian of materials contained in the legislative library and the minutes were testified to be a true and accurate copy of the original of the minutes. This was sufficient authentication of the official minutes. Morgan v. Polk County Bd. of Educ., — N.C. App. —, 328 S.E.2d 320 (1985).

Rule 45. Subpoena.

CASE NOTES

Subpoenas are not available by statute until an action has been commenced. In re Superior Court Order Dated April 8, 1983, 70 N.C. App. 63, 318 S.E.2d 843, cert. granted, 312 N.C. 624, 323 S.E.2d 926 (1984).

At the investigatory stage there is insufficient evidence to support a finding of probable cause, and administrative or criminal search warrants cannot be used. In re Superior Court Order Dated April 8, 1983, 70 N.C. App. 63, 318 S.E.2d 843, cert. granted, 312 N.C. 624, 323 S.E.2d 926 (1984).

Corporations have never possessed the kind of Fourth Amendment protection accorded to persons and their homes. Corporations' special status as creatures of the state exposes them to exhaustive state scrutiny in exchange for the privilege of state recognition. In re Superior Court Order Dated April 8, 1983, 70 N.C. App. 63, 318 S.E.2d 843, cert. granted, 312 N.C. 624, 323 S.E.2d 926 (1984).

Nothing in common law prohibits an order requiring production of bank records as part of an investigation of criminal activities of the bank's customers, and, if anything, the common law courts affirmatively possessed such power. By extension, then, the Superior Courts of North Carolina continue to possess such power where the interests of justice so require. In re Superior Court Order Dated April 8, 1983, 70 N.C. App. 63, 318 S.E.2d 843, cert. granted, 312 N.C. 624, 323 S.E.2d 926 (1984).

Where it was evident that plaintiffs waited until the last minute to serve an extremely broad subpoena, the court properly found that the subpoena was unreasonable and oppressive and did not abuse its discretion in quashing it. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

Rule 46. Objections and exceptions.

CASE NOTES

I. IN GENERAL.

Requirement of subsection (a)(1), etc. —

In accord with original. See McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 885 (1984).

Section (b) of this rule only requires, etc. —

Where no proper exception was made,

but the transcript shows that the plaintiff informed the court of his opposition to the directed verdict and the grounds for his opposition, the exception was properly preserved pursuant to section (b) of this rule. McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983), cert. denied, 310 N.C. 477, 312 S.E.2d 885 (1984).

Applied in Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984); State v. McGill, — N.C. App. —, 326 S.E.2d 345 (1985).

Stated in Skvarla v. Park, 62 N.C. App. 482, 303 S.E.2d 354 (1983).

Rule 49. Verdicts.

CASE NOTES

I. IN GENERAL.

The judge is required, etc. —

The trial judge must submit to the jury all issues which are necessary to settle the material controversies arising out of the pleadings. Winston-Salem Joint Venture v. City of Winston-Salem, 65 N.C. App. 532, 310 S.E.2d 58 (1983).

Applied in Stiles v. Charles M. Morgan Co., 64 N.C. App. 328, 307 S.E.2d 409 (1983).

Cited in Durham v. Quincy Mut. Fire Ins. Co., 311 N.C. 361, 317 S.E.2d 372 (1984).

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

CASE NOTES

I. IN GENERAL.

Applied in Libby Hill Seafood Restaurants, Inc. v. Owens, 62 N.C. App. 695, 303 S.E.2d 565 (1983); Church v. First Union Nat'l Bank, 63 N.C. App. 359, 304 S.E.2d 633 (1983); Oxendine v. Moss, 64 N.C. App. 205, 306 S.E.2d 831 (1983); Jones v. Allred, 64 N.C. App. 462, 307 S.E.2d 578 (1983); Browne v. Macaulay, 65 N.C. App. 708, 309 S.E.2d 704 (1983); Willoughby v. Wilkins, 65 N.C. App. 626, 310 S.E.2d 90 (1983); Murdock v. Ratliff, 310 N.C. 652, 314 S.E.2d 518 (1984); Wiseman v. Wiseman, 68 N.C. App. 252, 314 S.E.2d 566 (1984); Carolina First Nat'l Bank v. Douglas Gallery of Homes, Ltd., 68 N.C. App. 246, 314 S.E.2d 801 (1984); Davis v. Mobilift Equip. Co., 70 N.C. App. 621, 320 S.E.2d 406 (1984); Walker v. Santos, 70 N.C. App. 623, 320 S.E.2d 407 (1984); Jones v. Gwynne, 312 N.C. 393, 323 S.E.2d 9 (1984); Dotson v. Payne, — N.C. App. —, 323 S.E.2d 362 (1984); Kabatnik v. Westminster Co., — N.C. App. —, 323 S.E.2d 398 (1984); Godfrey v. Van Harris Realty, Inc., — N.C. App. —, 325 S.E.2d 27 (1985).

Stated in Sample v. Morgan, 66 N.C. App. 338, 311 S.E.2d 47 (1984).

Cited in Copy Prods., Inc. v. Randolph, 62 N.C. App. 553, 303 S.E.2d 87 (1983); Moore v. Reynolds, 63 N.C. App. 160, 303 S.E.2d 839 (1983); Driftwood Manor Investors v. City Fed. Sav. & Loan Ass'n, 63 N.C. App. 459, 305 S.E.2d 204 (1983); Hefner v. Stafford, 64 N.C. App. 707, 308 S.E.2d 93 (1983); Cook v. Ponos, 65 N.C. 705, 309 S.E.2d 706 (1983); New Hanover County v. Burton, 65 N.C. App. 544, 310 S.E.2d 72 (1983); Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 311 S.E.2d 559 (1984); Mims v. Mims, 65 N.C. App. 725, 310 S.E.2d 130 (1984); Wilder v. Squires, 68 N.C. App. 310, 315 S.E.2d 63 (1984); Simmons v. C.W. Myers Trading Post, Inc., 68 N.C. App. 511, 315 S.E.2d 75 (1984); Pleasant v. Johnson, 69 N.C. App. 538, 317 S.E.2d 104 (1984); David-

son & Jones, Inc. v. North Carolina Dep't of Admin., 69 N.C. App. 563, 317 S.E.2d 718 (1984); Herbert v. Babson, — N.C. App. —, 328 S.E.2d 796 (1985).

II. DIRECTED VERDICT.

A. In General.

Purpose of this rule. —

In accord with original. See Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984).

Directed verdicts are appropriate only in jury cases. —

Directed verdicts are appropriate only in jury cases. In nonjury civil cases the appropriate motion by which a defendant may test the sufficiency of the plaintiff's evidence to show a right to relief is a motion for involuntary dismissal under Rule 41(b). The distinction is more than one of mere nomenclature, as a different test is to be applied to determine the sufficiency of the evidence to withstand the motion when the case is tried before the court and jury than when the court alone is finder of facts. Mayo v. Mayo, — N.C. App. —, 326 S.E.2d 283 (1985).

The purpose of a motion for directed verdict, made pursuant to section (a), is to test the legal sufficiency of the evidence to take the case to the jury and to support a verdict for the nonmoving party. In passing upon the motion, the court must consider the evidence in the light most favorable to the nonmoving party, taking all evidence which tends to support his position as true, resolving all contradictions, conflicts and inconsistencies in his favor and giving him the benefit of all reasonable inferences. The motion may be granted only if the evidence is insufficient, as a matter of law, to support a verdict for the nonmoving party. The same test is apposite whether considering a section (a) motion directed at the plaintiff's claim or at the defendant's counterclaim. Eatman v. Bunn, — N.C. App. —, 325 S.E.2d 50 (1985).

A motion for a directed verdict under section (a) presents substantially the same question as formerly presented by motion for judgment of nonsuit. Harrell v. Clarke, — N.C. App. —, 325 S.E.2d 33 (1985).

Treatment of Involuntary Dismissal, etc. —

It is permissible for motions made under Rule 41(b) at the close of plaintiff's evidence in jury trials to be treated as motions for directed verdict under section (a) of this rule. Sample v. Morgan, 311 N.C. 717, 319 S.E.2d 607 (1984).

As Considered in the Light, etc. —

In accord with 2nd paragraph in original. See Crisp v. Benfield, 64 N.C. App. 357, 307 S.E.2d 179 (1983); Douglas v. Parks, 68 N.C. App. 496, 315 S.E.2d 84, cert. denied, 311 N.C. 754, 321 S.E.2d 131 (1984).

With Contradictions, Conflicts, etc.—

In accord with first paragraph in original. See Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984).

In determining whether the evidence is sufficient to withstand a motion for directed verdict, plaintiff's evidence must be taken as true and all the evidence must be viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, with conflicts, contradictions and inconsistencies being resolved in plaintiff's favor. Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 62 N.C. App. 419, 303 S.E.2d 332, cert. denied, 309 N.C. 461, 307 S.E.2d 364, 365 (1983).

Upon defendants' motion for directed verdict, plaintiff's evidence is taken as true, along with all reasonable inferences therefrom, resolving all conflicts and inconsistencies in plaintiff's favor, and disregarding defendant's evidence unless favorable to plaintiff or tending to clarify plaintiff's case. Forsyth County v. Shelton, — N.C. App. —, 329 S.E.2d 730 (1985).

And Giving Nonmovant, etc. —

In accord with first paragraph in original. See Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984).

In accord with 2nd paragraph in original. See Bryant v. Nationwide Mut. Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

In accord with 7th paragraph in original. See Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983); Henderson v. Traditional Log Homes, Inc., 70 N.C. App. 303, 319 S.E.2d 290, cert. denied, 312 N.C. 623, 323 S.E.2d 923 (1984).

In accord with 14th paragraph in original. See Hawkins v. State Capital Ins. Co., — N.C. App. —, 328 S.E.2d 793 (1985).

Upon a motion for a directed verdict, the court must view the evidence in the light most favorable to the nonmovant, resolving all conflicts in his favor and giving him the benefit of every inference that could reasonably be drawn from the evidence in his favor. It is only where the evidence, when so considered, is in-

sufficient to support a verdict in the nonmovant's favor that the motion for directed verdict should be granted. West v. Slick, — N.C. —, 326 S.E.2d 601 (1985).

Question Presented by Motion for Directed Verdict. —

In accord with 1st paragraph in original. See Hong v. George Goodyear Co., 63 N.C. App. 741, 306 S.E.2d 157 (1983); Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 316 S.E.2d 256 (1984).

A motion for a directed verdict pursuant to section (a) of this rule presents the question of whether the evidence presented is sufficient to carry the case to the jury. In passing on this motion, the trial judge must consider the evidence in the light most favorable to the nonmovant, and conflicts in the evidence together with inferences which may be drawn from it must be resolved in favor of the nonmovant. The motion may be granted only if the evidence is insufficient to justify a verdict for the nonmovant as a matter of law. Satterfield v. Pappas, 67 N.C. App. 28, 312 S.E.2d 511, cert. denied, 311 N.C. 403, 319 S.E.2d 274 (1984).

Where Question Is Close, Better Practice, etc. —

In accord with 1st paragraph in original. See Tice v. Hall, 63 N.C. App. 27, 303 S.E.2d 832 (1983), aff'd, 310 N.C. 589, 313 S.E.2d 565 (1984).

If More Than Scintilla of Evidence Motion Should Be Denied. — The court should deny a motion for directed verdict when it finds any evidence more than a scintilla to support plaintiff's prima facie case in all its constituent elements. Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

The court should deny motion for directed verdict if there is more than a scintilla of evidence to support the plaintiff's prima facie case. Southern Ry. v. O'Boyle Tank Lines, 70 N.C. App. 1, 318 S.E.2d 872 (1984).

And If Plaintiff Shows No Right, etc. —

In accord with 2nd paragraph in original. See Mitchell v. Parker, 68 N.C. App. 458, 315 S.E.2d 76, cert. denied, 311 N.C. 760, 321 S.E.2d 140, 141 (1984); Willis v. Russell, 68 N.C. App. 424, 315 S.E.2d 91 (1984).

The scope of review of a trial court's decision granting the defendant's motion for a directed verdict is whether the evidence, when considered in the light most favorable to the plaintiff, is sufficient for submission to the jury; if the plaintiff fails to make a prima facie showing for relief, it is not entitled to have its case sent to the jury and the judge may rule on the issue as a matter of law. Air Traffic Conference of Am. v. Marina Travel, Inc., 69 N.C. App. 179, 316 S.E.2d 642 (1984).

A directed verdict is proper only if it appears that the nonmovant failed to show a right to recover upon any view of the facts which the evidence reasonably tends to establish. West v. Slick, — N.C. —, 326 S.E.2d 601 (1985).

A verdict may never, etc. —

A verdict may not be directed when the facts are in dispute, and the credibility of testimony is for the jury, not the trial judge. Population Planning Assocs. v. Mews, 65 N.C. App. 96, 308 S.E.2d 739 (1983).

A verdict may never be directed when there is conflicting evidence in contested issues of fact. Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 316 S.E.2d 256 (1984).

Motion for directed verdict may be granted only if, etc. —

In accord with 2nd paragraph in original. See Henderson v. Traditional Log Homes, Inc., 70 N.C. App. 303, 319 S.E.2d 290 (1984).

In accord with 4th paragraph in original. See Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 316 S.E.2d 256 (1984).

The court must consider even "incompetent," etc. —

The court must consider even incompetent evidence in ruling on a motion for a directed verdict. The reason for this rule is that the admission of incompetent evidence may have caused the plaintiff to omit competent evidence of the same import. Haney v. Alexander, — N.C. App. —, 323 S.E.2d 430 (1984).

What Evidence of Movant May Be Considered, etc. —

In accord with 1st paragraph in original. See Henderson v. Traditional Log Homes, Inc., 70 N.C. App. 303, 319 S.E.2d 290, cert. denied, 312 N.C. 623, 323 S.E.2d 923 (1984).

Direction of Verdict in Favor of Party with Burden, etc. —

There is no constitutional or procedural impediment to granting a directed verdict in favor of the party with the burden of proof when the credibility of the movant's witnesses is manifest as a matter of law. Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

Where the plaintiffs fail to make a

prima facie showing for relief, they are not entitled to have their case sent to the jury and the trial judge may rule on the issue as a matter of law. Hong v. George Goodyear Co., 63 N.C. App. 741, 306 S.E.2d 157 (1983).

Directed Verdict When Plaintiff's Evidence Shows Contributory Negligence. —

In accord with 5th paragraph in original. See Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

When a defendant moves for a directed verdict in a medical malpractice case, the question raised is whether plainiff has offered evidence of each of the following elements of his claim for relief: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages. Mitchell v. Parker, 68 N.C. App. 458, 315 S.E.2d 76, cert. denied, 311 N.C. 760, 321 S.E.2d 140, 141 (1984).

Raising of Issues on Appeal. — When a specific ground for a directed verdict is not stated in the original motion, it cannot be raised on appeal; even the sufficiency of the evidence cannot be raised for the first time on appeal. Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323, cert. denied, 311 N.C. 401, 319 S.E.2d 271 (1984).

B. Statement of Specific Grounds.

The courts need not inflexibly enforce the rule, etc. —

While the better practice is to state specific grounds for a motion for directed verdict, it is not necessary where the issue is identified and the grounds for the motion are apparent to the court and the parties. Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

III. JUDGMENT NOTWITHSTANDING THE VERDICT AND NEW TRIAL.

What Is Motion for Judgment N.O.V. —

In accord with 1st paragraph in original. See Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 316 S.E.2d 256 (1984).

In accord with 2nd paragraph in original. See Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 316 S.E.2d 256 (1984).

A motion for judgment notwithstanding the verdict is essentially the renewal of prior motion for a directed verdict. Therefore, rules regarding the sufficiency of the evidence to go to the jury are equally applicable to a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict, notwithstanding the contrary verdict reached by the jury. Henderson v. Traditional Log Homes, Inc., 70 N.C. App. 303, 319 S.E.2d 290, cert. denied, 312 N.C. 623, 323 S.E.2d 923 (1984).

A motion for judgment notwithstanding the verdict, or judgment N.O.V., is in effect a directed verdict granted after the jury verdict. Bryant v. Nationwide Mut. Fire Ins. Co., 67 N.C. App. 616, 313 S.E.2d 803, cert. granted, 311 N.C. 399, 319 S.E.2d 267 (1984).

A motion under section (b) of this rule is essentially a renewal of an earlier motion for a directed verdict. Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

Motion for Directed Verdict Prerequisite, etc. —

In accord with 3rd paragraph in original. See Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985); Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

A motion for judgment notwithstanding the verdict is cautiously and sparingly granted. —

In accord with original. See Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

Standards for granting a motion, etc. —

The test for determining the sufficiency of the evidence when ruling on a motion for judgment notwithstanding the verdict is the same as that applied when ruling on a motion for directed verdict. Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co., 311 N.C. 62, 316 S.E.2d 256 (1984).

A motion for judgment non obstante veredicto is essentially a renewal of a motion for directed verdict, and the same standards govern the trial court's consideration of it as govern a directed verdict motion. Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

If the motion for directed verdict could have been properly granted, then the subsequent motion for judgment notwithstanding the verdict should also be granted. Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

Giving Nonmovant the Benefit of Every Inference, etc. —

A motion for judgment notwithstanding the verdict presents the question of whether the evidence was sufficient to

entitle the plaintiff to have a jury pass on it. The evidence must be considered in the light most favorable to the party opposing the motion, and the opponent is entitled to the benefit of every reasonable inference which may legitimately be drawn from the evidence, and all conflicts in the evidence are resolved in favor of the opponent. Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

Grant of Judgment N.O.V. Erroneous Where Case Was Sufficient, etc. —

In accord with 1st paragraph in original. See Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

If More Than Scintilla of Evidence Motion Should Be Denied. — The court should deny a motion for judgment notwithstanding the verdict when it finds any evidence more than a scintilla to support plaintiff's prima facie case in all its constituent elements. Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

Where defendant has the burden of proof on an affirmative defense, the granting of a directed verdict or judgment notwithstanding the verdict in his favor will be more closely scrutinized. Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

Contributory Negligence as Grounds for Judgment N.O.V. — Judgment notwithstanding the verdict on the grounds of contributory negligence should be granted only when the evidence establishes plaintiff's negligence so clearly that no other reasonable inference can be drawn from the evidence. Clark v. Moore, 65 N.C. App. 609, 309 S.E.2d 579 (1983).

Trial Judge to Rule on Alternative Motion for New Trial. —

In accord with 2nd paragraph in original. See Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

The trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge. Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

Paternity Suit. — In a paternity case, judgment non obstante veredicto in favor of plaintiff, the party with the burden of proof, was not improper on grounds that plaintiff's proof depended in part on her credibility as a witness, where defendant corroborated most of plaintiff's testimony and refused none of it. Smith v. Price, — N.C. App. —, 328 S.E.2d 811 (1985).

Rule 51. Instructions to jury.

(a) *Judge to explain law but give no opinion on facts.* -- In charging the jury in any action governed by these rules, a judge shall not give an opinion as to whether or not a fact is fully or sufficiently proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence. If the judge undertakes to state the contentions of the parties, he shall give equal stress to the contentions of each party.

(1967, c. 954, s. 1; 1985, c. 537, s. 2.)

Only Part of Rule Set Out. — As the rest of the rule was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective July 1, 1985, rewrote subsection (a), which read "In charging the jury in any action governed by these rules, no judge shall give an opinion whether a fact is fully or sufficiently proved, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. The judge shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided, the judge shall give equal stress to the contentions of the various parties."

CASE NOTES

I. IN GENERAL.

Applied in Goble v. Helms, 64 N.C. App. 439, 307 S.E.2d 807 (1983); Sykes v. Floyd, 65 N.C. App. 172, 308 S.E.2d 498 (1983); In re Lee, 69 N.C. App. 277, 317 S.E.2d 75 (1984); Pittman v. First Protection Life Ins. Co., — N.C. App. —, 325 S.E.2d 287 (1985).

Stated in In re Will of Maynard, 64 N.C. App. 211, 307 S.E.2d 416 (1983); Adams v. Mills, 68 N.C. App. 256, 314 S.E.2d 589 (1984).

II. CHARGE TO THE JURY, GENERALLY.

Editor's Note. — The cases cited below were decided prior to the 1985 amendment rewriting section (a) of this rule.

Requirement of Former § 1-180, etc. —

Although the provisions of § 1-180 have been repealed and are now embodied in subsection (a) of this rule, the law remains, for all practical purposes, unchanged. Consolidated Systems v. Granville Steel Corp., 63 N.C. App. 485, 305 S.E.2d 57 (1983).

Not Dependent on Request, etc. —

The trial court has a duty, without a request for special instruction, to explain the law and apply it to the evidence on all substantial features of the case. The failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. Stiles v. Charles M. Morgan Co., 64 N.C. App. 328, 307 S.E.2d 409 (1983).

Judge Must Declare, etc. —

This rule imposes upon the trial judge a duty to explain the law and to apply it to the evidence on all substantial features of the case. Federated Mut. Ins. Co. v. Hardin, 67 N.C. App. 487, 313 S.E.2d 801 (1984).

This rule imposes a positive duty on the trial judge to charge on the substantial features of the case as the evidence dictates. Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

No Error in Failure to Instruct, etc.—

While it is the general rule that in a civil case the trial judge must declare and explain the law arising in the evidence, even in the absence of a special request such rule has certain accepted limits. Such as the duty is to explain the law and apply it on all substantial features of the case and the instruction must be based on evidence which, when viewed in the light most favorable to the proponent, will support a reasonable inference of each essential element of the claim or defense asserted. In re Will of Cooley, 66 N.C. App. 411, 311 S.E.2d 613 (1984).

Trial judge did not err in failing to charge on the jury's right to consider the physical evidence, where the plaintiff had failed to submit a proposed instruction and had failed to submit her request to him in writing as required by section (b) of this rule. Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

V. OPINION OF THE JUDGE.

In Any Manner at Any Stage of Trial. —

Expressions of opinion in the presence of a jury are prohibited, and understandably so, since most juries lack the training needed to consider only relevant and competent evidence without guidance. In contrast, in a trial without a jury, the fact finder is also a highly trained legal expert, and thus the evil addressed by the statute is less likely to exist. Consolidated Systems v. Granville Steel Corp., 63 N.C. App. 485, 305 S.E.2d 57 (1983).

Expert Witness. — Where the witness involved was not a party to the litigation and court's declaration of him as an expert in no way touched upon any question which the jury had to decide, there was no prejudicial error by virtue of the trial court's stating its ruling concerning such witness in the presence of the jury. In re Lee, 69 N.C. App. 277, 317 S.E.2d 75 (1984).

Rule 52. Findings by the court.

CASE NOTES

I. IN GENERAL.

In cases where the trial judge sits as the trier of facts, he is required to (1) find the facts on all issues joined in the pleadings; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly. Gil-

bert Eng'g Co. v. City of Asheville, — N.C. App. —, 328 S.E.2d 849 (1985).

Applied in Turner v. Turner, 64 N.C. App. 342, 307 S.E.2d 407 (1983); African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983); In re Lowery, 65 N.C. App. 320, 309 S.E.2d 469 (1983); Gates v. Gates, 69 N.C. App. 421, 317 S.E.2d 402 (1984); Brooks v. Butler, 70 N.C. App. 681, 321 S.E.2d 440 (1984); Chloride, Inc. v. Honeycutt, — N.C. App. —, 323 S.E.2d 368 (1984); J.M. Thompson Co. v. Doral Mfg. Co., — N.C. App. —, 324 S.E.2d 909 (1985); Glesner v. Dembrosky, — N.C. App. —, 327 S.E.2d 60 (1985); Rowe v. Rowe, — N.C. App. —, 327 S.E.2d 624 (1985).

Cited in Roberts v. Roberts, 68 N.C. App. 163, 314 S.E.2d 781 (1984); Barnhill v. Barnhill, 68 N.C. App. 697, 315 S.E.2d 548 (1984); Vaglio v. Town & Campus Int'l, Inc., 71 N.C. App. 250, 322 S.E.2d 3 (1984).

II. FINDINGS AND CONCLUSIONS, GENERALLY.

Duty of Judge to Find Facts and State Conclusions, etc. —

This rule governs findings by the court in nonjury proceedings. This rule requires the trial court in such proceedings to do three things: (1) find facts on all issues of fact joined on the pleadings, (2) declare conclusions of law arising on the facts found, and (3) to enter judgment accordingly. This is because when a trial judge sits as both judge and juror, as he or she does in a nonjury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom. In re Whisnant, 71 N.C. App. 439, 322 S.E.2d 434 (1984).

To comport with subsection (a)(1) of this rule, the trial court must make a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment. Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 65 N.C. App. 242, 310 S.E.2d 33 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689, — U.S. —, 105 S. Ct. 128, 83 L. Ed. 2d 69 (1984).

So as to Render Them Distinguishable. —

The judge complies with section (a)(1) if he separates the findings and conclusions in such a manner as to render them distinguishable, no matter how the separation is effected. Highway Church of Christ, Inc. v. Barber, — N.C. App. —, 325 S.E.2d 305 (1985).

Ultimate facts are the final, etc. —

An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. In re City of Durham Annexation Ordinance Numbered 5991 for Area A, 69 N.C. App. 77, 316 S.E.2d 649, appeal dismissed, 312 N.C. 493, 322 S.E.2d 553 (1984).

The trial judge is required, etc. —

Section (a)(1) of this rule does not require recitation of evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached. Chemical Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 65 N.C. App. 242, 310 S.E.2d 33 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689, — U.S. —, 105 S. Ct. 128, 83 L. Ed. 2d 69 (1984).

In accord with 2nd paragraph in original. See Plott v. Plott, — N.C. —, 326 S.E.2d 863 (1985).

A finding of essential facts as lay a basis for the decision is sufficient under section (a) of this rule. Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984).

The general rule is that in making findings of fact, the trial court is required only to make brief, pertinent and definite findings and conclusions about the matters in issue, but need not make a finding on every issue requested. Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984).

The facts required to be found are the ultimate facts established by the evidence which are determinative of the questions involved in the action and are essential to support the conclusions of law reached. Gilbert Eng'g Co. v. City of Asheville, — N.C. App. —, 328 S.E.2d 849 (1985).

Purpose of requiring findings of fact, etc. —

The purpose of detailed findings of specific fact is to allow a reviewing court to determine from the record whether the judgment and the underlying legal conclusions represent a correct application of the law. Waynick Constr., Inc. v. York, 70 N.C. App. 287, 319 S.E.2d 304, cert. denied, 312 N.C. 624, 323 S.E.2d 926 (1984); Gilbert Eng'g Co. v. City of

Asheville, — N.C. App. —, 328 S.E.2d 849 (1985).

The purpose for requiring conclusions of law to be stated separately is to enable the reviewing court to determine what law the court applied to the facts found. Waynick Constr., Inc. v. York, 70 N.C. App. 287, 319 S.E.2d 304, cert. denied, 312 N.C. 624, 323 S.E.2d 926 (1984).

Trial court's findings of fact are conclusive if they are supported, etc.—

In accord with 1st paragraph in original. See Gilbert Eng'g Co. v. City of Asheville, — N.C. App. —, 328 S.E.2d 849 (1985).

In accord with 4th paragraph in original. See Fortis Corp. v. Northeast Forest Prods., 68 N.C. App. 752, 315 S.E.2d 537 (1984).

Although the question of the sufficiency of the evidence to support the findings may be raised on appeal, the appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

In cases involving a higher evidentiary standard, the appellate court must review the evidence in order to determine whether the findings are supported by clear, cogent and convincing evidence and support the conclusions of law. In re Montgomery, 311 N.C. 101, 316 S.E.2d 246 (1984).

This rule does not require the manual drafting of such judgment or oral dictation thereof. Johnson v. Johnson, 67 N.C. App. 250, 313 S.E.2d 162 (1984).

III. FINDINGS AND CONCLUSIONS ON GRANT OR DENIAL OF MOTIONS, PRELIMINARY INJUNCTIONS, ETC.

In a hearing involving a motion for declaration of compliance, in which neither side requested findings of fact, the court did not have to find the facts specially. Horne v. Flack, 68 N.C. App. 749, 315 S.E.2d 539 (1984).

Rule 53. Referees.

Legal Periodicals. — For survey of 1982 family law, see 61 N.C.L. Rev. 1155 (1983).

CASE NOTES

I. IN GENERAL.

In the absence of exceptions, etc.—

In accord with original. See State ex rel. Gilchrist v. Cogdill, — N.C. App. —, 327 S.E.2d 647 (1985).

ARTICLE 7.

Judgment.

Rule 54. Judgments.

Legal Periodicals.—

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

For survey of 1982 law on torts, see 61 N.C.L. Rev. 1225 (1983).

CASE NOTES

I. IN GENERAL.

Ruling on interlocutory nature of appeals is properly a matter for the appellate division, not the trial court. Since this often requires consideration of the merits, motions to dismiss appeals as being interlocutory should properly be filed after the record on appeal is filed in the appellate court. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

The appellate division possesses suffi-

cient authority to dispose of interlocutory appeals which do not affect a substantial right by dismissal. It has express authority to do so on motion of the parties if the appeal is frivolous or taken solely for purposes of delay. Or it may exercise its general authority in response to motions filed under the general motions provision. Or the appellate division may dismiss upon its own motion as part of its general duty to apply the laws governing the right to appeal. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Plaintiff in Unfair Trade Practices action has no right of immediate appeal from an interlocutory order dismissing her claim for treble damages. Simmons v. C.W. Myers Trading Post, Inc., 68 N.C. App. 511, 315 S.E.2d 75, cert. denied, 312 N.C. 85, 321 S.E.2d 898 (1984).

Relief under section (c) of this rule is always proper when it does not operate to the substantial prejudice of the opposing party. Such relief should, therefore, be denied when the relief demanded was not suggested or illuminated by the pleadings nor justified by the evidence adduced at trial. North Carolina Nat'l Bank v. Carter, 71 N.C. App. 118, 322 S.E.2d 180 (1984).

Applied in Bumgarner v. Tomblin, 63 N.C. App. 636, 306 S.E.2d 178 (1983); Payne v. North Carolina Farm Bureau Mut. Ins. Co., 67 N.C. App. 692, 313 S.E.2d 912 (1984); Perry v. Aycock, 68 N.C. App. 705, 315 S.E.2d 791 (1984); International Harvester Credit Corp. v. Bowman, 69 N.C. App. 217, 316 S.E.2d 619 (1984); In re Watson, 70 N.C. App. 120, 318 S.E.2d 544 (1984); Schuman v. Roger Baker & Assocs., 70 N.C. App. 313, 319 S.E.2d 308 (1984); Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984); Miller v. Henderson, 71 N.C. App. 366, 322 S.E.2d 594 (1984); Garrison v. Garrison, 71 N.C. App. 618, 322 S.E.2d 824 (1984); Johnson v. Brown, — N.C. App. —, 323 S.E.2d 389 (1984); Alford v. Shaw, — N.C. App. —, 324 S.E.2d 878 (1985); Case v. Case, — N.C. App. —, 325 S.E.2d 661 (1985); Abner Corp. v. City Roofing & Sheetmetal Co., — N.C. App. —, 326 S.E.2d 632 (1985).

Stated in Sanders v. George A. Yancey Trucking Co., 62 N.C. App. 602, 303 S.E.2d 600 (1983); Salvation Army v. Welfare, 63 N.C. App. 156, 303 S.E.2d 658 (1983); Patterson v. DAC Corp., 66 N.C. App. 110, 310 S.E.2d 783 (1984).

Cited in Porter v. Matthews Enters., Inc., 63 N.C. App. 140, 303 S.E.2d 828 (1983); Johnston County v. McCormick, 65 N.C. App. 63, 308 S.E.2d 872 (1983); Simmons v. C.W. Myers Trading Post, Inc., 68 N.C. App. 511, 315 S.E.2d 75 (1984); Alamance County Hosp. v. Neighbors, 68 N.C. App. 771, 315 S.E.2d 779 (1984); Stephenson v. Jones, 69 N.C. App. 116, 316 S.E.2d 626 (1984); Starkey v. Cimarron Apts., Inc., 70 N.C. App. 772, 321 S.E.2d 229 (1984).

II. JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES.

Section (b) of this rule and § 7A-27(c) do not absolutely bar appeals from other than final judgments. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

And Appeal Is Permitted Where a Substantial Right, etc. —

Orders which are technically interlocutory may properly be appealed, regardless of lack of certification under section (b) of this rule, if they affect a substantial right. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

No hard and fast rules exist for determining which appeals affect a substantial right. Rather, such decisions usually require consideration of the facts of the particular case. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Where a distinct possibility of inconsistent verdicts in separate trials had arisen, and the trial courts order allowing summary judgment therefore affected a substantial right, the denial of which would work an injury to the plaintiff if not corrected before an appeal from a final judgment, plaintiff's appeal was properly before the Court of Appeals. Perry v. Aycock, 68 N.C. App. 705, 315 S.E.2d 791 (1984).

Appeal from Judgment Adjudicating Fewer than All Claims, etc. —

Although the defendants' appeal was from an order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, and was thus premature, the Court of Appeals chose to exercise its discretion to pass on the merits of the defendants' appeal. International Harvester Credit Corp. v. Bowman, 69 N.C. App. 217, 316 S.E.2d 619, cert. denied, 312 N.C. 493, 322 S.E.2d 556 (1984).

The fact that plaintiff waived her right to appeal the order granting summary judgment to one of three defendants in no way affected her statutory right to appeal from the final judgment,

since although she could have appealed the entry of summary judgment as to that defendant, she was not required to do so. Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984).

Under section (b) of this rule, in the absence of a determination by the trial judge that there is no just reason for delay, there can be no appellate review of an order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties. Thompson v. Newman, — N.C. App. —, 328 S.E.2d 597 (1985).

Denial of Summary Judgment, etc.—

Fact that the trial court makes the finding required under section (b) of this rule before a final judgment can be entered, i.e., that there is no just reason for delay of entry of a final judgment, does not make the denial of summary judgment immediately appealable, because it is not a final judgment. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1963).

Rule 55. Default.

CASE NOTES

I. IN GENERAL.

Effect of Appearance of Defendant on Right to Notice. — Defendant's appearance in an action is of no significance in determining whether he is entitled to notice of plaintiff's motion for any entry of default under section (a). It is only in reference to entry of a default judgment, under section (b), that a party's appearance entitles him to notice. G & M Sales of E.N.C., Inc. v. Brown, 64 N.C. App. 592, 307 S.E.2d 593 (1983).

Applied in Pryse v. Strickland Lumber & Bldg. Supply, Inc., 66 N.C. App. 361, 311 S.E.2d 598 (1984).

II. ENTRY OF DEFAULT.

Entry of default is only, etc. —

Generally, there is first an interlocutory entry of default, and then a final judgment by default only after the requisites to its entry, including a jury trial on damages, have occurred. An entry of default is not a final order or a final judgment. Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984).

III. ENTRY OF JUDGMENT BY DEFAULT.

A. By Clerk.

When Clerk May Enter Judgment.—

The clerk can enter a default judgment against a defendant only if the defendant has failed to appear in the matter. North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983).

The entry of default by the clerk requires only that the clerk ascertain that the party against whom a judgment for affirmative relief is sought has failed to plead. Beard v. Pembaur, 68 N.C. App. 52, 313 S.E.2d 853, cert. denied, 311 N.C. 750, 321 S.E.2d 126 (1984).

B. By Judge.

As Is Determination, etc. —

Section (d) of this rule specifically allows the trial court to set aside an entry of default for good cause shown. The determination of whether good cause has been shown is for the trial judge in the exercise of his sound discretion. Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984).

IV. SETTING ASIDE DEFAULT.

Entry of default and judgment by default would be improper where defendants showed (1) excusable neglect in failing to timely file a responsive pleading and (2) a meritorious defense to plaintiff's claim. North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983).

In exercising its discretion, etc. —

A motion for entry of default and default judgment is addressed to the discretion of the court. In exercising its discretion the trial court should be guided by the consideration that default judgments are disfavored by the law. North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983).

Rule 56. Summary judgment.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Conversion of Rule 12(b)(6) and 12(c) Motions, etc. —

Where the record contains affidavits and indicates that the trial judge, in addition to considering the pleadings and attached exhibits, also heard counsel for both parties and considered briefs submitted by both parties, the motion for judgment on the pleadings (Rule 12(c)) must be considered as though it was made under this rule. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

Where matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment under Rule 56. DeArmon v. B. Mears Corp., — N.C. —, 325 S.E.2d 223 (1985).

Section (c) does not require that a party move for summary judgment in order to be entitled to it. McNair Constr. Co. v. Fogle Bros. Co., 64 N.C. App. 282, 307 S.E.2d 200 (1983), cert. denied, 312 N.C. 84, 321 S.E.2d 897 (1984).

Applied in Coats v. Jones, 309 N.C. 815, 309 S.E.2d 253 (1983); Henderson v. Provident Life & Accident Ins. Co., 62 N.C. App. 476, 303 S.E.2d 211 (1983); Sharpe v. Nationwide Mut. Fire Ins. Co., 62 N.C. App. 564, 302 S.E.2d 893 (1983); Cleland v. Children's Home, Inc., 64 N.C. App. 153, 306 S.E.2d 587 (1983); Langley v. Moore, 64 N.C. App. 520, 307 S.E.2d 817 (1983); Warren Bros. Co. v. North Carolina Dep't of Transp., 64 N.C. App. 598, 307 S.E.2d 836 (1983); McCullough v. Amoco Oil Co., 310 N.C. 452, 312 S.E.2d 417 (1984); Durham v. Cox, 65 N.C. App. 739, 310 S.E.2d 371 (1984); Carter v. Poole, 66 N.C. App. 143, 310 S.E.2d 617 (1984); Elliott v. Duke Univ., Inc., 66 N.C. App. 590, 311 S.E.2d 632 (1984); Latta v. Farmers County Mut. Fire Ins. Co., 67 N.C. App. 494, 313 S.E.2d 214 (1984); Bennett v. Fuller, 67 N.C. App 466, 313 S.E.2d 597 (1984); DeArmon v. B. Mears Corp., 67 N.C. App. 640, 314 S.E.2d 124 (1984); Parks v. Perry, 68 N.C. App. 202, 314 S.E.2d 287 (1984); Jennings v. Lindsey, 69 N.C. App. 710, 318 S.E.2d 318 (1984); Stephenson v. Rowe, 69 N.C. App. 717, 318 S.E.2d 324 (1984); Fraver v. North Carolina Farm Bureau Mut. Ins. Co., 69 N.C. App. 733, 318 S.E.2d 340 (1984); Smith-Douglass, Div. of Borden Chem., Borden, Inc. v. Kornegay, 70 N.C. App. 264, 318 S.E.2d 895 (1984); Broadway v. Blythe Indus., Inc., 70 N.C. App. 435, 320 S.E.2d 295 (1984); Lee v. State Farm Fire & Cas. Co., 70 N.C. App. 575, 320 S.E.2d 413 (1984); Harris v. Walden, 70 N.C. App. 616, 320 S.E.2d 435 (1984); Hyde v. Taylor, 70 N.C. App. 523, 320 S.E.2d 904 (1984); Cabarrus County v. City of Charlotte, 71 N.C. App. 192, 321 S.E.2d 476 (1984); Ingle v. Allen, 71 N.C. App. 20, 321 S.E.2d 588 (1984); Grad v. Kaasa, 312 N.C. 310, 321 S.E.2d 888 (1984); Hall v. T.L. Kemp Jewelry, Inc., 71 N.C. App. 101, 322 S.E.2d 7 (1984); Azzolino v. Dingfelder, 71 N.C. App. 289, 322 S.E.2d 567 (1984); State ex rel. Edmisten v. Challenge, Inc., 71 N.C. App. 575, 322 S.E.2d 658 (1984); In re Morgan, 71 N.C. App. 614, 322 S.E.2d 778 (1984); Isenhour v. Isenhour, — N.C. App. —, 323 S.E.2d 369 (1984); Johnson v. Brown, — N.C. App. —, 323 S.E.2d 389 (1984); Pet, Inc. v. University of N.C., — N.C. App. —, 323 S.E.2d 745 (1984); Doby v. Lowder, — N.C. App. —, 324 S.E.2d 26 (1984); Dubose Steel, Inc. v. Branch Banking & Trust Co., — N.C. App. —, 324 S.E.2d 859 (1985); Bicycle Transit Auth., Inc. v. Bell, — N.C. App. —, 324 S.E.2d 863 (1985); Northwestern Bank v. Gladwell, — N.C. App. —, 325 S.E.2d 37 (1985); Yamaha Int'l Corp. v. Parks, — N.C. App. —, 325 S.E.2d 55 (1985); E-B Grain Co. v. Denton, — N.C. App. —, 325 S.E.2d 522 (1985); Penn Compression Moulding, Inc. v. Mar-Bal, Inc., — N.C. App. —, 326 S.E.2d 280 (1985); Abner Corp. v. City Roofing & Sheetmetal Co., — N.C. App. —, 326 S.E.2d 632 (1985); Griffin v. Baucom, — N.C. App. —, 328 S.E.2d 38 (1985).

Quoted in Lewis v. City of Washington, 63 N.C. App. 552, 305 S.E.2d 752 (1983).

Stated in State ex rel. Grimsley v.

Buchanan, 64 N.C. App. 367, 307 S.E.2d 385 (1983); Asher v. Asher, 66 N.C. App. 711, 311 S.E.2d 700 (1984); Poythress v. Libbey-Owens Ford Co., 67 N.C. App. 720, 313 S.E.2d 893 (1984); Towery v. Anthony, 68 N.C. App. 216, 314 S.E.2d 570 (1984).

Cited in Raintree Homeowners Ass'n v. Raintree Corp., 62 N.C. App. 668, 303 S.E.2d 579 (1983); North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983); Wilkes County ex rel. Nations v. Gentry, 63 N.C. App. 432, 305 S.E.2d 207 (1983); City Nat'l Bank v. Rojas, 64 N.C. App. 347, 307 S.E.2d 387 (1983); Frendlich v. Vaughan's Foods of Henderson, Inc., 64 N.C. App. 332, 307 S.E.2d 412 (1983); African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983); Brown v. North Carolina Wesleyan College, Inc., 65 N.C. App. 579, 309 S.E.2d 701 (1983); New Hanover County v. Burton, 65 N.C. App. 544, 310 S.E.2d 72 (1983); Presbyterian Hosp. v. McCartha, 66 N.C. App. 177, 310 S.E.2d 409 (1984); Lowder ex rel. Doby v. Doby, 68 N.C. App. 491, 315 S.E.2d 517 (1984); Lowder v. Rogers, 68 N.C. App. 507, 315 S.E.2d 519 (1984); Fiber Indus., Inc. v. Salem Carpet Mills, Inc., 68 N.C. App. 690, 315 S.E.2d 735 (1984); Thorpe v. DeMent, 69 N.C. App. 355, 317 S.E.2d 692 (1984); McDowell v. Estate of Anderson, 69 N.C. App. 725, 318 S.E.2d 258 (1984).

II. PURPOSE OF SUMMARY JUDGMENT.

This rule is designed to permit penetration, etc. —

In accord with 1st paragraph in original. See Southeastern Asphalt & Concrete Co. v. American Defender Life Ins. Co., 69 N.C. App. 185, 316 S.E.2d 311 (1984); Cannon v. Miller, 71 N.C. App. 460, 322 S.E.2d 780 (1984).

Summary judgment is designed to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. Highlands Tp. Taxpayers Ass'n v. Highlands Tp. Taxpayers Ass'n, 62 N.C. App. 537, 303 S.E.2d 234 (1983).

The goal of this procedural device is to allow penetration of an unfounded claim or defense before trial. Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983).

A motion for summary judgment is an attempt by a party to avoid the necessity of trial by exposing a fatal weakness in the claim or defense of his opponent. Normile v. Miller, 63 N.C. App. 689, 306 S.E.2d 147 (1983), cert. granted, 311 N.C. 305, 317 S.E.2d 681 (1984).

The goal of summary judgment procedures is to allow penetration of an unfounded claim or defense before trial. Thus, if there is any question as to the credibility of an affiant in a summary judgment motion or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied. Broadway v. Blythe Indus., Inc., — N.C. —, 326 S.E.2d 266 (1985).

The ultimate goal of the procedural device of summary judgment is to allow penetration of an unfounded claim or defense before trial. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, cert. denied as to additional issues, 312 N.C. 495, 322 S.E.2d 558 (1984).

And to Allow a Preview, etc. —

In accord with original. See Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983).

Purpose of summary, etc. —

The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. Gray v. Hager, 69 N.C. App. 331, 317 S.E.2d 59 (1984).

The purpose of this rule is to eliminate formal trials, etc. —

In accord with 1st paragraph in original. See Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983).

III. PROPRIETY OF SUMMARY JUDGMENT.

A. In General.

Summary judgment is a drastic remedy. —

In accord with original. See Wilson Bros. v. Mobil Oil, 63 N.C. App. 334, 305 S.E.2d 40, cert. denied, 309 N.C. 634, 308 S.E.2d 718, 719 (1983); Bradshaw v. McElroy, 62 N.C. App. 515, 302 S.E.2d 908 (1983).

And Must Be Used Cautiously. —

In accord with 1st paragraph in original. See Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 69 N.C. App. 164, 316 S.E.2d 318, cert. denied, 312 N.C. 496, 322 S.E.2d 560 (1984).

While the granting of summary judgment is a drastic remedy and should be granted cautiously, summary judgment is appropriate when the nonmoving party cannot produce evidence of an essential element of his claim. Anderson v. Canipe, 69 N.C. App. 534, 317 S.E.2d 44 (1984).

Especially in Negligence Cases. — Summary judgment is a somewhat drastic remedy and should be granted cautiously, especially in actions alleging negligence as a basis of recovery. Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984).

So That No Party Is Deprived, etc.—

In accord with original. See Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983); Justus v. Deutsch, 62 N.C. App. 711, 303 S.E.2d 571, cert. denied, 309 N.C. 821, 310 S.E.2d 349 (1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984).

And Whether Party Is Entitled to Judgment. —

In accord with 3rd paragraph in original. See Buffington v. Buffington, 69 N.C. App. 483, 317 S.E.2d 97 (1984); Dumouchelle v. Duke Univ., 69 N.C. App. 471, 317 S.E.2d 100 (1984).

A genuine issue is one, etc. —

In accord with original. See Justus v. Deutsch, 62 N.C. App. 711, 303 S.E.2d 571, cert. denied, 309 N.C. 821, 310 S.E.2d 349 (1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984); Anderson v. Canipe, 69 N.C. App. 534, 317 S.E.2d 44 (1984); All In One Maintenance Serv. v. Beech Mt. Constr. Co., 70 N.C. App. 49, 318 S.E.2d 856 (1984).

A genuine issue of material fact is defined as one in which the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. A genuine issue is one which can be maintained by substantial evidence. Smith v. Smith, 65 N.C. App. 139, 308 S.E.2d 504 (1983).

When Issue Is Material. —

In accord with 1st paragraph in original. See Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984).

In accord with 2nd paragraph in original. See Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983); Elmore's Feed & Seed, Inc. v. Patrick, 62 N.C. App. 715, 303 S.E.2d 394 (1983).

In accord with 4th paragraph in original. See Anderson v. Canipe, 69 N.C. App. 534, 317 S.E.2d 44 (1984); All In One Maintenance Serv. v. Beech Mt. Constr. Co., 70 N.C. App. 49, 318 S.E.2d 856 (1984).

A fact is material if it constitutes a legal defense, such as the bar of an applicable statute of limitations. Pembee Mfg. Corp. v. Cape Fear Constr. Co., — N.C. —, 329 S.E.2d 350 (1985).

Summary Judgment to be Granted Only Where No Genuine Issue, etc. —

In accord with 5th paragraph in original. See Carlton v. Carlton, — N.C. App. —, 329 S.E.2d 682 (1985).

Summary judgment is proper only where there are no material facts in issue. Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 69 N.C. App. 164, 316 S.E.2d 318, cert. denied, 312 N.C. 496, 322 S.E.2d 560 (1984).

And Where a Party Is Entitled to Judgment, etc. —

In accord with 3rd paragraph in original. See Lattimore v. Fisher's Food Shoppe, Inc., 69 N.C. App. 227, 316 S.E.2d 344, cert. denied, 312 N.C. 494, 322 S.E.2d 557 (1984); Ivey v. Williams, — N.C. App. —, 328 S.E.2d 837 (1985).

In accord with 4th paragraph in original. See Ruffin v. Contractors & Materials, 69 N.C. App. 174, 316 S.E.2d 353 (1984).

Summary judgment, like judgment on the pleadings, is appropriately granted only where no disputed issues of fact have been presented and the undisputed facts show that any party is entitled to judgment as a matter of law. Minor v. Minor, 70 N.C. App. 76, 318 S.E.2d 865, cert. denied, 312 N.C. 495, 322 S.E.2d 558 (1984).

When considering a motion for summary judgment, the question before the court is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. The burden upon the moving party is to establish that there is no genuine issue as to any material fact remaining to be determined and this burden may be carried by a movant by proving that an essential element of the

opposing party's claim is nonexistent. Gray v. Hager, 69 N.C. App. 331, 317 S.E.2d 59 (1984).

Even If Facts Claimed by Plaintiff are Proved, etc. —

In accord with 1st paragraph in original. See Hudson v. All Star Mills, Inc., 68 N.C. App. 447, 315 S.E.2d 514, cert. denied, 311 N.C. 755, 321 S.E.2d 134 (1984); Lowder v. Lowder, 68 N.C. App. 505, 315 S.E.2d 520, cert. denied, 311 N.C. 759, 321 S.E.2d 138 (1984).

If different material conclusions, etc. —

In accord with 3rd paragraph in original. See Carlton v. Carlton, — N.C. App. —, 329 S.E.2d 682 (1985).

Lack of Cause of Action or Defense, etc. —

Summary judgment is appropriately entered if the movant establishes that an essential part or element of the opposing party's claim is nonexistent. Rorrer v. Cooke, — N.C. —, 329 S.E.2d 355 (1985).

If plaintiff's claim is barred by the statute of limitations, etc. —

Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate. Pembee Mfg. Corp. v. Cape Fear Constr. Co., — N.C. —, 329 S.E.2d 350 (1985).

Rarely is it proper to enter summary judgment in favor of the party having the burden of proof. Blackwell v. Massey, 69 N.C. App. 240, 316 S.E.2d 350 (1984).

Summary judgment may be granted for a party with the burden of proof on his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize section (f) of this rule; and (3) when summary judgment is otherwise appropriate. Almond Grading Co. v. Shaver, — N.C. App. —, 329 S.E.2d 417 (1985).

In application for life insurance policy, written questions and answers relating to health are material as a matter of law. Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983).

B. Particular Types of Actions, etc.

Summary judgment is rarely appropriate in a negligence action. —

Negligence claims are rarely susceptible of summary adjudication, and should ordinarily be resolved by trial of the issues. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

And Ordinarily Negligence Actions, etc. —

Negligence issues are not ordinarily susceptible to summary disposition. However, where there is no genuine issue of material fact and reasonable men could only concede the defendant was not negligent, then a motion for summary judgment is proper. Boza v. Schiebel, 65 N.C. App. 151, 308 S.E.2d 510 (1983), cert. denied, 310 N.C. 475, 312 S.E.2d 882 (1984).

There is a presumption against granting summary judgment in negligence cases. Wilson Bros. v. Mobil Oil, 63 N.C. App. 334, 305 S.E.2d 40, cert. denied, 309 N.C. 634, 308 S.E.2d 718, 719 (1983).

As it is usually the jury's prerogative, etc. —

In accord with 2nd paragraph in original. See Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 69 N.C. App. 164, 316 S.E.2d 318, cert. denied, 312 N.C. 496, 322 S.E.2d 560 (1984).

The stringent requirements placed on a movant are intended, because summary judgment is a drastic measure, and it should be used with caution. This is especially true in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case. McCullough v. AMOCO Oil Co., 64 N.C. App. 312, 307 S.E.2d 208 (1983), rev'd on other grounds, 310 N.C. 452, 312 S.E.2d 417 (1984).

It is an accepted tenet of the jurisprudence that summary judgment is rarely proper in negligence cases. Even where there is no dispute as to the essential facts, where reasonable people could differ with respect to whether a party acted with reasonable care, it ordinarily remains the province of the jury to apply the reasonable person standard. But where there is no genuine issue of material fact and reasonable men could only conclude that the defendant was not negligent, entry of summary judgment is proper. Elmore's Feed & Seed, Inc. v. Patrick, 62 N.C. App. 715, 303 S.E.2d 394 (1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292,

304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984); Wilson Bros. v. Mobil Oil, 63 N.C. App. 334, 305 S.E.2d 40, cert. denied, 309 N.C. 634, 308 S.E.2d 718, 719 (1983).

Summary judgment may be granted in a negligence action. Cole v. Duke Power Co., 68 N.C. App. 159, 314 S.E.2d 808, cert. denied, 311 N.C. 752, 321 S.E.2d 129 (1984).

When Summary Judgment for Defendant Is Proper in Negligence Action. —

In accord with 1st paragraph in original. See Rorrer v. Cooke, — N.C. —, 329 S.E.2d 355 (1985).

In accord with 2nd paragraph in original. See Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 69 N.C. App. 164, 316 S.E.2d 318, cert. denied, 312 N.C. 496, 322 S.E.2d 560 (1984).

While summary judgment is generally not appropriate in negligence cases, it is appropriate in cases in which it appears that the plaintiff cannot recover even if the facts as alleged by the plaintiff are true. Stoltz v. Burton, 69 N.C. App. 231, 316 S.E.2d 646 (1984).

Where it is clearly established that defendant's negligence was not the proximate cause of plaintiff's injury, summary judgment is appropriate. Southern Watch Supply Co. v. Regal Chrysler-Plymouth, Inc., 69 N.C. App. 164, 316 S.E.2d 318, cert. denied, 312 N.C. 496, 322 S.E.2d 560 (1984).

Summary judgment in a libel action is not favored where proof of actual malice is required of the plaintiff. Cochran v. Piedmont Publishing Co., 62 N.C. App. 548, 302 S.E.2d 903, cert. denied, 309 N.C. 819, 310 S.E.2d 348 (1983), — U.S. —, 105 S. Ct. 83, 83 L. Ed. 2d 30 (1984).

C. Cases in which Summary Judgment Held Proper.

Estoppel. — Where plaintiff asserts estoppel against defendant summary judgment is appropriate when the defendants as the moving parties establish the absence of any genuine issue of fact as to a complete defense to the opponent's claim. If the factual evidence, taken in the light most favorable to the nonmovant, allows no inferences inconsistent with the defense, the movant has satisfied his burden, and summary judgment in its favor will be affirmed and this is true even when the facts raise difficult questions of law. Thomas v. Ray, 69 N.C. App. 412, 317 S.E.2d 53 (1984).

Legal Malpractice Action. — Summary judgment in favor of estate of defendant attorney in legal malpractice action alleging his negligent representation of plaintiff in a medical malpractice action held proper. Rorrer v. Cooke, — N.C. —, 329 S.E.2d 355 (1985).

D. Cases in Which Summary Judgment Held Improper.

Claims or defenses which are not well suited to summary judgment are those in which the determination of essential elements of these claims or defenses rests within the peculiar expertise of fact finders. Thus if there is any question as to the credibility of affiants in a summary judgment motion or if there is a question which can be resolved only by the weight of the evidence, summary judgment should be denied. Cannon v. Miller, 71 N.C. App. 460, 322 S.E.2d 780 (1984).

Conversion. — Summary judgment is inappropriately granted in an action for conversion when the evidence raises a genuine issue as to whether defendant's possession of plaintiff's property is authorized or wrongful. Gadson v. Toney, 69 N.C. App. 244, 316 S.E.2d 320 (1984).

Construction Contract. — Where plaintiff asserted that it was entitled to summary judgment because it had substantially performed its contract but had not been paid as agreed, but even if all the claims made by plaintiff in support of his motion were accepted as true, questions of whether the incomplete performance by plaintiff was substantial performance and of the amount plaintiff was entitled to recover remained, summary judgment for plaintiff as to its claim against defendant would be reversed. Almond Grading Co. v. Shaver, — N.C. App. —, 329 S.E.2d 417 (1985).

IV. BURDEN ON MOTION FOR SUMMARY JUDGMENT.

Movant Must Establish Lack of a Triable Issue. —

In accord with 1st paragraph in original. See Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, cert. denied as to additional issues, 312 N.C. 495, 322 S.E.2d 558 (1984); Carlton v. Carlton, — N.C. App. —, 329 S.E.2d 682 (1985).

In accord with 2nd paragraph in original. See Dixie Chem. Corp. v. Edwards, 68 N.C. App. 714, 315 S.E.2d 747 (1984).

A defendant is entitled to summary judgment only when he can produce a forecast of evidence, which when viewed

most favorably to plaintiff would, if offered by plaintiff at trial, without more, compel a directed verdict in defendant's favor, or if defendant can show through discovery that plaintiff cannot support his claim. Coats v. Jones, 63 N.C. App. 151, 303 S.E.2d 655, aff'd, 309 N.C. 815, 309 S.E.2d 253 (1983).

The moving party has the burden of establishing that there is no genuine issue as to any material fact, entitling him to judgment as a matter of law. This motion requires the movant and the opponent to produce a forecast of the evidence he will present at trial. Normile v. Miller, 63 N.C. App. 689, 306 S.E.2d 147 (1983), cert. granted, 311 N.C. 305, 317 S.E.2d 681 (1984).

The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. His papers are meticulously scrutinized and all inferences are resolved against him. Joel T. Cheatham, Inc. v. Hall, 64 N.C. App. 678, 308 S.E.2d 457 (1983); Boyce v. Meade, 71 N.C. App. 592, 322 S.E.2d 605 (1984).

The party moving for summary judgment ultimately has the burden of establishing the lack of any triable issue of fact. Pembee Mfg. Corp. v. Cape Fear Constr. Co., — N.C. —, 329 S.E.2d 350 (1985).

The moving party has the burden of clearly establishing the lack of any triable issue of fact; his papers are carefully scrutinized while those of the nonmoving party are indulgently regarded. Town of West Jefferson v. Edwards, — N.C. App. —, 329 S.E.2d 407 (1985); Almond Grading Co. v. Shaver, — N.C. App. —, 329 S.E.2d 417 (1985).

And Must Show Entitlement, etc.—

In accord with 3rd paragraph in original. See Kaimowitz v. Duke L.J., 68 N.C. App. 463, 315 S.E.2d 82 (1984).

When the party with the burden of proof moves for summary judgment, he must show that there are no genuine issues of fact, that there are no gaps in his proof, that no inferences inconsistent with his recovery arise from the evidence, and that there is no standard that must be applied to the facts by the jury. The party with the burden of proof who moves for summary judgment supported only by his own affidavits will ordinarily not be able to meet these requirements and thus will not be entitled to summary judgment. Parks Chevrolet, Inc. v. Watkins, — N.C. App. —, 329 S.E.2d 728 (1985).

Nonmovant Must Evince Existence of Triable Issue of Material Fact. — The party opposing summary judgment is not entitled to have the motion denied on the mere hope that at trial he will be able to discredit the movant's evidence; he must, at the hearing upon motion for summary judgment, be able to evince the existence of a triable issue of material fact. Wachovia Bank & Trust Co. v. Grose, 64 N.C. App. 289, 307 S.E.2d 216 (1983), cert. denied, 311 N.C. 309, 317 S.E.2d 908 (1984).

Or by Showing that Opponent, etc.—

In accord with original. See Asheville Contracting Co. v. City of Wilson, 62 N.C. App. 329, 303 S.E.2d 365 (1983); Byrd Motor Lines v. Dunlop Tire & Rubber Corp., 63 N.C. App. 292, 304 S.E.2d 773 (1983), cert. denied, 310 N.C. 624, 315 S.E.2d 689 (1984).

In accord with 2nd paragraph in original. See Brown v. Fulford, 311 N.C. 205, 316 S.E.2d 220 (1984).

Or to Surmount an Affirmative Defense. —

In accord with 1st paragraph in original. See Town of West Jefferson v. Edwards, — N.C. App. —, 329 S.E.2d 407 (1985).

Failure to Respond Not Always, etc. —

On a motion for summary judgment the moving party has the burden of establishing that there is no genuine issue as to any material fact. Once the moving party has met its burden, the opposing party may not rest on the mere allegations or denials of his pleading. Instead, the opposing party must set forth specific facts showing that there is a genuine issue for trial, either by affidavits or as otherwise provided in this rule. If the opposing party is unable to present the necessary opposing material he may seek the protection of section (f) of this rule, which gives the trial court the discretion to refuse the motion for judgment or order a continuance. Gillis v. Whitley's Disct. Auto Sales, Inc., 70 N.C. App. 270, 319 S.E.2d 661 (1984).

Mere failure of the nonmoving party to respond with opposing affidavits or depositions does not automatically mean that summary judgment is appropriate. The moving party must still succeed on the strength of its evidence, and when that evidence contains material contradictions or leaves questions of credibility unanswered the movant has failed to satisfy its burden. Perry v. Aycock, 68 N.C. App. 705, 315 S.E.2d 791 (1984).

If movant fails to carry his burden of proof, etc. —

In accord with 1st paragraph in original. See Almond Grading Co. v. Shaver, — N.C. App. —, 329 S.E.2d 417 (1985).

In accord with 2nd paragraph in original. See Brown v. Fulford, 311 N.C. 205, 316 S.E.2d 220 (1984).

If the moving party satisfies, etc. —

Once the movant for summary judgment demonstrates that no material issues of fact exist, the burden shifts to the nonmovant to set forth specific facts showing that genuine issues of fact remain for trial. Orient Point Assocs. v. Plemmons, 68 N.C. App. 472, 315 S.E.2d 366 (1984).

When a party moves for summary judgment on a claim and properly supports all the essentials of that claim with evidence, it falls to the opposing party to present contradictory evidence or to show by facts that the movant's evidence is insufficient or unreliable. And when the opposing party fails to do that and it plainly appears from the pleadings and evidence presented that the movant is entitled to recover on the claim, summary judgment is proper. Blackwell v. Massey, 69 N.C. App. 240, 316 S.E.2d 350 (1984).

The moving party has the burden of showing that no material issues of fact exist. In rebuttal, the nonmovant must then set forth specific facts showing that genuine issues of fact remain for trial. Southeastern Asphalt & Concrete Co. v. American Defender Life Ins. Co., 69 N.C. App. 185, 316 S.E.2d 311 (1984).

When Nonmovant Must Come Forward, etc. —

In addition to no issue of fact being present, to grant summary judgment a court must find "that on the undisputed aspects of the opposing evidential forecasts the party given judgment is entitled to it as a matter of law." Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983); Elmore's Feed & Seed, Inc. v. Patrick, 62 N.C. App. 715, 303 S.E.2d 394 (1983).

The device of summary judgment effectively forces the non-moving party to produce a forecast of the evidence which he has available for presentation at trial to support his claim or defense. Cannon v. Miller, 71 N.C. App. 460, 322 S.E.2d 780 (1984).

Once a defendant has properly pleaded the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action. Pembee Mfg. Corp. v. Cape Fear Constr. Co., — N.C. —, 329 S.E.2d 350 (1985).

Hence when motion, etc. —

When the party moving for summary judgment presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment. Wachovia Bank & Trust Co. v. Grose, 64 N.C. App. 289, 307 S.E.2d 216 (1983), cert. denied, 311 N.C. 309, 317 S.E.2d 908 (1984).

When the moving party by affidavit or otherwise presents materials in support of his motion, it becomes incumbent upon the opposing party to take affirmative steps to defend his position by proof of his own. If he rests upon the mere allegations or denial of his pleadings, he does so at the risk of having judgment entered against him. Murphrey v. Winslow, 70 N.C. App. 10, 318 S.E.2d 849, cert. denied as to additional issues, 312 N.C. 495, 322 S.E.2d 558 (1984).

Not every failure to respond to a motion for summary judgment will require the entry of summary judgment. The moving party must satisfy his burden of proving that there is no genuine issue of any material fact. However, when the moving party presents an adequately supported motion, the opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case, or otherwise suffer a summary judgment. Whitley v. Coltrane, 65 N.C. App. 679, 309 S.E.2d 712 (1983).

Or Provide an Excuse for Not So Showing. —

In accord with 2nd paragraph in original. See Town of West Jefferson v. Edwards, — N.C. App. —, 329 S.E.2d 407 (1985).

And Nonmovant Is Not Required to Make out Prima Facie Case for Jury. —

In accord with 1st paragraph in original. See Rorrer v. Cooke, 69 N.C. App. 305, 317 S.E.2d 34, cert. granted, 312 N.C. 495, 322 S.E.2d 560 (1984).

Defendant's Response Held Inadequate. —

Where in opposition to plaintiff's evidence, defendant's sole and only support was verified denial upon information and belief of forgery allegations in complaint, this was not sufficient to rebut affidavits based on personal knowledge,

and since no excuse was offered for defendant's failure of proof, and the court was given no reason to believe that her position in the case would ever be stronger than it then was, judgment against her was correctly entered. Blackwell v. Massey, 69 N.C. App. 240, 316 S.E.2d 350 (1984).

Defendant's affidavit, which only restated the unsupported allegations previously made by the defendant in his answer and in his answers to plaintiff's interrogatories, was insufficient to withstand plaintiff's motion for summary judgment. Dixie Chem. Corp. v. Edwards, 68 N.C. App. 714, 315 S.E.2d 747 (1984).

V. FUNCTION OF TRIAL COURT.

Court Is Not Authorized to Decide, etc. —

In ruling on a motion for summary judgment, the court should not decide issues of fact. However, summary judgments should be looked upon with favor where no genuine issue of material fact is presented. Joel T. Cheatham, Inc. v. Hall, 64 N.C. App. 678, 308 S.E.2d 457 (1983).

This rule authorizes the trial court to determine only whether a genuine issue of fact exists; it does not authorize the court to decide an issue of fact. Cannon v. Miller, 71 N.C. App. 460, 322 S.E.2d 780 (1984).

But to Determine Whether Genuine, etc. —

Summary judgment does not authorize the court to decide an issue of fact. It authorizes the court to determine whether a genuine issue of fact exists. Sauls v. Charlotte Liberty Mut. Ins. Co., 62 N.C. App. 533, 303 S.E.2d 358 (1983); Elmore's Feed & Seed, Inc. v. Patrick, 62 N.C. App. 715, 303 S.E.2d 394 (1983); Justus v. Deutsch, 62 N.C. App. 711, 303 S.E.2d 571, cert. denied, 309 N.C. 821, 310 S.E.2d 349 (1983).

VI. EVIDENCE ON MOTION.

A. In General.

What Evidence May Be Considered, etc. —

In accord with 3rd paragraph in original. See Gebb v. Gebb, 67 N.C. App. 104, 312 S.E.2d 691 (1984).

A motion for summary judgment allows one party to force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. Dixie Chem. Corp. v. Edwards, 68 N.C. App. 714, 315 S.E.2d 747 (1984).

Summary judgment is a device by which a defending party may force the claimant to produce a forecast of claimant's evidence demonstrating that claimant will, at trial, be able to make out at least a prima facie case or that he will be able to surmount an affirmative defense. Snipes v. Jackson, 69 N.C. App. 64, 316 S.E.2d 657, cert. denied and appeal dismissed, 312 N.C. 85, 321 S.E.2d 899 (1984).

Arguments of Counsel. — On a motion for summary judgment the court may consider the arguments of counsel as long as the arguments are not considered as facts or evidence. Gebb v. Gebb, 67 N.C. App. 104, 312 S.E.2d 691 (1984).

Nonexpert opinion on ultimate issues may not be relied on to defend against summary judgment. Whether expert opinion on ultimate issues so presented may be relied on is not clear. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Unpled affirmative defenses may be heard for the first time on motion for summary judgment even though not asserted in the answer at least where both parties are aware of the defense. Gillis v. Whitley's Disct. Auto Sales, Inc., 70 N.C. App. 270, 319 S.E.2d 661 (1984).

VII. CONSTRUCTION OF EVIDENCE AND INFERENCES.

Court Must View Record in Light Most Favorable, etc. —

In accord with 1st paragraph in original. See Lumbermens Mut. Cas. Co. v. Smallwood, 68 N.C. App. 642, 315 S.E.2d 533 (1984).

The nature of summary judgment procedure coupled with the generally liberal rules relating to amendment of pleadings, require that unpleaded affirmative defenses be deemed part of the pleadings where such defenses are raised in a hearing on motion for summary judgment. C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgt. Corp., 66 N.C. App. 170, 310 S.E.2d 615, rev'd on other grounds, 316 S.E.2d 298 (1984).

In ruling on a motion for a summary judgment, the court must consider the evidence in the light most favorable to the nonmovant, and the slightest doubt as to the facts entitles him to a trial. Snipes v. Jackson, 69 N.C. App. 64, 316 S.E.2d 657, cert. denied and appeal dismissed, 312 N.C. 85, 321 S.E.2d 899 (1984).

While Resolving Inconsistencies, etc. —

In determining whether a genuine issue of material fact exists, the court must view all material furnished in support of and in opposition to the motion for summary judgment in the light most favorable to the party opposing the motion. Bradshaw v. McElroy, 62 N.C. App. 515, 302 S.E.2d 908 (1983).

Movant's Papers Must Be Carefully Scrutinized. —

In accord with 2nd paragraph in original. See Pembee Mfg. Corp. v. Cape Fear Constr. Co., — N.C. —, 329 S.E.2d 350 (1985).

While the Opposing Party's Papers Are Treated Indulgently. —

In accord with 1st paragraph in original. See Pembee Mfg. Corp. v. Cape Fear Constr. Co., 69 N.C. App. 505, 317 S.E.2d 41 (1984); Carlton v. Carlton, — N.C. App. —, 329 S.E.2d 682 (1985).

IX. NOTICE.

And May Be Waived. —

Dismissing a party's claim or defense by summary judgment is too grave a step to be taken on short notice; unless, of course, the right to notice that those opposing summary judgment have under section (c) of this rule is waived. Tri City Bldg. Components, Inc. v. Plyler Constr. Co., 70 N.C. App. 605, 320 S.E.2d 418 (1984).

Judgment in Error, etc. —

Failure to comply with the mandatory 10-day notice requirement will ordinarily result in reversal of summary judgment obtained by the party violating the rule. Zimmerman's Dep't Store, Inc. v. Shipper's Freight Lines, 67 N.C. App. 556, 313 S.E.2d 252 (1984).

XI. PROCEDURES WHEN AFFIDAVITS UNAVAILABLE.

Sufficient time for the completion of discovery is one major goal of section (f). Ipock v. Gilmore, — N.C. App. —, 326 S.E.2d 271 (1985).

Section (f) is an additional safeguard against an improvident or premature grant of summary judgment. Consistent with this purpose, courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality. Ipock v. Gilmore, — N.C. App. —, 326 S.E.2d 271 (1985).

Before allowing summary judgment for a defendant in a medical malpractice case, the trial court should be satisfied that the plaintiff has had ample opportunity to obtain affidavits required to rebut a defendant's affidavits on the issues of standard of care and violation of the standard, it being clear that defending health care providers have an advantageous position with respect to developing affidavits in support of their position. Beaver v. Hancock, — N.C. App. —, 324 S.E.2d 294 (1985).

XII. CASES NOT FULLY ADJUDICATED ON MOTION.

And to Make a Summary, etc. —

In accord with original. See Case v. Case, — N.C. App. —, 325 S.E.2d 661 (1985).

XIII. APPEALS.

Questions on Appeal, etc. —

In accord with original. See Smith v. Smith, 65 N.C. App. 139, 308 S.E.2d 504 (1983).

Denial of Motion, etc. —

The denial of a motion for summary judgment is not appealable. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

Fact that the trial court makes the finding required under Rule 54(b) before a final judgment can be entered, i.e., that there is no just reason for delay of the entry of a final judgment, does not make the denial of summary judgment immediately appealable, because it is not a final judgment. Lamb v. Wedgewood S. Corp., 308 N.C. 419, 302 S.E.2d 868 (1983).

The denial of a motion for summary judgment is a nonappealable interlocutory order. DeArmon v. B. Mears Corp., — N.C. —, 325 S.E.2d 223 (1985).

Rule 57. Declaratory judgments.

CASE NOTES

Cited in State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

Rule 58. Entry of judgment.

CASE NOTES

Objectives of Rule. —

Since many rights relating to the appeals process are "keyed" to the time of "entry of judgment," it is imperative that the judge's decisions become part of the court's records and that all interested persons know the exact date on which judgment is entered. State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984).

There are no cases which have construed § 15A-101(4a), which governs "entry of judgment" in criminal cases. However, this rule is sufficiently analogous to provide guidance in the area. State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984).

Requirements for Entry of Judgments, etc. —

Although there are situations where it would be more convenient for a judge to mail his ruling to the clerk, and then allow the clerk to notify the respective parties of the judge's decision, the better practice, in criminal cases, is for the judge to announce his rulings in open court and direct the clerk to note the ruling in the minutes of the court. When the judge's ruling is not announced in open court, the order or judgment containing the ruling must be signed and filed with the clerk in the county, in the district and during the session when and where the question is presented. These rules serve to protect the interests of the defendant, the State, and the public, by allowing all interested persons to be informed as to when a judgment or order has been rendered in a particular matter. State v. Boone, 310 N.C. 284, 311 S.E.2d 552 (1984).

Better Practice for Trial Judge to Direct Clerk to Enter Judgment. — The inattention of the trial bench to the directory mandate of the second paragraph of this rule has resulted in conflicting decisions on the dismissal of appeals for failure to give timely notice following entry of judgment. Obviously, the better practice is for the trial judge to specifically direct the clerk as to entry of judgment, and for the parties to ensure that the provisions of such direction are included in the record on appeal. Gates v. Gates, 69 N.C. App. 421, 317 S.E.2d 402 (1984), aff'd, 312 S.E.2d 620, 323 S.E.2d 920 (1985).

Applied in Stephenson v. Rowe, 69 N.C. App. 717, 318 S.E.2d 324 (1984).

Cited in Berger v. Berger, 67 N.C. App. 591, 313 S.E.2d 825 (1984); Day v. Coffey, 68 N.C. App. 509, 315 S.E.2d 96 (1984).

Rule 59. New trials; amendment of judgments.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

A motion for a new trial made under this rule is intended to serve as a substitute for the obligation of counsel to timely object to the jury instructions. Hanna v. Brady, — N.C. App. —, 327 S.E.2d 22 (1985).

Judge's Traditional Authority, etc. —

In accord with original. See Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

And the Court's Decision, etc. —

In accord with 2nd paragraph in original. See Hord v. Atkinson, 68 N.C. App. 346, 315 S.E.2d 339 (1984).

A trial court's discretionary order, pursuant to this rule, for or against a new trial upon any ground may be reversed on appeal only when abuse of discretion is clearly shown. State ex rel. Gilchrist v. Cogdill, — N.C. App. —, 327 S.E.2d 647 (1985).

A trial judge's discretionary order made pursuant to this rule for or against a new trial may be reversed only when an abuse of discretion is clearly shown. Hanna v. Brady, — N.C. App. —, 327 S.E.2d 22 (1985).

An order made under the discretionary power of this rule shall stand unless

the reviewing court is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice. Hanna v. Brady, — N.C. App. —, 327 S.E.2d 22 (1985).

Absent a valid motion pursuant to subsection (a)(8) of this rule and an order granting such motion for errors of law specifically identified, the Court of Appeals erred in reversing the trial judge's conditional grant of a new trial where there was no manifest abuse of discretion on the part of the trial judge. Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

Scope of Review of Discretionary Ruling. —

In accord with 1st paragraph in original. See Pearce v. Fletcher, — N.C. App. —, 328 S.E.2d 889 (1985); Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

The standard for review of a trial court's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is virtually prohibitive of appellate intervention. Pearce v. Fletcher, — N.C. App. —, 328 S.E.2d 889 (1985).

When Discretionary Order May Be Reversed. —

In accord with 1st paragraph in original. See Pearce v. Fletcher, — N.C. App. —, 328 S.E.2d 889 (1985).

In accord with 2nd paragraph in original. See Pearce v. Fletcher, — N.C. App. —, 328 S.E.2d 889 (1985); Bryant v. Nationwide Mut. Fire Ins. Co., — N.C. —, 329 S.E.2d 333 (1985).

Appeal Divests Trial Court, etc. — The general rule that an appeal takes a case out of the jurisdiction of the trial court was not changed by the enactment of Rules 59 and 60. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

But General Rule Has Exceptions. — The general rule that an appeal takes a case out of the jurisdiction of the trial court is subject to two exceptions and one qualification: The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that "the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned" and thereby regain jurisdiction of the cause. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

Applied in Goble v. Helms, 64 N.C. App. 439, 307 S.E.2d 807 (1983); State ex rel. Everett v. Hardy, 65 N.C. App. 350, 309 S.E.2d 280 (1983); Wachovia Bank & Trust Co. v. Guthrie, 67 N.C. App. 622, 313 S.E.2d 603 (1984); Elks v. Hannan, 68 N.C. App. 757, 315 S.E.2d 553 (1984); Hardy v. Floyd, 70 N.C. App. 608, 320 S.E.2d 320 (1984); In re Will of Leonard, — N.C. App. —, 323 S.E.2d 377 (1984).

Stated in Marley v. Gantt, — N.C. App. —, 323 S.E.2d 725 (1984).

Cited in African Methodist Episcopal Zion Church v. Union Chapel A.M.E. Zion Church, 64 N.C. App. 391, 308 S.E.2d 73 (1983); Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 311 S.E.2d 559 (1984); Highway Church of Christ, Inc. v. Barber, — N.C. App. —, 325 S.E.2d 305 (1985); Staples v. Woman's Clinic, — N.C. App. —, 327 S.E.2d 58 (1985).

III. ALTERING OR AMENDING JUDGMENTS.

Order entered by trial judge after verdict, due to his apprehension about the jury being affected by an exhibit that he had excluded, although improperly denominated a mistrial, would not fail merely because it was inadvertently given the wrong nomenclature, and would therefore be considered an order granting a new trial for misconduct by the jury or prevailing party under the provisions of section (a)(2) of this rule. Elks v. Hannan, 68 N.C. App. 757, 315 S.E.2d 553 (1984).

Rule 60. Relief from judgment or order.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Applied in Braun v. Grundman, 63 N.C. App. 387, 304 S.E.2d 636 (1983); Gardner v. Gardner, 63 N.C. App. 678, 306 S.E.2d 496 (1983); Brown v. Miller, 63 N.C. App. 694, 306 S.E.2d 502 (1983); Briar Metal Prods., Inc. v. Smith, 64 N.C. App. 173, 306 S.E.2d 553 (1983); State ex rel. Miles v. Mitchell, 64 N.C. App. 202, 306 S.E.2d 857 (1983); Carter v. Carr, 68 N.C. App. 23, 314 S.E.2d 281 (1984); Conrad Indus., Inc. v. Sonderegger, 69 N.C. App. 159, 316 S.E.2d 327 (1984); Buie v. Johnston, 69 N.C. App. 463, 317 S.E.2d 91 (1984); Gates v. Gates, 69 N.C. App. 421, 317 S.E.2d 402 (1984); Callaway v. Freeman, 71 N.C. App. 451, 322 S.E.2d 432 (1984); Akzona, Inc. v. American Credit Indem. Co., 71 N.C. App. 498, 322 S.E.2d 623 (1984); United States v. Scott, 45 Bankr. 318 (M.D.N.C. 1984).

Stated in State v. O'Neal, — N.C. App. —, 312 S.E.2d 493 (1984); Department of Transp. v. Combs, 71 N.C. App. 372, 322 S.E.2d 602 (1984).

Cited in North Carolina Nat'l Bank v. McKee, 63 N.C. App. 58, 303 S.E.2d 842 (1983); Leach v. Alford, 63 N.C. App. 118, 304 S.E.2d 265 (1983); Hogan v. Cone Mills Corp., 63 N.C. App. 439, 305 S.E.2d 213 (1983); Jackson v. Jackson, 68 N.C. App. 499, 315 S.E.2d 90 (1984); Miller v. Kite, 69 N.C. App. 679, 318 S.E.2d 102 (1984); Bomer v. Campbell, 70 N.C. App. 137, 318 S.E.2d 841 (1984); Simmons v. Tuttle, 70 N.C. App. 101, 318 S.E.2d 847 (1984); Staples v. Woman's Clinic, — N.C. App. —, 327 S.E.2d 58 (1985); Prevatte v. Prevatte, — N.C. App. —, 329 S.E.2d 413 (1985).

II. RELIEF UNDER SECTION (a).

The trial court's failure to allow and tax costs could be considered an oversight or omission in the order, and since the substantive rights of the parties were not affected thereby, the court had authority under section (a) of this rule to correct the inadvertent omission of costs from its order. Ward v. Taylor, 68 N.C. App. 74, 314 S.E.2d 814, cert. denied, 311 N.C. 769, 321 S.E.2d 157 (1984).

III. RELIEF UNDER SECTION (b).

A. In General.

The broad language of section (b)(6) of this rule gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice. Flinn v. Laughinghouse, 68 N.C. App. 476, 315 S.E.2d 72, appeal dismissed and cert. denied, 311 N.C. 755, 321 S.E.2d 132 (1984).

Where a movant is uncertain whether to proceed under clause (1) or (6) of section (b), he need not specify which section if his motion is timely and the reason justifies relief under either clause. The movant must show that he has a meritorious defense, as it would be a waste of judicial economy to vacate a judgment or order when the movant could not prevail on the merits of the civil action. Oxford Plastics v. Goodson, — N.C. App. —, 328 S.E.2d 7 (1985).

Divorce Decree Regular on Face of Judgment Roll. — Section (b)(4) of this rule requires that the judgment be void. A divorce decree, in all respects regular on the face of the judgment roll, is at most voidable, not void. Howell v. Tunstall, 64 N.C. App. 703, 308 S.E.2d 454 (1983).

Alimony Pendente Lite. — Given the interlocutory nature of an order for alimony pendente lite, which allows correction of any error at the district court's final hearing on the matter, such an order is not a "final judgment, order, or proceeding" that can be the proper subject of a motion under section (b) of this Rule. Coleman v. Coleman, — N.C. App. —, 328 S.E.2d 871 (1985).

Child Support. — Like custody orders, child support orders are not "final" orders only in the sense that they may be modified subsequently upon a motion in the cause and a showing of change of circumstances, and thus, like custody orders, a party may seek relief from a child support order pursuant to section (b) of this rule. Coleman v. Coleman, — N.C. App. —, 328 S.E.2d 871 (1985).

Section (b) has been described, etc.—

If the motion does not allege factual allegations corresponding to the specific situations contemplated in clauses (1) through (5), subsection (6) of this rule serves as a "grand reservoir of equitable power" by which a court may grant relief from an order or judgment. Oxford Plastics v. Goodson, — N.C. App. —, 328 S.E.2d 7 (1985).

Motion under section (b) cannot be a substitute, etc. —

In accord with 2nd paragraph in original. See Coleman v. Coleman, — N.C. App. —, 328 S.E.2d 871 (1985).

A motion for relief, etc. —

In accord with original. See Oxford Plastics v. Goodson, — N.C. App. —, 328 S.E.2d 7 (1985).

And Will Be Disturbed, etc. —

In accord with original. See Oxford Plastics v. Goodson, — N.C. App. —, 328 S.E.2d 7 (1985).

Appellate review of a section (b) motion, etc. —

In accord with original. See Hilton v. Howington, 63 N.C. App. 717, 306 S.E.2d 196 (1983), cert. denied, 310 N.C. 152, 311 S.E.2d 291 (1984).

The trial judge's extensive power to afford relief from judgments is accompanied by a corresponding discretion to deny it, and the only question for appellate determination is whether the trial court abused its discretion in denying the motion. Sawyer v. Goodman, 63 N.C. App. 191, 303 S.E.2d 632, cert. denied, 309 N.C. 823, 310 S.E.2d 352 (1983).

Appeal Divests Trial Court, etc. —

The general rule that an appeal takes a case out of the jurisdiction of the trial court was not changed by the enactment of § 1A-1, Rules 59 and 60. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

The general rule that an appeal takes a case out of the jurisdiction of the trial court is subject to two exceptions and one qualification: The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal. The qualification to the general rule is that the trial judge, after notice and on proper showing, may adjudge the appeal has been abandoned and thereby regain jurisdiction of the cause. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

B. Mistake, Inadvertence, Surprise and Excusable Neglect.

1. In General.

Excusability of the neglect on which relief is granted, etc. —

In considering granting relief from a court order finding the waiver of exemptions by failure to act, the court must focus on the litigant's excusable neglect, not the attorney's. The negligence of the attorney, in attending to his clients' case, although inexcusable, may still be cause for relief. In re Laughinghouse, 44 Bankr. 789 (Bankr. E.D.N.C. 1984).

Neglect of the attorney will not be imputed to the litigant, etc. —

In cases allowing relief from judgments pursuant to section (b)(1) of this rule, the courts have pointed out that where the client shows some diligence, and there is no evidence of inexcusable neglect, relief will be granted. This is because, the law does not demand that a litigant in effect be his own attorney, when he employs one to represent him. A nonlawyer is not supposed to know the technical steps of a lawsuit and cannot be expected to know what allegations must be pled to prove those facts which the nonlawyer client relates to his attorney. Furthermore, the court must keep in mind that exemption laws must be liberally construed in the debtors' favor. In re Laughinghouse, 44 Bankr. 789 (Bankr. E.D.N.C. 1984).

Finality of Findings on, etc. —

Whether the facts found constitute excusable neglect or not is a matter of law and reviewable on appeal when the trial court's findings are made under a misapprehension of the law, and when the findings are insufficient to support the trial court's conclusion of law. Oxford Plastics v. Goodson, — N.C. App. —, 328 S.E.2d 7 (1985).

Attacking Consent Judgment on Grounds of Mutual Mistake. — When parties seek to attack a consent judgment on the basis of mutual mistake by way of a motion in the cause, section (b)(6) of this rule controls. In re Baity, 65 N.C. App. 364, 309 S.E.2d 515 (1983), cert. denied, 311 N.C. 401, 319 S.E.2d 266 (1984).

C. Newly Discovered Evidence.

Failure to Produce Evidence Earlier, etc. —

The trial court did not abuse its discretion in ordering a new trial pursuant to subsection (b)(2) of this rule where the plaintiff used due diligence in bringing to the court's attention the merits of its motion and the plaintiff could not have otherwise learned of the recanted evidence and perjured testimony of defendant's witness which formed the basis of the motion but for the subsequent change by said witness. Conrad Indus., Inc. v. Sonderegger, 69 N.C. App. 159, 316 S.E.2d 327, cert. denied, 311 N.C. 752, 321 S.E.2d 129 (1984).

D. Fraud, Misrepresentation and Misconduct of Adverse Party.

Where decedent's nephew was not notified or made a party to adoption nullification proceeding initiated by daughter of decedent's former wife, the nephew was fully empowered to bring an independent action to vacate the clerk's order. Flinn v. Laughinghouse, 68 N.C. App. 499, 315 S.E.2d 72, appeal dismissed and cert. denied, 311 N.C. 755, 321 S.E.2d 132 (1984).

E. Other Reasons Justifying Relief Under Subsection (b)(6).

Subsection (b)(6) not a "Catch-All" Rule. —

In accord with original. See Vaglio v. Town & Campus Int'l, Inc., 71 N.C. App. 250, 322 S.E.2d 3 (1984).

A judgment may be valid, irregular, erroneous, or void. An erroneous judgment is one rendered according to the course and practice of the court but contrary to the law or upon a mistaken view of the law. A void judgment has semblance of a valid judgment, but lacks some essential element such as jurisdiction or service of process. Thus, a judgment is not void if the court had jurisdiction over the parties and the subject matter and had authority to render the judgment entered. Windham Distrib. Co. v. Davis, — N.C. App. —, 323 S.E.2d 506 (1984).

A judgment or order rendered without an essential element such as jurisdiction or proper service of process is void. County of Wayne ex rel. Williams v. Whitley, — N.C. App. —, 323 S.E.2d 458 (1984).

Where Competent Evidence Shows, etc. —

Courts have the power to vacate judgments when such is appropriate, yet they should not do so under subdivision (b)(6) of this rule except in extraordinary circumstances and after a showing that justice demands it. Vaglio v. Town & Campus Int'l, Inc., 71 N.C. App. 250, 322 S.E.2d 3 (1984).

The expansive test by which relief can be given under section (6) of this rule is whether (1) extraordinary circumstances exist and (2) there is a showing that justice demands it. Oxford Plastics v. Goodson, — N.C. App. —, 328 S.E.2d 7 (1985).

Rule 61. Harmless error.

CASE NOTES

The admission of incompetent testimony will not be held prejudicial when its import is abundantly established by other competent testimony or when the testimony is merely cumulative or corroborative. Warren v. City of Asheville, — N.C. App. —, 328 S.E.2d 859 (1985).

The burden is on the appellant not only to show error, but also to enable the Court to see that he was prejudiced and that a different result would likely have ensued had the error not occurred. Warren v. City of Asheville, — N.C. App. —, 328 S.E.2d 859 (1985).

Applied in Barber v. Dixon, 62 N.C. App. 455, 302 S.E.2d 915 (1983); McKay v. Parham, 63 N.C. App. 349, 304 S.E.2d 784 (1983); Sloop v. Friberg, 70 N.C. App. 690, 320 S.E.2d 921 (1984).

Stated in Marley v. Gantt, — N.C. App. —, 323 S.E.2d 725 (1984).

Cited in Lee v. Keck, 68 N.C. App. 320, 315 S.E.2d 323 (1984).

Rule 62. Stay of proceedings to enforce a judgment.

(b) *Stay on motion for new trial or for judgment.* — In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment made pursuant to Rule 50, or

of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

(1967, c. 954, s. 1; 1973, c. 91; 1979, c. 820, s. 10.)

Only Part of Rule Set Out. — As the rest of the rule was not affected, it is not set out.

Editor's Note. — Subsection (b) of this rule is set out to correct an error in the Replacement Volume.

CASE NOTES

Cited in Forsyth County v. Shelton, — N.C. App. —, 329 S.E.2d 730 (1985).

Rule 63. Disability of a judge.

CASE NOTES

So as to Effectuate Decision Already Made. —

In accord with original. See In re Whisnant, 71 N.C. App. 439, 322 S.E.2d 434 (1984).

Article 8.

Miscellaneous.

Rule 65. Injunctions.

Legal Periodicals. — For note discussing preliminary injunctions in employment noncompetition cases in light of A.E.P. Industries, Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 752 (1983), see 63 N.C.L. Rev. 222 (1984).

CASE NOTES

I. IN GENERAL.

Unclear Order May Require Clarifying Instructions. — The language of an injunctive order may be so unclear that a party is, in good faith, unable to follow the trial court's directives in the absence of clarifying instructions. Hopper v. Mason, 71 N.C. App. 448, 322 S.E.2d 193 (1984).

No appeal lies to an appellate court from an interlocutory order unless the order deprives the appellant of a substantial right which he would lose absent a review prior to final determination. Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost should the order escape appellate review before final judgment. Robins & Weill, Inc. v. Mason, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 559 (1984).

The voluntary and unconditional dismissal of the proceedings by the plaintiff is equivalent to a judicial determination that the proceeding for an injunction was wrongful, since thereby the plaintiff is held to have confessed that he was not entitled to the equitable relief sought. Leonard E. Warner, Inc. v. Nissan Motor Corp., in U.S.A., 66 N.C. App. 73, 311 S.E.2d 1 (1984).

Applied in Dixon v. Dixon, 62 N.C. App. 744, 303 S.E.2d 606 (1983); Spencer v. Spencer, 70 N.C. App. 159, 319 S.E.2d 636 (1984); Unigard Mut. Ins. Co. v. Ingram, — N.C. App. —, 323 S.E.2d 442 (1984).

Cited in Shishko v. Whitley, 64 N.C. App. 668, 308 S.E.2d 448 (1983); American Motors Sales Corp. v. Peters, 311 N.C. 311, 317 S.E.2d 351 (1984); State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

II. PRELIMINARY INJUNCTIONS.

Purpose of Preliminary, etc. —

In accord with 1st paragraph in original. See A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

A preliminary injunction is interlocutory in nature, issued after notice and hearing, and restrains a party pending final determination on the merits. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

Grounds for Preliminary Injunction. —

In accord with 1st paragraph in original. See Robins & Weill, Inc. v. Mason, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 559 (1984).

A preliminary injunction will be issued only if plaintiff is able to show likelihood of success on the merits of his case and if plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the court, issuance is necessary for the protection of plaintiff's rights during the course of litigation. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

To constitute irreparable injury it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

Decision of the trial judge, etc. —

Issuance of a preliminary injunction is a matter of discretion to be exercised by the hearing judge after a careful balancing of the equities. A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

Scope of Review of Preliminary Injunction. —

In accord with 2nd paragraph in main volume. See A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 302 S.E.2d 754 (1983).

The scope of appellate review in the granting or denying of a preliminary injunction is essentially de novo. An appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself. Robins & Weill, Inc. v. Mason, 70 N.C. App. 537, 320 S.E.2d 693, cert. denied, 312 N.C. 495, 322 S.E.2d 559 (1984).

III. TEMPORARY RESTRAINING ORDERS.

The purpose of a temporary restraining order, issued ex parte, is "to preserve the status quo" pending a full hearing. Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

Temporary restraining order is not, etc. —

Factors considered justified the conclusion that absent ex parte restraining order, plaintiff-wife would suffer irreparable injury for which she had no adequate remedy at law. Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

IV. SECURITY.

The purpose of the security requirement in section (c) is to protect the restrained party from damages incurred as a result of the wrongful issuance of the injunctive relief. Similarly, it has been suggested that the purpose of the bond is to require that the plaintiff assume the risk of paying damages he causes as the "price" he must pay to have the extraordinary privilege of a temporary restraining order or preliminary injunction. Leonard E. Warner, Inc. v. Nissan Motor Corp., in U.S.A., 66 N.C. App. 73, 311 S.E.2d 1 (1984).

Application of Section (c). — Where trial court specifically stated in its order that no security shall be required of the plaintiff since this is a suit between spouses relating to divorce from bed and board, alimony, temporary alimony, possession of personal property and attorney fees, and it properly could view foreign action initiated by defendant-husband as a type of interfering with plaintiff during pendency of the suit, its restraining order thus fell within section (c) of this rule express exclusion from the usual security requirements. Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

Where the record established no material damage or likelihood of harm to defendant-husband from issuance of the restraining order and that plaintiff-wife had considerable assets with which to respond in damages if defendant-husband subsequently was found to have suffered from wrongful issuance of the order, trial court properly dispensed with requirement for security. Huff v. Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

No security is required when a preliminary injunction is issued to preserve the trial court's jurisdiction over the subject matter involved. Huff v.

Huff, 69 N.C. App. 447, 317 S.E.2d 65 (1984).

Federal Decisions Must Be Utilized, etc. —

The question of when recovery on a bond posted under this rule is proper has rarely been addressed by North Carolina courts. It has been held that in interpreting section (c) of this rule North Carolina courts may look to federal decisions for guidance. Leonard E. Warner, Inc. v. Nissan Motor Corp. in U.S.A., 66 N.C. App. 73, 311 S.E.2d 1 (1984).

VI. DAMAGES ON DISSOLUTION.

Recovery under this rule may not be granted until the court has finally decided that plaintiff was not entitled to the injunction, or until something occurs equivalent to such a decision. Leonard E. Warner, Inc. v. Nissan Motor Corp. in U.S.A., 66 N.C. App. 73, 311 S.E.2d 1 (1984).

Rule 68. Offer of judgment and disclaimer.

Legal Periodicals. —

For survey of 1982 law on Civil Procedure, see 61 N.C.L. Rev. 991 (1983).

CASE NOTES

I. IN GENERAL.

Applied in Lowe v. Bell House, Inc., — N.C. App. —, 328 S.E.2d 301 (1985).

Rule 70. Judgment for specific acts; vesting title.

CASE NOTES

The recovery of costs in a civil action is totally dependent upon statutory authority and without such authority costs may not be awarded. Upon being granted the authority to order costs, the amount of such costs lies within the discretion of the trial court. Coastal Prod. Credit Ass'n v. Goodson Farms, Inc., 71 N.C. App. 421, 322 S.E.2d 398 (1984).

Where damages are alleged because of noncompliance with a consent judgment, a Rule 70 motion is inappropriate. Population Planning Assocs. v. Mews, 65 N.C. App. 96, 308 S.E.2d 739 (1983).

Cited in Ellis v. Ellis, 68 N.C. App. 634, 315 S.E.2d 526 (1984).

Chapter 1B.
Contribution.

Article 1.
Uniform Contribution among Tort-Feasors Act.

§ 1B-3. Enforcement.

CASE NOTES

Party Entitled to One Satisfaction. — Although an injured party may pursue and obtain judgments against all joint tort-feasors for a single injury, he may have only one satisfaction. Ipock v. Gilmore, — N.C. App. —, 326 S.E.2d 271 (1985).

Subsection (e) codifies the common-law rule applicable to joint tort-feasors. Ipock v. Gilmore, — N.C. App. —, 326 S.E.2d 271 (1985).

Article 2.
Judgment against Joint Obligors or Joint Tort-Feasors.

§ 1B-7. Payment of judgment by one of several.

CASE NOTES

Equitable Contribution. — Nothing on the face of this section, or in its history, indicates that the General Assembly intended to eliminate the right to seek equitable contribution. Holcomb v. Holcomb, 70 N.C. App. 471, 320 S.E.2d 12 (1984).

At no point did any prior version of the contribution statute, nor does the modern version, expressly or impliedly eliminate the equitable contribution action. Rather, equitable contribution has continued as an independent action, separate from the summary proceedings set out in statute for preserving the judgment. Holcomb v. Holcomb, 70 N.C. App. 471, 320 S.E.2d 12 (1984).

Chapter 1C.

Enforcement of Judgments.

Article 16.

Exempt Property.

Sec.

Article 16.
Exempt Property.

§ 1C-1601. What property exempt; waiver; exceptions.

(a) Exempt property. — Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of his creditors:

(1) The debtor's aggregate interest, not to exceed seven thousand five hundred dollars ($7,500) in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's aggregate interest in any property, not to exceed two thousand five hundred dollars ($2,500) in value less any amount of the exemption used under subdivision (1).

(3) The debtor's interest, not to exceed one thousand dollars ($1,000) in value, in one motor vehicle.

(4) The debtor's aggregate interest, not to exceed two thousand five hundred dollars ($2,500) in value for the debtor plus five hundred dollars ($500) for each dependent of the debtor, not to exceed two thousand dollars ($2,000) total for dependents, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest, not to exceed five hundred dollars ($500) in value, in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor.

(6) Life insurance as provided in Article X, Section 5 of the Constitution of North Carolina.

(7) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(8) Compensation for personal injury or compensation for the death of a person upon whom the debtor was dependent for support, but such compensation is not exempt from claims for funeral, legal, medical, dental, hospital, and health care charges related to the accident or injury giving rise to the compensation.

(1981, c. 490, s. 1; 1981 (Reg. Sess., 1982), c. 1224, ss. 1-7, 20.)

Only Part of Section Set Out. — As the rest of the section was not affected, it is not set out.

Editor's Note. — Subsection (a) of this section is set out to correct an error in subdivision (a)(3) in this section as set out in the Replacement Volume.

CASE NOTES

Legislative Intent. — There is no clear indication in §§ 1C-1601 through 1C-1604 that the General Assembly intended to repeal any statutes other than §§ 1-369 through 1-392. Therefore, to find that §§ 1C-1601 through 1C-1604 precludes the exemption granted by § 135-9 would be to determine that § 135-9 has been repealed by implication. Repeal by implication is not favored in North Carolina. In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

The provisions of §§ 1C-1601 to 1C-1604 govern the federal government's efforts to execute a judgment. United States v. Scott, 45 Bankr. 318 (M.D.N.C. 1984).

The purpose of the exemption under subdivision (a)(1) of this section, is to permit the debtor some flexibility in determining which of his assets should be sheltered from creditors' claims. There is no reason to treat motor vehicles differently from other forms of property in according protection to this legislative goal. Avco Fin. Servs. v. Isbell, 67 N.C. App. 341, 312 S.E.2d 707 (1984).

The residential exemption of subdivision (a)(1) is conditional; property allocated to the debtor as a residence is free from the enforcement of creditors' claims only so long as the debtor or dependent for the debtor uses the property as a residence. Once the debtor ceases to so use the exempt property as a residence, the prohibition on the creditor's enforcement of his judgment ceases. In re Love, 42 Bankr. 317 (Bankr. E.D.N.C. 1984).

The North Carolina residential exemption is conditioned upon continued ownership of the property by the debtor. In re Love, 42 Bankr. 317 (Bankr. E.D.N.C. 1984).

The North Carolina residential exemption was enacted in 1983 as a part of the legislation which included the "opt out" of the federal bankruptcy exemptions of 11 U.S.C. § 522(d), and an overhaul of many of North Carolina's exemptions. The concept of the conditional residential exemption is entirely consistent with a long line of North Carolina cases holding that the homestead exemption in North Carolina is conditioned on continued use as a residence and continued ownership. In re Love, 42 Bankr. 317 (Bankr. E.D.N.C. 1984).

North Carolina law clearly provides for a residential exemption which is conditioned upon continued use as a residence and continued ownership. If the exempt residence ceases to be used as a residence or ceases to be owned by the debtor (or a dependent) the property is no longer exempt. In that event, a judgment creditor can enforce the judgment lien. If the judgment lien is unconditionally cancelled the judgment creditor would lose the right to pursue the property in the future should the use or ownership of the property change. In re Love, 42 Bankr. 317 (Bankr. E.D.N.C. 1984).

The language of subdivision (a)(2) of this section is clear and free from ambiguity. Avco Fin. Servs. v. Isbell, 67 N.C. App. 341, 312 S.E.2d 707 (1984).

Under subdivision (a)(2) then, a debtor, may use the exemption to shelter any property except that described in the residence exemption, whether it be motor vehicles, other personal property, tools of the trade, or property not qualifying for any other exemption. Avco Fin. Servs. v. Isbell, 67 N.C. App. 341, 312 S.E.2d 707 (1984).

The limits contained in subdivision (a)(3) of this section apply only to exemptions claimed under that subsection and have no application to exemptions claimed under subdivision (a)(2) of this section. Avco Fin. Servs. v. Isbell, 67 N.C. App. 341, 312 S.E.2d 707 (1984).

Subsection (c) of this section does not preclude the use of § 135-9 by a bankruptcy debtor to claim an exemption in state employee retirement benefits. In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

Purpose of Subsection (d). — The obvious purpose of subsection (d) of this section is to prevent pre-petition planning whereby a debtor uses nonexempt property to purchase exempt personal property, or purchases exempt personal property with the proceeds of a dischargeable loan obligation. In re Ellis, 33 Bankr. 16 (Bankr. E.D.N.C. 1983).

Applicability of Subsection (e) to Court Appointed Counsel Fees. — The State assumes the status of a judgment lien creditor against the assets of an indigent defendant who has accepted court-appointed counsel and been found guilty of the offense. The lien is not valid unless the indigent defendant was given both notice of the State claim and the opportunity to resist its perfection in a hearing before the trial court. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

North Carolina is not barred from structuring a program to collect the amount it is owed from a financially-able defendant through reasonable and fairly administered procedures. The State's initiatives in this area naturally must be narrowly drawn to avoid either chilling the indigent's exercise of the right to counsel, or creating discriminating terms of repayment based solely on the defendant's poverty. Beyond these threshold requirements, however, the State has wide latitude to shape its attorneys fees recoupment or restitution program along the lines it deems most appropriate for achieving lawful State objectives. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

Term "purchase" does not encompass every means of acquiring property, and should be defined in the context of subsection (d) of this section so as not to include an acquisition of exemptable property by exchange of life, exemptable personal property where there is no new interest in property obtained, but merely a transfer of equity from the property given to the property received. This definition allows the statute to accomplish its purpose of denying debtors the benefit of certain prebankruptcy petition planning, but will not unnecessarily hinder an honest debtor who trades certain property which could be claimed as exempt for other property of like kind a short time before seeking a fresh start. In re Ellis, 33 Bankr. 16 (Bankr. E.D.N.C. 1983).

This section expresses interest in ensuring that a bankruptcy debtor retain sufficient possessions for a fresh start. In re Ellis, 33 Bankr. 16 (Bankr. E.D.N.C. 1983).

Exemptions Available in Bankruptcy. — The legislature exercised its right to "opt out" of the federal bankruptcy exemptions law by adopting a statute which provides North Carolina citizens with a list of exemptions available to them, and precludes a debtor's use of the federal "laundry list" by expressly not authorizing its use. Thus the exemptions available to a North Carolina debtor in bankruptcy are those prescribed by §§ 1C-1601, 1C-1602 and the exemptions, other than those in 11 U.S.C. § 522(d), afforded by federal law. Berry v. First-Citizens Bank & Trust Co., 33 Bankr. 351 (Bankr. W.D.N.C. 1983).

A debtor's failure to properly preserve his exemptions by not complying with the requirements of exemption laws in a prior state regulated proceeding will be fatal to the debtor's later claim of exemptions in bankruptcy. In re Laughinghouse, 44 Bankr. 789 (Bankr. E.D.N.C. 1984).

Once a debtor validly waives his exemptions by failure to act after being given both notice and an opportunity to claim them as required by state law, the exemptions cannot be revived merely by filing a bankruptcy petition. In re Laughinghouse, 44 Bankr. 789 (Bankr. E.D.N.C. 1984).

Exemption Laws Construed in Favor of Debtor. — The State recognizes that the waiver of exemptions may result in harsh consequences to debtors, and the waiver issue is not one to be taken lightly. The courts have held that the exemption laws must be liberally construed in favor of the debtor. In re Laughinghouse, 44 Bankr. 789 (Bankr. E.D.N.C. 1984).

Excusable neglect. — In considering granting relief from a court order finding the waiver of exemptions by failure to act, the court must focus on the litigant's excusable neglect, not the attorney's. The negligence of the attorney, in attending to his clients' case, although inexcusable, may still be cause for relief. In re Laughinghouse, 44 Bankr. 789 (Bankr. E.D.N.C. 1984).

Life Insurance Policy. — Upon filing a bankruptcy petition, a debtor can claim as exempt the value of her life insurance policy. There is no provision, however, that extends the protection of the life insurance exemption to the beneficiary of the policy once the proceeds are in the beneficiary's hands. The proceeds are treated like any other asset of the beneficiary and are available to his creditors, except to the extent an exemption or other protection is available to the beneficiary in his own right under applicable law. The result is no different where the beneficiary is the codebtor of the insured in a joint bankruptcy case. Butler v. Sharik, 41 Bankr. 388 (Bankr. E.D.N.C. 1984).

Cited in In re Russell, 44 Bankr. 452 (Bankr. E.D.N.C. 1984); Carter v. Homesley (In re Strom), 46 Bankr. 144 (Bankr. E.D.N.C. 1985).

§ 1C-1602. Alternative exemptions.

CASE NOTES

Exemptions Available in Bankruptcy. — The legislature exercised its right to "opt out" of the federal bankruptcy exemptions law by adopting a statute which provides North Carolina citizens with a list of exemptions available to them, and precludes a debtor's use of the federal "laundry list" by expressly not authorizing its use. Thus the exemptions available to a North Carolina debtor in bankruptcy are those prescribed by §§ 1C-1601, 1C-1602 and the exemptions, other than those in 11 U.S.C. § 522(d), afforded by federal law. Berry v. First-Citizens Bank & Trust Co., 33 Bankr. 351 (Bankr. W.D.N.C. 1983).

Applied in United States v. Scott, 45 Bankr. 318 (M.D.N.C. 1984).

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

§ 1C-1603. Procedure for setting aside exempt property.

CASE NOTES

Exemptions Available in Bankruptcy. — The legislature exercised its right to "opt out" of the federal bankruptcy exemptions law by adopting a statute which provides North Carolina citizens with a list of exemptions available to them, and precludes a debtor's use of the federal "laundry list" by expressly not authorizing its use. Thus the exemptions available to a North Carolina debtor in bankruptcy are those prescribed by §§ 1C-1601, 1C-1602 and the exemptions, other than those in 11 U.S.C. § 522(d), afforded by federal law. Berry v. First-Citizens Bank & Trust Co., 33 Bankr. 351 (Bankr. W.D.N.C. 1983).

Applied in In re Love, 42 Bankr. 317 (Bankr. E.D.N.C. 1984); United States v. Scott, 45 Bankr. 318 (M.D.N.C. 1984).

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

§ 1C-1604. Effect of exemption.

CASE NOTES

Applied in In re Love, 42 Bankr. 317 (Bankr. E.D.N.C. 1984); United States v. Scott, 45 Bankr. 318 (M.D.N.C. 1984).

Cited in In re Hare, 32 Bankr. 16 (Bankr. E.D.N.C. 1983).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

October 1, 1985

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1985 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

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