

NORTH CAROLINA GENERAL ASSEMBLY
1969 SESSION

CHAPTER 895
SENATE BILL 651

1 AN ACT TO AMEND THE RULES OF CIVIL PROCEDURE AND CERTAIN OTHER
2 STATUTES RELATING TO CIVIL PROCEDURE.

3
4 The General Assembly of North Carolina do enact:
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6 **Section 1.** G.S. 1A-1, Rule 4(a) is hereby amended and rewritten to read as follows:

7 "(a) Summons — issuance; who may serve. Upon the filing of the complaint, summons
8 shall be issued forthwith, and in any event within five days. The complaint and summons shall
9 be delivered to some proper person for service. In this State, such proper person shall be the
10 sheriff of the county where service is to be made or some other person duly authorized by law
11 to serve summons. Outside this State, such proper person shall be anyone who is not a party
12 and is not less than 21 years of age or anyone duly authorized to serve summons by the law of
13 the place where service is to be made. Upon request of the plaintiff separate or additional
14 summons shall be issued against any defendants. A summons is issued when, after being filled
15 out and dated, it is signed by the officer having authority to do so. The date the summons bears
16 shall be prima facie evidence of the date of issue."

17 **Sec. 2.** G.S. 1A-1, Rule 4(j)(1) and Rule 4(j)(2) are hereby amended and rewritten
18 to read as follows:

19 "(1) Natural Person. Except as provided in subsection (2) below, upon a natural
20 person:

21 a. By delivering a copy of the summons and of the complaint to him or
22 by leaving copies thereof at the defendant's dwelling house or usual
23 place of abode with some person of suitable age and discretion then
24 residing therein; or b. By delivering a copy of the summons and of
25 the complaint to an agent authorized by appointment or by law to be
26 served or to accept service of process or by serving process upon
27 such agent or the party in a manner specified by any statute.

28 (2) Natural Person Under Disability. Upon a natural person under disability by
29 serving process in any manner prescribed in this Section (j) for service upon
30 a natural person and, in addition, where required by paragraph a or b below,
31 upon a person therein designated.

32 a. Where the person under disability is a minor, process shall be served
33 separately in any manner prescribed for service upon a natural person
34 upon a parent or guardian having custody of the child, or if there be
35 none, upon any other person having the care and control of the child.
36 If there is no parent, guardian, or other person having care and
37 control of the child when service is made upon the child, then service
38 of process must also be made upon a guardian ad litem who has been
39 appointed pursuant to Rule 17.

40 b. If the plaintiff actually knows that a person under disability is under
41 guardianship of any kind, process shall be served separately upon his
42 guardian in any manner applicable and appropriate under this Section
43 (j). If the plaintiff does not actually know that a guardian has been

appointed when service is made upon a person known to him to be incompetent to have charge of his affairs, then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17."

Sec. 3. G.S. 1A-1, Rule 4(j)(6), Rule 4(j)(7) and Rule 4(j)(8) are hereby amended and rewritten to read as follows:

- "(6) Domestic or Foreign Corporation. Upon a domestic or foreign corporation:
 - a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; or
 - b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or process or by serving process upon such agent or the party in a manner specified by any statute.
- (7) Partnerships. Upon a general or limited partnership:
 - a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney in fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf or by leaving copies thereof in the office of such general partner, attorney in fact or agent with the person who is apparently in charge of the office.
 - b. If relief is sought against a partner specifically, a copy of the summons and of the complaint must be served on such partner as provided in this Section (j).
- (8) Other Unincorporated Associations and Their Officers. Upon any unincorporated association, organization, or society other than a partnership:
 - a. By delivering a copy of the summons and of the complaint to an officer, director, managing agent or member of the governing body of the unincorporated association, organization or society, or by leaving copies thereof in the office of such officer, director, managing agent or member of the governing body with the person who is apparently in charge of the office; or
 - b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute."

Sec. 4. G.S. 1A-1, Rule 4(j) is hereby amended by adding a new subdivision (9) at the end thereof to read as follows:

- "(9) Alternative Method of Service on Party That Cannot Otherwise Be Served or is not Inhabitant of or Found Within State. - Any party that cannot after due diligence be served within this State in the manner heretofore prescribed in this Section (j), or that is not an inhabitant of or found within this State, or is concealing his person or whereabouts to avoid service of process, or is a transient person, or one whose residence is unknown, or is a corporation incorporated under the laws of any other state or foreign country and has no agent authorized by appointment or by law to be served or to accept service of process, service upon the defendant may be made in the following manner:
 - a. Personal Service Outside State. Personal service may be made on any party outside this State by anyone authorized by section (a) of this

1 rule and in the manner prescribed in this Section (j) for service on
2 such party within this State. Before judgment by default may be had
3 on such service, there shall be filed with the court an affidavit of
4 service showing the circumstances warranting the use of personal
5 service outside this State and proof of such service in accordance
6 with the requirements of G. S. 1-75.10(1).

7 b. Registered Mail. Any party subject to service of process under this
8 subsection(9) may be served by mailing a copy of the summons and
9 complaint, registered mail, return receipt requested, addressed to the
10 party to be served. Service shall be complete on the day the summons
11 and complaint are delivered to the addressee, but the court in which
12 the action is pending shall, upon motion of the party served, allow
13 such additional time as may be necessary to afford the defendant
14 reasonable opportunity to defend the action. Before judgment by
15 default may be had on such service, the serving party shall file an
16 affidavit with the court showing the circumstances warranting the use
17 of service by registered mail and averring (i) that a copy of the
18 summons and complaint was deposited in the post office for mailing
19 by registered mail, return receipt requested, (ii) that it was in fact
20 received as evidenced by the attached registry receipt or other
21 evidence satisfactory to the court of delivery to the addressee and
22 (iii) that the genuine receipt or other evidence of delivery is attached.
23 This affidavit shall be prima facie evidence that service was made on
24 the date disclosed therein in accordance with the requirements of this
25 paragraph, and shall also constitute the method of proof of service of
26 process when the party appears in the action and challenges such
27 service upon him.

28 c. Service By Publication. A party subject to service of process under
29 this subsection (9) may be served by publication whenever the party's
30 address, whereabouts, dwelling house or usual place of abode is
31 unknown and cannot with due diligence be ascertained, or there has
32 been a diligent but unsuccessful attempt to serve the party under
33 either paragraph a or under paragraph B. or under paragraphs a and b
34 of this subsection (9). Service of process by publication shall consist
35 of publishing a notice of service of process by publication in a
36 newspaper qualified for legal advertising in accordance with G.S. 1-
37 597, 1-598, and published in the county where the action is pending
38 or, if no qualified newspaper is published in such county, then in a
39 qualified newspaper published in an adjoining county, or in a county
40 in the same judicial district, once a week for three successive weeks.
41 If the party's post office address is known or can with reasonable
42 diligence be ascertained, there shall be mailed to the party at or
43 immediately prior to the first publication a copy of the notice of
44 service of process by publication. The mailing may be omitted if the
45 post office address cannot be ascertained with reasonable diligence.
46 Upon completion of such service there shall be filed with the court an
47 affidavit showing the publication and mailing in accordance with the
48 requirements of G.S. 1-75.10(b) and the circumstances warranting the
49 use of service by publication.

50 The notice of service of process by publication shall (i) designate the court
51 in which the action has been commenced and the title of the action which

1 title may be indicated sufficiently by the name of the first plaintiff and the
2 first defendant; (ii) be directed to the defendant sought to be served; (iii)
3 state either that a pleading seeking relief against the person to be served has
4 been filed or has been required to be filed therein not later than a date
5 specified in the notice; (iv) state the nature of the relief being sought; (v)
6 require the defendant being so served to make defense to such pleading,
7 within 40 days after a date stated in the notice, exclusive of such date, which
8 date so stated shall be the date of the first publication of notice, or the date
9 when the complaint is required to be filed, whichever is later, and notify the
10 defendant that upon his failure to do so the party seeking service of process
11 by publication will apply to the court for the relief sought; (vi) be subscribed
12 by the party seeking service or his attorney and give the postoffice address
13 of such party or his attorney; and (vii) be substantially in the following form:

14 NOTICE OF SERVICE OF PROCESS BY PUBLICATION

15 STATE OF NORTH CAROLINA

16 COUNTY

17 In the Court

18 [Title of action or special proceeding] To [Person to be served]: Take notice that a pleading
19 seeking relief against you (has been filed) (is required to be filed not later than, 19....) in
20 the above-entitled (action) (special proceeding). The nature of the relief being sought is as
21 follows: (State nature.) You are required to make defense to such pleading not later than (.....,
22 19....) and upon your failure to do so the party seeking service against you will apply to the
23 court for the relief sought.

24 This, the day of, 19.....

25 (Attorney) (Party)

26 (Address)

- 27 d. Alternative Provisions for Service in a Foreign Country. Where
- 28 service under this subsection (9) is to be effected upon a party in a
- 29 foreign country, in the alternative service of the summons and
- 30 complaint may be made (i) in the manner prescribed by the law of
- 31 the foreign country for service in that country in an action in any of
- 32 its courts of general jurisdiction; or (ii) as directed by the foreign
- 33 authority in response to a letter rogatory, when service in either case
- 34 is reasonably calculated to give actual notice; or (iii) upon an
- 35 individual, by delivery to him personally, and upon a corporation or
- 36 partnership or association, by delivery to an officer or a managing or
- 37 general agent; or (iv) by any form of mail, requiring a signed receipt,
- 38 to be addressed and dispatched by the clerk of the court to the party
- 39 to be served; or (v) as directed by order of the court. Service under
- 40 (iii) or (v) may be made by any person authorized by section (a) of
- 41 this rule or who is designated by order of the court or by the foreign
- 42 court. On request, the clerk shall deliver the summons to the plaintiff
- 43 for transmission to the person or the foreign court or officer who will
- 44 make the service. Proof of service may be made as prescribed in G.S.
- 45 1-75.10, the order of the court or paragraph b hereof, in which case
- 46 there shall be included an affidavit or certificate of addressing and
- 47 mailing by the clerk of the court, or by the law of the foreign country.
- 48 e. Attack on Judgment by Default. No party served under this
- 49 subsection (9) may attack any judgment by default entered on such
- 50 service on the ground that service, as required by this section (j),
- 51 should or could have been effected, with or without due diligence,

1 under some other subsection of this section (j) or under a different
2 paragraph of this subsection (9)."

3 **Sec. 5.** G.S. 1A-1, Rule 17(a) is hereby amended and rewritten to read as follows:

4 "(a) Real Party in Interest. Every claim shall be prosecuted in the name of the real party
5 in interest; but an executor, administrator, guardian, trustee of an express trust, a party with
6 whom or in whose name a contract has been made for the benefit of another, or a party
7 authorized by statute may sue in his own name without joining with him the party for whose
8 benefit the action is brought; and when a statute of the State so provides, an action for the use
9 or benefit of another shall be brought in the name of the State of North Carolina. No action
10 shall be dismissed on the ground that it is not prosecuted in the name of the real party in
11 interest until a reasonable time has been allowed after objection for ratification of
12 commencement of the action by, or joinder or substitution of, the real party in interest; and such
13 ratification, joinder, or substitution shall have the same effect as if the action had been
14 commenced in the name of the real party in interest."

15 **Sec. 6.** (a) G.S. 1A-1, Rule 17(b) is amended by renumbering subsection (6) thereof
16 as subsection "(7)" and inserting the following new subsection "(6)":

17 "(6) When guardian ad litem not required in domestic relations actions.
18 Notwithstanding any other provisions of this Rule, an infant who is
19 competent to marry, and who is 18 years of age or older, is competent to
20 prosecute or defend an action or proceeding for his or her absolute divorce,
21 divorce from bed and board, alimony pendente lite, permanent alimony with
22 or without divorce, or an action or proceeding for the custody and support of
23 his or her child, without the appointment of a guardian ad litem."

24 **Sec. 7.** G.S. 1A-1, Rule 18(a) is amended and rewritten as follows:

25 "(a) Joinder of Claims. A party asserting a claim for relief as an original claim,
26 counterclaim, crossclaim, or third-party claim, may join, either as independent or as alternate
27 claims, as many claims, legal or equitable, as he has against an opposing party."

28 **Sec. 8.** G.S. 1A-1, Rule 34 is hereby amended by deleting that paragraph of the
29 Rule numbered "(b)" and entitled "Discovery Without Court Order." and by deleting the letter
30 and symbols "(a)" from the first line of Rule 34.

31 **Sec. 9.** G.S. 1A-1, Rule 40 is hereby amended by rewriting the catchline to read
32 "Assignment of Cases for Trial; Continuances.", making Rule 40 as presently written
33 subsection (a) and adding a subsection (b) to read as follows:

34 "(b) No continuance shall be granted except upon application to the court. A continuance
35 may be granted only for good cause shown and upon such terms and conditions as justice may
36 require."

37 **Sec. 10.** G.S. 1A-1, Rule 41 is hereby amended and rewritten to read as follows:

38 "Rule 41

39 "DISMISSAL OF ACTIONS.

40 "(a) Voluntary Dismissal; Effect Thereof.

41 (1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23 (c) and of
42 any statute of this State, an action or any claim therein may be dismissed by
43 the plaintiff without order of court (i) by filing a notice of dismissal at any
44 time before the plaintiff rests his case, or; (ii) by filing a stipulation of
45 dismissal signed by all parties who have appeared in the action. Unless
46 otherwise stated in the notice of dismissal or stipulation, the dismissal is
47 without prejudice, except that a notice of dismissal operates as an
48 adjudication upon the merits when filed by a plaintiff who has once
49 dismissed in any court of this or any other state or of the United States, an
50 action based on or including the same claim. If an action commenced within
51 the time prescribed therefor, or any claim therein, is dismissed without

1 prejudice under this subsection, a new action based on the same claim may
2 be commenced within one year after such dismissal unless a stipulation filed
3 under (ii) of this subsection shall specify a shorter time.

- 4 (2) By Order of Judge. Except as provided in subsection (1) of this section, an
5 action or any claim therein shall not be dismissed at the plaintiffs instance
6 save upon order of the judge and upon such terms and conditions as justice
7 requires. Unless otherwise specified in the order, a dismissal under this
8 subsection is without prejudice. If an action commenced within the time
9 prescribed therefor, or any claim therein, is dismissed without prejudice
10 under this subsection, a new action based on the same claim may be
11 commenced within one year after such dismissal unless the judge shall
12 specify in his order a shorter time.

13 "(b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to
14 comply with these rules or any order of court, a defendant may move for dismissal of an action
15 or of any claim therein against him. After the plaintiff in an action tried by the court without a
16 jury, has completed the presentation of his evidence, the defendant, without waiving his right to
17 offer evidence in the event the motion is not granted, may move for a dismissal on the ground
18 that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the
19 facts may then determine them and render judgment against the plaintiff or may decline to
20 render any judgment until the close of all the evidence. If the court renders judgment on the
21 merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the
22 court in its order for dismissal otherwise specifies, a dismissal under this section and any
23 dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for
24 improper venue, or for failure to join a necessary party, operates as an adjudication upon the
25 merits. If the court specifies that the dismissal of an action commenced within the time
26 prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order
27 that a new action based on the same claim may be commenced within one year or less after
28 such dismissal.

29 "(c) Dismissal of Counterclaim; crossclaim, or third-party claim. The provisions of this
30 rule apply to the dismissal of any counterclaim, crossclaim, or third-party claim.

31 "(d) Costs. A plaintiff who dismisses an action or claim under section (a) of this rule
32 shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a
33 plaintiff who has once dismissed an action in any court commences an action based upon or
34 including the same claim against the same defendant before the payment of the costs of the
35 action previously dismissed, unless such previous action was brought in forma pauperis, the
36 court, upon motion of the defendant, shall dismiss the action."

37 **Sec. 11.** G.S. 1A-1, Rule 50(b) is hereby amended and rewritten to read as follows:

38 "(b) Motion for Judgment Notwithstanding the Verdict.

- 39 (1) Whenever a motion for a directed verdict made at the close of all the
40 evidence is denied or for any reason is not granted, the submission of the
41 action to the jury shall be deemed to be subject to a later determination of
42 the legal questions raised by the motion. Not later than 10 days after entry of
43 judgment, a party who has moved for a directed verdict may move to have
44 the verdict and any judgment entered thereon set aside and to have judgment
45 entered in accordance with his motion for a directed verdict; or if a verdict
46 was not returned such party, within 10 days after the jury has been
47 discharged, may move for judgment in accordance with his motion for a
48 directed verdict. In either case the motion shall be granted if it appears that
49 the motion for directed verdict could properly have been granted. A motion
50 for a new trial may be joined with this motion, or a new trial may be prayed
51 for in the alternative. If a verdict was returned the judge may allow the

1 judgment to stand or may set aside the judgment and either order a new trial
2 or direct the entry of judgment as if the requested verdict had been directed.
3 If no verdict was returned the judge may direct the entry of judgment as if
4 the requested verdict had been directed or may order a new trial. Not later
5 than ten (10) days after entry of judgment or the discharge of the jury if a
6 verdict was not returned, the judge on his own motion may, with or without
7 further notice and hearing, grant, deny, or redeny a motion for directed
8 verdict made at the close of all the evidence that was denied or for any
9 reason was not granted.

- 10 (2) An appellate court, on finding that a trial judge should have granted a motion
11 for directed verdict made at the close of all the evidence, may not direct
12 entry of judgment in accordance with the motion unless the party who made
13 the motion for a directed verdict also moved for judgment in accordance
14 with Rule 50(b)(1) or the trial judge on his own motion granted, denied or
15 redened the motion for a directed verdict in accordance with Rule 50(b)(1)."

16 **Sec. 12.** G.S. 1A-1, Rule 52(a) is hereby amended and rewritten to read as follows:

17 "Rule 52

18 "FINDINGS BY THE COURT

19 "(a) Findings. (1) In all actions tried upon the facts without a jury or with an advisory
20 jury, the court shall find the facts specially and state separately its conclusions of law thereon
21 and direct the entry of the appropriate judgment.

22 (2) Findings of fact and conclusions of law are necessary on decisions of any motion or
23 order ex mero motu only when requested by a party and as provided by Rule 41(b). Similarly,
24 findings of fact and conclusions of law are necessary on the granting or denying of a
25 preliminary injunction or any other provisional remedy only when required by statute expressly
26 relating to such remedy or requested by a party.

27 (3) If an opinion or memorandum of decision is filed, it will be sufficient if the findings
28 of fact and conclusions of law appear therein."

29 **Sec. 13.** G.S. 1A-1, Rule 53(a)(1) is hereby amended and rewritten to read as
30 follows:

- 31 "(1) By consent. Any or all of the issues in an action may be referred upon the
32 written consent of the parties except in actions to annul a marriage, actions
33 for divorce, actions for divorce from bed and board, actions for alimony
34 without divorce or actions in which a ground of annulment or divorce is in
35 issue."

36 **Sec. 14.** G.S. 1-75.10(1)b is hereby amended to read as follows:

- 37 "b. If served by any other person, his affidavit thereof, showing place,
38 time and manner of service; his qualifications to make service under
39 Rule 4(a) or Rule 4(j)(9)(d) of the Rules of Civil Procedure; that he
40 knew the person served to be the party mentioned in the summons
41 and delivered to and left with him a copy; and if the defendant was
42 not personally served, he shall state in such affidavit when, where
43 and with whom such copy was left. If such service is made outside
44 this State, the proof thereof may in the alternative be made in
45 accordance with the law of the place where such service is made."

46 **Sec. 15.** G.S. 1-271 is hereby amended by adding at the end thereof a new sentence
47 to read as follows:

48 "A party who cross assigns error in the grant or denial of a motion under the Rules of Civil
49 Procedure is a party aggrieved."

50 **Sec. 16.** G.S. 50-13.3(b) is hereby amended by striking out the period at the end
51 thereof and adding thereto the words and figures, "and G. S. 1A-1, Rule 65".

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Sec. 17. G.S. 50-13.4(f) is hereby amended by:

- (1) Striking out of subdivision "(2)" the letters and figures, "G.S. 1-227" and inserting in lieu thereof "G.S. 1A-1, Rule 70".
- (2) Inserting in subdivision "(5)", immediately after the words "General Statutes" and before the comma, the words and figures, "and G.S. 1A-1, Rule 65".

Sec. 18. G.S. 50-16.7 is hereby amended by:

- (1) Striking out of subsection "(c)" the letters and figures, "G.S. 1-227" and inserting in lieu thereof "G.S. 1A-1, Rule 70".
- (2) Inserting in subsection "if", immediately after the words "General Statutes" and before the comma, the words and figures, "and G.S. 1A-1, Rule 65".

Sec. 19. G.S. 1-65.5 and Article 3 of Chapter 1B of the General Statutes are hereby repealed.

Sec. 20. All laws and clauses of laws in conflict with this Act are hereby repealed.

Sec. 21. This Act shall be in full force and effect on and after January 1, 1970, and shall apply to actions and proceedings pending on that date as well as to actions and proceedings commenced on and after that date. This Act takes effect on the same date as Chapter 954 of the Session Laws of 1967, entitled an Act to Amend the Laws relating to Civil Procedure. In the construction of that Act and this Act, no significance shall be attached to the fact that this Act was enacted at a later date.

In the General Assembly read three times and ratified, this the 19th day of June, 1969.