CHAPTER 6

PROCEDURAL PROBLEMS IN CIVIL LITIGATION

Presented by:
D. Kyle Deak

Materials Prepared by:
D. Kyle Deak
Gary S. Parsons
Gavin B. Parsons
Martin D. Warf
Whitney S. Waldenberg

Troutman Sanders LLP
Raleigh, North Carolina

I. INTRODUCTION

Civil Procedure addresses the web of formal processes and systems by which law addresses civil conflicts. Civil procedure is often one of the first topics encountered by law students and, hence, is often revered as one of the benchmark "rights of passage" to the practice of law. It is also often perceived as an esoteric topic which troubles law students. For those who choose to delve into the tumultuous world of litigation and trial practice, civil procedure is the code which crafts our daily existence and brings some predictability and consistency into an otherwise chaotic world.

That said, civil trial practice is a labyrinth of pitfalls through which practitioners must carefully and diligently maneuver. When I was asked to prepare this topic for presentation, I struggled to decide what topics to address. As trial attorneys, we will all likely face certain procedural problems, from the mundane to the truly bizarre. After reflection, I thought the best course of action would be to select a few topics from which members of our firm have witnessed realistic and plausible problems which any member of this audience may face in the course of their practice. These materials are an attempt to craft together some easily discernible references if, by chance, you encounter any of the problems addressed here and are not meant as an overall guide to each and every procedural problem which one may face in civil litigation.

II. SERVICE OF PROCESS PROBLEMS

A. Sufficiency of Process.

1. Issuance.

Under Rule G.S. §1A-1, Rule 4(a), a summons must be issued within five days after the complaint is filed. The action abates if the summons is not timely issued, but obtaining issuance of the summons after the deadline will revive the action and cause it to be commenced on the date of issuance of the subsequent process. Roshelli v. Sperry, 57 N.C. App. 305, 291 S.E.2d 355 (1982).[1]

Similarly, Rule 4(a) requires that the complaint and summons be delivered to a proper person for service after filing and issuance. Failure to deliver

[1] But see Selph v. Post, 144 N.C. App. 606, 552 S.E.2d 171 (2001) (Where summons was issued seven calendar days after filing of complaint, five day rule was satisfied and summons related back to filing of complaint, where seven-day period included an intervening weekend); see also G.S. § 1A-1 Rule 6(a).

the summons to a sheriff within sixty days after it is issued does not, however, preclude it from serving as a basis for issuance of alias and pluries summonses. Smith v. Starnes, 317 N.C. 613, 346 S.E.2d 424 (1986). Indeed, a plaintiff is not required to prove good faith, excusable neglect, or even give any reason at all to justify failure to promptly deliver summons to sheriff. Robinson v. Parker, 124 N.C. App. 164, 476 S.E.2d 406 (1996). A deliberate failure to deliver the summons in an effort to gain a tactical advantage, however, will result in a dismissal under G.S. §1A-1, Rule 41(b), authorizing dismissals for failure to comply with the Rules of Civil Procedure. Smith v. Quinn, 324 N.C. 316, 378 S.E.2d 28 (1989).

2. Content of summons.

The provision covering content of summons that has generated the most litigation is the requirement that it be directed to the defendant. For years, this mandated that the copy of the summons delivered to the defendant actually be directed to him or her. Stone v. Hicks, 45 N.C. App. 66, 262 S.E.2d 318 (1980) (service of a summons on a defendant directed to a co-defendant was held invalid).

In Harris v. Maready, the Supreme Court overruled Stone and held that a defendant is sufficiently served with process, even though the copy of the summons he received was addressed to another defendant. The Court observed that there was no substantial possibility of confusion about the defendant as the party being sued because the defendant was personally served with a summons listing his name in the caption and in the body of the complaint, and that any person served in this manner would have made further inquiry personally or through counsel if he or she had any doubt that he or she was being sued and would be required to answer the complaint.

The Court of Appeals subsequently held that a summons directed to the sheriff, rather than the defendant, was not fatally defective where the name and address of the defendant appeared immediately below the directory portion of the summons. Steffey v. Mazza Constr. Group, Inc., 113 N.C. App. 538, 439 S.E.2d 241 (1944), disc. rev. improvidently granted, 339 N.C. 734, 455 S.E.2d 155 (1995). The Court held that, because the defendant was properly named in the complaint and caption of the summons, there was no substantial possibility of confusion as to whether it was the party served.

At approximately the same time, the North Carolina Supreme Court overruled a line of Court of Appeals decisions that had held that a trial court could not grant a Rule 4(i) motion to amend a summons to designate the correct county

when the caption of the summons listed the incorrect county, even though the proper county appeared on the face of the complaint. Hazelwood v. Bailey, 335 N.C. 769, 442 S.E.2d 515 (1995), overruling Brantley v. Sawyer, 5 N.C. App. 557, 169 S.E.2d 55 (1969); Grace v. Johnson, 21 N.C. App. 432, 204 S.E.2d 723 (1974); Everhart v. Sowers, 63 N.C. App. 747, 306 S.E.2d 472 (1983).

3. Return of service.

A sheriff's return of service, properly executed, raises the presumption of regularity of official acts and thus cannot be overcome by a single affidavit of the defendant. Guthrie v. Ray, 293 N.C. 67, 235 S.E.2d 146 (1977). Thus, when a defendant appears and challenges the sufficiency of service or the veracity of the sheriff's return, the motion will not be granted unless there are at least two affidavits to contradict the presumption of proper service created by the sheriff's return. Id.

4. Extension of chain of process and discontinuance of action.

The mechanics of alias and pluries summonses, endorsements, or Rule 4(e) will not be addressed in great detail. It is worthy of note, however, that the Lemons decision, while apparently opening the door to widespread, practical use of Rule 6(b) to extend expired summonses, was sharply curtailed in Dozier v. Crandall, 105 N.C. App. 74, 411 S.E.2d 635, disc. rev. improvidently allowed, 332 N.C. 480, 420 S.E.2d 826 (1992). In that case, the court held that Lemons permitted an extension of time to serve a summons past the thirty days[2] specified in Rule 4(c), so long as it was accomplished before the ninety-day period specified in Rule 4(d) for issuance of an endorsement or alias and pluries summons. The court held that once the ninety-day period expired and the action was discontinued, pursuant to Rule 4(e), Rule 6(b) did not grant the court discretion to negate that discontinuance. See also Hollowell v. Carlisle, 115 N.C. App. 364, 444 S.E.2d 681 (1994) (trial court had authority, upon showing of excusable neglect, to grant extension of time to serve dormant summons where that summons had in fact been served less than ninety days after issuance).

The Court of Appeals, however, has extended reasonable protection to plaintiffs who, in reliance upon the usual good faith of defendants soliciting extensions of time to plead, grant stipulations that extend beyond the ninety-day period for renewal of the chain of process. In Storey v. Hailey, 114 N.C. App. 173, 441 S.E.2d 602 (1994), the court reversed a dismissal of an action for insufficient service of process where the defendant had requested and received several

[2] Now sixty days, effective October 1, 2001. 2001 N.C. Sess. Laws, § 1.

extensions of time to plead by stipulation from the plaintiff's counsel, to a time well past the expiration of the original summons, and then changed attorneys, filed motions to dismiss, and demanded an immediate chambers hearing, contending that exigent matters of estate administration required immediate resolution of this case. In holding that the defendant was estopped to assert these process and service defenses, the court stated:

> The defendant's conduct in securing extensions of time, through opposing counsel's professional courtesy, to 54 days past the date when plaintiff could have procured endorsement of the original summons or issuance of an alias and pluries summons, acts to estop defendant from asserting these defenses. Any other result would serve only to stifle professional courtesy among members of the bar during a time when legal etiquette and professionalism are becoming more rare.

Id. at 177, 441 S.E.2d at 605.

In a another case, the Court of Appeals applied Rule 4(d) surprisingly strictly, holding that where an alias or pluries summons was issued and did not include a reference in its body to the original summons and the box on the summons form designated for "alias or pluries" was not checked, the subsequent summonses did not relate back to the original summons. Integon Gen. Ins. Co. v. Martin, 217 N.C. App. 440, 490 S.E.2d 242 (1997). The Court held that:

> The issuance of an alias or pluries summons without this reference has the double effect of initiating a new action and discontinuing the original one. Reference to another legal document such as a complaint "does not constitute a link in the chain of process" because the complaint is not an official court document vested with the court's authority to confer jurisdiction.

Id. at 441, 490 S.E.2d at 244 (citations omitted). This is yet another example of why it is crucial for the lawyer to review each and every summons sent to the Clerk for issuance. Delegating the completion of these forms to a secretary or paralegal is a reasonable measure. Delegating the final approval of the contents of the summons, without having a lawyer review them before they are sent to the clerk for issuance, is not. The criticality of having each and every box and space on the form properly checked and completed, together with the extreme

consequences if they are not, should command the attention of every lawyer who has filed any action near any statute of limitations.

5. Service on individuals.

Given that personal delivery to individual defendants is pretty much self-explanatory, no substantial discussion will be wasted on that topic. The requirements for substitute personal service on an individual by leaving a copy at the individual's dwelling house or usual place of abode are also well known to experienced practitioners.

It bears repeating, however, that such substituted service may be accomplished only at the defendant's residence or place of abode, and not at a place of business or other location. Greenup v. Register, 104 N.C. App. 618, 410 S.E.2d 398 (1991). Similarly, substituted service on a defendant by giving copies to his mother in her car at a place away from the home she occupied with her son was not valid service under Rule 4(j)(1)a. Williams v. Hartis, 18 N.C. App. 89, 195 S.E.2d 806 (1973).

Still, the Court has shifted away from the strict application of substituted service when process is left with a person at the defendant's dwelling house or usual place of abode. In Glover v. Farmer, 127 N.C. App. 488, 490 S.E.2d 576 (1997), disc. rev. denied, 347 N.C. 575, 502 S.E.2d 590 (1998), the Court of Appeals held that the defendant's adult daughter, who was visiting with the defendant for a week was "residing" in the defendant's home for the purposes of Rule 4. The Court thus held that service by leaving a copy of the summons and complaint with the daughter was sufficient to satisfy the requirements of substituted service. Id. at 492, 490 S.E.2d at 578.

The method of choice for service on an individual, however, should usually be certified mail or use of a designated delivery service authorized pursuant to 26 U.S.C. § 7502(f)(2),[3] because of the additional protection afforded to a plaintiff by Rule 4(j2)(2). This provision creates a presumption that that:

> [T]he person who received the mail or delivery and signed the receipt was an agent of the addressee authorized by appointment or by law to be served or to accept service of process or was a person of suitable age

[3] This innovation was made available by the 2001 amendment to Rule 4, which became effective October 1, 2001. 2001 N.C. Sess. L. c. 279, s. 2.1.

> and discretion residing in the addressee's dwelling house or usual place of abode.

Id.

> Even more essential, however, is the savings clause which provides: In the event the presumption described in the preceding sentence is rebutted by proof that the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein, the statute of limitation may not be pleaded as a defense if the action was initially commenced within the period of limitation and service of process is completed within 60 days from the date the service is declared invalid.

Id. (emphasis added).

Curiously, however, the savings clause does not parallel the agency and residency presumption. Specifically, the presumption created by the affidavit of service required by G.S. §§ 1-75.10(4) and 1-75.10(5), is that the person receiving the mail or delivery was either (1) the defendant's agent for service or acceptance of process or (2) a person of suitable age and discretion residing in the defendant's dwelling house or usual place of abode. G.S. § 1A-1, Rule 4(j2)(2). The savings provision, however, applies only where the presumption is rebutted by "proof that the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein." Id. (emphasis added). Thus, this presumption is not available to salvage certified mail or designated delivery service on a corporation where the defendant files affidavits rebutting the presumption that the person receiving the mail was not the corporate defendant's agent for service or acceptance of service. Hanover Ins. Co. v. Amana Refrigeration, Inc., 106 N.C. App. 79, 415 S.E.2d 99, disc. rev. denied, 332 N.C. 344, 421 S.E.2d 147 (1992). Given this narrow interpretation of this savings clause, prudence would dictate that service be repeated if the Postal Service delivers the certified mail at the post office rather than "at the addressee's dwelling house or usual place of abode." G.S. § 1A-1, Rule 4(j2)(2). [4]

[4] Problems can also arise when the UPS or FedEx courier, as they often do with packages, leaves the summons and complaint inside the door or on the steps at the defendant's home.

Yet, the stringency with which Rule 4(j2)(2) will be applied was called into question in Fender v. Deaton, 130 N.C. App. 657, 503 S.E.2d 707, (1998), disc. rev. denied, 350 N.C. 94, 527 S.E.2d 666 (1999). In that case, the Court held that the presumption of agency had not been rebutted where the defendant, a lawyer being sued for malpractice, challenged certified mail service of the summons and complaint. In support of his motion to dismiss, the defendant/lawyer offered evidence that there was no formal procedure with respect to taking delivery of the mail at his office, but it was the custom in his firm that whomever handled the mail signed for certified mail when it was delivered. Id. at 658, 503 S.E.2d at 707. His wife, who worked at his office, had signed the return receipt for the summons and complaint. Id. She testified that she had signed and received certified mail many times in the past, except when the return receipt was restricted to the addressee only and the post office would not allow her to receive it. Id. at 663, 503 S.E.2d at 711. Further, the defendant's wife was deposed and testified that the firm had never had a policy regarding who could receive certified mail, that she had never been told that she did not have the authority to sign for certified mail, and that her actions of signing for certified mail in the past had never been questioned. The opinion presumably would have reached a different result if the evidence had been focused on whether the defendant's wife was in fact the defendant's agent to accept or to receive service of process. None of the evidence recited in the Court's decision nor the discussion in the opinion involved any analysis of the scope of the defendant's wife's agency; rather, it focused solely on her authority to deal with certified mail addressed to members of the firm.

The subject of service on minors and others under a disability gives rise to many potential problems and is most often overlooked by plaintiffs' counsel. Rule 4(j)(2)a. specifies that both the minor and a parent or guardian having custody of the child or some other person having care and control of the child must be served using one of the methods specified in Rule 4(j). Thus, both the minor and the child must be served, although this can be done by personal delivery, substitute service by leaving the summons and complaint with a person of suitable age and discretion residing with the minor and the parent or guardian, or by certified or registered mail. All too often, however, plaintiffs' counsel will serve the parent of the child with one summons directed only to the child, with no separate service of any summons directed to the parent or any separate effort for additional service on that parent or guardian. The usual assumption appears to be that service on the parent of one copy of the summons and complaint is sufficient, and that the minor need not be separately served. This is directly contrary to the language of the Rule, and usually draws a dismissal motion from defense attorneys who are careful about protecting their rights to assert process or service defenses.

6. Service on counties and municipalities.

If service is attempted by personal delivery on a county or city, it may be accomplished only by delivery specifically to one of the individuals named in Rule 4(j)(5). Johnson v. City of Raleigh, 98 N.C. App. 147, 389 S.E.2d 849, disc. rev. denied, 327 N.C. 140, 394 S.E.2d 176 (1990). Thus, attempted service on the city by leaving a copy of a summons and complaint with the mayor's assistant, rather than the mayor, city manager, or clerk, as required by Rule 4(j)(5)a., would be insufficient to confer jurisdiction. Id. Service on a county by delivery to the county attorney is similarly insufficient. Appeal of Brunswick County, 81 N.C. App. 391, 344 S.E.2d 584 (1986).

By far the safest method, again, for service on municipalities would appear to be certified or registered mail, as authorized by Rule 4(j)(5)a. In such cases, the courts will apply the presumption of agency created in Rule 4(j2)(2), absent specific evidence to rebut the agency presumption. Steffey, supra. Again, plaintiff's counsel should be cautious when confronted with a motion to dismiss with or without a supporting affidavit, inasmuch as the motion could potentially be re-served shortly before the minimum time mandated before the hearing, with sufficient affidavits attached, thereby rendering the defendant's affidavit challenging service adequate under Rule 6. G. Gray Wilson, North Carolina Civil Procedure § 6-5, p. 110 (2d ed. 2003); see also Ryals v. Hall-Lane Moving and Storage Co., Inc., 122 N.C. App. 242, 468 S.E.2d 600, disc. rev. denied, 343 N.C. 514, 472 S.E.2d 19 (1996) (affidavits in support of motion to dismiss stated in answer need not be served with answer; time constraints on service of affidavits in support of motions set out in Rule 6(d) are not applicable to motions set out in answer).

This creates a substantial problem for the plaintiff, because Rule 6(d)'s timing requirement has been met, but the plaintiff would not have received notice of the factual basis for the challenge to service in time to have alias and pluries process issued and served. The 2000 amendment to G.S. § 1A-1, Rule 7(b)(1), requiring that the grounds for motions be stated "with particularity" alleviated this dilemma somewhat. Still, the best method to avoid this problem is to immediately have an alias and pluries summons issued whenever a process or service motion is received and then serve the defendant again, but this time employing several different means of service, to assure that this challenge will be cured. After this has been done, the plaintiff should keep the chain of process alive, while serving requests for admission that service and process are sufficient and that the court has acquired personal jurisdiction over the defendant.

If the defendant challenges service on the county or town and the ninety days to keep the chain of process alive have expired, the tolling provision in Rule 4(j2)(2) will not apply, because this subsection applies only to the presumptions that the person signing the return receipt resided at the addressee's dwelling house or place of abode and was a person of suitable age and discretion residing therein. Hanover Ins. Co. v. Amana Refrigeration, Inc., supra. Extra attention to the mechanics and timing of the chain of process are thus essential to avoid losing a good case to this pitfall.

7. Service on corporations.

Rule 4(j)(6) provides a variety of means for service on corporations. By far the method of choice is service on the registered agent, again preferably by certified mail or designated delivery service. The problems with using other forms of service are well illustrated by Williams v. Burroughs Wellcome Co., 46 N.C. App. 459, 265 S.E.2d 633 (1980). In that case, the plaintiff attempted to serve the defendant by leaving copies in the office of a managing agent, with the person apparently in charge of the office. The court held that the evidence was sufficient to show that the person with whom the process was left was apparently in charge of an office of the defendant, but it held that there was insufficient evidence to show that the office in which the process was left was that of a managing agent of the corporate defendant. Fortunately for that plaintiff, the court remanded the case to the Trial Division for rehearing on the issue of whether the office in which the process was left was that of a managing agent. Potentially, if the office could not be shown to be that of a managing agent, the action would be barred by the statute of limitations.

Again, by using personal delivery, rather than certified mail, the plaintiff deprived himself of the presumption that the person receiving the service was an agent of the corporation for service of process. This presumption could have forced the defendant to come forward with affidavits in support of the motion, thereby pointing out to the plaintiff the specific insufficiency of the service, which could be corrected once alias and pluries summonses were issued.

8. Service by publication.

This method should be an absolute last resort. It is fraught with a number of specific requirements, and overlooking any of them will be fatal, thereby rendering service void. Sink v. Easter, 284 N.C. 555, 202 S.E.2d 138 (1974). The first hurdle to be cleared is the requirement that the party exercise due

diligence to serve a defendant by personal delivery or mail before resorting to publication. As well summarized by the leading commentator on North Carolina procedure,

> While there is no mandatory checklist for what constitutes due diligence under this rule, service by another means should be attempted before resorting to publication. Counsel should check the records of any available governmental agencies such as the post office, the division of motor vehicles in Raleigh, or the county register of deeds or clerk of the court. Counsel should also contact directory assistance, or if an insurance company is involved, defendant's insurer for his address. When it is suspected the defendant has either moved or departed the jurisdiction, counsel might consider canvassing defendant's former neighborhood or checking with his former employer. Another option is to retain a locator service or private investigator to try to trace defendant to his most current address or place of employment. When under the facts of a particular case defendant simply cannot be located through the exercise of due diligence, service by publication is proper.

G. Gray Wilson, North Carolina Civil Procedure § 4-22, p. 65 (2d ed. 2003).

It is worthy of note that the summons requirement can be dispensed with if publication is commenced within five days after filing the action, and there is adequate evidence that having a summons issued for service would be a useless formality. McCoy v. McCoy, 29 N.C. App. 109, 223 S.E.2d 513 (1976). Moreover, if a summons is timely issued after the filing of the complaint, service by publication undertaken at any time within ninety days after the commencement of the action will be sufficient to keep the action alive, even if the publication is not commenced within sixty days after issuance of the last summons in the chain of process. County of Wayne ex rel. Williams v. Whitley, 72 N.C. App. 155, 323 S.E.2d 458 (1984).

9. Proof of service.

Under G.S. §§1-75.10 and 1A-1, Rule 4(j2), proof of service is necessary only where the defendant appears in the action and challenges service of the summons upon him or before judgment by default may be had. Lynch v. Lynch, 303 N.C. 367, 279 S.E.2d 840 (1981). Thus, a party is properly served by registered or certified mail on the day the summons and complaint are actually delivered, even though no affidavits of service have been filed. Id. Proof of service is necessary only when the adequacy of service and process are challenged by motion. Id. Moreover, under Rule 6(d), affidavits in proof of service are, by definition, submitted in opposition to the defendant's motion to dismiss; therefore, they need not be served until one day before the hearing on the defendant's dismissal motion. G.S. §1A-1, Rule 6 (d); see also Quattrone v. Rochester, 46 N.C. App. 799, 266 S.E.2d 40, disc. rev. denied, 301 N.C. 95, 273 S.E.2d 300 (1980) (plaintiff's failure to file affidavit of service until after hearing on motion to dismiss, more than three years after the accident and 114 days after service of summons, did not render service invalid).

10. Sufficiency of summons served with delayed service of complaint.

A wrinkle in a Court of Appeals decision bears watching by all practitioners for the plaintiff or defendant. In Latham v. Cherry, 111 N.C. App. 871, 433 S.E.2d 478 (1993), cert. denied, 335 N.C. 556, 441 S.E.2d 116 (1994), the Court of Appeals held that the form "Delayed Service of Complaint" typically issued by the Administrative Office of the Courts to serve with a complaint filed after the Rule 3 application and order extending time to file complaint had been issued was insufficient to support jurisdiction because it did not instruct the defendant to appear.

In that case, the summons issued with the Rule 3 order was returned unserved. The "Delayed Service of Complaint" was subsequently issued when the complaint was filed, but the Court of Appeals noted that it:

> [I]nstructs defendant to answer, but it does not instruct defendant to appear . . . . The "Delayed Service of Complaint" in this case does not contain the required statutory language and does not serve as proper notification to defendant that she must appear.

Id. at 874, 433 S.E.2d at 481 (emphasis added) (citations omitted).[5]

Plaintiffs should thus be cautious never to use this particular device. Instead, they should have an alias and pluries summons issued whenever the complaint is filed after a Rule 3 application and order has been issued. A better solution, whenever possible, is not to utilize the Rule 3(a)(1) procedure at all. See, e.g., Osborne v. Walton, 110 N.C. App. 850, 431 S.E.2d 496 (1993) (action abates when complaint not filed within the time specified in Rule 3, and filing of complaint after that deadline cannot be corrected by Rule 6 motion for extension of time).

Defendants, on the other hand, should carefully examine the timing of service of complaints filed after issuance of a Rule 3 application and order. If the original summons issued with the Rule 3 order has never been served on the defendant, and the only service is with the "Delayed Service of Complaint," the defendant should always challenge service of process.

B. Waiver of process by general appearance.

The North Carolina Legislature has adopted as statutory law the general common law maxim that, "A court of this State having jurisdiction of the subject matter may, without serving a summons upon him, exercise jurisdiction in an action over a person ... who makes a general appearance in an action ..." N.C.G.S. § 1-75.7. In applying this statute, North Carolina's courts hold that "The concept of a 'general appearance'...should be given a liberal interpretation." Alexiou v. O.R.I.P. Ltd., 36 N.C.App. 246, 248, 243 S.E.2d 412, 414 (1978). Consistent with this rule of construction, the State's courts have determined that ". . . virtually any action other than a motion to dismiss for lack of jurisdiction constitutes a general appearance in a court having subject matter jurisdiction." Jerson v. Jerson, 68 N.C.App. 738, 739, 315 S.E.2d 522, 523 (1984) (emphasis added); see also, Alexiou, at 248, 243 S.E.2d at 414; Motor Co. v. Reaves, 184 N.C. 260, 264, 114 S.E. 175, 177 (1922). Further, ". . . it has long been the rule in this jurisdiction that a general appearance will dispense with process and service." Williams v. Williams, 46 N.C. App. 787, 789, 266 S.E.2d 25, 27 (1980) (emphasis added).

Over the years, North Carolina's Courts have held that the following acts constitute a general appearance.

[5] AOC Form CV-103 Rev. 3/98, while revised subsequent to the Latham decision, inexplicably still contains this fatal flaw which the Court of Appeals held rendered it defective as a link in the chain of process.

1. The defendant's counsel's participation in a conference in chambers with the plaintiff's counsel and the court. Williams v. Williams, 46 N.C.App 787, 788, 266 S.E.2d 25, 27 (1980).

2. Moving for extension of time to answer or plead. Simms v. Mason's Stores, Inc., 285 N.C. 145, 203 S.E.2d 769 (1974) (subsequently changed by statute).

3. A written notice of appeal to the District Court from a small claims court judgment. Alexiou, supra.

4. A judgment debtor filing a motion to claim exempt property after entry of default and default judgment have been entered. Faucette v. Dickerson, 103 N.C.App. 620, 624, 406 S.E.2d 602, 605 (1991).

5. Moving for a change of venue, filing motions for summary judgment, participating in a summary judgment hearing, or requesting that an action be calendared. Blackwell v. Massey, 69 N.C.App. 240, 316 S.E.2d 350 (1984).

6. Submission of documents containing financial information relevant to establishment of child support. Bullard v. Bader, 117 N.C.App. 299, 450 S.E.2d 757 (1994).

7. Procuring the reduction of a civil arrest bond by consent order. Reverie Lingerie Inc., v. McCain, 258 N.C. 353, 128 S.E.2d 835 (1963).

In Faucette v. Dickerson, for example, where a judgment debtor filed a motion to claim exempt property after entry of default and judgment by default were entered against her, she made a general appearance and waived her objection to process. 103 N.C.App. 620, 624, 406 S.E.2d 602, 605 (1991). The Court added, "'If the defendant by motion or otherwise invokes the adjudicatory powers of the court in any other matter not directly related to the questions of jurisdiction, he has made a general appearance and had submitted himself to the jurisdiction of the court whether he intended to or not.'" Id. at 624, 406 S.E.2d at 605 (quoting, Swenson v. Thibaut, 39 N.C.App. 77, 89, 250 S.E.2d 279, 288 (1978) (emphasis added).

As these cases illustrate, practitioners should be wary of proceeding without preserving any and all service defenses.

III. DISCOVERY PROBLEMS

A. Interrogatories.

N.C. Gen. Stat. § 1A-1, Rule 33 of the North Carolina Rules of Civil Procedure provides that "[a] party may direct no more than 50 interrogatories, in one or more sets, to any other party [...]. Interrogatory parts and subparts shall be counted as separate interrogatories for the purposes of this rule." N.C. Gen. Stat. § 1A-1, Rule 33 (2006) (emphasis added).

Similarly, Rule 18 of the North Carolina Business Court General Rules of Practice and Procedure states that "[p]resumptively, subject to stipulation of the parties and order of the Court for good cause shown, interrogatories (including sub-parts) and requests for admission are limited to fifty (50) in number by each party." N.C. Bus. Court Rules § 18.2 (emphasis added).

Both rules explicitly state that any subpart will be counted as a separate interrogatory. There are several federal cases which discuss how "parts" and subparts" should be counted. See e.g., Kendall v. GES Exposition Servs, Inc., 174 F.R.D 684 (D. Nev. 1997).

Neither the Business Court Rules nor the North Carolina Rules of Civil Procedure explicitly states what happens when a party exceeds the allotted amount of interrogatories allowed. Nor are there many North Carolina cases discussing the consequences of such a situation. However, the general rule appears to be that "a party may object to an entire set of interrogatories on the ground the total number of interrogatories propounded by the opposing party exceeds 50. The respondent presumably may not undertake to answer only the first 50 interrogatories or the 50 of his choosing, and if he does so, an objection based on number is waived." G. Gray Wilson, North Carolina Civil Procedure, §33-2 (2nd Ed. 2006).

There are a few Federal Rules Decisions from the Fourth Circuit which reflect this general rule. In Herdlein Tech., Inc. v. Century Contractors, Inc., 147 F.R.D. 103 (M.D.N.C. 1993), the court explained that if a responding party is going to object to the number of interrogatories, he must do so before actually responding to them, or he will waive any objection as to number. Id. at 104. "Otherwise the responding party could selectively respond to the

interrogatories and thereby strategically omit the most prejudicial information." Id. The court further explained that:

> [The party submitting interrogatories] has a right to have interrogatories of its choosing answered fully and completely, [and] if the court were to allow [the responding party] to answer certain interrogatories and then object that the total number of interrogatories exceeds the limit of twenty, the court essentially would be allowing [the responding party] to determine for itself what information to reveal.

Id. at 104-05. Similarly, the court in Capacchione v. Chralotte-Mecklenburg Sch., 182 F.R.D. 486 (M.D.N.C. 1998), determined that the responding party waived any objection as to the number of interrogatories when it responding to a selected portion of them and did not first object "to the court." Id. at 492. The court explained that waiver is appropriate because "[j]ust as the responding party is not entitled to randomly select which of the [...] interrogatories it will answer, the propounding party is not now obligated to select from which of the [...] interrogatories it will seek to compel answers." Id.

However, it must be noted that in footnote four, the court recognizes that absent a protective order, "the responding party's best course for adequately reserving its objections to the supernumerary interrogatories is to answer up to the numerical limit and object to the remainder without answering." Id. (citing Moore's Federal Practice § 33.30[1]). Presumably, without knowing, this means that the responding party should first seek a protective order from the court and only upon denial of such, try to preserve its objection by answering up to the numerical limit.

B. Apex Depositions.

The term Apex Deposition refers to a deposition in which a litigant seeks to depose the president, chief executive, or other high-ranking corporate official instead of lower level fact witnesses or the corporation itself thorough Rule 30(b)(6) because they want to speak with the "person in charge" who may or may not have relevant information relating to the action.

Taking depositions in North Carolina actions is governed by G.S. § 1A-1, Rule 30. In pertinent part that rule states, "After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination." The North Carolina Supreme Court has stated

that, "[T]his language is clear and unequivocal...the right to take the deposition granted by Rule 30(a) is unqualified except for the provision of Rule 26(c) authorizing the trial court to issue protective orders." Tennessee-Carolina Transportation, Inc. v. Strick Corporation, 291 N.C. 618, 626, 231 S.E.2d 597, 602 (1977).

Although Rule 30 allows parties to take depositions of all other parties to a lawsuit including a party's corporate officers, its application is tempered by G.S. § 1A-1, Rule 26(c) which provides that:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the judge of the court in which the action is pending may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the of the following: (1) that the discovery not be had...

A leading commentator on North Carolina Civil Procedure has described good cause by stating, "Good cause is not defined in the rule, but it has been described as a factual matter to be determined from the nature and character of the information sought by deposition or interrogatory weighed in the balance of the factual issues involved in each action." G. Gray Wilson, North Carolina Civil Procedure, §26-10 (2nd Ed. 2006) (emphasis added)(citations omitted). Other than this very general description of good cause, there is no specific guidance or standard for challenging Apex depositions in North Carolina.

While there is no caselaw in North Carolina which specifically denies a litigant the right to depose a president, chief executive, or other high-ranking corporate official and makes a litigant instead depose a lower level fact witness or the corporation itself thorough Rule 30(b)(6), use of Rule 26 (c) and a good faith argument supported with attendant affidavits showing good cause through the hardship created by the deposition may prove helpful in resolving this situation in favor of your client.

IV. MOTIONS PRACTICE PROBLEMS

A. Consent of Defendants in Removal Motions.

The procedure for removal to Federal court from a State court is provided in 28 U.S.C. § 1446. Section 1446(a) provides that '[a] defendant or defendants desiring to remove any civil action . . . from a State court shall file . . . a notice of removal ..."

In a case involving multiple defendants, all defendants must consent to removal. Creasy v. Coleman Furniture Corp., 763 F.2d 656, 660 (4th Cir. 1985) (stating, in dicta, that "in a § 1441 case involving multiple defendants, all of the defendants must agree to the removal of the state court action"). Consent to removal must be official and be communicated by each defendant. Martin Oil Co., 827 F. Supp. at 1237-38. Any doubts should be resolved against removal. Hoffman v. Vulcan Materials Co., 19 F. Supp. 2d 475, 478 (M.D.N.C. 1998).

In cases involving multiple defendants, the traditional view has been that a removal notice must be filed within thirty days of service on the first-served defendant. See Getty Oil Corporation v. Insurance Co. of North America, 841 F.2d 1254, 1263 (5th Cir. 1988); 16 Moore's Federal Practice, § 107.30[3][a] (3d ed. 1999). The rationale behind this rule has been explained as an effort to promote unanimity among the defendants. See id. at 1262-63.

The Fourth Circuit, however, has noted that this rule "could lead to 'inequity.'" See McKinney v. Board of Trustees of Maryland Community College, 955 F.2d 924, 926-27 (4th Cir. 1992). In McKinney, the Fourth Circuit explained that a crafty plaintiff could easily overcome a defendant's right of removal by "maneuvering to serve defendant B late on the thirtieth day. Obviously B is unlikely to rush to the courthouse door before it closes to file his joinder of A's removal petition; he is unlikely to even realize what is happening to him before it is too late." Id., 955 F.2d at 928 (quoting McKinney v. Board of Trustees of Maryland Community College, 713 F. Supp. 185, 189 (W.D.N.C. 1989)). Therefore, the rule in the Fourth Circuit is that "individual defendants have thirty days from the time they are served with process or with a complaint to join in an otherwise valid removal petition." Id. at 928.

B. Motions *in limine*.

Motions in limine are often thought of as definitive rulings which preclude evidence at trial. As such, all too often attorneys rely upon the early

ruling by the court to preserve any subsequent rights of appeal for perceived errors in admission of evidence during the course of the trial.

As the North Carolina Supreme Court has stated, however, "[a] ruling on a motion in limine is a preliminary or interlocutory decision which the trial court can change if circumstances develop which make it necessary." State v. Lamb, 321 N.C. 633, 649, 365 S.E.2d 600, 608 (1988) (quoted with approval in State v. Smith, 352 N.C. 531, 553, 532 S.E.2d 773, 787 (2000), cert. denied, 532 U.S. 949, 149 L. Ed. 2d 360, 121 S. Ct. 1419 (2001)); see also State v. Hayes, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam) (reversing this Court's opinion to the contrary: "Rulings on motions in limine are preliminary in nature and subject to change at trial, depending on the evidence offered, and thus an objection to an order granting or denying the motion is insufficient to preserve for appeal the question of the admissibility of the evidence.") (internal quotations omitted)).

One should be very wary when utilizing a motion in limine. While it is often a good tool to educate the court as to the legal issues which will be presented during the course of the trial, it is not a definitive ruling which preserves a right of appeal if the evidence which was previously excluded is subsequently allowed into evidence by the court. Proper objection must be made each and every time the previously precluded evidence is introduced in order to preserve for appeal the question of the admissibility of the evidence.

C. Rule 41 Voluntary Dismissal.

> It is well established that once a plaintiff files a voluntary dismissal under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure, "it [is] as if the suit had never been filed." The refiling of the case within the one-year time limit of the rule "begins [the] case anew for all purposes." As a result, the dismissal "carries down with it previous rulings and orders in the case."

Barham v. Hawk, 165 N.C. App. 708, 719, 600 S.E.2d 1, 8 (2004), aff'd per cur., 360 N.C. 358, 625 S.E.2d 778 (2006) (emphasis added) (citations omitted).

In Barham, a medical malpractice action, the Court held that a voluntary dismissal of a prior action between the parties nullified a discovery scheduling order entered in the prior case setting deadlines for identifying expert witnesses. On this basis, it held that the trial court erred in the second action in

excluding the plaintiff's expert from testifying as a sanction for failing to identify him in the prior action in accordance with the scheduling order entered in that case. See id. at 719-721, 600 S.E.2d at 8.

In Tompkins v. Log Systems Inc., 96 N.C. App. 333, 385 S.E.2d 545 (1989), discr. rev. denied, 326 N.C. 366, 389 S.E.2d 819 (1990), the plaintiff had successfully defended a motion for summary judgment filed and argued by the defendant in a prior action. See id. at 334, 385 S.E.2d at 546. Later, the plaintiff voluntarily dismissed the first action under Rule 41. When the plaintiff refiled, the defendant again moved for summary judgment, which the trial court granted. See id.

The plaintiff argued on appeal that, because the defendant's summary judgment motion had been denied in the first action, the trial court was precluded from granting the motion on an identical claim in the second case because the latter superior court judge could not "overrule" the decision of the judge in the prior case. 96 N.C. App. at 335, 385 S.E.2d at 546. The Court of Appeals affirmed the grant of summary judgment in the refiled action, holding:

> In this case plaintiff was granted a voluntary dismissal without prejudice of his original action. At that point it was as if the suit had never been filed. Plaintiff then refiled his claim within the one-year time limit established by the statute. Such refiling began this case anew for all purposes. Once refiled the case must be considered on its merits without reference to the disposition of the prior action. Therefore, Judge Kirby's ruling in the prior action did not foreclose Judge Lewis from considering defendant's summary judgment motion in this new action.

Id. 96 N.C. App. at 335, 385 S.E.2d at 547 (1989) (citations omitted) (emphasis added).

In Sturm v. Schamens, 99 N.C. App. 207, 392 S.E.2d 432 (1990), the plaintiff had twice before made claims in litigation that the defendant, his securities broker, had made unauthorized trades in the plaintiff's account. The first claim was asserted in a crossclaim that was voluntarily dismissed without prejudice. The second was made in an arbitration proceeding that was later withdrawn.

The plaintiff then filed a civil action against the defendant, and the defendant moved to stay the case and to compel binding arbitration under the account agreement. The plaintiff contended that the defendant had waived his right to compel arbitration by not demanding it in the earlier proceeding. In reversing the denial of the defendant's motion to compel arbitration, the Court initially noted that the plaintiff had shown no prejudice by the defendant's actions in the prior proceedings, but then held:

> Those matters, however, have no bearing on our determination. In both situations plaintiff took a voluntary dismissal. When a party has taken a voluntary dismissal, refiling the action begins the case anew. It is "as if the suit had never been filed." Schamens' only action to date in the current case has been to file a Motion to Dismiss and to Compel Arbitration, neither of which unfairly prejudices plaintiff.

Id., 99 N.C. App. at 209, 392 S.E.2d at 433 (citations omitted) (emphasis added).

> This reasoning is consistent with the spirit and purpose of Rule 41(a). The Rule 41(a) voluntary dismissal has salvaged more lawsuits than any other procedural device, giving the plaintiff a second chance to present a viable case at trial. Many plaintiffs have used this rule to cure an unforeseen defect in a claim that did not become apparent until trial.
>
> The rule also offers a safety net to plaintiff or his counsel who are either unprepared or unwilling to proceed with trial the first time the case is called. The purpose of our long-standing rule allowing a plaintiff to take a voluntary dismissal and refile the claim within one year even though the statute of limitations has run subsequent to a plaintiff's filing of the original complaint is to provide a one-time opportunity where the plaintiff, for whatever reason, does not want to continue the suit. The range of reasons clearly includes those circumstances in which the plaintiff fears dismissal of the case for rule violations, shortcomings in the pleadings, evidentiary failures, or any other of the myriad reasons for which the cause of action might fail. The only limitations are that the dismissal not be done in bad faith and that it be done

> prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against plaintiff at any time prior to plaintiff resting his or her case at trial.

Brisson v. Santoriello, 351 N.C. 589, 597, 528 S.E.2d 568, 572-573 (2000)(citations omitted)(emphasis added).[6]

Most recently, however, our Court of Appeals has indicated a seeming departure from this long standing line of cases. In Stocum v. Oakley, 648 S.E.2d 227, 2007 N.C. App. LEXIS 1685 (2007), Plaintiff, facing a motion to dismiss for violation of Rules 4, 11, and 41 for failure to timely serve and prosecute the Complaint and alleged improper statements of counsel, took a voluntary dismissal prior to the hearing on the motion to dismiss. Plaintiff re-filed the Complaint within the allowed one-year re-filing period. Defendants renewed their motion to dismiss in the subsequent suit based upon the previously noted violations of Rules 4, 11, and 41 in the prior suit. The trial court dismissed the subsequent action based upon the conduct which had occurred in the previously dismissed case. The Court of Appeals upheld the dismissal of the subsequently filed case based upon conduct which had occurred in the previously dismissed case. This decision gives pause for whether a Rule 41 voluntary dismissal truly wipes away the prior case "as if the suit had never been filed."

V. CONCLUSION

Procedure, while viewed as a nuisance by some and a necessary evil by others, is nonetheless an essential part of the life of any civil trial lawyer. In today's malpractice environment, these procedural issues cannot be taken lightly or overlooked.

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[6] Indeed, our Court of Appeals has held that a plaintiff is entitled to voluntarily dismiss an action without prejudice, even after the trial court has notified the parties that it intends to grant a motion to dismiss, where the dismissal is filed before the written order is filed with the Clerk. Schnitzlein v. Hardee's Food Systems, Inc., 134 N.C. App. 153, 516 S.E.2d 891, discr. rev. denied, 351 N.C. 109, 540 S.E.2d 365 (1999).