Summary Ejectment Roundtable

On June 14, approximately 30 people – including yours truly – participated in a Statewide Roundtable on Summary Ejectment jointly sponsored by AOC and the Bolch Judicial Institute. Participants included representatives from Legal Services, the private bar, the Duke Civil Justice Clinic, the N.C. Justice Center, and other non-profits, along with magistrates, clerks, district court judges, and AOC staff. Not surprisingly, the training and performance of small claims magistrates was one of several areas of focus, and that discussion was wide-ranging and free-flowing. My topic today is an extremely cherry-picked list of five procedural errors participants mentioned having encountered in summary ejectment actions. These are anecdotal reports, and I do not have the sense that most of them are common errors. (I sure hope not!) But when they occur, they are serious errors, and so I want to address them. Here goes. . .

Issue #1: When a magistrate hears evidence in a SE case, the plaintiff has the right to take a voluntary dismissal of the action at any point before the conclusion of the plaintiff's evidence. Even after that point, in extraordinary cases a magistrate has discretion to allow the plaintiff to voluntarily dismiss the case at any time prior to the entry of judgment. GS 1A-1, Rule 41(b). If the plaintiff fails to prove the case and does not take a voluntary dismissal, the magistrate must enter a judgment on the merits in favor of the defendant. This judgment is always with prejudice. There are no circumstances under which a final judgment on the merits of a case is without prejudice. This simply should never happen.

Issue #2: In 2013 the General Assembly amended GS 7A-223 to add subsection (b), related to continuances in summary ejectment cases. That statute sets out the following rules: (1) A continuance is appropriate when a party shows good cause; and (2) A continuance in a summary ejectment action may not exceed five business days or until the next session of small claims court, whichever is longer, unless all parties agree to a longer period of time. NOTE that the requirement of agreement by all parties applies only to extending the length of the continuance. A continuance should always be granted when a party demonstrates good cause, regardless of whether the other party agrees.

Issue #3: Summary ejectment actions must be filed in the name of the real party in interest, i.e., the name of the person entitled to possession of the premises. In most cases, this is the owner of the property, although it is sometimes a tenant seeking to regain possession from a sub-tenant. It is NOT the person or business managing the property. The authorization in GS 7A-223 for an agent of the plaintiff with personal knowledge of the relevant facts to sign the complaint is by no means equivalent to a modification of the real party in interest rule. Remember that a real party in interest issue should be raised by the magistrate even if the defendant is not present or fails to raise it. If the plaintiff does not spontaneously testify to ownership of the property, it is appropriate for the magistrate to inquire. If the name of someone other than the person actually entitled to possession appears in the plaintiff's box on the complaint form, the magistrate should refuse to go forward with the case until the error is corrected.

The last two issues, while procedural, are much broader and thus difficult to address in any detail in a blog post. The first concerns the appropriate procedure when only an attorney for plaintiff appears in court – unaccompanied by the plaintiff or other witnesses. In summary ejectment cases, this event is usually accompanied by a request for judgment on the pleadings, not requiring evidence to be produced in support of the claim for possession. When a defendant is present, however, the law requires the plaintiff to prove his right to possession by the greater weight of the evidence. What must the attorney do in this event?

Certainly, the attorney should provide a magistrate with a copy of the written lease if one exists. Can the attorney provide evidence by testifying? The answer is no. What happens instead is that the attorney attempts to establish the elements of the case in chief by cross-examining the defendant. It is entirely proper for the attorney to do this. This is sometimes challenging territory for a magistrate, who is attempting to accomplish a number of not entirely harmonious objectives. The magistrate must remain in control of the courtroom, protect the witness from harassment, allow the attorney to assertively pursue tough or challenging questions, maintain his or her own impartiality, assess the reliability and credibility of the evidence elicited, and leave everyone involved with the impression that they were fairly treated and fully heard. The way in which a magistrate might skillfully walk this tightrope is a frequent topic in magistrate training, but that discussion is beyond the scope of this blog. There are two key points: First, the attorney is entitled to cross-examine the defendant, and such questioning – while definitely the exception, rather than the rule, in small claims court – is a time-honored means of testing the truth and reliability of the testimony of a witness. Second, proper cross examination of a witness does not include harassing or intimidating a witness in a manner tending to obscure, rather than reveal, the truth. It is appropriate for a magistrate to intervene in the rare situation in which this occurs. Finally, a magistrate should never hesitate to ask follow-up clarifying questions as needed in order to reach a fair and accurate decision. See GS Ch. 8C-1, NC Rules of Evidence, Rules 611(a) & 614.

The final issue concerns a very common practice in summary ejectment actions when both parties are present and the landlord has won. Often, the magistrate's decision is greeted with a barrage of questions about what happens next. In fact, "What Happens Next" is a critically important, potentially quite complicated topic. The desire of a magistrate to be helpful and to provide accurate information is in some tension with the prohibition against giving legal advice as well as with the pressing need to call the next case. Some magistrates deal with this problem by providing the parties with written information, and there are distinct advantages to this practice. At a minimum, in my opinion, magistrates should inform the losing parties of their right to appeal, because of the rule that notice of appeal may be given in open court. Parties who do give notice of appeal must be informed of the need to see the clerk to finalize their appeal. What magistrates should *not* do, in my opinion, is to suggest the possibility of "working something out with the landlord." Nor should the magistrate offer predictions such as "So long as you move out in ten days, you'll be fine" or, "I'm certain the landlord will do his best to work with you." The plaintiff has asked for a judgment, and the magistrate has entered one. Subsequent dealings between the parties often raise very confusing legal issues: have they entered into a new lease? Under what terms? What impact, if

any, does the post-judgment payment of rent by the tenant have on the enforceability of the judgment? Comments by a magistrate indicating that such transactions may be “what happens next” are not legally helpful or meaningful, and run a very real risk of misleading or confusing the parties.

NC small claims magistrates make hundreds of difficult decisions in summary ejectment actions under a variety of challenging circumstances every business day. The law is complex, and the procedure, frankly, sometimes mystifying. When hundreds of decision-makers are charged with such an important responsibility, it’s unlikely that I’ll ever run out of things to blog about, but that should not obscure the consistently careful and correct manner in which summary ejectment cases are determined by NC magistrates. Hats off to you!