

PLEADING AND DISCOVERY: MEETING REQUIREMENTS WITHOUT GETTING BOXED IN

PLEADINGS

I. Complaint:

- NCGS 7A-243 Proper division for trial of civil actions generally determined by amount in controversy.
 - o \$10K or less, District, More than \$10K, Superior
 - Amount is computed without regards to interest and costs
 - Rule 8(a)(2) is silent to penalty of pleading a specific amount over \$10,000, but be aware, earlier decisions suggested dismissal with prejudice under Rule 41 was proper. However, later cases state that this was too drastic and lesser remedies should be tried first (ie, dismissal with leave to refile after payment of costs, reprimand, order striking offending portion of the complaint, fines, etc)
- NCGS 7A-210, Small claim action defined
 - o The amt in controversy does not exceed \$4000
 - o Technically, you must request an assignment to Small Claims but to designate “Small Claim” on the face of the complaint is sufficient
 - o Only principal relief is monetary
 - Has anyone tried small case in Magistrate’s court????

Let’s Discuss:

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- Trial divisions between district and superior are administrative, not jurisdictional so a party can file suit for one dollar in district court and recover a million. Only jurisdictional limitation lies before a magistrate whose small claims court falls within the district division, where the amt in controversy cannot exceed \$4000.

Rule 8 General Rules of Pleadings:

- (a) Claims for Relief. A pleading which set forth a claim for relief, whether an original claim, counterclaim, cross-claim, 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 actions, where the matter in controversy exceeds the sum or value of \$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 \$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 30 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 provided by Rule 15

Before the Rules of Civil Procedure were enacted, North Carolina proscribed to the theory of “factual” pleading. Rule 8 now only requires “notice” pleading.

Generally, what you should be aware of when filing your Complaint:

- A pleading complies with Rule 8 if it gives sufficient notice of the events or transactions which lets the adverse party understand the nature and basis of the claim, to file a responsive pleading to the claim and – by using the rules provided for obtaining pre-trial discovery – to get any additional facts he may need to prepare for trial. *Sutton v. Duke*
- Allegations must be liberally construed (*Gore v. George J. Ball*), and courts will exercise great restraint in ruling on the factual sufficiency of a complaint (*Smith v. City of Charlotte*).

- But, the complaint must still at least include the substantive elements of a legally cognizable claim in order to withstand dismissal. (Stanback v. Stanback)

Be aware of Rule 9 Pleading Special Matters:

- In subsection (g), when items of special damages are claimed, each shall be averred.
- **Please Remember:** The facts giving rise to these special damages must be alleged so as to inform the defendant in a fair manner of the scope of the plaintiff's demand. (Stanford v. Owens)
 - o **Beware:** Where the special damage is an integral part of the claim for relief, insufficient allegations of the damages could be the basis for dismissal for failure to state a claim upon which relief can be granted. (Stanback v. Stanback)
 - o **However:** Although it is not sufficient for plaintiff to simply allege he sustained special damages, if a complaint alleges special damages but lacks specificity, the proper thing for a defendant to do is to actually move for a more definitive statement under Rule 12(e). Failure to do so may constitute a waiver of a defendant's right to further particulars.
 - **Also Note:** Where special damages have not been pled, plaintiff will generally be given ample opportunity to amend the complaint absent any prejudice to the defendant. (Action repair v. American Broadcasting).
- Rule 9(g) does not specify the difference between special and general damages, but case law is helpful.
 - o General damages are the natural and necessary result of the wrong, are implied by law, and may be recovered under a general allegation of damages. (Rodd v. W.H. King)
 - o Special damages are those which are the actual, but not the necessary, result of the injury complained of, and which in fact follows it as a natural and proximate consequence in the particular case, as distinguished from general damages such as might accrue to any person similarly injured. (Penner v. Elliot)
 - Special damages do not necessarily or naturally flow from the wrongful act in question but are damages which actually result from the act. (Oberholtzer v. Huffman)

- Examples of special damages:
 - Lost profits in a personal injury suit if they arise naturally and proximately from the injury, and if they are reasonable definite and certain (Ponder v. Budweiser)
 - Loss of use if vehicle is damaged and can be economically repaired. This right to recover loss of use is limited to where the vehicle can be repaired at a reasonable cost in a reasonable time. (Carolina Timber v. Bell)

- Aggravation of pre-existing injury: is it considered a special damage?

- Has anyone ever run into problems with pleading special damages?

<p>Let's Discuss:</p> <hr/> <hr/> <hr/> <hr/> <hr/>
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Pleading Punitive Damages:

- 1D-15 Standards for recovery of punitive damages.
 - **Simply:** In auto tort cases, must prove defendant is liable for compensatory damages and show willful and wanton conduct.

 - **So how do you plead punitives?**
 - Notice Pleading Rules!!!
 - Punitive damages need not be specifically pleaded by that name in a complaint. All that is necessary is that the plaintiff place the defendant on notice as to the aggravating circumstances which would justify an award of punitive damages. (Henry v. Deen)

 - Where the pleading fairly apprises opposing parties of the facts which will support an award of punitive

damages, they may be recovered at trial without having been specially pleaded. (Holloway v. Wachovia)

- Sample portion of Complaint alleging punitive damages:

THIRD CAUSE OF ACTION PUNITIVE DAMAGES	
17.	Paragraphs one through seventeen are incorporated herein by reference.
18.	Upon information and belief, the Defendant McLamb was intoxicated from the use of alcohol or drugs at the time of the collision referenced above.
19.	The conduct of the Defendant McLamb described herein constituted willful and wanton disregard for the rights of the Plaintiff and gross negligence. Defendant is liable to Plaintiff for punitive damages as a result of such conduct.

Rule 7 Pleadings allowed; form of motions.

- Also keep in mind, subsection (d): unless otherwise ordered by the judge, pleadings shall not be read to the jury.
 - o **This does not mean** that pleadings cannot be read to the jury. The only effect of this Rule was to eliminate the practice of introducing cases to the jury by reading the pleadings. It is not concerned with the admissibility of evidence. If anything a litigant says about his case is relevant and otherwise admissible, it can be put into evidence against him.
 - **Be careful in what you say in your Complaint.** Do not make stretches you cannot prove or will have a difficult time proving. Because we are in a notice pleading state, be as simple as you can.
 - **Do not have the Complaint verified by your client.** Although your client can still be cross examined with the

Complaint, even if he does not verify it, why make the cross examination more effective by having the Complaint verified under oath by your client.

- Has anyone had their client crossed with the Complaint?

Let's Discuss: <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
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Demand for Relief:

- You must demand relief in your Complaint. A document that contains do demand for relief does not constitute a Complaint. (Carolina Freight Carriers v. Local 61)
 - o **However:** It is not fatal to demand the wrong type of relief, as long as some type of relief is demanded. (NC State Port Auth v. Lloyd A. Fry Roofing). Here the court held that where the wrong measure of damages was requested, the complaint was still sufficient because it stated a claim for tort and the prayer included “for all relief which is appropriate and just”.

Here is a sample prayer for relief:

WHEREFORE, the Plaintiff prays the Court for judgment against Defendants, McLamb and Williams, jointly and severally, for an amount in excess of \$10,000.00 for compensatory and punitive damages, together with the costs of this suit, interest from the date this suit was instituted, reasonable attorney’s fees and such other relief as the Court may deem just and proper.

THE PLAINTIFF HEREBY DEMANDS TRIAL BY JURY.

- Rule 8 merely requires the plaintiff to demand the relief to which he believes he is entitled to under the law, even if it has not been properly requested. (Benton v. W.H. Weaver)
 - **Therefore**, in every pleading requesting relief, include the catchall prayer “and any other relief the Court may deem just and proper”.
 - **However**, this is probably sufficient to cover general damages, but still be mindful of special damages under Rule 9.
 - **But still take comfort** – your damages may be freely amended at almost any time, even during trial. (Lee v. Regan), allowing plaintiff to amend his damage claim to include aggravation of a pre existing injury and to increase the special damages claim.

Did you know?

Plaintiff may move for attorney fees, pursuant to N.C.G.S. §6-21.1, after verdict is returned in his favor; it is not required that the Plaintiff affirmatively plead for such an award as a separate claim in the complaint. (Black v. Standard Guaranty Ins)

II. RESPONSE TO REQUEST FOR MONETARY RELIEF SOUGHT

Rule 8(a)(2) above provides that after service of the complaint, any party may request of the claimant a written statement of monetary relief sought, and the claimant shall, within 30 days after such service, provide such statement which shall not be filed with the clerk until the action has been called for trial.

Providing a response to these requests can cause you to think for hours on a variety of “what if” questions.

A dilemma that I always run into is as follows:

Once upon a time, there was a Plaintiff’s attorney named Beth Leone who had an extreme dislike for Allstate.... Oops! My mind started to wander. Let’s try again.

Once upon a time, in fact, on many occasions, there was a good and just Plaintiff’s attorney named Beth Leone who received a Request for Monetary Relief Sought from her wicked and evil opposing counsel. Knowing generally what the case

was worth, she responded with an amount that she believed the case to be truly worth. However, when she got to mediation, the opposing counsel considered her reasonable and totally legitimate response to be an “opening” offer at mediation, and would not respond to any amount above the dollar figure in her response.

Since that time, I’ve responded to each Request for Monetary Relief Sought with the following letter:

Dear *:

Enclosed herein please find Plaintiff’s Response to Request for Monetary Relief Sought in the amount of \$[prompt, Amount of Monetary Relief Sought?]. I would like to make clear that this is an amount that I believe to represent the true value of my client’s case at this point in time. This, of course, is subject to change based upon further discovery in this matter.

I point this out only because I have run into situations at mediation wherein counsel for the defense expect my opening demand to be no higher than my statement of Monetary Relief Sought. I expect this is because they think I might be inflating the amount. At any rate, I would just like you and your carrier to know my position on this and that my client should not be held to this figure as an opening or high end amount at mediation.

If you have any questions or would like to discuss this further, please do not hesitate to contact me.

In addition, I don’t want to put an amount in that is too high, because on occasion, the defense attorney has put my response into evidence, over my objection as to its admissibility under Rule 408. As you can see, it can be a delicate matter in how to properly respond to one of these Requests. I have freely amended my Response if the value of my case has changed before trial.

In the past, there has been some excellent suggestions on how to respond to a Request for Monetary Relief Sought. I searched the database of the discussions from the Auto Torts listserve, and provide these as food for thought (giving proper credit to those that offered advice):

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| After stating your amount, adding: “or whatever amount 12 reasonable and prudent jurors feel to be reasonable and just compensation to the Plaintiff.” Beth Leone |
| Asking for: “the amount of available insurance coverage”. Rachel Decker |
| Don’t respond to the request within 30 days but after discovery is completed and satisfied the defense attorney knows all of your case flaws, file your request and put in the exact amount you plan on asking the jury for. Chris Nichols |
| Ignore the Request until trial, responding with a letter that you do not know the amount yet. If they file a motion to compel, you can go ahead and file your response. Because you can amend with Rule 15, you can always ask for a higher amount and then before trial, amend for a more reasonable figure. If the defense is able to use your earlier pleading against you, you look all the more reasonable to the jury because you’ve come down on your amount. Jay Trehy |

<p>“That at this time the Plaintiff is seeking \$XXX in damages. However, the Plaintiff reserves the right to amend or modify this statement of monetary relief as circumstances warrant such.” If the bomb drops, you can lower it, or if things get better, you can raise it. Danny Glover.</p>
<p>“Plaintiff states that the amount of monetary relief sought at this time prior to formal discovery of the physicians and other health care providers is between \$60,000 and \$90,000. The Plaintiff is unable to identify an exact amount of damages sought because a portion of these damages are for the Plaintiff’s physical pain and mental suffering which by law are not capable of determination by any mathematical formula and are awarded by the jury based upon reason and common sense after considering all of the evidence presented at trial. The Plaintiff hereby objects to any more specific amount of relief sought than that state above.” Mark Melrose</p>
<p>“\$XXXX as this represents an average jury verdict for this type of injury”. Frank Pope</p>

Other ideas? Ever had your Response read to the jury?

<p>Let’s Discuss:</p> <hr/> <hr/> <hr/> <hr/> <hr/>
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DISCOVERY

I. Answering Interrogatories and Requests for Production

There are interrogatories that we see over and over again that can go to the heart of your client’s damage. Especially, questions pertaining to your client’s medical treatment and your responses to those questions, can make or break your damages claim.

General Rules to answering Interrogatories and Requests for Production of Documents:

1. ANSWER SIMPLY
 - a. Object only when absolutely necessary; they will get the information at deposition.
 - b. The longer and more complicated your objections are, the more you draw attention to your answers and subject yourself to a Motion to Compel.
 - c. If it appears that you are “baring your soul”, chances are lessened they will pursue additional information

2. **ANSWER COMPLETELY**
 - a. Remember, they will get the information at a deposition
 - b. The more completely you answer, the easier it is for you to refer back to your answers and rely on the content therein

3. **GIVE ORGANIZED ANSWERS**
 - a. When listing out medical providers, or medical bills, answer with particularity. This makes it easier for you to refer back to what you have provided, and what you still need to supplement
 - b. If you make it hard on the Defendant, it will also be hard on you in referring back to your responses
 - c. There is no question as to what is provided

4. **PROVIDE ONLY WHAT YOU HAVE TO**
 - a. Although you want to give complete and organized answers, give only what you have to
 - b. Read the questions strictly

5. **KEEP THE DOOR OPEN**
 - a. When answering all inclusive questions, make sure they understand the answer is not exhaustive of the information
 - b. Reserve the right to supplement. Technically, you have a duty to supplement, but when you “reserve the right”, you can show the jury that you fully expect more information to surface

Anyone have any tips they wish to share?

Let's Discuss: <hr/> <hr/> <hr/> <hr/> <hr/>
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Examples:

QUESTIONS: Ever received disability or worker's comp payments . . . Ever been injured in an accident... Ever made a claim for personal injury....

ANSWER: Objection; overly broad and unduly burdensome; irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objection, and limiting his answer to the ten years immediately preceding the incident which is the subject of this suit, Plaintiff states none.

Note: Always lodge your objection, even if the answer is “none”, to protect yourself if your client suddenly remembers something.

QUESTION: Describe in detail all injuries claimed to have been caused, aggravated or otherwise contributed to by the accident

ANSWER: See attached medical records.

QUESTION: List all medical providers the Plaintiff has seen for the injuries contend were as a result of the accident

ANSWER: See attached medical records.

QUESTION: Produce all records generated by any hospital or doctor’s office, etc, for injuries you contend you sustained in the incident described in the Complaint.

RESPONSE: See attached medical records marked as Exhibits as follows:
Exhibit 1 – Wake Med Center Emergency Room records dated 11/7/00
Exhibit 2 – Eastern Carolina Medical Center records dated 11/11/00 – 2/19/01
Exhibit 3 – Pro Active Therapy records dated 12/21/00 – 2/11/01

Note: The defendant will be entitled to the injury related meds. To make it simple, in answering Interrogatories, just refer the Defendant to the medical records. In the responses to the requests for production, itemize out what you are providing to make it easier on you when referring back to see what you’ve produced. By not

objecting and simply providing the information, you give the appearance of “baring your soul”.

QUESTION: Identify medical treatment preceding the accident...

ANSWER: Objection; overly broad and unduly burdensome; irrelevant and not reasonably calculated to lead to the discovery of admissible evidence; doctor patient privilege. Without waiving said objection, Plaintiff states that for the past ten years, she has seen the following providers:
(list out)

QUESTION: Produce all medical records for treatment rendered to Plaintiff for the ten years preceding the incident

ANSWER: Objection; overly broad and unduly burdensome; irrelevant and not reasonably calculated to lead to the discovery of admissible evidence; doctor patient privilege. Without waiving said objection, Plaintiff provides the following medical records:
(list out)

Note: When dealing with a soft tissue injury, recommend getting the records yourself to review and then producing to the Defendant.

Note: Golden Rule – Doctor/Patient Privilege must be lodged when you respond to the discovery or it is forever waived. When responding to produce any type of medical information, I always lodge the doctor/patient privilege unless the request is specifically for accident related materials.

ANSWER: Objection; overly broad and unduly burdensome; irrelevant and not reasonably calculated to lead to the discovery of admissible evidence; doctor patient privilege. Without waiving said objection, Plaintiff states that she will provide a limited medical

release to enable the Defendant to obtain her medical records for the ten years preceding the incident, provided Defendant will give a copy of any such records obtained to the Plaintiff

Note: If your injury is clear cut (ie, a broken leg), let the Defendant do the leg work, bear the costs and get your records for you.

There is a danger in providing a release to the Defendant, especially if they choose “not” to get the records before your client’s deposition. For example, you may not have the benefit of the prior records to go over with your client, and there may be instances of prior neck or back pain that your client innocently forgot about. If they get in their deposition, and testify that they never had any prior neck/back problems, but then the records later reflect that they did in fact have some minor complaints, your client’s credibility is ruined, no matter how minor the prior complaints were.

ANSWER: Objection; overly broad and unduly burdensome; irrelevant and not reasonably calculated to lead to the discovery of admissible evidence; doctor patient privilege. Without waiving said objection, Plaintiff provides the following medical records for treatment rendered in the past ten years, limited to treatment provided to any body part that Plaintiff injured in the incident which is the subject of this suit as follows:
(list out)

Note: If you want to test how far a Defendant will pursue something, offer only records to the portion of the body that your client injured in the accident. Some courts will uphold your objection, but others will make you produce all records for the prior years.

QUESTION: If you claim the injuries sustained caused you to limit or cease your participation in any hobbies or other recreation, state the name of the hobby or form of recreation, whether you have ceased or merely limited, what injury caused you to limit or cease

ANSWER: Although this answer is in no way exhaustive of the ways in which Plaintiff participation in hobbies or other activities was limited, Plaintiff states that he

Note: Keep the door open for your client to remember further things. Your client will almost always remember a great many things that occurred after they've already answered the Interrogatories under oath.

QUESTION: Have you sustained any additional financial losses...

ANSWER: Plaintiff has sustained additional financial losses as follows:

1. Grass cutting service \$560.00
2. House cleaning service \$321.00
3. Prescription expenses \$492.00

Plaintiff reserves the right to supplement this answer.

Note: Be thorough in claiming any type of out of pocket expenses to maximize damages. Reserve the right to supplement your answer.

Miscellaneous Tips to Keep it Simple for Answering Discovery:

1. When responding to request for expert opinions, reference the medical records for the substance of facts and opinions
2. Make sure you seasonably supplement your discovery so that you are not prohibited later from introducing something into evidence
3. Make sure you have complete medical bills to maximize your damages. Remember there are usually three bills for an emergency room visit (charge from hospital, emergency physician service and radiology).
4. When answering interrogatories, answer with "Plaintiff states" rather than in first person. It makes cross impeachment less personal.

II. Preparing for Depositions

There is nothing more important in the discovery process than making sure your client is adequately prepped for his or her deposition. Never throw your client into a deposition without taking the time to make sure they understand the process and what they can expect.

It is a requirement that my client comes in to see me before his deposition. I schedule the appointment at the time the deposition is set. I make sure they see me within a day or two of the deposition so my advice is fresh in their minds.

Some things that are important in prepping your client as it relates to damages:

1. Make sure your client is familiar with their medical records. One of the favorite defense tactics is to ask your client in their deposition what complaints they had at the emergency room, then when their deposition testimony differs from the records, they will beat them up on cross at trial.
2. Make sure your client doesn't exaggerate. Remember: the defense attorney is strictly "eyeballing" your client to determine what type of witness they will make in front of a jury. Have your client act with the utmost credibility and decorum in their deposition and show the defense attorney what a great witness they will make at trial.
3. Make sure your client understands the importance of a deposition. If they react badly or get upset during the deposition, the purse strings will tighten at mediation. Tell your client not to fight with the defense attorney. No matter how mad they get, add a "yes sir" or "yes ma'am" to the end of every answer.
4. Impose upon your client the importance of telling the truth and to not take that step out "onto a limb".
5. Make sure your client knows how to leave the door open to all inclusive questions.
6. Make sure your client knows when to shut up. Listen to the question, answer only the question, and then stop.

Anyone have any favorite deposition preparation words of advice to share?

Let's Discuss:
