# THE GENERAL STATUTES OF NORTH CAROLINA

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## 1987 CUMULATIVE SUPPLEMENT

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**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

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Annotated through 356 S.E.2d 26. For complete scope of annotations, see scope of volume page.

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**Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.**

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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 1987 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 1987 Regular Session affecting Chapters 1A through 7A of the General Statutes.

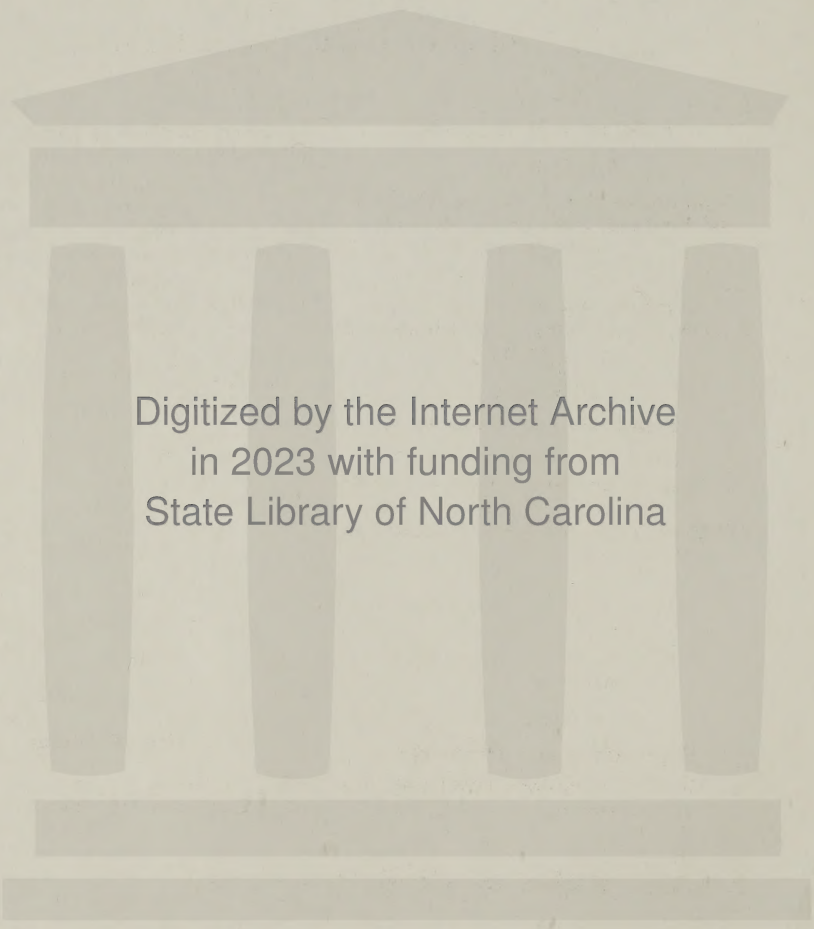
**Annotations:**

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

North Carolina Reports through Volume 319, p. 464.
North Carolina Court of Appeals Reports through Volume 85, p. 173.
South Eastern Reporter 2nd Series through Volume 356, p. 26.
Federal Reporter 2nd Series through Volume 817, p. 761.
Federal Supplement through Volume 658, p. 304.
Federal Rules Decisions through Volume 115, p. 78.
Bankruptcy Reports through Volume 72, p. 618.
Supreme Court Reporter through Volume 107, p. 2210.
North Carolina Law Review through Volume 65, p. 847.
Wake Forest Law Review through Volume 22, p. 424.
Campbell Law Review through Volume 9, p. 206.
Duke Law Journal through 1987, p. 190.
North Carolina Central Law Journal through Volume 16, p. 222.
Opinions of the Attorney General.

## User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included herein. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1A, Part I for the complete User's Guide.



# The General Statutes of North Carolina 1987 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.

## 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).

For survey of North Carolina construction law, with particular reference to civil procedure and evidence, see 21 Wake Forest L. Rev. 633 (1986).

### 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).

**Private Condemnation Proceedings.** — Section 40A-12, together with § 1-393, gives trial courts clear authority to apply the Rules of Civil Procedure in private condemnation proceedings, at least to the extent that those rules do not directly conflict with procedures specifically mandated by Chapter 40A. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

**Special Proceedings.** — Even where an action is a special proceeding, the Rules of Civil Procedure are made applicable by § 1-393, which provides that the Rules of Civil Procedure and the provisions of Chapter 1 on civil procedure are applicable to special proceedings, except as otherwise provided. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

**Rules of Civil Procedure are not strictly applicable to proceedings under Worker's Compensation Act.** Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

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

**Stated** in Long v. Reeves, 77 N.C. App. 830, 336 S.E.2d 98 (1985).

**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, § 44A-13(a) controls over this rule. RDC, Inc. v. Brookleigh Bldrs., Inc., 309 N.C. 182, 305 S.E.2d 722 (1983).

**Cited** in North Carolina Nat'l Bank v. C.P. Robinson Co., 319 N.C. 63, 352 S.E.2d 684 (1987).

ARTICLE 2.

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

## Rule 3. Commencement of action.

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

A civil action may also be commenced by the issuance of a summons when

(1) A person makes application to the court stating the nature and purpose of his action and requesting permission to file his complaint within 20 days and

(2) The court makes an order stating the nature and purpose of the action and granting the requested permission.

The summons and the court's order shall be served in accordance with the provisions of Rule 4. When the complaint is filed it shall be served in accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If the complaint is not filed within the period specified in the clerk's order, the action shall abate.

(b) The clerk shall maintain as prescribed by the Administrative Office of the Courts a separate index of all medical malpractice actions, as defined in G.S. 90-21.11. Upon the commencement of a medical malpractice action, the clerk shall provide a current copy of the index to the senior regular resident judge of the district in which the action is pending. (1967, c. 954, s. 1; 1987, c. 859, s. 2.)

**Effect of Amendments.** — The 1987 amendment, effective October 1, 1987, and applicable to disciplinary actions commenced and suits filed on or after that date, designated the existing language as subsection (a) and added subsection (b).

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, 312 N.C. 796, 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, 312 N.C. 796, 325 S.E.2d 484 (1985).

**The actions of a state officer pursuant to this rule cannot operate to extend the statute of limitations as provided for by Congress** in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) and applied by the Supreme Court. Cannon v. Kroger Co., 647 F. Supp. 82 (M.D.N.C. 1986).

**Applied** in White v. Graham, 72 N.C. App. 436, 325 S.E.2d 497 (1985); Adams v. Brooks, 73 N.C. App. 624, 327 S.E.2d 19 (1985); Smith v. Starnes, 74 N.C. App. 306, 328 S.E.2d 20 (1985); Harris v. Scotland Neck Rescue Squad, Inc., 75 N.C. App. 444, 331 S.E.2d 695 (1985); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

**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, 74 N.C. App. 557, 328 S.E.2d 611 (1985); Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985); Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985); In re King, 79 N.C. App. 139, 339 S.E.2d 87 (1986); Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987); Pinewood Manor Mobile Homes, Inc. v. North Carolina Manufactured Hous. Bd., — N.C. App. —, 353 S.E.2d 231 (1987).

### II. COMMENCEMENT BY ISSUANCE OF SUMMONS.

**The intent of this rule, etc.** — The requirement that a summons be issued and served in accordance with Rule 4, along with the court's order granting permission to file a complaint within 20 days, is intended to ensure that the defendant will have notice of the commencement of an action against him. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

**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, 312 N.C. 796, 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, 312 N.C. 796, 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).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

### 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 Rule 3 requirement that a summons be issued and served in accordance with this rule, along with the court's order granting permission to file a com-

plaint within 20 days, is intended to ensure that the defendant will have notice of the commencement of an action against him. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

**The primary purpose of Rule 4, etc. —**

The purpose behind 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, 73 N.C. App. 624, 327 S.E.2d 19 (1985), overruled on other grounds, Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986).

**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. —**

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, 72 N.C. App. 155, 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., 71 N.C. App. 700, 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, 72 N.C. App. 155, 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, 72 N.C. App. 107, 323 S.E.2d 470 (1984), cert. denied, 313 N.C. 612, 332 S.E.2d 83 (1985).

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. Wil-

liams v. Whitley, 72 N.C. App. 155, 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).

**Notice of Additional Claims to Party in Default. —** A party who is in default for failure to appear is ordinarily not entitled to notice of additional pleadings in the case, but where a new or additional claim is asserted, service on the party, even though in default, is required in the same manner as provided by this rule for the service of summons. First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

Plaintiff, who defaulted on original complaint which alleged that she was a resident of this state was entitled to notice of plaintiff's subsequent motion to declare that none of her property was exempt by virtue of non-residency, and an opportunity to contest the factual allegations as to her non-residency. Where she was given neither notice nor an opportunity to be heard, in violation of statutory and constitutional provisions, the order declaring that her property was not exempt was invalid, and she was entitled to relief therefrom pursuant to § 1A-1, Rule 60(b)(4). First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

**What Service Required Where Party Intervenes. —**

A party who intervenes pursuant to Rule 24 is not required to issue a summons and complaint pursuant to this rule. In re Baby Boy Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986), cert. denied, — N.C. —, 351 S.E.2d 750 (1987).

**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, 312 N.C. 796, 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, 312 N.C. 796, 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, 312 N.C. 796, 325 S.E.2d 484 (1985).

**Delay in substituting correct name not fatal. —** Where plaintiffs sued and served the appropriate party, their delay in substituting the correct name of that party was not fatal. Tyson v. L'eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987).

**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, 312 N.C. 796, 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, 72 N.C. App. 262, 324 S.E.2d 301 (1985); White v. Graham, 72 N.C. App. 436, 325 S.E.2d 497 (1985); VEPCO v. Tillett, 73 N.C. App. 512, 327 S.E.2d 2 (1985); North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

**Cited** in Stevens v. Stevens, 68 N.C. App. 234, 314 S.E.2d 786 (1984); Estrada v. Burnham, 74 N.C. App. 557, 328 S.E.2d 611 (1985); C.W. Matthews Contracting Co. v. State, 75 N.C. App. 317, 330 S.E.2d 630 (1985); Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986); Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986); Phillips Factors Corp. v. Harbor Lane of Pensacola, Inc., 648 F. Supp. 1580 (M.D.N.C. 1986); Humprey v. Sinnott, — N.C. App. —, 352 S.E.2d 443 (1987).

## 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).

**Service on Partners — Purpose of Paragraph (j)(7)b.** — The purpose of paragraph (j)(7)b of this rule is to provide notice of the commencement of an action to the individual partner, so that he may protect his interests, and to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180 (1986).

**Same — Service of Summons Prerequisite to Individual Liability.** — Actual notice of a suit against the partnership will not cure the requirement that a partner must be served with a summons to be held individually liable. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 83 N.C. App. 512, 349 S.E.2d 873 (1986), reconsideration denied, — N.C. —, 351 S.E.2d 760 (1987).

Each partner in a partnership is jointly and severally liable for a tort committed in the course of the partnership business, and the injured party may sue all members of the partnership or any one of them at his election. But a partner who is not served with summons is not bound beyond his partnership assets. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 83 N.C. App. 512, 349 S.E.2d 873 (1986), reconsideration denied, — N.C. —, 351 S.E.2d 760 (1987).

**Same — Effect of Verification of Answer.** — Defendant partner's verification of original answer where he was sued in his partnership capacity did not subject him to individual liability. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 83 N.C. App. 512, 349 S.E.2d 873 (1986), reconsideration denied, — N.C. —, 351 S.E.2d 760 (1987).

**Same — Effect of Participation in Suit.** — A partner who participates in a malpractice suit by acquainting himself with the facts of the pending suit and notifying his insurance carrier of the suit does not subject himself to individual liability when the Rules of Civil Procedure require that he be served with process individually before being held individually liable. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 83 N.C. App. 512, 349 S.E.2d 873 (1986), reconsideration denied, — N.C. —, 351 S.E.2d 760 (1987).

**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 al-

lowing 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).

**Separate Houses on Same Farm.** — Defendant and his parents shared the same dwelling and place of abode, for purposes of Rule 4 (j)(1)a, where they lived on the same farm, owned by the parents, although they occupied separate houses, about 60 to 100 yards apart. Bowers v. Billings, 80 N.C. App. 330, 342 S.E.2d 58 (1986).

**Actions Constituting Effectual Service.** — The placing of envelope addressed to defendant and containing summons and complaint on the seat of a nearby pickup truck, presumed to be defendant's but actually one driven by his employee, as defendant watched, after defendant refused to accept service of same, where defendant's employee found the envelope and delivered it to defendant's wife the next day constituted effectual service on defendant in view of the fact that service had previously been attempted upon him by certified mail, restricted delivery, which service had been refused. Currie v. Wood, 112 F.R.D. 408 (E.D.N.C. 1986).

**Waiver of Right to Challenge Jurisdiction.** — Assuming, without deciding, that the service required by § 55-71(c), relating to determining the validity of the election or appointment of corporate directors or officers, must be made in the manner required by subsection (j) of this rule, respondents waived their right to challenge personal jurisdiction where they each received a copy of the petition and notice of hearing from petitioner's counsel more than 10 days prior to the hearing, made a joint response to the petition requesting that the court declare the entire election void but did not assert any defense of insufficiency of service of process, and appeared at the hearing and participated fully. Stancil v. Bruce Stancil Refrigeration, Inc., 81 N.C. App. 567, 344 S.E.2d 789, cert. denied, 318 N.C. 418, 349 S.E.2d 601 (1986).

### B. Delivery to Person Residing at Defendant's Usual Abode.

**Delivery to Brother.** — Testimony of deputy and his two returns of service were competent evidence which would support the trial court's finding that defendant resided at the address in question with his brother, and that his brother was a person of suitable age and discretion to accept service. Olschesky v. Houston, — N.C. App. —, 352 S.E.2d 884 (1987).

### C. Service by Registered or Certified Mail.

**The language of former 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).

## III. SERVICE ON COUNTIES, MUNICIPALITIES AND OTHER LOCAL PUBLIC BODIES.

**County attorney is not authorized to accept service for the county.** Service upon the county manager or on the chairman, clerk or any member of the board of commissioners is necessary for service upon the county to be effective. In re Brunswick County, 81 N.C. App. 391, 344 S.E.2d 584 (1986).

**County Hospital Authority.** — Defendant hospital's motion to dismiss for insufficiency of process and insufficiency of service of process would be denied without prejudice to file a renewed motion if plaintiffs did not properly serve defendant within ten days of filing of courts order, where defendant was misnamed, in that the caption reads "Onslow Memorial Hospital, Incorporated," while defendant's actual name was the "Onslow County Hospital Authority," and where the complaint was served on the hospital administrator, who was not authorized to accept service

for the hospital, since dismissal is not justified where it appears that service can be properly made. Coastal Neuro-Psychiatric Assocs. v. Onslow County Hosp. Auth., 607 F. Supp. 49 (E.D.N.C. 1985).

## 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).

**Service on Wrong Agent Properly Kept Alive.** — Suit which was properly instituted against corporate defendant within the statute of limitations period but which was served on the wrong agent was properly kept alive, by alias and pluries summons until service was properly made upon a corporate officer. Tyson v. L'eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987).

**Service on Agent under Assumed Corporate Name.** — Where at the time that plaintiffs instituted their action, corporation had not complied with § 66-68, but was actively conducting business under an assumed name and holding itself out to the public and to its employees under that name, and where service of process was accomplished upon a corporate agent who might have been expected to know that the assumed name was a name used by the corporation, corporation was adequately served with sufficient legal process under its assumed name, and the trial court had jurisdiction. Tyson v. L'eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987).

**Defective Service Defense Not Waived.** — Where, after defendant was served, its counsel immediately notified plaintiff of the defect in service, invited proper service upon it, and advised it how a correction could be made, and where a default judgment had not yet been entered, but only entry of default, plaintiff's claim that defendant had waived any defenses it might have had to lack of jurisdiction by reason of defective service would be rejected. United States ex rel. Combustion Sys. Sales, Inc. v. Eastern Metal Prods. & Fabricators, Inc., 112 F.R.D. 685 (M.D.N.C. 1986).

## 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).

**This rule is appropriate only where a civil litigant's whereabouts are unknown, and the due diligence requirement contained therein is clear.** In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, cert. denied and appeal dismissed, 314 N.C. 665, 335 S.E.2d 322 (1985).

**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, 72 N.C. App. 155, 323 S.E.2d 458 (1984).

**Parental Rights Termination Case.** — Where the "name or identity" of a respondent parent is known, but his or her whereabouts are unknown, the petitioner in a parental rights termination case must proceed under G.S. 7A-289.27 and must comply with subdivision (j1) as regards service by publication, and specifically, with the due diligence requirement contained therein. In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, cert. denied and appeal dismissed, 314 N.C. 665, 335 S.E.2d 322 (1985).

**Personal Notice to Purported Adverse Possessor Not Required.** — Where a city, in a foreclosure action, gave personal notice to all the record owners of the property in question and notice by publication to all others having an interest in the disputed property who could not with due diligence be located, it was not required to give personal notice to a purported adverse possessor whose purported interest was not recorded. Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

**Service by publication was void, etc.** —

In accord with original. See In re Clark, 76 N.C. App. 83, 332 S.E.2d 196, cert. denied and appeal dismissed, 314 N.C. 665, 335 S.E.2d 322 (1985).

## 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.

**Section (e) of this rule controls in determining when an action is discontinued.** Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986).

**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, 74 N.C. App. 61, 327 S.E.2d 315 (1985).

Where alias summons was issued more than 90 days after the date the original summons was issued, it did not comply with subdivision (d)(2) of this rule, and thus the original summons could not serve as the basis for the issuance of an alias or pluries summons necessary to maintain an unbroken continuation of the action. Thus, under subsection (e) of this rule, the action would be deemed to have commenced against defendant on the date of issuance of the alias summons. Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987).

**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, 74 N.C. App. 61, 327 S.E.2d 315 (1985).

**Duly Issued Summons as Basis for Alias or Pluries Summons.** — A duly issued summons not served or delivered to the sheriff for service within 30 days of its issuance may nevertheless serve as the basis for an alias or pluries summons so as to toll the statute of limitations. Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986).

The case of Deaton v. Thomas, 262 N.C. 565, 138 S.E.2d 201 (1964), which held that a summons issued by the clerk but never delivered to the sheriff to whom it was directed for service may not serve as the basis for the issuance of an alias process or the extension of time for service, was decided under the old rules of civil procedure and relied, in part, on earlier decisions which held that a summons was not issued until it was delivered to the sheriff for service. Those cases are no longer controlling on the question of when a summons is issued. Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986).

**Tolling of Statute Stops Where Plaintiff Fails to Keep Action Alive.** — While the statute of limitations is tolled when suit is properly instituted, and it stays tolled as long as the action is alive, the tolling stops if the suit is discontinued by operation of law because of the plaintiff's failure to keep the action alive in an authorized manner after the original summons has lost its efficacy by not being served within the time

allowed. Long v. Fink, 80 N.C. App. 442, 342 S.E.2d 557 (1986).

**Summons Need Not Be Delivered to Sheriff within 30 Days to Be Kept Alive.** — In light of the clear language of subsection (e) of this rule on the discontinuance of a summons, there is no justification for construing the rule to require delivery of the summons to the sheriff within 30 days of its issuance to keep the summons alive. Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986).

The case of Adams v. Brooks, 73 N.C. App. 624, 327 S.E.2d 19, cert. denied, 313 N.C. 596, 332 S.E.2d 177 (1985), holding that plaintiff's summons could not be used as a basis for an extension of time for service since the summons was not delivered to the sheriff for service on defendant within 30 days of its issuance, is overruled. Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986).

**Unserved Dormant Summons Not Basis of Jurisdiction.** — Where summons was returned unserved by sheriff's department on October 17, 1982, (within 30 days of its issuance), and plaintiff served the original summons upon the Secretary of State's office on November 3, 1982, without having revived it under subsection (d) of this rule, this dormant summons could not and did not subject defendant to the jurisdiction of the court. Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987).

**Allowance of Voluntary Dismissal Held Nugatory.** — Where an action was discontinued by operation of law under section (e) of this rule, the statute of limitations having thereafter immediately run its remaining course, the judge's subsequent order of voluntary dismissal allowing plaintiff another year within which to refile the action was nugatory. Long v. Fink, 80 N.C. App. 442, 342 S.E.2d 557 (1986).

### VIII. DECISIONS UNDER PRIOR LAW.

**Editor's Note.** — The case of Deaton v. Thomas, 262 N.C. 565, 138 S.E.2d 201 (1964), annotated under the catchlines "Summons Never Delivered to Officer to Whom Directed" and "Prerequisites to Extension of Time for Service," has been overruled. See Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986).

### OPINIONS OF ATTORNEY GENERAL

**Service of process pursuant to §§ 1-105 and 1-105.1** upon the Commissioner of Motor Vehicles may be made by leaving a copy thereof with a fee of three dollars ($3.00) in the hands of the Commissioner of Motor Vehicles, or in his office. Service by Sheriff or Marshall is not required. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (1985).

Service upon the Commissioner of Motor Vehicles, in a manner consistent with this rule, meets the requirement of § 1-105. See opinion of Attorney General to Mr. J.M. Penny, Deputy Commissioner of Motor Vehicles, 55 N.C.A.G. 26 (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).

**Legal Periodicals.** —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

**What Service Required Where Party Intervenes.** —

Service, pursuant to this rule, of the motion accompanied with the pleading is sufficient service upon the party against whom relief is sought or denied in the intervenor's pleading and is sufficient process to acquire jurisdiction over the party if all other requisites for jurisdiction are met. In re Baby Boy Shamp, 82 N.C. 606, 347 S.E.2d 848 (1986), cert. denied, — N.C. —, 351 S.E.2d 750 (1987).

**Notice of Additional Claims to Party in Default.** — A party who is in default for failure to appear is ordinarily not entitled to notice of additional pleadings in the case, but where a new or additional claim is asserted, service on the party, even though in default, is required in the same manner as provided by § 1A-1, Rule 4 for the service of summons. First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

Plaintiff, who defaulted on original complaint which alleged that she was a resident of this state, was entitled to notice of plaintiff's subsequent motion to declare that none of her property was exempt by virtue of non-residency, and an opportunity to contest the factual allegations as to her non-residency. Where she was given neither notice nor an opportunity to be heard, in violation of statutory and constitutional provisions, the order declaring that her property was not exempt was invalid, and she was entitled to relief therefrom pursuant to § 1A-1, Rule 60(b)(4). First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

**Quoted** in Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

**Cited** in State v. Hege, 78 N.C. App. 435, 337 S.E.2d 130 (1985).

## Rule 6. Time.

**Legal Periodicals.** —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

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).

### II. ENLARGEMENT OF TIME.

**Extending Time in Which to File Complaint.** — The clerk represents and is the court by virtue of § 1-7 and has the authority to exercise the discretionary powers conferred by this rule for the purpose of extending additional time in which to file a complaint. Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

### 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).

Although affidavits in support of a motion for summary judgment are required by section (d) of this rule and Rule 56(c) to be filed and served with the motion, Rule 56(e) grants to the trial judge wide discretion to permit further affidavits to supplement those which have already been served. Rolling Fashion Mart, Inc. v. Mainor, 80 N.C. App. 213, 341 S.E.2d 61 (1986).

### 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).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

### 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); In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986); Smith v. North Carolina Farm Bureau Mut. Ins. Co., 84 N.C. App. 120, 351 S.E.2d 774 (1987).

### 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).

**But Some Pleading Alleging Last Clear Chance, etc. —**

Where the plaintiff in a negligence action did not exercise the option of filing a reply alleging last clear chance, nor plead facts in his complaint sufficient to invoke the doctrine, the pleadings were not sufficient to raise the defense. Meadows v. Lawrence, 75 N.C. App. 86, 330 S.E.2d 47 (1985), aff'd, 315 N.C. 383, 337 S.E.2d 851 (1986).

## Rule 8. General rules of pleadings.

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

(1) A short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and

(2) A demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded. In all negligence actions, and in all claims for punitive damages in any civil action, wherein the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars ($10,000). However, at any time after service of the claim for relief, any party may request of the claimant a written statement of the monetary relief sought, and the claimant shall, within 10 days after such service, provide such statement, which shall not be filed with the clerk until the action has been called for trial or entry of default entered. Such statement may be amended in the manner and at times as provided by Rule 15.

(1967, c. 954, s. 1; 1975, 2nd Sess., c. 977, s. 5; 1979, ch. 654, s. 4; 1985 (Reg. Sess., 1986), c. 1027, s. 56.)

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

**Editor's Note.** —

Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

**Effect of Amendments.** — The 1985 (Reg. Sess., 1986) amendment, effective January 1, 1987, and applicable to pleadings, motions, or papers filed on or after that date, rewrote subdivision (a)(2), which formerly provided that the pleading should not state the demand for monetary relief, but should state that the relief demanded exceeded $10,000.00, in professional malpractice actions, including actions against health care providers, and in actions against product manufacturers, wholesalers or retailers for personal injury, death or property damage based on or arising out of any alleged defect or failure in relation to a product.

**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).

For article, "The American Medical Association vs. The American Tort System," see 8 Campbell L. Rev. 241 (1986).

## CASE NOTES

### I. IN GENERAL.

**Subsection (b) of this rule is virtually identical to FRCP 8(b).** Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

**The Right to Amend, etc.** —

A motion to amend an answer is addressed to the sound discretion of the trial judge, and he has broad discretion in permitting or denying amendments. Hinson v. Brown, 80 N.C. App. 661, 343 S.E.2d 284 (1986), appeal dismissed, 318 N.C. 282, 348 S.E.2d 138 (1986).

**This rule did not remove all requirements of particularity.** Thus, mere assertion of a grievance will not suffice, but the pleader must plead with sufficient particularity to identify the legal issues and to allow the other party to frame a responsive pleading. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

**The policy behind the notice theory** of the present rules is to resolve controversies on the merits, following opportunity for discovery, rather than resolving them on technicalities of pleading. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

**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, 71 N.C. App. 762, 323 S.E.2d 369 (1984); Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

**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., 74 N.C. App. 499, 328 S.E.2d 793 (1985).

**Cited** in Beard v. Pembaur, 68 N.C. App. 52, 313 S.E.2d 853 (1984); Wilder v. Amatex Corp., 314 N.C. 550, 336 S.E.2d 66 (1985); Rowe v. Franklin County, 318 N.C. 344, 349 S.E.2d 65 (1986); WXQR Marine Broadcasting Corp. v. JAI, Inc., — N.C. App. —, 350 S.E.2d 912 (1986).

### II. PLEADINGS, GENERALLY.

**Concept of "Notice Pleading" Adopted.** —

This rule was intended to liberalize pleading requirements by adopting the concept of "notice pleading," thereby abolishing the more strict requirements of "fact pleading." Smith v. North Carolina Farm Bureau Mut. Ins. Co., 84 N.C. App. 120, 351 S.E.2d 774 (1987).

**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., 73 N.C. App. 134, 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, 73 N.C. App. 182, 326 S.E.2d 271 (1985), cert. denied, 314 N.C. 116, 332 S.E.2d 481 (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).

Under our modern practice only claims for fraud, duress, libel and slander have to be pleaded with any particularity at all. In all other instances the complaint is sufficient if it gives the court and the parties notice of the trans-

actions, occurrences, or series of transactions or occurrences intended to be proved, showing that the pleader is entitled to relief. Newton v. Whitaker, 83 N.C. App. 112, 349 S.E.2d 333 (1986).

A pleading is sufficient if it gives notice of the events and transactions and allows the adverse party to understand the nature of the claim and to prepare for trial. Smith v. North Carolina Farm Bureau Mut. Ins. Co., 84 N.C. App. 120, 351 S.E.2d 774 (1987).

**All this rule requires is a "short and plain statement," etc. —**

It was error for the court to strike a lengthy, highly detailed and technical complaint on the apparent grounds that it did not contain a short and plain statement of the facts. This rule prescribes the minimum information that a pleading must contain; it does not require that a complaint contain only a "short and plain statement." Holley v. Burroughs Wellcome Co., 74 N.C. App. 738, 330 S.E.2d 228 (1985), aff'd, 318 N.C. 352, 348 S.E.2d 772 (1986).

**Allegations Must Be Liberally Construed. —**

Pleadings must be liberally construed to do substantial justice, and must be fatally defective before they may be rejected as insufficient. Smith v. North Carolina Farm Bureau Mut. Ins. Co., 84 N.C. App. 120, 351 S.E.2d 774 (1987).

**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), rev'd on other grounds, 311 N.C. 536, 319 S.E.2d 912 (1984); 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, 72 N.C. App. 107, 323 S.E.2d 470 (1984), cert. denied, 313 N.C. 612, 332 S.E.2d 83 (1985).

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).

A dismissal with prejudice, pursuant to Rule 41(b), is an available sanction for a plaintiff's violation of subdivision (a)(2) of this rule. It is not, however, the only available sanction and should be applied only when the trial court determines that less drastic sanctions will not suffice. Miller v. Ferree, 84 N.C. App. 135, 351 S.E.2d 845 (1987).

The determination of whether to dismiss for a violation of subdivision (a)(2) and whether such a dismissal should be with prejudice so as to bar a subsequent action, involves the exercise of judicial

discretion. Miller v. Ferree, 84 N.C. App. 135, 351 S.E.2d 845 (1987).

**As to use of the Rule 41(b) power of dismissal as a sanction for violation of provision of section (a)(2) of this rule 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).

**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).

**Complaint Held Sufficient.** —

While the allegation in a malpractice claim, that the defendant-physician's conduct "amounted to a reckless and wanton disregard of and indifference to the rights and safety of" the plaintiff-patient, mentioned no particular instance of aggravated conduct, it was sufficient to put the defendant on notice of a punitive damage claim, to provide an understanding of the nature and basis of the claim, and to allow him to prepare his defense. Paris v. Kreitz, 75 N.C. App. 365, 331 S.E.2d 234, cert. denied, 315 N.C. 185, 337 S.E.2d 858 (1985).

**Methods for Obtaining Facts More Specifically.** —

Once a complaint gives general notice of the matter being pleaded, the defendant must rely on other procedures, such as discovery, to further define the issues and prepare for trial. Smith v. North Carolina Farm Bureau Mut. Ins. Co., 84 N.C. App. 120, 351 S.E.2d 774 (1987).

### 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).

**As Well as Laches.** —

Laches is an affirmative defense which must be specifically pleaded by answer. Bertie-Hertford Child Support Enforcement Agency v. Barnes, 80 N.C. App. 552, 342 S.E.2d 579 (1986).

**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).

**Sudden Emergency.** — Defendants failed to meet the requirement of section (c) of this rule when they failed to set forth affirmatively sudden emergency as an avoidance or affirmative defense. Hinson v. Brown, 80 N.C. App. 661, 343 S.E.2d 284 (1986), appeal dismissed, 318 N.C. 282, 348 S.E.2d 138 (1986).

**Contributory Negligence Sufficiently Pleaded.** — Where defendant in her answer specifically alleged contributory negligence and referred to the actions which constituted the alleged contributory negligence, plaintiff was therefore put on notice that defendant would try to prove that plaintiff could not recover on those grounds. Watkins v. Hellings, 83 N.C. App. 430, 350 S.E.2d 590 (1986).

**Burden on Plaintiff When Statute of Limitations Is Pleaded.** — North Carolina, apparently alone among American jurisdictions, continues to adhere to the rule that once the statute of

limitations has been properly pleaded in defense the burden of proof shifts to the plaintiff to show that the action was filed within the statutory period. This anomalous rule survived the adoption of the Rules of Civil Procedure, which specifically list the statute of limitations as an affirmative defense and operate generally to place the burden of proof of affirmative defenses on the party raising them. Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

**Where the defense admits that the statute of limitations does not bar the claim,** the question should be summarily treated (if at all) by the court, not the jury. Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

### V. ALTERNATIVE, HYPOTHETICAL AND INCONSISTENT STATEMENTS.

**There is no requirement that all claims be legally consistent.** Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

**A party may even allege and prove inconsistent or alternative theories** without subjecting the case to directed verdict. Hall v. Mabe, 77 N.C. App. 758, 336 S.E.2d 427 (1985).

## Rule 9. Pleading special matters.

### CASE NOTES

VIII. Pleading and Practice.
IX. Time and Place.

### 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).

**Intent and knowledge may be averred generally.** Carver v. Roberts, 78 N.C. App. 511, 337 S.E.2d 126 (1985).

**When Complaint Is Sufficient.** — Under our modern practice only claims for fraud, duress, libel and slander have to be pleaded with any particularity at all. In all other instances the complaint is sufficient if it gives the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved, showing that the pleader is entitled to relief. Newton v. Whitaker, 83 N.C. App. 112, 349 S.E.2d 333 (1986).

**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); Dellinger v. Lamb, 79 N.C. App. 404, 339 S.E.2d 480 (1986).

**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).

### II. CAPACITY.

**Allegations that a party is a member of and properly represents a class under Rule 23** suffice as the "affirmative averment" of "capacity and authority to sue" required by Section (a) of this rule. Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

### III. FRAUD, DURESS, MISTAKE, ETC.

**Notice Pleading Not Applicable, etc.** —

A claim for relief based on fraud is unique and must be pleaded with particularity even under the liberal rules of notice pleading. Stanford v. Owens, 76 N.C. App. 284, 332 S.E.2d 730, cert. denied, 314 N.C. 670, 336 S.E.2d 402 (1985).

**What Constitutes Fraud.** —

To prevail in a cause of action sounding in fraud, the plaintiff must prove that false representations or concealments were made with knowledge of the truth or with reckless indifference thereto. Watts v. Cumberland County Hosp. Sys., 74 N.C. App. 769, 330 S.E.2d 256 (1985), rev'd in part on other grounds, 317 N.C. 110, 343 S.E.2d 879 (1986).

**Requirements of Pleading Averring Fraud.** —

In accord with 2nd paragraph in origi-

nal. See Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), rev'd on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986).

Without any essential factual basis to support the plaintiff's allegation that the defendant knowingly made false misrepresentations — a critical element of fraud — his tort claim for fraud could not withstand a motion to dismiss. Beasley v. National Sav. Life Ins. Co., 75 N.C. App. 104, 330 S.E.2d 207, cert. granted, 314 N.C. 537, 335 S.E.2d 13 (1985), discretionary review improvidently allowed, 316 N.C. 372, 341 S.E.2d 338 (1986).

**Mere generalities and conclusory, etc. —**

In order to state a cause of action for fraud, facts must be alleged which, if true, would constitute fraud, it not being sufficient to allege the elements of fraud in general terms. Watts v. Cumberland County Hosp. Sys., 74 N.C. App. 769, 330 S.E.2d 256 (1985), rev'd in part on other grounds, 317 N.C. 110, 343 S.E.2d 879 (1986).

**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).

**IX. TIME AND PLACE.**

**For the purposes of testing the timeliness of a complaint, averments of time and place are material.** This allows early consideration of statute of limitations defenses, which are appropriately raised by motions to dismiss. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

## Rule 10. Form of pleadings.

**CASE NOTES**

**Quoted** in Lawson v. Lawson, 84 N.C. App. 51, 351 S.E.2d 794 (1987).

**Cited** in State v. McLean, 74 N.C. App. 224, 328 S.E.2d 451 (1985); Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986).

## Rule 11. Signing and verification of pleadings.

(a) *Signing by Attorney.* — Every pleading, motion, and other paper of 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 his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing

law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(1967, c. 954, s. 1; 1985 (Reg. Sess., 1986), c. 1027, s. 55.)

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

**Editor's Note.** — Session Laws 1985 (Reg. Sess., 1986), c. 1027, s. 57, contains a severability clause.

**Effect of Amendments.** — The 1985 (Reg. Sess., 1986) amendment, effective January 1, 1987, and applicable to pleadings, motions, or papers filed on or after that date, rewrote subsection (a).

**Legal Periodicals.** —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Practice and Procedure Under Amended Rule 11 of the Federal Rules of Civil Procedure," see 9 Campbell L. Rev. 11 (1986).

## CASE NOTES

### I. IN GENERAL.

**Plaintiff May Not File Solely to Toll Statute.** — A plaintiff may not file a complaint within the time permitted by the statute of limitations for the sole purpose of tolling the statute of limitations, but with no intention of pursuing the prosecution of the action, then voluntarily dismiss the complaint and thereby gain an additional year pursuant to Rule 41 (a)(1). Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

**Pleading in Violation of Section (a) May Not Be Voluntarily Dismissed.** — Rule 41(a)(1) and section (a) of this rule must be construed in pari materia to require that, in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year "extension" by way of a Rule 41(a)(1) voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading, including section (a) of this rule. A pleading filed in violation of section (a) should be stricken as "sham and false" and may not be voluntarily dismissed without prejudice in order to give the pleader the benefit of the "saving" provision of Rule 41(a)(1). Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

**Defendant partner's verification of original answer** where he was sued in his partnership capacity did not subject him to individual liability. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 83 N.C. App. 512, 349 S.E.2d 873 (1986), reconsideration denied, — N.C. —, 351 S.E.2d 760 (1987).

**Petition to Review Zoning Board Decision Need Not Be Verified.** — No civil procedure rule or statute requires a petition to review a zoning board decision to be verified. Little v. City of Locust, 83 N.C. App. 224, 349 S.E.2d 627 (1986).

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

**Cited** in Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986); WXQR Marine Broadcasting Corp. v. JAI, Inc., 83 N.C. App. 520, 350 S.E.2d 912 (1986).

# 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).

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

## CASE NOTES

### I. IN GENERAL.

**Failure to plead the particulars of jurisdiction is not fatal** to a claim, so long as the facts alleged permit the inference of jurisdiction under the statute. Williams v. Institute for Computational Studies, — N.C. App. —, 355 S.E.2d 177 (1987).

**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).

**Appeal of Dismissal.** — Although order dismissing class action without prejudice did not determine the controversy and was interlocutory, the order affected a substantial right of the unnamed plaintiffs and was immediately appealable. Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437, cert. granted, 316 N.C. 731, 345 S.E.2d 386 (1986).

**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, 71 N.C. App. 707, 323 S.E.2d 381 (1984); Stokes v. Wilson & Redding Law Firm, 72 N.C. App. 107, 323 S.E.2d 470 (1984); Schneider v. Brunk, 72 N.C. App. 560, 324 S.E.2d 922 (1985); Northwestern Bank v. Gladwell, 72 N.C. App. 489, 325 S.E.2d 37 (1985); Trustees of Rowan Technical College v. J. Hyatt Hammond Assocs., 313 N.C. 230, 328 S.E.2d 274 (1985); Bjornsson v. Mize, 75 N.C. App. 289, 330 S.E.2d 520 (1985); Fraser v. Di Santi, 75 N.C. App. 654, 331 S.E.2d 217 (1985); Craven County Hosp. Corp. v. Lenoir County, 75 N.C. App. 453, 331 S.E.2d 690 (1985); Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985); Biddix v. Henredon Furn. Indus., Inc., 76 N.C. App. 30, 331 S.E.2d 717 (1985); Olive v. Great Am.

Ins. Co., 76 N.C. App. 180, 333 S.E.2d 41 (1985); Claycomb v. HCA-Raleigh Community Hosp., 76 N.C. App. 382, 333 S.E.2d 333 (1985); Threatt v. Hiers, 76 N.C. App. 521, 333 S.E.2d 772 (1985); Forbes Homes, Inc. v. Trimpi, 80 N.C. App. 418, 342 S.E.2d 526 (1986); Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986); Blanton v. Moses H. Cone Mem. Hosp., — N.C. —, 354 S.E.2d 455 (1987).

**Stated** in Towery v. Anthony, 68 N.C. App. 216, 314 S.E.2d 570 (1984); Southland Assocs. Realtors v. Miner, 73 N.C. App. 319, 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., 72 N.C. App. 419, 324 S.E.2d 909 (1985); Black v. Littlejohn, 312 N.C. 626, 325 S.E.2d 469 (1985); Sperry Corp. v. Patterson, 73 N.C. App. 123, 325 S.E.2d 642 (1985); Forbes Homes, Inc. v. Trimpi, 313 N.C. 168, 326 S.E.2d 30 (1985); Boston v. Webb, 73 N.C. App. 457, 326 S.E.2d 104 (1985); Ratton v. Ratton, 73 N.C. App. 642, 327 S.E.2d 1 (1985); Pittman v. Pittman, 73 N.C. App. 584, 327 S.E.2d 8 (1985); Adams v. Nelson, 313 N.C. 442, 329 S.E.2d 322 (1985); Rorrer v. Cooke, 313 N.C. 338, 329 S.E.2d 355 (1985); Thompson v. Newman, 74 N.C. App. 597, 328 S.E.2d 597 (1985); Estrada v. Burnham, 74 N.C. App. 557, 328 S.E.2d 611 (1985); Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985); Sides v. Duke Hosp., 74 N.C. App. 331, 328 S.E.2d 818 (1985); Evans v. Mitchell, 74 N.C. App. 730, 329 S.E.2d 681 (1985); North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985); Andrews v. Peters, 75 N.C. App. 252, 330 S.E.2d 638 (1985); Paris v. Kreitz, 75 N.C. App. 365, 331 S.E.2d 234 (1985); Square D Co. v. C.J. Kern Contractors, 314 N.C. 423, 334 S.E.2d 63 (1985); Bolton Corp. v. T.A. Loving Co., 77 N.C. App. 90, 334 S.E.2d 495 (1985); Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985); Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985); DeSoto Trail, Inc. v. Covington Diesel, Inc., 77 N.C. App. 637, 335 S.E.2d 794 (1985); Land-of-Sky Regional Council v. County of Henderson, 78 N.C. App. 85, 336 S.E.2d 653 (1985); Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985); Mastrom, Inc. v. Continental Cas. Co., 78 N.C. App. 483, 337 S.E.2d 162 (1985); Blanton v. Moses H. Cone Mem. Hosp., 78 N.C. App. 502, 337 S.E.2d 200 (1985); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985); Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc., 78 N.C. App. 558, 337 S.E.2d 685 (1985); Alamance County Hosp. v. Neighbors, 315 N.C. 362, 338 S.E.2d 87 (1986); Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986); Schuman v. Investors Title Ins. Co., 78 N.C. App. 783, 338 S.E.2d 611 (1986); Trought v. Richardson, 78 N.C. App. 758, 338 S.E.2d 617 (1986); Poore v. Swan Quarter Farms, Inc., 79 N.C. App.

286, 338 S.E.2d 817 (1986); Vann v. North Carolina State Bar, 79 N.C. App. 166, 339 S.E.2d 95 (1986); Dellinger v. Lamb, 79 N.C. App. 404, 339 S.E.2d 480 (1986); Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986); Lowder ex rel. Doby v. Doby, 79 N.C. App. 501, 340 S.E.2d 487 (1986); Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986); Beasley v. National Sav. Life Ins. Co., 316 N.C. 372, 341 S.E.2d 338 (1986); Jackson v. Housing Auth., 316 N.C. 259, 341 S.E.2d 523 (1986); Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986); First Charter Nat'l Bank v. Taylor, 80 N.C. App. 315, 341 S.E.2d 747 (1986); Mize v. County of Mecklenburg, 80 N.C. App. 279, 341 S.E.2d 767 (1986); Hardaway Constructors, Inc. v. North Carolina Dep't of Transp., 80 N.C. App. 264, 342 S.E.2d 52 (1986); Clark v. Asheville Contracting Co., 316 N.C. 475, 342 S.E.2d 832 (1986); Lee ex rel. Schlosser v. Mowett Sales Co., 316 N.C. 489, 342 S.E.2d 882 (1986); Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986); Indiana Lumbermen's Mut. Ins. Co. v. Champion, 80 N.C. App. 370, 343 S.E.2d 15 (1986); Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986); Vick v. Vick, 80 N.C. App. 697, 343 S.E.2d 245 (1986); Shaw v. Jones, 81 N.C. App. 486, 344 S.E.2d 321 (1986); Davis v. City of Archdale, 81 N.C. App. 505, 344 S.E.2d 369 (1986); Masciulli v. Tucker, 82 N.C. App. 200, 346 S.E.2d 305 (1986); Forsyth County Bd. of Social Servs. v. Division of Social Servs., 317 N.C. 689, 346 S.E.2d 414 (1986); Bolton Corp. v. T.A. Loving Co., 317 N.C. 623, 347 S.E.2d 369 (1986); In re Baby Boy Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986); Overcash v. Statesville City Bd. of Educ., 318 N.C. App. 411, 348 S.E.2d 524 (1986); Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986); Forbes Homes, Inc. v. Trimpi, 318 N.C. 473, 349 S.E.2d 852 (1986); Cameron-Brown Co. v. Daves, 83 N.C. App. 281, 350 S.E.2d 111 (1986); Brickman v. Codella, 83 N.C. App. 377, 350 S.E.2d 164 (1986); Treants Enters., Inc. v. Onslow County, 83 N.C. App. 345, 350 S.E.2d 365 (1986); Lee v. Barksdale, 83 N.C. App. 368, 350 S.E.2d 508 (1986); Lawson v. Lawson, 84 N.C. App. 51, 351 S.E.2d 794 (1987); Tyson v. L'eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987); Bryant v. Short, — N.C. App. —, 352 S.E.2d 245 (1987); Harshaw v. Mustafa, — N.C. App. —, 352 S.E.2d 247 (1987); Jackson County ex rel. Child Support Enforcement Agency ex rel. Jackson v. Swayney, 319 N.C. 52, 352 S.E.2d 413 (1987); Contract Steel Sales, Inc. v. Freedom Constr. Co., — N.C. App. —, 353 S.E.2d 418 (1987); Byrne v. Bordeaux, — N.C. App. —, 354 S.E.2d 277 (1987); Wiggins v. City of Monroe, — N.C. App. —, 354 S.E.2d 365 (1987); Miller v. C.W. Myers Trading Post, Inc., — N.C. App. —, 355 S.E.2d 189 (1987); In re Melkonian, — N.C. App. —, 355 S.E.2d 503 (1987); In re Melkonian, — N.C. App. —, 355 S.E.2d 798 (1987).

### IV. SUBJECT MATTER JURISDICTION.

**Lack of jurisdiction, etc. —** Lack of subject matter jurisdiction may always be raised by a party, or the court may raise such defect on its own initiative, even after an answer has been filed. Jackson County ex rel. Child Support Enforcement Agency v. Swayney, 75 N.C. App. 629, 331 S.E.2d 145 (1985), rev'd in part on other grounds, 319 N.C. 52, 352 S.E.2d 413 (1987).

**Failure to join a necessary party does not result in a lack of jurisdiction over the subject matter** of the proceeding. Stancil v. Bruce Stancil Refrigeration, Inc., 81 N.C. App. 567, 344 S.E.2d 789, cert. denied, 318 N.C. 418, 349 S.E.2d 601 (1986).

**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.

**Inappropriate Challenge By Motion For Directed Verdict. —** Accord-

ing to this section, a motion for a directed verdict is not an appropriate method of presenting the defense of lack of jurisdiction over the person. Harris v. Pembaur, — N.C. App. —, 353 S.E.2d 673 (1987).

**Methods of Challenging Jurisdiction.** — This section provides that a defendant may raise the defense of lack of jurisdiction over his person by a pre-answer motion or by a responsive pleading. If the defendant fails to proceed in this manner, the defense of lack of jurisdiction is waived. Harris v. Pembaur, — N.C. App. —, 353 S.E.2d 673 (1987).

**A defendant submits to the jurisdiction of the court by** formally entering a voluntary appearance, by seeking some affirmative relief at the hands of the court, or by utilizing the facilities of the court in some manner inconsistent with the defense that the court has no jurisdiction over her. Harris v. Pembaur, — N.C. App. —, 353 S.E.2d 673 (1987).

**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).

**Filing Answer as Waiver of Right to Contest.** — The defendant waived his right to contest lack of personal jurisdiction when he filed his answer without raising this defense. Jackson County ex rel. Child Support Enforcement Agency v. Swayney, 75 N.C. App. 629, 331 S.E.2d 145 (1985), rev'd in part on other grounds, 319 N.C. 52, 352 S.E.2d 413 (1987).

**Where defendant admitted the existence of jurisdiction in her answer,** that fact is conclusively established and cannot be disputed. Harris v. Pembaur, — N.C. App. —, 353 S.E.2d 673 (1987).

**Voluntary Appearance As Waiver of Defense, etc.** —

Nonresident defendant, by moving for a discretionary change of venue pursuant to § 1-83(2) without first or simultaneously asserting his defenses under section (b) of this rule relating to jurisdiction and process, made a general appearance and voluntarily submitted himself to the jurisdiction of the court. Humprey v. Sinnott, — N.C. App. —, 352 S.E.2d 443 (1987).

Once defendant submitted herself to the jurisdiction of the court, then the defense of lack of jurisdiction over the person was no longer available to her. Harris v. Pembaur, — N.C. App. —, 353 S.E.2d 673 (1987).

**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).

## VIII. INSUFFICIENCY OF SERVICE.

**Appeal.** — An order ruling on the sufficiency of service of process is not immediately appealable. Seabrooke v. Hagin, 83 N.C. App. 60, 348 S.E.2d 614 (1986).

## 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).

**Complaint Must Be Liberally Construed.** — In analyzing the sufficiency of the complaint under subsection (b)(6) of this rule, the complaint must be liberally construed. Dixon v. Stuart, — N.C. App. —, 354 S.E.2d 757 (1987).

**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), rev'd on other grounds, 313 N.C. 565, 330 S.E.2d 600 (1985).

The question for the court on a motion to dismiss is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. Harris v. NCNB Nat'l

Bank, — N.C. App. —, 355 S.E.2d 838 (1987).

**Motion to dismiss is the usual, etc.—**

In accord with the 1st paragraph in the main volume. See Braun v. Glade Valley School, Inc., 77 N.C. App. 83, 334 S.E.2d 404 (1985).

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).

**Function of a motion to dismiss, etc. —**

In accord with the main volume. See Laumann v. Plakakis, 84 N.C. App. 131, 351 S.E.2d 765 (1987).

**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).

**The test on a motion to dismiss for failure to state a claim** upon which relief can be granted is whether the pleading is legally sufficient. State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

**A legal insufficiency** may be due to an absence of law to support a claim of the sort made, absence of fact sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the claim. State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

**Allegations Treated as True. —**

In accord with 1st paragraph in the main volume. See Ladd v. Estate of Kellenberger, 314 N.C. 477, 334 S.E.2d 751 (1985); Sorrell v. Sorrell's Farms & Ranches, Inc., 78 N.C. App. 415, 337 S.E.2d 595 (1985); Hawkins v. Webster, 78 N.C. App. 589, 337 S.E.2d 682 (1985); Fox v. Wilson, — N.C. App. —, 354 S.E.2d 737 (1987).

In accord with 3rd paragraph in original. See Ruffin v. Contractors & Materials, 69 N.C. App. 174, 316 S.E.2d 353 (1984); State ex rel. Tennessee Dep't of Health & Env't v. Environmental Mgt. Comm'n, 78 N.C. App. 763, 338 S.E.2d 781 (1986).

In an appellate review of a dismissal of a counterclaim under subsection (b)(6), the material allegations of fact alleged in the counterclaim were taken as admitted. Barnaby v. Boardman, 313 N.C. 565, 330 S.E.2d 600 (1985).

**But Not Conclusions or Unwarranted Deductions. —**

In accord with the main volume. See Hill v. Perkins, — N.C. App. —, 353 S.E.2d 686 (1987).

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the allegations of the complaint must be viewed as admitted, and the motion should not be allowed unless the complaint affirmatively shows that plaintiff has no cause of action. Gatlin v. Bray, 81 N.C. App. 639, 344 S.E.2d 814 (1986).

**But Not Conclusions, etc. —**

In accord with the main volume. See Hoover v. Liberty Mut. Ins. Co., — N.C. App. —, 353 S.E.2d 248 (1987).

On a motion to dismiss for failure to state a claim upon which relief can be granted, all allegations of fact are taken as true but conclusions of law are not. Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986).

**But Not to Defective Statement of Good Claim. —**

In accord with first paragraph in main volume. See Anderson v. Texas Gulf, Inc., 83 N.C. App. 634, 351 S.E.2d 109 (1986).

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).

**Mere vagueness or lack of detail is not ground, etc. —**

While mere vagueness is not enough to dismiss the complaint, the complaint must state enough to satisfy the requirements of the substantive law giving rise to the claim; merely asserting a grievance is not enough. Braun v. Glade Valley School, Inc., 77 N.C. App. 83, 334 S.E.2d 404 (1985).

**But Complaint Must State Substantive Elements, etc. —**

In order to withstand a motion to dis-

miss pursuant to Rule 12(b)(6), the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must make allegations sufficient to satisfy the substantive elements of at least some recognized claim. Harris v. Duke Power Co., 83 N.C. App. 195, 349 S.E.2d 394 (1986); Fox v. Wilson, — N.C. App. —, 354 S.E.2d 737 (1987); Harris v. NCNB Nat'l Bank, — N.C. App. —, 355 S.E.2d 838 (1987).

With the adoption of "notice pleading," mere vagueness or lack of detail is no longer ground for allowing a motion to dismiss. Gatlin v. Bray, 81 N.C. App. 639, 344 S.E.2d 814 (1986).

**Upon Which Relief Can Be Granted Under Some Theory. —**

In accord with 1st paragraph in main volume. See Hawkins v. Webster, 78 N.C. App. 589, 337 S.E.2d 682 (1985).

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).

A motion to dismiss for failure to state a claim upon which relief may be granted is addressed to whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiffs, give rise to a claim for relief on any theory. Ford v. Peaches Entertainment Corp., 83 N.C. App. 155, 349 S.E.2d 82 (1986), cert. denied, 318 N.C. 694, 351 S.E.2d 746 (1987).

**The facts pleaded in the complaint are the determining factors in deciding whether the complaint states a claim** upon which relief can be granted; the legal theory set forth in the complaint does not determine the validity of the claim. Braun v. Glade Valley School, Inc., 77 N.C. App. 83, 334 S.E.2d 404 (1985).

**In order to survive a motion to dismiss pursuant to subdivision (b)(6), a complaint for fraud must allege** with particularity all material facts and circumstances constituting the fraud. But while the facts constituting fraud must be alleged with particularity, there is no requirement that any precise formula be followed or that any certain language be used. Carver v. Roberts, 78 N.C. App. 511, 337 S.E.2d 126 (1985).

**Test for Sufficiency of Complaint. —**

In accord with 1st paragraph in the main volume. See Dixon v. Stuart, — N.C. App. —, 354 S.E.2d 757 (1987).

In accordance with 5th paragraph in the main volume. See Gatlin v. Bray, 81 N.C. App. 639, 344 S.E.2d 814 (1986).

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 (1984), rev'd in part on other grounds, 314 N.C. 267, 333 S.E.2d 236 (1985).

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. —**

In accord with 1st paragraph in the main volume. See Ladd v. Estate of Kellenberger, 314 N.C. 477, 334 S.E.2d 751 (1985).

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).

A complaint would not be dismissed for failure to state a valid claim unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Unless the face of the complaint shows an insurmountable bar to recovery, plaintiff's action should not be dismissed on the pleading. Lyon v. Continental Trading Co., 76 N.C. App. 499, 333 S.E.2d 774 (1985).

Subdivision (b)(6) generally precludes dismissal except in those instances in

which the face of the complaint discloses some insurmountable bar to recovery. Hawkins v. Webster, 78 N.C. App. 589, 337 S.E.2d 682 (1985).

**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); Braun v. Glade Valley School, Inc., 77 N.C. App. 83, 334 S.E.2d 404 (1985); Sorrell v. Sorrell's Farms & Ranches, Inc., 78 N.C. App. 415, 337 S.E.2d 595 (1985); Bryant v. Pitt, 78 N.C. App. 801, 338 S.E.2d 588 (1986); Miller v. Parlor Furn. of Hickory, Inc., 79 N.C. App. 639, 339 S.E.2d 804, cert. denied and appeal dismissed, 316 N.C. 732, 345 S.E.2d 389 (1986); Stikeleather v. Willard, 83 N.C. App. 50, 348 S.E.2d 607 (1986).

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, 469 U.S. 858, 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, 73 N.C. App. 672, 327 S.E.2d 308, cert. denied, 314 N.C. 114, 332 S.E.2d 479 (1985).

In accord with 4th paragraph in the main volume. See Ladd v. Estate of Kellenberger, 314 N.C. 477, 334 S.E.2d 751 (1985); Fox v. Wilson, — N.C. App. —, 354 S.E.2d 737 (1987); Dixon v. Stuart, — N.C. App. —, 354 S.E.2d 757 (1987); Harris v. NCNB Nat'l Bank, — N.C. App. —, 355 S.E.2d 838 (1987).

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), rev'd on other grounds, 313 N.C. 565, 330 S.E.2d 600 (1985).

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).

Dismissal of a complaint is proper under the provisions of subsection (b)(6) when one or more of the following three conditions is satisfied: (1) When the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; (3) when some fact disclosed in the complaint necessarily defeats the plaintiff's claim. Oates v. Jag, Inc., 314 N.C. 276, 333 S.E.2d 222 (1985).

**Complaint Without Merit May Be Dismissed. —**

In accord with 1st paragraph in main volume. See Lee v. Paragon Group Contractors, 78 N.C. App. 334, 337 S.E.2d 132 (1985).

Where plaintiff's nuisance complaint made no allegations of defendant's intentional conduct but was merely a broad assertion to the effect that the location and operation of defendant's business was a nuisance to them and the court should, therefore, grant plaintiffs' injunctive relief and damages, and, moreover, where plaintiffs' complaint did not even assert that their remedy at law was inadequate so that they would be entitled to the equitable remedy of a permanent injunction, plaintiffs' complaint failed to state a complaint upon which relief could be granted. State v. Mercer, — N.C. App. —, 353 S.E.2d 682 (1987).

**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).

When a complaint states a valid claim but also discloses an unconditional affirmative defense which defeats the asserted claim, the motion to dismiss for failure to state a claim upon which relief can be granted will be granted and the action dismissed. Skinner v. E.F. Hutton

& Co., 314 N.C. 267, 333 S.E.2d 236 (1985).

**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); Jackson v. Bumgardner, 318 N.C. 172, 347 S.E.2d 743 (1986); Hooper v. Liberty Mut. Ins. Co., — N.C. App. —, 353 S.E.2d 248 (1987).

A complaint is dismissable for want of proof under subdivision (b)(6) of this rule only when it appears that the proof needed is beyond the realm of possibility. Newton v. Whitaker, 83 N.C. App. 112, 349 S.E.2d 333 (1986).

**When the complaint discloses on its face, etc. —**

In accord with the main volume. See Fleet Real Estate Funding Corp. v. Blackwelder, 83 N.C. App. 27, 348 S.E.2d 611 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

**Grant of Motion after Previous Denial by Another Judge.** — Superior court erred in granting a 12(b)(6) motion after moving party's previous 12(b)(6) motion had been denied by another superior court judge. Jenkins v. Wheeler, 81 N.C. App. 512, 344 S.E.2d 371 (1986).

**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 (1984), rev'd on other grounds, 313 N.C. 565, 330 S.E.2d 600 (1985).

**A statute of limitations can be the basis for dismissal on a Rule 12(b)(6) motion** if the face of the complaint discloses that plaintiff's claim is so barred. Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

**Appellate Court's Prior Decision Not Binding.** — The appellate court's prior decision, in which it "vacated" an order dismissing the plaintiff's complaint for failure to state a claim, was not binding on the court on a later appeal of a judgment notwithstanding the verdict. While the appellate court, in the first appeal, held that the complaint disclosed no insurmountable bar to recover under at least one of the claims for relief, its inquiry in the second appeal was a very different one: Was the evidence introduced at trial, viewed in the light most favorable to the plaintiff, insufficient as a matter of law to support the jury's verdict? Pearce v. American Defender Life Ins. Co., 74 N.C. App. 620, 330 S.E.2d 9 (1985), rev'd in part on other grounds, 316 N.C. 461, 343 S.E.2d 174 (1986).

**Motion to Dismiss for Abuse of Process.** — Allegations in the complaint that the defendant filed liens "for the purpose of injuring and destroying the credit business of the plaintiffs and in general to oppress the plaintiffs," and that the defendant knew they were without legal basis, stated an ulterior motive and a willful act not proper in the regular course of the earlier legal proceeding and, therefore, the defendant's motion to dismiss the action for abuse of process was properly denied. Hewes v. Wolfe, 74 N.C. App. 610, 330 S.E.2d 16 (1985).

**Allegations of Plaintiff's Expenses Did Not State Claim.** — Allegations made concerning the expenses the plaintiff occurred in presenting his claim and in preparing and pursuing his lawsuit did not state a claim that would support legal relief. Dailey v. Integon Gen. Ins. Corp., 75 N.C. App. 387, 331 S.E.2d 148, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

**Complaint for Insurance Benefits Alleging Intentional Infliction of Emotional Distress.** — Since a contract of insurance is a commercial transaction, absent allegations of specific facts which, if proved, would have demonstrated calculated intentional conduct causing emotional distress directed towards the claimant, a complaint for insurance benefits alleging intentional infliction of emotional distress did not withstand a motion to dismiss under subsection (b)(6). Beasley v. National Sav. Life Ins. Co., 75 N.C. App. 104, 330 S.E.2d 207 (1985), discretionary review improvidently granted, 316 N.C. 372, 341 S.E.2d 338 (1986).

There is a difference between sufficiently alleging a claim and sufficiently proving it. Although the plaintiff clearly alleged a claim for the intentional infliction of emotional distress, there was no testimony whatsoever to indicate that

he suffered emotional distress. Such an injury cannot be assumed, but must be proved by evidence. Dailey v. Integon Gen. Ins. Corp., 75 N.C. App. 387, 331 S.E.2d 148, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

**For claims based on third-party beneficiary contract doctrine to withstand a motion to dismiss,** plaintiffs' allegations must show: (1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for his direct, and not incidental, benefit. Raritan River Steel Co. v. Cherry, Bekaert & Holland, 79 N.C. App. 81, 339 S.E.2d 62, cert. granted, 316 N.C. 734, 345 S.E.2d 392 (1986).

**Plaintiffs' allegation of a very general taking by aircraft overflights** "within the past two years" failed to allege with reasonable specificity when the alleged appropriation or taking occurred; however, rather than dismissing the complaint altogether, the court should have required plaintiffs to come forward in accordance with defendant's motion for a more definite statement and plead the facts they possessed, so that the court could then rule on their timeliness and sufficiency. Smith v. City of Charlotte, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

**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).

**When Denial of Motion May be Reviewed on Appeal.** — Ordinarily, denial of a motion to dismiss for failure to state a claim is an interlocutory order from which no immediate appeal may be taken. Nevertheless, where a decision of the principal question presented would expedite the administration of justice, or where the case involves a legal issue of public importance, appellate courts may exercise their discretion to determine such an appeal on its merits. Flaherty v. Hunt, 82 N.C. App. 112, 345 S.E.2d 426, cert. denied, 318 N.C. 505, 349 S.E.2d 859 (1986).

**Review of Denial of Motion to Dismiss Not Available after Judgment on Merits.** — Where an unsuccessful motion to dismiss is grounded on an alleged insufficiency of the facts to state a claim for relief, and the case thereupon proceeds to judgment on the merits, the unsuccessful movant may not on an appeal from the final judgment seek review of the denial of the motion to dismiss. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755 (1986), cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986); Drain v. United Servs. Life Ins. Co., — N.C. App. —, 354 S.E.2d 269 (1987).

**Summary Judgment Not Precluded, etc.** —

In accord with 2nd paragraph in the main volume. See Dull v. Mutual of Omaha Ins. Co., — N.C. App. —, 354 S.E.2d 752 (1987); Burton v. NCNB Nat'l Bank, — N.C. App. —, 355 S.E.2d 800 (1987).

### 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., 312 N.C. 749, 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).

**Illustrative Case.** — Where plaintiff sought a personal judgment against owners based on its contract to drill a well and to have such personal judgment declared to be a specific lien on the property allegedly conveyed by owners to purchasers, but there was no allegation in the complaint that the purchasers were indebted to plaintiff in any amount, and subsequently plaintiff abandoned its claim for a personal judgment based on the contract to drill the well by taking a voluntary dismissal of its claim against owners, when the trial judge granted the purchasers' Rule 12(b) motion to dismiss there was no debt or judgment to be secured by a lien on the property in question, and since the court necessarily considered matters outside the pleadings, i.e., the voluntary dismissal of plaintiff's claim for personal judgment against owners, the Rule 12(b)(6) order was converted to a summary judgment for the purchasers with respect to the dismissal of plaintiff's claim to have a lien imposed on the property. Caldwell's Well Drilling, Inc. v. Moore, 79 N.C. App. 721, 340 S.E.2d 515 (1986).

### X. FAILURE TO JOIN NECESSARY PARTY.

**A defense of failure to join a necessary party must be raised in the trial court;** it may not be asserted for the first time on appeal. Stancil v. Bruce Stancil Refrigeration, Inc., 81 N.C. App. 567, 344 S.E.2d 789, cert. denied, 318 N.C. 418, 349 S.E.2d 601 (1986).

### XI. MOTION FOR JUDGMENT ON THE PLEADINGS.

**Judgment on the pleadings is proper only, etc.** —

In accord with the 3rd paragraph in the main volume. See DeTorre v. Shell Oil Co., — N.C. App. —, 353 S.E.2d 269 (1987).

**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).

The movant under section (c) of this rule must show, even when viewing the facts and permissible inferences in the light most favorable to the nonmoving party, that he is clearly entitled to judgment as a matter of law. DeTorre v. Shell Oil Co., — N.C. App. —, 353 S.E.2d 269 (1987).

**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).

**Findings and Conclusions as Surplusage.** — Findings of fact and conclusions of law in a judgment on the pleadings were surplusage and of no legal effect. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

### 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 com-

plaints. Estrada v. Jaques, 70 N.C. App. 627, 321 S.E.2d 240 (1984).

**"Short and Plain Statement" in Complaint.** — It was error for the court to strike a lengthy, highly detailed and technical complaint on the apparent grounds that it did not contain a short and plain statement of the facts. Rule 8 prescribes the minimum information that a pleading must contain; it does not require that a complaint contain only a "short and plain statement." Holley v. Burroughs Wellcome Co., 74 N.C. App. 736, 330 S.E.2d 228 (1985), aff'd, 318 N.C. 352, 348 S.E.2d 772 (1986).

## 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); Basinger v. Basinger, 80 N.C. App. 554, 342 S.E.2d 549 (1986).

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

#### II. COUNTERCLAIMS.

**The purpose of section (a), etc.** —
In accord with original. See Carolina Squire, Inc. v. Champion Map Corp., 75 N.C. App. 194, 330 S.E.2d 36 (1985).

**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., 72 N.C. App. 673, 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., 72 N.C. App. 673, 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).

**Similarity in Nature of Action and Remedy, etc.** —
Section (a) of this rule does not require that the legal claims be identical. It is sufficient that the nature of the actions and the remedies sought are logically related in fact and law. Brooks v. Rogers, 82 N.C. App. 502, 346 S.E.2d 677 (1986).

**In determining whether certain claims arose out of the same transaction or occurrence as a prior action** for purposes of treating them as compulsory counterclaims, several factors are considered: (1) Whether the issues of fact and law are largely the same; (2) whether substantially the same evidence is involved in each action; and (3) whether there is a logical relationship between the two actions. Brooks v. Rogers, 82 N.C. App. 502, 346 S.E.2d 677 (1986).

**In order to give effect to purpose of section (a), etc.** —
If an action may be denominated a compulsory counterclaim in a prior action, it must be either (1) dismissed with leave to file it in the former case, or (2) stayed until the conclusion of the former case. However, because the purpose of section (a) of this rule is to combine related claims in one action, thereby avoiding a wasteful multiplicity of litigation, the option to stay the second action should be reserved for unusual circumstances. Brooks v. Rogers, 82 N.C. App. 502, 346 S.E.2d 677 (1986).

**Claim for damages for breach of contract should have been raised as compulsory counterclaim** in a previously filed declaratory judgment action, since both actions arose out of the same franchise agreement, both actions were brought about by the same set of occurrences, the damage claim was clearly ex-

tant during the pleading phase of the declaratory judgment action, none of the exceptions to the compulsory counterclaim provisions were applicable, and the plaintiff made no showing that its rights would have been jeopardized if all issues were adjudicated in a single action. Carolina Squire, Inc. v. Champion Map Corp., 75 N.C. App. 194, 330 S.E.2d 36 (1985).

**Claim of Diversion of Partnership Assets and Accounting.** — The original action claimed a diversion of partnership assets and sought a partnership accounting. A later abuse of process claim was that the plaintiffs in the original action, for ulterior motives, used their action to file lis pendens and liens against the property of the plaintiffs in the second action. The two claims, while possessing similar factual bases, required different proof, and the plaintiffs in the second action, by failing to plead a counterclaim in the first action, were not barred by res judicata from asserting their abuse of process claim. Hewes v. Wolfe, 74 N.C. App. 610, 330 S.E.2d 16 (1985).

**A nonqualifying corporation, against which an action is brought in this State, may bring a compulsory counterclaim** in that action. E & E Indus., Inc. v. Crown Textiles, Inc., 80 N.C. App. 508, 342 S.E.2d 397 (1986).

By suing in a forum of this State a foreign corporation which has not obtained a certificate of authority before the commencement of the action, a North Carolina corporation effectively waives any protection which § 55-154 affords it from compulsory counterclaims asserted by the party sued. E & E Indus., Inc. v. Crown Textiles, Inc., 80 N.C. App. 508, 342 S.E.2d 397 (1986).

**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).

**Joinder of Other Parties.** — Section (a) of this rule clearly contemplates that all counterclaims arising out of the same transaction or occurrence be asserted, even if other parties must then be joined, as long as the court can acquire jurisdiction over them. Brooks v. Rogers, 82 N.C. App. 502, 346 S.E.2d 677 (1986).

### III. CROSSCLAIMS.

**Dismissal of Plaintiff's Claims Does Not Require Dismissal of Crossclaims.** — Unless a crossclaim is dependent upon the plaintiff's original claim (as would be, e.g., a crossclaim for indemnity or contribution) or is purely defensive, the plaintiff's dismissal of its claims against all of the defendants does not require the dismissal of a crossclaim properly filed in the same action. Jennette Fruit & Produce Co. v. Seafare Corp., 75 N.C. App. 478, 331 S.E.2d 305 (1985).

## Rule 14. Third-party practice.

**Legal Periodicals.** —

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

### CASE NOTES

**This rule anticipates, etc.** —

This rule anticipates the disposition in one trial of cases involving multiple parties. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

**When a third-party defendant has an opportunity to participate fully** in the determination of third-party plaintiff's liability, it is bound by a judgment in favor of the original plaintiff. City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986).

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

**Quoted** in Holland v. Edgerton, — N.C. App. —, 355 S.E.2d 514 (1987).

# 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).

**Federal Rule Compared, etc.** —
As the official comment makes clear, the last sentence of section (a) was expressly intended to depart from the federal rule time table. Hyder v. Dergance, 76 N.C. App. 317, 332 S.E.2d 713 (1985).

**This rule contemplates liberality, etc.** —
In accord with 1st paragraph in original. See Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

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.** —
In accord with 1st paragraph in main volume. See Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

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.** —
In accord with last paragraph in main volume. See Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

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, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (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, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (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).

The defendant indicated his consent to the amended complaint, allegedly filed without leave of the court or the written consent of the defendant, by filing an answer, by responding to the allegations within it, and by submitting materials in support of his motion for summary judgment. Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), rev'd on other grounds, 317 N.C. 321, 345 S.E.2d 201 (1986).

**Reasons justifying denial of an amendment are:** (a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments. Martin v. Hare, 78 N.C. App. 358, 337 S.E.2d 632 (1985).

**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.**

In accord with 3rd paragraph in the main volume. See Tyson v. Ciba-Geigy Corp., 82 N.C. App. 626, 347 S.E.2d 473 (1986).

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).

Under this rule, the trial judge had broad discretion to permit or deny defendant's motion to amend her answer to allege a counterclaim six months after her original answer was filed, whether the counterclaim to be alleged was compulsory or permissive. Grant & Hastings, P.A. v. Arlin, 77 N.C. App. 813, 336 S.E.2d 111 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 894 (1986).

Ruling on defendant's motion to amend its answer is within the discretion of the trial court. Hatfield v. Jefferson Std. Life Ins. Co., — N.C. App. —, 355 S.E.2d 199 (1987).

**Courts' Ruling Not Reviewable Absent Showing of Abuse.** —

In accord with 1st paragraph in the main volume. See Tyson v. Ciba-Geigy Corp., 82 N.C. App. 626, 347 S.E.2d 473 (1986).

In accord with 2nd paragraph in main volume. See Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

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, 73 N.C. App. 589, 327 S.E.2d 248 (1985), rev'd on other grounds, 316 N.C. 16, 340 S.E.2d 397 (1986).

Discretion in allowing amendment of pleadings is vested in the trial judge and his ruling will not be disturbed on appeal absent a showing of prejudice to the opposing party. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

A motion to amend is directed to the discretion of the trial court, and the exercise of the court's discretion is not reviewable absent a clear showing of abuse. Martin v. Hare, 78 N.C. App. 358, 337 S.E.2d 632 (1985). Pressman v.

UNC, 78 N.C. App. 296, 337 S.E.2d 644 (1985), cert. granted, 315 N.C. 589, 341 S.E.2d 28 (1986).

After the statutory time for amending pleadings as a matter of course has elapsed, a motion to amend a complaint pursuant to section (a) of this rule is addressed to the sound discretion of the trial judge, and the denial of such motion is not reviewable on appeal absent a clear showing of abuse. Caldwell's Well Drilling, Inc. v. Moore, 79 N.C. App. 730, 340 S.E.2d 518 (1986).

**Once party amends pleading without leave of court** as permitted by section (a), the opposing party has 30 days in which to respond; the rule does not distinguish between minor and major amendments. Hyder v. Dergance, 76 N.C. App. 317, 332 S.E.2d 713 (1985).

**Amendment Adding Plaintiff and Alleging That Defendant Was Conducting Business under Corporate Name.** — In an action brought by agents of a landowner seeking damages for the defendants' failure to construct a pond, the defendants failed to demonstrate prejudice from amendments to the pleading adding an additional plaintiff — the landowner — and inserting additional language that one of the defendants was conducting business under a corporate name. Neither of these amendments brought out any new material, changed the theory of the case, or in any way surprised the defendants. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

**Motion Held Timely.** — Where plaintiff filed his motion to amend his complaint to add a cause of action to enforce a materialman's or laborer's lien on December 8, 1983, and the last day he had furnished material or labor to defendants' property was June 15, 1983, his motion was thus filed within the 180-day period set forth in § 44A-13(a), as the date of the filing of the motion, rather than the date on which the court ruled on it, was the crucial date in measuring the period of limitations. Plaintiff's amendment was therefore not barred by the statute of limitations, and whether it would "relate back" to the filing of the original complaint was immaterial. Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

**Failure of trial court to state specific reasons for denial of motion to amend does not preclude appellate court** from examining the reasons for denial. Martin v. Hare, 78 N.C. App. 358, 337 S.E.2d 632 (1985).

**The trial court did not err by denying the plaintiffs' motion to amend complaint** by adding an additional cause of action one year and seven months after the original filing of the complaint and only seven days before the hearing of a motion for summary judgment, which motion was filed nine months after the extensive discovery conducted in the case was complete. Pressman v. UNC, 78 N.C. App. 296, 337 S.E.2d 644 (1985), cert. granted, 315 N.C. 589, 341 S.E.2d 28 (1986).

In civil action wherein plaintiff alleged a contract with defendants to drill a well in property owned by them, which property was conveyed by defendants to purchasers, the trial court did not abuse its discretion in denying motion to amend plaintiff's complaint to allege that defendants acted as agent for purchasers, which motion was made when the case came on for hearing on defendants' Rule 12(b) motions to dismiss, as in their answer defendants had alleged that they were acting as agents for purchasers in contracting with plaintiff to drill the well, which answer was filed on January 4, 1985, and plaintiff did not make its motion to amend until April 22, 1985. Caldwell's Well Drilling, Inc. v. Moore, 79 N.C. App. 730, 340 S.E.2d 518 (1986).

**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, 72 N.C. App. 668, 325 S.E.2d 36 (1985); Griffin v. Baucom, 74 N.C. App. 282, 328 S.E.2d 38 (1985); Crowder v. North Carolina Farm Bureau Mut. Ins. Co., 79 N.C. App. 551, 340 S.E.2d 127 (1986); Perry v. Perry, 80 N.C. App. 169, 341 S.E.2d 53 (1986).

**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, 73 N.C. App. 512, 327 S.E.2d 2 (1985); Carver v. Roberts, 78 N.C. App. 511, 337 S.E.2d 126 (1985); Raritan River Steel Co. v. Cherry, Bekaert & Holland, 79 N.C. App. 81, 339 S.E.2d 62 (1986); Denny v. Hinton, 110 F.R.D. 434 (M.D.N.C. 1986); American Marble Corp. v. Crawford, 84 N.C. App. 86, 351 S.E.2d 848 (1987).

## 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, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (1985).

**Under section (b) the rule of "litigation by consent," etc. —**

Where no objection is raised at trial on the grounds that the profferred evidence is not within the scope of the pleadings, no formal amendment is required and the pleadings are deemed amended by implication. Wohlfahrt v. Schneider, 82 N.C. App. 69, 345 S.E.2d 448 (1986).

**Party who fails to object, etc. —**

To limit the scope of the issues raised by the evidence at trial, it is the duty of the opponent to object specifically to evidence offered at trial as being outside the scope of the pleadings. Absent objection, the party will be deemed to have impliedly consented to trial of the issues. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

**Better Practice, etc. —**

Even though technically no amendment is required when issues are tried by implied consent, the better practice is to move to amend the pleadings to actually reflect the theory of recovery. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

**The court has authority under section (b) of this rule, etc. —**

In accord with the main volume. See Williams v. Sapp, 83 N.C. App. 116, 349 S.E.2d 304 (1986).

**An amendment to conform the pleadings to the evidence may be offered even after oral argument.** Mobley v. Hill, 89 N.C. App. 79, 341 S.E.2d 46 (1986).

**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, 72 N.C. App. 549, 325 S.E.2d 275, cert. denied, 313 N.C. 604, 330 S.E.2d 612 (1985).

**Burden of Party Objecting, etc. —**

Even when a timely specific objection is made, the party objecting must show some actual prejudice arising from a proposed amendment, i.e., some undue disadvantage or difficulty in presenting the merits of its case. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

**Specific Objections Required. —**

Under section (b) of this rule, a party attempting to limit the trial of issues by implied consent must object specifically to evidence outside the scope of the original pleadings; otherwise, allowing an amendment to conform the pleadings to the evidence will not be error, and, in fact, is not even technically necessary. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

**Where the evidence which supports an unpleaded issue also tends to support an issue properly raised** by the pleadings, no objection to such evidence is necessary and the failure to object does not amount to implied consent to try the unpleaded issue. Tyson v. Ciba-Geigy Corp., 82 N.C. App. 626, 347 S.E.2d 473 (1986).

In passing upon a trial judge's ruling as to a directed verdict, the Court of Appeals cannot review the case as the parties might have tried it; rather, the court

must review the case as it was tried below, as reflected in the record on appeal. Where evidence which supported a claim for fraud was also relevant to the issue of mutual mistake raised in plaintiff's complaint, its admission did not constitute "implied consent" to try the issue of fraud. Accordingly, if plaintiff was to prevail on his contention that the court erred in granting defendant's motion for a directed verdict, he was required to have done so on the pleaded ground of mutual mistake. Howell v. Waters, 82 N.C. App. 481, 347 S.E.2d 65 (1986), cert. denied, 318 N.C. 694, 351 S.E.2d 747 (1987).

**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).

**Fact that defendant had announced that he would not introduce evidence when motion to amend was made,** nothing more appearing, did not give rise to prejudice. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

**Reduction of Interest Being Sought.** — Where plaintiff in complaint sought interest in excess of the 12% allowed under § 24-1.1, but presented evidence as to the amount of interest when calculated at 12% per annum, the trial court did not abuse its discretion in granting an amendment to the pleadings so as to reduce the interest sought to that calculated at 12% per annum. Northwestern Bank v. Barber, 79 N.C. App. 425, 339 S.E.2d 452, cert. denied, 316 N.C. 733, 345 S.E.2d 391 (1986).

**Conversion of Condemnation Proceeding into Quiet Title Action.** — Trial court did not err by applying section (b) of this rule in such a way as to convert condemnation proceeding brought by private condemnors, with the consent of the parties, into an action to quiet title. VEPCO v. Tillett, 316 N.C. 73, 340 S.E.2d 62 (1986).

**In an action alleging medical malpractice,** although the plaintiff presented evidence tending to show that the defendant-physician altered emergency room records, they were not permitted to amend their pleadings under section (b). This was not simply an "act of negligence," but was a separate cause of action, which the defendant was not prepared to defend against and to which he did not impliedly consent to the trial of. Paris v. Kreitz, 75 N.C. App. 365, 331 S.E.2d 234, cert. denied, 315 N.C. 185, 337 S.E.2d 858 (1985).

### III. RELATION BACK OF AMENDMENTS.

**Federal Decisions as Aid in Construction.** — Federal decisions considering the question of whether an original pleading gave notice of a claim set forth in the amended pleading should provide enlightenment in construing this rule. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 83 N.C. App. 512, 349 S.E.2d 873 (1986), reconsideration denied, — N.C. —, 351 S.E.2d 760 (1987).

**Guidance from New York Decisions.** — Since section (c) of this rule is modeled after Sec. 203(e) of the New York Civil Practice Law and Rules, New York decisions provide guidance for relation back in North Carolina. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 83 N.C. App. 512, 349 S.E.2d 873 (1986), reconsideration denied, — N.C. —, 351 S.E.2d 760 (1987).

**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).

Under the Rules of Civil Procedure, whether an amendment will relate back does not depend upon whether it states a new cause of action, but upon whether the original pleading gave defendants sufficient notice of the proposed new claim. Mauney v. Morris, 316 N.C. 67, 340 S.E.2d 397 (1986).

**Amendment to action against a partnership which added an individual partner as defendant** was tantamount to the addition of a new party, and the plaintiff's amendment would not relate back to the filing of the original action. Stevens v. Nimocks, 82 N.C. App. 350, 346 S.E.2d 180, cert. denied, 83 N.C. App. 512, 349 S.E.2d 873 (1986), reconsideration denied, — N.C. —, 351 S.E.2d 760 (1987).

**Surety's Statutory Liability.** — As the one-year limitation in § 44A-28(b) was a condition precedent to surety's liability, surety's liability to plaintiff accordingly ceased one year after either of the two starting dates provided by the statute. Accordingly, once surety's lia-

bility terminated, plaintiff's amendment could not revive that liability, irrespective of any "relation back" under section (c) of this rule. Pyco Supply Co. v. American Centennial Ins. Co., — N.C. App. —, 354 S.E.2d 360 (1987).

### 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.

(a) In any action, the judge may in his discretion direct the attorneys for the parties to appear before him for a conference to consider

(1) The simplification and formulation of the issues;
(2) The necessity or desirability of amendments to the pleadings;
(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
(4) The limitation of the number of expert witnesses;
(5) The advisability or necessity of a reference of the case, either in whole or in part;
(6) Matters of which the court is to be asked to take judicial notice;
(7) Such other matters as may aid in the disposition of the action.

If a conference is held, the judge may make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. If any issue for trial as stated in the order is not raised by the pleadings in accordance with the provisions of Rule 8, upon motion of any party, the order shall require amendment of the pleadings.

(b) In a medical malpractice action as defined in G.S. 90-21.11, at the close of the discovery period scheduled pursuant to Rule 26(f1), the judge shall schedule a final conference. After the conference, the judge shall refer any consent order calendaring the case for trial to the senior resident superior court judge or the chief district court judge, who shall approve the consent order unless he finds that:

(1) The date specified in the order is unavailable,
(2) The terms of the order unreasonably delay the trial, or
(3) The ends of justice would not be served by approving the order.

If the senior resident superior court judge or the chief district court judge does not approve the consent order, he shall calendar the case for trial.

In calendaring the case, the court shall take into consideration the nature and complexity of the case, the proximity and convenience of witnesses, the needs of counsel for both parties concerning

their respective calendars, the benefits of an early disposition and such other matters as the court may deem proper. (1967, c. 954, s. 1; 1987, c. 859, s. 4.)

**Effect of Amendments.** — The 1987 amendment, effective October 1, 1987, and applicable to disciplinary actions commenced and suits filed on or after that date, designated the existing language as subsection (a) and added subsection (b).

**Legal Periodicals.** —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

**Failure to Find Stipulated Facts.** — Especially in light of the conclusive nature of stipulations, and the binding effect of pretrial orders, failure to find facts stipulated to in a pretrial order can hardly be prejudicial. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

**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.

(b) *Infants, incompetents, etc.* —

(1) Infants, etc., Sue by Guardian or Guardian Ad Litem. — In actions or special proceedings when any of the parties plaintiff are infants or incompetent persons, whether residents or nonresidents of this State, they must appear by general or testamentary guardian, if they have any within the State or by guardian ad litem appointed as hereinafter provided; but if the action or proceeding is against such guardian, or if there is no such known guardian, then such persons may appear by guardian ad litem.

(2) Infants, etc., Defend by Guardian Ad Litem. — In actions or special proceedings when any of the defendants are infants or incompetent persons, whether residents or nonresidents of this State, they must defend by general or testamentary guardian, if they have any within this State or by guardian ad litem appointed as hereinafter provided; and if they have no known general or testamentary guardian in the State, and any of them have been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, or incompetent persons, and fix and tax his fee as part of the costs. The guardian so appointed shall, if the cause is a civil action, file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special

proceeding, a copy of the complaint, with the summons, must be served on him. After 20 days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant or incompetent persons or defendants.

All orders or final judgments duly entered in any action or special proceeding prior to April 8, 1974, when any of the defendants were infants or incompetent persons, whether residents or nonresidents of this State, and were defended therein by a general or testamentary guardian or guardian ad litem, and summons and complaint or petition in said action or special proceeding were duly served upon the guardian or guardian ad litem and answer duly filed by said guardian or guardian ad litem, shall be good and valid notwithstanding that said order or final judgment was entered less than 20 days after notice of the summons and complaint served upon said guardian or guardian ad litem.

(3) Appointment of Guardian Ad Litem Notwithstanding the Existence of a General or Testamentary Guardian. — Notwithstanding the provisions of subsections (b)(1) and (b)(2), a guardian ad litem for an infant or incompetent person may be appointed in any case when it is deemed by the court in which the action is pending expedient to have the infant, or insane or incompetent person so represented, notwithstanding such person may have a general or testamentary guardian.

(4) Appointment of Guardian Ad Litem for Unborn Persons. — In all actions in rem and quasi in rem and in all actions and special proceedings which involve the construction of wills, trusts and contracts or any instrument in writing, or which involve the determination of the ownership of property or the distribution of property, if there is a possibility that some person may thereafter be born who, if then living, would be a necessary or proper party to such action or special proceeding, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem to defend on behalf of such unborn person. Service upon the guardian ad litem appointed for such unborn person shall have the same force and effect as service living. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(5) Appointment of Guardian Ad Litem for Corporations, Trusts, or Other Entities Not in Existence. — In all actions which involve the construction of wills, trusts, contracts or written instruments, or the determination of the ownership of property or the disposition or distribution of property pursuant to the provisions of a will, trust, contract or written instrument, if such will, trust, contract or written instrument provides benefits for disposition or distribution of property to a corporation, a trust, or an entity thereafter

to be formed for the purpose of carrying into effect some provision of the said will, trust, contract or written instrument, the court in which said action or special proceeding is pending, upon motion of any of the parties or upon its own motion, may appoint some discreet person guardian ad litem for such corporation, trust or other entity. Service upon the guardian ad litem appointed for such corporation, trust or other entity shall have the same force and effect as service upon such corporation, trust or entity would have had if such corporation, trust or other entity had been in existence. All proceedings by and against the said guardian ad litem after appointment shall be governed by all provisions of the law applicable to guardians ad litem for living persons.

(6) Repealed by Sessions Laws 1981, c. 599, s. 1, effective October 1, 1981.

(7) Miscellaneous Provisions. — The provisions of this rule are in addition to any other remedies or procedures authorized or permitted by law, and it shall not be construed to repeal or to limit the doctrine of virtual representation or any other law or rule of law by which unborn persons or nonexistent corporations, trusts or other entities may be represented in or bound by any judgment or order entered in any action or special proceeding. This rule shall apply to all pending actions and special proceedings to which it may be constitutionally applicable. All judgments and orders heretofore entered in any action in which a guardian or guardians ad litem have been appointed for any unborn person or persons or any nonexistent corporations, trusts or other entities, are hereby validated as of the several dates of entry thereof in the same manner and to the full extent that they would have been valid if this rule had been in effect at the time of the appointment of such guardians ad litem; provided, however, that the provisions of this sentence shall be applicable only in such cases and to the extent to which the application thereof shall not be prevented by any constitutional limitation.

(1967, c. 954, s. 1; 1969, c. 895, ss. 5, 6; 1971, c. 1156, ss. 3, 4; 1973, c. 1199; 1981, c. 599, s. 1; 1987, c. 550, s. 13.)

**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 1987 amendment, effective October 1, 1987, deleted a former final sentence of subdivision (b)(1), which read "The duty of the State solicitors to prosecute in the cases specified in Chapter 33 of the General Statutes, entitled 'Guardian and ward,' is not affected by this section."

**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); Fraser v. Di Santi, 75 N.C. App. 654, 331 S.E.2d 217 (1985).

**Quoted** in In re Locklear, 314 N.C. 412, 334 S.E.2d 46 (1985); Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

**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, 72 N.C. App. 499, 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).

**The real party in interest is the one who is entitled to receive the fruits of the litigation** (i.e., the damages). Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

**The mere appointment of an agent does not make him the real party in interest.** Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

In a breach of contract action, the evidence clearly established an agency relationship, as it disclosed that certain individuals, the original plaintiffs, negotiated the construction of a pond on behalf of a landowner. The real party in interest was the landowner. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

**Assignee of Franchisor.** — In action for alleged breach of franchise agreement, plaintiff, as assignee of the franchisor, was a real party in interest, and had the right to enforce the contract against the defendant. Wiener King Systems v. Brooks, 628 F. Supp. 843 (W.D.N.C. 1986).

**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).

**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).

### III. INFANTS AND INCOMPETENTS.

**Now Infant or Incompetent Plaintiff, etc. —**

When a party to a lawsuit in this state is mentally incompetent, he must be represented by his guardian if he has one, and if not, by a guardian ad litem. Sheppard v. Community Fed Sav. & Loan, — N.C. App. —, 352 S.E.2d 252 (1987).

**Whether appointment of a guardian ad litem for a minor is necessary is controlled by section (b) of this rule.** In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

**Judge Must Determine Question, etc. —**

When a question as to a party's competence arises during the course of a civil action or proceeding, the court must conduct an evidentiary hearing, and if it is found from the evidence that the party is mentally incompetent and he does not object, a guardian ad litem should be appointed to act for him, but if, notwithstanding the court's finding, the party asserts his competency, the issue must be determined as provided in § 35-2. Sheppard v. Community Fed. Sav. & Loan, — N.C. App. —, 352 S.E.2d 252 (1987).

## 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).

An insurance company is only a necessary party plaintiff when it has compensated the insured for the insured's entire loss. Smoky Mt. Enters., Inc., 76 N.C. App. 123, 332 S.E.2d 200 (1985).

**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).

**Necessary Parties in Adjacent Landowners Action.** — In a private nuisance action alleging that the separate development of the lands owned by adjacent landowners together caused flooding damages, this claim could not be fully adjudicated without the addition of one of these landowners; thus, it was a necessary party. Bjornsson v. Mize, 75 N.C. App. 289, 330 S.E.2d 520, cert. denied, 314 N.C. 537, 335 S.E.2d 13 (1985).

**Quoted** in State ex rel. Utilities Comm'n v. Nantahala Power & Light Co., 314 N.C. 246, 333 S.E.2d 217 (1985).

**Cited** in Britt v. Britt, 82 N.C. App. 303, 346 S.E.2d 259 (1986).

## 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).

#### II. PERMISSIVE JOINDER.

**Joining Insurance Company That Partially Paid Loss.** — It is not error to join, as a proper party plaintiff to the action, an insurance company that has partially paid the insured for the insured's loss, but the insurance company's presence in the action is not required. Smoky Mt. Enters., Inc., 76 N.C. App. 123, 332 S.E.2d 200 (1985).

## 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.

**The requirements for a class action** are: (1) The existence of a class; (2) the class members within the jurisdiction of the court must adequately represent any class members outside the jurisdiction of the court; (3) the class must be so numerous as to make it impracticable to bring each member before the court; (4) more than one issue of law or fact common to the class should be present; (5) the party representing the class must fairly insure the representation of all class members; and (6) adequate notice must be given to the class members. Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437, cert. granted, 316 N.C. 731, 345 S.E.2d 386 (1986).

**"Class" Defined More Expansively than under Former Law.** — The re-

peal of former § 1-70 and adoption of the less restrictive language of only the first sentence of the 1938 version of Federal Rule 23 reveals a legislative intent that the term "class" under this rule be defined more expansively than under former law. Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

**"Community of Interest" Not Required.** — A "class" exists under this rule when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members. It is unnecessary for any member of the class to share a jural relationship or "community of interest" with any other member of the class. Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

Statements in cases holding or implying that the former "community of interest" standard applies under Rule 23(a), e.g., Maffei v. Alert Cable Television of N.C., Inc., 75 N.C. App. 473, 331 S.E.2d 188 (1985), reversed on other grounds, 316 N.C. 615, 342 S.E.2d 867 (1986); English v. Holden Beach Realty Corp., 41 N.C. App. 1, 254 S.E.2d 223, disc. rev. denied, 297 N.C. 609, 257 S.E.2d 217 (1979); and Mosley v. National Fin. Co., 36 N.C. App. 109, 243 S.E.2d 145, disc. rev. denied, 295 N.C. 467, 246 S.E.2d 9 (1978), are disapproved by the Supreme Court. Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

**Whether a class exists is a question of fact, etc.** —

Whether a class exists is a question of fact to be determined by the court on a case-by-case basis. Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437, cert. granted, 316 N.C. 731, 345 S.E.2d 386 (1986).

**Class Must Be So Numerous, etc.** —

Parties seeking to utilize this rule must establish that the class members are so numerous that it is impractical to bring them all before the court. It is not necessary that they demonstrate the impossibility of joining class members, but they must demonstrate substantial difficulty or inconvenience in joining all members of the class. Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

**There is no hard and fast formula, etc.** —

In accord with the main volume. See Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

**Affirmative Averment under Rule 9(a).** — Allegations that a party is a member of and properly represents a class under this rule suffice as the "affirmative averment" of "capacity and authority to sue" required by Rule 9(a). Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

**And it must not appear that there is a conflict, etc.** —

The named representatives must show that there is no conflict of interest between them and the members of the class who are not named parties, so that the interest of the unnamed class members will be adequately and fairly protected. Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

**Party or parties representing the class, etc.** —

The class representatives within this jurisdiction must establish that they will adequately represent those outside the jurisdiction. Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

**Burden on Party Invoking Rule.** —

In accord with 1st paragraph of main volume. See Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437, cert. granted, 316 N.C. 731, 345 S.E.2d 386 (1986).

**Discretion of Trial Court.** —

Although this rule should receive a liberal construction and be kept free from technical restrictions, a court has broad discretion in deciding whether to allow a class action. Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437, cert. granted, 316 N.C. 731, 345 S.E.2d 386 (1986).

In deciding whether to certify a class, a trial judge has broad discretion and may consider factors not expressly mentioned in this rule. Maffei v. Alert Cable TV of N.C., Inc., 316 N.C. 615, 342 S.E.2d 867 (1986).

**Notice to Members, etc.** —

In accord with the main volume. See Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

The trial court should require that the best notice practical under the circumstances be given to class members. Such notice should include individual notice to all members who can be identified through reasonable efforts, but it need not comply with the formalities of service of process. Notice of the action should be given as soon as possible after the action is commenced. Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

**Opportunity to Request Exclusion from Class.** — As part of notification, the trial court may require that potential class members be given an opportunity to request exclusion from the class within a specified time in a manner similar to the current federal practice. Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

**Refusal to Certify on Cost and Benefits Analysis.** — Although one of the basic purposes of class actions is to provide a forum whereby claims which might not be economically pursued individually can be aggregated in an efficient and economically reasonable manner, there is a level at which the costs in pursuing the class action far outweigh any economic good sense and fair use of judicial resources. Maffei v. Alert Cable TV of N.C., Inc., 316 N.C. 615, 342 S.E.2d 867 (1986), upholding trial court's refusal to certify a class where the recovery which each member stood to gain was a mere 29 cents.

**Unintentional illegality in the language of standard or uniform contracts** cannot be raised as a shield to prevent plaintiffs from prosecuting a suit as a class action. Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

**Dismissal of Class Action Upheld.** — Trial court did not err in dismissing class action alleging that plaintiffs, both named and unnamed, purchased new mobile or manufactured homes within North Carolina; that they financed at least $3,000.00 of their purchases through retail installment sales contracts entered after April 1, 1980; that the retail installment sales contracts fixed a finance charge rate in excess of the maximum rate allowable; and that the retail installment sales contracts were ultimately assigned to defendants. The interest of each of the unnamed plaintiffs related solely to the particular retail installment sales contracted which such plaintiff signed, and there was insufficient "community of interest" between the named plaintiffs and the unnamed plaintiffs to require the trial court to certify the action as a class action. Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437, cert. granted, 316 N.C. 731, 345 S.E.2d 386 (1986).

**Appeal of Order Dismissing Class Action.** — Although order dismissing class action without prejudice did not determine the controversy and was interlocutory, the order affected a substantial right of the unnamed plaintiffs and was immediately appealable. Crow v. Citicorp Acceptance Co., 79 N.C. App. 447, 339 S.E.2d 437, cert. granted, 316 N.C. 731, 345 S.E.2d 386 (1986).

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

# Rule 24. Intervention.

## CASE NOTES

### I. IN GENERAL.

**Intervention pursuant to section (b) of this rule is permissive** and within the discretion of the trial court. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

**An intervenor by permission need not show a direct personal or pecuniary interest** in the subject of the litigation. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

**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).

**In determining whether motion to intervene is timely, trial court will give consideration to:** (1) The status of the case; (2) the unfairness or prejudice to the existing parties; (3) the reason for any delay in moving for intervention; (4) the resulting prejudice to the applicant if the motion is denied; and (5) any unusual circumstances. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

**Motion Prior to Trial and After Judgment.** — As a general rule, motions to intervene made prior to trial are seldom denied. Conversely, motions to intervene made after judgment has been rendered are disfavored and are granted only after a finding of extraordinary and unusual circumstances and upon a strong showing of entitlement and justification. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

**A motion to intervene after the entry of default** against the defendant, his liability to the plaintiff being conclusively established, the extent of liability never being in issue, was untimely. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

**Service by Intervenor.** —

A party who intervenes pursuant to this rule is not required to issue a summons and complaint pursuant to Rule 4. In re Baby Boy Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986), cert. denied, — N.C. —, 351 S.E.2d 750 (1987).

Service, pursuant to Rule 5, of the motion accompanied with the pleading is sufficient service upon the party against whom relief is sought or denied in the intervenor's pleading and is sufficient process to acquire jurisdiction over the party if all other requisites for jurisdiction are met. In re Baby Boy Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986), cert. denied, — N.C. —, 351 S.E.2d 750 (1987).

**Intervention by Foster Parents.** — In proceeding brought by Department of Social Services in which custody was put in issue by guardian ad litem and natural father, trial court did not err in permitting child's foster parents to intervene. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986), distinguishing Oxendine v. Dep't of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

**Intervention by Grandmother.** — As grandmother's interest in obtaining compensation from defendant for amounts expended for child support would be impaired by any judgment involving defendant's child support obligation which failed to take her claim for reimbursement into account, regardless of whether she would be bound by that judgment, and she would, as a practical matter, suffer the expense and inconvenience of bringing a separate suit against defendant, and would also be impeded by defendant's ability to force litigation of the additional issue of res judicata, her intervention would be allowed. State ex rel. Crews v. Parker, — N.C. —, 354 S.E.2d 501 (1987).

**Applied** in Thompson v. Thompson, 70 N.C. App. 147, 319 S.E.2d 315 (1984); Thompson v. Thompson, 313 N.C. 313, 328 S.E.2d 288 (1955).

**Cited** in Colon v. Bailey, 76 N.C. App. 491, 333 S.E.2d 505 (1985); Trustees of Garden of Prayer Baptist Church v. Geraldco Bldrs., Inc., 78 N.C. App. 108, 336 S.E.2d 694 (1985); State ex rel. Pender County Child Support Enforcement Agency v. Parker, 82 N.C. App. 419, 346 S.E.2d 270 (1986).

## 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).

**Cited** in Allred v. Tucci, — N.C. App. —, 354 S.E.2d 291 (1987).

## 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 antici-

pation 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.

(f1) Medical malpractice discovery conference. In a medical malpractice action as defined in G.S. 90-21.11, upon the case coming at issue or the filing of a responsive pleading or motion requiring a determination by the court, the judge shall, within 30 days, direct the attorneys for the parties to appear for a discovery conference. At the conference the court may consider the matters set out in Rule 16, and shall:

(1) Rule on all motions;
(2) Establish an appropriate schedule for designating expert witnesses, consistent with a discovery schedule pursuant to subdivision (3), to be complied with by all parties to the action such that there is a deadline for designating all expert witnesses within an appropriate time for all parties to implement discovery mechanisms with regard to the designated expert witnesses;
(3) Establish by order an appropriate discovery schedule designated so that, unless good cause is shown at the conference for a longer time, and subject to further orders of the court, discovery shall be completed within 150 days after the order is issued; nothing herein shall be construed to prevent any party from utilizing any procedures afforded under Rules 26 through 36, so long as trial or any hearing before the court is not thereby delayed; and
(4) Approve any consent order which may be presented by counsel for the parties relating to parts (2) and (3) of this subsection, unless the court finds that the terms of the consent order are unreasonable.

If a party fails to identify an expert witness as ordered, the court shall, upon motion by the moving party, impose an appropriate sanction, which may include dismissal of the action, entry of default against the defendant, or exclusion of the testimony of the expert witness at trial.

(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; 1987, c. 859, s. 3.)

**Only Part of Rule Set Out.** — As the rest of the rule was not affected by the amendments, 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).

The 1987 amendment, effective October 1, 1987, and applicable to disciplinary actions commenced and suits filed on or after that date, added subsection (f1).

**Legal Periodicals.** —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For note, "Discovery and Testimony of Unretained Experts: Creating a Clear and Equitable Standard to Govern Compliance with Subpoenas," see 1987 Duke L.J. 140 (1987).

## 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, 72 N.C. App. 537, 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); Walker v. Liberty Mut. Ins. Co., — N.C. App. —, 353 S.E.2d 425 (1987).

### 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).

Protective orders pursuant to section (c) of this rule are within the trial court's discretion and will only be disturbed for an abuse of discretion. Hartman v. Hartman, 82 N.C. App. 167, 346 S.E.2d 196, cert. denied as to additional issues, 318 N.C. 506, 349 S.E.2d 860 (1986).

**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 28. Persons before whom depositions may be taken.

### CASE NOTES

### I. IN GENERAL.

**Applied** in State v. Isleib, 80 N.C. App. 599, 343 S.E.2d 234 (1986); State v. Morrison, 84 N.C. App. 41, 351 S.E.2d 810 (1987).

**Cited** in In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404 (1986).

## Rule 30. Depositions upon oral examination.

**Legal Periodicals. —**

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

### 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.

**Legal Periodicals.** —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

**Use of Depositions at Trial Stage Limited.** —

In accord with original. See Warren v. City of Asheville, 74 N.C. App. 402, 328 S.E.2d 859, cert. denied, 314 N.C. 336, 333 S.E.2d 496 (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, 74 N.C. App. 402, 328 S.E.2d 859, cert. denied, 314 N.C. 336, 333 S.E.2d 496 (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, 74 N.C. App. 1, 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 33. Interrogatories to parties.

(a) *Availability; procedures for use.* — Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons a complaint upon that party.

A party may direct no more than 50 interrogatories, in one or more sets, to any other party, except upon leave granted by the Court for good cause shown or by agreement of the other party. Interrogatory parts and subparts shall be counted as separate interrogatories for purposes of this rule.

There shall be sufficient space following each interrogatory in which the respondent may state the response. The respondent shall: (1) state the response in the space provided, using additional pages if necessary; or (2) restate the interrogatory to be followed by the response.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. An objection to an interrogatory shall be made by stating the objection and the reason therefor either in the space following the interrogatory

or following the restated interrogatory. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon the defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(1967, c. 954, s. 1; 1971, c. 1156, s. 4.5; 1975, c. 99; c. 762, s. 2; 1987, c. 73; c. 613, s. 1.)

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

**Effect of Amendments.** — Session Laws 1987, c. 73, effective October 1, 1987, and applicable to any action filed on or after October 1, 1987, added the second paragraph of subsection (a).

Session Laws 1987, c. 613, s. 1, effective October 1, 1987, inserted the catchline of subsection (a), inserted the present third paragraph of subsection (a), and inserted the second sentence of the final paragraph of subsection (a).

**Legal Periodicals.** —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

**Where plaintiff served answers to interrogatories after defendant had filed motion to dismiss** and plaintiff's failure to comply with this rule clearly prejudiced the defendant's ability to prepare for trial, the court had authority to dismiss the action. Hayes v. Browne, 76 N.C. App. 98, 331 S.E.2d 763 (1985), cert. denied, 315 N.C. 587, 341 S.E.2d 25 (1986).

**Interrogatories As Admissions of Party Opponent.** — Defendant's answers to interrogatories, duly signed by defendant's attorney, were admissions of a party opponent, and as such should have been admitted into evidence. Karp v. UNC, 78 N.C. App. 214, 336 S.E.2d 640 (1985).

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

(b) *Procedure.* — The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities

will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

There shall be sufficient space following each request in which the respondent may state the response. The respondent shall: (1) state the response in the space provided, using additional pages if necessary; or (2) restate the request to be followed by the response. An objection to a request shall be made by stating the objection and the reason therefor either in the space following the request or following the restated request.

(1967, c. 954, s. 1; 1969, c. 895, s. 8; 1973, c. 923, s. 1; 1975, c. 762, s. 2; 1987, c. 613, 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 1987 amendment, effective October 1, 1987, inserted the subsection catchline of subsection (b) and added the final paragraph of that subsection.

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 examination 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).

**Cited** in Talbert v. Mauney, — N.C. App. —, 343 S.E.2d 5 (1986).

## 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.

(a) *Request for admission.* — A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. If the request is served with service of the summons and complaint, the summons shall so state.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 60 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

There shall be sufficient space following each request in which the respondent may state the response. The respondent shall:

(1) State the response in the space provided, using additional pages if necessary; or

(2) Restate the request to be followed by the response. An objection to a request shall be made by stating the objection and the reason therefor either in the space following the request or following the restated request.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition

of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(1967, c. 954, s. 1; 1975, c. 762, s. 2; 1981, c. 384, ss. 1, 2; 1987, c. 613, s. 3.)

**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 1987 amendment, effective October 1, 1987, added the third paragraph of subsection (a).

**Legal Periodicals.** —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

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).

**Applied** in VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

**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); Watkins v. Hellings, 83 N.C. App. 430, 350 S.E.2d 590 (1986); WXQR Marine Broadcasting Corp. v. JAI, Inc., 83 N.C. App. 520, 350 S.E.2d 912 (1986).

## 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 pro-

hibiting 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).

**Legal Periodicals.** —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

## CASE NOTES

**Although interlocutory, a party may appeal from order imposing sanctions** by striking his defense and entering judgment as to liability. Vick v. Davis, 77 N.C. App. 359, 335 S.E.2d 197 (1985), aff'd, 317 N.C. 328, 345 S.E.2d 217 (1986).

**Burden to Show Justification for, etc.** —

If a noncomplying party wishes to avoid court-imposed sanctions for his failure to answer interrogatories, the burden is upon him to show that there is justification for his noncompliance. Hayes v. Browne, 76 N.C. App. 98, 331 S.E.2d 763 (1985), cert. denied, 315 N.C. 587, 341 S.E.2d 25 (1986).

**Section (d) requires no finding, etc.** —

The language of subsection (d) requires no finding of willfulness. The 1975 amendment to subsection (d) deletes the specific reference to "willful" from the rule. Hayes v. Browne, 76 N.C. App. 98, 331 S.E.2d 763 (1985), cert. denied, 315 N.C. 587, 341 S.E.2d 25 (1986).

**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).

**For case upholding default judgment, etc.** —

In accord with 1st paragraph in the main volume. See Vick v. Davis, 77 N.C. App. 359, 335 S.E.2d 197 (1985), aff'd, 317 N.C. 328, 345 S.E.2d 217 (1986).

**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).

**Where plaintiff served answers to interrogatories after defendant had filed motion to dismiss** and plaintiff's failure to comply with Rule 33 clearly prejudiced the defendant's ability to prepare for trial, the court had authority to dismiss the action. Hayes v. Browne, 76 N.C. App. 98, 331 S.E.2d 763 (1985), cert. denied, 315 N.C. 587, 341 S.E.2d 25 (1986).

**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); Vick v. Davis, 77 N.C. App. 359, 335 S.E.2d 197 (1985), aff'd, 317 N.C. 328, 345 S.E.2d 217 (1986).

The choice of sanctions under this rule cannot be overturned absent a showing of abuse of that discretion. Mount Olive Home Health Care Agency, Inc. v. N.C. Dep't of Human Resources, 78 N.C. App. 224, 336 S.E.2d 625 (1985).

**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).

**Hearing officer's order excluding petitioner's expert witnesses for failure to identify them, in violation of court order,** until four days before the hearing date, showed no abuse of discretion. Mount Olive Home Health Care Agency, Inc. v. N.C. Dep't of Human Resources, 78 N.C. App. 224, 336 S.E.2d 625 (1985).

**Appealability of Orders Denying Discovery.** — Orders denying discovery need no sanctions under this rule for enforcement. They are appealable if they affect a substantial right of the party requesting discovery. Walker v. Liberty Mut. Ins. Co., — N.C. App. —, 353 S.E.2d 425 (1987).

**Appealability of Sanctions Order.** — An order compelling discovery is not a final judgment, nor does it affect a substantial right, and consequently, it is not appealable. However, when the order is enforced by sanctions pursuant to section (b) of this rule, the order is appealable as a final judgment. Walker v. Liberty Mut. Ins. Co., — N.C. App. —, 353 S.E.2d 425 (1987).

**Findings on Motion for Expenses.** — Because of the risk to litigants of substantial monetary awards against them in the application of section (c) of this rule, it is the better practice for the trial court to make findings in disposing of defendant's motion for expenses. Watkins v. Hellings, 83 N.C. App. 430, 350 S.E.2d 590 (1986).

**Sanctions Upheld for Violation of Court Orders.** — Sanctions imposed by trial court for violation of discovery order, of the Rules of Civil Procedure and of consent order, without justification, which sanctions included the striking of defenses, the payment of attorney's fees,

and the supplying of further answers to the interrogatories would be upheld in view of the facts. Martin v. Solon Automated Servs., Inc., — N.C. App. —, 352 S.E.2d 278 (1987).

**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., 72 N.C. App. 324, 325 S.E.2d 6 (1985); Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985).

**Stated** in Wade v. Wade, 72 N.C. App. 372, 325 S.E.2d 260 (1985); Wilson v. Wilson, 73 N.C. App. 96, 325 S.E.2d 668 (1985).

**Cited** in Stone v. Martin, 69 N.C. App. 650, 318 S.E.2d 108 (1984); Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986); Stone v. Martin, — N.C. App. —, 355 S.E.2d 255 (1987).

## 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).

**Cited** in Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986).

## Rule 39. Trial by jury or by the court.

CASE NOTES

**Applied** in Phillips v. Phillips, 73 N.C. App. 68, 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).

**Legal Periodicals.** —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

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.

**A motion for continuance is addressed, etc. —**

In accord with 1st paragraph in the main volume. See Spence v. Jones, 83 N.C. App. 8, 348 S.E.2d 819 (1986).

**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, 72 N.C. App. 22, 324 S.E.2d 26 (1984).

In accord with the main volume. See Spence v. Jones, 83 N.C. App. 8, 348 S.E.2d 819 (1986).

**But court's ruling on a continuance, etc. —**

In accord with the main volume. See Spence v. Jones, 83 N.C. App. 8, 348 S.E.2d 819 (1986).

# 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, 313 N.C. 200, 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).

**Review of Judgment Dismissing, etc. —**

A judgment by a court determining its statutory authority to dismiss an action in such a way as not to bar further litigation on the merits therein may be questioned only by appeal. Miller v. Ferree, 84 N.C. App. 135, 351 S.E.2d 845 (1987).

**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, 72 N.C. App. 107, 323 S.E.2d 470 (1984); Metcalf v. McGuinn, 73 N.C. App. 604, 327 S.E.2d 51 (1985); Northwestern Bank v. Rash, 74 N.C. App. 101, 327 S.E.2d 302 (1985); Smith v. Starnes, 74 N.C. App. 306, 328 S.E.2d 20 (1985); Cheek v. Higgins, 76 N.C. App. 151, 331 S.E.2d 712 (1985); Lyon v. Continental Trading Co., 76 N.C. App. 499, 333 S.E.2d 774 (1985); Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985); Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

**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., 71 N.C. App. 758, 323 S.E.2d 398 (1984); Howard v. Smoky Mt. Enters., Inc., 76 N.C. App. 123, 332 S.E.2d 200 (1985); Harwood v. Harrelson Ford, Inc., 78 N.C. App. 445, 337 S.E.2d 158 (1985); Burns v. Forsyth County Hosp. Auth., 81 N.C. App. 556, 344 S.E.2d 839 (1986); Reavis v. Reavis, 82 N.C. App. 77, 345 S.E.2d 460 (1986); Baker v. Mauldin, 82 N.C. App. 404, 346 S.E.2d 240 (1986); Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986); Dowat, Inc. v. Tiffany Corp., 83 N.C. App. 207, 349 S.E.2d 610 (1986); Olschesky v. Houston, — N.C. App. —, 352 S.E.2d 884 (1987).

## II. VOLUNTARY DISMISSAL.

**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.** —

When a party properly takes a first voluntary dismissal of an action filed within the statute of limitations, that party then has one year to refile the same action, even though the refiling may be beyond the general statute of limitations. Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986).

**Discretion of Trial Court under Subsection (a)(2).** —

Dismissals entered pursuant to subsection (a)(2) of this rule are within the discretion of the trial court, which may, in the further exercise of its discretion, dismiss with or without prejudice. Smith v. Williams, 82 N.C. App. 672, 347 S.E.2d 842 (1986).

**Consent of Counterclaiming Defendant Not Required under Subsection (a)(2).** — Contrary to the practice under subsection (a)(1) of this rule, and contrary to the language and practice under Federal Rule 41(a)(2), the consent of a counterclaiming defendant is not required for dismissals entered pursuant to subsection (a)(2) of this rule to be without prejudice. Smith v. Williams, 82 N.C. App. 672, 347 S.E.2d 842 (1986).

**Complaint Filed Solely to Toll Statute May Not Be Voluntarily Dismissed Without Prejudice.** — A plaintiff may not file a complaint within the time permitted by the statute of limitations for the sole purpose of tolling the statute of limitations, but with no intention of pursuing the prosecution of the action, then voluntarily dismiss the complaint and thereby gain an additional year pursuant to subsection (a)(1) of this rule. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

**Nor May Pleading in Violation of Rule 11(a).** — Subsections (a)(1) of this rule and 11(a) must be construed in pari materia to require that, in order for a timely filed complaint to toll the statute of limitations and provide the basis for a one-year "extension" by way of a voluntary dismissal without prejudice, the complaint must conform in all respects to the rules of pleading, including Rule 11(a). A pleading filed in violation of Rule 11(a) should be stricken as "sham and false" and may not be voluntarily dismissed without prejudice in order to give the pleader the benefit of the "saving" provision of subsection (a)(1) of this rule. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

**Where an action was discontinued by operation of law under Rule 4(e), the statute of limitations having thereafter immediately run** its remaining course, the judge's subsequent order of voluntary dismissal allowing plaintiff another year within which to refile the action was nugatory. Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

**Administrative Adjustment of Claims.** — Once the conditions of § 136-29(a) (administrative adjustment of claims) were satisfied — the claimant filed its claim within six months of an

adverse ruling by the state highway administrator —, the trial court was vested with jurisdiction and the claimant was allowed, as a matter of right under subsection (a)(1), to take a voluntary dismissal and refile its claim within one year. C.W. Matthews Contracting Co. v. State, 75 N.C. App. 317, 330 S.E.2d 630 (1985).

**Fraud Claim Not Exempt From Limitation of § 1-25.** — Though a claim of fraud rested upon somewhat the same allegations that were made in support of a negligent misrepresentation claim when an action was first filed, the plaintiffs did not in effect or otherwise also allege that the defendants had defrauded them, so this rule did not exempt the fraud claim from the fatal effects of the limitations period under § 1-52. Stanford v. Owens, 314 N.C. App. 292, 332 S.E.2d 730, cert. denied, 314 N.C. 670, 336 S.E.2d 402 (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) is identical, etc.** —

In accord with the main volume. See Daniels v. Montgomery Mut. Ins. Co., 81 N.C. App. 600, 344 S.E.2d 847, cert. granted, 318 N.C. 413, 349 S.E.2d 592 (1986).

**Judge May Consider Motion At Conclusion of Plaintiff's Evidence.** — The trial judge may weigh the evidence, find the facts and sustain defendant's Rule 41(b) motion at the conclusion of plaintiff's evidence even though plaintiff has made out a prima facie case which would have precluded a directed verdict for defendant in a jury trial. Childers v. Hayes, 77 N.C. App. 792, 336 S.E.2d 146 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

**Function of Judge.** — Since the court will determine the facts anyway, the function of a judge on a motion to dismiss under subsection (b) of this rule is to evaluate the evidence without any limitations as to inferences in favor of the plaintiff. Holthusen v. Holthusen, 79 N.C. App. 618, 339 S.E.2d 823 (1986).

**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).

**There is no exception under section (b)** of this rule for filing beyond the limitations period for a plaintiff whose prior action was dismissed by an order and judgment which did not specify that a subsequent action could be commenced within one year. Burgess v. Equilink Corp., 652 F. Supp. 1422 (W.D.N.C. 1987).

**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, 313 N.C. 200, 328 S.E.2d 437 (1985).

**Dismissal with prejudice under subsection (b) cannot be premised on party's failure to comply with erroneous order.** In re Will of Parker, 76 N.C. App. 594, 334 S.E.2d 97, cert. denied, 315 N.C. 185, 337 S.E.2d 859 (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, 313 N.C. 200, 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, 313 N.C. 200, 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, 313 N.C. 200, 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, 313 N.C. 200, 328 S.E.2d 437 (1985).

**A dismissal with prejudice precludes, etc.** —

Where order of the federal district court dismissed plaintiff's action primarily for the failure of his federal question claims, and did not elaborate on his state law claims, and plaintiff, although he had ample opportunity to seek an amendment of the order to specify that the dismissal of the state law claims was without prejudice and that a new action based on those claims could be brought within one year pursuant to section (b) of this rule, did not properly seek amendment of the order to comply with the criterion of section (b) of this rule, his failure to do so took his claims out of the saving clause thereof, so that his state claims were time-barred by the applicable statutes of limitations. Burgess v. Equilink Corp., 652 F. Supp. 1422 (W.D.N.C. 1987).

**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).

**Motion to Dismiss Provides Procedure to Render Judgment Against Plaintiff.** — A motion for dismissal pursuant to this rule, made at the close of plaintiff's evidence in a non-jury trial, not only tests the sufficiency of plaintiff's proof to show a right to relief, but also provides a procedure whereby the judge may weigh the evidence, determine the facts, and render judgment on the merits against the plaintiff, even though the plaintiff may have made out a prima facie case. McKnight v. Cagle, 76 N.C. App. 59, 331 S.E.2d 707 (1985).

**Findings of Fact and Conclusions of Law.** — As a fact-finder, the trial judge in ruling on a motion for involuntary dismissal, must find the facts on all issues raised by the pleadings, and state his conclusions of law based thereon, in order that appellate court may determine from the record the basis of his decision. The findings of fact are conclusive on appeal if supported by competent evidence. McKnight v. Cagle, 76 N.C. App. 59, 331 S.E.2d 707 (1985).

When a motion under section (b) of this rule is made in a nonjury trial, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. Childers v. Hayes, 77 N.C. App. 792, 336 S.E.2d 146 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 892 (1986).

**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 defendant'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).

**Authority to Dismiss in Absence of Motion.** — The trial judge has the authority to dismiss a claim pursuant to subsection (b) in the absence of a motion by the defendant to do so. Blackwelder Furn. Co. of Statesville, Inc. v. Harris, 75 N.C. App. 625, 331 S.E.2d 274 (1985).

Whether a judge may dismiss a claim pursuant to subsection (b) depends on the facts and circumstances surrounding the particular case. Blackwelder Furn. Co. of Statesville, Inc. v. Harris, 75 N.C. App. 625, 331 S.E.2d 274 (1985).

**Motion at Close of All Evidence.** — Where the court sits as finder of fact, if it allows a motion under subsection (b) of this rule it must find facts just as it would in entering judgment without al-

lowing the motion. There is therefore little point in making such a motion at the close of all the evidence. Concrete Serv. Corp. v. Investors Group, Inc., — N.C. App. —, 340 S.E.2d 755 (1986).

**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).

**Motion to Have Bankruptcy Trustee Made Party to Action.** — Since the plaintiff made a motion to have its trustee in bankruptcy a party to the action, which the court improperly denied, as the trustee appeared to be a necessary party, without making the required findings of fact, and since the trustee was present when the case was called, the court erred in dismissing the plaintiff's claim for failure to prosecute. Blackwelder Furn. Co. of Statesville, Inc. v. Harris, 75 N.C. App. 625, 331 S.E.2d 274 (1985).

**When Dismissal for Failure to Prosecute Not Proper.** — The trial court erred in dismissing plaintiff's action for failure to appear and prosecute his action, where plaintiff's attorney was present and appeared ready to go forward with his case. Terry v. Bob Dunn Ford, Inc., 77 N.C. App. 457, 335 S.E.2d 227 (1985).

**Imposition of Lesser Sanctions for Noncompliance.** — The trial court has the authority, pursuant to section (b) of this rule, to impose lesser sanctions against a party or counsel for failure to comply with a court order. The lesser sanctions imposed may include costs plus attorney's fees. In considering what sanctions to impose, the trial court must make findings concerning the effectiveness of alternative sanctions and must make findings that the plaintiff is capable of performing the alternative. Daniels v. Montgomery Mut. Ins. Co., 81 N.C. App. 600, 344 S.E.2d 847, cert. granted, 318 N.C. 413, 349 S.E.2d 592 (1986).

**Use of Less Drastic Sanctions When Sufficient.** — A dismissal with prejudice, pursuant to section (b) of this rule, is an available sanction for a plaintiff's violation of Rule 8(a)(2). It is not, however, the only available sanction and should be applied only when the trial court determines that less drastic sanctions will not suffice. Miller v. Ferree, 84 N.C. App. 135, 351 S.E.2d 845 (1987).

### 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).

**Motion for Involuntary Dismissal Appropriate Test for, etc.** —

A Rule 50(a) motion for directed verdict is appropriate only to a case tried before a jury. In non-jury trials, a motion for involuntary dismissal under subsection (b) provides a procedure whereby, at the close of the plaintiff's evidence, the judge can give judgment against the plaintiff, not only because his proof has failed to make out a case, but also on the basis of facts as the judge may determine them. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

In a nonjury trial when a motion to dismiss pursuant to subsection (b) is made, the judge becomes both judge and jury. He must consider and weigh all competent evidence before him, and must pass on the credibility of the witnesses and determine the weight to be accorded their testimony. In re Hughes, 74 N.C. App. 751, 330 S.E.2d 213 (1985).

**Significance of motion to dismiss, etc.** —

In a bench trial, there is little point to a motion to dismiss at the close of all the evidence, since at that point in trial the judge will decide the facts in any event. When the judge decides the case, either on a motion for dismissal or at the close of all the evidence, he must make findings of fact and separate conclusions of law. In re Hughes, 74 N.C. App. 751, 330 S.E.2d 213 (1985).

**Court May Determine Facts, etc.** — In accord with 2nd paragraph in origi-

nal. 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).

**And except in the clearest of cases, etc. —**

The permissive language of section (b) of this rule makes it clear that the court may decline to render judgment until all of the evidence has been presented. In fact, a judge should decline to do so except in the clearest of cases. Esteel Co. v. Goodman, 82 N.C. App. 692, 348 S.E.2d 153 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 745 (1987).

**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).

**Question Raised by Section (b). —**

In a nonjury case, after the plaintiff has rested his case, the defendant may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The question presented is whether the plaintiff's evidence, taken as true, would support findings of fact upon which the trier of fact could properly base a judgment for the plaintiff. Woodlief v. Johnson, 75 N.C. App. 49, 330 S.E.2d 265 (1985).

**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).

**Exercise of Judicial Discretion. —** The determination of whether to dismiss for a violation of Rule 8(a)(2) and whether such a dismissal should be with prejudice so as to bar a subsequent action, involves the exercise of judicial discretion. Miller v. Ferree, 84 N.C. App. 135, 351 S.E.2d 845 (1987).

## 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

#### I. IN GENERAL.

**Cited** in Harwood v. Harrelson Ford, Inc., 78 N.C. App. 445, 337 S.E.2d 158 (1985); Sharp v. Sharp, 84 N.C. App. 128, 351 S.E.2d 799 (1987).

#### 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

#### I. IN GENERAL.

**Stated** in Williams v. Institute for Computational Studies, — N.C. App. —, 355 S.E.2d 177 (1987).

**Cited** in State v. Baker, 77 N.C. App. 465, 335 S.E.2d 56 (1985).

#### 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, disclosure 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., 74 N.C. App. 169, 328 S.E.2d 320 (1985).

## Rule 45. Subpoena.

**Legal Periodicals. —**

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

### 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 (1984), rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

**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 (1984), rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

**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 (1984), rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

**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 (1984), rev'd on other grounds, 315 N.C. 378, 338 S.E.2d 307 (1986).

**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, 73 N.C. App. 206, 326 S.E.2d 345 (1985); State v. Bright, 78 N.C. App. 239, 337 S.E.2d 87 (1985); In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

**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).

In accord with the 4th paragraph in the main volume. See La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986).

**Waiver of issue by failure to object. —** By application of section (c) of this rule, where the defendants failed to object to the first issue submitted to the jury, they waived their right to appeal on the ground that it was erroneous. Barnett v. Security Ins. Co., — N.C. App. —, 352 S.E.2d 855 (1987).

**Applied** in Stiles v. Charles M. Morgan Co., 64 N.C. App. 328, 307 S.E.2d 409 (1983); Fallston Finishing, Inc. v. First Union Nat'l Bank, 76 N.C. App. 347, 333 S.E.2d 321 (1985); Dobruck v. Lineback, 77 N.C. App. 233, 334 S.E.2d 455 (1985); Petty v. City of Charlotte, — N.C. App. —, 355 S.E.2d 210 (1987).

**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.

**Legal Periodicals. —**

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

CASE NOTES

I. IN GENERAL.

**Rule 50 motions apply only to issues tried by a jury,** not a judge. Holthusen v. Holthusen, 79 N.C. App. 618, 339 S.E.2d 823 (1986).

**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, 71 N.C. App. 691, 323 S.E.2d 362 (1984); Kabatnik v. Westminster Co., 71 N.C. App. 758, 323 S.E.2d 398 (1984); Godfrey v. Van Harris Realty, Inc., 72 N.C. App. 466, 325 S.E.2d 27 (1985); Tyson Foods, Inc. v. Ammons, 75 N.C. App. 548, 331 S.E.2d 208 (1985); Cockman v. White, 76 N.C. App. 387, 333 S.E.2d 54 (1985); Pasour v. Pierce, 76 N.C. App. 364, 333 S.E.2d 314 (1985); Fallston Finishing, Inc. v. First Union Nat'l Bank, 76 N.C. App. 347, 333 S.E.2d 321 (1985); Campbell v. Connor, 77 N.C. App. 627, 335 S.E.2d 788 (1985).

**Stated** in Sample v. Morgan, 66 N.C. App. 338, 311 S.E.2d 47 (1984); Petty v. City of Charlotte, — N.C. App. —, 355 S.E.2d 210 (1987).

**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); Davidson & Jones, Inc. v. North Carolina Dep't of Admin., 69 N.C. App. 563, 317 S.E.2d 718 (1984); Herbert v. Babson, 74 N.C. App. 519, 328 S.E.2d 796 (1985); Hornby v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 77 N.C. App. 475, 335 S.E.2d 335 (1985); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985); Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc., 78 N.C. App. 558, 337 S.E.2d 685 (1985); Baynard v. Service Distrib. Co., 78 N.C. App. 796, 338 S.E.2d 622 (1986); McDaniel v. Bass-Smith Funeral Home, 80 N.C. App. 629, 343 S.E.2d 228 (1986); United States Helicopters, Inc. v. Black, 318 N.C. 268, 347 S.E.2d 431 (1986); Tatum v. Tatum, 318 N.C. 407, 348 S.E.2d 813 (1986); Kennedy v. K-Mart Corp., — N.C. App. —, 352 S.E.2d 876 (1987).

## 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); Burris v. Shumate, 77 N.C. App. 209, 334 S.E.2d 514 (1985); Rice v. Wood, 82 N.C. App. 318, 346 S.E.2d 205, cert. denied, 318 N.C. 417, 349 S.E.2d 599 (1986); Hitchcock v. Cullerton, 82 N.C. App. 296, 346 S.E.2d 215 (1986); Britt v. Britt, 82 N.C. App. 303, 346 S.E.2d 259 (1986), cert. granted, — N.C. —, 351 S.E.2d 740 (1987).

A motion for directed verdict is to test the legal sufficiency of the evidence to take the case to the jury. DeHart v. R/S Fin. Corp., 78 N.C. App. 93, 337 S.E.2d 94 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986).

The purpose of a motion for a directed verdict is to test the legal sufficiency of the evidence. Allison v. Food Lion, Inc., — N.C. App. —, 352 S.E.2d 256 (1987).

**Motion for directed verdict is the only procedure, etc. —**

In accord with 2nd paragraph in main volume. See Yeargin v. Spurr, 78 N.C. App. 243, 336 S.E.2d 680 (1985).

**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, 73 N.C. App. 406, 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 evi-

dence 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, 72 N.C. App. 504, 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, 72 N.C. App. 516, 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); Allison v. Food Lion, Inc., — N.C. App. —, 352 S.E.2d 256 (1987).

In accord with 3rd paragraph in the main volume. See Rice v. Wood, 82 N.C. App. 318, 346 S.E.2d 205, cert. denied, 318 N.C. 417, 349 S.E.2d 599 (1986); Britt v. Britt, 82 N.C. App. 303, 346 S.E.2d 259 (1986), cert. granted, — N.C. —, 351 S.E.2d 740 (1987).

**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); Allison v. Food Lion, Inc., — N.C. App. —, 352 S.E.2d 256 (1987).

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, 74 N.C. App. 674, 329 S.E.2d 730, cert. denied and appeal dismissed, 314 N.C. 328, 333 S.E.2d 484 (1985).

In considering a motion for directed verdict, the nonmovant's evidence must be taken as true, and contradictions, inconsistencies and conflicts in the evidence must be resolved in favor of the nonmovant. Morris v. Bruney, 78 N.C. App. 668, 338 S.E.2d 561 (1986).

**And Giving Nonmovant, etc. —**

In accord with 1st 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., 313 N.C. 362, 329 S.E.2d 333 (1985); Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986); Woodruff v. Shuford, 82 N.C. App. 260, 346 S.E.2d 173 (1986).

In accord with 3rd paragraph in the main volume. See Sharpe v. Wyse, 317 N.C. 694, 346 S.E.2d 485 (1986).

In accord with 5th paragraph in main volume. See Phelps v. Duke Power Co., 78 N.C. App. 222, 332 S.E.2d 715, cert. denied, 314 N.C. 668, 336 S.E.2d 401 (1985); Hall v. Mabe, 77 N.C. App. 758, 336 S.E.2d 427 (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 10th paragraph in main volume. See DeHart v. R/S Fin. Corp., 78 N.C. App. 93, 337 S.E.2d 94 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986).

In accord with the 12th paragraph in the main volume. See Bruegge v. Mastertemp, Inc., 83 N.C. App. 508, 350 S.E.2d 918 (1986); Atwater v.

Castlebury, — N.C. App. —, 353 S.E.2d 263 (1987).

In accord with 14th paragraph in original. See Hawkins v. State Capital Ins. Co., 74 N.C. App. 499, 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 insufficient to support a verdict in the nonmovant's favor that the motion for directed verdict should be granted. West v. Slick, 313 N.C. 33, 326 S.E.2d 601 (1985).

When passing on a motion for a directed verdict, the plaintiff should be given the benefit of all reasonable inferences; the motion should be denied if there is a scintilla of evidence to support plaintiffs' prima facie case in all its constituent elements. These principles are equally applicable to defendants' counterclaim. Burris v. Shumate, 77 N.C. App. 209, 334 S.E.2d 514 (1985).

On a directed verdict motion, the record is viewed in the light most favorable to the nonmoving party, resolving all conflicts in its favor and giving it the benefit of every favorable inference. Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32 (1986).

On a motion for directed verdict, the evidence in favor of the nonmovant must be taken as true, resolving all conflicts in the nonmovant's favor and entitling him to the benefit of all reasonable inferences. Rice v. Wood, 82 N.C. App. 318, 346 S.E.2d 205, cert. denied, 318 N.C. 417, 349 S.E.2d 599 (1986).

**Motion for a directed verdict under section (a) tests the legal, etc. —**

A motion for directed verdict by a defendant tests the legal sufficiency of the evidence to go to the jury. Hall v. Mabe, 77 N.C. App. 758, 336 S.E.2d 427 (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); Allison v. Food Lion, Inc., — N.C. App. —, 352 S.E.2d 256 (1987).

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).

A motion for a directed verdict presents the same question for both the trial and appellate courts: Whether the evidence, taken in the light most favorable to the nonmovant, and giving the nonmovant the benefit of every reasonable inference arising from the evidence, is sufficient for submission to the jury. Alston v. Herrick, 76 N.C. App. 246, 332 S.E.2d 720 (1985), aff'd, 315 N.C. 386, 337 S.E.2d 851 (1986).

The court may grant a motion for directed verdict only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. Cates v. Wilson, 83 N.C. App. 448, 350 S.E.2d 898 (1986).

**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); Rice v. Wood, 82 N.C. App. 318, 346 S.E.2d 205, cert. denied, 318 N.C. 417, 349 S.E.2d 599 (1986).

If there is more than a scintilla of evidence supporting each element of nonmovant's case, the motion for directed verdict should be denied. Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32 (1986).

**And If Plaintiff Shows No Right, etc. —**

In accord with 2nd paragraph in origi-

nal. 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, 313 N.C. 33, 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).

A verdict may never be directed when there is conflicting evidence on contested issues of fact. DeHart v. R/S Fin. Corp., 78 N.C. App. 93, 337 S.E.2d 94 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986).

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

In accord with 1st paragraph in main volume. See Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985); cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

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); Morris v. Bruney, 78 N.C. App. 668, 338 S.E.2d 561 (1986); Woodruff v. Shuford, 82 N.C. App. 260, 346 S.E.2d 173 (1986); Moore v. North Carolina Farm Bureau Mut. Ins. Co., 82 N.C. App. 616, 347 S.E.2d 489 (1986), cert. denied, 318 N.C. 696, 351 S.E.2d 749 (1987).

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).

A directed verdict in favor of the party with the burden of proof is proper only when the proponent has established a clear and uncontradicted prima facie case and the credibility of his evidence is manifest as a matter of law. Homeland, Inc. v. Backer, 78 N.C. App. 477, 337 S.E.2d 114 (1985), cert. denied, 316 N.C. 377, 342 S.E.2d 896 (1986).

**Evidence that raises a mere possibility or conjecture is insufficient to** withstand a motion for a directed verdict. Bruegge v. Mastertemp, Inc., 83 N.C. App. 508, 350 S.E.2d 918 (1986).

**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, 71 N.C. App. 731, 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, 74 N.C. App. 413, 328 S.E.2d 811 (1985), rev'd in part on other grounds, 315 N.C. 523, 340 S.E.2d 408 (1986).

**As Where Credibility, etc. —**

A directed verdict or a judgment notwithstanding the verdict may be entered in favor of the party with the burden of proof where credibility is manifest as a matter of law. Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

**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 in Personal Injury Actions. —**

If the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, even though the possibility of accident may arise on the evidence. Bruegge v. Mastertemp, Inc., 83 N.C. App. 508, 350 S.E.2d 918 (1986).

**When Defendant Entitled to Directed Verdict in a Negligence Action. —**

A defendant in a negligence action is not entitled to a directed verdict unless the plaintiff has failed, as matter of law to establish the elements of actionable negligence. McMurray v. Surety Fed. Sav. & Loan Ass'n, 82 N.C. App. 729, 348 S.E.2d 162 (1986), cert. denied, 318 N.C. 695, 351 S.E.2d 748 (1987).

**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).

**Trial court erred in directing verdict on issue of contributory negligence.** — See Alston v. Herrick, 76 N.C. App. 246, 332 S.E.2d 720 (1985), aff'd, 315 N.C. 386, 337 S.E.2d 851 (1986).

**When a defendant moves for a directed verdict in a medical malpractice case,** the question raised is whether plaintiff 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).

**Movant for subsection (b) motion must make motion for directed verdict at the close of all evidence.** Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

**By introducing evidence, defendants waived their motion** for directed verdict made at the close of plaintiffs' evidence. Rice v. Wood, 82 N.C. App. 318, 346 S.E.2d 205, cert. denied, 318 N.C. 417, 349 S.E.2d 599 (1986).

**Trial judge was held to have authority to direct verdict of his own initiative;** however, mindful of the low evidentiary threshold necessary to take a case to the jury, and also of the detailed procedure outlined in this rule, which presumes the use of a motion before a verdict is directed, the court of appeals did not encourage the frequent use of this practice, and cautioned trial judges to use it sparingly. L. Harvey & Son Co. v. Jarman, 76 N.C. App. 191, 333 S.E.2d 47 (1985).

**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).

**The question presented on appeal of the granting of a motion for a directed verdict** is whether the evidence, taken in the light most favorable to the appellant, is sufficient for submission of the case to the jury. Hitchcock v. Cullerton, 82 N.C. App. 296, 346 S.E.2d 215 (1986).

**Motion for directed verdict improperly granted.** — See Calhoun v. Calhoun, 76 N.C. App. 305, 332 S.E.2d 734 (1985), cert. denied, 315 N.C. 586, 341 S.E.2d 23 (1986).

### 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, 74 N.C. App. 413, 328 S.E.2d 811 (1985), rev'd in part on other grounds, 315 N.C. 523, 340 S.E.2d 408 (1986).

**The purpose of the "specific grounds" requirement, etc. —**

In accord with main volume. See Nelson v. Chin Yung Chang, 78 N.C. App. 471, 337 S.E.2d 650 (1985), cert. denied, 317 N.C. 335, 346 S.E.2d 501 (1986).

**A motion for directed verdict must state the grounds therefor;** otherwise, error may not be urged on appeal. Hall v. Mabe, 77 N.C. App. 758, 336 S.E.2d 427 (1985).

**Appellant who fails to state specific grounds, etc. —**

A motion for directed verdict must state the grounds therefor, and grounds not asserted in the trial court may not be asserted on appeal. Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32 (1986).

### 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); DeHart v. R/S Fin. Corp., 78 N.C. App. 93, 337 S.E.2d 94 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986).

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); Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

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., 313 N.C. 362, 329 S.E.2d 333 (1985).

**Motion for Directed Verdict Prerequisite, etc. —**

In accord with 3rd paragraph in original. See Smith v. Price, 74 N.C. App. 413, 328 S.E.2d 811 (1985), rev'd in part on other grounds, 315 N.C. 523, 340 S.E.2d 408 (1986); Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 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., 313 N.C. 362, 329 S.E.2d 333 (1985).

**Standards for granting a motion, etc. —**

In accord with 1st paragraph in main volume. See State v. Moore, — N.C. —, 340 S.E.2d 401 (1986).

In accord with 2nd paragraph in main volume. See DeHart v. R/S Fin. Corp., 78 N.C. App. 93, 337 S.E.2d 94 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 893 (1986).

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, 74 N.C. App. 413, 328 S.E.2d 811 (1985), rev'd in part on other grounds, 315 N.C. 523, 340 S.E.2d 408 (1986).

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., 313 N.C. 362, 329 S.E.2d 333 (1985).

The same rules by which the sufficiency of the evidence is tested upon motion for a directed verdict pursuant to section (a) of this rule apply to the determination of a motion for judgment notwithstanding the verdict. Allen v. Pullen, 82 N.C. App. 61, 345 S.E.2d 469 (1986), cert. denied, 318 N.C. 691, 351 S.E.2d 738 (1987).

A motion for judgment notwithstanding the verdict, like a motion for a directed verdict, tests the legal sufficiency of the evidence to take the case to the jury. Taylor v. Walker, — N.C. App. —, 353 S.E.2d 239 (1987).

**Evidence Must Be Viewed, etc. —**

In resolving the question whether the evidence is sufficient to support the verdict, the evidence, of course, must be viewed in the light most favorable to the party who won the verdict. Dailey v. Integon Gen. Ins. Corp., 75 N.C. App. 387, 331 S.E.2d 148, cert. denied, 314 N.C. 664, 336 S.E.2d 399 (1985).

**Giving Nonmovant the Benefit of Every Inference, etc. —**

In accord with 2nd paragraph in original. See Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985); Allen v. Pullen, 82 N.C. App. 61, 345 S.E.2d 469 (1986), cert. denied, 318 N.C. 691, 351 S.E.2d

738 (1987); Taylor v. Walker, — N.C. App. —, 353 S.E.2d 239 (1987).

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, 74 N.C. App. 413, 328 S.E.2d 811 (1985), rev'd in part on other grounds, 315 N.C. 523, 340 S.E.2d 408 (1986).

In considering a motion for judgment n.o.v., the trial court is to consider all evidence in the light most favorable to the party opposing the motion. The nonmovant is to be given the benefit of every reasonable inference that legitimately may be drawn from the evidence, and contradictions must be resolved in the nonmovant's favor. Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

**Motion for Judgment N.O.V. Proper, etc.—**

A motion for a judgment notwithstanding the verdict, like a motion for a directed verdict, will be granted only if the evidence, considered in the light most favorable to the plaintiff, is insufficient as a matter of law to justify a verdict for the plaintiff. Perry v. Williams, — N.C. App. —, 353 S.E.2d 226 (1987).

**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., 313 N.C. 362, 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., 313 N.C. 362, 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); Taylor v. Walker, — N.C. App. —, 353 S.E.2d 239 (1987).

**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., 313 N.C. 362, 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., 313 N.C. 362, 329 S.E.2d 333 (1985).

**Motion to be Decided as Question of Law.** — A motion to set a verdict aside and for a new trial pursuant to Rule 59 is directed to the discretion of the trial judge while a motion for judgment notwithstanding the verdict pursuant to this rule is to be decided as a question of law. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

**A motion for directed verdict is appropriate only to a case tried before a jury.** In non-jury trials, a motion for involuntary dismissal under Rule 41(b) provides a procedure whereby, at the close of the plaintiff's evidence, the judge can give judgment against the plaintiff, not only because his proof has failed to make out a case, but also on the basis of facts as the judge may determine them. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

**Scope of Review.** — A motion for judgment notwithstanding the verdict involves the same legal questions raised by the motion for directed verdict, and is therefore equally restricted as a basis for asserting error on appeal. Mobley v. Hill, 80 N.C. App. 79, 341 S.E.2d 46 (1986).

**Reinstatement of Verdict on Reversal of Judgment N.O.V.** — Where plaintiff and third party defendant moved, alternatively to their motion for judgment notwithstanding the verdict, for a new trial, which motion was denied, and neither of them excepted to or

brought forward as a cross-assignment of error the denial of the motion, on reversal of the judgment n.o.v. entered by the trial court, the verdict of the jury would be reinstated and judgment entered in accordance therewith. Allen v. Pullen, 82 N.C. App. 61, 345 S.E.2d 469 (1986), cert. denied, 318 N.C. 691, 351 S.E.2d 738 (1987).

**When the trial court fails to comply with Rule 59 and this rule in ordering a new trial,** the general course is to reverse and remand for reinstatement of the verdict. Barnett v. Security Ins. Co., — N.C. App. —, 352 S.E.2d 855 (1987).

## 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."

**Legal Periodicals.** —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

For article, "Rummaging Through a Wilderness of Verbiage: The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

### 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., 72 N.C. App. 428, 325 S.E.2d 287 (1985).

**Quoted** in Dobson v. Honeycutt, 78 N.C. App. 709, 338 S.E.2d 605 (1986).

**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).

**Cited** in Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985); Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759 (1985); Murrow v. Daniels, — N.C. App. —, 355 S.E.2d 204 (1987).

#### 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 ex-

plain 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); Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

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).

**The trial court has a duty to explain the law and apply it to the evidence** on all substantial features of the case. Failure to do so constitutes prejudicial error and entitles the aggrieved party to a new trial. Scher v. Antonucci, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

**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).

**Trial judge properly refused to submit instruction on "proper control" of automobile.** See Dunn v. Herring, 75 N.C. App. 308, 330 S.E.2d 834, cert. denied, 314 N.C. 538, 535 S.E.2d 16 (1985).

**Instruction for following too closely.** — Where violation of § 20-152(a) bore directly on the issue of defendant's negligence, which was a substantial feature of the case, the court should have declared and explained the section in its charge to the jury, and should also have explained that violation of this section was negligence per se. It has this duty irrespective of plaintiff's request for special instructions. Scher v. Antonucci, 77 N.C. App. 810, 336 S.E.2d 434 (1985).

## IV. SPECIAL INSTRUCTIONS.

**Once contributory negligence becomes a question for the jury,** the "reasonable person" objective standard comes into play. The trial court's refusal to give a subsection (b) requested special jury instruction phrased in terms of actual knowledge, the subjective standard, was proper. King v. Allred, 76 N.C. App. 427, 333 S.E.2d 758, cert. denied, 315 N.C. 184, 337 S.E.2d 857 (1985).

## 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.

**Legal Periodicals.** —

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

## CASE NOTES

### I. IN GENERAL.

**Jurisdiction of Trial Court.** —

The trial court is not divested of jurisdiction to hear and rule on a Rule 52(b) motion, even though notice of appeal has been given. York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

Where notice of appeal from default judgment for defendants with respect to plaintiff's claim and defendants' counter-claim against plaintiff was filed at the same time as plaintiff's Rule 52(b) motion for amended and additional findings of fact and his Rule 60(b) motion for relief from judgment, under the circumstances of the case the trial court had jurisdiction to rule on plaintiff's Rule 60(b) motion. York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

**Presumption Where Trial Court Is Not Required to Find Facts.** — When the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment. Estrada v. Burnham, 316 N.C. 318, 341 S.E.2d 538 (1986).

**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. Gilbert Eng'g Co. v. City of Asheville, 74 N.C. App. 350, 328 S.E.2d 849, cert. denied, 314 N.C. 329, 333 S.E.2d 485 (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, 71 N.C. App. 805, 323 S.E.2d 368 (1984); J.M. Thompson Co. v. Doral Mfg. Co., 72 N.C. App. 419, 324 S.E.2d 909 (1985); Glesner v. Dembrosky, 73 N.C. App. 594, 327 S.E.2d 60 (1985); Rowe v. Rowe, 74 N.C. App. 54, 327 S.E.2d 624 (1985); McKnight v. Cagle, 76 N.C. App. 59, 331 S.E.2d 707 (1985); Gebb v. Gebb, 77 N.C. App. 309, 335 S.E.2d 221 (1985); Smith v. Mariner, 77 N.C. App. 589, 335 S.E.2d 530 (1985); Olschesky v. Houston, — N.C. App. —, 352 S.E.2d 884 (1987).

**Quoted** in Stonewall Ins. Co. v. Fortress Reinsurers Managers, Inc., 83 N.C. App. 263, 350 S.E.2d 131 (1986).

**Stated** in In re Environmental Mgt. Comm'n, 80 N.C. App. 1, 341 S.E.2d 588 (1986).

**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); Edge v. Metropolitan Life Ins. Co., 78 N.C. App. 624, 337 S.E.2d 672 (1985); In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986); Aetna Cas. & Sur. Co. v. Younts, — N.C. App. —, 352 S.E.2d 850 (1987).

### II. FINDINGS AND CONCLUSIONS, GENERALLY.

**In actions tried upon facts without jury, the court must make its own determination** as to what pertinent facts are established by the evidence, rather than merely reciting what the evidence may tend to show. Lee v. Lee, 78 N.C. App. 632, 337 S.E.2d 690 (1985).

Subsection (a)(1) of this rule requires, in nonjury cases, that the trial judge make specific findings of ultimate facts established by the evidence, state the conclusions of law thereon, and direct entry of the appropriate judgment. City of Statesville v. Roth, 77 N.C. App. 803, 336 S.E.2d 142 (1985).

**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, 469 U.S. 835, 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, 72 N.C. App. 481, 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, 469 U.S. 835, 105 S. Ct. 128, 83 L. Ed. 2d 69 (1984).

In accord with 2nd paragraph in original. See Plott v. Plott, 313 N.C. 63, 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, 74 N.C. App. 350, 328 S.E.2d 849, cert. denied, 314 N.C. 329, 333 S.E.2d 485 (1985).

**When findings are required, they must be made with sufficient specificity** to allow meaningful appellate review. Andrews v. Peters, 318 N.C. 133, 347 S.E.2d 409 (1986).

**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, 74 N.C. App. 350, 328 S.E.2d 849, cert. denied, 314 N.C. 329, 333 S.E.2d 485 (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).

The requirement that where the trial judge sits as the trier of facts, he must find facts upon all issues raised by the pleadings and evidence and declare the conclusions of law arising on the facts found is designed to dispose of the issues raised and to permit a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law. Wohlfahrt v. Schneider, 82 N.C. App. 69, 345 S.E.2d 448 (1986).

**Findings on Discretionary Rulings.** — When requested, findings of fact and conclusions of law must be made even on rulings resting within the trial court's discretion. Andrews v. Peters, 318 N.C. 133, 347 S.E.2d 409 (1986).

**Findings on Setting Aside Verdict on Damages.** — Findings, when requested, should be made in support of the ultimate conclusion that the damages appear to have been given under the influence of passion or prejudice in order to facilitate meaningful appellate review of an order setting aside the verdict on damages. Andrews v. Peters, 318 N.C. 133, 347 S.E.2d 409 (1986).

**Findings and Conclusions on Alimony Award.** — Because an alimony award is determined by a trial court without a jury, section (a) of this rule requires the trial court to find facts specially and state conclusions of law separately. Perkins v. Perkins, — N.C. App. —, 355 S.E.2d 848 (1987).

**If no findings of fact are required, the findings which support the trial judge's ruling are deemed implicit** in the ruling. Donavant v. Hudspeth, 318 N.C. 1, 347 S.E.2d 797 (1986).

**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, 74 N.C. App. 350, 328 S.E.2d 849, cert. denied, 314 N.C. 329, 333 S.E.2d 485 (1985); City of Statesville v. Roth, 77 N.C. App. 803, 336 S.E.2d 142 (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).

The appellate courts are bound by the trial court's findings of fact so long as there is some evidence to support those findings, even though the evidence could sustain findings to the contrary. Lyerly v. Malpass, 82 N.C. App. 224, 346 S.E.2d 254 (1986), cert. denied, 318 N.C. 695, 351 S.E.2d 748 (1987).

**But Sufficiency of Evidence, etc. —**

Where plaintiffs have not assigned error to the judge's findings, those findings are conclusive on appeal, and the Supreme Court is only required to determine whether the findings support the trial judge's conclusions and the entry of judgment. Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

**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.

**Trial court's compliance with party's motion under subsection (a)(2) is mandatory.** Andrews v. Peters, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985), aff'd, 318 N.C. 133, 347 S.E.2d 409 (1986).

**Additional Findings of Fact Necessary.** — Given the defendant's motion specifically asking for findings of fact and conclusions of law on the decision of the plaintiff's motion for a new trial, the insufficient findings of fact in the order granting the motion, and the conflicting evidence in the record, additional findings of fact were essential to provide the appellate court with a basis for a meaningful review. Andrews v. Peters, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985), aff'd, 318 N.C. 133, 347 S.E.2d 409 (1986).

**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).

**It is not a part of the function of the court on a motion for summary judgment, etc. —**

In accord with 2nd paragraph in the main volume. See White v. Town of Emerald Isle, 82 N.C. App. 392, 346 S.E.2d 176, cert. denied, 318 N.C. 511, 349 S.E.2d 874 (1986).

**But Findings and Conclusions Do**

**Not Invalidate Summary Judgment.** —

In accord with the main volume. See White v. Town of Emerald Isle, 82 N.C. App. 392, 346 S.E.2d 176, cert. denied, 318 N.C. 511, 349 S.E.2d 874 (1986).

### V. REVIEW ON APPEAL.

**Review without Excepting to Findings at Trial.** — Section (c) of this rule allows a party to seek appellate review on the question of whether the evidence supported the findings of fact without excepting at trial to the judge's findings, but in the record on appeal it is incumbent upon appellant to assign error so as to outline his objections on appeal. Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

**Review Even Where Defendant Failed to Request Specific Findings.** — The court's failure to make specific findings and any miscalculation in the findings were reviewable under this rule on appeal despite failure of defendant to request specific or different findings. Davis v. Taylor, 81 N.C. App. 42, 344 S.E.2d 19, cert. denied, 318 N.C. 414, 349 S.E.2d 593 (1986).

## Rule 53. Referees.

**Legal Periodicals.** —

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

For article analyzing the 1983 amendments to Rules 6, 7, 11, 16, 26, 52, 53 and 67, FRCP, comparing these rules with North Carolina practice, and suggesting changes in certain state and federal rules, see 20 Wake Forest L. Rev. 819 (1984).

### CASE NOTES

### I. IN GENERAL.

**The word "may," as used in section (a) of this rule, connotes permissive and not mandatory power** in the court to grant a reference. Green Hi-Win Farm Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

**To Whom Reference Is "Compulsory".** — Once a court orders a reference, whether upon application by any party or on its own motion, it is "compulsory" only as to the parties to the processioning action. Green Hi-Win Farm Inc. v. Neal, 83 N.C. App. 201, 349 S.E.2d 614 (1986), cert. denied, 319 N.C. 104, 353 S.E.2d 109 (1987).

**The ordering of a reference is within the sound discretion of the court.** Livermon v. Bridgett, 77 N.C. App. 533, 335 S.E.2d 753 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

The ordering or refusal to order a compulsory reference is a matter within the discretion of the trial judge. Vick v. Vick, 80 N.C. App. 697, 343 S.E.2d 245 (1986).

**Ordering Reference in Boundary Dispute Case.** — Where the pleadings showed a potentially complicated boundary dispute in which one side claimed the boundaries were not as stated in the deeds but were marked by known and visible boundaries on the ground, and a view of the premises would, therefore, be helpful, there was no abuse of discretion by the trial court in ordering the reference. Livermon v. Bridgett, 77 N.C. App. 533, 335 S.E.2d 753 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

**The referee has authority to resolve issues not contained in the pleadings** at any stage of the action. Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

**In the absence of exceptions, etc.** —

In accord with original. See State ex rel. Gilchrist v. Cogdill, 74 N.C. App. 133, 327 S.E.2d 647 (1985).

**Applied** in Davis v. Hall, 80 N.C. App. 532, 342 S.E.2d 576 (1986).

### II. JURY TRIAL.

**Preservation of Right to Jury Trial.** — When the referee's report is adverse to a party, that party may preserve his right to jury trial pursuant to subsection (b) of this rule. Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

**Right to Jury Trial Only If Evidence Raises Fact Issue.** — Although when a court orders a compulsory reference, a party preserves his right to trial by complying with the procedural steps

outlined in this rule, the party is entitled to trial by jury only if the evidence before the referee was sufficient to raise an issue of fact. Fauchette v. Zimmerman, 79 N.C. App. 265, 338 S.E.2d 804 (1986).

## 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.

**Final Judgment Defined.** —

In accord with main volume. See Beam v. Morrow, 77 N.C. App. 800, 336 S.E.2d 106 (1985), cert. denied, 316 N.C. 192, 341 S.E.2d 575 (1986).

**The order of an appellate court dismissing an appeal upon denying a petition for review is not a judgment;** it is not a ruling on the merits of the rights or obligations of the parties, but is purely procedural in nature. Hunter v. City of Asheville, 80 N.C. App. 325, 341 S.E.2d 743 (1986).

The effective date of an annexation ordinance was July 11, 1983, the date the judgment of the Court of Appeals holding the ordinance to be valid was certified, and not December 6, 1983, the date of the Supreme Court's order dismissing plaintiffs' appeal and denying discretionary review of the judgment of the Court of Appeals, as the final judgment in the annexation case was the judgment of the Court of Appeals. Hunter v. City of Asheville, 80 N.C. App. 325, 341 S.E.2d 743 (1986).

**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 sufficient 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, 71 N.C. App. 660, 323 S.E.2d 389 (1984);

Alford v. Shaw, 72 N.C. App. 537, 324 S.E.2d 878 (1985); Case v. Case, 73 N.C. App. 76, 325 S.E.2d 661 (1985); Abner Corp. v. City Roofing & Sheetmetal Co., 73 N.C. App. 470, 326 S.E.2d 632 (1985).

**Quoted** in Beasley v. National Sav. Life Ins. Co., 75 N.C. App. 104, 330 S.E.2d 207 (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); Lee v. Mowett Sales Co., 78 N.C. App. 556, 334 S.E.2d 250 (1985); Rivenbark v. Southmark Corp., 77 N.C. App. 225, 334 S.E.2d 451 (1985); City of Winston-Salem v. Ferrell, 79 N.C. App. 103, 338 S.E.2d 794 (1986); United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986); Clark v. Asheville Contracting Co., 316 N.C. 475, 342 S.E.2d 832 (1986); Cherry, Bekaert & Holland v. Worsham, 81 N.C. App. 116, 344 S.E.2d 97 (1986); County of Dare v. R.O. Givens Signs, Inc., 81 N.C. App. 526, 344 S.E.2d 324 (1986); Jenkins v. Wheeler, 81 N.C. App. 512, 344 S.E.2d 371 (1986); Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555 (1986); Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E.2d 824 (1986); Little v. City of Locust, 83 N.C. App. 224, 349 S.E.2d 627 (1986); Holland v. Edgerton, — N.C. App. —, 355 S.E.2d 514 (1987).

## 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).

**"Other Statutes" Refers Particularly, etc. —**

The "other statutes" referred to by subsection (b) of this section are § 1-227 and § 7A-27(d), which allow an immediate appeal from a judicial determination which deprives appellant of a substantial right which he would lose if the ruling is not reviewed on appeal before final judgment. Beam v. Morrow, 77 N.C. App. 800, 336 S.E.2d 106 (1985), cert. denied, 316 N.C. 192, 341 S.E.2d 575 (1986).

**The right to appeal is available through two channels.** — This rule allows appeal if there has been a final judgment as to all of the claims and parties, or if the specific action of the trial court from which appeal is taken is final and the trial judge expressly determines that there is no just reason for delaying the appeal. The second channel to an appeal is by way of §§ 1-277 or 7A-27; an appeal will be permitted under these statutes if a substantial right would be affected by not allowing appeal before final judgment. Brown v. Brown, 77 N.C. App. 206, 334 S.E.2d 506 (1985), cert. denied, 315 N.C. 389, 335 S.E.2d 878, cert. denied, 315 N.C. 389, 338 S.E.2d 878 (1986).

**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).

**In determining the appealability of interlocutory orders a substantial right is** a right which will be lost or irremediably adversely affected if the order is not reviewable before the final judgment. Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985).

**Appeal from Judgment Adjudicating Less 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, 74 N.C. App. 597, 328 S.E.2d 597 (1985).

**Judgments Held Nonappealable.** —

Partial summary judgment orders, which established the negligence of defendant-administrator's decedent and the absence of contributory negligence or assumption of risk on the part of plaintiff, had the effect of fixing liability and retaining the cause for determination solely on the issue of damages, and were not immediately appealable, despite the trial court's recital that this was a final judgment and that there was no just reason for delay. Schuch v. Hoke, 82 N.C. App. 445, 346 S.E.2d 313 (1986).

**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).

**Judgment dismissing plaintiff's punitive damage claim** against defendant was immediately appealable, as plaintiff had a substantial right to have all of her claims for relief tried at the same time before the same judge and jury. Byrne v. Bordeaux, — N.C. App. —, 354 S.E.2d 277 (1987).

**Dismissal of One Defendant.** — Dismissal of Count II of plaintiff's amended complaint, resulting in dismissal of plaintiff's claim against defendant professional corporation, affected her substantial right to have determined in a single proceeding the issues of whether she had been damaged by the actions of one, some or all of the defendants, especially since her claims against all of them arose upon the same series of transactions. Therefore, her appeal therefrom was not premature. Fox v. Wilson, — N.C. App. —, 354 S.E.2d 737 (1987).

**Trial judge's order that denial of immediate appeal would affect substantial right of plaintiffs was tantamount to certification** that there was no just reason for delay, and accordingly the appeal was effectively certified and was therefore properly before the court of appeals. Smock v. Brantley, 76 N.C. App. 73, 331 S.E.2d 714 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 30 (1986).

**In an action seeking quiet title to property** which the plaintiff's, the original owners, alleged was secured by two of the defendants by fraud or by mutual mistake and conveyed to the other defendant, the current owner, by general warranty deed, summary judgment in favor of the current owner precluded the plaintiffs from obtaining reformation of the deed and reconveyance of the property, thereby affecting a substantial right; and, therefore, the interlocutory order was appealable. Jenkins v. Maintenance, Inc., 76 N.C. App. 110, 332 S.E.2d 90 (1985).

**In action by discharged employee seeking to recover accumulated vacation leave, "substantial right"** of the plaintiff was affected by the granting of summary judgment for the defendant, so that the order granting the motion for summary judgment was appealable, despite the defendant's pending counterclaim for wrongful conversion of company funds, and despite the absence of a determination by the trial judge under subsection (b), that "there was no just reason for delay." Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985).

# 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).

**A motion to intervene after the entry of default against the defendant,** his liability to the plaintiff being conclusively established, the extent of liability never being in issue, was untimely. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

**Applied** in Pryse v. Strickland Lumber & Bldg. Supply, Inc., 66 N.C. App. 361, 311 S.E.2d 598 (1984); Smith v. Barfield, 77 N.C. App. 217, 334 S.E.2d 487 (1985).

### 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).

The entry of default is interlocutory in nature and is not a final judicial action. State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

**Defaults may not be entered, etc. —**

By waiting till an answer had been tardily filed before seeking to obtain entry of default, the plaintiff waived its rights to entry of default. Joe Newton, Inc. v. Tull, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

**Substantive Allegations Deemed, etc. —**

In accord with original. See State Employee's Credit Union, Inc. v. Gentry, 75 N.C. App. 260, 330 S.E.2d 645 (1985).

**Raising Affirmative Defense for First Time on Summary Judgment Ruling.** — Even if the plaintiff's motion to strike the tardily filed answer had been ruled upon and allowed before the trial court considered the defendant's motion for summary judgment based upon an affirmative defense, the defendants would have been entitled to proceed with their motion. An affirmative defense may be raised for the first time by affidavit for the purpose of ruling on a motion for summary judgment. Joe Newton, Inc. v. Tull, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

### 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.

**When Judgment Must Be Entered by Judge. —**

In accord with 1st paragraph in the main volume. See Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

**An appearance need not be a direct response to the complaint;** there may be an appearance whenever a defendant takes, seeks or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff. Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

### IV. SETTING ASIDE DEFAULT.

**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).

**And Court's Determination Will Not Be Disturbed, etc. —**

In accord with 1st paragraph in the main volume. See Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985).

**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).

**Where 30 days had not elapsed since the filing of amended complaint, judgment by default was not available;** the default judgment obtained was, therefore, void; and it was error as a matter of law for the court to refuse to set it aside. Hyder v. Dergance, 76 N.C. App. 317, 332 S.E.2d 713 (1985).

**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., 312 N.C. 749, 325 S.E.2d 223 (1985).

The denial of a Rule 12(b)(6) motion to dismiss does not prevent the court from allowing a subsequent motion for summary judgment. Dull v. Mutual of Omaha Ins. Co., — N.C. App. —, 354 S.E.2d 752 (1987); Burton v. NCNB Nat'l Bank, — N.C. App. —, 355 S.E.2d 800 (1987).

**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).

**When it is unclear from looking at a judgment whether a default judgment or a summary judgment was intended,** the wording of the body of the judgment itself controls, not the heading. East Carolina Oil Transp., Inc. v. Petroleum Fuel & Term. Co., 82 N.C. App. 746, 348 S.E.2d 165 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 745 (1987).

**A motion for summary judgment denied by one superior court judge may not be allowed by another** superior court judge on identical legal issues. Furr v. Charmichael, 82 N.C. App. 634, 347 S.E.2d 481 (1986).

**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, 71 N.C. App. 762, 323 S.E.2d 369 (1984); Johnson v. Brown, 71 N.C. App. 660, 323 S.E.2d 389 (1984); Pet, Inc. v. University of N.C., 72 N.C. App. 128, 323 S.E.2d 745 (1984); Doby v. Lowder, 72 N.C. App. 22, 324 S.E.2d 26 (1984); Dubose Steel, Inc. v. Branch Banking & Trust Co., 72 N.C. App. 598, 324 S.E.2d 859 (1985); Bicycle Transit Auth., Inc. v. Bell, 72 N.C. App. 577, 324 S.E.2d 863 (1985); Northwestern Bank v. Gladwell, 72 N.C. App. 489, 325 S.E.2d 37 (1985); Yamaha Int'l Corp. v. Parks, 72 N.C. App. 625, 325 S.E.2d 55 (1985); E-B Grain Co. v. Denton, 73 N.C. App. 14, 325 S.E.2d 522 (1985); Penn Compression Moulding, Inc. v. Mar-Bal, Inc., 73 N.C. App. 291, 326 S.E.2d 280 (1985); Abner Corp. v. City Roofing & Sheetmetal Co., 73 N.C. App. 470, 326 S.E.2d 632 (1985); Griffin v. Baucom, 74 N.C. App. 282, 328 S.E.2d 38 (1985); Spears v. Walker, 75 N.C. App. 169, 330 S.E.2d 38 (1985); Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985); Chaparral Supply v. Bell, 76 N.C. App. 119, 331 S.E.2d 735 (1985); Sartin v. Carter, 76 N.C. App. 278, 332 S.E.2d 521 (1985); Olive v. Great Am. Ins. Co., 76 N.C. App. 180, 333 S.E.2d 41 (1985); Morris v. Morris, 79 N.C. App. 386, 339 S.E.2d 424 (1986); Hartman v. Hartman, 80 N.C. App. 452, 343 S.E.2d 11 (1986); Coastal Concrete Co. v. Garner, 81 N.C. App. 523, 344 S.E.2d 376 (1986); Schiller v. Scott, 82 N.C. App. 90, 345 S.E.2d 444 (1986); Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986).

**Quoted** in Lewis v. City of Washington, 63 N.C. App. 552, 305 S.E.2d 752 (1983); Johnson v. Smith, Scott & Assocs., 77 N.C. App. 386, 335 S.E.2d 205 (1985); United Church of God, Inc. v. McLendon, 81 N.C. App. 495, 344 S.E.2d 373 (1986); Gunby v. Pilot Freight Carriers, Inc., 82 N.C. App. 427, 346 S.E.2d 188 (1986); Harris v. Maready, — N.C. App. —, 353 S.E.2d 656 (1987); Pyco Supply Co. v. American Centennial Ins. Co., — N.C. App. —, 354 S.E.2d 360 (1987).

**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); Vann v. North Carolina State Bar, 79 N.C. App. 166, 339 S.E.2d 95 (1986); Miller v. C.W. Myers Trading Post, Inc., — N.C. App. —, 355 S.E.2d 189 (1987).

**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); Bolton Corp. v. T.A. Loving Co., 77 N.C. App. 90, 334 S.E.2d 495 (1985); Woodell v. Pinehurst Surgical Clinic, 78 N.C. App. 230, 336 S.E.2d 716 (1985); Lee v. Paragon Group Contractors, 78 N.C. App. 334, 337 S.E.2d 132 (1985); Poore v. Swan Quarter Farms, Inc., 79 N.C. App. 286, 338 S.E.2d 817 (1986); Bruce v. Bruce, 79 N.C. App. 579, 339 S.E.2d 855 (1986); Barrino v. Radiator Specialty Co., 315 N.C. 500, 340 S.E.2d 295 (1986); Graham v. Mid-State Oil Co., 79 N.C. App. 716, 340 S.E.2d 521 (1986); Shaw v. Jones, 81 N.C. App. 486, 344 S.E.2d 321 (1986); Reavis v. Reavis, 82 N.C. App. 77, 345 S.E.2d 460 (1986); Queensboro Steel Corp. v. East Coast Mach. & Iron Works, Inc., 82 N.C. App. 182, 346 S.E.2d 248 (1986); Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986); Rose v. Currituck County Bd. of Educ., 83 N.C. App. 408, 350 S.E.2d 376 (1986); Lee v. Barksdale, 83 N.C. App. 368, 350 S.E.2d 508 (1986); Town of Hazelwood v. Town of Waynesville, 83 N.C. App. 670, 351 S.E.2d 558 (1987); Tyson v. L'eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987); Bryant v. Short, — N.C. App. —, 352 S.E.2d 245 (1987); McNeil v. Hartford Accident & Indem. Co., — N.C. App. —, 352 S.E.2d 915 (1987); Wagner v. R, J & S Assocs., — N.C. App. —, 353 S.E.2d 234 (1987); Hill v. Perkins, — N.C. App. —, 353 S.E.2d 686 (1987); Ipock ex rel. Hill v. Gilmore, — N.C. App. —, 354 S.E.2d 315 (1987); Knotville Volunteer Fire Dep't, Inc. v. Wilkes County, — N.C. App. —, 355 S.E.2d 139 (1987).

## 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); N.C. Coastal Motor Line v. Everette Truck Line, 77 N.C. App. 149, 334 S.E.2d 499 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986); Sink v. Andrews, 81 N.C. App. 594, 344 S.E.2d 831 (1986).

In accord with 2nd paragraph in the main volume. See Baum v. Golden, 83 N.C. App. 218, 349 S.E.2d 625 (1986), cert. denied, 319 N.C. 102, 353 S.E.2d 104 (1987).

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., 313 N.C. 150, 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).

Summary judgment is designed to eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim of a party is exposed. Hall v. Post, — N.C. App. —, 355 S.E.2d 819 (1987).

**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).

**And to Bring Litigation, etc. —**

In accord with 1st paragraph in original. Harris v. Walden, 314 N.C. 284, 333 S.E.2d 254 (1985); Campbell v. Board of Educ., 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

**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).

In accord with 3rd paragraph in the main volume. See Pierce Concrete, Inc. v. Cannon Realty & Constr. Co., 77 N.C. App. 411, 335 S.E.2d 30 (1985).

The purpose of summary judgment is 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. Pressman v. UNC, 78 N.C. App. 296, 337 S.E.2d 644 (1985), cert. granted, 315 N.C. 589, 341 S.E.2d 28 (1986).

**One purpose of motion for summary judgment is to avoid useless trials** when a debtor has chosen to defend rather than default. Land-of-Sky Regional Council v. County of Henderson, 78 N.C. App. 85, 336 S.E.2d 653 (1985).

The purpose of a motion for summary judgment is to avoid a useless trial. N.C. Coastal Motor Line v. Everette Truck Line, 77 N.C. App. 149, 334 S.E.2d 499 (1985), cert. denied, 315 N.C. 391 338 S.E.2d 880 (1986).

**It is not the purpose of the summary judgment, etc. —**

Summary judgment is not a device to resolve factual disputes; however, complex facts and legal issues do not preclude summary judgment. Land-of-Sky Regional Council v. County of Henderson, 78 N.C. App. 85, 336 S.E.2d 653 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

## 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. —**

In accord with original. See Laughter v. Southern Pump & Tank Co., 75 N.C. App. 185, 330 S.E.2d 51, cert. denied, 314 N.C. 666, 335 S.E.2d 495 (1985).

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).

**And Awarded Only Where the Truth Is Clear. —**

In accord with main volume. See Warren v. Rosso & Mastracco, Inc., 78 N.C. App. 163, 336 S.E.2d 699 (1985).

**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); Barnes v. Wilson Hdwe. Co., 77 N.C. App. 473, 336 S.E.2d 457 (1985).

**Generally Summary Judgment Inappropriate Where Subjective Feelings, etc. —**

Summary judgment is rarely proper when a state of mind such as intent or knowledge is at issue. Valdese Gen. Hosp. v. Burns, 79 N.C. App. 163, 339 S.E.2d 23 (1986).

Summary judgment is generally not appropriate where intent or other subjective feelings are at issue. The rule that intent should generally be a question of fact for the jury does not mean, however, that it should always be so.

Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986).

**And Whether Party Is Entitled to Judgment. —**

In accord with 1st paragraph in the main volume. See First Am. Fed. Sav. & Loan Ass'n v. Royall, 77 N.C. App. 131, 334 S.E.2d 792 (1985).

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); Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985); Surrette v. Duke Power Co., 78 N.C. App. 647, 338 S.E.2d 129 (1986).

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); Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985).

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); Surrette v. Duke Power Co., 78 N.C. App. 647, 338 S.E.2d 129 (1986).

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., 313 N.C. 488, 329 S.E.2d 350 (1985).

**A Question of Fact Which Is Immaterial Does Not Preclude, etc. —**

In accord with main volume. See Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986); Prince v. Mallard Lakes Ass'n, 82 N.C. App. 431, 346 S.E.2d 191, cert. denied, 318 N.C. 508, 349 S.E.2d 865 (1986); Dull v. Mutual of Omaha Ins. Co., — N.C. App. —, 354 S.E.2d 752 (1987).

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

In accord with 5th paragraph in original. See Carlton v. Carlton, 74 N.C. App. 690, 329 S.E.2d 682 (1985).

In accord with 7th paragraph in original. See Bicycle Transit Auth., Inc. v. Bell, 314 N.C. 219, 333 S.E.2d 299 (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).

Summary judgment is appropriate only where there are no genuine and material issues of fact to be resolved. Harris-Teeter Supermarkets, Inc. v. Hampton, 76 N.C. App. 649, 334 S.E.2d 81, cert. denied, 315 N.C. 183, 337 S.E.2d 857 (1985).

Summary judgment under this section should be granted when there is no genuine issue of material fact and only issues of law remain. Johnson v. Holbrook, 77 N.C. App. 485, 335 S.E.2d 53 (1985).

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

In accord with 1st paragraph in main volume. See Laughter v. Southern Pump & Tank Co., 75 N.C. App. 185, 330 S.E.2d 51, cert. denied, 314 N.C. 666, 335 S.E.2d 495 (1985); Schaffner v. Cumberland County Hosp. Sys., 77 N.C. App. 689, 336 S.E.2d 116 (1985); Valdese Gen. Hosp. v. Burns, 79 N.C. App. 163, 339 S.E.2d 23 (1986); Ward v. Turcotte, 79 N.C. App. 458, 339 S.E.2d 444 (1986); Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986).

In accord with 2nd paragraph in main volume. See Candid Camera Video World, Inc. v. Mathews, 76 N.C. App. 634, 334 S.E.2d 94 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 879 (1986).

In accord with 3rd paragraph in main volume. 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, 74 N.C. App. 532, 328 S.E.2d 837 (1985).

In accord with 4th paragraph in main volume. See Ruffin v. Contractors & Materials, 69 N.C. App. 174, 316 S.E.2d 353 (1984); Amoco Oil Co. v. Griffin, 78 N.C. App. 716, 338 S.E.2d 601, cert. denied, 316 N.C. 374, 342 S.E.2d 889 (1986).

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).

A motion for summary judgment should be allowed only when there exists no triable genuine issue of material fact and the movant's forecast of the evidence demonstrates that it is entitled to a judgment as a matter of law. Cashion v. Texas Gulf, Inc., 79 N.C. App. 632, 339 S.E.2d 797 (1986).

Summary judgment is appropriate only where the pleadings, affidavits and other evidentiary materials before the court disclose that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. Rolling Fashion Mart, Inc. v. Mainor, 80 N.C. App. 213, 341 S.E.2d 61 (1986).

A party moving for summary judgment is entitled to such judgment if he can show, through pleadings and affidavits, that there is no genuine issue of material fact requiring a trial and that he is entitled to judgment as a matter of law. Hagler v. Hagler, — N.C. —, 354 S.E.2d 228 (1987).

**This rule does not require that party move for summary judgment in order to be entitled to it;** however, the nonmovant must be entitled to the judgment as a matter of law. N.C. Coastal Motor Line v. Everette Truck Line, 77 N.C. App. 149, 334 S.E.2d 499 (1985), cert. denied, 315 N.C. 391, 338 S.E.2d 880 (1986).

**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, 74 N.C. App. 690, 329 S.E.2d 682 (1985); Warren v. Rosso & Mastracco, Inc., 78 N.C. App. 163, 336 S.E.2d 699 (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, 313 N.C. 338, 329 S.E.2d 355 (1985).

Where the pleadings or proof of the plaintiff disclose that no claim exists, summary judgment for defendant is proper. Colonial Bldg. Co. v. Justice, 83 N.C. App. 643, 351 S.E.2d 140 (1986).

**And Presence of Difficult Questions of Law, etc. —**

Summary judgment is appropriate where there is no genuine issue of material fact and the case presents only questions of law. This is true even if the questions of law are complex. VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986).

**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., 313 N.C. 488, 329 S.E.2d 350 (1985).

**When the statute of limitations is properly pleaded and the facts of the**

**case are not in dispute,** resolution of the question becomes a matter of law, and summary judgment may be appropriate. Marshburn v. Associated Indem. Corp., — N.C. App. —, 353 S.E.2d 123 (1987).

**When defendant establishes a complete defense, etc. —**

The court may grant summary judgment if the movant conclusively establishes every element of its claim or conclusively establishes a complete defense or legal bar to the nonmovant's claim. VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986).

A defending party is entitled to summary judgment if he can show that no claim for relief exists or that the claimant cannot overcome an affirmative defense to the claim. Rolling Fashion Mart, Inc. v. Mainor, 80 N.C. App. 213, 341 S.E.2d 61 (1986).

**A defending party may show as a matter of law, etc. —**

A defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. Little v. National Servs. Indus., Inc., 79 N.C. App. 688, 340 S.E.2d 510 (1986).

**Summary judgment may be granted in favor of a nonmoving party, etc. —**

In an appropriate case, summary judgment may be rendered against the moving party. Candid Camera Video World, Inc. v. Mathews, 76 N.C. App. 634, 334 S.E.2d 94 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 879 (1980).

**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, 74 N.C. App. 576, 329 S.E.2d 417 (1985); Valdese Gen. Hosp. v. Burns, 79 N.C. App. 163, 339 S.E.2d 23 (1986).

**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).

**Plaintiff's bare assertions in unverified complaint,** which were denied by defendant, held insufficient to support entry of summary judgment for plaintiff. Smith v. Rushing Constr. Co., — N.C. App. —, 353 S.E.2d 692 (1987).

### B. Particular Types of Actions, etc.

**Summary judgment is an appropriate procedure in a declaratory judgment action. —**

Summary judgment can be appropriate in an action for a declaratory judgment where there is no genuine issue of material fact and one of the parties is entitled to judgment as a matter of law. North Carolina Ass'n of ABC Bds. v. Hunt, 76 N.C. App. 290, 332 S.E.2d 693, cert. denied, 314 N.C. 667, 336 S.E.2d 400 (1985).

**Summary judgment is rarely appropriate in a negligence action. —**

In accord with main volume. See Barnes v. Wilson Hdwe. Co., 77 N.C. App. 773, 336 S.E.2d 457 (1985); Warren v. Rosso & Mastracco, Inc., 78 N.C. App. 163, 336 S.E.2d 699 (1985).

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).

**Or Where Contributory Negligence, etc. —**

In accord with the main volume. See Branks v. Kern, 83 N.C. App. 32, 348 S.E.2d 815 (1986), cert. granted, 319 N.C. 102, 353 S.E.2d 105 (1987).

**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).

Issues of negligence should ordinarily be resolved by a jury and are rarely appropriate for summary judgment. Schaffner v. Cumberland County Hosp. Sys., 77 N.C. App. 689, 336 S.E.2d 116 (1985), cert. denied, 316 N.C. 195, 341

S.E.2d 578, — N.C. —, 341 S.E.2d 579 (1986).

**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).

Ordinarily, summary judgment is not appropriate in negligence actions because the right of recovery usually depends on the application of the reasonable person standard of care. Only the jury, under instructions from the court, may apply that standard. Holley v. Burroughs Wellcome Co., 74 N.C. App. 736, 330 S.E.2d 228 (1985), aff'd, 318 N.C. 352, 348 S.E.2d 772 (1986).

Summary judgment is rarely appropriate in negligence cases, even when there is no dispute as to the facts, because the issue of whether a party acted in conformity with the reasonable person standard is ordinarily an issue to be determined by a jury. Surrette v. Duke Power Co., 78 N.C. App. 647, 338 S.E.2d 129 (1986).

**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, 313 N.C. 338, 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); O'Connor v. Corbett Lumber Corp., — N.C. App. —, 352 S.E.2d 267 (1987).

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 may be granted, in a negligence case where there is no question as to the credibility of witnesses and the evidence shows either (1) a lack of any negligence on the part of the defendant, or (2) that plaintiff was contributorily negligent as a matter of law. Surrette v. Duke Power Co., 78 N.C. App. 647, 338 S.E.2d 129 (1986).

As a general rule, summary judgment is not appropriate where issues of negligence are involved. However, if the evidentiary forecasts establish either a lack of any conduct on the part of the movant which could constitute negligence, or the existence, as a matter of law, of a complete defense to the claim, summary judgment may be properly allowed. Sink v. Andrews, 81 N.C. App. 594, 344 S.E.2d 831 (1986).

Summary judgment is appropriate in a negligence case if it is established that the alleged negligence of a defendant was not the proximate cause of a plain-

tiff's injury. Street v. Moffitt, 84 N.C. App. 138, 351 S.E.2d 821 (1987).

**Expiration of Statute of Repose.** — Whether a statute of repose has expired is strictly a legal issue, and where the pleadings and proof show without contradiction that the statute has expired, then summary judgment may be granted. Cellu Prods. Co. v. G.T.E. Prods. Corp., 81 N.C. App. 474, 344 S.E.2d 566 (1986).

**In claim for relief based on fraud, summary judgment for defendant is proper where** the forecast of evidence shows that even one of the essential elements of fraud is missing. Uzzell v. Integon Life Ins. Corp., 78 N.C. App. 458, 337 S.E.2d 639 (1985), cert. denied, 317 N.C. 341, 346 S.E.2d 149 (1986).

**The inference created by res ipsa loquitur will defeat a motion for summary judgment** even though the defendant presents evidence tending to establish absence of negligence. The burden of proving negligence, however, remains with the plaintiff; accordingly, the finder of fact may reject the permissible inference of negligence even though the defendant presents no evidence. Schaffner v. Cumberland County Hosp. Sys., 77 N.C. App. 689, 336 S.E.2d 116 (1985), cert. denied, 316 N.C. 195, 341 S.E.2d 578, — N.C. —, 341 S.E.2d 579 (1986).

**For discussion of application of res ipsa loquitur in medical malpractice actions,** see Schaffner v. Cumberland County Hosp. Sys., 77 N.C. App. 689, 336 S.E.2d 116 (1985), cert. denied, 316 N.C. 195, 341 S.E.2d 578, — N.C. —, 341 S.E.2d 579 (1986).

**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), 469 U.S. 816, 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, 313 N.C. 338, 329 S.E.2d 355 (1985).

**Summary judgment properly entered for defendants.** — See Smith v. Association for Retarded Citizens for Hous. Dev. Servs., Inc., 75 N.C. App. 435, 331 S.E.2d 324 (1985).

**Action to Quiet Title.** — Where a city became the record owner of property pursuant to a tax foreclosure sale, and where purported adverse possessors brought their action to quiet title beyond the one year statute of limitation contained in § 105-377, there were no genuine issues of material fact and the city was entitled to summary judgment. Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

**In a private nuisance action against adjacent landowners,** one of the defendants presented an affidavit that it was not and had never been an owner of the land in question. By failing to come forward with evidence, by affidavit or otherwise, which would have tended to show an issue of triable fact, the plaintiff's claim was subject to summary judgment. Bjornsson v. Mize, 75 N.C. App. 289, 330 S.E.2d 520, cert. denied, 314 N.C. 537, 335 S.E.2d 13 (1985).

**Controlling Statutes of Limitation and Repose.** — Although ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending, where the information sought by plaintiff was not material to the pertinent dates under the statutes of limitation and repose which controlled the disposition of the case, plaintiff suffered no prejudice because the court granted defendant's summary judgment motion, based on such statutes, prior to the completion of discovery. Cellu Prods. Co. v. G.T.E. Prods. Corp., 81 N.C. App. 474, 344 S.E.2d 566 (1986).

### 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, 74 N.C. App. 576, 329 S.E.2d 417 (1985).

**Use of Road Where Dedication in Issue.** — Where the plaintiff brought an action against her neighbor to enjoin his use of a road which ran against the plaintiff's property to the defendant's property, the material issue of whether the road dedication had ever been accepted or rejected by an appropriate authority precluded summary judgment as a matter of law. Cavin v. Ostwalt, 76 N.C. App. 309, 332 S.E.2d 509 (1985).

**Separation Agreement Did Not Bar Divorce Action Where Issue of Duress Raised.** — Since the plaintiff's affidavit, averring duress or fear, raised a genuine issue of material fact as to the validity of a separation agreement asserted by the defendant in bar of the action for absolute divorce and an equitable distribution of marital property, the court improvidently granted the defendant's motion for summary judgment. Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985).

**Conflict in forecasts of evidence as to causation.** — In a private nuisance action, where there was a conflict in the forecasts of evidence as to causation offered by the parties' affidavits, the question of causation was a question of fact and the court erred in granting summary judgment. Bjornsson v. Mize, 75 N.C. App. 289, 330 S.E.2d 520, cert. denied, 314 N.C. 537, 335 S.E.2d 13 (1985).

**Negligence of Veterinarian.** — Where the forecast of evidence before the trial court was sufficient to allow a trier of fact to reasonably find that plaintiff was a business invitee of defendant veterinarian; that defendant owed plaintiff a duty to exercise reasonable care to restrain plaintiff's cat during operation and to adequately warn plaintiff of the risk of remaining in close proximity to the cat during the operation; that defendant breached that duty in both respects; that plaintiff was injured and damaged; and that defendant's breach was the proximate cause of plaintiff's injury and damages; and where reasonable men could differ as to whether plaintiff's failure to keep out of harm's way constituted contributory negligence, summary judgment in defendant's favor was improper. Branks v. Kern, 83 N.C. App. 32, 348 S.E.2d 815 (1986), cert. granted, 319 N.C. 102, 353 S.E.2d 105 (1987).

## 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, 74 N.C. App. 690, 329 S.E.2d 682 (1985); Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985); Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738 (1985); Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985); Land-of-Sky Regional Council v. County of Henderson, 78 N.C. App. 85, 336 S.E.2d 653 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986); Hatfield v. Jefferson Std. Life Ins. Co., — N.C. App. —, 355 S.E.2d 199 (1987); Hall v. Post, — N.C. App. —, 355 S.E.2d 819 (1987).

In accord with 2nd paragraph in original. See Dixie Chem. Corp. v. Edwards, 68 N.C. App. 714, 315 S.E.2d 747 (1984); Campbell v. Board of Educ., 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986); Uzzell v. Integon Life Ins. Corp., 78 N.C. App. 458, 337 S.E.2d 639 (1985),

cert. denied, 317 N.C. 341, 346 S.E.2d 149 (1986).

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., 313 N.C. 488, 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, 74 N.C. App. 377, 329 S.E.2d 407 (1985); Almond Grading Co. v. Shaver, 74 N.C. App. 576, 329 S.E.2d 417 (1985).

A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. Bicycle Transit Auth., Inc. v. Bell, 314 N.C. 219, 333 S.E.2d 299 (1985).

The party moving for summary judgment has the burden of showing the lack of any genuine issue of material fact. If the movant is also the party bringing the action, he must establish his claim beyond any genuine dispute with respect to any material fact. Lambe-Young, Inc. v. Austin, 75 N.C. App. 569, 331 S.E.2d 293 (1985).

A party moving for summary judgment must establish that there is no genuine issue of material fact or that it has a complete defense as a matter of law. Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985), cert. denied, 315 N.C. 597, 341 S.E.2d 39 (1986).

As the movants for summary judgment, plaintiffs had the burden of clearly establishing by the record presented to the court that there was no triable issue of fact in regard to defendants' counterclaim. Rose v. Lang, — N.C. App. —, 355 S.E.2d 795 (1987).

**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); Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985); Bjornsson v. Mize, 75 N.C. App. 289, 330 S.E.2d 520, cert. denied, 314 N.C. 537, 335 S.E.2d 13 (1985); Branch Banking & Trust Co. v. Kenyon Inv. Corp., 76 N.C. App. 1, 332 S.E.2d 186, cert. granted, 314 N.C. 662, 335 S.E.2d 902 (1985); Pardue v. Northwestern Bank, 77 N.C. App. 834, 336 S.E.2d 456 (1985); Surrette v. Duke Power Co., 78 N.C. App. 677, 338 S.E.2d 129 (1986).

**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, 74 N.C. App. 719, 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); Branks v. Kern, 83 N.C. App. 32, 348 S.E.2d 815 (1986), cert. granted, 319 N.C. 102, 353 S.E.2d 105 (1987).

**Or to Surmount an Affirmative Defense. —**

In accord with 1st paragraph in original. See Town of West Jefferson v. Edwards, 74 N.C. App. 377, 329 S.E.2d 407 (1985).

In accord with 2nd paragraph in original. See Sanyo Elec., Inc. v. Albright Distrib. Co., 76 N.C. App. 115, 331 S.E.2d 738, cert. denied, 314 N.C. 668, 335 S.E.2d 496 (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).

The mere failure of the nonmoving party to respond with opposing affidavits or depositions does not automatically mean that summary judgment is appropriate, and the moving party must still succeed on the strength of its evidence. Cellu Prods. Co. v. G.T.E. Prods. Corp., 81 N.C. App. 474, 344 S.E.2d 566 (1986).

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

In accord with 1st paragraph in original. See Almond Grading Co. v. Shaver, 74 N.C. App. 576, 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).

**Nonmovant does not have burden, etc. —**

The burden rests on the movant to make a conclusive showing; until then, the non-movant has no burden to produce evidence. VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

**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); Little v. National Servs. Indus., Inc., — N.C. App. —, 340 S.E.2d 510 (1986).

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).

If the movant's burden is carried, the burden is on the opposing party to show that there is a question of material fact that can only be resolved by proceeding to trial. Branch Banking & Trust Co. v.

Kenyon Inv. Corp., 76 N.C. App. 1, 332 S.E.2d 186, cert. denied, 314 N.C. 662, 335 S.E.2d 902 (1985).

The burden is upon the party moving for summary judgment to show that there is no genuine issue of law. If the movant meets this burden, the burden then shifts to the nonmovant to set forth specific facts showing that there is a genuine issue of material fact for trial. BM & W of Fayetteville, Inc. v. Barnes, 75 N.C. App. 600, 331 S.E.2d 308 (1985).

Once the moving party has submitted materials in support of the motion the burden shifts to the opposing party to produce evidence establishing that the motion should not be granted. Campbell v. Board of Educ., 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

**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., 313 N.C. 488, 329 S.E.2d 350 (1985).

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. Campbell v. Board of Educ., 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

Once plaintiff has made and supported its motion for summary judgment, under section (e) of this rule, the burden is then on the defendant to introduce evidence in opposition to the motion setting forth specific facts showing that there is a genuine issue for trial. The defendant then must come forward with a forecast of his own evidence. Amoco Oil Co. v. Griffin, 78 N.C. App. 716, 338 S.E.2d 601, cert. denied, 316 N.C. 374, 342 S.E.2d 889 (1986).

**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).

The moving party has the burden of establishing a lack of triable issues of fact but the nonmoving party may not rest upon mere allegations of his pleadings. Cashion v. Texas Gulf, Inc., 79 N.C. App. 632, 339 S.E.2d 797 (1986).

The moving party, through his forecast of the evidence, has the burden of establishing a lack of triable issues of fact, but the nonmoving party may not rest upon the mere allegations of his pleadings. Johnson v. Builder's Transp., Inc., 79 N.C. App. 721, 340 S.E.2d 515 (1986).

**But Must Demonstrate Existence of a Genuine Issue. —**

In accord with 1st paragraph in the

main volume. See Pierce Concrete, Inc. v. Cannon Realty & Constr. Co., 75 N.C. App. 411, 335 S.E.2d 30 (1985).

**Or Provide an Excuse for Not So Showing. —**

In accord with 2nd paragraph in original. See Town of West Jefferson v. Edwards, 74 N.C. App. 377, 329 S.E.2d 407 (1985).

**General Denial by Nonmovant, etc. —**

An answer filed by defendant as nonmovant which only generally denies the allegations of the complaint fails to raise a genuine issue of fact. An affidavit which merely reaffirms the allegations of the defendant's answer is also insufficient. Amoco Oil Co. v. Griffin, 78 N.C. App. 716, 338 S.E.2d 601, cert. denied, 316 N.C. 374, 342 S.E.2d 889 (1986).

**But party opposing motion, etc. —**

In accord with original. See Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985).

**And Nonmovant Is Not Required to Make Out Prima Facie Case, etc. —**

In a hearing on a motion for summary judgment the nonmovant, unlike a plaintiff at trial, does not have to automatically make out a prima facie case, but only has to refute any showing made that his case is fatally deficient. Riddle v. Nelson, — N.C. App. —, 353 S.E.2d 866 (1987).

**Nor to Present Evidence as to All Elements of Claim.** — As nonmovants at a hearing on a motion for summary judgment, defendants did not have to automatically present evidence as to all the elements of their counterclaim as they would at trial; they only had to refute any showing by plaintiffs that the claim was fatally deficient. Rose v. Lang, — N.C. App. —, 355 S.E.2d 795 (1987).

**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).

The court is not authorized to decide an issue of fact but to determine if such an issue exists. Campbell v. Board of Educ., 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

In ruling on a motion for summary judgment, the court does not resolve issues of fact, and must deny the motion if there is any genuine issue of material fact. Warren v. Rosso & Mastracco, Inc., 78 N.C. App. 163, 336 S.E.2d 699 (1985).

**Nor to Make Findings, etc. —**

Findings of fact in a summary judgment order are ill advised because they indicate that a question of fact was presented and resolved by the trial court. Amoco Oil Co. v. Griffin, 78 N.C. App. 716, 338 S.E.2d 601, cert. denied, 316 N.C. 374, 342 S.E.2d 889 (1986).

A trial judge is not required to make findings of fact for summary judgment. Amoco Oil Co. v. Griffin, 78 N.C. App. 716, 338 S.E.2d 601, cert. denied, 316 N.C. 374, 342 S.E.2d 889 (1986).

A trial judge is not required to make findings of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal. White v. Town of Emerald Isle, 82 N.C. App. 392, 346 S.E.2d 176, cert. denied, 318 N.C. 511, 349 S.E.2d 874 (1986).

**But to Determine Whether Genuine, etc. —**

In accord with 1st paragraph in original. See Narron v. Hardee's Food Systems, 75 N.C. App. 579, 331 S.E.2d 205, cert. denied, 314 N.C. 542, 335 S.E.2d 316 (1985); Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), cert. granted as to additional issues, 315 N.C. 390, 338 S.E.2d 879 (1986); Barnes v. Wilson Hdwe. Co., 77 N.C. App. 773, 336 S.E.2d 457 (1985); Johnson v. Builder's Transp., Inc., 79 N.C. App. 721, 340 S.E.2d 515 (1986).

In accord with last paragraph in main volume. See Land-of-Sky Regional Council v. County of Henderson, 78 N.C. App. 85, 336 S.E.2d 653 (1985), cert. denied, 316 N.C. 553, 344 S.E.2d 7 (1986).

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).

The judge's role is to determine from the forecast of the evidence if there is a material issue of fact that is triable. Lawson v. Lawson, 84 N.C. App. 51, 351 S.E.2d 794 (1987).

**Rule 52(a)(2) does not apply, etc. —**

In accord with the main volume. See White v. Town of Emerald Isle, 82 N.C. App. 392, 346 S.E.2d 176, cert. denied, 318 N.C. 511, 349 S.E.2d 874 (1986).

## 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).

**Judge May Determine Credibility of Deposition Witness.** — Witness credibility is ordinarily a jury question. On a motion for summary judgment, however, the judge may determine that a deposition witness is credible as a matter of law where only latent doubts exist as to the witness' credibility and the opposing party fails to go beyond his pleadings in opposing the motion. Holley v. Burroughs Wellcome Co., 74 N.C. App. 736, 330 S.E.2d 228 (1985), aff'd, 318 N.C. 352, 348 S.E.2d 772 (1986).

**Mere Interest Does Not Render Deposition Testimony Inherently Suspect.** — In North Carolina, the mere fact that a witness has an interest in a case is not sufficient by itself to render his deposition testimony inherently suspect for purposes of summary judgment. In order for the testimony of an interested witness to be inherently suspect, it must concern facts peculiarly within the knowledge of the witness. Holley v. Burroughs Wellcome Co., 74 N.C. App. 736, 330 S.E.2d 228 (1985), aff'd, 318 N.C. 352, 348 S.E.2d 772 (1986).

**Plaintiffs Not Required to Go Beyond Pleadings Where Interested Party's Testimony Inherently Suspect.** — In a civil action for injuries allegedly resulting from the negligent marketing and promotion of an anesthetic, the physician responsible for anesthetizing the injured party was clearly an interested party and more than a latent doubt was raised as to his credibility, even though a malpractice action against the doctor was settled prior to trial. Accordingly, his deposition testimony was inherently suspect and the plaintiffs were not required to go beyond their pleadings in order to defeat the summary judgment motion. Holley v. Burroughs Wellcome Co., 74 N.C. App. 736, 330 S.E.2d 228 (1985), aff'd, 318 N.C. 352, 348 S.E.2d 772 (1986).

**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 pre-

sented 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).

### B. Form of Affidavits and Other Evidence.

**Affidavit merely restating allegations of the complaint** consists of conclusory allegations, unsupported by facts. It thus does not suffice to defeat a motion for summary judgment. Campbell v. Board of Educ., 76 N.C. App. 495, 333 S.E.2d 507 (1985), cert. denied, 315 N.C. 390, 338 S.E.2d 878 (1986).

**The trial court has discretionary authority to exclude confusing materials which purport to supplement affidavits** supporting summary judgment. VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

## 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); Watts v. Cumberland County Hosp. Sys., 75 N.C. App. 1, 330 S.E.2d 242 (1985), cert. denied as to additional issues, 314 N.C. 548, 338 S.E.2d 27 (1986); Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985); Surrette v. Duke Power Co., 78 N.C. App. 647, 338 S.E.2d 129 (1986); VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188 (1986); Hinson v. Hinson, 80 N.C. App. 561, 343 S.E.2d 266 (1986); Brisson v. Williams, 82 N.C. App. 53, 345 S.E.2d 432, cert. denied, 318 N.C. 691, 350 S.E.2d 857 (1986).

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).

**And Draw All Reasonable Inferences in Favor of Nonmovant. —**

In accord with 3rd paragraph in the main volume. See Lessard v. Lessard, 77 N.C. App. 97, 334 S.E.2d 475 (1985), cert. granted as to additional issues, 315 N.C. 390, 338 S.E.2d 878 (1986), aff'd, 316 N.C. 546, 342 S.E.2d 522 (1986); Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985), cert. denied, 315 N.C. 597, 341 S.E.2d 39 (1986).

**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., 313 N.C. 488, 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, 74 N.C. App. 690, 329 S.E.2d 682 (1985); Cox v. Cox, 75 N.C. App. 354, 330 S.E.2d 506 (1985); Overstreet v. City of Raleigh, 75 N.C. App. 351, 330 S.E.2d 643 (1985); Walker v. Westinghouse Elec. Corp., 77 N.C. App. 253, 335 S.E.2d 79 (1985), cert. denied, 315 N.C. 597, 341 S.E.2d 39 (1986).

**No Appeal of Right from Denial of Motion.** — The order entered by the trial court denying the defendants' motions to dismiss and for summary judgment was not a final determination of the defendants' rights, even though the trial court stated that "there is no just reason to delay the appeal," and did not affect the defendants' substantial rights. The appeal of the order, therefore, could not lie as of right. Fraser v. Di Santi, 75 N.C. App. 654, 331 S.E.2d 217, cert. de-

nied, 315 N.C. 183, 337 S.E.2d 856 (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).

### X. SERVICE AND FILING OF AFFIDAVITS.

**Admission of Supplemental Affidavits.** — Although affidavits in support of a motion for summary judgment are required by Rule 6(d) and Section (c) of this rule to be filed and served with the motion, section (e) of this rule grants to the trial judge wide discretion to permit further affidavits to supplement those which have already been served. Rolling Fashion Mart, Inc. v. Mainor, 80 N.C. App. 213, 341 S.E.2d 61 (1986).

Affidavit which did no more than explain transactions referred to in earlier affidavits filed by the parties and provide copies of the documents involved in those transactions was clearly supplemental, and it was not an abuse of discretion for the court to admit this affidavit when filed on the day of the hearing. Rolling Fashion Mart, Inc. v. Mainor, 80 N.C. App. 213, 341 S.E.2d 61 (1986).

### XI. PROCEDURES WHEN AFFIDAVITS UNAVAILABLE.

**Sufficient time for the completion of discovery is one major goal of section (f).** Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271, cert. denied, 314 N.C. 116, 332 S.E.2d 481 (1985).

**And Section (f) Should Be Applied with Liberality.** — 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, 73 N.C. App. 182, 326 S.E.2d 271, cert. denied, 314 N.C. 116, 332 S.E.2d 481 (1985).

**Discretion of Court.** — The court may grant or deny a continuance pursuant to subdivision (f) in the exercise of its discretion. Glynn v. Stoneville Furn. Co., — N.C. App. —, 354 S.E.2d 552 (1987).

**The court did not abuse its discretion in denying plaintiff's motion,** where plaintiff's affidavit accompanying his motion did not detail any facts, as required by section (f), necessary to justify his opposition to defendant's motion for summary judgment which plaintiff could not present by affidavit. Glynn v. Stoneville Furn. Co., — N.C. App. —, 354 S.E.2d 552 (1987).

**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, 72 N.C. App. 306, 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, 73 N.C. App. 76, 325 S.E.2d 661, cert. denied, 313 N.C. 597, 330 S.E.2d 606 (1985).

### XIII. APPEALS.

**Grant of Summary Judgment Is Fully Reviewable.** — Since the trial court, in entering summary judgment, rules only on questions of law, a summary judgment is fully reviewable on appeal. VEPCO v. Tillett, 80 N.C. App. 383, 343 S.E.2d 188, cert. denied, 317 N.C. 715, 347 S.E.2d 457 (1986).

**Questions on Appeal, etc. —**

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

Although the enumeration of findings of fact and conclusions of law is technically unnecessary and generally inadvisable in summary judgment cases, summary judgment, by definition, is always based on two underlying questions

of law: (1) Whether there is a genuine issue of material fact, and (2) whether the moving party is entitled to judgment. On appeal, review of summary judgment is necessarily limited to whether the trial court's conclusions as to whether these questions of law were correct ones. Thus, notice of appeal adequately apprises the opposing party and the appellate court of the limited issues to be reviewed. Ellis v. Williams, — N.C. —, 355 S.E.2d 479 (1987).

**Exceptions and Assignments of Error.** — Rule 10(a) of the Rules of Appellate Procedure does not require a party against whom summary judgment has been entered to place exceptions and assignments of error into the record on appeal. Ellis v. Williams, — N.C. —, 355 S.E.2d 479 (1987).

**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., 312 N.C. 749, 325 S.E.2d 223 (1985).

The denial of a motion for summary judgment is not reviewable on appeal from final judgment. Concrete Serv. Corp. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

**The standard for reviewing a summary judgment motion is** whether the pleadings, depositions, answers to interrogatories, and admissions 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. Pressman v. UNC, 78 N.C. App. 296, 337 S.E.2d 644 (1985), cert. granted, 315 N.C. 589, 341 S.E.2d 28 (1986).

**Partial Summary Judgment on Issue of Liability, etc.** —

In accord with the main volume. See Coleman v. Interstate Cas. Ins. Co., — N.C. App. —, 352 S.E.2d 249 (1987).

Partial summary judgment orders, which established the negligence of defendant-administrator's decedent and the absence of contributory negligence or assumption of risk on the part of plaintiff, had the effect of fixing liability and retaining the cause for determination solely on the issue of damages, and were not immediately appealable, despite the trial court's recital that this was a final judgment and that there was no just reason for delay. Schuch v. Hoke, 82 N.C. App. 445, 346 S.E.2d 313 (1986).

## 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

**The purpose of requirements for notations required by this rule is to** provide a basis for making the time of entry of judgment easily identifiable and to give fair notice to all the parties of the entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

**Objectives of Rule.** —

In accord with 1st paragraph in original. See John T. Council, Inc. v. Balfour Prods. Group, Inc., 74 N.C. App. 668, 330 S.E.2d 6, cert. denied, 314 N.C. 538, 335 S.E.2d 316 (1985).

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).

**Entry of judgment in open court by another district court judge without notice to the parties** that the judgment was entered was error, but as the notice of appeal was timely filed, there was no prejudice. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

**Order Dismissing Receiver Not Entered When Mere Instruction to Prepare Order Given.** — An order dismissing a receiver from his duties was entered and notice given when entry of the order was given to the clerk, the order filed, and notice of its filing mailed to all parties, and not when, at an earlier hearing, the court "merely instructed" the receiver to prepare an appropriate order. John T. Council, Inc. v. Balfour Prods. Group, Inc., 74 N.C. App. 668, 330 S.E.2d 6, cert. denied, 314 N.C. 538, 335 S.E.2d 316 (1985).

**Authority to Make Findings of Fact and Conclusions of Law.** — Pursuant to the provisions of this rule, after "entry" of judgment in open court, a trial court retains the authority to approve the judgment and direct its prompt preparation and filing. Such authority necessarily includes making appropriate findings of fact and entering appropriate conclusions of law, and the giving of notice of appeal in open court after "entry" of judgment does not divest the trial court of such authority. Hightower v. Hightower, — N.C. App. —, 354 S.E.2d 743 (1987).

**Withdrawal of Rule 59 motion did not entitle defendants to ten days from their withdrawal to file notice of appeal** from judgment; to hold otherwise would thwart the tolling provision of Rule 3(c), N.C. Rules App. P. and circumvent this rule, i.e., to give all interested parties a definite fixed time of a judicial determination they can point to as the time of entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

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

**Quoted** in Vick v. Vick, 80 N.C. App. 697, 343 S.E.2d 245 (1986).

**Stated** in L. Harvey & Son Co. v. Shivar, 83 N.C. App. 673, 351 S.E.2d 335 (1987).

**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); Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

# 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, 73 N.C. App. 521, 327 S.E.2d 22, cert. denied, 313 N.C. 600, 332 S.E.2d 179 (1985).

**Judge's Traditional Authority, etc.** —
In accord with original. See Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985).

**A motion for a new trial is no substitute for timely motions for directed verdict and judgment n.o.v.** In re Will of King, 80 N.C. App. 471, 342 S.E.2d 394, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

**Motion Directed to Court's Discretion While Rule 50 Motion Presents Question of Law.** — A motion to set a verdict aside and for a new trial pursuant to this rule is directed to the discretion of the trial judge, while a motion for judgment notwithstanding the verdict pursuant to Rule 50 is to be decided as a question of law. Penley v. Penley, 314 N.C. 1, 332 S.E.2d 51 (1985).

**Discretion of Court as to Motion Claiming Excessive or Inadequate Damages.** — A motion for a new trial on the grounds that damages awarded are inadequate or excessive and which appear to have been given under the influence of passion or prejudice is directed to the sound discretion of the trial court. The trial court's decision will not be disturbed on appeal in the absence of a showing of abuse of discretion. Haas v. Kelso, 76 N.C. App. 77, 331 S.E.2d 759 (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); Watts v. Schult Homes Corp., 75 N.C. App. 110, 330 S.E.2d 41, cert. denied, 314 N.C. 548, 335 S.E.2d 320 (1985); State v. Hanes, 77 N.C. App. 222, 334 S.E.2d 444 (1985); Yeargin v. Spurr, 78 N.C. App. 243, 336 S.E.2d 680 (1985).

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, 74 N.C. App. 133, 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, 73 N.C. App. 521, 327 S.E.2d 22, cert. denied, 313 N.C. 600, 332 S.E.2d 179 (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, 73 N.C. App. 521, 327 S.E.2d 22, cert. denied, 313 N.C. 600, 332 S.E.2d 179 (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., 313 N.C. 362, 329 S.E.2d 333 (1985).

A trial court's order under this rule is not to be disturbed absent an affirmative showing of manifest abuse of discretion by the judge or a substantial miscarriage of justice. Branch Banking & Trust Co. v. Home Fed. Sav. & Loan Ass'n, — N.C. App. —, 354 S.E.2d 541 (1987).

**Additional Findings Held Essential to Provide Basis for Review.** — Given the defendant's motion specifically asking for findings of fact and conclusions of law on the decision of the plaintiff's motion for a new trial, the insufficiency in the findings of fact in the order granting the motion, and the conflicting evidence in the record, additional findings of fact were essential to provide the appellate court with a basis for a meaningful review. Andrews v.

Peters, 75 N.C. App. 252, 330 S.E.2d 638, cert. denied, 315 N.C. 182, 337 S.E.2d 65 (1985), aff'd, 318 N.C. 133, 347 S.E.2d 409 (1986).

**Vacating of Dismissal for Failure to State Claim Not Binding on Later Appeal.** — The appellate court's prior decision, in which it "vacated" an order dismissing the plaintiff's complaint for failure to state a claim, was not binding on the court on a later appeal of a judgment notwithstanding the verdict. While the appellate court, in the first appeal, held that the complaint disclosed no insurmountable bar to recover under at least one of the claims for relief, its inquiry in the second appeal was a very different one: Was the evidence introduced at trial, viewed in the light most favorable to the plaintiff, insufficient as a matter of law to support the jury's verdict? Pearce v. American Defender Life Ins. Co., 74 N.C. App. 620, 330 S.E.2d 9, cert. granted, 314 N.C. 542, 335 S.E.2d 20 (1985), aff'd in part and rev'd in part, 316 N.C. 461, 343 S.E.2d 174 (1986).

**Scope of Review of Discretionary Ruling.** —

In accord with 1st paragraph in original. See Pearce v. Fletcher, 74 N.C. App. 543, 328 S.E.2d 889 (1985); Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985); Yeargin v. Spurr, 78 N.C. App. 243, 336 S.E.2d 680 (1985).

In accord with the 2nd paragraph in the main volume. See Watkins v. Watkins, 83 N.C. App. 587, 351 S.E.2d 331 (1986).

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, 74 N.C. App. 543, 328 S.E.2d 889 (1985).

An appellate court's review of a trial judge's discretionary ruling denying a motion to set aside a verdict and order a new trial is limited to a determination of whether the record clearly demonstrates a manifest abuse of discretion by the trial judge. Pittman v. Nationwide Mut. Fire Ins. Co., 79 N.C. App. 431, 339 S.E.2d 441, cert. denied, 316 N.C. 733, 345 S.E.2d 391 (1986).

Since under this rule motions are addressed to the sound discretion of the trial court, the only question before the court on appeal is whether the trial court abused its discretion in denying the motion. In re Will of King, 80 N.C. App. 471, 342 S.E.2d 394, cert. denied, 317 N.C. 704, 347 S.E.2d 43 (1986).

**When Discretionary Order May Be Reversed.** —

In accord with 1st paragraph in original. See Pearce v. Fletcher, 74 N.C. App. 543, 328 S.E.2d 889 (1985).

In accord with 2nd paragraph in original. See Pearce v. Fletcher, 74 N.C. App. 543, 328 S.E.2d 889 (1985); Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 329 S.E.2d 333 (1985).

A discretionary ruling granting or denying a new trial is reversed only where an abuse of discretion is clearly shown resulting in a substantial miscarriage of justice. Travis v. Knob Creek, Inc., — N.C. App. —, 353 S.E.2d 229 (1987).

**Both a motion and an order for new trial filed under subsection (a)(8) of this rule have two basic requirements:** First, the errors to which the trial judge refers must be specifically stated; second, the moving party must have objected to the error which is assigned as the basis for the new trial. Barnett v. Security Ins. Co., — N.C. App. —, 352 S.E.2d 855 (1987).

**The courts of this state have no authority to grant remittiturs without consent** of the prevailing party. Pittman v. Nationwide Mut. Fire Ins. Co., 79 N.C. App. 431, 339 S.E.2d 441, cert. denied, 316 N.C. 733, 345 S.E.2d 391 (1986).

**A discretionary new trial order, as opposed to order granting new trial as matter of law, is not reviewable** on appeal in the absence of manifest abuse. Edge v. Metropolitan Life Ins. Co., 78 N.C. App. 624, 337 S.E.2d 672 (1985).

**Withdrawal of Rule 59 motion did not entitle defendants to ten days from their withdrawal to file notice of appeal** from judgment; to hold otherwise would thwart the tolling provision of Rule 3(c), N.C. Rules App. P. and circumvent Rule 58, N.C. Rules Civ. P., i.e., to give all interested parties a definite fixed time of a judicial determination they can point to as the time of entry of judgment. Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

**The law does not require that trial judge specify his reasons for granting discretionary new trial** in the absence of a specific request. Edge v. Metropolitan Life Ins. Co., 78 N.C. App. 624, 337 S.E.2d 672 (1985).

**Section (d), requiring statement of reasons, applies only to cases in which trial court orders new trial on its own motion.** Edge v. Metropolitan Life Ins. Co., 78 N.C. App. 624, 337 S.E.2d 672 (1985).

**New Trial Where Instructions Did Not Reflect Change in Law Only Hours Before.** — Although plaintiffs did not object to jury instructions, it was not error for the trial court to grant a new trial on the grounds that the jury had been erroneously charged where both court and counsel were understandably unaware that the law had changed only hours before the jury was charged. Any objections lodged by the plaintiffs would have been unavailing where the trial judge instructed the jury in accordance with what to him was still established law. Hunnicutt v. Griffin, 76 N.C. App. 259, 332 S.E.2d 525, cert. denied, 314 N.C. 665, 336 S.E.2d 400 (1985).

**Order denying a motion for a new trial was reversed** because it was based upon an error of law, to wit, that the evidence raised an issue of fact as to contributory negligence. The evidence was undisputed and susceptible of only one inference, i.e., no contributory negligence, and the question should have been withdrawn from the jury. Watts v. Schult Homes Corp., 75 N.C. App. 110, 330 S.E.2d 41, cert. denied, 314 N.C. 548, 335 S.E.2d 320 (1985).

**New Trial on Basis of Juror Misconduct.** — Prior to July 1, 1984, the effective date of the Rules of Evidence, a juror's testimony could not be received even to show that extraneous prejudicial information was improperly brought to the jury's attention. While such evidence could be received in a criminal case because of the constitutional right of confrontation, no such exception to the general anti-impeachment rule applied in civil cases. Therefore, it was error for judge to grant a conditional new trial on the basis of juror misconduct proved solely by the juror's affidavit and testimony. Smith v. Price, 315 N.C. 523, 340 S.E.2d 408 (1986).

**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).

**When the trial court fails to comply with Rule 50 and this rule in ordering a new trial,** the general course is to reverse and remand for reinstatement of the verdict. Barnett v. Security Ins. Co., — N.C. App. —, 352 S.E.2d 855 (1987).

**Findings on Setting Aside Verdict on Damages.** — Findings, when requested, should be made in support of the ultimate conclusion that the damages appear to have been given under the influence of passion or prejudice in order to facilitate meaningful appellate review of an order setting aside a verdict on damages. Andrews v. Peters, 318 N.C. 133, 347 S.E.2d 409 (1986).

**Failure of Court to Specify Errors Relied On In Granting Motion.** — Where the trial court allowed defendants' motion for a new trial "for errors committed by the court during the course of the trial," but the court's order did not specify the errors, the trial court failed to fulfill the requirements of this rule. Barnett v. Security Ins. Co., — N.C. App. —, 352 S.E.2d 855 (1987).

**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, 71 N.C. App. 714, 323 S.E.2d 377 (1984).

**Stated** in Marley v. Gantt, 72 N.C. App. 200, 323 S.E.2d 725 (1984); Hinson v. Hinson, 78 N.C. App. 613, 337 S.E.2d 663 (1985).

**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, 72 N.C. App. 481, 325 S.E.2d 305 (1985); Staples v. Woman's Clinic, 73 N.C. App. 617, 327 S.E.2d 58 (1985); Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (1985); Appelbe v. Appelbe, 76 N.C. App. 391, 333 S.E.2d 312 (1985); Dewey v. Dewey, 77 N.C. App. 787, 336 S.E.2d 451 (1985); Carver v. Roberts, 78 N.C. App. 511, 337 S.E.2d 126 (1985); Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986); Sanders v. Spaulding & Perkins, Ltd., 82 N.C. App. 680, 347 S.E.2d 866 (1986); Poston v. Morgan, 83 N.C. App. 295, 350 S.E.2d 108 (1986); Colonial Bldg. Co. v. Justice, 83 N.C. App. 643, 351 S.E.2d 140 (1986); Campbell ex rel. McMillan v. Pitt County Mem. Hosp., — N.C. App. —, 352 S.E.2d 902 (1987); Hill v. Hanes Corp., — N.C. —, 353 S.E.2d 392 (1987).

### II. TIME FOR SERVING MOTIONS AND AFFIDAVITS.

**Timeliness Not Affected by Entry of Jury Verdict.** — The entry of the jury verdict is not mentioned in the provisions of section (b) of this rule which limit the time period within which motions for a new trial can be made. Sheehan v. Harper Bldrs., Inc., 83 N.C. App. 630, 351 S.E.2d 114 (1986).

**Amendment of Divorce Judgment.** — Although not so designated, a motion to have separation agreement incorporated into divorce decree was essentially one made pursuant to this rule to alter or amend the divorce judgment. The trial court had no authority to alter or amend such judgment under this rule pursuant to a motion made more than 10 days after entry of the judgment sought to be altered or amended. Coats v. Coats, 79 N.C. App. 481, 339 S.E.2d 676 (1986).

### 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 59 motion to amend judgment filed 10 days after judgment by defendant tolled the time for filing and serving a cross-notice of appeal** until entry of an order on the motion pursuant to Rule 3(c) N.C. Rules App. P. However, where defendants later withdrew their Rule 59 motion, the 10-day time limit to give notice of appeal under Rule 3(c) was not tolled because there was never a judicial determination on defendants' motion. Landin Ltd. v. Sharon Luggage, Ltd., of Greensboro, Inc., 78 N.C. App. 558, 337 S.E.2d 685 (1985).

## 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

III. Relief Under Section (b).
F. Void Judgments.

### I. IN GENERAL.

**Wording of Judgment Controls.** — When it is unclear from looking at a judgment whether a default judgment or a summary judgment was intended, the wording of the body of the judgment itself controls, not the heading. East Carolina Oil Transp., Inc. v. Petroleum Fuel & Term. Co., 82 N.C. App. 746, 348 S.E.2d 165 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 745 (1987).

**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); Buie v. Johnston, 313 N.C. 586, 330 S.E.2d 197 (1985); In re Saunders, 77 N.C. App. 462, 335 S.E.2d 58 (1985).

**Stated** in State v. O'Neal, 67 N.C. App. 65, 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, 73 N.C. App. 617, 327 S.E.2d 58 (1985); Prevatte v. Prevatte, 74 N.C. App. 582, 329 S.E.2d 413 (1985); Andrews v. Peters, 75 N.C. App. 252, 330 S.E.2d 638 (1985); Appelbe v. Appelbe, 76 N.C. App. 391, 333 S.E.2d 312 (1985); Smith v. Barfield, 77 N.C. App. 217, 334 S.E.2d 487 (1985); Carver v. Roberts, 78 N.C. App. 511, 337 S.E.2d 126 (1985); Harwood v. Harrelson Ford, Inc., 78 N.C. App. 445, 337 S.E.2d 158 (1985); Schofield v. Schofield, 78 N.C. App. 657, 338 S.E.2d 132 (1986); Weiss v. Woody, 80 N.C. App. 86, 341 S.E.2d 103 (1986); Amick v. Amick, 80 N.C. App. 291, 341 S.E.2d 613 (1986); Hartman v. Hartman, 80 N.C. App. 452, 343 S.E.2d 11 (1986); Narron v. Union Camp Corp., 81 N.C. App. 263, 344 S.E.2d 64 (1986); Georgia-Pacific Corp. v. Bondurant, 81 N.C. App. 362, 344 S.E.2d 302 (1986); Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986); Andrews v. Peters, 318 N.C. 133, 347 S.E.2d 409 (1986); In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986); Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986); L. Harvey & Son Co. v. Shivar, 83 N.C. App. 673, 351 S.E.2d 335 (1987); Harshaw v. Mustafa, — N.C. App. —, 352 S.E.2d 247 (1987); Petty v. City of Charlotte, — N.C. App. —, 355 S.E.2d 210 (1987).

## II. RELIEF UNDER SECTION (a).

**The court's authority under section (a) is limited to the correction of clerical errors or omissions.** Courts do not have the power under section (a) to affect the substantive rights of the parties or to correct substantive errors in their decisions. Hinson v. Hinson, 78 N.C. App. 613, 337 S.E.2d 663 (1985), cert. denied, 316 N.C. 376, 342 S.E.2d 895 (1986).

**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).

Trial court had jurisdiction to consider motion filed by guardian ad litem pursuant to this rule requesting a supplemental order, wherein she alleged that through oversight and inadvertence the district court had failed to order assessment of costs incurred in custody action, including witness fees for out-of-county witnesses as well as for expert witnesses, even though the guardian ad litem's motion was made approximately four months after the order awarding custody was entered and the county Division of Social Services had filed its notice of appeal. In re Scearce, 81 N.C. App. 662, 345 S.E.2d 411, cert. denied, 318 N.C. 415, 349 S.E.2d 590 (1986).

## 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, 74 N.C. App. 256, 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, 74 N.C. App. 494, 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, 74 N.C. App. 494, 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, 74 N.C. App. 256, 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, 74 N.C. App. 494, 328 S.E.2d 871 (1985); Long v. Fink, 80 N.C. App. 482, 342 S.E.2d 557 (1986).

**A motion for relief, etc.** —

In accord with original. See Oxford Plastics v. Goodson, 74 N.C. App. 256, 328 S.E.2d 7 (1985).

**And Will Be Disturbed, etc.** —

In accord with original. See Oxford Plastics v. Goodson, 74 N.C. App. 256, 328 S.E.2d 7 (1985); Williams v. Jennette, 77 N.C. App. 283, 335 S.E.2d 191 (1985); Vuncannon v. Vuncannon, 82 N.C. App. 255, 346 S.E.2d 274 (1986).

**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); Thomas M. McInnis & Assocs. v. Hall, 76 N.C. App. 486, 333 S.E.2d 544 (1985), cert. granted, 315 N.C. 597, 339 S.E.2d 413 (1986); Stoner v. Stoner, 83 N.C. App. 523, 350 S.E.2d 916 (1986).

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).

**Court to Make Findings of Fact.** —

In accord with main volume. See York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

**Applicability to Industrial Commission Motion.** — Since the North Carolina Industrial Commission has no rule comparable to section (b), and because the Rules of Civil Procedure are applicable, the Industrial Commission should have treated defendant's motion pursuant to § 97-85 and Industrial Commission Rule XXI for a new hearing on the ground that he had not received notice of hearing in which plaintiff was awarded compensation as one made pursuant to section (b) to be relieved from a judgment. Long v. Reeves, 77 N.C. App. 830, 336 S.E.2d 98 (1985).

**Remand to Industrial Commission Following Appeal.** — Motion under subsections (b)(2) and (b)(6) of this rule, filed in the Court of Appeals while workers' compensation case was pending therein, whereby defendants moved for a new hearing before the Industrial Commission in the event that the Court of Appeals ruled adversely to defendants on the merits of their appeal, should have been remanded to the Commission for initial determination following decision on the merits of the appeal. Hill v. Hanes Corp., — N.C. —, 353 S.E.2d 392 (1987).

**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).

**Motion Made after Notice of Appeal.** — The trial court does not have jurisdiction to rule on a motion pursuant to section (b) of this rule where such motion is made after the notice of appeal has been given. York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

As a general rule, an appeal divests the trial court of jurisdiction of a case and, pending appeal, the trial court is functus officio. However, the trial court retains limited jurisdiction to hear and consider a Rule 60(b) motion to indicate what action it would be inclined to take were an appeal not pending. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

**Notice of Appeal Filed at Same Time as Motions.** — Where notice of appeal from default judgment for defendants with respect to plaintiff's claim and defendants' counterclaim against plaintiff was filed at the same time as plaintiff's Rule 52(b) motion for amended and additional findings of fact and his Rule 60(b) motion for relief from judgment under the circumstances of the case, the trial court had jurisdiction to rule on plaintiff's Rule 60(b) motion. York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

**Elapsed Time Held Not Unreasonable.** — The period of time between November 26, 1984, and April 1, 1985, was not an unreasonable amount of time to elapse so as to preclude relief under subsections (b)(5) and (b)(6) of this rule. Poston v. Morgan, 83 N.C. App. 295, 350 S.E.2d 108 (1986).

### B. Mistake, Inadvertence, Surprise and Excusable Neglect.

#### 1. In General.

**One Year Filing Period.** — The requirement that the motion to set aside a judgment made pursuant to subsection (b)(1) of this rule be made within one year is mandatory. Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987).

**Along with Finding, etc.** —

In accord with 2nd paragraph in original. See Chaparral Supply v. Bell, 76 N.C. App. 119, 331 S.E.2d 735 (1985).

In accord with 3rd paragraph in original. See Thomas M. McInnis & Assocs. v. Hall, 76 N.C. App. 486, 333 S.E.2d 544 (1985), cert. granted, 315 N.C. 597, 339 S.E.2d 413, aff'd in part and rev'd in part, 318 N.C. 421, 349 S.E.2d 552 (1986).

In order for a party to be entitled to relief under section (b) of this rule, he must show excusable neglect and a meritorious defense. East Carolina Oil Transp., Inc. v. Petroleum Fuel & Term. Co., 82 N.C. App. 746, 348 S.E.2d 165 (1986); Thomas M. McInnis & Assocs. v. Hall, 318 N.C. 421, 349 S.E.2d 552 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 745 (1987).

**Court Determines Only Whether Meritorious Defense Pleaded.** — As for the defense, the trial court does not hear the facts but determines only whether the movant has pleaded a meritorious defense. Chaparral Supply v. Bell, 76 N.C. App. 119, 331 S.E.2d 735 (1985).

**To merely deny indebtedness and assert presence of a meritorious defense is not sufficient.** This is true even when the facts found justify a conclusion that the movant's neglect was excusable. The trial court cannot set aside the judgment unless there is a meritorious defense, a real or substantial defense on the merits. Chaparral Supply v. Bell, 76 N.C. App. 119, 331 S.E.2d 735 (1985).

**A party served with a summons must give the matter the attention that a person of ordinary prudence would give** to his important business. Failure to do so is not excusable neglect under subsection (b)(1) of this rule. East Carolina Oil Transp., Inc. v. Petroleum Fuel & Term. Co., 82 N.C. App. 746, 348 S.E.2d 165 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 745 (1987).

**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).

**Wife's failure to respond to complaint was excusable neglect,** where she turned the papers over to her husband upon the assurance from him that this matter had been resolved and that there was no necessity to respond to the complaint. Thomas M. McInnis & Assocs. v. Hall, 76 N.C. App. 486, 333 S.E.2d 544 (1985), cert. granted, 315 N.C. 597, 339 S.E.2d 413, aff'd in part and rev'd in part, 318 N.C. 421, 349 S.E.2d 552 (1986).

**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).

**Determination of whether excusable neglect, etc. —**

In accord with 2nd paragraph in the main volume. See Thomas M. McInnis & Assocs. v. Hall, 318 N.C. 421, 349 S.E.2d 552 (1986).

**Finality of Findings on, etc. —**

In accord with 2nd paragraph in original. See Chaparral Supply v. Bell, 76 N.C. App. 119, 331 S.E.2d 735 (1985).

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, 74 N.C. App. 256, 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).

**Remand for Hearing and Findings.** — Where although a hearing was conducted, at which plaintiff's counsel was not present, the trial court made no findings of fact resolving the critical issues as to whether plaintiff was entitled to relief from judgment on the grounds of "mistake, inadvertence, surprise, or excusable neglect" and whether plaintiff had a meritorious defense to defendants' counterclaim, the order denying plaintiff's motion would be vacated and the case would be remanded to the district court for a new hearing and ruling on all issues raised by the Rule 60(b) motion. York v. Taylor, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

### 2. Relief Held Proper.

**When counsel engaged for a case declines to go forward** with it, the litigant is entitled both to reasonable notice of that fact and a reasonable opportunity to obtain substitute counsel. And where the record plainly showed that plaintiff had had neither, its failure to attend trial was excusable as a matter of law. Barclays Am. Corp. v. Howell, 81 N.C. App. 654, 345 S.E.2d 228 (1986).

**Suit Filed against Wife Where Judgment against Husband Had Been Satisfied.** — It was not unreasonable for wife to rely on her husband's assurance that the matter raised in the suit filed against her had been taken care of, where a prior action against her husband was based upon the same contract on which she was being sued, and her husband had satisfied the judgment entered against him in that action. Thomas M. McInnis & Assocs. v. Hall, 318 N.C. 421, 349 S.E.2d 552 (1986).

### 3. Relief Held Improper.

**Where important information was requested from plaintiff** by plaintiff's counsel, and plaintiff did not produce the information until well after the time for filing a response to the counterclaim and after hearing on summary judgment, plaintiff showed no excusable neglect and was not entitled to relief under section (b)(1) of this rule. East Carolina Oil Transp., Inc. v. Petroleum Fuel & Term. Co., 82 N.C. App. 746, 348 S.E.2d 165 (1986), cert. denied, 318 N.C. 693, 351 S.E.2d 745 (1987).

### 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).

In order to support a motion under subsection (b)(2) of this rule, new evidence must be presented that was not discoverable by due diligence in time to move for a new trial. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, discretionary review allowed as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

### 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).

**Section (b)(6) is equitable in nature, etc. —**

In accord with the main volume. See Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987).

**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, 72 N.C. App. 179, 323 S.E.2d 506 (1984), cert. denied, 313 N.C. 613, 330 S.E.2d 617 (1985).

**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, 72 N.C. App. 155, 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, 74 N.C. App. 256, 328 S.E.2d 7 (1985).

**Test for Setting Aside Judgment, etc. —**

In accord with the 1st paragraph in the main volume. See Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987).

**Due Diligence Requirement Not Circumvented. —** On defendants' motion under Rule 60(b)(6), seeking relief from Industrial Commission's award, the court would decline to circumvent the "due diligence" requirement of Rule 60(b)(2) by indiscriminately entertaining any and all "newly discovered evidence" under Rule 60(b)(6). Otherwise, Rule 60(b)(6) would become a vehicle for unsuccessful litigants to obtain automatic rehearings before the Commission without satisfying the requirements of § 97-47. Hill v. Hanes Corp., 79 N.C. App. 67, 339 S.E.2d 1, discretionary review allowed as to additional issues, 316 N.C. 376, 342 S.E.2d 895 (1986).

**The Industrial Commission has inherent power analogous to that conferred on courts by Rule 60(b)(6),** in the exercise of supervision over its own judgments to set aside a former judgment when the paramount interest in

achieving a just and proper determination of a workers compensation claim requires it. Hogan v. Cone Mills Corp., 315 N.C. 127, 337 S.E.2d 477 (1985).

**Plaintiffs who because of procedural blunders made by some of their attorneys had never had a full hearing** on the merits of any of their claims, and whose avenues of appeal were cut off through gross neglect by their attorneys showed a basis for relief under subsections (b)(5) and (b)(6) of this rule, and the trial court abused its discretion in denying plaintiffs' motion to modify a prior court order which enjoined further suits by plaintiffs against defendants as vexatious as a matter of law. Poston v. Morgan, 83 N.C. App. 295, 350 S.E.2d 108 (1986).

**Four Year Old Consent Order.** — Trial court did not abuse its discretion in refusing to set aside a consent order that plaintiff had signed over four years ago on grounds that it was void because of plaintiff's lack of voluntary consent thereto. Prescott v. Prescott, 83 N.C. App. 254, 350 S.E.2d 116 (1986).

**A void judgment binds no one,** and it is immaterial whether the judgment was or was not entered by consent. Allred v. Tucci, — N.C. App. —, 354 S.E.2d 291 (1987).

**A judgment is not void if** the court has jurisdiction over the parties and the subject matter and had the authority to render the judgment entered. Huggins v. Hallmark Enters., Inc., 84 N.C. App. 128, 351 S.E.2d 799 (1987).

**Failure to Give Notice or Opportunity to Be Heard.** — Defendant, who defaulted on original complaint which alleged that she was a resident of this state, was entitled to notice of plaintiff's subsequent motion to declare that none of her property was exempt by virtue of non-residency, and an opportunity to contest the factual allegations as to her non-residency. Where she was given neither notice nor an opportunity to be heard, in violation of statutory and constitutional provisions, the order declaring that her property was not exempt was invalid, and she was entitled to relief therefrom pursuant to subsection (b)(4) of this rule. First Union Nat'l Bank v. Rolfe, 83 N.C. App. 625, 351 S.E.2d 117 (1986).

**Time for Attacking Void Judgment.** — Although section (b) of this rule contains the requirement that all motions made pursuant thereto be made "within a reasonable time," the requirement is not enforceable with respect to motions made pursuant to subsection (b)(4), because a void judgment is a legal nullity which may be attacked at any time. Allred v. Tucci, — N.C. App. —, 354 S.E.2d 291 (1987).

**Relief from Void Divorce Following Death of Spouse.** — A proceeding to set aside an invalid divorce decree is not barred by the death of one of the spouses where property rights are involved. Allred v. Tucci, — N.C. App. —, 354 S.E.2d 291 (1987).

Husband's motion for relief from December 16, 1985, judgment of divorce from bed and board, filed on May 20, 1986, two months after wife's death, was timely, and was properly granted, as the judgment of divorce, although entered with the consent of the parties, contained no finding of material facts and was therefore void. Allred v. Tucci, — N.C. App. —, 354 S.E.2d 291 (1987).

## Rule 61. Harmless error.

### CASE NOTES

**Error alone will not justify reversal;** the error must affect some substantial right of the appellant. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

**Mere formal defects in findings** ordinarily will be ignored if the substance of the judgment is sufficient. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

**The failure to make certain findings,** even when specifically requested, does not rise to the level of reversible error if the requested findings are not material. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

Especially in light of the conclusive nature of stipulations and the binding effect of pretrial orders, failure to find facts stipulated to in a pretrial order can hardly be prejudicial. Andrews v. Andrews, 79 N.C. App. 228, 338 S.E.2d 809, cert. denied, 316 N.C. 730, 345 S.E.2d 385 (1986).

**The introduction of inadmissible evidence** by itself will not require reversal; the appellant must demonstrate that the error was prejudicial, i.e., that it probably influenced the verdict of the jury. Broyhill v. Coppage, 79 N.C. App. 221, 339 S.E.2d 32 (1986).

**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, 74 N.C. App. 402, 328 S.E.2d 859, cert. denied, 314 N.C. 336, 333 S.E.2d 496 (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, 74 N.C. App. 402, 328 S.E.2d 859, cert. denied, 314 N.C. 336, 333 S.E.2d 496 (1985).

The party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result. Lawing v. Lawing, 81 N.C. App. 159, 344 S.E.2d 100 (1986).

**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); Mills v. New River Wood Corp., 77 N.C. App. 576, 335 S.E.2d 759 (1985).

**Stated** in Marley v. Gantt, 72 N.C. App. 200, 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).

(e) *Stay in favor of North Carolina, city, county, local board of education, or agency thereof.* — When an appeal is taken by the State of North Carolina, or a city or a county thereof, a local board of education, or an officer in his official capacity or agency thereof or by direction of any department or agency of the State of North Carolina or a city or county thereof or a local board of education and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(1967, c. 954, s. 1; 1973, c. 91; 1979, c. 820, s. 10; 1987, c. 462, s. 1.)

**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 main volume.

**Effect of Amendments.** — The 1987 amendment, effective June 24, 1987, inserted "city, county, local board of education" in the first sentence of subsection (e), and inserted "or a city or a county thereof, a local board of education" and "or a city or county thereof or a local board of education" in the second sentence of subsection (e).

CASE NOTES

**Cited** in Forsyth County v. Shelton, 74 N.C. App. 674, 329 S.E.2d 730 (1985); Leary v. Nantahala Power & Light Co., 76 N.C. App. 165, 332 S.E.2d 703 (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).

**Entry of judgment in open court by another district court judge without notice to the parties** that the judgment was entered was error, but as the notice of appeal was timely filed, there was no prejudice. Brower v. Brower, 75 N.C. App. 425, 331 S.E.2d 170 (1985).

## Article 8.

## *Miscellaneous.*

## Rule 65. Injunctions.

(b) *Temporary restraining order; notice; hearing; duration.* — A temporary restraining order may be granted without notice to the adverse party if it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the judge fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice and a motion for a preliminary injunction is made, it shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with a motion for a preliminary injunction, and, if he does not do so, the judge shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the judge may prescribe, the adverse party may appear and move its dissolution or modification and in that event the judge shall proceed to hear and determine such motion as expeditiously as the ends of justice require. Damages may be awarded in an order for dissolution as provided in section (e).

(1967, c. 954, s. 1.)

**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 main volume.

**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, 71 N.C. App. 725, 323 S.E.2d 442 (1984).

**Stated** in American Marble Corp. v. Crawford, 84 N.C. App. 86, 351 S.E.2d 848 (1987).

**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).

**It was error for court to issue permanent injunction at hearing to show cause why temporary restraining order should not be continued.** Everette v. Taylor, 77 N.C. App. 442, 335 S.E.2d 212 (1985).

**No Jurisdiction to Determine Controversy on Merits. —** A judge conducting a hearing to determine whether a temporary restraining order should be continued as a preliminary injunction pursuant to this rule has no jurisdiction to determine a controversy on its merits; neither can the parties to an action confer this jurisdiction upon the trial court by granting consent to such a hearing. Everette v. Taylor, 77 N.C. App. 442, 335 S.E.2d 212 (1985).

### 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).

**Damages Following Voluntary Dismissal. —** Award of damages upon the dissolution of an injunction was not improper where the injunction was granted because there was probable cause to believe that defendants might be able to establish their right to the injunction

upon trying the issues raised by their counterclaim, but where after the case was tried almost to a conclusion, defendants voluntarily dismissed their counterclaim; although it was done "without prejudice," this dismissal could only be construed as an acknowledgement by the defendants that they could not establish their entitlement to the restraining order. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

## 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., 74 N.C. App. 196, 328 S.E.2d 301 (1985).

## Rule 68.1. Confession of judgment.

(b) *Procedure.* — A prospective defendant desiring to confess judgment shall file with the clerk of the superior court as provided in section (c) a statement in writing signed and verified or sworn to by such defendant authorizing the entry of judgment for the amount stated. The statement shall contain the name of the prospective plaintiff, his county of residence, the name of the defendant, his county of residence, and shall concisely show why the defendant is or may become liable to the plaintiff.

If either the plaintiff or defendant is not a natural person, for the purposes of this rule its county of residence shall be considered to be the county in which it has its principal place of business, whether in this State or not.

(1967, c. 954, s. 1; 1987, c. 288, s. 1.)

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

**Editor's Note.** — Session Laws 1987, c. 288, s. 2 provides: "This act is effective upon ratification [June 4, 1987] and validates all confessions of judgment heretofore entered under G.S. 1A-1, Rule 68.1, which were sworn to but not verified, but this act shall not affect any pending litigation."

**Effect of Amendments.** — The 1987 amendment, effective June 4, 1987, inserted "or sworn to" following "signed and verified" in the first sentence of subsection (b).

# 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-1. Right to contribution.

CASE NOTES

I. IN GENERAL.

**The right to contribution is statutory and is applicable only between joint tort-feasors.** Roseboro Ford, Inc. v. Bass, 77 N.C. App. 363, 335 S.E.2d 214 (1985).

**No Right to Contribution from One Not a Joint Tort-Feasor.** —

There is no right to contribution from one who is not a joint tort-feasor. Holland v. Edgerton, — N.C. App. —, 355 S.E.2d 514 (1987).

**Nor for Claim on Contract.** — Under subsection (a) of this section, a defendant is entitled to contribution where he and one or more other persons are jointly or severally liable in tort. By the clear language of the statute, a defendant is not entitled to contribution for a claim against him in contract. Holland v. Edgerton, — N.C. App. —, 355 S.E.2d 514 (1987).

Claim for relief, based on a breach of implied warranty, gave rise to no right of contribution on the part of third party plaintiff, because it sounded in contract and not in tort. Holland v. Edgerton, — N.C. App. —, 355 S.E.2d 514 (1987).

**Contribution Not Available for Intentional Infliction of Mental Distress.** — The language of subsection (c) of this section clearly excludes the possibility of contribution on any claim by plaintiffs for intentional infliction of mental distress. Holland v. Edgerton, — N.C. App. —, 355 S.E.2d 514 (1987).

**Applied** in United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985).

## § 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, 73 N.C. App. 182, 326 S.E.2d 271, cert. denied, 314 N.C. 116, 332 S.E.2d 481 (1985).

**Subsection (e) codifies the common-law rule applicable to joint tort-feasors.** Ipock v. Gilmore, 73 N.C. App. 182, 326 S.E.2d 271, cert. denied, 314 N.C. 116, 332 S.E.2d 481 (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.

**Editor's Note.** — The legislation and annotations affecting Chapter 1C have been included in a recently published replacement chapter.

# Chapter 4.

# Common Law.

## § 4-1. Common law declared to be in force.

CASE NOTES

I. GENERAL CONSIDERATION.

**Cited** in State v. Mann, 317 N.C. 164, 345 S.E.2d 365 (1986).

# Chapter 5A.

# Contempt.

## Article 1.

## *Criminal Contempt.*

## § 5A-11. Criminal contempt.

CASE NOTES

I. GENERAL CONSIDERATION.

**Notice of Charges and Opportunity to Be Heard.** — The principles of due process require that before an attorney is finally adjudicated in contempt and sentenced after a trial for conduct during the trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. In re Paul, — N.C. App. —, 353 S.E. 2d 254 (1987).

IV. ACTS CONSTITUTING CONTEMPT.

A. In General.

**In order for an act to be "willful,"** as the term is used in criminal law, it must be done deliberately and purposefully in violation of law, and without authority, justification or excuse. State v. Chriscoe, — N.C. App. —, 354 S.E.2d 289 (1987).

**"Grossly negligent,"** for purposes of criminal culpability, implies recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others. State v. Chriscoe, — N.C. App. —, 354 S.E.2d 289 (1987).

**Willfulness or Gross Negligence Not Shown.** — Where evidence showed that defendant's short delay of an hour or an hour and a quarter in arriving at court was due, not merely to an absence of transportation, but also to her concern for her mother's safety brought about by her mother's failure to arrive on time or to answer the telephone, defendant's behavior did not rise to the level of willfulness or gross negligence. State v. Chriscoe, — N.C. App. —, 354 S.E.2d 289 (1987).

B. Disruptive Conduct.

**Employment of Individual to Disrupt Criminal Trial.** — Evidence held sufficient to support the trial judge's finding that respondent attorney solicited an individual to disrupt the criminal trial of his client, thereby committing willful behavior during the sitting of a court which tended to interrupt its proceedings, in violation of subsection (a) of this section. In re Paul, — N.C. App. —, 353 S.E. 2d 254 (1987).

C. Disobedience of Orders.

**In the absence of an order** to be present, defendant may not be held in contempt for violation of such an order. State v. Chriscoe, — N.C. App. —, 354 S.E.2d 289 (1987).

## § 5A-15. Plenary proceedings for contempt.

CASE NOTES

**Notice of Charges and Opportunity to Be Heard.** — The principles of due process require that before an attorney is finally adjudicated in contempt and sentenced after a trial for conduct during the trial, he should have reasonable notice of the specific charges and opportunity to be heard in his own behalf. In re Paul, — N.C. App. —, 353 S.E.2d 254 (1987).

## Article 2.

## *Civil Contempt.*

## § 5A-21. Civil contempt; imprisonment to compel compliance.

### CASE NOTES

#### I. GENERAL CONSIDERATION.

**Thus, Defendant Must Possess Means, etc. —**

The purpose of civil contempt is to coerce compliance with a court order; therefore, present ability or means to satisfy that order is essential. Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

**Findings on Means to Comply Held Adequate.** — Trial court's finding regarding contemnor's "present means to comply" held minimally sufficient to satisfy the statutory requirement for civil contempt, although specific findings supporting the contemnor's present means are preferable. Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

#### V. APPEAL AND ERROR.

**Scope of Review. —**

Review in contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Adkins v. Adkins, 82 N.C. App. 289, 346 S.E.2d 220 (1986).

## § 5A-22. Release when civil contempt no longer continues.

### CASE NOTES

**Cited** in Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986).

# Chapter 6.

# Liability for Court Costs.

## Article 3.

## *Civil Actions and Proceedings.*

**Legal Periodicals.** — For article, "Awarding Attorney Fees Against Adversaries: Introducing the Problem," see 1986 Duke L.J. 435 (1986).

## § 6-20. Costs allowed or not, in discretion of court.

CASE NOTES

**Award of Costs for Expert Witnesses.** — For case upholding award to plaintiffs as costs of charges of expert witnesses for time spent outside trial and expenses for expert witnesses who testified about the standard of care applicable to nurses in similar communities, see Campbell ex rel. McMillan v. Pitt County Mem. Hosp., — N.C. App. —, 352 S.E.2d 902 (1987).

## § 6-21. Costs allowed either party or apportioned in discretion of court.

CASE NOTES

I. GENERAL CONSIDERATION.

**Fees for Services pursuant to Void Contract.** — A trial court has no discretion to award statutory legal fees for services rendered in a child custody and support action pursuant to a contract void as against public policy. Davis v. Taylor, 81 N.C. App. 42, 344 S.E.2d 19, cert. denied, 318 N.C. 414, 349 S.E.2d 593 (1986).

**Cited** in In re Cooper, 81 N.C. App. 27, 344 S.E.2d 27 (1986).

## § 6-21.1. Allowance of counsel fees as part of costs in certain cases.

**Legal Periodicals.** —

For note, "Bad Faith Refusal to Pay First-Party Insurance Claims: A Growing Recognition of Extra-Contract Damages," see 64 N.C.L. Rev. 1421 (1986).

For article, "North Carolina's Cautious Approach Toward the Imposition of Extracontract Liability on Insurers for Bad Faith," see 21 Wake Forest L. Rev. 957 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

**This section refers only to the amount of the judgment,** not to the amount of the verdict. Wells v. Jackson, — N.C. App. —, 355 S.E.2d 837 (1987).

## § 6-21.2. Attorneys' fees in notes, etc., in addition to interest.

**Legal Periodicals.** —

For note, "Preemption of State Law Notice Provisions Governing the Recovery of Attorneys' Fees by Section 506(b) of the Bankruptcy Code," see 1 Duke L.J. 176 (1986).

### CASE NOTES

**Counsel fees are not a subject of arbitration,** even where the contract provides that the owner will pay reasonable attorney's fees incurred by the contractor for the collection of any defaulted payment due to the contractor by the owner as a result of the contract. In North Carolina, such attorney's fees are collectible only under this section. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

**Meaning of "Evidence of Indebtedness."** —

In accord with 1st paragraph in the main volume. See G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

**Construction of Subdivision (5).** — The notice provision of subdivision (5) of this section simply provides that the obligor will have five days' notice to pay any outstanding balance on the debt before the claimant goes to the expense of employing counsel to collect the balance due. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

**Demand by Obligor for Arbitration.** — The notice provisions of subdivision (5) of this section have no application in a situation where the obligor has refused to pay obligee's claim and demanded arbitration pursuant to the terms of the contract. Moreover, when obligee filed its response to obligor's demand for arbitration, and its own claim for the balance due on the contract, it clearly notified obligor that it was demanding attorneys' fees under the terms of the contract. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

**Recovery of Percentage of Outstanding Balance.** — Where contract provided that owner would pay reasonable attorney's fees incurred by the contractor for the collection of any defaulted payment, under the provisions of this section, contractor could recover as attorney's fees 15% of the "outstanding balance" due on the contract. G.L. Wilson Bldg. Co. v. Thorneburg Hosiery Co., — N.C. App. —, 355 S.E.2d 815 (1987).

## § 6-21.5. Attorney's fees in nonjusticiable cases.

### CASE NOTES

**The only basis for the award of attorney's fees under this section** is the complete absence of a justiciable issue. Bryant v. Short, — N.C. App. —, 352 S.E.2d 245 (1987), upholding order awarding attorney's fees.

**This section appears to be based on deterring frivolous and bad faith lawsuits** by the use of attorney's fees. Daniels v. Montgomery Mut. Ins. Co., 81 N.C. App. 600, 344 S.E.2d 847 (1986), cert. granted, 318 N.C. 414, 349 S.E.2d 592 (1986).

**"Justiciable issues" are those which are real** and present, as opposed to imagined or fanciful. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. granted, 318 N.C. 284, 347 S.E.2d 461 (1986).

**"Complete absence of a justiciable issue"** suggests that it must conclusively appear that such issues are absent, even giving the losing party's pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss. Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. granted, 318 N.C. 284, 347 S.E.2d 461 (1986).

**Specific Findings Not Required Absent Justiciable Issue.** — The sufficiency of a pleading is a question of law for the court, and the trial court need not make its findings more detailed if it

states that the pleading raised no justiciable issue of law or fact. Bryant v. Short, — N.C. App. —, 352 S.E.2d 245 (1987).

**Award of attorney fees under this section held proper.** Sprouse v. North River Ins. Co., 81 N.C. App. 311, 344 S.E.2d 555, cert. granted, 318 N.C. 284, 347 S.E.2d 461 (1986).

# Chapter 7A.

# Judicial Department.

# SUBCHAPTER II. APPELLATE DIVISION OF THE GENERAL COURT OF JUSTICE.

## ARTICLE 2.

## *Appellate Division Organization.*

### § 7A-6. Appellate division reporters; reports.

(b1) In addition to and as an alternative to the provisions for the publication and sale of the appellate division reports of subsection (a) and subsection (b) of this section, the Supreme Court may designate a commercial law publisher's reports and advance sheets of the opinions of the Supreme Court and the Court of Appeals as the Official Reports of the Appellate Division, or the Administrative Officer of the Courts, with the approval of the Supreme Court, may contract with a commercial law publisher or publishers to act as printer and vendor of the reports and advance sheets of the Supreme Court and the Court of Appeals upon such terms as the Supreme Court deems advisable after consultation with the Department of Administration.

(1967, c. 108, s. 1; c. 691, s. 57; 1969, c. 1190, s. 1; 1971, c. 377, s. 2; 1975, c. 879, s. 46; 1977, c. 721, s. 1; 1987, c. 404.)

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

**Effect of Amendments.** — The 1987 amendment, effective June 18, 1987, added subsection (b1).

## Article 3.

## *The Supreme Court.*

### § 7A-10. Organization; compensation of justices.

CASE NOTES

**Cited** in Bradshaw v. Administrative Office of Courts, 83 N.C. App. 237, 349 S.E.2d 621 (1986).

## Article 4.

## *Court of Appeals.*

### § 7A-16. Creation and organization.

CASE NOTES

**Cited** in Bradshaw v. Administrative Office of Courts, 83 N.C. App. 237, 349 S.E.2d 621 (1986).

## Article 5.

## *Jurisdiction.*

### § 7A-26. Appellate jurisdiction of the Supreme Court and the Court of Appeals.

**Legal Periodicals.** — For article, "Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge / Jury Question, and Procedural Discretion," see 64 N.C.L. Rev. 993 (1986).

### § 7A-27. Appeals of right from the courts of the trial divisions.

(a) Appeal lies of right directly to the Supreme Court in all cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death or imprisonment for life.

(1967, c. 108, s. 1; 1971, c. 377, s. 3; 1973, c. 704; 1977, c. 711, s. 4; 1987, c. 679.)

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

**Effect of Amendments.** — The 1987 amendment, effective July 24, 1987, and applicable to all judgments containing sentences of life imprisonment entered on or after that date, rewrote subsection (a), which read "From a judgment of a superior court which includes a sentence of death or imprisonment for life, unless the judgment was based on a plea of guilty or nolo contendere, appeal lies of right directly to the Supreme Court."

CASE NOTES

I. GENERAL CONSIDERATION.

**Applied** in State v. Rowe, 81 N.C. App. 469, 344 S.E.2d 574 (1986); State v. Nations, — N.C. —, 354 S.E.2d 510 (1987); State v. Nations, — N.C. —, 354 S.E.2d 516 (1987).

**Cited** in State v. Henry, 318 N.C. 408, 348 S.E.2d 593 (1986); Little v. City of Locust, 83 N.C. App. 224, 349 S.E.2d 627 (1986).

IV. INTERLOCUTORY ORDERS.

A. Generally.

**But Interlocutory Order May Be Appealed, etc.** —

Although it is the general rule that no appeal lies from an interlocutory order, § 1-277 and Subsection (d) of this section permit an immediate appeal from an interlocutory order which affects a substantial right. Fox v. Wilson, — N.C. App. —, 354 S.E.2d 737 (1987).

B. Particular Orders.

**Preliminary Injunction Pursuant to Covenant Not to Compete.** — Preliminary injunction entered by the trial court against defendant, pursuant to a covenant not to compete, was appealable prior to final determination on the merits, as it deprived defendant of a substantial right which he would lose absent review prior to a final determination. Masterclean of N.C., Inc. v. Guy, 82 N.C. App. 45, 345 S.E.2d 692 (1986).

**An order that denied a motion to invalidate appellee's request for a jury trial** was interlocutory, and no appeal lay to an appellate court therefrom, as such order did not deprive the appellants of a substantial right. Faircloth v. Beard, 83 N.C. App. 235, 349 S.E.2d 609 (1986).

**Dismissal of Claim Against One Defendant.** — Dismissal of Count II of plaintiff's amended complaint, resulting in dismissal of plaintiff's claim against defendant professional corporation, affected her substantial right to have determined in a single proceeding the issues of whether she had been damaged by the actions of one, some or all of the defendants, especially since her claims against all of them arose upon the same series of transactions. Therefore, her appeal therefrom was not premature. Fox v. Wilson, — N.C. App. —, 354 S.E.2d 737 (1987).

**Termination of Temporary Alimony.** — Appeal of an order terminating dependent spouse's right to receive temporary alimony was not premature, as the question of plaintiff's continued entitlement to the previously ordered alimony pendente lite until such time as her prayer for permanent alimony could be heard affected a "substantial right" of the dependent spouse. Brown v. Brown, — N.C. App. —, 355 S.E.2d 525 (1987).

## § 7A-29. Appeals of right from certain administrative agencies.

(a) From any final order or decision of the North Carolina Utilities Commission not governed by subsection (b), the Department of Human Resources pursuant to G.S. 131E-188(b), the Commissioner of Banks pursuant to Articles 17 and 18 of Chapter 53 of the General Statutes, the Administrator of Savings and Loans pursuant to Article 3A of Chapter 54B of the General Statutes, the North Carolina Industrial Commission, the North Carolina State Bar pursuant to G.S. 84-28, the Property Tax Commission pursuant to G.S. 105-290 and 105-342, the Board of State Contract Appeals pursuant to G.S. 143-135.9, or an appeal from the Commissioner of Insurance pursuant to G.S. 58-9.4, or from the Governor's Waste Management Board pursuant to G.S. 130A-293 and G.S. 104E-6.2, appeal as of right lies directly to the Court of Appeals.

(1967, c. 108, s. 1; 1971, c. 703, s. 5; 1975, c. 582, s. 12; 1979, c. 584, s. 1; 1981, c. 704, s. 28; 1983, c. 526, s. 1; c. 761, s. 188; 1983 (Reg. Sess., 1984), c. 1000, s. 2; c. 1087, s. 2; c. 1113, s. 2; 1985, c. 462, s. 3; 1987, c. 850, s. 2.)

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

**Editor's Note.** —

Session Laws 1987, c. 850, s. 27(a) provides: "Notwithstanding any other provision of this act, this act shall not be construed as a revenue bill within the meaning of Section 23 of Article II of the Constitution of North Carolina. Any provision of this act contrary to this section is void."

Session Laws 1987, c. 850, s. 27(b) is a severability clause.

The reference to § 143-135.9 in subsection (a) appears to be in error. Sections 143-135.10 et seq., which were repealed by Session Laws 1987, c. 847, s. 5, related to the former Board of State Contract Appeals.

**Effect of Amendments.** —

The 1987 amendment, effective August 14, 1987, substituted "or from the Governor's Waste Management Board pursuant to" for "or from the Governor pursuant to the Waste Management Act of 1981."

CASE NOTES

**Cited** in State ex rel. Utilities Comm'n v. Public Staff, N.C. Utils. Comm'n, 317 N.C. 26, 343 S.E.2d 898 (1986); In re Wake Kidney Clinic, — N.C. App. —, 355 S.E.2d 788 (1987).

## § 7A-30. Appeals of right from certain decisions of the Court of Appeals.

CASE NOTES

I. IN GENERAL.

**Applied** in Sharpe v. Park Newspapers, 317 N.C. 579, 347 S.E.2d 25 (1986); Weaver v. Swedish Imports Maintenance, Inc., — N.C. —, 354 S.E.2d 477 (1987); Morrison v. Sears, Roebuck & Co., — N.C. —, 354 S.E.2d 495 (1987).

**Cited** in Holley v. Burroughs Wellcome Co., 318 N.C. 352, 348 S.E.2d 772 (1986); Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 348 S.E.2d 782 (1986); R.J. Reynolds Tobacco Co. v. Durham County, — U.S. —, 107 S. Ct. 499, 93 L. Ed. 2d 449 (1986); Jackson County ex rel. Child Support Enforcement Agency ex rel. Jackson v. Swayney, 319 N.C. 52, 352 S.E.2d 413 (1987).

III. DISSENT.

**Issues on Appeal Under Subdivision (2).** — In accord with 1st paragraph in the main volume. See State v. Hooper, 318 N.C. 680, 351 S.E.2d 286 (1987).

## § 7A-31. Discretionary review by the Supreme Court.

CASE NOTES

**Applied** in Cavenaugh v. Cavenaugh, 317 N.C. 652, 347 S.E.2d 19 (1986).

**Cited** in Tom Togs, Inc. v. Ben Elias Indus. Corp., 318 N.C. 361, 348 S.E.2d 782 (1986).

## § 7A-32. Power of Supreme Court and Court of Appeals to issue remedial writs.

CASE NOTES

**Applied** in Coleman v. Interstate Cas. Ins. Co., — N.C. App. —, 352 S.E.2d 249 (1987).

### Article 6.

*Retirement of Justices and Judges of the Appellate Division; Retirement Compensation; Recall to Emergency Service; Disability Retirement.*

## § 7A-39.14. Recall by Chief Justice of retired or emergency justices or judges for temporary vacancy.

(f) This section shall expire on July 31, 1989.

(1985, c. 698, s. 15(a), (b); 1985 (Reg. Sess., 1986), c. 851, s. 3; c. 1014, s. 225; 1987, c. 703, s. 5; c. 738, s. 131(a), (b).)

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

**Editor's Note.** —

Session Laws 1985, c. 698, s. 15(b), as amended by Session Laws 1985 (Reg. Sess., 1986), c. 851, s. 3, and c. 1014, s. 225, and by Session Laws 1987, c. 703, s. 5, provided that the section would expire on August 23, 1987, or upon ratification of the Current Operations Appropriations Act of 1987 (Session Laws 1987, c. 738), whichever came later. However, Session Laws 1987, c. 738, s. 131(a) repealed Session Laws 1985, c. 698, s. 15 (b), as amended.

Section 131(b) of Session Laws 1987, c. 738 adds a new subsection (f) to this section, providing for expiration on July 31, 1989.

Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

**Effect of Amendments.** — The 1987 amendment, effective July 1, 1987, added subsection (f).

## SUBCHAPTER III. SUPERIOR COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

### Article 7.

*Organization.*

## § 7A-41. (For effective date see note) Superior court divisions and districts; judges.

(a) The counties of the State are organized into judicial divisions and judicial districts, and each district has the counties, and the



**§ 7A-41 has a delayed effective date. See notes for date.**

number of regular resident superior court judges set forth in the following table, and for districts of less than a whole county, as set out in subsection (b) of this section:

| Judicial Division | Judicial District | Counties | No. of Resident Judges |
|---|---|---|---|
| First | 1 | Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans | 2 |
| | 2 | Beaufort, Hyde, Martin, Tyrrell, Washington | 1 |
| | 3A | Pitt | 1 |
| | 3B | Carteret, Craven, Pamlico | 1 |
| | 4A | Duplin, Jones, Sampson | 1 |
| | 4B | Onslow | 1 |
| | 5 | New Hanover, Pender | 2 |
| | 6A | Halifax | 1 |
| | 6B | Bertie, Hertford, Northampton | 1 |
| | 7A | Nash | 1 |
| | 7B | (part of Wilson, part of Edgecombe, see subsection (b)) | 1 |
| | 7C | (part of Wilson, part of Edgecombe, see subsection (b)) | 1 |
| | 8A | Lenoir and Greene | 1 |
| | 8B | Wayne | 1 |
| Second | 9 | Franklin, Granville, Person, Vance, Warren | 2 |
| | 10A | (part of Wake, see subsection (b)) | 1 |
| | 10B | (part of Wake, see subsection (b)) | 2 |
| | 10C | (part of Wake, see subsection (b)) | 1 |
| | 10D | (part of Wake, see subsection (b)) | 1 |
| | 11 | Harnett, Johnston, Lee | 1 |
| | 12A | (part of Cumberland, see subsection (b)) | 1 |
| | 12B | (part of Cumberland, see subsection (b)) | 1 |



**§ 7A-41 has a delayed effective date. See notes for date.**

| Judicial Division | Judicial District | Counties | No. of Resident Judges |
|---|---|---|---|
| | 12C | (part of Cumberland, see subsection (b)) | 2 |
| | 13 | Bladen, Brunswick, Columbus | 1 |
| | 14A | (part of Durham, see subsection (b)) | 1 |
| | 14B | (part of Durham, see subsection (b)) | 3 |
| | 15A | Alamance | 1 |
| | 15B | Orange, Chatham | 1 |
| | 16A | Scotland, Hoke | 1 |
| | 16B | Robeson | 1 |
| Third | 17A | Caswell, Rockingham | 1 |
| | 17B | Stokes, Surry | 1 |
| | 18A | (part of Guilford, see subsection (b)) | 1 |
| | 18B | (part of Guilford, see subsection (b)) | 1 |
| | 18C | (part of Guilford, see subsection (b)) | 1 |
| | 18D | (part of Guilford, see subsection (b)) | 1 |
| | 18E | (part of Guilford, see subsection (b)) | 1 |
| | 19A | Cabarrus | 1 |
| | 19B | Montgomery, Randolph | 1 |
| | 19C | Rowan | 1 |
| | 20A | Anson, Moore, Richmond | 1 |
| | 20B | Stanly, Union | 1 |
| | 21A | (part of Forsyth, see subsection (b)) | 1 |
| | 21B | (part of Forsyth, see subsection (b)) | 1 |
| | 21C | (part of Forsyth, see subsection (b)) | 1 |
| | 21D | (part of Forsyth, see subsection (b)) | 1 |
| | 22 | Alexander, Davidson, Davie, Iredell | 2 |
| | 23 | Alleghany, Ashe, Wilkes, Yadkin | 1 |
| Fourth | 24 | Avery, Madison, Mitchell, Watauga, Yancey | 1 |
| | 25A | Burke, Caldwell | 1 |
| | 25B | Catawba | 1 |
| | 26A | (part of Mecklenburg, see subsection (b)) | 2 |
| | 26B | (part of Mecklenburg, see subsection (b)) | 2 |
| | 26C | (part of Mecklenburg, see subsection (b)) | 2 |



**§ 7A-41 has a delayed effective date. See notes for date.**

| Judicial Division | Judicial District | Counties | No. of Resident Judges |
|---|---|---|---|
| | 27A | Gaston | 2 |
| | 27B | Cleveland, Lincoln | 1 |
| | 28 | Buncombe | 2 |
| | 29 | Henderson, McDowell, Polk, Rutherford, Transylvania | 1 |
| | 30A | Cherokee, Clay, Graham, Macon, Swain | 1 |
| | 30B | Haywood, Jackson | 1 |

(b) For judicial districts of less than a whole county, or with part of one county with part of another, the composition of the district and the number of judges is as follows:

(1) Judicial District 7B consists of County Commissioner Districts 1, 2 and 3 of Wilson County, Blocks 127 and 128 of Census Tract 6 of Wilson County, and Townships 12 and 14 of Edgecombe County. It has one judge.

(2) Judicial District 7C consists of the remainder of Edgecombe and Wilson Counties not in Judicial District 7B. It has one judge.

(3) Judicial District 10A consists of Raleigh Precincts 12, 13, 14, 18, 19, 20, 22, 25, 26, 28, 34, 35, and 40, and St. Matthews #3, except that if the Wake County Board of Elections provides that the area in Raleigh Township which was incorrectly placed in a St. Mary's precinct shall be in Raleigh Precinct 40, that area shall be considered to be in Raleigh Precinct 40 for district purposes. It has one judge.

(4) Judicial District 10B consists of Buckhorn Precinct, Cary Precincts 1, 2, 3, 4, 5, 6, and 7, Cedar Fork Precinct, Holly Springs Precinct, House Creek Precinct #1, Meredith Precinct, Middle Creek Township, Raleigh Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 16, 21, 23, 24, 27, 29, 31, 32, 33, 36, and 41, Swift Creek Precinct #1 and #2 and White Oak Township. It has two judges.

(5) Judicial District 10C consists of Barton's Creek Precinct, Leesville Precinct, House Creek Precinct #2, Little River Township, Marks Creek Township, New Light Township, Panther Branch Township, St. Mary's Precincts #1, #2, #3, #4, #5, and #6, and Wake Forest Township. It has one judge.

(6) Judicial District 10D consists of the remainder of Wake County not in Judicial Districts 10A, 10B or 10C. It has one judge.

(7) Judicial District 12A consists of that part of Cross Creek Precinct #18 north of Raeford Road, Montclair Precinct, that part of Precinct 71-1 not in Judicial District 12B, Precinct 71-2, Morganton #2 Precinct, Cottonade Precinct, Cumberland Precincts 1 and 2, and Brentwood Precinct. It has one judge.



**§ 7A-41 has a delayed effective date. See notes for date.**

(8) Judicial District 12B consists of all of State House of Representatives District 17, except for Westarea Precinct, and it also includes that part of Cross Creek Precinct #15 east of Village Drive. It has one judge.

(9) Judicial District 12C consists of the remainder of Cumberland County not in Judicial Districts 12A or 12B. It has two judges.

(10) Judicial District 14A consists of Durham Precincts 9, 11, 12, 13, 14, 15, 18, 34, 40, 41, and 42, and that part of Durham Precinct 39 east of North Carolina Highway #751. It has one judge.

(11) Judicial District 14B consists of the remainder of Durham County not in Judicial District 14A. It has three judges.

(12) Judicial District 18A consists of Greensboro Precincts 5, 6, 7, 8, 9, 19, 25, 29, 30, 44, and 45 and Clay and Fentress Precincts. It has one judge.

(13) Judicial District 18B consists of High Point Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20, and 21, Deep River Precinct, and Jamestown Precincts 1 and 3. It has one judge.

(14) Judicial District 18C consists of Greensboro Precincts 20, 27, 31, 32, 34, 37, 38, 39, and 43, High Point Precinct 19, Stokesdale, Oak Ridge, Bruce, Friendship I, Friendship II, Jamestown II, South Center Grove, North Center Grove, and North Monroe Precincts. It has one judge.

(15) Judicial District 18D consists of Greensboro Precincts 4, 11, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 26, 36, and 42, and North and South Sumner Precincts. It has one judge.

(16) Judicial District 18E consists of the remainder of Guilford County not in Judicial Districts 18A, 18B, 18C, or 18D. It has one judge.

(17) Judicial District 21A consists of the Southwest Ward of Winston-Salem, and Precincts 80-6, 80-7, 80-8, 3-1, 9-1, 13-1, 13-2, 13-3, 7-1, 7-2, 7-3, 5-1, 5-2, 5-3, 12-2, and 12-3. It has one judge.

(18) Judicial District 21B consists of the Northwest Ward, the South Ward, and the Southeast Ward of Winston-Salem, and Precincts 4-1 and 4-2. It has one judge.

(19) Judicial District 21C consists of Precincts 80-1, 80-2, 80-3, 80-4, 80-5, 80-9, 10-2, 10-3, 3-2, 3-3, 11-1, 11-2, 2-1, 6-1, 6-2, 6-3, 6-4, 1-1, 1-2, and 1-3. It has one judge.

(20) Judicial District 21D consists of the North Ward, the Northeast Ward, and the East Ward of Winston-Salem, and Precincts 8-2 and 8-3. It has one judge.

(21) Judicial District 26A consists of Charlotte Precincts 11, 12, 13, 14, 15, 16, 22, 23, 24, 25, 26, 27, 31, 33, 39, 41, 42, 46, 52, 54, 55, 56, 58, 60, 77, 78, and 82, and Long Creek Precinct #2 of Mecklenburg County. It has two judges.

(22) Judicial District 26B consists of Charlotte Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 17, 18, 20, 21, 28, 29, 30, 32, 34, 35, 36, 37, 38, 43, 44, 45, 47, 51, 61, 62, 63, 65, 66, 67, 68, 69, 71, 74, 83, 84, and 86, Crab Orchard Precincts 1 and 2, and Mallard Creek Precinct 1. It has two judges.

(23) Judicial District 26C consists of the remainder of Mecklenburg County not in Judicial Districts 26A or 26B. It has two judges.



**§ 7A-41 has a delayed effective date. See notes for date.**

(c) In subsection (b) above:

(1) the names and boundaries of townships are as they were legally defined and in effect as of January 1, 1980, and recognized in the 1980 U.S. Census;

(2) for Guilford County, precinct boundaries are as shown on maps in use by the Guilford County Board of Elections on April 15, 1987,

(3) for Mecklenburg, Wake, and Durham Counties, precinct boundaries are as shown on the current maps in use by the appropriate county board of elections as of January 31, 1984, in accordance with G.S. 163-128(b); and

(4) for Wilson County, commissioner districts are those in use for election of members of the county board of commissioners as of January 1, 1987.

(5) for Cumberland County, House District 17 is in accordance with the boundaries in effect on January 1, 1987. Precincts are in accordance with those as approved by the United States Department of Justice on February 28, 1986.

(6) for Forsyth County, the boundaries of wards and precincts are those in effect on "WARD MAP 1985", published November 1985 by the City of Winston-Salem and Forsyth County.

If any changes in precinct boundaries, wards, commissioner districts, or House of Representative districts have been made since the dates specified, or are made, those changes shall not change the boundaries of the judicial districts.

(d) The several judges, their terms of office, and their assignments to districts are as follows:

(1) In the first judicial district, J. Herbert Small and Thomas S. Watts serve terms expiring December 31, 1994.

(2) In the second judicial district, William C. Griffin serves a term expiring December 31, 1994.

(3) In the third-A judicial district, David E. Reid serves a term expiring on December 31, 1992.

(4) In the third-B judicial district, Herbert O. Phillips, III, serves a term expiring on December 31, 1994.

(5) In the fourth-A judicial district, Henry L. Stevens, III, serves a term expiring December 31, 1994.

(6) In the fourth-B judicial district, James R. Strickland serves a term expiring December 31, 1992.

(7) In the fifth judicial district, no election shall be held in 1992 for the full term of the seat now occupied by Bradford Tillery, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the fifth judicial district, Napoleon B. Barefoot serves a term expiring December 31, 1994.

(8) In the sixth-A judicial district, Richard B. Allsbrook serves a term expiring December 31, 1990.

(9) In the sixth-B judicial district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(10) In the seventh-A judicial district, Charles B. Winberry, serves a term expiring December 31, 1994.



**§ 7A-41 has a delayed effective date. See notes for date.**

(11) In the seventh-B judicial district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(12) In the seventh-C judicial district, Franklin R. Brown serves a term expiring December 31, 1990.

(13) In the eighth-A judicial district, James D. Llewellyn serves a term expiring December 31, 1994.

(14) In the eighth-B judicial district, Paul M. Wright serves a term expiring December 31, 1992.

(15) In the ninth judicial district, Robert H. Hobgood and Henry W. Hight, Jr., serve terms expiring December 31, 1994.

(16) In the tenth-A judicial district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(17) In the tenth-B judicial district, Robert L. Farmer serves a term expiring December 31, 1992. In the tenth-B judicial district, no election shall be held in 1990 for the full term of the seat now occupied by Henry v. Barnette, Jr., and the holder of that seat shall serve until a successor is elected in 1992 and qualifies. The succeeding term begins January 1, 1993.

(18) In the tenth-C judicial district, Edwin S. Preston, serves a term expiring December 31, 1990. In the tenth-D judicial district, Donald Stephens serves a term expiring December 31, 1988.

(19) In the eleventh judicial district, Wiley F. Bowen serves a term expiring December 31, 1990.

(20) In the twelfth-A judicial district, D.B. Herring, Jr., serves a term expiring December 31, 1990.

(21) In the twelfth-B judicial district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(22) In the twelfth-C judicial district, no election shall be held in 1992 for the full term of the seat now occupied by Coy E. Brewer, Jr., and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the twelfth-C judicial district, E. Lynn Johnson serves a term expiring December 31, 1994.

(23) In the thirteenth judicial district, Giles R. Clark serves a term expiring December 31, 1994.

(24) In the fourteenth-A judicial district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(25) In the fourteenth-B judicial district, no election shall be held in 1992 for the full term of the seat now occupied by Anthony M. Brannon, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins July 1, 1995.

(26) In the fourteenth-B judicial district, no election shall be held in 1990 for the full term of the seat now occupied by Thomas H. Lee, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term begins January 1, 1995. In the fourteenth-B



**§ 7A-41 has a delayed effective date. See notes for date.**

judicial district, J. Milton Read, Jr., serves a term expiring December 31, 1994.

(27) In the fifteenth-A judicial district, J.B. Allen, Jr., serves a term expiring December 31, 1994.

(28) In the fifteenth-B judicial district, F. Gordon Battle serves a term expiring December 31, 1994.

(29) In the sixteenth-A judicial district, B. Craig Ellis serves a term expiring December 31, 1994.

(30) In the sixteenth-B judicial district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(31) In the seventeenth-A judicial district, Melzer A. Morgan, Jr., serves a term expiring December 31, 1990.

(32) In the seventeenth-B judicial district, James M. Long serves a term expiring December 31, 1994.

(33) In the eighteenth-A judicial district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(34) In the eighteenth-B judicial district, Edward K. Washington's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(35) In the eighteenth-C judicial district, W. Douglas Albright serves a term expiring December 31, 1990.

(36) In the eighteenth-D judicial district, Thomas W. Ross's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(37) In the eighteenth-E judicial district, Joseph John's term expired December 31, 1986, but he is holding over because of a court order enjoining an election from being held in 1986. A successor shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(38) In the nineteenth-A judicial district, James C. Davis serves a term expiring December 31, 1992.

(39) In the nineteenth-B judicial district, Russell G. Walker, Jr., serves a term expiring December 31, 1990.

(40) In the nineteenth-C judicial district, Thomas W. Seay, Jr., serves a term expiring December 31, 1990.

(41) In the twentieth-A judicial district, F. Fetzer Mills serves a term expiring December 31, 1992.

(42) In the twentieth-B judicial district, William H. Helms serves a term expiring December 31, 1990.

(43) In the twenty-first-A judicial district, William Z. Wood serves a term expiring December 31, 1990.

(44) In the twenty-first-B judicial district, Judson D. DeRamus, Jr., serves a term expiring December 31, 1988.

(45) In the twenty-first-C judicial district, William H. Freeman serves a term expiring December 31, 1990.

(46) In the twenty-first-D judicial district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(47) In the twenty-second judicial district, no election shall be held in 1992 for the full term of the seat now occupied by



**§ 7A-41 has a delayed effective date. See notes for date.**

Preston Cornelius, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term shall begin January 1, 1995. In the twenty-second judicial district, Robert A. Collier serves a term expiring December 31, 1994.

(48) In the twenty-third judicial district, Julius A. Rousseau, Jr., serves a term expiring December 31, 1990.

(49) In the twenty-fourth judicial district, Charles C. Lamm, Jr., serves a term expiring December 31, 1994.

(50) In the twenty-fifth-A judicial district, Claude S. Sitton serves a term expiring December 31, 1994.

(51) In the twenty-fifth-B judicial district, Forrest A. Ferrell serves a term expiring December 31, 1990.

(52) In the twenty-sixth-A judicial district, no election shall be held in 1994 for the full term of the seat now occupied by W. Terry Sherrill, and the holder of that seat shall serve until a successor is elected in 1996 and qualifies. The succeeding term shall begin January 1, 1997. In the twenty-sixth-A judicial district, a judge shall be elected in 1988 to serve an eight-year term beginning January 1, 1989.

(53) In the twenty-sixth-B judicial district, Frank W. Snepp, Jr., and Kenneth A. Griffin serve terms expiring December 31, 1990.

(54) In the twenty-sixth-C judicial district, no election shall be held in 1992 for the full term of the seat now occupied by Chase Boone Saunders, and the holder of that seat shall serve until a successor is elected in 1994 and qualifies. The succeeding term shall begin January 1, 1995. In the twenty-sixth-C judicial district, Robert M. Burroughs serves a term expiring December 31, 1994.

(55) In the twenty-seventh-A judicial district, no election shall be held in 1988 for the full term of the seat now occupied by Robert E. Gaines, and the holder of that seat shall serve until a successor is elected in 1990 and qualifies. The succeeding term begins January 1, 1991. In the twenty-seventh-A judicial district, Robert W. Kirby serves a term expiring December 31, 1990.

(56) In the twenty-seventh-B judicial district, John M. Gardner serves a term expiring December 31, 1994.

(57) In the twenty-eighth judicial district, Robert D. Lewis and C. Walter Allen serve terms expiring December 31, 1990.

(58) In the twenty-ninth judicial district, Hollis M. Owens, Jr., serves a term expiring December 31, 1990.

(59) In the thirtieth-A judicial district, James U. Downs serves a term expiring December 31, 1990.

(60) In the thirtieth-B judicial district, Janet M. Hyatt serves a term expiring December 31, 1994.

(e) In a district having more than one regular resident judge where the district consists of all of a county or all of several counties, the judge who has the most continuous service on the superior court is the senior regular resident superior court judge. If two judges are of equal seniority, the oldest judge is the senior regular resident judge. In a single-judge district, where the district consists of all of a county or all of several counties, the single judge is the senior regular resident judge.



**§ 7A-41 has a delayed effective date. See notes for date.**

In any county where there is more than one judicial district, but the districts include only territory from that county, then from all of the districts in that county, the judge who has the most continuous service on the superior court is the senior regular resident superior court judge for all of those districts and for the county. If two judges are of equal seniority, the oldest judge is the senior regular resident judge for all of those districts and for the county.

In any county where there is more than one judicial district, and the districts include part from that county, and part from another county, then from all of the districts in both those counties, the judge who has the most continuous service on the superior court is the senior regular resident superior court judge for all of those districts and for both counties. If two judges are of equal seniority, the oldest judge is the senior regular resident judge for all of those districts and for both counties.

Senior regular resident judges and regular resident judges possess equal judicial jurisdiction, power, authority and status, but all duties placed by the Constitution or statutes on the resident judge of a judicial district, including the appointment to and removal from office, which are not related to a case, controversy or judicial proceeding and which do not involve the exercise of judicial power, shall be discharged by the senior regular resident judge. A senior regular resident superior court judge in a multi-judge district, by notice in writing to the Administrative Officer of the Courts, may decline to exercise the authority vested in him by this section, in which event such authority shall be exercised by the regular resident judge next senior in point of service or age, respectively.

In the event the senior regular resident judge of a multi-judge district is unable, due to mental or physical incapacity, to exercise the authority vested in him by the statute, and the Chief Justice, in his discretion, has determined that such incapacity exists, the Chief Justice shall appoint an acting senior regular resident judge from the other regular resident judges of the district, to exercise, temporarily, the authority of the senior regular resident judge; provided that in any county where there is more than one judicial district, the appointment may be made of any of the other regular resident judges of any district in that county. Such appointee shall serve at the pleasure of the Chief Justice and until his temporary appointment is vacated by appropriate order. (1969, c. 1171, ss. 1-3; c. 1190, s. 4; 1971, c. 377, s. 5; c. 997; 1973, c. 47, s. 2; c. 646; c. 855, s. 1; 1975, c. 529; c. 956, ss. 1, 2; 1975, 2nd Sess., c. 983, s. 114; 1977, c. 1119, ss. 1, 3, 4; c. 1130, ss. 1, 2; 1977, 2nd Sess., c. 1238, s. 1; c. 1243, s. 4; 1979, c. 838, s. 119; c. 1072, s. 1; 1979, 2nd Sess., c. 1221, s. 1; 1981, c. 964, ss. 1, 2; 1981 (Reg. Sess., 1982), c. 1282, s. 71.2; 1983 (Reg. Sess., 1984), c. 1109, ss. 4, 4.1; 1985, c. 698, s. 11(a); 1987, c. 509, s. 1; c. 549, s. 6.6.)

**For this section as in effect until the 1987 amendments become effective,** see the main volume.

**Editor's Note.** —

Session Laws 1987, c. 509, s. 12 provided that except for ss. 4, 5, 6, 9, 12, 15, and 16, the act would only become effective if funds were appropriated to implement the act, and that it was the intent of the General Assembly to review this question during consideration of the Expansion Budget request of the Administrative Office of the Courts. However, Session Laws 1987, c. 738, s. 124 repealed c. 509, s. 12.

Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 509, s. 15, c.



**§ 7A-41 has a delayed effective date. See notes for date.**

549, s. 6.13, and c. 738, s. 237 are severability clauses.

**Effect of Amendments.** —

Session Laws 1987, c. 509, § 1, effective beginning with the 1988 primaries and elections for election purposes and for terms of office, and effective January 1, 1989, for all other purposes, rewrote this section.

Session Laws 1987, c. 549, s. 6.6, effective July 3, 1987, substituted "twenty-sixth-C" for "twenty-seventh-C" in the third sentence of subdivision (d)(54), as enacted by Session Laws 1987, c. 509.

CASE NOTES

**Preclearance of Acts Pursuant to Voting Rights Act.** —

Elections proposed to be held in Judicial Districts 3, 4, 8 and 12 would not offend provisions of federal court order of Sept. 24, 1985, and thus would not be enjoined, as such elections would not result in any retrogression in the voting right privileges of racial minorities in those districts, and the judgeships to be filled in those districts in 1986, all of which were created under law prior to section 5 of the Voting Rights Act, have not become an integral part of the voting procedures established by the North Carolina statutes creating new judgeships in those districts. Haith v. Martin, 643 F. Supp. 253 (E.D.N.C. 1986).

## § 7A-45. (Section repealed effective January 1, 1989 — See note) Special judges; appointment; removal; vacancies; authority.

(a) The Governor may appoint eight special superior court judges except as provided by this subsection. A special judge takes the same oath of office and is subject to the same requirements and disabilities as is or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district. Initial appointments made under this section shall be to terms of office beginning July 1, 1967, and expiring June 30, 1971. As the terms expire, the Governor may appoint successors for terms of four years each, except that terms beginning July 1, 1987, shall expire December 31, 1988; provided that if any judge serving as a special superior court judge on December 31, 1988, is to become first eligible for service retirement under G.S. 135-57 between December 31, 1988, and July 1, 1989, the term of that judge shall expire on that eligibility date, and except that if any special superior court judge who is holding office on June 30, 1987, has five years of membership service under G.S. 135-53(12) on that date, or will have three years of such service on or before December 1, 1987 if continued in office, the term of office of that judge is extended through December 31, 1988. All incumbents shall continue in office until their successors are appointed and qualify.

(b) A special judge is subject to removal from office for the same causes and in the same manner as a regular judge of the superior court, and a vacancy occurring in the office of special judge is filled by the Governor by appointment for the unexpired term.

(c) A special judge, in any court in which he is duly appointed to hold, has the same power and authority in all matters whatsoever that a regular judge holding the same court would have. A special judge, duly assigned to hold the court of a particular county, has during the session of court in that county, in open court and in



**§ 7A-45 has a delayed repeal date. See notes for date.**

chambers, the same power and authority of a regular judge in all matters whatsoever arising in that judicial district that could properly be heard or determined by a regular judge holding the same session of court.

(d) A special judge is authorized to settle cases on appeal and to make all proper orders in regard thereto after the time for which he was commissioned has expired. (1927, c. 206, ss. 1, 2, 5, 7; 1929, c. 137, ss. 1, 2, 5, 7; 1931, c. 29, ss. 1, 2, 5, 7; 1933, c. 217, ss. 1, 2, 5, 7; 1935, c. 97, ss. 1, 2, 5, 7; 1937, c. 72, ss. 1, 2, 5, 7; 1939, c. 31, ss. 1, 2, 5, 7; 1941, c. 51, ss. 1, 2, 5, 7; 1943, c. 58, ss. 1, 2, 5, 7; 1945, c. 153, ss. 1, 2, 5, 7; 1947, c. 24, ss. 1, 2, 5, 7; 1949, c. 681, ss. 1, 2, 5, 7; 1951, c. 78, s. 1; c. 1119, ss. 1, 2, 5, 7; 1953, c. 1322, ss. 1, 2, 5, 7; 1955, c. 1016, s. 1; 1959, c. 465; 1961, c. 34; 1963, c. 1170; 1969, c. 1190, s. 41; 1973, c. 82; 1987, c. 509, ss. 6, 7.)

**Section Repealed Effective January 1, 1989.** — Session Laws 1987, c. 509, s. 7 repeals this section, effective January 1, 1989, except that as to any judge continuing to serve under the proviso of subsection (a) of this section added by Session Laws 1987, c. 509, s. 6, this section is repealed on the eligibility date for retirement set forth in the proviso.

**Editor's Note.** —

Session Laws 1987, c. 509, s. 12 provided that except for ss. 4, 5, 6, 9, 12, 15, and 16, the act would only become effective if funds were appropriated to implement the act, and that it was the intent of the General Assembly to review this question during consideration of the Expansion Budget request of the Administrative Office of the Courts. However, Session Laws 1987, c. 738, s. 124, repealed c. 509, s. 12.

Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 509, s. 15 and c. 738, s. 237 are severability clauses.

**Effect of Amendments.** — The 1987 amendment by c. 509, s. 6, effective June 29, 1987, added "except as provided by this subsection" at the end of the first sentence of subsection (a), and added the language beginning "except that terms beginning July 1, 1987" at the end of the next-to-last sentence of subsection (a).

## § 7A-45.1. Special judges.

(a) The Governor may appoint two special superior court judges. A special judge takes the same oath of office and is subject to the same requirements and disabilities as are or may be prescribed by law for regular judges of the superior court, save the requirement of residence in a particular district. Appointments made under this section shall be to terms of office beginning August 1, 1987, and expiring December 31, 1990.

(b) A special judge is subject to removal from office for the same causes and in the same manner as a regular judge of the superior court, and a vacancy occurring in the office of special judge is filled by the Governor by appointment for the unexpired term.

(c) A special judge, in any court in which he is duly appointed to hold, has the same power and authority in all matters that a regular judge holding the same court would have. A special judge, duly assigned to hold the court of a particular county, has during the session of court in that county, in open court and in chambers, the same power and authority of a regular judge in all matters arising in that judicial district that could properly be heard or determined by a regular judge holding the same session of court.

(d) A special judge is authorized to settle cases on appeal and to make all proper orders in regard thereto after the time for which he was commissioned has expired. (1987, c. 738, s. 123(a).)



**§ 7A-45 has a delayed repeal date. See notes for date.**

**Editor's Note.** — Session Laws 1987, c. 738, s. 238 makes this section effective July 1, 1987.

Session Laws 1987, c. 738, s. 123(b) provides that in the election of 1990, two additional regular superior court judges shall be elected for terms beginning January 1, 1991, for districts to be designated by the General Assembly.

Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

## § 7A-47.2. (Effective January 1, 1989) Jurisdiction of superior court judges.

Notwithstanding any other provision of law, in addition to any other jurisdiction granted by law, a superior court judge of a district has jurisdiction in the entire county or counties in which the district is located, and a superior court judge holding court in a district has jurisdiction in the entire county or counties in which the district is located. (1987, c. 509, s. 2.)

**Editor's Note.** — Session Laws 1987, c. 509, s. 2 makes this section effective January 1, 1989.

Session Laws 1987, c. 509, s. 12 provided that except for ss. 4, 5, 6, 9, 12, 15, and 16, the act would only become effective if funds were appropriated to implement the act, and that it was the intent of the General Assembly to review this question during the consideration of the Expansion Budget request of the Administrative Office of the Courts. However, Session Laws 1987, c. 738, s. 124 repealed c. 509, s. 12.

Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 509, s. 15 and c. 738, s. 237 are severability clauses.

## § 7A-47.3. (Effective January 1, 1989) Assignment of judges in certain districts.

When a county is divided into more than one district, and judges are assigned to hold court, assignments shall be made for the county as a whole, for the superior court of that county. (1987, c. 509, s. 3.)

**Editor's Note.** — Session Laws 1987, c. 509, s. 3 makes this section effective January 1, 1989.

Session Laws 1987, c. 509, s. 12 provided that except for ss. 4, 5, 6, 9, 12, 15, and 16, the act would only become effective if funds were appropriated to implement the act, and that it was the intent of the General Assembly to review this question during the consideration of the Expansion Budget request of the Administrative Office of the Courts. However, Session Laws 1987, c. 738, s. 124 repealed c. 509, s. 12.

Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 509, s. 15 and c. 738, s. 237 are severability clauses.



**§ 7A-47.2 has a delayed effective date. See notes for date.**
**§ 7A-47.3 has a delayed effective date. See notes for date.**

## Article 8.

## *Retirement of Judges of the Superior Court; Retirement Compensation for Superior Court Judges; Recall to Emergency Service of Judges of the District and Superior Court; Disability Retirement for Judges of the Superior Court.*

### § 7A-52. Retired district and superior court judges may become emergency judges subject to recall to active service; compensation for emergency judges on recall.

(a) Judges of the district court and judges of the superior court who have not reached the mandatory retirement age specified in G.S. 7A-4.20, but who have retired under the provisions of G.S. 7A-51, or under the Uniform Judicial Retirement Act after having completed eight years of creditable service, may apply as provided in G.S. 7A-53 to become emergency judges of the court from which they retired. The Chief Justice of the Supreme Court may order any emergency judge of the district or superior court who, in his opinion, is competent to perform the duties of a judge of the court from which such judge retired, to hold regular or special sessions of such court, as needed. Order of assignment shall be in writing and entered upon the minutes of the court to which such emergency judge is assigned.

(1967, c. 108, s. 2; 1973, c. 640, s. 4; 1977, c. 736, s. 3; 1979, c. 878, s. 2; 1981, c. 455, s. 6; c. 859, s. 47; 1981 (Reg. Sess., 1982), c. 1253, s. 3; 1983, c. 784; 1985, c. 698, s. 9(b); 1987, c. 738, s. 132.)

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

**Editor's Note.** — Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

**Effect of Amendments.** — The 1987 amendment, effective July 1, 1987, substituted "eight years" for "12 years" in the first sentence of subsection (a).

## Article 9.

## *District Attorneys and Judicial Districts.*

### § 7A-60. District attorneys and prosecutorial districts.

(a) Except as provided in subsection (b), effective January 1, 1971, the State shall be divided into prosecutorial districts, as shown in subsection (a1) of this section. In the general election of November 1970, a district attorney shall be elected for a four-year term for each prosecutorial district. The district attorney shall be a resident of the district for which elected, and shall take office on

January 1 following the election. A vacancy in the office of district attorney shall be filled as provided in Article IV, Sec. 19 of the Constitution.

(a1) The counties of the State are organized into prosecutorial districts, and each district has the counties and the number of full-time assistant district attorneys set forth in the following table:

| *Judicial District* | *Counties* | *No. of Full-Time Asst. District Attorneys* |
|---|---|---|
| 1 | Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans | 5 |
| 2 | Beaufort, Hyde, Martin, Tyrrell, Washington | 4 |
| 3A | Pitt | 4 |
| 3B | Carteret, Craven, Pamlico | 4 |
| 4 | Duplin, Jones, Onslow, Sampson | 8 |
| 5 | New Hanover, Pender | 7 |
| 6 | Bertie, Halifax, Hertford, Northampton | 4 |
| 7 | Edgecombe, Nash, Wilson | 7 |
| 8 | Greene, Lenoir, Wayne | 8 |
| 9 | Franklin, Granville, Person, Vance, Warren | 6 |
| 10 | Wake | 15 |
| 11 | Harnett, Johnston, Lee | 6 |
| 12 | Cumberland, Hoke | 12 |
| 13 | Bladen, Brunswick, Columbus | 5 |
| 14 | Durham | 8 |
| 15A | Alamance | 3 |
| 15B | Orange, Chatham | 3 |
| 16 | Robeson, Scotland | 7 |
| 17A | Caswell, Rockingham | 3 |
| 17B | Stokes, Surry | 3 |
| 18 | Guilford | 14 |
| 19A | Cabarrus, Rowan | 5 |
| 19B | Montgomery, Randolph | 3 |
| 20 | Anson, Moore, Richmond, Stanly, Union | 8 |
| 21 | Forsyth | 9 |
| 22 | Alexander, Davidson, Davie, Iredell | 7 |
| 23 | Alleghany, Ashe, Wilkes, Yadkin | 3 |
| 24 | Avery, Madison, Mitchell, Watauga, Yancey | 3 |
| 25 | Burke, Caldwell, Catawba | 8 |
| 26 | Mecklenburg | 19 |
| 27A | Gaston | 6 |
| 27B | Cleveland, Lincoln | 4 |
| 28 | Buncombe | 5 |
| 29 | Henderson, McDowell, Polk, Rutherford, Transylvania | 6 |

| *Judicial District* | *Counties* | *No. of Full-Time Asst. District Attorneys* |
|---|---|---|
| 30 | Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain. | 5 |

(1967, c. 1049, s. 1; 1975, c. 956, s. 4; 1977, c. 1130, s. 3; 1977, 2nd Sess., c. 1238, s. 2; 1981, c. 964, ss. 2, 3; 1987, c. 509, ss. 4, 5; c. 738, s. 127(a).)

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

**Editor's Note.** —

Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 509, s. 15 and c. 738, s. 237 are severability clauses.

**Effect of Amendments.** — Session Laws 1987, c. 509, ss. 4 and 5, effective July 1, 1987, substituted "as shown in subsection (a1) of this section" for "the numbers and boundaries of which shall be identical with those of the superior and district court judicial districts, except as provided in this section" at the end of the first sentence of subsection (a), and added subsection (a1).

Session Laws 1987, c. 738, s. 127(a), effective October 1, 1987, added one full-time assistant district attorney for districts 11, 25, 27A, 27B and 29, in subsection (a1) as enacted by Session Laws 1987, c. 509.

## § 7A-65. Compensation and allowances of district attorneys and assistant district attorneys.

(d) In lieu of merit and other increment raises paid to regular State employees, an assistant district attorney shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, and fourteen and four-tenths percent (14.4%) after 15 years of service. "Service" means service as an assistant district attorney. (1967, c. 1049, s. 1; 1973, c. 47, s. 2; 1983, c. 761, ss. 246, 248; 1983 (Reg. Sess., 1984), c. 1034, ss. 92, 165; c. 1109, s. 13.1; 1985, c. 689, s. 2; c. 698, s. 10(b); 1985 (Reg. Sess., 1986), c. 1014, s. 224; 1987, c. 738, s. 33(a).)

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

**Editor's Note.** —

Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

**Effect of Amendments.** —

The 1987 amendment, effective July 1, 1987, deleted "and" following "five years of service" and inserted "and fourteen and four-tenths percent (14.4%) after 15 years of service" in the first sentence of subsection (d).

## Article 11.

## *Special Regulations.*

### § 7A-95. Reporting of trials.

(c) If an electronic or other mechanical device is utilized, it shall be the duty of the clerk of the superior court or some person designated by the clerk to operate the device while a trial is in progress, and the clerk shall thereafter preserve the record thus produced, which may be transcribed, as required, by any person designated by the Administrative Office of the Courts. If stenotype, shorthand, or stenomask equipment is used, the original tapes, notes, discs or other records are the property of the State, and the clerk shall keep them in his custody.

(1965, c. 310, s. 1; 1969, c. 1190, s. 7; 1971, c. 377, s. 32; 1987, c. 384, s. 1.)

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

**Effect of Amendments.** — The 1987 amendment, effective June 16, 1987, substituted "may be transcribed, as required, by any person designated by the Administrative Office of the Courts" for "and transcribe the record as required" at the end of the first sentence of subsection (c).

## Article 12.

## *Clerk of Superior Court.*

### § 7A-101. Compensation.

The clerk of superior court is a full-time employee of the State and shall receive an annual salary, payable in equal monthly installments, based on the population of the county, as determined by the population projections of the Office of State Budget and Management for the year preceding the first year of each biennial budget, according to the following schedule:

| *Population* | *Annual Salary* |
|---|---|
| Less than 50,000 | $34,728 |
| 50,000 to 99,999 | 39,948 |
| 100,000 to 199,999 | 45,156 |
| 200,000 and above | 51,516 |

When a county changes from one population group to another, the salary of the clerk shall be changed to the salary appropriate for the new population group on July 1 of the first year of each biennial budget, except that the salary of an incumbent clerk shall not be decreased by any change in population group during his continuance in office.

The clerk shall receive no fees or commission by virtue of his office. The salary set forth in this section is the clerk's sole official compensation, but if, on June 30, 1975, the salary of a particular clerk, by reason of previous but no longer authorized merit incre-

ments, is higher than that set forth in the table, that higher salary shall not be reduced during his continuance in office.

In lieu of merit and other increment raises paid to regular State employees, a clerk of superior court shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Budget Appropriation Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. Service shall mean service in the elective position of clerk of superior court and shall not include service as an assistant, deputy, or acting clerk. Service shall also mean service as a justice or judge of the General Court of Justice or as a district attorney. (1965, c. 310, s. 1; 1967, c. 691, s. 5; 1969, c. 1186, s. 3; 1971, c. 877, ss. 1, 2; 1973, c. 571, ss. 1, 2; 1975, c. 956, s. 7; 1975, 2nd Sess., c. 983, s. 11; 1977, c. 802, s. 42; 1977, 2nd Sess., c. 1136, s. 13; 1979, c. 838, s. 85; 1979, 2nd Sess., c. 1137, s. 12; 1981, c. 964, s. 14; c. 1127, s. 12; 1983, c. 761, ss. 200, 247, 249; 1983 (Reg. Sess., 1984), c. 1034, ss. 86, 87; c. 1109, s. 13.1; 1985, c. 479, s. 211; c. 689, s. 3; c. 698, s. 10(c); 1985 (Reg. Sess., 1986), c. 1014, s. 34; 1987, c. 738, s. 20.)

**Editor's Note.** —

Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

**Effect of Amendments.** —

The 1987 amendment, effective July 1, 1987, rewrote the schedule of salaries for clerks of superior court in the first paragraph.

## § 7A-102. Assistant and deputy clerks; appointment; number; salaries; duties.

(c) Notwithstanding the provisions of subsection (a), the Administrative Officer of the Courts shall establish an incremental salary plan for assistant clerks and for deputy clerks based on a series of salary steps corresponding to the steps contained in the Salary Plan for State Employees adopted by the Office of State Personnel, subject to a minimum and a maximum annual salary as set forth below. On and after July 1, 1985, each assistant clerk and each deputy clerk shall be eligible for an annual step increase in his salary plan based on satisfactory job performance as determined by each clerk. Notwithstanding the foregoing, if an assistant or deputy clerk's years of service in the office of superior court clerk would warrant an annual salary greater than the salary first established under this section, that assistant or deputy clerk shall be eligible on and after July 1, 1984, for an annual step increase in his salary plan. Furthermore, on and after July 1, 1985, that assistant or deputy clerk shall be eligible for an increase of two steps in his salary plan, and shall remain eligible for a two-step increase each year as recommended by each clerk until that assistant or deputy clerk's annual salary corresponds to his number of years of service. A full-time assistant clerk or a full-time deputy clerk shall be paid an annual salary subject to the following minimum and maximum rates:

| *Assistant Clerks* | *Annual Salary* |
|---|---|
| Minimum | $ 17,628 |
| Maximum | 29,580 |

| *Deputy Clerks* | *Annual Salary* |
|---|---|
| Minimum | $ 13,812 |
| Maximum | 22,680 |

Full-time assistant clerks, licensed to practice law in North Carolina, who are employed in the office of superior court clerk on and after July 1, 1984, are authorized an entry-level annual salary of not more than three-fourths of the maximum annual salary established for assistant clerks. Full-time assistant clerks, holding a law degree from an accredited law school, who are employed in the office of superior court clerk on and after July 1, 1984, are authorized an entry-level annual salary of not more than two-thirds of the maximum annual salary established for assistant clerks. The entry-level annual salary for all other assistant and deputy clerks employed on and after July 1, 1984, shall be at the minimum rates as herein established. (1777, c. 115, s. 86; P.R.; R.C., c. 19, s. 15; Code, s. 75; 1899, c. 235, ss. 2, 3; Rev., ss. 898-900; 1921, c. 32, ss. 1-3; C.S., ss. 934(a)-934(c), 935-937; 1951, c. 159, ss. 1, 2; 1959, c. 1297; 1963, c. 1187; 1965, c. 264; c. 310, s. 1; 1971, c. 363, s. 2; 1973, c. 678; 1983 (Reg. Sess., 1984), c. 1034, ss. 88, 89; 1985, c. 479, s. 212; c. 757, s. 190; 1985 (Reg. Sess., 1986), c. 1014, p. 35; 1987, c. 738, s. 21(a).)

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

**Editor's Note.** —

Session Laws 1987, c. 738, s. 21(b) provides: "Nothing contained in this Part limits any other provisions of G.S. 7A-102(c)." Section 21(b) is contained in Part I of Chapter 738, "Current Operations/General Fund."

Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

**Effect of Amendments.** —

The 1987 amendment, effective July 1, 1987, rewrote the schedule of minimum and maximum annual salary rates for assistant clerks and deputy clerks in the first paragraph of subsection (c).

## § 7A-103. Authority of clerk of superior court.

CASE NOTES

**Clerk May Correct Orders Entered Erroneously.** — The broad grant of power to the clerk in subsection (a) of this section includes the power to correct orders entered erroneously, whenever the clerk's attention is directed to the error by motion or by other means. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986).

**The clerk had authority to rehear a petition to reopen an estate and to reverse her prior order** that the estate be reopened. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986).

**Acts of Heirs Would Not Affect Clerk's Determination.** — The clerk of court was not bound, in making a discretionary determination of whether "proper cause" existed for reopening an estate, by any estoppel theory based upon acts of the heirs. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986).

**Refusal to Reopen Estate Upheld.** — In light of the public policy in favor of the expedited administration of estates, as evidenced by the six-month statute of limitations and other provisions of Chapter 28A, petitioner, who alleged that the deceased had promised to devise a life estate to her, had a heavy burden of justifying her failure to bring her suit

within the six-month period provided for that purpose, or at the very least, within the greater than two-year period that the estate actually remained open. There was no error in the clerk's determination that this burden was not met. In re Estate of English, 83 N.C. App. 359, 350 S.E.2d 379 (1986).

**The purpose of the subpoena duces tecum is to require the production of specific items** patently material to the inquiry. Therefore, it must specify with as much precision as fair and feasible the particular items desired. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

**Discovery is not a proper purpose for a subpoena duces tecum.** State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

**What Documents Are Subject to Subpoena Duces Tecum.** — Documents not subject to the criminal discovery statute, § 15A-903, may still be subject to a subpoena duces tecum. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

**A motion to quash a subpoena duces tecum is addressed to the sound discretion of the trial judge,** and is not subject to review absent a showing of abuse of discretion. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

**Trial court did not abuse its discretion in quashing subpoena duces tecum** which called for all files and records of children's home relating to the victim and another witness in a prosecution for taking indecent liberties with a child. State v. Newell, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

## § 7A-111. Receipt and disbursement of insurance and other moneys for minors and incapacitated adults.

(a) When a minor under 18 years of age is named beneficiary in a policy or policies of insurance, and the insured dies prior to the majority of such minor, and the proceeds of each individual policy do not exceed twenty-five thousand dollars ($25,000) such proceeds may be paid to and, if paid, shall be received by the public guardian or clerk of the superior court of the county wherein the beneficiary is domiciled. The receipt of the public guardian or clerk shall be a full and complete discharge of the insurer issuing the policy or policies to the extent of the amount paid to such public guardian or clerk.

Any person having in his possession twenty-five thousand dollars ($25,000) or less for any minor under 18 years of age for whom there is no guardian, may pay such moneys into the office of the public guardian, if any, or the office of the clerk of superior court of the county of the recipient's domicile. The receipt of the public guardian or clerk shall constitute a valid release of the payor's obligation to the extent of the sum delivered to the clerk.

The clerk is authorized under this section to receive, to administer and to disburse the monies held in such sum or sums and at such time or times as in his judgment is in the best interest of the child, except that the clerk must first determine that the parents or other persons responsible for the child's support and maintenance are financially unable to provide the necessities for such child, and also that the child is in need of maintenance and support or other necessities, including, when appropriate, education. The clerk shall require receipts or paid vouchers showing that the monies disbursed under this section were used for the exclusive use and benefit of the child.

(b) When an adult who is mentally incapable on account of sickness, old age, disease or other infirmity to manage his own affairs is named beneficiary in a policy or policies of insurance, and the in-

sured dies during the incapacity of such adult, and the proceeds of each individual policy do not exceed five thousand dollars ($5,000) such proceeds may be paid to and, if paid, shall be received by the public guardian or clerk of the superior court of the county wherein the beneficiary is domiciled. A certificate of mental incapacity, signed by a physician or reputable person who has had an opportunity to observe the mental condition of an adult beneficiary, filed with the clerk, is prima facie evidence of the mental incapacity of such adult, and authorizes the clerk to receive and administer funds under this section. The receipt of the public guardian or clerk shall be a full and complete discharge of the insurer issuing the policy or policies to the extent of the amount paid to such public guardian or clerk.

Any person having in his possession five thousand dollars ($5,000) or less for any incapacitated adult for whom there is no guardian, may pay such monies into the office of the public guardian, if any, or the office of the clerk of superior court of the county of the recipient's domicile. The clerk's receipt shall constitute a valid release of the payor's obligation to the extent of the sum delivered to the clerk.

The clerk is authorized to receive, to administer and, upon a finding of fact that it is in the best interest of the incapacitated adult, to disburse funds directly to a creditor, a relative or to some discreet and solvent neighbor or friend for the purpose of handling the property and affairs of the incapacitated adult. The clerk shall require receipts or paid vouchers showing that the monies disbursed under this section were used for the exclusive use and benefit of the incapacitated adult.

(c) Any monies paid to the clerk of the superior court under subsection (a) of this section shall also include the name, last known address, social security number or taxpayer identification number of the beneficiary or payee, and the name and address of the nearest relative of the beneficiary or payee.

(d) The determination of incapacity authorized in subsection (b) of this section is separate and distinct from the procedure for the determination of incompetency provided in Chapter 35A. (1899, c. 82; Rev., s. 924; 1911, c. 29, s. 1; 1919, c. 91; C.S., s. 962; Ex. Sess., 1924, c. 1, s. 1; 1927, c. 76; 1929, c. 15; 1933, c. 363; 1937, c. 201; 1945, c. 160, ss. 1, 2; 1949, c. 188; 1953, c. 101; 1959, c. 794, ss. 1, 2; 1961, c. 377; 1971, c. 363, s. 8; c. 1231, s. 1; 1983, c. 65, s. 3; 1987, c. 29; c. 550, s. 14.)

**Effect of Amendments.** — Session Laws 1987, c. 29, effective October 1, 1987, rewrote this section.

Session Laws 1987, c. 550, s. 14, effective October 1, 1987, substituted "Chapter 35A" for "Chapter 35" in subsection (d).

# SUBCHAPTER IV. DISTRICT COURT DIVISION OF THE GENERAL COURT OF JUSTICE.

## ARTICLE 13.

## *Creation and Organization of the District Court Division.*

### § 7A-130. Creation of district court division and district court districts; seats of court.

The district court division of the General Court of Justice is hereby created. It consists of various district courts organized in territorial districts. The numbers and boundaries of the districts are as provided by G.S. 7A-133. The district court shall sit in the county seat of each county, and at such additional places in each county as the General Assembly may authorize, except that sessions of court are not required at an additional seat of court unless the chief district judge and the Administrative Officer of the Courts concur in a finding that the facilities are adequate. (1965, c. 310, s. 1; 1987, c. 509, s. 14.)

**Editor's Note.** — Session Laws 1987, c. 509, s. 12 provided that except for ss. 4, 5, 6, 9, 12, 15, and 16, the act would only become effective if funds were appropriated to implement the act, and that it was the intent of the General Assembly to review this question during the consideration of the Expansion Budget request of the Administrative Office of the Courts. However, Session Laws 1987, c. 738, s. 124 repealed c. 509, s. 12.

Session Laws 1987, c. 738, s. 1.1 provides c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 509, s. 15 and c. 738, s. 237 are severability clauses.

**Effect of Amendments.** — The 1987 amendment, effective June 29, 1987, substituted "as provided by G.S. 7A-133" for "identical to those of the superior judicial districts" at the end of the second sentence.

### § 7A-133. (Effective until December 1, 1988) Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

Each district court district shall have the numbers of judges and each county within the district shall have the numbers of magistrates and additional seats of court, as set forth in the following table:



**§ 7A-133 is set out twice. See section headings for effective dates.**

| District | Judges | County | Magistrates Min.-Max. | | Additional Seats of Court |
|---|---|---|---|---|---|
| 1 | 3 | Camden | 1 | 2 | |
| | | Chowan | 2 | 3 | |
| | | Currituck | 1 | 2 | |
| | | Dare | 3 | 5 | |
| | | Gates | 2 | 3 | |
| | | Pasquotank | 3 | 4 | |
| | | Perquimans | 2 | 3 | |
| 2 | 3 | Martin | 5 | 8 | |
| | | Beaufort | 4 | 5 | |
| | | Tyrrell | 1 | 2 | |
| | | Hyde | 2 | 4 | |
| | | Washington | 3 | 4 | |
| 3 | 6 | Craven | 7 | 10 | |
| | | Pitt | 10 | 12 | Farmville, Ayden |
| | | Pamlico | 2 | 3 | |
| | | Carteret | 5 | 8 | |
| 4 | 5 | Sampson | 6 | 8 | |
| | | Duplin | 9 | 11 | |
| | | Jones | 2 | 3 | |
| | | Onslow | 8 | 11 | |
| 5 | 4 | New Hanover | 6 | 10 | |
| | | Pender | 4 | 6 | |
| 6 | 3 | Northampton | 5 | 6 | |
| | | Halifax | 9 | 14 | Roanoke Rapids, Scotland Neck |
| | | Bertie | 4 | 5 | |
| | | Hertford | 5 | 6 | |
| 7 | 4 | Nash | 7 | 10 | Rocky Mount |
| | | Edgecombe | 4 | 6 | Rocky Mount |
| | | Wilson | 4 | 6 | |
| 8 | 5 | Wayne | 5 | 8 | Mount Olive |
| | | Greene | 2 | 4 | |
| | | Lenoir | 4 | 7 | La Grange |
| 9 | 4 | Person | 3 | 4 | |
| | | Granville | 3 | 7 | |
| | | Vance | 3 | 5 | |
| | | Warren | 3 | 4 | |
| | | Franklin | 3 | 6 | |
| 10 | 9 | Wake | 12 | 17 | Apex Wendell Fuquay-Varina Wake Forest |
| 11 | 4 | Harnett | 7 | 11 | Dunn |
| | | Johnston | 10 | 12 | Benson and Selma |
| | | Lee | 4 | 6 | |
| 12 | 6 | Cumberland | 10 | 17 | |
| | | Hoke | 4 | 5 | |
| 13 | 4 | Bladen | 4 | 6 | |
| | | Brunswick | 4 | 7 | |
| | | Columbus | 6 | 8 | Tabor City |
| 14 | 5 | Durham | 8 | 12 | |
| 15A | 3 | Alamance | 7 | 9 | Burlington |
| 15B | 3 | Orange | 4 | 8 | Chapel Hill |
| | | Chatham | 3 | 6 | Siler City |



**§ 7A-133 is set out twice. See section headings for effective dates.**

| District | Judges | County | Magistrates Min. | Magistrates Max. | Additional Seats of Court |
|---|---|---|---|---|---|
| 16 | 4 | Robeson | 8 | 16 | Fairmont<br>Maxton<br>Pembroke<br>Red Springs<br>Rowland<br>St. Pauls |
| | | Scotland | 3 | 5 | |
| 17A | 3 | Caswell | 2 | 5 | |
| | | Rockingham | 4 | 9 | Reidsville<br>Eden<br>Madison |
| 17B | 2 | Stokes | 2 | 4 | |
| | | Surry | 5 | 8 | Mt. Airy |
| 18 | 8 | Guilford | 20 | 26 | High Point |
| 19A | 4 | Cabarrus | 5 | 9 | Kannapolis |
| | | Rowan | 5 | 10 | |
| 19B | 2 | Montgomery | 2 | 4 | |
| | | Randolph | 5 | 8 | Liberty |
| 20 | 5 | Stanly | 5 | 6 | |
| | | Union | 4 | 6 | |
| | | Anson | 4 | 5 | |
| | | Richmond | 5 | 6 | Hamlet |
| | | Moore | 5 | 8 | Southern Pines |
| 21 | 6 | Forsyth | 3 | 15 | Kernersville |
| 22 | 5 | Alexander | 2 | 3 | |
| | | Davidson | 7 | 10 | Thomasville |
| | | Davie | 2 | 3 | |
| | | Iredell | 4 | 8 | Mooresville |
| 23 | 3 | Alleghany | 1 | 2 | |
| | | Ashe | 3 | 4 | |
| | | Wilkes | 4 | 6 | |
| | | Yadkin | 3 | 5 | |
| 24 | 3 | Avery | 3 | 4 | |
| | | Madison | 4 | 5 | |
| | | Mitchell | 3 | 4 | |
| | | Watauga | 4 | 6 | |
| | | Yancey | 2 | 4 | |
| 25 | 5 | Burke | 4 | 7 | |
| | | Caldwell | 4 | 7 | |
| | | Catawba | 6 | 9 | Hickory |
| 26 | 11 | Mecklenburg | 15 | 26 | |
| 27A | 5 | Gaston | 11 | 20 | |
| 27B | 3 | Cleveland | 5 | 8 | |
| | | Lincoln | 4 | 6 | |
| 28 | 4 | Buncombe | 6 | 15 | |
| 29 | 4 | Henderson | 4 | 6 | |
| | | McDowell | 3 | 4 | |
| | | Polk | 3 | 4 | |
| | | Rutherford | 6 | 8 | |
| | | Transylvania | 2 | 4 | |
| 30 | 3 | Cherokee | 3 | 4 | |
| | | Clay | 1 | 2 | |
| | | Graham | 2 | 3 | |
| | | Haywood | 5 | 7 | Canton |
| | | Jackson | 3 | 4 | |
| | | Macon | 3 | 4 | |
| | | Swain | 2 | 3 | |



**§ 7A-133 is set out twice. See section headings for effective dates.**

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6; 1979, c. 465; c. 838, ss. 117, 118; c. 1072, ss. 2, 3; 1979, 2nd Sess., c. 1221, s. 2; 1981, c. 964, s. 4; 1983, c. 881, s. 5; 1983 (Reg. Sess., 1984), c. 1109, s. 5; 1985, c. 698, ss. 7(a), 12; 1985 (Reg. Sess., 1986), c. 1014, s. 222; 1987, c. 738, s. 130(a).)

**Section Set Out Twice.** — The section above is effective until Dec. 1, 1988. For this section as amended effective Dec. 1, 1988, see the following section, also numbered § 7A-133.

**Editor's Note.** —

Session Laws 1987, c. 738, s. 1.1 provides c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

**Effect of Amendments.** —

Session Laws 1987, c. 738, s. 130(a), effective October 1, 1987, added one additional magistrate to the maximum for the Counties of Buncombe and Wake.

## § 7A-133. (Effective December 1, 1988) Numbers of judges by districts; numbers of magistrates and additional seats of court, by counties.

Each district court district shall have the numbers of judges and each county within the district shall have the numbers of magistrates and additional seats of court, as set forth in the following table:

| District | Judges | County | Magistrates Min.-Max. | | Additional Seats of Court |
|---|---|---|---|---|---|
| 1 | 3 | Camden | 1 | 2 | |
| | | Chowan | 2 | 3 | |
| | | Currituck | 1 | 2 | |
| | | Dare | 3 | 5 | |
| | | Gates | 2 | 3 | |
| | | Pasquotank | 3 | 4 | |
| | | Perquimans | 2 | 3 | |
| 2 | 3 | Martin | 5 | 8 | |
| | | Beaufort | 4 | 5 | |
| | | Tyrrell | 1 | 2 | |
| | | Hyde | 2 | 4 | |
| | | Washington | 3 | 4 | |
| 3 | 7 | Craven | 7 | 10 | |
| | | Pitt | 10 | 12 | Farmville, Ayden |
| | | Pamlico | 2 | 3 | |
| | | Carteret | 5 | 8 | |
| 4 | 5 | Sampson | 6 | 8 | |
| | | Duplin | 9 | 11 | |
| | | Jones | 2 | 3 | |
| | | Onslow | 8 | 11 | |
| 5 | 5 | New Hanover | 6 | 10 | |
| | | Pender | 4 | 6 | |
| 6 | 3 | Northampton | 5 | 6 | |
| | | Halifax | 9 | 14 | Roanoke |



**§ 7A-133 is set out twice. See section headings for effective dates.**

| District | Judges | County | Magistrates Min. | Magistrates Max. | Additional Seats of Court |
|---|---|---|---|---|---|
| | | | | | Rapids, Scotland Neck |
| | | Bertie | 4 | 5 | |
| | | Hertford | 5 | 6 | |
| 7 | 5 | Nash | 7 | 10 | Rocky Mount |
| | | Edgecombe | 4 | 6 | Rocky Mount |
| | | Wilson | 4 | 6 | |
| 8 | 5 | Wayne | 5 | 8 | Mount Olive |
| | | Greene | 2 | 4 | |
| | | Lenoir | 4 | 7 | La Grange |
| 9 | 4 | Person | 3 | 4 | |
| | | Granville | 3 | 7 | |
| | | Vance | 3 | 5 | |
| | | Warren | 3 | 4 | |
| | | Franklin | 3 | 6 | |
| 10 | 10 | Wake | 12 | 17 | Apex<br>Wendell<br>Fuquay-Varina<br>Wake Forest |
| 11 | 5 | Harnett | 7 | 11 | Dunn |
| | | Johnston | 10 | 12 | Benson and Selma |
| | | Lee | 4 | 6 | |
| 12 | 6 | Cumberland | 10 | 17 | |
| | | Hoke | 4 | 5 | |
| 13 | 4 | Bladen | 4 | 6 | |
| | | Brunswick | 4 | 7 | |
| | | Columbus | 6 | 8 | Tabor City |
| 14 | 5 | Durham | 8 | 12 | |
| 15A | 3 | Alamance | 7 | 9 | Burlington |
| 15B | 3 | Orange | 4 | 8 | Chapel Hill |
| | | Chatham | 3 | 6 | Siler City |
| 16 | 5 | Robeson | 8 | 16 | Fairmont<br>Maxton<br>Pembroke<br>Red Springs<br>Rowland<br>St. Pauls |
| | | Scotland | 3 | 5 | |
| 17A | 3 | Caswell | 2 | 5 | |
| | | Rockingham | 4 | 9 | Reidsville<br>Eden<br>Madison |
| 17B | 2 | Stokes | 2 | 4 | |
| | | Surry | 5 | 8 | Mt. Airy |
| 18 | 9 | Guilford | 20 | 26 | High Point |
| 19A | 4 | Cabarrus | 5 | 9 | Kannapolis |
| | | Rowan | 5 | 10 | |
| 19B | 3 | Montgomery | 2 | 4 | |
| | | Randolph | 5 | 8 | Liberty |
| 20 | 5 | Stanly | 5 | 6 | |
| | | Union | 4 | 6 | |
| | | Anson | 4 | 5 | |
| | | Richmond | 5 | 6 | Hamlet |
| | | Moore | 5 | 8 | Southern Pines |
| 21 | 7 | Forsyth | 3 | 15 | Kernersville |



**§ 7A-133 is set out twice. See section headings for effective dates.**

| District | Judges | County | Magistrates Min.-Max. | | Additional Seats of Court |
|---|---|---|---|---|---|
| 22 | 5 | Alexander | 2 | 3 | |
| | | Davidson | 7 | 10 | Thomasville |
| | | Davie | 2 | 3 | |
| | | Iredell | 4 | 8 | Mooresville |
| 23 | 3 | Alleghany | 1 | 2 | |
| | | Ashe | 3 | 4 | |
| | | Wilkes | 4 | 6 | |
| | | Yadkin | 3 | 5 | |
| 24 | 3 | Avery | 3 | 4 | |
| | | Madison | 4 | 5 | |
| | | Mitchell | 3 | 4 | |
| | | Watauga | 4 | 6 | |
| | | Yancey | 2 | 4 | |
| 25 | 6 | Burke | 4 | 7 | |
| | | Caldwell | 4 | 7 | |
| | | Catawba | 6 | 9 | Hickory |
| 26 | 12 | Mecklenburg | 15 | 26 | |
| 27A | 5 | Gaston | 11 | 20 | |
| 27B | 3 | Cleveland | 5 | 8 | |
| | | Lincoln | 4 | 6 | |
| 28 | 4 | Buncombe | 6 | 15 | |
| 29 | 4 | Henderson | 4 | 6 | |
| | | McDowell | 3 | 4 | |
| | | Polk | 3 | 4 | |
| | | Rutherford | 6 | 8 | |
| | | Transylvania | 2 | 4 | |
| 30 | 3 | Cherokee | 3 | 4 | |
| | | Clay | 1 | 2 | |
| | | Graham | 2 | 3 | |
| | | Haywood | 5 | 7 | Canton |
| | | Jackson | 3 | 4 | |
| | | Macon | 3 | 4 | |
| | | Swain | 2 | 3 | |

(1965, c. 310, s. 1; 1967, c. 691, s. 8; 1969, c. 1190, s. 10; c. 1254; 1971, c. 377, s. 7; cc. 727, 840, 841, 842, 843, 865, 866, 898; 1973, cc. 132, 373, 483; c. 838, s. 1; c. 1376; 1975, c. 956, ss. 8, 10; 1977, cc. 121, 122; c. 678, s. 2; c. 947, s. 1; c. 1130, ss. 4, 5; 1977, 2nd Sess., c. 1238, s. 3; c. 1243, ss. 3, 6; 1979, c. 465; c. 838, ss. 117, 118; c. 1072, ss. 2, 3; 1979, 2nd Sess., c. 1221, s. 2; 1981, c. 964, s. 4; 1983, c. 881, s. 5; 1983 (Reg. Sess., 1984), c. 1109, s. 5; 1985, c. 698, ss. 7(a), 12; 1985 (Reg. Sess., 1986), c. 1014, s. 222; 1987, c. 738, ss. 126(a), 130(a).)

**Section Set Out Twice.** — The section above is effective Dec. 1, 1988. For this section as in effect until Dec. 1, 1988, see the preceding section, also numbered § 7A-133.

**Editor's Note.** —

Session Laws 1987, c. 738, s. 126(b) provides that the judges added by s. 126(a) shall be elected at the 1988 general election.

Session Laws 1987, c. 738, s. 1.1 provides c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

**Effect of Amendments.** —

Session Laws 1987, c. 738, s. 130(a), effective October 1, 1987, added one additional magistrate to the maximum for the Counties of Buncombe and Wake.

Session Laws 1987, c. 738, s. 126(a), effective December 1, 1988, added one additional district court judge in districts 3, 5, 7, 10, 11, 16, 18, 19B, 21, 25 and 26.



**§ 7A-133 is set out twice. See section headings for effective dates.**

## Article 14.

## *District Judges.*

### § 7A-140. Number; election; term; qualification; oath.

CASE NOTES

**Cited** in Bradshaw v. Administrative Office of Courts, 83 N.C. App. 237, 349 S.E.2d 621 (1986).

### § 7A-142. Vacancies in office.

CASE NOTES

**Challenge Held Moot.** — Complaint filed on August 29, 1986, by individual who wished to be considered in selection process for district court judge, but who was ineligible by virtue of this section, seeking to have the requirement that the persons nominated by the Bar to fill a vacancy for district court judge be members of the same political party as the vacating judge declared unconstitutional only for the purpose of permitting him to be included in the selection process, where the Bar meeting that he sought to participate in had been held on August 25, 1986, was moot when it was filed and would be dismissed. Pearson v. Martin, — N.C. —, 355 S.E.2d 496 (1987).

## Article 16.

## *Magistrates.*

### § 7A-171. Numbers; appointment and terms; vacancies.

CASE NOTES

**Cited** in Bradshaw v. Administrative Office of Courts, 83 N.C. App. 237, 349 S.E.2d 621 (1986).

### § 7A-171.1. Duty hours, salary, and travel expenses within county.

(a) The Administrative Officer of the Courts, after consultation with the chief district judge and pursuant to the following provisions, shall set an annual salary for each magistrate.

(1) A full-time magistrate, so designated by the Administrative Officer of the Courts, shall be paid the annual salary indicated in the table below according to the number of years he has served as a magistrate. The salary steps shall take effect on the anniversary of the date the magistrate was originally appointed:

*Table of Salaries of Full-Time Magistrates*

| *Number of Prior Years of Service* | *Annual Salary* |
|---|---|
| Less than 1 | $ 14,076 |
| 1 or more but less than 3 | 14,808 |
| 3 or more but less than 5 | 16,320 |
| 5 or more but less than 7 | 17,988 |
| 7 or more but less than 9 | 19,836 |
| 9 or more but less than 11 | 21,840 |
| 11 or more | 24,036 |

A "Full-time magistrate" is a magistrate who is assigned to work an average of not less than 40 hours a week during his term of office.

Notwithstanding any other provision of this subdivision, a full-time magistrate, who was serving as a magistrate on December 31, 1978, and who was receiving an annual salary in excess of that which would ordinarily be allowed under the provisions of this subdivision, shall not have the salary, which he was receiving reduced during any subsequent term as a full-time magistrate. That magistrate's salary shall be fixed at the salary level from the table above which is nearest and higher than the latest annual salary he was receiving on December 31, 1978, and, thereafter, shall advance in accordance with the schedule in the table above.

(2) A part-time magistrate, so designated by the Administrative Officer of the Courts, is included, in accordance with G.S. 7A-170, under the provisions of G.S. 135-1(10) and 135-40.2(a) and shall receive an annual salary based on the following formula: The average number of hours a week that a part-time magistrate is assigned work during his term shall be multiplied by the annual salary payable to a full-time magistrate who has the same number of years of service prior to the beginning of that term as does the part-time magistrate and the product of that multiplication shall be divided by the number 40. The quotient shall be the annual salary payable to that part-time magistrate.

A "part-time magistrate" is a magistrate who is assigned to work an average of less than 40 hours of work a week during his term. No magistrate may be assigned an average of less than 10 hours of work a week during his term.

Notwithstanding any other provision of this subdivision, upon reappointment as a magistrate and being assigned to work the same or greater number of hours as he worked as a magistrate for a term of office ending on December 31, 1978, a person who received an annual salary in excess of that to which he would be entitled under the formula contained in this subdivision shall receive an annual salary equal to that received during the prior term. That magistrate's salary shall increase in accordance with the salary formula contained in this subdivision.

(3) Notwithstanding any other provision of this section, a beginning full-time magistrate with a two-year Associate in Applied Science degree in criminal justice or paralegal

training from a North Carolina community college or the equivalent degree from a private educational institution in North Carolina, may be initially employed at the annual salary provided in the table above for a magistrate with "3 or more but less than 5" years of service; a beginning full-time magistrate with a four-year degree from an accredited senior institution of higher education may be initially employed at the annual salary provided in the table above for a magistrate with "5 or more but less than 7" years of service; a beginning full-time magistrate who holds a law degree from an accredited law school may be employed at the annual salary provided in the table for a magistrate with "7 or more but less than 9" years of service; and a beginning full-time magistrate who is licensed to practice law in North Carolina may be initially employed at the annual salary provided in the table for a magistrate with "9 or more but less than 11" years of service. Seniority increments for a magistrate with a two or four-year degree or a law degree or for a magistrate licensed to practice law in North Carolina as described herein accrue thereafter at two-year intervals, as provided in the table.

Magistrates with a two or four-year degree or a law degree described herein who became magistrates before July 1, 1979 are entitled to an increase of three, five and seven years, respectively, in their seniority, for pay purposes only. Full-time magistrates licensed to practice law in North Carolina who became magistrates before July 1, 1979 are entitled to the pay of a magistrate with 9 or more years of service, and part-time magistrates holding a law degree or a license to practice law as described above who became magistrates before July 1, 1979 are entitled to a proportionate adjustment in their pay. Pay increases authorized by this subdivision are not retroactive.

(4) Notwithstanding any other provision of this section, a beginning full-time magistrate with 10 years' experience within the last 12 years as a sheriff or deputy sheriff, administrative officer for a district attorney, city or county police officer, or highway patrolman in the State of North Carolina, or with 10 years' experience within the last 12 years as clerk of superior court or an assistant or deputy clerk of court in the State of North Carolina may be initially employed at the annual salary provided in the table in subdivision (1) for a magistrate with "five or more but less than seven" years of service. Seniority increments for a magistrate with the law-enforcement or judicial system experience described above accrue thereafter at two-year intervals, as provided in the table. A beginning magistrate who meets the criteria for increased beginning salary under both subdivisions (3) and (4) may not combine those entry levels but may begin at the higher of the two levels.

(5) The Administrative Officer of the Courts shall provide magistrates with longevity pay at the same rates as are provided by the State to its employees subject to the State Personnel Act.

(1977, c. 945, s. 5; 1979, c. 838, s. 84; c. 991; 1979, 2nd Sess., c. 1137, s. 11; 1981, c. 914, s. 1; c. 1127, s. 11; 1983, c. 761, s. 199; c.

923, s. 217; 1983 (Reg. Sess., 1984), c. 1034, ss. 84, 211; 1985, c. 698, ss. 13(a), (14); 791, s. 39.1; 1985 (Reg. Sess., 1986), c. 1014, ss. 36, 223(a); 1987, c. 564, s. 12; c. 738, ss. 22, 34.)

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

**Editor's Note.** —

Session Laws 1987, c. 738, s. 1.1 provides c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

**Effect of Amendments.** —

Session Laws 1987, c. 564, s. 12, effective July 6, 1987, substituted "community college" for "community college or technical institute" in subdivision (a)(3).

Session Laws 1987, c. 738, s. 22, effective July 1, 1987, rewrote the table of salaries in subdivision (a)(1).

Session Laws 1987, c. 738, s. 34, effective July 1, 1987, added subdivision (a)(5).

## Article 17.

## *Clerical Functions in the District Court.*

### § 7A-180. Functions of clerk of superior court in district court matters.

The clerk of superior court:

(8) Has the power to accept written appearances, waivers of trial and pleas of guilty to violations of G.S. 14-107 when restitution is made, the amount of the check is one thousand dollars ($1000) or less, and the warrant does not charge a fourth or subsequent violation of this statute, and, in such cases, to enter such judgments as the chief district judge shall direct and, forward the amounts collected as restitution to the appropriate prosecuting witnesses and to collect the costs. (1965, c. 310, s. 1; 1967, c. 691, s. 16; 1969, c. 1190, s. 14; 1973, c. 503, ss. 3, 4; c. 1286, s. 6; 1975, c. 166, s. 23; c. 626, s. 2; 1981, c. 142; 1983, c. 586, s. 4; 1985, c. 425, s. 3; c. 764, s. 10; 1987, c. 355, s. 3.)

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

**Effect of Amendments.** —

The 1987 amendment, effective October 1, 1987, and applicable to pleas entered on or after that date, substituted "one thousand dollars ($1,000)" for "four hundred dollars ($400.00)" in subdivision (8).

## Article 18.

## *District Court Practice and Procedure Generally.*

### § 7A-198. Reporting of civil trials.

(c) If an electronic or other mechanical device is utilized, it shall be the duty of the clerk of the superior court or some other person designated by him to operate the device while a trial is in progress, and the clerk shall thereafter preserve the record thus produced, which may be transcribed, as required, by any person designated by the Administrative Office of the Courts. If stenotype, shorthand, or stenomask equipment is used, the original tapes, notes, discs, or

other records are the property of the State, and the clerk shall keep them in his custody.

(1965, c. 310, s. 1; 1969, c. 1190, s. 18; 1985, c. 764, s. 13; 1987, c. 384, s. 2.)

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

**Effect of Amendments.** — The 1987 amendment, effective June 16, 1987, substituted "which may be transcribed, as required, by any person designated by the Administrative Office of the Courts" for "transcribe the record as required" at the end of the first sentence of subsection (c).

## Article 19.

## *Small Claim Actions in District Court.*

### § 7A-220. No required pleadings other than complaint.

There are no required pleadings in assigned small claim actions other than the complaint. Answers and counterclaims may be filed by the defendant in accordance with G.S. 7A-218 and G.S. 7A-219. Any new matter pleaded in avoidance in the answer is deemed denied or avoided. On appeal from the judgment of the magistrate for trial de novo before a district judge, the judge shall allow appropriate counterclaims, cross claims, third party claims, replies, and answers to cross claims, in accordance with G.S. 1A-1, et seq. (1965, c. 310, s. 1; 1987, c. 628.)

**Effect of Amendments.** — The 1987 amendment, effective October 1, 1987, and applicable to all actions filed on and after that date, rewrote this section.

### § 7A-228. New trial before magistrate; appeal for trial de novo; how appeal perfected; oral notice; dismissal.

(b1) A person desiring to appeal as a pauper shall, within 10 days of entry of judgment by the magistrate, file an affidavit that he is unable by reason of his poverty to pay the costs of appeal and proves, by one or more witnesses, that he has a meritorious cause of action or defense. Within 20 days after entry of judgment, a superior or district court judge, magistrate, or the clerk of the superior court may authorize a person to appeal to district court as a pauper.

(1965, c. 310, s. 1; 1969, c. 1190, s. 22; 1979, 2nd Sess., c. 1328, s. 3; 1981, c. 599, s. 3; 1985, c. 753, ss. 1, 2; 1987, c. 553.)

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

**Effect of Amendments.** — The 1987 amendment, effective October 1, 1987, added subsection (b1).

## § 7A-231. Provisional and incidental remedies.

OPINIONS OF ATTORNEY GENERAL

**The plaintiff's prosecution bond set out in § 1-109** is one of the provisional or incidental remedies which are not obtainable while a civil action is pending before the magistrate by virtue of the last sentence of this section. See opinion of Attorney General to Ms. Jane M. Eason Civil Magistrate, New Hanover County, 55 N.C.A.G. 99 (1986).

# SUBCHAPTER V. JURISDICTION AND POWERS OF THE TRIAL DIVISIONS OF THE GENERAL COURT OF JUSTICE.

## ARTICLE 20.

## *Original Civil Jurisdiction of the Trial Divisions.*

## § 7A-240. Original civil jurisdiction generally.

CASE NOTES

**Jurisdiction Over All Justiciable Matters Not Placed Elsewhere.** — Except for areas specifically placing jurisdiction elsewhere (such as claims under the Worker's Compensation Act), the trial courts of North Carolina have subject matter jurisdiction over "all justiciable matters of a civil nature." Harris v. Pembaur, — N.C. App. —, 353 S.E.2d 673 (1987).

**Contract dispute between the parties constituted a "justiciable matter"** that is "cognizable" in North Carolina trial courts; therefore, trial judge's determination that there was no subject matter jurisdiction was in error. Harris v. Pembaur, — N.C. App. —, 353 S.E.2d 673 (1987).

## § 7A-244. Domestic relations.

The district court division is the proper division without regard to the amount in controversy, for the trial of civil actions and proceedings for annulment, divorce, equitable distribution of property, alimony, child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof. (1965, c. 310, s. 1; 1981, c. 815, s. 5; 1987, c. 573, s. 1.)

**Editor's Note.** — Session Laws 1987, c. 573, s. 2 provides: "This act shall become effective October 1, 1987. This act applies to any action filed on or after that date. However, the superior court may transfer a pending action to the district court division."

**Effect of Amendments.** — The 1987 amendment, effective October 1, 1987, substituted "child support, child custody and the enforcement of separation or property settlement agreements between spouses, or recovery for the breach thereof" for "child support, and child custody".

CASE NOTES

**Child Custody Jurisdiction.** — The district court had jurisdiction over the subject matter of petition filed, signed and verified by the county division of social services, which alleged that the child had been placed with DSS by its mother; that the putative father was unknown; that North Carolina was the home state of the child and no other state had jurisdiction over the child; and that the best interest of the child would be served if the court assumed jurisdiction over him. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

**Continuing Jurisdiction in Child Custody Matters.** — Once jurisdiction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

## Article 22.

## *Jurisdiction of the Trial Divisions in Criminal Actions.*

## § 7A-272. Jurisdiction of district court.

CASE NOTES

I. GENERAL CONSIDERATION.

**Cited** in State v. Brown, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

II. JURISDICTION OVER MISDEMEANORS.

**What Jurisdictional Issues May Arise.** — Because the General Assembly has given the District Court Division statewide jurisdiction to hear misdemeanors, jurisdictional issues should arise only to determine: (i) whether North Carolina courts can hear the case, and (ii) which division of the General Court of Justice must first try the matter. State v. Bolt, 81 N.C. App. 133, 344 S.E.2d 51 (1986).

## § 7A-273. Powers of magistrates in infractions or criminal actions.

In criminal actions or infractions, any magistrate has power:

(6) Notwithstanding the provisions of subdivision (1) of this section, to hear and enter judgment as the chief district judge shall direct in all worthless check cases brought under G.S. 14-107, when the amount of the check is one thousand dollars ($1,000) or less. Provided, however, that under this section magistrates may not impose a prison sentence longer than 30 days;

(8) To accept written appearances, waivers of trial and pleas of guilty in violations or G.S. 14-107 when the amount of the check is one thousand dollars ($1,000) or less, restitution is made, and the warrant does not charge a fourth or subsequent violation of this statute, and in these cases to enter judgments as the chief district judge directs. (1965, c. 310, s. 1; 1969, c. 876, s. 2; c. 1190, s. 25; 1973, c. 6; c. 503, s. 8; c. 1286, s. 7; 1975, c. 626, s. 4; 1977, c. 873, s. 1; 1979, c. 144, s. 3; 1981, c. 555, s. 3; 1983, c. 586, s. 5; 1985, c. 425, s. 4; c. 764, s. 16; 1987, c. 355, ss. 1, 2.)

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

**Effect of Amendments.** — The 1987 amendment, effective October 1, 1987, and applicable to pleas entered on or after that date, substituted "one thousand dollars ($1,000)" for "five hundred dollars ($500.00)" in subdivision (6), and rewrote subdivision (8), which read "To accept written appearances, waivers of trial and pleas of guilty to violations of G.S. 14-107 and enter such judgment as the chief district judge shall direct, when the amount of the check is five hundred dollars ($500.00) or less, restitution is made, and the warrant does not charge a fourth or subsequent violation of this statute."

## Article 24B.

## *Termination of Parental Rights.*

## § 7A-289.22. Legislative intent; construction of Article.

**Legal Periodicals.** —

For comment, "Termination of Parental Rights," see 21 Wake Forest L. Rev. 431 (1986).

## § 7A-289.23. Jurisdiction.

CASE NOTES

**The district court had jurisdiction** over the subject matter of petition filed, signed and verified by county division of social services, which alleged that child had been placed with DSS by its mother; that the putative father was unknown; that North Carolina was the home state of the child and no other state had jurisdiction over the child; and that the best interest of the child would be served if the court assumed jurisdiction over him. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

**Continuing Jurisdiction.** — Once jurisdiction of the court attaches to a child custody matter, it exists for all time until the cause is fully and completely determined. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

## § 7A-289.24. Who may petition.

A petition to terminate the parental rights of either or both parents to his, her, or their minor child may only be filed by:

(7) Any person who has filed a petition for adoption pursuant to Chapter 48 of the General Statutes. (1977, c. 879, s. 8; 1983, c. 870, s. 1; 1985, c. 758, s. 1; 1987, c. 371, s. 2.)

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

**Effect of Amendments.** —

The 1987 amendment, effective June 15, 1987, deleted "when there has been a determination of abuse or neglect under Article 44 of Chapter 7A of the General Statutes" at the end of subdivision (7).

CASE NOTES

**This section limits the persons or agencies who may petition** for termination of parental rights. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

**Allegations of Standing by DSS.** — Allegations of petition filed by county department of social services, though inartfully drafted, were sufficient to establish that DSS was a party entitled to petition for termination of respondent's parental rights in her children pursuant to subdivision (3) of this section. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

**Substitution of DSS for Director as Petitioner.** — Respondents were not entitled to dismissal of petition by reason of the erroneous designation of the director of the county department of social services as petitioner, and could in no way be prejudiced by permitting DSS to ratify the petition and be substituted as petitioner. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

**Cited** in Prescott v. Prescott, 83 N.C. App. 254, 350 S.E.2d 116 (1986).

## § 7A-289.25. Petition.

The petition shall be verified by the petitioner and shall be entitled "In re (Last name of child), a minor child"; and shall set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner shall so state:

(4) The name and address of any person appointed as guardian of the person of the child pursuant to the provisions of Chapter 35A of the General Statutes, or of G.S. 7A-585.

(1977, c. 879, s. 8; 1979, c. 110, s. 8; 1981, c. 469, s. 23; 1987, c. 550, s. 15.)

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

**Effect of Amendments.** — The 1987 amendment, effective October 1, 1987, substituted "Chapter 35A" for "Article 1 of Chapter 33" in subdivision (4).

CASE NOTES

**Quoted** in Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

**Cited** in In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404 (1986).

## § 7A-289.26. Preliminary hearing; unknown parent.

(d) If the court is unable to ascertain the name or identity of the unknown parent, the court shall order publication of notice of the termination proceeding and shall specifically order the place or places of publication and the contents of the notice which the court concludes is most likely to identify the child to such unknown parent. The notice shall be published in a newspaper qualified for legal advertising in accordance with G.S. 1-597 and 1-598 and published in the counties directed by the court, once a week for three successive weeks. Provided, further, the notice shall:

(1) Designate the court in which the petition is pending;

(2) Be directed to "the father (mother) (father and mother) of a male (female) child born on or about .....in ..... (date)

County, ....., (city)
....., respondent";
(State)

(3) Designate the docket number and title of the case (the court may direct the actual name of the title be eliminated and the words "In Re Doe" substituted therefor);
(4) State that a petition seeking to terminate the parental rights of the respondent has been filed;
(5) Direct the respondent to answer the petition within 30 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of first publication of notice, and be substantially in the form as set forth in G.S. 1A-1, Rule 4(j1); and
(6) State that the respondent's parental rights to the child will be terminated upon failure to answer the petition within the time prescribed.

Upon completion of the service, an affidavit of the publisher shall be filed with the court.

(1977, c. 879, s. 8; 1987, c. 282, s. 1.)

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

**Effect of Amendments.** — The 1987 amendment, effective June 4, 1987, substituted "G.S. 1A-1, Rule 4(j1)" for "G.S. 1A-1, Rule 4(j)(9)(c)" near the end of subdivision (d)(5).

## § 7A-289.28. Failure of respondents to answer.

Upon the failure of the respondents to file written answer to the petition with the court within 30 days after service of the summons and petition, or within the time period established for a defendant's reply by G.S. 1A-1, Rule 4(j1) if service is by publication, the court shall issue an order terminating all parental and custodial rights of the respondent or respondents with respect to the child; provided the court shall order a hearing on the petition and may examine the petitioner or others on the facts alleged in the petition. (1977, c. 879, s. 8; 1979, c. 525, s. 3; 1987, c. 282, s. 2.)

**Effect of Amendments.** — The 1987 amendment, effective June 4, 1987, substituted "G.S. 1A-1, Rule 4(j1)" for "G.S. 1A-1, Rule 4(j)(9)c."

## § 7A-289.30. Adjudicatory hearing on termination.

### CASE NOTES

**The termination of parental rights statute, etc.** —

In accord with 1st paragraph in the main volume. See In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

At the adjudication stage, petitioner is required to prove the existence of grounds for termination listed in § 7A-289.32 by clear, cogent and convincing evidence, pursuant to subsection (e) of this section, while at the disposition stage, the court's decision as to whether to terminate parental rights is discretionary. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

**Separate Hearings Not Required.** — Although the court is required to apply different evidentiary standards at each of the two stages of adjudication and disposition, there is no requirement that the stages be conducted at two separate hearings. In re White, 81 N.C. App.

82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

**Court May Consider Previous Adjudication.** — In determining whether there is neglect which authorizes the termination of parental rights, the trial court is allowed to consider a previous adjudication of neglect. It must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect. In re Stewart, 82 N.C. App. 651, 347 S.E.2d 495 (1986).

**Stated** in In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

## § 7A-289.31. Disposition.

### CASE NOTES

**The termination of parental rights statute, etc. —**

In accord with 1st paragraph in the main volume. See In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

**Separate Hearings Not Required.** — Although the court is required to apply different evidentiary standards at each of the two stages of adjudication and disposition, there is no requirement that the stages be conducted at two separate hearings. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

**Cited** in In re Stewart, 82 N.C. App. 651, 347 S.E.2d 495 (1986).

## § 7A-289.32. Grounds for terminating parental rights.

**Legal Periodicals. —**

For comment, "Termination of Parental Rights," see 21 Wake Forest L. Rev. 431 (1986).

### CASE NOTES

#### I. GENERAL CONSIDERATION.

**Finding of Any One, etc. —**

In accord with the main volume. See In re Stewart, 82 N.C. App 651, 347 S.E.2d 495 (1986).

**Separate Hearings Not Required.** — Although the court is required to apply different evidentiary standards at each of the two stages of adjudication and disposition, there is no requirement that the stages be conducted at two separate hearings. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

**But Has Discretionary Authority, etc. —**

At the adjudication stage, petitioner is required to prove the existence of grounds for termination, listed in this section, by clear, cogent and convincing evidence, pursuant to § 7A-289.30(e), while at the disposition stage, the court's decision as to whether to terminate parental rights is discretionary. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

#### II. NEGLECT.

**Standard of Proof for Termination and Removal Distinguished.** — There is a substantive difference between the quantum of adequate proof of neglect and dependency for purposes of termination and for purposes of removal. The most significant difference is that while parental rights may not be terminated for threatened future harm, the Department of Social Services may obtain temporary custody of a child when there is a risk of neglect in the future. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

**A prior adjudication of neglect, etc. —**

Evidence of neglect by a parent prior to losing custody of a child, including an adjudication of such neglect, is admissible in subsequent proceedings to terminate parental rights. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

**But Court Must Also Consider, etc. —**

Where termination of parental rights is sought upon allegations of neglect, the

court may consider evidence of neglect occurring before custody has been taken from the parents, but termination may not be based solely on conditions of neglect which may have previously existed but no longer exist. The court must also consider evidence of any change in condition up to the time of the hearing, but this evidence is to be considered in light of the evidence of prior neglect and the probability of repetition of neglect. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

**And Must Independently Determine, etc. —**

In accord with the main volume. See Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

**Termination of parental rights for neglect may not be based solely on conditions which existed in the distant past** but no longer exist. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

**Burden on Petitioner.** — The petitioner seeking termination bears the burden of showing by clear, cogent and convincing evidence that neglect exists at the time of the termination proceeding. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

**Termination of parental rights by reason of neglect upheld.** In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

Where the evidence disclosed that respondent father had never provided a home or other essentials for his two children throughout their entire lifetime, and that he has basically depended upon others to do so, the fact that after the children were placed in foster care respondent made some payments to Department of Social Services for their support did not invalidate the court's findings of neglect under subsection (2) of this section. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

**Termination Not Upheld.** — Where the trial court based its conclusion of neglect on its findings relative to past conditions and made no determination resolving conflicts in the evidence as to whether conditions existing at the time of the hearing were indicative of a probability of continued neglect or whether the previous neglect had ameliorated, the trial court found insufficient facts to support its conclusion that respondent's minor children were neglected children and its order terminating respondent's parental rights on that basis. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

### III. FAILURE TO PAY REASONABLE PORTION OF COST OF CARE.

**Ability to Pay Controls, etc. —**

A parent's ability to pay is the controlling characteristic of what is a "reasonable portion" of cost of foster care for the child which the parent must pay. Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

**Finding on Ability to Pay Held Not Required.** — Where petition did not allege, and the court did not find, that respondent father had not paid a reasonable portion of the cost of child care while his two children were in foster care, the court was not required to make findings as to his ability to pay pursuant to subdivision (4) of this section. In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986).

### IV. WILLFUL ABANDONMENT.

**"Abandonment" Defined. —**

Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

**The word "willful"** encompasses more than an intention to do a thing; there must also be purpose and deliberation. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

**Question of Fact.** — Whether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

**Adoption Without Consent of Parent Upon Finding of Willful Abandonment.** — Prior to October 1, 1985, two procedures were available to enable a petitioning party to adopt a minor child without the consent of the opposing biological parent. First, under this section, a court could terminate the parental rights of a biological parent upon a finding of one of the grounds enumerated therein, and then pursuant to § 48-5, once a district court had entered

an order terminating the parental rights of the biological parent, that parent was no longer a necessary party to an adoption proceeding. Second, the court, under § 48-5(d), upon proper motion, was authorized to hold a hearing to determine whether an abandonment as defined in § 48-2(1)a and (1)b had taken place. However, effective October 1, 1985, these proceedings were merged into one termination of parental rights proceeding under subsection (8) of this section to ascertain whether the parent had willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition. In re Searle, 82 N.C. App. 273, 346 S.E.2d 511 (1986).

## § 7A-289.33. Effects of termination order.

**Legal Periodicals.** — For comment, "Termination of Parental Rights," see 21 Wake Forest L. Rev. 431 (1986).

### Article 25.

### *Jurisdiction and Procedure in Criminal Appeals from District Courts.*

## § 7A-290. Appeals from district court in criminal cases; notice; appeal bond.

CASE NOTES

**I. GENERAL CONSIDERATION.**

**Cited** in Field v. Sheriff of Wake County, 654 F. Supp. 1367 (E.D.N.C. 1986).

# SUBCHAPTER VI. REVENUES AND EXPENSES OF THE JUDICIAL DEPARTMENT.

### Article 28.

### *Uniform Costs and Fees in the Trial Divisions.*

## § 7A-307. Costs in administration of estates.

(a) In the administration of the estates of decedents, minors, incompetents, of missing persons, and of trusts under wills and under powers of attorney, and in collections of personal property by affidavit, the following costs shall be assessed:

(1) For the use of the courtroom and related judicial facilities, the sum of three dollars ($3.00), to be remitted to the county. Funds derived from the facilities fees shall be used in the same manner, for the same purposes, and subject to the same restrictions, as facilities fees assessed in criminal actions.

(2) For support of the General Court of Justice, the sum of twenty-two dollars ($22.00), plus an additional forty cents (40¢) per one hundred dollars ($100.00), or major fraction thereof, of the gross estate, not to exceed three thousand

dollars ($3,000). Gross estate shall include the fair market value of all personalty when received, and all proceeds from the sale of realty coming into the hands of the fiduciary, but shall not include the value of reality. In collections of personal property by affidavit, the fee based on the gross estate shall be computed from the information in the final affidavit of collection made pursuant to G.S. 28A-25-3 and shall be paid when that affidavit is filed. In all other cases, this fee shall be computed from the information reported in the inventory and shall be paid when the inventory is filed with the clerk. If additional gross estate, including income, comes into the hands of the fiduciary after the filing of the inventory, the fee for such additional value shall be assessed and paid upon the filing of any account or report disclosing such additional value. For each filing the minimum fee shall be five dollars ($5.00). Sums collected under this subsection shall be remitted to the State Treasurer.

(2a) Notwithstanding subdivision (2) of this subsection, the fee of forty cents (40¢) per one hundred dollars ($100.00), or major fraction, of the gross estate, not to exceed three thousand dollars ($3,000), shall not be assessed on personalty received by a trust under a will when the estate of the decedent was administered under Chapters 28 or 28A of the General Statutes. Instead, a fee of ten dollars ($10.00) shall be assessed on the filing of each annual and final account.

(3) For probate of a will without qualification of a personal representative, the clerk shall assess a facilities fee as provided in subdivision (1) of this subsection and shall assess for support of the General Court of Justice, the sum of twelve dollars ($12.00).

(1965, c. 310, s. 1; 1967, c. 691, s. 31; 1969, c. 1190, s. 30; 1971, c. 1181, s. 1; 1973, c. 1335, s. 1; 1981, c. 691, s. 4; 1983, c. 713, ss. 10-17; 1985, c. 481, ss. 1-5; 1985 (Reg. Sess., 1986), c. 855; 1987, c. 837.)

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

**Effect of Amendments.** —

The 1987 amendment, effective with respect to estates of decedents dying on or after October 1, 1987, substituted "of the gross estate, not to exceed three thousand dollars ($3,000)" for "of the gross estate" in the first sentences of subdivisions (a)(2) and (a)(2a).

# SUBCHAPTER VII. ADMINISTRATIVE MATTERS.

## ARTICLE 29.

## *Administrative Office of the Courts.*

### § 7A-343.1. Distribution of copies of the appellate division reports.

The Administrative Officer of the Courts shall, at the State's expense distribute such number of copies of the appellate division reports to federal, State departments and agencies, and to educational institutions of instruction, as follows:

| | |
|---|---|
| Governor, Office of the | 1 |
| Lieutenant Governor, Office of the | 1 |
| Secretary of State, Department of the | 2 |
| Treasurer, Department of the State | 1 |
| Superintendent of Public Instruction | 1 |
| Office of the Attorney General | 11 |
| State Bureau of Investigation | 1 |
| Agriculture, Department of | 1 |
| Labor, Department of | 1 |
| Insurance, Department of | 1 |
| Budget Bureau, Department of Administration | 1 |
| Property Control, Department of Administration | 1 |
| State Planning, Department of Administration | 1 |
| Board of Natural Resources and Community Development | 1 |
| Revenue, Department of | 1 |
| Board of Human Resources | 1 |
| Commission for the Blind | 1 |
| Board of Transportation | 1 |
| Motor Vehicles, Division of | 1 |
| Utilities Commission | 8 |
| Industrial Commission | 11 |
| Office of Administrative Hearings | 2 |
| Community Colleges, Department of | 38 |
| Employment Security Commission | 1 |
| Commission of Correction | 1 |
| Parole Commission | 1 |
| Archives and History, Division of | 1 |
| Crime Control and Public Safety, Department of | 2 |
| Department of Cultural Resources | 3 |
| Legislative Building Library | 2 |
| Justices of the Supreme Court | 1 ea. |
| Judges of the Court of Appeals | 1 ea. |
| Judges of the Superior Court | 1 ea. |
| Clerks of the Superior Court | 1 ea. |
| District Attorneys | 1 ea. |
| Emergency and Special Judges of the Superior Court | 1 ea. |
| Supreme Court Library | AS MANY AS REQUESTED |
| Appellate Division Reporter | 1 |
| University of North Carolina, Chapel Hill | 71 |

| | |
|---|---|
| University of North Carolina, Charlotte | 1 |
| University of North Carolina, Greensboro | 1 |
| University of North Carolina, Asheville | 1 |
| North Carolina State University, Raleigh | 1 |
| Appalachian State University | 1 |
| East Carolina University | 1 |
| Fayetteville State University | 1 |
| North Carolina Central University | 17 |
| Western Carolina University | 1 |
| Duke University | 17 |
| Davidson College | 2 |
| Wake Forest University | 25 |
| Lenoir Rhyne College | 1 |
| Elon College | 1 |
| Campbell College | 25 |
| Federal, Out-of-State and Foreign | |
| Secretary of State | 1 |
| Secretary of Defense | 1 |
| Secretary of Health, Education and Welfare | 1 |
| Secretary of Housing and Urban Development | 1 |
| Secretary of Transportation | 1 |
| Attorney General | 1 |
| Department of Justice | 1 |
| Internal Revenue Service | 1 |
| Veterans' Administration | 1 |
| Library of Congress | 5 |
| Federal Judges resident in North Carolina | 1 ea. |
| Marshal of the United States Supreme Court | 1 |
| Federal District Attorneys resident in North Carolina | 1 ea. |
| Federal Clerks of Court resident in North Carolina | 1 ea. |
| Supreme Court Library exchange list | 1 |

Each justice of the Supreme Court and judge of the Court of Appeals shall receive for his private use, one complete and up-to-date set of the appellate division reports. The copies of reports furnished each justice or judge as set out in the table above may be retained by him personally to enable him to keep up-to-date his personal set of reports. (1977, c. 379, s. 2; c. 771, s. 4; 1979, c. 899, s. 1; 1979, 2nd Sess., c. 1278; 1985 (Reg. Sess., 1986), c. 1022, s. 2; 1987, c. 877, s. 1.)

**Effect of Amendments.** — The 1987 amendment, effective August 14, 1987, and applicable only to appellate division reports issued after that date, changed the number of reports allocated to the Department of Community Colleges from 1 to 38.

# SUBCHAPTER IX. REPRESENTATION OF INDIGENT PERSONS.

## ARTICLE 36.

## *Entitlement of Indigent Persons Generally.*

## § 7A-450. Indigency; definition; entitlement; determination; change of status.

### CASE NOTES

#### III. APPOINTMENT OF EXPERTS.

**When Right to Expert Arises.** — Subsection (b) of this section requires the appointment of expert assistance only upon a showing by the defendant that: (1) he will be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it will materially assist him in the preparation of his defense. State v. Johnson, 317 N.C. 193, 344 S.E.2d 775 (1986).

There is no constitutional requirement that private investigators or experts always be made available, and subsection (b) of this section and § 7A-454 require such assistance only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that the defendant will not receive a fair trial. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

**Refusal to Appoint Expert Upheld — Ballistics Expert.** — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, where the victim testified that she was shot at point-blank range, but defendant testified that he accidentally shot her when he picked up his shotgun in the den where he had placed it after a hunting trip and pulled the lever to see if it was loaded, and that he was some distance away from the victim when it discharged, the trial judge did not abuse his discretion in denying defendant's request for a medical expert and a ballistics expert. Defense counsel could educate himself on the likely effects of a point-blank gunshot to adequately cross-examine the state's witness. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

**Same — Investigator.** — Defendant's mere general desire to search for possible evidence which might be of use in impeaching a key witness who provided evidence to support the elements of premeditation and deliberation in murder prosecution was not such a significant factor in the defendant's defense as to justify the appointment of an investigator. State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

**Same — Medical Expert.** — The trial court did not err in denying defendant's motion to appoint a medical expert to assist in the preparation of his defense in a first degree murder by poisoning case, where defendant failed to set out any facts evidencing a specific or particularized need for a medical expert. State v. Johnson, 317 N.C. 193, 344 S.E.2d 775 (1986).

Trial court's denial of defendant's motions, alleging a question as to the cause of death, for the appointment of a pathologist or other medical expert was not error, where, although the defendant arguably made a threshold showing of a specific necessity for the assistance of such experts, he was provided with a copy of the autopsy report, and also had available and used ample medical expertise (including the favorable testimony of the two specialists) in preparing and presenting his defense. State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986).

**Refusal to Appoint Expert Held Error — Psychiatrist.** — The trial court's denial of defendant's pretrial motion for the appointment of a psychiatrist to assist in his defense was error where, under all the facts and circumstances known to the court at the time the motion for psychiatric assistance was made, defendant had demonstrated that his sanity when the offense was committed would likely be a significant factor at trial. State v. Gambrell, 318 N.C. 249, 347 S.E.2d 390 (1986).

## § 7A-451. Scope of entitlement.

(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;

(2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;

(3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars ($500.00) or more, or has been sentenced to a term of imprisonment;

(4) A hearing for revocation of probation;

(5) A hearing in which extradition to another state is sought;

(6) A proceeding for an inpatient involuntary commitment to a facility under Part 7 of Article 5 of Chapter 122C of the General Statutes, or a proceeding for commitment under Part 8 of Article 5 of Chapter 122C of the General Statutes.

(7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;

(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;

(9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;

(10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and

(11) A proceeding for the provision of protective services according to Chapter 108, Article 4, of the General Statutes;

(12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes;

(13) A proceeding to find a person incompetent under Subchapter I of Chapter 35A, of the General Statutes;

(14) A proceeding to terminate parental rights where a guardian ad litem is appointed pursuant to G.S. 7A-289.23;

(15) An action brought pursuant to Article 24B of Chapter 7A of the General Statutes to terminate an indigent person's parental rights.

(1969, c. 1013, s. 1; 1973, c. 151, ss. 1, 3; c. 616; c. 726, s. 4; c. 1116, s. 1; c. 1125; c. 1320; c. 1378, s. 2; 1977, c. 711, ss. 7, 8; c. 725, s. 2; 1979, 2nd Sess., c. 1206, s. 3; 1981, c. 966, s. 4; 1983, c. 638, s. 23; c. 864, s. 4; 1985, c. 509, s. 1; c. 589, s. 3; 1987, c. 550, s. 16.)

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

**Editor's Note.** —

Chapter 108, Article 4, referred to in subdivision (a)(11) of this section, was recodified as Article 4A of Chapter 1089 by Session Laws 1975, c. 797, and Article 4A was repealed by Session Laws 1981, c. 275, s. 1. As to protection of abused, neglected or exploited disabled adults, see § 108A-99 et seq.

Article 23 of Chapter 7A, referred to in subdivision (a)(12) of this section, was repealed by Session Laws 1979, c. 815, s. 1, effective Jan. 1, 1980. As to the North Carolina Juvenile Code, see §§ 7A-516 through 7A-732.

**Effect of Amendments.** —

The 1987 amendment, effective Octo-

ber 1, 1987, substituted "Subchapter I of Chapter 35A" for "Chapter 35, Article 1A" in subdivision (a)(13).

## § 7A-454. Supporting services.

CASE NOTES

**When Private Investigators or Expert Assistance, etc. —**

There is no constitutional requirement that private investigators or experts always be made available, and § 7A-450(b) and this section require such assistance only upon a showing by defendant that there is a reasonable likelihood that it will materially assist the defendant in the preparation of his defense or that without such help it is probable that the defendant will not receive a fair trial. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

**A private investigator need not be provided when no unique skill is required or when there is no unduly burdensome time requirement** that would prevent defense counsel from adequately conducting the investigation himself. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

**Denial of Motion for Medical Expert Upheld.** — Trial court's denial of defendant's motions, alleging a question as to the cause of death, for the appointment of a pathologist or other medical experts was not error, where, although the defendant arguably made a threshold showing of a specific necessity for the assistance of such experts, he was provided with a copy of the autopsy report, and also had available and used ample medical expertise (including the favorable testimony of two specialists) in preparing and presenting his defense. State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986).

**Denial of Motion for Medical Expert and Ballistics Expert Upheld.** — In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, where the victim testified that she was shot at point-blank range, but defendant testified that he accidentally shot her when he picked up his shotgun in the den where he had placed it after a hunting trip and pulled the lever to see if it was loaded, and that he was some distance away from the victim when it discharged, the trial judge did not abuse his discretion in denying request for a medical expert and a ballistics expert. Defense counsel could educate himself on the likely effects of a point-blank gunshot to adequately cross-examine the state's witness. State v. Newton, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

**Denial of Motion for Investigator Upheld. —**

Defendant's mere general desire to search for possible evidence which might be of use in impeaching a key witness who provided evidence to support the elements of premeditation and deliberation in murder prosecution was not such a significant factor in the defendant's defense as to justify the appointment of an investigator. State v. Hickey, 317 N.C. 457, 346 S.E.2d 646 (1986).

## Article 37.

## *The Public Defender.*

## § 7A-465. Public defender; defender districts; qualifications; compensation.

The office of public defender is established, effective January 1,

1970, in the following judicial districts: the twelfth and the eighteenth.

The office of public defender is established, effective July 1, 1973, in the twenty-eighth judicial district.

The office of public defender is established, effective July 1, 1975, in the twenty-sixth and twenty-seventh judicial districts. Effective July 1, 1978, the twenty-seventh judicial district is divided into judicial districts 27A and 27B. On that date the current public defender of the twenty-seventh district shall become the public defender for district 27A.

Effective January 1, 1981, the office of public defender is established in the third judicial district.

Effective June 1, 1983, the office of public defender is established in judicial district 15B.

The public defender shall be an attorney licensed to practice law in North Carolina, and shall devote his full time to the duties of his office.

In lieu of merit and other increment raises paid to regular State employees, a public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, fourteen and four-tenths percent (14.4%) after 15 years of service, and nineteen and two-tenths percent (19.2%) after 20 years of service. "Service" means service as a public defender. (1969, c. 1013, s. 1; 1973, c. 47, s. 2; c. 799, s. 1; 1975, c. 956, s. 14; 1977, c. 802, s. 41.2; c. 1130, s. 6; 1977, 2nd Sess., c. 1219, s. 43.3; 1979, 2nd Sess., c. 1284, s. 1; 1981 (Reg. Sess., 1982), c. 1282, s. 72; 1983 (Reg. Sess., 1984), c. 1034, s. 94; 1987, c. 738, s. 35.)

**Editor's Note.** — Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

**Effect of Amendments.** — The 1987 amendment, effective July 1, 1987, rewrote the first sentence of the last paragraph.

## § 7A-467. Assistant defenders; assigned counsel.

Each public defender is entitled to at least one full-time assistant public defender, and to such additional assistants, full-time or part-time, as may be authorized by the Administrative Office of the Courts. Assistants are appointed by the public defender and serve at his pleasure. Compensation of assistants shall be as provided in the biennial Current Operations Appropriations Act. Assistants shall perform such duties as may be assigned by the public defender.

A member of the district bar who consents to such service may be assigned by the public defender to represent an indigent person, and when so assigned is entitled to the services of the defender's office to the same extent as a full-time public defender. In assigning

assistant defenders and members of the bar generally the defender shall consider the nature of the case and the skill of counsel, to the end that all indigent persons are adequately represented.

If a conflict of interests prohibits the public defender from representing an indigent person, or in unusual circumstances when, in the opinion of the court the proper administration of justice requires it, the court may assign any member of the district bar to represent an indigent person, and when so assigned, counsel is entitled to the services of the defender's office to the same extent as counsel assigned by the public defender.

Members of the bar assigned by the defender or by the court are compensated in the same manner as assigned counsel are compensated in districts which do not have a public defender.

In lieu of merit and other increment raises paid to regular State employees, an assistant public defender shall receive as longevity pay an amount equal to four and eight-tenths percent (4.8%) of the annual salary set forth in the Current Operations Appropriations Act payable monthly after five years of service, nine and six-tenths percent (9.6%) after 10 years of service, and fourteen and four-tenths percent (14.4%) after 15 years of service. "Service" means service as an assistant public defender. (1969, c. 1013, s. 1; 1983 (Reg. Sess., 1984), c. 1034, ss. 93, 165; 1987, c. 738, s. 33(b).)

**Editor's Note.** — Session Laws 1987, c. 738, s. 1.1 provides that c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

**Effect of Amendments.** — The 1987 amendment, effective July 1, 1987, rewrote the first sentence of the last paragraph.

# SUBCHAPTER XI. NORTH CAROLINA JUVENILE CODE.

## Article 41.

## *Purpose; Definitions.*

## § 7A-516. Purpose.

### CASE NOTES

**The district court's authority in juvenile dispositions is limited to** utilization of currently existing programs or those for which the funding and machinery for implementation is in place. In re Jackson, — N.C. App —, 352 S.E.2d 449 (1987).

**Court Order May Not Exceed Court's Authority.** — When a student has been lawfully suspended or expelled pursuant to § 115C-391 and the school has not provided a suitable alternative educational forum, court-ordered public school attendance is not a dispositional alternative available to the juvenile court judge, absent a voluntary reconsideration of or restructuring of the suspension by the school board to allow the student's restoration to an educational program within its system. In re Jackson, — N.C. App. —, 352 S.E.2d 449 (1987).

**Dismissal of Petitions Against Juveniles Treated Unequally.** — The trial court erred in not dismissing petitions against six juveniles who received unequal treatment vis a vis other juveniles who were alleged to have committed the same or similar offenses by de-

sign, in that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to victim while the other juveniles who were similarly situated were not prosecuted because they, or their parents, were able or willing to pay $1,000 to the complainant. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Cited** in State v. Moore, 317 N.C. 275, 345 S.E.2d 217 (1986).

## § 7A-517. Definitions.

Unless the context clearly requires otherwise, the following words have the listed meanings:

(1) Abused Juveniles. — Any juvenile less than 18 years of age whose parent or other person responsible for his care:

a. Inflicts or allows to be inflicted upon the juvenile a physical injury by other than accidental means which causes or creates a substantial risk of death, disfigurement, impairment of physical health, or loss or impairment of function of any bodily organ; or

b. Creates or allows to be created a substantial risk of physical injury to the juvenile by other than accidental means which would be likely to cause death, disfigurement, impairment of physical health, or loss or impairment of the function of any bodily organ; or

c. Commits, permits, or encourages the commission of a violation of the following laws by, with, or upon the juvenile: first degree rape, as provided in G.S. 14-27.2; second degree rape as provided in G.S. 14-27.3; first degree sexual offense, as provided in G.S. 14-27.4; second degree sexual offense, as provided in G.S. 14-27.5; sexual act by a custodian, as provided in G.S. 14-27.7; crime against nature, as provided in G.S. 14-177; incest, as provided in G.S. 14-178 and 14-179; preparation of obscene photographs, slides or motion pictures of the juvenile, as provided in G.S. 14-190.5; employing or permitting the juvenile to assist in a violation of the obscenity laws as provided in G.S. 14-190.6; dissemination of obscene material to the juvenile as provided in G.S. 14-190.7 and G.S. 14-190.8; displaying or disseminating material harmful to the juvenile as provided in G.S. 14-190.14 and G.S. 14-190.15; first and second degree sexual exploitation of the juvenile as provided in G.S. 14-190.16 and G.S. 14-190.17; promoting the prostitution of the juvenile as provided in G.S. 14-190.18; and taking indecent liberties with the juvenile, as provided in G.S. 14-202.1, regardless of the age of the parties.

d. Creates or allows to be created serious emotional damage to the juvenile and refuses to permit, provide for, or participate in treatment. Serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal or aggressive behavior toward himself or others; or

e. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

(2) Aftercare. — The supervision of a juvenile who has been returned to the community on conditional release after having been committed to the Division of Youth Services.

(3) Administrator for Juvenile Services. — The person who is responsible for the planning, organization, and administration of a statewide system of juvenile intake, probation, and aftercare services.

(4) Director of the Division of Youth Services. — The person responsible for the supervision of the administration of institutional and detention services.

(5) Caretaker. — Any person other than a parent who has the care of a juvenile. Caretaker includes any blood relative, stepparent, foster parent, house parent, cottage parent, or other person supervising a juvenile in a child-care facility. "Caretaker" also means any person who has the responsibility for the care of a juvenile in a day-care plan or facility as defined in G.S. 110-86 and includes any person who has the approval of the care provider to assume responsibility for the juveniles under the care of the care provider.

(6) Chief Court Counselor. — The person responsible for administration and supervision of juvenile intake, probation, and aftercare in each judical district, operating under the supervision of the Administrator for Juvenile Services.

(7) Clerk. — Any clerk of superior court, acting clerk, or assistant or deputy clerk.

(8) Community-Based Program. — A program providing nonresidential or residential treatment to a juvenile in the community where his family lives. A community-based program may include specialized foster care, family counseling, shelter care, and other appropriate treatment.

(9) Court. — The District Court Division of the General Court of Justice.

(10) Court Counselor. — A person responsible for probation and aftercare services to juveniles on probation or on conditional release from the Division of Youth Services under the supervision of the chief court counselor.

(11) Custodian. — The person or agency that has been awarded legal custody of a juvenile by a court.

(12) Delinquent Juvenile. — Any juvenile less than 16 years of age who has committed a crime or infraction under State law or under an ordinance of local government, including violation of the motor vehicle laws.

(13) Dependent Juvenile. — A juvenile in need of assistance or placement because he has no parent, guardian or custodian responsible for his care or supervision or whose parent, guardian, or custodian is unable to provide for his care or supervision.

(14) Detention. — The confinement of a juvenile pursuant to an order for secure custody pending an adjudicatory or dispositional hearing or admission to a placement with the Division of Youth Services.

(15) Detention Home. — An authorized facility providing secure custody for juveniles.

(16) Holdover Facility. — A place in a jail which has been approved by the Department of Human Resources as meeting the State standards for detention as required in G.S. 153A-221 providing close supervision where the juvenile cannot converse with, see, or be seen by the adult population.

(16.1) In Loco Parentis. — A person acting in loco parentis means one, other than parents or legal guardian, who has assumed the status and obligation of a parent without being awarded the legal custody of a juvenile by a court.

(17) Intake Counselor. — A person who screens a petition alleging that a juvenile is delinquent or undisciplined to determine whether the petition should be filed.

(18) Interstate Compact on Juveniles. — An agreement ratified by 50 states and the District of Columbia providing a formal means of returning a juvenile, who is an absconder, escapee or runaway, to his home state.

(19) Judge. — Any district court judge.

(20) Juvenile. — Any person who has not reached his eighteenth birthday and is not married, emancipated, or a member of the armed services of the United States. For the purposes of subdivisions (12) and (28) of this section, a juvenile is any person who has not reached his sixteenth birthday and is not married, emancipated, or a member of the armed forces. A juvenile who is married, emancipated, or a member of the armed forces, shall be prosecuted as an adult for the commission of a criminal offense. Wherever the term "juvenile" is used with reference to rights and privileges, that term encompasses the attorney for the juvenile as well.

(21) Neglected Juvenile. — A juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law.

(22) Petitioner. — The individual who initiates court action, whether by the filing of a petition or of a motion for review alleging the matter for adjudication.

(23) Probation. — The status of a juvenile who has been adjudicated delinquent, is subject to specified conditions under the supervision of a court counselor, and may be returned to the court for violation of those conditions during the period of probation.

(24) Prosecutor. — The assistant district attorney assigned by the district attorney to juvenile proceedings.

(25) Protective Supervision. — The status of a juvenile who has been adjudicated delinquent or undisciplined and is under the supervision of a court counselor.

(26) Regional Detention Home. — A state-supported and administered regional facility providing detention care.

(27) Shelter Care. — The temporary care of a juvenile in a physically unrestricting facility pending court disposition.

(28) Undisciplined Juvenile. — A juvenile less than 16 years of age who is unlawfully absent from school; or who is regularly disobedient to his parent, guardian, or custodian and beyond their disciplinary control; or who is regularly found in places where it is unlawful for a juvenile to be; or who has run away from home.

The singular includes the plural, the masculine singular includes the feminine singular and masculine and feminine plural unless

otherwise specified. (1979, c. 815, s. 1; 1981, c. 336; c. 359, s. 2; c. 469, ss. 1-3; c. 716, s. 1; 1985, c. 648; c. 757, s. 156(q); 1985 (Reg. Sess., 1986), c. 852, s. 16; 1987, c. 162; c. 695.)

**Effect of Amendments.** —

Session Laws 1987, c. 162, effective October 1, 1987, rewrote subdivision (5), which formerly read "Caretaker. — Any person other than a parent who is in care of a juvenile, including any blood relative, stepparent, foster parent, or house parent, cottage parent or other person supervising a juvenile in a child care facility. 'Caretaker' also means any adult person with the approval of the care provider in a day care plan or facility as defined in G.S. 110-86."

Session Laws 1987, c. 695, effective July 29, 1987, rewrote paragraph (1)c.

**Legal Periodicals.** —

For article, "Regulation of Pornography — The North Carolina Approach," see 21 Wake Forest L. Rev. 263 (1986).

For comment, "Termination of Parental Rights," see 21 Wake Forest L. Rev. 431 (1986).

**CASE NOTES**

V. Abused Juvenile.

**I. GENERAL CONSIDERATION.**

**"Custodian."** — Definition of "custodian" in subdivision (11) of this section is much narrower than the previous definition. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 699, 349 S.E.2d 589 (1986).

**Quoted** in Union County Dep't of Social Servs. v. Mullis, 82 N.C. App. 340, 346 S.E.2d 289 (1986).

**Cited** in In re White, 81 N.C. App. 82, 344 S.E.2d 36, cert. denied, 318 N.C. 283, 347 S.E.2d 470 (1986); In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986); In re Stewart, 82 N.C. App. 651, 347 S.E.2d 495 (1986); In re Baby Boy Shamp, 82 N.C. App. 606, 347 S.E.2d 848 (1986); In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986); In re Ewing, 83 N.C. App. 535, 350 S.E.2d 887 (1986); State v. Stokes, 319 N.C. 1, 352 S.E.2d 653 (1987).

**V. ABUSED JUVENILE.**

**Permanent Nature of Disfigurement.** — By using the word "disfigurement" instead of words of transient import such as bruise, abrasion, contusion, discoloration, marks, or stripes in context with other words clearly indicating permanency ("death," "impairment of physical health," "loss or impairment of function of any bodily organ") the General Assembly obviously intended to limit the application of subdivision (1)a of this section to injuries permanent in their effect. In re Mickle, — N.C. App. —, 353 S.E.2d 232 (1987).

**A temporary bruising is not a "disfigurement"** under subdivision (1)a of this section. In re Mickle, — N.C. App. —, 353 S.E.2d 232 (1987).

## Article 42.

## *Jurisdiction.*

## § 7A-523. Jurisdiction.

(a) The court has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be delinquent, undisciplined, abused, neglected, or dependent. This jurisdiction does not extend to cases involving adult defendants alleged to be guilty of abuse or neglect. For purposes of determining jurisdiction, the age of the

juvenile either at the time of the alleged offense or when the conditions causing the juvenile to be abused, neglected, or dependent arose, governs. There is no minimum age for juveniles alleged to be abused, dependent or neglected. For juveniles alleged to be delinquent or undisciplined, the minimum age is six years of age.

The court also has exclusive original jurisdiction of the following proceedings:

(1) Proceedings under the Interstate Compact on Juveniles and the Interstate Parole and Probation Hearing Procedures for Juveniles;

(2) Proceedings to determine whether a juvenile who is on conditional release and under the aftercare supervision of the court counselor has violated the terms of his conditional release established by the Division of Youth Services;

(3) Proceedings involving judicial consent for emergency surgical or medical treatment for a juvenile when his parent, guardian, legal custodian, or other person standing in loco parentis refuses to consent for treatment to be rendered;

(4) Proceedings to determine whether a juvenile should be emancipated;

(5) Proceedings to terminate parental rights;

(6) Proceedings to review the placement of a juvenile in foster care pursuant to an agreement between the juvenile's parents or guardian and a county department of social services;

(7) Proceedings in which a person is alleged to have obstructed or interfered with an investigation required by G.S. 7A-544.

(1979, c. 815, s. 1; 1983, c. 837, s. 1; 1985, c. 459, s. 2; 1987, c. 409, s. 2.)

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

**Effect of Amendments.** — The 1987 amendment, effective October 1, 1987, added subdivision (a)(7).

CASE NOTES

**Cited** in In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404 (1986).

## § 7A-524. Retention of jurisdiction.

CASE NOTES

**Cited** in State v. Stokes, — N.C. —, 352 S.E.2d 653 (1987).

## Article 43.

## *Screening of Delinquency and Undisciplined Petitions.*

## § 7A-530. Intake services.

### CASE NOTES

**Prior Approval for Filing of Petition.** — Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition. Furthermore, when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filng. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Cited** in In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

## § 7A-531. Preliminary inquiry.

### CASE NOTES

**Prior Approval of Filing of Petition Required.** — Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition. Furthermore, when the district attorney approves the filng of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Limits on Involvement of District Attorney.** — The district attorney's involvement in cases charging juveniles with being undisciplined or delinquent, before the juvenile petition is filed, is limited to (1) assisting the intake counselor, when requested, during the preliminary inquiry in determining the legal sufficiency of the evidence, and (2) reviewing the decision of the intake counselor not approving the filing of a juvenile petition, and affirming the decision of the intake counselor or directing the filing of a petition himself. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

## § 7A-532. Evaluation.

### CASE NOTES

**Prior Approval of Filing of Petition Required.** — Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition. Furthermore when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Dismissal of Petitions Filed Against Juveniles Treated Unequally.**— The trial court erred in not dismissing petitions against six juveniles who received unequal treatment vis a vis other juveniles who were alleged to have committed the same or similar offenses by design, in that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to victim while the other juveniles who were similarly situated were not prosecuted because they, or their parents, were able or willing to pay $1,000 to the complainant. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

## § 7A-533. Evaluation decision.

CASE NOTES

**Prior Approval of Filing of Petition Required.** — Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition. Furthermore when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Dismissal of Petitions Filed Against Juveniles Treated Unequally.** — The trial court erred in not dismissing petitions against six juveniles who received unequal treatment vis a vis other juveniles who were alleged to have committed the same or similar offenses by design, in that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to victim while the other juveniles who were similarly situated were not prosecuted because they, or their parents, were able or willing to pay $1,000 to the complainant. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

## § 7A-535. Request for review by prosecutor.

CASE NOTES

**Prior Approval of Filing of Petition Required.** — Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the district attorney has approved the filing of such petition. Furthermore when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Dismissal of Petitions Filed Against Juveniles Treated Unequally.** — The trial court erred in not dismissing petitions against six juveniles who received unequal treatment vis a vis other juveniles who were alleged to have committed the same or similar offenses by design, in that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to victim while the other juveniles who were similarly situated were not prosecuted because they, or their parents, were able or willing to pay $1,000 to the complainant. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

## § 7A-536. Review of determination that petition should not be filed.

CASE NOTES

**Limits on Involvement of District Attorney.** — The district attorney's involvement in cases charging juveniles with being undisciplined or delinquent, before the juvenile petition is filed, is limited to (1) assisting the intake counselor, when requested, during the preliminary inquiry in determining the legal sufficiency or the evidence, and (2) reviewing the decision of the intake counselor not approving the filing of a juvenile petition, and affirming the decision of the intake counselor or directing the filing of a petition himself. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Prior Approval of Filing of Petition Required.** — Before a juvenile petition may be filed charging any juvenile with being delinquent or undisciplined, the record must affirmatively disclose that either the intake counselor or the

district attorney has approved the filing of such petition. Furthermore when the district attorney approves the filing of such petition, the record must affirmatively disclose that the intake counselor has theretofore disapproved the filing. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Dismissal of Petitions Filed Against Juveniles Treated Unequally.** — The trial court erred in not dismissing petitions against six juveniles who received unequal treatment vis a vis other juveniles who were alleged to have committed the same or similar offenses by design, in that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to victim while the other juveniles who were similarly situated were not prosecuted because they, or their parents, were able or willing to pay $1,000 to the complainant. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

## Article 44.

## *Screening of Abuse and Neglect Complaints.*

## § 7A-543. Duty to report child abuse or neglect.

CASE NOTES

**Quoted** in State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

## § 7A-544. Investigation by Director; notification of person making the report.

CASE NOTES

**Quoted** in State v. Mutakbbic, 317 N.C. 264, 345 S.E.2d 154 (1986).

## § 7A-544.1. Interference with investigation.

(a) If any person obstructs or interferes with an investigation required by G.S. 7A-544, the Director may file a petition naming said person as respondent and requesting an order directing the respondent to cease such obstruction or interference. The petition shall contain the name and date of birth and address of the juvenile who is the subject of the investigation, shall specifically describe the conduct alleged to constitute obstruction of or interference with the investigation, and shall be verified.

(b) For purposes of this section, obstruction of or interference with an investigation means refusing to disclose the whereabouts of the juvenile, refusing to allow the director to have personal access to the juvenile, refusing to allow the director to observe or interview the juvenile in private, refusing to allow the director to arrange for an evaluation of the juvenile by a physician or other expert, or other conduct that makes it impossible for the director to carry out his duty to investigate.

(c) Upon filing of the petition, the court shall schedule a hearing to be held not less than five days after service of the petition and summons on the respondent. Service of the petition and summons and notice of hearing shall be made as provided by the Rules of

Civil Procedure on the respondent; the juvenile's parent, guardian, custodian, or caretaker; and any other person determined by the court to be a necessary party. If at the hearing on the petition the court finds by clear, cogent and convincing evidence that the respondent, without lawful excuse, has obstructed or interfered with an investigation required by G.S. 7A-544, the court may order the respondent to cease such obstruction or interference. The burden of proof shall be on the petitioner.

(d) If the director has reason to believe that the juvenile is in need of immediate protection or assistance, he shall so allege in the petition and may seek an ex parte order from the court. If the court, from the verified petition and any inquiry the court makes of the director, finds probable cause to believe both that the juvenile is at risk of immediate harm and that the respondent is obstructing or interfering with the director's ability to investigate to determine the juvenile's condition, the court may enter an ex parte order directing the respondent to cease such obstruction or interference. The order shall be limited to provisions necessary to enable the Director to conduct an investigation sufficient to determine whether the juvenile is in need of immediate protection or assistance. Within 10 days after the entry of an ex parte order under this subsection, a hearing shall be held to determine whether there is good cause for the continuation of the order or the entry of a different order. An order entered under this subsection shall be served on the respondent along with a copy of the petition, summons, and notice of hearing.

(e) The Director may be required at a hearing under this section to reveal the identity of any person who made a report of suspected abuse or neglect as required by G.S. 7A-543.

(f) An order entered pursuant to this section is enforceable by civil or criminal contempt as provided in Chapter 5A of the General Statutes. (1987, c. 409, s. 1.)

**Editor's Note.** — Session Laws 1987, c. 409, s. 4 makes the section effective October 1, 1987.

## § 7A-551. Privileges not grounds for excluding evidence.

Neither the physician-patient privilege, the psychologist-client privilege, nor the husband-wife privilege shall be grounds for excluding evidence of abuse or neglect in any judicial proceeding (civil, criminal, or juvenile) in which a juvenile's abuse or neglect is in issue nor in any judicial proceeding resulting from a report submitted under this Article, both as said privileges relate to the competency of the witness and to the exclusion of confidential communications. (1979, c. 815, s. 1; 1987, c. 323, s. 1.)

**Effect of Amendments.** — The 1987 amendment, effective June 8, 1987, inserted "the psychologist-client privilege" near the beginning of the section.

CASE NOTES

**Section 8-53.1 is read in pari materia, etc.** —

In accord with the main volume. See State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

**Privilege Not Available in Child Abuse Cases.** — By virtue of § 8-53.1 and this section, the physician-patient privilege, created by § 8-53 is not available in cases involving child abuse. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

**Section 8-53.1 and this section plainly facilitate the prosecution of child abusers,** without regard to whether the medical information was obtained before or after the accused was officially charged with a crime. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

**Evidence That Defendant in Sexual Abuse Case, etc.** — Any privilege which defendant, who sought treatment of a sexually transmittable disease after he had been charged with sexual crimes against his children and taken into custody, might have been entitled to by § 8-53 was nullified by § 8-53.1 and this section. State v. Etheridge, 319 N.C. 34, 352 S.E.2d 673 (1987).

## Article 45.

## *Venue; Petition; Summons.*

## § 7A-559. Pleading and process.

CASE NOTES

**Cited** in In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

## § 7A-562. Immediate need for petition when clerk's office is closed.

(b) When the office of the clerk of superior court is closed, a magistrate may be authorized by the Chief District Judge to draw, verify, and issue petitions as follows:

(1) When an intake counselor requests a petition alleging a juvenile to be delinquent or undisciplined, or

(2) When the Director of the Department of Social Services requests a petition alleging a juvenile to be abused, neglected, or dependent, or

(3) When the Director of the Department of Social Services requests a petition alleging the obstruction of or interference with an investigation required by G.S. 7A-544.

(c) The authority of the magistrate under subsection (b) is limited to emergency situations when a petition is required in order to obtain a secure or nonsecure custody order or an order under G.S. 7A-544.1. Any petition issued under this section shall be delivered to the clerk's office for processing as soon as that office is open for business. (1979, c. 815, s. 1; 1987, c. 409, s. 3.)

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

**Effect of Amendments.** — The 1987 amendment, effective October 1, 1987, added "or" at the end of subdivision (b)(2), added subdivision (b)(3), and in the first sentence of subsection (c) inserted "or an order under G.S. 7A-544.1."

## Article 46.

*Temporary Custody; Secure and Nonsecure Custody; Custody Hearings.*

### § 7A-574. Criteria for secure or nonsecure custody.

(b) When a request is made for secure custody, the judge may order secure custody only where he finds there is a reasonable factual basis to believe that the juvenile actually committed the offense as alleged in the petition, and

(1) That the juvenile is presently charged with a felony, and has demonstrated that he is a danger to property or persons; or

(1.1) The juvenile is presently charged with a misdemeanor at least one element of which is assault on a person; or

(2) That the juvenile has willfully failed to appear on a pending delinquency charge or on charges of violation of probation or conditional release, providing the juvenile was properly notified; or

(3) That a delinquency charge is pending against the juvenile and there is a reasonable cause to believe the juvenile will not appear in court; or

(4) That the juvenile is an absconder from any State training school or detention facility in this or another state; or

(5) That there is reasonable cause to believe the juvenile should be detained for his own protection because the juvenile has recently suffered self-inflicted physical injury or recently attempted to do so; in such case, the juvenile must have been refused admission by one appropriate hospital and the period of secure custody is limited to 24 hours to determine the need for inpatient hospitalization; if such a juvenile is placed in secure custody, he shall receive continuous supervision while in secure custody and a physician shall be notified immediately; or

(6) That the juvenile is alleged to be undisciplined by virtue of his being a runaway and is found to be inappropriate for nonsecure custody placement or because he refuses nonsecure custody and the court finds that the juvenile needs secure custody for up to 72 hours to evaluate the juvenile's need for medical or psychiatric treatment or to facilitate reunion with his parents; or

(7) That the juvenile is alleged to be undisciplined and has willfully failed to appear in court after proper notice; such a juvenile shall be brought to court as soon as possible and in no event should be held more than 72 hours.

(1979, c. 815, s. 1; 1981, c. 426, ss. 1-4; c. 526; 1983, c. 590, ss. 2-6; 1987, c. 101.)

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

**Effect of Amendments.** — The 1987 amendment, effective October 1, 1987, inserted subdivision (b)(1.1).

CASE NOTES

**Standard of Proof for Termination and Removal Distinguished.** — There is a substantive difference between the quantum of adequate proof of neglect and dependency for purposes of termination and for purposes of removal. The most significant difference is that while parental rights may not be terminated for threatened future harm, the Department of Social Services may obtain temporary custody of a child when there is a risk of neglect in the future. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

**The task at the temporary custody or removal stage** is to determine whether the child is exposed to a substantial risk of physical injury because the parent is unable to provide adequate protection. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

**Removal of Child Upheld.** — Evidence held sufficient to show that seven-year old child was exposed to a substantial risk of physical injury because of her mother's inability to maintain secure living arrangements for her, so as to permit the Department of Social Services to remove her from her mother's custody until such accommodations could be provided. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

## Article 47.

## *Basic Rights.*

## § 7A-586. Appointment and duties of guardian ad litem.

CASE NOTES

**This section does not prevent the application of other pertinent statutory provisions.** In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

**Whether appointment of a guardian ad litem for a minor is necessary is controlled by § 1A-1, Rule 17(b).** In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

## Article 48.

## *Law-Enforcement Procedures in Delinquency Proceedings.*

CASE NOTES

**Legislative Intent.** — In enacting this Article, dealing with criminal procedure in the juvenile context, the legislature's primary concern was the growing problem of juvenile crime. This Article, then, must be read as a legislative attempt to deal with this problem. In re Stallings, 318 N.C. 565, 350 S.E.2d 327 (1986), rehearing granted, 318 N.C. 703, 351 S.E.2d 750 (1987).

## § 7A-594. Role of the law-enforcement officer.

CASE NOTES

**Showup.** — The legislature did not intend to preclude the use of the showup in juvenile investigations without a court order. This technique serves the important law enforcement objective of efficiency and protects the juvenile from more intrusive identification techniques. In re Stallings, 318 N.C. 565, 350 S.E.2d 327 (1986), rehearing granted, 318 N.C. 703, 351 S.E.2d 750 (1987).

## § 7A-595. Interrogation procedures.

CASE NOTES

**Juvenile's rights under this section arise only if the juvenile is in custody.** State v. Smith, 317 N.C. 100, 343 S.E.2d 518 (1986).

**Juvenile Held "In Custody".** — Sixteen-year old defendant who was asked to accompany officers to local police station, who at no time was told that he was free to leave, and who was in the constant presence of law enforcement officers with firearms was "in custody" at the time his confession was obtained. State v. Smith, 317 N.C. 100, 343 S.E.2d 518 (1986).

**Findings Required.** —

This section requires the trial court to find as a fact that the juvenile knowingly, willingly, and understandingly waived his juvenile rights prior to admitting any statement made by the juvenile during a custodial interrogation. In re Ewing, 83 N.C. App. 535, 350 S.E.2d 887 (1986).

**Right of Juvenile to Have Parent Present.** — Under the Fifth and Sixth Amendments to the United States Constitution, an accused, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police. A juvenile's right, pursuant to subdivision (a)(3) of this section, to have a parent present during custodial interrogation is entitled to similar protection. State v. Smith, 317 N.C. 100, 343 S.E.2d 518 (1986).

**Parent May Not Waive Rights of Juvenile.** — Finding that respondent's mother freely, understandingly, and knowingly waived respondent's juvenile rights is not equivalent to a finding that respondent knowingly and understandingly waived his rights. Furthermore, a parent, guardian, or custodian may not waive any right on behalf of the juvenile. In re Ewing, 83 N.C. App. 535, 350 S.E.2d 887 (1986).

**Failure to Object at Trial Waives Argument on Appeal.** — In a capital murder trial, defendant's failure to object at trial to the state's introduction of his out-of-court statement on grounds that he was not advised of his rights under subsection (a) of this rule waived his right to complain of its admission on appeal. State v. Stokes, 319 N.C. 1, 352 S.E.2d 653 (1987).

**Confession Held Inadmissible.** — Juvenile's confession which resulted from police-initiated custodial interrogation in the absence of counsel or a parent after the juvenile invoked his right to have a parent present during questioning was erroneously admitted. State v. Smith, 317 N.C. 100, 343 S.E.2d 518 (1986).

## § 7A-596. Authority to issue nontestimonial identification order where juvenile alleged to be delinquent.

CASE NOTES

**The purpose of this section** was to empower officials to conduct the same identification procedures on juveniles as on adults. In re Stallings, 318 N.C. 565, 350 S.E.2d 327 (1986), rehearing granted, 318 N.C. 703, 351 S.E.2d 750 (1987).

**Showup.** —

The legislature did not intend to preclude the use of the showup in juvenile investigations without a court order. This technique serves the important law enforcement objective of efficiency and protects the juvenile from more intrusive identification techniques. In re Stallings, 318 N.C. 565, 350 S.E.2d 327 (1986), rehearing granted, 318 N.C. 703, 351 S.E.2d 750 (1987), disapproving the rule stated in State v. Norris, 77 N.C. App. 525, 335 S.E.2d 764 (1985), cited in the main volume.

### Article 49.

### *Transfer to Superior Court.*

## § 7A-608. Transfer of jurisdiction of juvenile to superior court.

CASE NOTES

**Cited** in State v. Stokes, 319 N.C. 1, 352 S.E.2d 653 (1987).

## § 7A-611. Right to pretrial release; detention.

Once the order of transfer has been entered, the juvenile has the right to pretrial release as provided in G.S. 15A-533 and 15A-534. Pending release under this Article, the judge shall order that the juvenile be detained in a local detention home as defined by G.S. 7A-517(15) or a regional detention home as defined by G.S. 7A-517(26) while awaiting trial. The judge may order the juvenile to be held in a holdover facility as defined by G.S. 7A-517(16) at any time the presence of the juvenile is required in court for pretrial hearings or trial, if the judge finds that it would be inconvenient to return the juvenile to the local or regional detention home.

Should the juvenile be found guilty, or enter a plea of guilty or no contest to criminal offenses in superior court and the juvenile receives an active sentence, then immediate transfer to the Department of Correction shall be ordered. Until such time as the juvenile is transferred to the Department of Correction, the juvenile may be detained in a holdover facility as defined by G.S. 7A-517(16). The juvenile may not be detained in a local detention home as defined by G.S. 7A-517(15) or a regional detention home as defined by G.S. 517(26) [7A-517(26)] pending transfer to the Department of Correction. The juvenile may be kept by the Department of Correction as a safekeeper until the juvenile is placed in an appropriate correctional program. (1979, c. 815, s. 1; 1987, c. 144.)

**Editor's Note.** — The reference "7A-517(26)" has been inserted in brackets following "517(26)" in the next-to-last sentence of the second paragraph to reflect the reference that was apparently intended.

**Effect of Amendments.** — The 1987 amendment, effective October 1, 1987, substituted "shall order" for "may order" in the second sentence of the first paragraph, substituted "in a local detention home as defined by G.S. 7A-517(15) or a regional detention home as defined by G.S. 7A-517(26) while awaiting trial" for "in a juvenile detention home or a separate section of a local jail as provided by G.S. 7A-576" at the end of the second sentence of the first paragraph, added the third sentence of the first paragraph, and added the second paragraph.

## Article 51.

## *Hearing Procedures.*

## § 7A-633. When admissions by juvenile may be accepted.

### CASE NOTES

**Court To Make Individual Inquiries.** — It is the duty of the trial judge in carrying out the requirements of this section to give each child individual attention, as it is impossible for the judge to determine that the admission is a product of informed choice without making the required inquires of each child individually. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

## § 7A-635. Quantum of proof in adjudicatory hearing.

### CASE NOTES

**The proper quantum of proof, etc.** —

In a juvenile adjudicatory hearing, the respondent is entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults. The State, therefore, must present substantial evidence of each essential element of the offense charged and of respondent's being the perpetrator. In re Walker, 83 N.C. App. 46, 348 S.E.2d 823 (1986).

**The statutory use of "shall," etc.** — It is reversible error for a trial court to fail to state affirmatively that an adjudication of delinquency is based upon proof beyond a reasonable doubt. In re Walker, 83 N.C. App. 46, 348 S.E.2d 823 (1986).

**The statutory use of "shall" is a mandate, etc.** — The order of the trial judge must affirmatively state that the allegations are proved beyond a reasonable doubt, even in cases where the juvenile admits the offense alleged. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Stated** in In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

**Cited** in In re Ewing, 83 N.C. App. 535, 350 S.E.2d 887 (1986).

## § 7A-637. Adjudication.

CASE NOTES

**The statutory use of "shall," etc.** — It is reversible error for a trial court to fail to state affirmatively that an adjudication of delinquency is based upon proof beyond a reasonable doubt. In re Walker, 83 N.C. App. 46, 348 S.E.2d 823 (1986).

**The statutory use of "shall" is a mandate, etc.** —

The order of the trial judge must affirmatively state that the allegations are proved beyond a reasonable doubt, even in cases where the juvenile admits the offense alleged. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Cited** in In re Ewing, 83 N.C. App. 535, 350 S.E.2d 887 (1986).

## Article 52.

## *Dispositions.*

## § 7A-646. Purpose.

CASE NOTES

**Court Limited to Using Available Dispositional Alternatives.** — The district court's authority in juvenile dispositions is limited to utilization of currently existing programs or those for which the funding and machinery for implementation is in place. In re Jackson, — N.C. App. —, 352 S.E.2d 449 (1987).

When a student has been lawully suspended or expelled pursuant to § 115C-391 and the school has not provided a suitable alternative educational forum, court-ordered public school attendance is not a dispositional alternative available to the juvenile court judge, absent a voluntary reconsideration of or restructuring of the suspension by the school board to allow the student's restoration to an educational program within its system. In re Jackson, — N.C. App. —, 352 S.E.2d 449 (1987).

**Identical Judgments Erroneous for Varying Offenses and Culpability.** — The juvenile court failed to consider the express purposes of the juvenile code where it entered identical judgments in all six cases tried together wherein the juveniles ranged in age from six to 14, were found to have committed and admitted committing different offenses and had varying degrees of culpability. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Quoted** in In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

## § 7A-647. Dispositional alternatives for delinquent, undisciplined, abused, neglected, or dependent juvenile.

CASE NOTES

**Evidence of prior neglect** which led to an adjudication of neglect shows circumstances as they were and therefore is relevant to whether a change of circumstances have occurred since the court's order. In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

**Standard of Proof for Termination and Removal Distinguished.** — There is a substantive difference between the quantum of adequate proof of neglect and dependency for purposes of termination and for purposes of removal. The most significant difference is that while parental rights may not be terminated for threatened future harm, the Department of Social Services may obtain temporary custody of a child when there is a

risk of neglect in the future. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

**The task at the temporary custody or removal stage is** to determine whether the child is exposed to a substantial risk of physical injury because the parent is unable to provide adequate protection. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

**Removal of Child Upheld.** — Evidence held sufficient to show that seven-year old child was exposed to a substantial risk of physical injury because of her mother's inability to maintain secure living arrangements for her, so as to permit the Department of Social Services to remove her from her mother's custody until such accommodations could be provided. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

**Modification Upheld.** — Where the court had previously deemed it in the best interest of minor children who had been adjudicated neglected that mother comply with certain orders of the court, the court acted with full statutory authority when it later conducted a hearing upon social worker's subsequent motion and determined that mother's refusal to cooperate with community-level services and orders applicable to her constituted a "change of circumstances" affecting the best interest of the children, sufficient to require modification of prior custody orders. In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

**Award of Custody to Foster Parents.** — Having acquired subject matter jurisdiction, trial court, guided by the best interests of the child, had broad dispositional powers, including the power to award legal custody of child to its foster parents. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 715, 349 S.E.2d 589 (1986).

**Cited** in In re Jackson, — N.C. App. —, 352 S.E.2d 449 (1987).

### OPINIONS OF ATTORNEY GENERAL

**Educational Interests of Handicapped Child.** — In those situations where the parents of a handicapped child are unavailable or unknown and the child is a ward of the State, the responsibility and authority for representing that child's educational interests rests with a surrogate parent, and not with the county director of social services. Further, § 115C-116(c) and 20 U.S.C. § 1415(b)(1)(B) prohibit the county director of social services or any employee of a department of social services involved in the education or care of such child from serving as a surrogate parent in such circumstances. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

**Conflicting Provisions.** — Subdivision (2) of this section, as amended by Session Laws 1985, c. 777, appears on its face to be in conflict with 20 U.S.C. § 1415 and with §§ 115C-106, 115C-114, and 115C-116, to the extent that it authorizes the county director of social services to make educational decisions for a handicapped child in the custody of a department of social services. This apparent conflict should be resolved by giving full effect to 20 U.S.C. § 1415. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

The provisions of Article 9, Chapter 115C should be considered as an exception to the provisions of paragraph (2)c of this section to the extent those statutes are in conflict. See opinion of Attorney General to Mr. Johnnie Ellerbe, Consultant, Division for Exceptional Children, State Department of Public Instruction, 55 N.C.A.G. 94 (1986).

## § 7A-648. Dispositional alternatives for delinquent or undisciplined juvenile.

### CASE NOTES

**Cited** in In re Jackson, — N.C. App. —, 352 S.E.2d 449 (1987).

## § 7A-649. Dispositional alternatives for delinquent juvenile.

CASE NOTES

**Court Limited to Using Available Dispositional Alternatives.** — The district court's authority in juvenile dispositions is limited to utilization of currently existing programs or those for which the funding and machinery for implementation is in place. In re Jackson, — N.C. App. —, 352 S.E.2d 449 (1987).

When a student has been lawfully suspended or expelled pursuant to § 115C-391 and the school has not provided a suitable alternative educational forum, court-ordered public school attendance is not a dispositional alternative available to the juvenile court judge, absent a voluntary reconsideration for restructuring of the suspension by the school board to allow the student's restoration to an educational program within its system. In re Jackson, — N.C. App. —, 352 S.E.2d 449 (1987).

**Punishment Not Determined By Civil Liability of Parents.** —

The limit of the parents' civil liability for damage "maliciously or willfully" done to property by a juvenile pursuant to § 1-538.1, is not the proper criteria for determining the punishment to be imposed upon that juvenile found to be delinquent under this section. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Identical Judgments Erroneous for Varying Offenses and Culpability.** — The juvenile court failed to consider the express purposes of the juvenile code where it entered identical judgments in all six cases tried together wherein the juveniles ranged in age from six to 14, were found to have committed and admitted committing different offenses and had varying degrees of culpability. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

**Dismissal of Petitions Filed Against Juveniles Treated Unequally.** —

The trial court erred in not dismissing petitions against six juveniles who received unequal treatment vis a vis other juveniles who were alleged to have committed the same or similar offenses by design, in that each respondent was prosecuted because he or she, or his or her parents, was unwilling or unable to pay $1,000 compensation to the victim, while the other juveniles who were similarly situated were not prosecuted because they, or their parents, were able or willing to pay $1,000 to the complainant. In re Register, — N.C. App. —, 352 S.E.2d 889 (1987).

## § 7A-650. Authority over parents of juvenile adjudicated as delinquent, undisciplined, abused, neglected, or dependent.

(b1) In any case where a juvenile has been adjudicated as delinquent, undisciplined, abused, neglected or dependent, the judge may conduct a special hearing to determine if the court should order the parents to participate in medical, psychiatric, psychological or other treatment and pay the costs thereof. The notice of this hearing shall be by special petition and summons to be filed by the court and served upon the parents at the conclusion of the adjudication hearing. If, at this hearing, the court finds it in the best interest of the juvenile for the parent to be directly involved in treatment, the judge may order the parent to participate in medical, psychiatric, psychological or other treatment.

(1979, c. 815, s. 1; 1983, c. 837, ss. 2, 3; 1987, c. 598, s. 2.)

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

**Effect of Amendments.** — The 1987 amendment, effective October 1, 1987, and applicable to any person sentenced or any juvenile dispositional hearing held on or after that date, added "and pay the costs thereof" at the end of the first sentence of subsection (b1).

**CASE NOTES**

**Participation of Parent, etc.** — Subsection (b1) of this section does not authorize a court to order a parent of a juvenile who has been adjudicated as dependent or neglected to submit to medical, psychiatric, psychological or other assessment or treatment. In re Evans, 81 N.C. App. 449, 344 S.E.2d 325 (1986).

## § 7A-652. Commitment of delinquent juvenile to Division of Youth Services.

(c) In no event shall commitment of a delinquent juvenile be for a period of time in excess of that period for which an adult could be committed for the same act. Any juveniles committed for an offense for which an adult would be sentenced for 30 days or less shall be assigned to a local detention home as defined by G.S. 7A-517(15) or a regional home as defined by G.S. 7A-517(26).

(d1) The Chief Court Counselor shall insure that the records requested by the Director of Youth Services accompany the juvenile upon transportation for admittance to a training school or, if not obtainable at the time of admission, are sent to the training school within 15 days of the admission. If records requested by the Division of Youth Services for admission do not exist, to the best knowledge of the Chief Court Counselor, he shall so stipulate in writing to the training school. If such records do exist, but the Chief Court Counselor is unable to obtain copies of them, a district court judge may order that the records from public agencies be made available to the training school. Records that are confidential by law shall remain confidential and the Division of Youth Services shall be bound by the specific laws governing the confidentiality of these records. All records shall be used in a manner consistent with the best interest of the juvenile.

(1979, c. 815, s. 1; 1983, c. 133, s. 2; 1987, c. 100; c. 372.)

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

**Effect of Amendments.** — Session Laws 1987, c. 100, effective October 1, 1987, and applicable to juveniles committed on and after that date, inserted "of a delinquent juvenile" and "for the same act" in the first sentence of subsection (c) and added the second sentence of that subsection.

Session Laws 1987, c. 372, effective October 1, 1987, added subsection (d1).

## § 7A-657. Review of custody order.

(a) In any case where the judge removes custody from a parent or person standing in loco parentis because of dependency, neglect or abuse, the juvenile shall not be returned to the parent or person standing in loco parentis unless the judge finds sufficient facts to show that the juvenile will receive proper care and supervision.

In any case where custody is removed from a parent, the judge shall conduct a review within six months of the date the order was entered, and shall conduct subsequent reviews at least every year thereafter. The Director of Social Services shall make timely requests to the clerk to calendar the case at a session of court scheduled for the hearing of juvenile matters within six months of the date the order was entered. The Director shall make timely requests for calendaring of the yearly reviews thereafter. The clerk shall give 15 days' notice of the review to the parent or the person standing in loco parentis, the juvenile if 12 years of age or more, the guardian, foster parent, custodian or agency with custody, the guardian ad litem, and any other person the court may specify, indicating the court's impending review.

(b) Notwithstanding other provisions of this Article, the court may waive the holding of review hearings required by subsection (a), may require written reports to the court by the agency or person holding custody in lieu of review hearings, or order that review hearings be held less often than every 12 months, if the court finds by clear, cogent and convincing evidence that:

(1) The juvenile has been placed with a relative for a continuous period of at least one year; and

(2) The placement is stable and continuation of the placement is in the juvenile's best interest; and

(3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every 12 months; and

(4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion; and

(5) The court order has designated the relative as the juvenile's permanent caretaker at the review at which these findings are made.

The court may not waive or refuse to conduct a review hearing if a party files a motion seeking the review.

(c) At every review hearing, the court shall consider information from the Department of Social Services, the court counselor, the juvenile, the parent or person standing in loco parentis, the custodian, the foster parent, the guardian ad litem, and any public or private agency which will aid it in its review.

In each case the court shall consider the following criteria:

(1) Services which have been offered to reunite the family;

(2) Where the juvenile's return home is unlikely, the efforts which have been made to evaluate or plan for other methods of care;

(3) Goals of the foster care placement and the appropriateness of the foster care plan;

(4) A new foster care plan, if continuation of care is sought, that addresses the role the current foster parent will play in the planning for the juvenile;

(5) Reports on the placements the juvenile has had and any services offered to the juvenile and the parent;
(6) When and if termination of parental rights should be considered;
(7) Any other criteria the court deems necessary.

(d) The judge, after making findings of fact, shall enter an order continuing the placement under review or providing for a different placement as is deemed to be in the best interest of the juvenile. If at any time custody is restored to a parent, the court shall be relieved of the duty to conduct periodic judicial reviews of the placement. (1979, c. 815, s. 1; 1987, c. 810.)

**Effect of Amendments.** — The 1987 amendment, effective August 13, 1987, rewrote this section.

CASE NOTES

**Quoted** in In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

## § 7A-659. Post termination of parental rights' placement court review.

**Legal Periodicals.** — For comment, "Termination of Parental Rights," see 21 Wake Forest L. Rev. 431 (1986).

CASE NOTES

**Foster Parents May Not Bring Custody Action.** — Nothing in the language of § 48-9.1(1) gives foster parents standing to contest the department's or agency's exercise of its rights as legal custodian; therefore, foster parents are without standing to bring an action seeking custody of minor child placed in their home by defendant. Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981); In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

The case of Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981) does not prohibit the transfer of legal care, custody and control of a foster child to its foster parents. Oxendine stands for the proposition that foster parents have no standing to bring a custody action pursuant to § 50-13.2 et seq. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

**But Foster Parents Have Right to Be Heard.** — At the very least, foster parents have the right for an opportunity to be heard, a right which derives from the child's right to have his or her best interests protected. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

**This section recognizes the right of foster parents to participate in review proceedings** concerning the placement and care of their foster child after termination of parental rights. In re Scearce, 81 N.C App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

**This section requires that notice of review be given to foster parents** and requires the foster parents to attend the review proceedings. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

**Intervention by Foster Parents in Custody Proceeding.** — In a proceeding brought by DSS in which custody was put in issue by guardian ad litem and natural father, trial court did not err in permitting child's foster parents to intervene. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986), distin-

guishing Oxendine v. Department of Social Servs., 303 N.C. 699, 281 S.E.2d 370 (1981).

**Power of Court to Award Custody to Foster Parents.** — Having acquired subject matter jurisdiction, trial court, guided by the best interests of the child, had broad dispositional powers, including the power to award legal custody of child to its foster parents. In re Scearce, 81 N.C. App. 531, 345 S.E.2d 404, cert. denied, 318 N.C. 415, 349 S.E.2d 589 (1986).

## Article 53.

## *Modification and Enforcement of Dispositional Orders; Appeals.*

## § 7A-664. Authority to modify or vacate.

### CASE NOTES

**Evidence of prior neglect** which led to an adjudication of neglect shows circumstances as they were and therefore is relevant to whether a change of circumstances have occurred since the court's order. In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

**Modification Upheld.** — Where the court had previously deemed it in the best interest of minor children who had been adjudicated neglected that mother comply with certain orders of the court, the court acted with full statutory authority when it later conducted a hearing upon social worker's subsequent motion and determined that mother's refusal to cooperate with community-level services and orders applicable to her constituted a "change of circumstances" affecting the best interest of the children, sufficient to require modification of prior custody orders. In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

## § 7A-666. Right to appeal.

### CASE NOTES

**Cited** in In re Brenner, 83 N.C. App. 242, 350 S.E.2d 140 (1986).

## Article 54.

## *Juvenile Records and Social Reports.*

## § 7A-675. Confidentiality of records.

(i) In the case of a child victim, a judge may order the sharing of information among such public agencies as the judge deems necessary to reduce the trauma to the child victim. (1979, c. 815, s. 1; 1987, c. 297.)

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

**Effect of Amendments.** — The 1987 amendment, effective June 8, 1987, added subsection (i).

# SUBCHAPTER XII. ADMINISTRATIVE HEARINGS.

## ARTICLE 60.

## *Office of Administrative Hearings.*

### § 7A-751. Director; powers and duties.

The head of the Office of Administrative Hearings is the Director. He shall serve as the chief administrative law judge of the Office of Administrative Hearings and shall have the powers and duties conferred on him by this Chapter and the Constitution and laws of this State.

The Office of Administrative Hearings is designated the official deferral agency under Section 706 of the Civil Rights Act of 1964, as amended, for all charges filed on a timely basis with the Equal Employment Opportunity Commission by any State or local government employee covered under Chapter 126 of the General Statutes. The Office of Administrative Hearings may contract with the Equal Employment Opportunity Commission to become a 706 deferral agency and may conduct necessary investigations and informal hearings or fact-finding proceedings. The Office of Administrative Hearings may prepare investigation reports with the findings, conclusions, and determinations of probable cause that a 706 deferral agency is required to make and may take other actions required for it to function as a 706 deferral agency for State and local employees covered under Chapter 126 of the General Statutes. Proceedings conducted by the Office of Administrative Hearings as a 706 deferral agency are not contested cases as defined in G.S. 150B-2(2). (1985, c. 746, s. 2; 1987, c. 774, s. 1; c. 827, s. 1.)

**Effect of Amendments.** — Session Laws 1987, c. 774, s. 1, effective August 12, 1987, substituted "administrative law judge" for "hearing officer."

Session Laws 1987, c. 827, s. 1, effective August 13, 1987, substituted reference to Chapter 150B for reference to Chapter 150A in this section.

### § 7A-754. Qualifications; standards of conduct; removal.

**Editor's Note.** —

Session Laws 1987, c. 830, s. 68(a), (b), provides: "(a) Notwithstanding the provisions of G.S. 126-4(1) the number of administrative law judges and employees of the Office of Administrative Hearings, their classifications, and their grades shall be as established by the General Assembly.

"An administrative law judge may be removed from office only by the Director of the Office of Administrative Hearings and only for just cause, as provided in G.S. 7A-754. Otherwise, administrative law judges and employees of the Office of Administrative Hearings shall be entitled to all of the benefits and subject to all of the restrictions of Chapter 126 of the General Statutes in the same manner as all other State employees subject to that Chapter.

"The number of administrative law judges and employees in the Office of Administrative Hearings and their classifications and grades are established as follows:

| Classification | Grade | Number |
|---|---|---|
| Administrative Law Judge | 83 | 8 |
| Deputy Director | 80 | 1 |
| Executive Legal Specialist | 80 | 1 |

| Classification | Grade | Number |
|---|---|---|
| Assistant Director | 77 | 1 |
| Administrative Legal Specialist | 77 | 1 |
| Mediation Supervisor | 76 | 1 |
| Mediation Specialist | 74 | 2 |
| Internal Auditor II | 74 | 1 |
| Administrative Services Manager | 73 | 1 |
| Paralegal III | 70 | 1 |
| Administrative Officer II | 70 | 1 |
| Accounting Assistant III | 67 | 1 |
| Paralegal II | 67 | 1 |
| Publications Coordinator | 67 | 1 |
| Chief Hearings Clerk | 67 | 1 |
| Administrative Assistant III | 67 | 1 |
| Administrative Assistant II | 65 | 1 |
| Administrative Assistant I | 63 | 1 |
| Clerk/Typist V | 61 | 4 |
| Records Clerk V | 61 | 1 |
| Word Processor IV | 59 | 3 |
| Clerk IV | 59 | 1 |
| Clerk/Receptionist III | 57 | 1 |

"(b) A person appointed as an administrative law judge shall be placed in that step of Grade 83 on the appropriate salary schedule as is determined by statute and regulations applicable to State employees generally.

"Any person who was appointed as a hearing officer in the Office of Administrative Hearings prior to the effective date of this act shall be entitled to all of the benefits accruing to State employees subject to the Personnel Act under any statute or rule and such entitlement shall be retroactive to the date of appointment, except that this paragraph shall not be construed to apply to the Director."

Session Laws 1987, c. 830, s. 1.1 provides that the act shall be known as "The State Aid For Nonstate Agencies Act of 1987."

Session Laws 1987, c. 830, s. 121 is a severability clause.

## § 7A-757. Temporary administrative law judges; appointments; powers and standards; fees.

When regularly appointed administrative law judges are unavailable, the Director of the Office of Administrative Hearings may contract with qualified individuals to serve as administrative law judges for specific assignments. A temporary administrative law judge shall have the same powers and adhere to the same standards as a regular administrative law judge in the conduct of a hearing. A temporary administrative law judge shall not be considered a State employee by virtue of this assignment, and shall be remunerated for his service at a rate not to exceed three hundred dollars ($300.00) per day and shall be reimbursed for travel and subsistence expenses at the rate allowed to State officers and employees by G.S. 138-6(a). The Director may also designate a full-time State employee to serve as a temporary administrative law judge with the consent of the employee and his supervisor; however, the employee is not entitled to any additional pay for this service. (1985, c. 746, s. 2; 1985 (Reg. Sess., 1986), c. 1022, s. 5; 1987, c. 878, s. 14.)

**Effect of Amendments.** —

The 1987 amendment, effective September 1, 1987, and applicable to contested cases commenced on or after September 1, 1987, substituted references to administrative law judges for references to hearing officers in the catchline and throughout the section.

## § 7A-758. Availability of administrative law judge to exempt agencies.

The Director of the Office of Administrative Hearings may, upon request of the head of the agency, provide an administrative law judge to preside at hearings of public bodies not otherwise authorized or required by statute to utilize an administrative law judge from the Office of Administrative Hearings including, but not limited to, State agencies exempt from the provisions of Chapter 150B, municipal corporations or other subdivisions of the State, and agencies of such subdivisions. (1985, c. 746, s. 2; 1987, c. 827, s. 1; c. 878, s. 15.)

**Effect of Amendments.** —

Session Laws 1987, c. 827, s. 1, effective August 13, 1987, substituted reference to Chapter 150B for reference to Chapter 150A in this section.

Session Laws 1987, c. 878, s. 15, effective September 1, 1987, and applicable to contested cases commenced on or after September 1, 1987, substituted references to administrative law judges for references to hearing officers in the catchline and throughout the section.

STATE OF NORTH CAROLINA

Department of Justice

Raleigh, North Carolina

*November 1, 1987*

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1987 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.

Lacy H. Thornburg
*Attorney General of North Carolina*