ADMINISTRATION OF JUSTICE

Number 2005/07 November 2005

2005 LEGISLATION AFFECTING SMALL CLAIMS ACTIONS AND OTHER NON-CRIMINAL FUNCTIONS OF MAGISTRATES

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The 2005 General Assembly enacted a number of bills affecting small claims and miscellaneous duties of magistrates, some of which made significant changes in certain summary ejectment actions. This bulletin will discuss those changes. Another bulletin by John Rubin will discuss criminal law changes. Copies of individual bills may be printed from the General Assembly's web site, www.ncleg.net. [1]

Small Claims Procedure

Service of Process

S.L. 2005-221 (H 1434) amends Rule 4 of the Rules of Civil Procedure, effective for actions filed on or after October 1, 2005, to permit signature confirmation as an additional method of service on a natural person. Signature confirmation is a new service provided by the U.S. Postal Service where the recipient signs for the letter. The serving party proves service by filing an affidavit averring that a copy of the summons and complaint was deposited in the post office for mailing by signature confirmation, and that it was in fact received. The serving party will receive a confirmation of service including the recipient's name and signature online, by fax or mail and must attach the confirmation to the affidavit. Although signature

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[1] On the right hand side of the website, you will see a section entitled "Site Searches." You can enter either the Senate or House bill number or the Session Law number (the number following S.L. 2005) to get to the bill. When you click on the bill or session law number, on the next screen click on the last version of the bill, which will be the session law version. In the bill, underlining indicates new language added and strike throughs indicate language deleted from the previous law.

service costs less than certified mail, it is available only with a letter sent by priority mail or first class mailing of a parcel. Therefore, signature confirmation may not be less expensive than certified mail, return receipt requested, but may be used because the plaintiff can confirm service quicker.

The only time signature confirmation may be used in small claims court is for actions to enforce motor vehicle liens, which authorizes service of process under Rule 4. For most small claims cases, G.S. 7A-217 governs service of process. It authorizes service only by having the sheriff deliver a copy of the summons and complaint to the defendant or leaving it at the defendant's dwelling with a person of suitable age and discretion; by registered or certified mail, return receipt requested; by defendant's written acceptance of service; or in summary ejectment cases by posting and first class mail. The statute also provides that jurisdiction over a defendant in small claims court may be established by the defendant's voluntary appearance. Therefore in most small claims cases, service by signature confirmation or service by depositing with a designate delivery service (another form of service authorized in 2001) are not allowable methods of service of the summons and complaint.

Counterclaims

G.S. 7A-219 provides that counterclaims, which would make the amount in controversy exceed the jurisdictional amount for small claims cases, are not permissible in a small claims action. The statute then provides: "No determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action, which, except for this section, might have been asserted under the Code of Civil Procedure as a counterclaim in the small claims action." Questions have been raised as to whether a defendant must file in the small claims action a compulsory counterclaim that falls within the jurisdictional amount of small claims court and whether a compulsory counterclaim that exceeds the jurisdictional amount must be raised on appeal of the case to district court. The Court of Appeals in *Fickley v. Greystone Enterprises, Inc.*, 140 N.C. App. 258 (2000) held that a defendant would lose the right to assert a compulsory counterclaim for more than the small claims jurisdictional amount if the defendant did not appeal the small claims action and raise the counterclaim in district court.

S.L. 2005-423 (S 1029) (hereinafter Chapter 423) clarifies the issue by providing that defendant's failure to file a counterclaim in a small claims action or to appeal a small claim judgment to district court does not bar the defendant from filing the claim as a separate action. The bill provides that this provision "becomes effective October 1, 2005," which raises an issue about how it applies to pending cases. Probably the best reading of the statute is a broad one, allowing separate actions to be filed in cases which were not final before October 1, 2005.

If a compulsory counterclaim is filed as a separate action, the language in G.S. 7A-219—"no determination of fact or law in an assigned small claim action estops a party thereto in any subsequent action …"—bars a defense of collateral estoppel.[2]

Landlord Tenant Issues

Summary Ejectment

Judgment on the Pleadings

Chapter 423 makes a major change in procedure in one type of summary ejectment judgment. General small claims law provides that failure to file a written answer constitutes a general denial, which means that the plaintiff must offer sufficient evidence to prove by a preponderance of the evidence that plaintiff is entitled to a judgment. The summary ejectment law provides that the magistrate shall give judgment for possession if the plaintiff proves the case by a preponderance of the evidence or the defendant admits the allegations of the complaint. Chapter 423 amends G.S. 42-30, effective October 1, 2005, to provide that the

[2] "Collateral estoppel applies when: '(1) a prior suit result[ed] in a final judgment on the merits; (2) identical issues [were] involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined.' In determining what issues were actually litigated or decided by the earlier judgment, the court in the second proceeding is free to go beyond the judgment roll, and may examine the pleadings and the evidence [if any] in the prior action." Youse v. Duke Energy Corp. ____ N.C. App. ____, 614 S.E.2d 396 (2005). For example, X files an action in small claims court asserting Y was negligent in damaging A's car in an automobile accident. X wins and Y does not appeal or appeals and loses in district court. Y later files an action against X, alleging that X was negligent in causing the accident. Except for the language in the statute, X could assert the earlier finding of Y's negligence as finding of contributory negligence in Y's lawsuit, which would be a bar to the award of damages in Y's lawsuit.

magistrate shall give judgment for possession based solely on the filed pleadings if the following four qualifications are met:

- The pleadings allege defendant's failure to pay rent as a breach of the lease for which reentry is allowed (block number 3 under #3 on AOC-CVM-201, Complaint in Summary Ejectment);
- The defendant has not filed an answer;
- The defendant fails to appear on the day of court; and
- The plaintiff requests, in open court, a judgment based on the pleadings.

In that case, the magistrate must give judgment for possession without asking the plaintiff to offer any evidence. If the plaintiff is seeking possession based on failure to pay rent (first block under #3 on complaint form), holding over after the end of the lease (second block) or criminal activity (fourth block), this new law does not apply. Under oath, plaintiff must prove that he or she is entitled to a judgment for possession. The same is true is plaintiff is seeking possession for breach of a condition of the lease for which reentry is specified based on a condition other than failure to pay rent.

If the plaintiff also is seeking monetary damages for back rent or physical damage to the property in an action based on defendant's failure to pay rent as a breach of the lease for which reentry is allowed, the plaintiff must prove by a preponderance of the evidence any monetary damages that are due. Only the possession part of the judgment is granted without evidence.

Notice to Terminate Lease of Mobile Home Space

G.S. 42-14 specifies the time by which a landlord or tenant must give notice to terminate a periodic tenancy at the end of the term if the lease does not provide a specific time for termination. Under that provision if the lease is for the rental of a mobile home space, the landlord or tenant who wishes to end the periodic tenancy at the end of a term must give at least 30 days notice before the end of the term that the lease terminates at the end of that term. Thus, if the tenant rents a mobile home space month-to-month, with the term beginning on the 15th of the month and if the landlord wishes to terminate the lease at the end of the term in January, the landlord must give notice to the tenant by December 15th that the lease will terminate on January 15th. If the tenant remains on the premises after January 15, the landlord may bring a summary ejectment action based on holding over after the end of the term. S.L. 2005-291 (H 1243) lengthens the time of the notice from thirty to sixty days before the end of the term and applies to notices to quit given on or after January 1, 2006.

The 60-day notice (30-day before January 1, 2006) applies only to the notice necessary to terminate a periodic tenancy at the end of the term. It does not require a landlord to wait longer than 10 days after demanding past due rent before bringing an action on the basis of "failure to pay rent." Nor does it require a landlord renting a mobile home space to wait any period beyond the breach before filing an action based on breach of a condition for which re-entry is specified. Nor does it give a tenant who rents a mobile home space 60 days to remove the mobile home after a judgment for possession is entered in a summary ejectment case.

Bond to Stay Execution of Summary Ejectment Judgment on Appeal

G.S. 42-34 requires the tenant to post a bond to stay execution of a summary ejectment judgment for possession if the tenant appeals the case and wishes to remain on the premises until the case is decided by the district court. Chapter 423

First, it makes it clear that the tenant's undertaking to pay into the clerk's office the contract rent as it becomes due during the time the case is on appeal applies to the "tenant's share" of the contract rent. Thus, in cases in which the tenant is receiving housing assistance, for example Section 8 or public housing, the tenant must pay into the clerk's office only the share of the rent he or she is obligated to pay, not the full amount of the contract rent, which is paid partially by a federal or other agency.

Second, as part of the bond to stay execution the tenant also must pay in cash the amount of undisputed rent in arrears to the clerk. The magistrate is required to determine the amount of undisputed rent in arrears in the summary ejectment judgment so that the clerk will know what amount to assess the tenant. The new law specifies that the magistrate must base that determination on the available evidence presented to the magistrate or the amounts listed on the complaint.[3]

Third, if the landlord or tenant requests a hearing before the clerk to modify the terms of the

[3] The statute specifies that it applies to situations where a judgment on the pleadings is authorized. However, the same concerns arise in other summary ejectment actions when the plaintiff has filed an action for possession only and monetary damages are not an issue in the case. The magistrate must either inquire of the plaintiff about the back rent owed or relied on the complaint to determine the amount of rent in arrears.

undertaking, the clerk must hold the hearing within ten calendar days.

Tenants Who Are Victims Domestic Violence, Sexual Assault or Stalking

S.L. 2005-423 (S 1029) adds three new statutes dealing with rights of tenants or household members who are victims of domestic violence, sexual assault or stalking (protected tenants). These statutes apply to leases entered into or renewed on or after October 1, 2005.

Change Locks

The new law adopts procedures for victims of domestic violence, sexual assault or stalking to have the locks changed on their rented residential premises. The cost of changing the locks is borne by the tenant.

If the perpetrator is not a tenant in the same dwelling, the protected tenant may request the landlord to change the locks upon giving written or oral notice of his or her status as a protected tenant. The tenant need not provide documentation of the domestic violence, assault or stalking. The landlord must change the locks or give the tenant permission to change them within 48 hours. If the landlord fails to act within the required time, the tenant may change the locks without the landlord's permission, but must give a key to the new locks to the landlord within 48 hours of changing the locks. The statute does not specify what happens if the tenant changes the locks but does not give a key to the landlord. Presumably, a landlord could make that a condition in a lease with a right of re-entry clause and then evict for failure to provide the keys. Also the landlord could hire a locksmith to make a key and require the tenant to reimburse the landlord for the cost.[4]

If the perpetrator is a tenant in the same dwelling unit as the protected tenant, the protected tenant may request that the landlord change the locks to keep the perpetrator out. The tenant must provide the landlord with a copy of an order issued by a court that orders the perpetrator to stay away from the dwelling unit. The statute is not specific on what constitutes an order of the court. It probably includes a regular or ex parte[5] domestic violence protective order or no contact order. It would include a suspended sentence in a criminal case in which the court orders the defendant to stay away from the dwelling unit. What is least clear is whether it includes a pretrial release order that requires the defendant to stay away from the dwelling unit. It could be argued that an order is one that could be enforced by contempt and therefore a pretrial release order would not qualify. On the other hand since the underlying policy is to protect the victim of domestic violence, sexual assault or stalking, protection may be most necessary soon after a criminal offense against the victim has occurred. The landlord must change the locks or give the tenant permission to change the locks within 72 hours after receipt of the request, and if the landlord fails to act, the tenant may change the locks without permission but must give a key to the landlord within 48 hours after changing the locks. The landlord has no duty to allow the perpetrator access to the dwelling unit unless that court order allows the perpetrator to return to the dwelling to retrieve personal belongings and has no duty to provide keys to the perpetrator. The landlord is not liable for civil damages to a perpetrator excluded from the dwelling unit for loss of use of the dwelling or for loss of use or damage to the perpetrator's personal property. A perpetrator who has been excluded from the dwelling remains liable under the lease with any other tenant for rent or damages to the dwelling unit.

Terminate Lease

Chapter 423 allows a protected tenant to terminate his or her rental agreement by providing the landlord with a written notice of termination to be effective on a date that is at least 30 days after the landlord's receipt of the notice. The tenant must include with the notice a copy of a valid regular (not ex parte) order of protection issued under General Statutes Chapters 50B or 50C, a criminal order that restrains a person from contact with a protected tenant, or a valid Address Confidentiality Program card issued pursuant to G.S. 15C-4 5 to the victim. Unlike the statute about changing locks, this provision, found in the same bill, specifically excludes ex parte orders. It does not define what is meant by "criminal order that restrains a person from contact with a protected tenant." However, the fact that it does not cover ex parte domestic violence or no contact orders under 50B and 50C would indicate that criminal order means as part of a suspended sentence after conviction and not a pretrial release order.

If the protected tenant is a victim of domestic violence or sexual assault, the tenant must attach a copy of a safety plan to the notice to terminate. The safety plan must be provided by a domestic violence or sexual assault program, must be dated during the term

[4] Another possibility that is unlikely to be followed would be for the landlord to file a district court action to require tenant to give the landlord a key.

[5] Another section in Chapter 423 allowing victims to terminate residential leases specifically excludes ex parte orders, which is some indication that this statute is intended to cover ex parte orders.

of the tenancy to be terminated, and must recommend relocation of the protected tenant. The tenant is liable for the rent due under the rental agreement prorated to the effective date of the termination but is not liable for any rent thereafter or fees for early termination. If there are other tenants residing in the dwelling unit besides the protected tenant, the tenancy continues for those tenants. A perpetrator who has been excluded from the dwelling unit under a court order remains liable under the lease with any other tenant of the dwelling unit for rent or damages to the dwelling unit.

Retaliation Prohibited

Chapter 423 also prohibits a landlord from terminating a tenancy, failing to renew a tenancy, refusing to enter into a rental agreement, or otherwise retaliating in the rental of a dwelling based substantially on the status of the tenant, applicant, or a household member as a victim of domestic violence, sexual assault, or stalking or based on the tenant or applicant having lawfully terminated a lease because of the domestic violence, sexual assault or stalking. The landlord may be provided court or federal agency records or files; documentation from a domestic violence or sexual assault program; or documentation from a religious, medical or other professional as evidence of domestic violence, sexual assault or stalking: law enforcement. The tenant might raise this statute as an affirmative defense in an action to evict the tenant or might bring an action to recover actual damages for breach of the statute.

Termination of Lease by Member of Military

G.S. 42-45 sets out a procedure for members of the United States Armed Forces who are required to move because of a permanent change of station orders or premature discharge from the military to terminate a residential lease. S.L. 2005-445 (S 1117) grants the same right to members of the United States Armed Forces who are deployed with a military unit for a period of at least ninety days. The soldier who wishes to terminate a lease must give written notice of termination to the landlord and must attach to the notice a copy of the official military orders or a written verification signed by the member's commanding officer. The termination is effective thirty days after the next rental payment is due or forty-five days after the landlord's receipt of the notice of termination, whichever is shorter. [6]

The liquidated damages provision in the statute applies to deployed personnel as well as relocated personnel. If the tenant has completed less than six months of the tenancy as of the date of termination and the landlord has suffered actual damages due to loss of the tenancy, the landlord may assess liquidated damages equal to one month's rent.[7] If the tenant has completed at least six months but less than nine months of the tenancy as of the effective date of the termination, the landlord may impose damages equal to one-half month's rent.

The provision applies to rental agreements entered into or renewed on or after September 28, 2005.

Miscellaneous Small Claims Matters

Motor Vehicle Repair Act

The North Carolina Motor Vehicle Repair Act, Article 15B of G.S. Chapter 20, requires motor vehicle repair shops to give written estimates for any repair work the cost of which will exceed $350. S.L. 2005-304 (H 1299) defines the term "cost of repair work" in determining whether the $350 threshold has been met. It consists of the cost of parts and labor necessary for the repair work; any charges for necessary diagnostic work and teardown; taxes, any repair shop supplies or overhead and any other extra services that are incidental to the repair work. The act applies to repair estimates made on or after October 1, 2005.

Retail Installment Sales Act

The Retail Installment Sales Act, Chapter 25A of the General Statutes, governs consumer credit sales

[6] The statute assumes that there is a lease for a definite period of time of at least one year. If the tenant has a month-to-month or week-to-week periodic tenancy, the tenant need not use this statute because the tenant can end that tenancy by giving notice at least seven days before the end of the month or two days before the end of the week, and leave after the end of that term without any penalty. However, if the tenant is leasing a mobile home space, rather than giving 60 days notice to terminate under the general law, the tenant can use this statute to terminate the periodic tenancy earlier than allowed under the general law.

[7] See footnote 6.

between sellers and buyers. It sets the maximum interest rates that can be charged in those contracts and regulates other contractual provisions. S.L. 2005-338 (H 1411) increases the cap for the amount financed to qualify as a consumer credit sale. To qualify as a consumer credit sale (and be covered by the Act) the maximum amount financed is increased from $25,000 to $75,000. This law probably will not affect small claims actions because the likelihood that an action would qualify for small claims court when the initial amount financed is over $25,000 is slim.

Disputed Escrow Money Held by Real Estate Broker

A real estate broker who holds earnest money under a contract to purchase real estate may not dispense the funds if the sale falls through without the written agreement of the parties or a court order. If the buyer or seller files a lawsuit and the amount of the money is $5,000 or less that suit may be filed in small claims court. The necessary parties are the buyer and seller, but the real estate broker may be joined as a defendant in the lawsuit. Sometimes the buyer and seller will not agree and neither will file a lawsuit to determine who is entitled to the monies, leaving the real estate broker holding the funds. S.L. 2005-395 (H 1284) allows the real estate broker to deposit the funds ninety days after notice to the buyer and seller with the clerk in the county in which the property for which the monies are being held is located. Once the monies are deposited, the buyer or seller may file a special proceeding with the clerk to determine the rightful ownership of the funds. If no proceeding is filed within one year, the clerk escheats the funds.

Exemptions from Money Judgments

For the first time since the 1991, the General Assembly in S.L. 2005-401 (H 1176) increased the value of property a judgment debtor may exempt from seizure to satisfy a judgment against the debtor. The new values are:

- In residence, from $10,000 to $18,500.
- In any property (wild card exemption) from $3,500 to $5,000 to the extent of the unused exemption amount under the residence exemption. This provision substantially expands the amount to be exempted under this exception because the previous provision allowed $3,500 "less any amount of exemption used. " A person who claimed a residence with $3,500 equity would not be entitled to claim any wild card exemption under the previous law, but under the new provision, that person would have $15,000 unused exemption in the residence, and could claim $5,000 under the wild card exemption.
- In one motor vehicle, from $1,500 to $3,000.
- In household furnishings, from $3,500 to $5,000, plus $1,000 for each dependent not to exceed $4,000 for dependents.
- In tools of the trade, from $750 to $2,000.

The act also adds new types of property that may be claimed as exempt. A judgment debtor may exempt up to $25,000 in a qualified college savings plan; all retirement benefits under retirement plans of states other than North Carolina to the extent that the benefits are exempt under those states (retirement benefits from the State of North Carolina North Carolina already are exempt by statute), and alimony, support, and child support payments or funds that have been received or to which the debtor is entitled to the extent the are reasonably necessary for support of the debtor or the debtor's dependent.

Ch. 401 also modifies G.S. 1C-1601(c) to conform to the court's holding in *Household Finance v. Ellis*, 107 N.C. App. 262, aff'd per curiam, 333 N.C. 785 (1993) that the constitutional exemptions can not be waived by failing to respond to the notice of rights. Although the practice has been for the judgment creditor to serve a copy of the motion to claim exemptions on the debtor along with the notice of rights to claim exemptions, until the enactment of Ch. 401 the statute did not require the service of the motion. The new exemptions and exemption amounts apply to judgments filed on or after January 1, 2006.

Domestic Violence

Domestic Violence Protective Orders

G.S. 50B-3 provides that the court may grant a domestic violence protective order (ex parte or regular) to bring about a cessation of domestic violence. Appellate court decisions have implied that any relief granted in the order must be supported by facts that the specific relief is necessary to bring about a cessation of violence.[8] S.L. 2005-423 (S 1029) rewrites the statute to provide that the court (and authorized magistrates) must issue a domestic violence protective order

[8] Bryant v. Williams, 161 N.C. App. 444 (2003).

restraining the defendant from further acts of domestic violence if the court finds an act of domestic violence has occurred. It authorizes the court to give any relief listed in the statute, eliminating any requirement to show that the specific relief is necessary for a cessation of the violence.

One possible type of relief in a protective order is to direct the defendant to stay away from the child's school. If that relief is granted, Chapter 423 requires the sheriff to deliver a copy of the order to the principal of the school for orders entered on or after October 1, 2005.

The act also provides that renewals of domestic violence orders may be for up to two years.

Under certain circumstances, a judge or magistrate must order a defendant as part of an order of protection to surrender his or her firearms to the sheriff. The defendant may retrieve the firearms after the order is no longer in effective, subject to certain restrictions. Chapter 423 adds a requirement that the defendant is not entitled to retrieve the weapons until there is a final disposition of any pending criminal charges in either State or federal court for crimes committed against the person who is the "subject of the protective order," which is the plaintiff.

Legislative Committee on Domestic Violence

During the last session, the General Assembly created an interim legislative committee to study and recommend changes to strengthen the State's domestic violence laws. This year S.L. 2005-356 (H 569) creates a permanent sixteen member Joint Legislative Committee on Domestic Violence to make on-going recommendations to reduce domestic violence. The Committee is to examine policies and recommendations of the Domestic Violence Commission, study funding of domestic violence programs, explore new programs, examine law enforcement and judicial responses to domestic violence, and review data collected on domestic violence.

Chapter 356 also requires the Administrative Office of the Courts, with the Department of Correction, to study the use of Global Positioning Satellite (GPS) technology to track criminal offenders and recommend to the General Assembly a pilot project to use GPS as a condition of pretrial release for domestic violence offenders.

Domestic Violence Victims Get Concealed Weapon Permits

The General Assembly passed a provision allowing a sheriff to issue a temporary concealed weapon permits to person who are protected by a domestic violence protective order if they are not otherwise prohibited from getting a permit. [S.L. 2005-343 (H 1311)] The clerk must give persons for whom protective orders are issued a copy of an informational sheet explaining their right to apply for a concealed weapon permit. The bill was enacted even though it was opposed by many domestic violence advocates, and the Governor signed the bill after receiving assurances from the Speaker that the provision requiring the clerk to tell victims how to apply for a permit would be removed in a separate bill. However, a bill that would have repealed the section was defeated in the closing hours of the session.[9]

Involuntary Commitments

S.L. 2005-135 (H 1199) amends the involuntary commitment law to conform to the practice in many counties. Physicians and psychologists are not required to personally appear before a magistrate or clerk to initiate an involuntary commitment. They may send a sworn petition to the judicial official in lieu of personally appearing. Rather than sending a hospital employee to the magistrate or clerk's office with the petition, many hospitals have been sending a copy of the petition by facsimile, and if the judicial official issues a custody order, the law enforcement officer who goes to the hospital to take the respondent to the 24-hour facility where he will be held retrieves the original petition and returns it to the clerk's office with the officer's return. The General Assembly specifically authorizes physicians and psychologists to file the affidavits by facsimile so long as the original paper copy is mailed to the clerk or magistrate within five days after the facsimile transmission.

Assigning Year's Allowance

S.L. 2005-225 (S 533) amends G.S. 30-17 to provide that when assigning the $2,000 allowance to a minor child of a deceased parent, the magistrate no longer

[9] Amy Gardner, *Domestic Violence Bill Signed*, News & Observer, August 30, 2005; Lynn Bonner, *Weapons Counseling Stays in Bill*, News & Observer, September 1, 2005.

subtracts the value of articles consumed by the child since the parent's death. The provision applies to estates of persons dying on or after October 1, 2005.

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