VOLUNTARY DISMISSALS UNDER RULE 41(a): THE SAVINGS PROVISION AND THE "TWO DISMISSAL RULE"

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Contents

I. Introduction. North Carolina Rule of Civil Procedure 41(a) provides three methods by which an action may be voluntarily dismissed without prejudice: by unilateral notice of the plaintiff; by stipulation of the appearing parties; or by order of the court. Any of the three methods invokes a "savings" provision allowing the plaintiff to bring the action again within a certain period of time—up to a year—and extends the statute of limitations on plaintiff's claim for the length of that refiling period. N.C. R. CIV. P. 41(a) [hereinafter "Rule 41(a)"]; North Carolina Railroad Co. v. Ferguson Builders Supply, Inc., 103 N.C. App. 768, 772–73, (1991); Parrish v. Uzzell, 41 N.C. App. 479, 483 (1979). This rule has been a lifeline for countless claimants who, for one reason or another, have been unable or unwilling to proceed with their cases the first time around. As generous as the provision is, however, it must be followed to the letter, and its restrictions—particularly the "two dismissal rule"—must be observed carefully. Otherwise a voluntary dismissal could doom a case rather than save it.

II. Text of Rule 41(a).[1]

Rule 41. Dismissal of actions

(a) Voluntary dismissal; effect thereof. –

(1) By Plaintiff; by Stipulation. -- Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

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

III. The Savings Provision.

A. In General. Whether by notice, stipulation, or court order (see Section V below), the effects of a voluntary dismissal under Rule 41(a) are to (1) divest the court of jurisdiction over the case, *VSD Comms, Inc. v. Lone Wolf Pub Grp, Inc.*, 124 N.C. App. 642, 643–44 (1996); *Lowe v. Bryant*, 55 N.C. App. 608, 611 (1982)[2]; and (2) "save" the case by allowing plaintiff to file "a new action based on the same claim" within one year of dismissal (or whatever shorter time the parties or court specify). The statutes of limitations applicable to the claims stated in the voluntarily-dismissed action are, therefore, extended for that one-year (or

[1] The full text of Rule 41—including provisions for *involuntary* dismissal—is included in the Appendix. A discussion of involuntary dismissals for failure to prosecute can be found in Ann M. Anderson, *Rule 41(b) Dismissal for Failure to Prosecute* in this Benchbook.

[2] Although a dismissal "strips the trial court of its authority to enter further orders in the adversary proceeding," the court retains authority to enter orders taxing certain costs and fees. *VSD Comms, Inc.*, 124 N.C. App. at 643–44 (authorizing an order of attorney fees under G.S. 6-21.5); Ward v. Taylor, 68 N.C. App. 74, 79 (1984) (authorizing award of costs); Walker Frames v. Shively, 123 N.C. App. 643, 646 (1996).

shorter) refiling period. In re Cole, 175 N.C. App. 653, 659 (2006); Staley v. Lingerfelt, 134 N.C. App. 294, 298 (1999). Rule 41(a) specifically states, however, that two prior voluntary dismissals of an action *by notice* bars the filing of a third. This "two-dismissal rule" is discussed in Section IV below.

B. Does Not Shorten the Limitations Period. The tolling effect of Rule 41(a) only applies where the original statute of limitations on a dismissed claim expires before the time a subsequent action must be filed. If, however, the original statute of limitations still has not run by the time the one-year (or shorter) refiling period ends, Rule 41(a) does not shorten the limitations period—the plaintiff may still file the claim again before the original statute of limitations expires. Guyton v. FM Lending Servs., Inc., 199 N.C. App. 30, 34–35 (2009). For example, a plaintiff filed her original action in September 1969, dismissed it in May 1970, and filed it again in June 1971, more than a year after dismissal. Her claim was not dismissed as untimely because the second action was still within the original three-year statute of limitations applicable to her negligence claim. Whitehurst v. Virginia Dare Trans. Co., Inc., 19 N.C. App. 352, 355–56 (1973); *see also* Barbee v. Transit Mgmt. of Charlotte, Inc., __ N.C. App. __, 745 S.E.2d 375 (2013) (unpublished) (all claims barred in second action except Ch. 75 claim for which original statute of limitations had not yet run).

IV. The "Two-dismissal Rule". A critical exception to the savings provision occurs when a party has already unilaterally dismissed its claim twice. Rule 41 provides that "the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim." Rule 41(a)(1).

A. Applies Only to "Notices" of Dismissal. The two dismissal rule only prohibits a third action based on the same claim where there were two prior *notices* of dismissal. The rule does not apply where one or both of the prior dismissals was by stipulation or court order. Rule 41(a)(1); Parrish v. Uzzell, 41 N.C. App. 479, 483–84 (1979). Examples:

- Estate of Livesay ex rel. Morley v. Livesay, 219 N.C. App. 183, 776–77 (2012). Where dismissal of the first action was by court order for failure to join a necessary party, and the second was by court order for failure to verify a pleading, the two dismissal rule did not prevent the third action.

- State ex rel. Carteret County Child Support Enforcement Office v. Davis, 207 N.C. App. 359, 362–63 (2010). Where a petition was dismissed the first time by the trial court for lack of personal jurisdiction, and the second dismissal was by notice of the petitioner, the petitioner's third action was not barred by the two-dismissal rule.

- Jarman v. Washington, 93 N.C. App. 76, 78 (1989). Where the trial court dismissed a complaint without prejudice for plaintiff's failure to file a pre-trial order, and plaintiff voluntary dismissed its second complaint, the two-dismissal rule did not apply to bar a third action.

- Kuhn v. Williamson, 122 F.R.D. 192, 193–94 (E.D.N.C.1988). Plaintiff filed a case under 42 U.S.C. § 1983 in federal district court and voluntarily dismissed it less than a month later. The same day, he filed a § 1983 action (along with several state law claims, including negligence) in Wake County Superior Court. Later several of the claims, including the § 1983 claim, were voluntarily dismissed pursuant to a *stipulation* of dismissal. Plaintiff later filed a notice of voluntary dismissal of his negligence claim. In a third action filed in Wake County Superior Court within a year of the prior dismissal (and later removed to federal court) plaintiff re-alleged his § 1983 and negligence claims. The federal district court held that these claims were not barred by the two-dismissal rule because the § 1983 claim had been dismissed the second time pursuant to a stipulation of dismissal, and the negligence claim had only been voluntarily dismissed one time before.

B. What Constitutes "Notice of Dismissal"? A "notice of dismissal" may be made either by: (1) filing a written notice with the clerk of court; or (2) by stating the dismissal in open court. Gilliam v. First Union Nat'l Bank, 125 N.C. App. 416, 418 (1997) (citing Danielson v. Cummings, 300 N.C. 175, 179–80 (1980)). If dismissal is taken in open court, no subsequent filing is required:

> Clearly, when parties confront each other face-to-face in a properly convened session of court where a written record is kept of all proceedings, there is no necessity to file a paper writing in order to take notice of a voluntary dismissal. In such a case, oral notice of dismissal is clearly adequate, and fully satisfies the 'filing' requirements of Rule 41(a)(i).

Danielson, 300 N.C. at 179; *see also* In re Cole, 175 N.C. App. 653, 659 (2006) (stating the rule). No means other than oral notice in open court may substitute for filing a written notice. Johnson v. Hutchens, 103 N.C. App. 384, 385–86 (1991). "Contact with defendant's attorney by telephone or mail concerning voluntary dismissal does not satisfy the filing requirement of Rule 41(a)(1)(i)." *Id.* (reversing dismissal of plaintiff's second complaint where trial court calculated first dismissal from date of telephone call between attorneys). For a discussion of when the one-year period for filing a second action begins to run after notice of dismissal, see Section VII below.

C. Applies Even if Service Defective in First Action. The plaintiff cannot escape the effects of the two-dismissal rule by asserting that the trial court was without personal jurisdiction over the defendant(s) in one or both of the first two actions:

> The fact that defendant was never served in either the first or second action, however, is not dispositive as to the application of the "two-dismissal rule" in this case. This Court has held that even when the trial court lacks personal jurisdiction over the defendant, Rule 41(a)(1) bars a third successive action involving the same claim.

Dunton v. Ayscue, 203 N.C. App. 356, 359 (2010) (citing Carter v. Clowers, 102 N.C. App. 247, 250–51 (1991)). "The crucial element . . . is the intention of the party to actually dismiss the case." Robinson v. General Mills Restaurants, 110 N.C. App. 633, 636 (1994). (Note, however, that failure to timely effectuate service prior to voluntary dismissal of a first action *does* prevent tolling in a second action. See Section VI.B below.)

D. Actions That are Foreclosed by Second Dismissal. The two-dismissal rule prevents a third filing of any "action based on or including the same claim" as the two previously-dismissed actions. Rule 41(a)(1). This rule is broad enough also to preclude certain actions against entities based on the actions of their employees or agents, where a third action against the employees or agents themselves would be precluded by the two-dismissal rule. *See, e.g.*, Graham v. Hardee's Food Sys., Inc., 121 N.C. App. 382, 385 (1996) (claims against company based on tortious conduct of employee were dismissed where plaintiff had taken two prior dismissals in actions against employee himself); Wrenn v. Maria Parham Hosp., Inc., 135 N.C. App. 672, 680–81 (1999) (action against hospital dismissed where two prior actions against physician had been dismissed). It has also precluded an action against a corporation where one of the prior two dismissed actions involving the same claims had named the corporation's sole shareholder as defendant rather than the corporation itself. City of Raleigh v. College Campus Apartments, Inc., 94 N.C. App. 280, 284 (noting that the two-dismissal rule did not require that defendants be identical in both dismissals), *aff'd per curiam*, 326 N.C. 360 (1990). The two-dismissal rule has also been applied to a third action based on the same set of operative facts as the first two actions, even though the claims stated in the first two actions did not overlap with each other; the court reasoned that "all of the claims could have been asserted in the same cause of action." Richardson v. McCracken Enterprises, 126 N.C. App. 506, 507–09 (1997) (dismissing claim for trespass, negligence, strict statutory liability, punitive damages, and nuisance, where one of the previously-dismissed actions had only stated a claim for nuisance), *aff'd per curiam*, 347 N.C. 660 (1998). But two successive voluntary dismissals of the two defendants from the same action amounted to only one dismissal of the *action* itself, and thus did not invoke the two-dismissal rule. Hopkins v. Ciba-Geigy Corp., 111 N.C. App. 179, 182 (1993). The two-dismissal rule does not, however, apply to a third action by a plaintiff against a defendant if the claim or remedy could not have been sought in the first two actions. *See, e.g.*, Lifestore Bank v. Mingo Tribal Pres. Trust, __ N.C. App. __, 763 S.E.2d 6, 10-11 (2014)

(permitting claim for money owed and judicial foreclosure where Chapter 45 foreclosure had been twice dismissed); Centura Bank v. Winters, 159 N.C. App. 456, 459 (2003) (allowing third action against defendants to collect rental debt because it was based on a separate default).

E. Appeal Issues. A party must raise the two-dismissal rule as a defense at the trial court level in order to preserve the issue on appeal. Carolina Forest Ass'n, Inc. v. White, 198 N.C. App. 1, 8 (2009). In addition, a party who has moved to dismiss an action as being barred by the two-dismissal rule does not have a right to an immediate appeal of that denial, but must instead appeal the issue after final adjudication. Allen v. Stone, 161 N.C. App. 519, 521–22 (2003).

V. The Three Methods of Voluntary Dismissal Without Prejudice.

A. Dismissal by Notice. Rule 41(a)(1)(i) allows a claimant to dismiss a case without the permission of either the opposing parties or the court. "[N]o action of the court is necessary to give the notice its full effect." Carter v. Clowers, 102 N.C. App. 247, 251 (1991). As discussed here, however, this right *must* be exercised "before the plaintiff rests his case" and *may not* be exercised if an opposing party has sought certain affirmative relief. (What constitutes "notice" of dismissal is discussed in Section IV.B above. The "two-dismissal rule" applicable to serial notices of voluntary dismissal is discussed in Section IV above.)

1. Must Occur "Before the Plaintiff Rests His Case".

a. In General. The savings provision of Rule 41(a)(1) will only toll the statute of limitations on dismissals by notice if the notice is made before plaintiff "rests his case." The Court of Appeals has held that, if plaintiff has already rested its case before making a notice of voluntary dismissal, the dismissal is deemed a dismissal *with prejudice* "barring [plaintiff] from refiling suit against [the] defendant" and "[entitling defendant] to a judgment as a matter of law" in a later-filed action based on the claim. Pardue v. Darnell, 148 N.C. App. 152, 157 (2001) (where plaintiff rested case at trial, then stated "We would move at this time to take a voluntary dismissal. We will refile again."); Moore v. Pate, 112 N.C. App. 833, 837 (1993). This timing restriction *does not* apply to voluntary dismissals by stipulation or by court order. Rule 41(a)(1)(ii); 41(a)(2). If plaintiff has already rested its case, any valid voluntary dismissal with prejudice must be by one of these other two methods. *See, e.g.*, *Pardue*, 148 N.C. App. at 155 (noting that plaintiff retains the option of applying "to the court under Rule 41(a)(2)").

b. "Rests His Case" and Summary Judgment. The most obvious interpretation of "before the plaintiff rests his case" is that the plaintiff may make a notice of voluntary dismissal up to the time it rests its case *at trial*. Our courts, however, have also applied the

concept in the summary judgment context, holding that that a party may not make a notice of dismissal after completing its *summary judgment* argument before the court rules on the summary judgment motion. In *Maurice v. Hatterasman Motel Corporation*, 38 N.C. App. 588, 591–92 (1978), the court reasoned that

> The decision of the court resulting from a motion for summary judgment is one on the merits of the case. All parties have an opportunity to present evidence on the question before the court. Where a party appears at a summary judgment hearing and produces evidence or is given an opportunity to produce evidence and fails to do so, and the question is submitted to the court for decision, he has "rested his case" within the meaning of Rule 41(a)(1)(i)[.] He cannot thereafter take a voluntary dismissal under Rule 41(a)(1)(i). *To rule otherwise would make a mockery of summary judgment proceedings.*

(emphasis added); *see also* Troy v. Tucker, 126 N.C. App. 213, 215-16 (1997) (voluntary dismissal unauthorized after plaintiff concluded her summary judgment argument). The rule stated in *Maurice* remains the law, but the court in a later opinion noted that the practicalities of applying the "resting" restriction to summary judgment are "less clear" than when applying it to "the actual trial of [the] action" because "on many occasions . . . the conduct of a summary judgment hearing in our trial courts is a fairly informal proceeding." Wesley v. Bland, 92 N.C. App. 513, 514–15 (1988). The court has thus refined the rule as follows:

> For purposes of summary judgment motions, this Court holds that the record must show that plaintiff has been given the opportunity at the hearing to introduce any evidence relating to the motion and to argue his position. Having done so and submitted the matter to the Court for determination, plaintiff will then be deemed to have "rested his case" for the purpose of summary judgment and will be precluded thereafter in dismissing his case pursuant to Rule 41 during the pendency of the summary judgment motion.

Id. at 515. Thus a plaintiff did not rest its case at summary judgment where its attorney took a voluntary dismissal at the hearing in lieu of taking his turn to argue his client's position. *Id.* at 514. Nor did a plaintiff rest its case where its attorney made

clear at the hearing that she did not intend to argue her client's case against summary judgment until the court had ruled on her motion to amend, and once the motion to amend was denied, she took a voluntary dismissal rather than argue the summary judgment motion or otherwise "submit[ ] the issue of summary judgment to the trial court for determination." Alston v. Duke Univ., 133 N.C. App. 57, 61–62 (1999). (Practical note: Demonstrating whether or not a party has engaged in argument at the hearing generally will require a transcript of the proceeding.)

Our courts have also held that when a plaintiff argues against a dispositive motion relating *not* to the actual allegations set out in the complaint (*i.e.*, the plaintiff's "case-in-chief"), but rather some other "factual basis for [defendant's] motion," the plaintiff has not "rested his case" for purposes of Rule 41(a)(i)(1). For example, in *Schnitzlein v. Hardee's Food Systems, Inc.*, 134 N.C. App. 153 (1999), plaintiff argued against a motion to dismiss on the basis that the complaint was preempted by ERISA. *Id.* at 156–57. The court held that plaintiff's subsequent voluntary dismissal was permitted because the parties' motion argument had pertained to the application of ERISA rather than to the merits of plaintiff's allegations against defendant. *Id.* at 158; *see also* Lowe v. Bryant, 55 N.C. App. 608, 611 (1982) (argument against motion to dismiss for failure to pay a bond did not constitute resting case, and subsequent voluntary dismissal was allowed).

2. Not Allowed if Adversary Seeks Affirmative Relief. An important restriction on a plaintiff's right to make notice of voluntary dismissal comes not from the text of Rule 41, but from long-standing case law. Our courts have held that a plaintiff may not unilaterally take a voluntary dismissal if the defendant has likewise stated a claim for affirmative relief arising out of the same transaction or occurrence alleged in plaintiff's complaint. McCarley v. McCarley, 289 N.C. 109, 113 (1976). If the defendant has made a request for such relief, defendant's consent is required for plaintiff's voluntary dismissal *Id.* at 111–12. In *Maurice v. Hatterasman Motel Corporation*, 38 N.C. App. 588, 592 (1978), for example, plaintiff could not voluntarily dismiss his quiet title action where defendant had filed a counterclaim alleging his sole ownership of the property. And in *Layell v. Baker*, 46 N.C. App. 1, 6 (1980), defendant's negligence counterclaim prevented plaintiff from dismissing his negligence action. If the defendant's counterclaim is factually independent of plaintiff's allegations, however, the plaintiff may proceed with a voluntary dismissal. *McCarley*, 289 N.C. at 112. And if the plaintiff and defendant simultaneously dismiss their respective claims, the effect is the same as consent to or stipulation of dismissal. Gilliken v. Pierce, 98 N.C. App. 484, 486–87 (1990).

Our courts define a request for affirmative relief as "relief for which defendant might maintain an action independently of plaintiff's claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it." Williams v. Poland, 154 N.C. App. 709, 712 (2002) (quotation omitted). Thus a motion under Rule 12(b)(6) to dismiss plaintiff's claim was not a request for "affirmative relief" that would have prevented plaintiff from filing a notice of voluntary dismissal. *Id.* at 712. Nor was a motion for attorney fees or a motion for summary judgment relating to plaintiff's claims. Kohn v. Mug-a-Bug, 94 N.C. App. 594, 596 (1989), *overruled on other grounds*, Bryson v. Sullivan 330 N.C. 644 (1992). Similarly, where defendant's indemnification claim (in this case, a cross-claim) was contingent upon plaintiff's recovery, it did not qualify as a request for affirmative relief. Travelers Ins. Co. v. Ryder Truck Rental, Inc., 34 N.C. App. 379, 381 (1977).

If a plaintiff has made a notice of voluntary dismissal despite defendant's qualifying request for affirmative relief, the proper procedural mechanism for defendant to challenge the dismissal is a "motion to set aside plaintiff's notice of dismissal" rather than a motion to strike the dismissal. *Travelers*, 34 N.C. App. at 380. *But see Layell*, 46 N.C. App. at 6 (discussing interesting procedural confusion after court immediately noticed a mistrial upon defendant's improper voluntary dismissal). Although a dismissal without prejudice is not a "final judgment, order, or proceeding", the use of Rule 60(b) has been approved as a procedural avenue for a motion to set aside such a dismissal. Bradley v. Bradley, 206 N.C. App. 249, 254 (2010); *see also* Section IX below.

B. Dismissal by Stipulation. Rule 41(a)(1)(ii) provides for voluntary dismissal without prejudice by "filing a stipulation of dismissal signed by all parties who have appeared in the action." Unlike unilateral notices of dismissal, such stipulations are not prohibited after a plaintiff rests its case; they may be filed any time before final judgment. Such a stipulation also does not count toward the two-dismissal rule, discussed in Section IV above. Stipulations of dismissal may also specify a refiling period shorter than one year. In practice, stipulations of dismissal often are used when both parties are dismissing their claims simultaneously. They are a useful tool for the parties to apportion costs amongst themselves. Sometimes parties will file such stipulations as a result of settlement, although often such dismissals are *with prejudice*.

C. Dismissal by Court Order. Rule 41(a)(2) provides for voluntary dismissal by order of court. Such a dismissal is without prejudice unless the court specifies otherwise. A dismissal by court order also tolls the applicable statute of limitations on plaintiff's claims for one year after dismissal "unless the judge shall specify in his order a shorter time." Two of the benefits of a dismissal pursuant to

court order are that (1) such a dismissal does not count toward the "two dismissal rule" (discussed in Section IV above); and (2) it can be still be obtained after plaintiff rests its case. *See, e.g.*, Pardue v. Darnell, 148 N.C. App. 152, 157 (2001) (noting that plaintiff retains the option of applying "to the court under Rule 41(a)(2)"). On the other hand, such dismissals are in the court's discretion and are to be made "upon such terms and conditions as justice requires." Courts, in general, should permit such dismissals where there are legitimate reasons the plaintiff cannot or should not continue his action and where the prejudice to defendant would not outweigh general considerations of justice. Official Comment, G.S. 1A-1, Rule 41(a)(2). *See also*, *e.g.*, King v. Lee, 279 N.C. 100, 107 (1971) (advising that a dismissal could be allowed if plaintiff could demonstrate that he would be able to put forth evidence); Thompson v. Town and Country Constr. Co., Inc., 39 N.C. App. 240, 242 (1978) (quoting the Official Comment).

VI. Circumstances Preventing Application of Tolling.

A. First Action Not Properly "Commenced".

1. In General. An action must be properly "commenced" prior to voluntary dismissal in order for Rule 41(a) to toll the statute of limitations in a subsequent action: Rule 41 "does not breathe life into an action already barred by the statute of limitations." Collins v. Edwards, 54 N.C. App. 180, 182–83 (1981). For example, in *Collins*, plaintiff failed to have a summons issued after filing her application to extend time to file a complaint under Rule of Civil Procedure 3(a). She later voluntarily dismissed the action and refiled outside the original statute of limitations. Because the summons was required in order to properly "commence" an action under that rule, plaintiff's second action was properly dismissed. *Id.* *See also* Sweet v. Boggs, 134 N.C. App. 173, 175 (1999) (complaint not "commenced" where plaintiff issued summons to personal representative but never amended complaint to allege cause of action against him).

2. Medical Malpractice — Failure to Include Rule 9(j) Certification. A complaint in a medical malpractice action must include the certification required by Rule of Civil Procedure 9(j). A dismissal pursuant to Rule 41(a) does not extend the time for filing the 9(j) certification past the expiration of the statute of limitations on the underlying claim (or 120-day extension).[3] For example, in *Bass v. Durham County Hospital Corporation*, plaintiff filed a complaint on the last day of a 120-day extension granted pursuant to Rule 9(j). 158 N.C. App. 217, 219 (2003), *reversed per curiam for reasons stated in dissent*, 358 N.C. 144 (2004). It contained no Rule 9(j) certification. Eleven days later, plaintiff filed an

[3] For more information regarding this special pleading requirement, see Ann M. Anderson, *Rule 9(j) of the Rules of Civil Procedure: Special Pleadings in Medical Malpractice Claims*, in this Benchbook.

amended complaint containing a Rule 9(j) certification. Plaintiff later dismissed her complaint and re-filed pursuant to Rule 41(a), this time including a Rule 9(j) certification. The trial court dismissed her complaint for failure to timely comply with the certification requirement. The Supreme Court affirmed the dismissal based on the dissenting opinion from the Court of Appeals, which concluded that "[p]laintiff's original complaint was not 'commenced within the time prescribed therefor' because plaintiff failed to comply with Rule 9(j) until after the original statute of limitations and the 120-day extension had expired." *Id*. at 223 (citing Thigpen v. Ngo, 355 N.C. 198 (2002)).

Similarly, in *McKoy v. Beasley,* a wrongful death claim based on medical malpractice was filed on April 7, 2007 with no Rule 9(j) certification. 213 N.C. App. 258, 260 (2011). The trial court dismissed the complaint on February 18, 2008 for failure to comply with Rule 9(j). The dismissal was without prejudice, but the trial court expressed "no opinion as to whether any re-filed action would be timely or untimely." *Id*. The plaintiff refiled the action on December 20, 2007, months after the original two-year statute of limitations had run. The new complaint contained a Rule 9(j) certification. *Id*. The Court of Appeals held that the action was untimely because there had been no Rule 9(j) certification filed prior to the expiration of the statute of limitations. *Id*. at 262–64 (citing *Bass* as the Supreme Court's prior overruling of Brisson v. Santoriello, 351 N.C. 589 (2000)). The court stated that "the defective original complaint cannot be rectified by a dismissal followed by a new complaint complying with Rule 9(j), where the second complaint is filed outside of the applicable statute of limitations." *Id.* at 263.

3. **Claims Filed in Bad Faith.** Voluntary dismissal of a complaint clearly filed in violation of Rule 11(a)'s good faith certification requirement does not extend the statute of limitations pursuant to Rule 41(a)(1). In *Estrada v. Burnham*, 316 N.C. 318 (1986), plaintiff, through counsel, filed a "bare bones" negligence complaint against a physician. Two minutes later, counsel for plaintiff filed a notice of voluntary dismissal of the complaint. The three-year statute of limitations expired the next day. Within one year of the voluntary dismissal, plaintiff filed a second negligence action against defendant. *Id.* at 319–20. Later, in court, counsel "in complete frankness, conceded that neither he nor anyone else ever attempted to serve the summons and complaint or the notice of dismissal . . . on defendant." *Id.* at 320. The North Carolina Supreme Court stated that although Rule 41(a)(1) contains no good-faith filing requirement of its own, it must be read in conjunction with Rule 11(a), and thus cannot operate to extend the statute of limitations on a "sham and false" complaint. *Id.* at 323. Because counsel admitted there was no intention to prosecute the first action, and that its sole purpose was to gain a one-year extension, the complaint "should be stricken and treated as if it had

never been filed." *Id.* at 325. Because the second action was, therefore, filed outside the statute of limitations, the trial court properly dismissed it. *Id.* at 325–26.

In *Hawkins v. State*, 117 N.C. App. 615 (1995), defendants argued that *Estrada* applied where plaintiff dismissed its complaint two months after filing. The Court of Appeals noted that the timing of this dismissal was decidedly less extreme than in *Estrada*, and that, most significantly, the plaintiff made no judicial admission of a lack of intent to prosecute. Plaintiff would, therefore, be allowed to take advantage of Rule 41(a)(1)'s savings provision. *Id.* at 623–24.

B. First Action Not Served Prior to Voluntary Dismissal. A frequent pitfall in attempting to use the savings provision is failing to properly serve the defendant in the original action prior to taking a voluntary dismissal. Defective service under Rule 4 of the first complaint prior to expiration of the statute of limitations prevents a plaintiff from invoking Rule 41(a)(1)'s extension of the statute of limitations in a later-filed action. In *Hall v. Lassiter*, 44 N.C. App. 23 (1979), for example, plaintiff served defendants at the place of their incorporated business rather than their "dwelling house or usual place of abode" as required by Rule 4(j)(1). Plaintiff did not thereafter attempt service by another method nor request an alias and pluries summons. Several months later, plaintiff voluntarily dismissed the complaint and filed a second complaint on the same day. *Id.* at 26. Affirming dismissal of the second complaint, the Court of Appeals concluded that defendants "were not served properly and the [original] action . . . was discontinued pursuant to Rule 4(e) well before plaintiff voluntarily attempted to dismiss the action pursuant to Rule 41(a)(1)." *Id.* at 27.

Proper service under Rule 4 must be made within 60 days after the date the summons is issued. N.C. R. CIV. P. 4(c). If service is not made by the time day 60 passes, the action is still alive, but the summons is "dormant" and cannot be validly served unless extended by an endorsement or issuance of an alias and pluries summons. The deadline to extend the summons is 90 days after the issuance of the original summons (or 90 days after the last extension). N.C. R. CIV. P. 4(d). When a summons is not extended before the 90 days expires, the action is "discontinued" as to any defendant not served. N.C. R. CIV. P. 4(e). For any alias and pluries summons issued after that date, "the action shall be deemed to have commenced on the date of such issuance or endorsement." *Id.* This resetting of the commencement date will cause a plaintiff to run afoul of a limitations period expiring before the 90 days is up. And Rule 41(a)'s savings provision will not apply to a second action if the first action was, in effect, "commenced" outside the statute of limitations: "Rule 41 does not authorize a party to take a dismissal without prejudice of a previous action barred by the statute of limitations and then refile the action in order to avoid the statute of limitations." Ready Mix Concrete v. Sales Corp., 36 N.C. App. 778, 782 (1978). In *Camara v. Gbarbera*, 191 N.C. App. 394 (2008), for example, plaintiffs filed a

negligence action a few days prior to the expiration of the original statute of limitations. *Id.* at 395. Plaintiffs thereafter obtained an alias and pluries summons within the 90 days allowed by Rule 4(d), but served it on defendants *after* the 60 days allowed by Rule 4(c). They then obtained another alias and pluries summons, but never served it. Relying to their detriment on their service of the first alias and pluries summons, plaintiffs voluntarily dismissed their complaint and refiled the next month. *Id.* at 396. The court held that because plaintiffs did not timely serve the complaint in the first action pursuant to Rule 4—thus causing the action to discontinue—the "the statute of limitations did not toll." *Id.* at 397. *See also* Latham v. Cherry, 111 N.C. App. 871, 873-74 (1993) (failure to serve copy of the order extending time to file her complaint and civil summons caused statute of limitations to lapse prior to voluntary dismissal); Johnson v. City of Raleigh, 98 N.C. App. 147, 150 (1990) (service upon city was by improper method and not corrected prior to voluntary dismissal); Wheeler v. Roberts, 45 N.C. App. 311, 313 (1980) (plaintiff's failure to comply with Rule 4(d) caused statute of limitations to lapse prior to filing of second complaint); Carl Rose & Sons Ready Mix Concrete, Inc. v. Thorp Sales Corp., 36 N.C. App. 778, 781 (1978) (same); Sawyer v. Ruiz, __ N.C. App. __, 758 S.E.2d 707 (2014) (unpublished) (plaintiff failed to serve any of twelve alias and pluries summonses issued prior to voluntary dismissal).

Even if plaintiff creates a rebuttable presumption of valid service and has a good faith belief that service was proper in the first action, defendant can rebut that presumption when the second action is filed, entitling defendant to dismissal on statute of limitations grounds. In *Lawrence v. Sullivan*, 192 N.C. App. 608, 610–11 (2008), plaintiff's first action was by certified mail signed for by "James Holt." In the second action, defendant showed she did not reside at the address where the first summons had been served in the previous action and that she did not receive papers signed for by James Holt. The first action, was, therefore, never tolled under Rule 41(a). *Id.* at 622–23.

VII. Filing Subsequent Action.

A. When One-Year (or Shorter) Period Begins. The time period within which a party may file a subsequent complaint after voluntary dismissal begins to run as follows:

1. Dismissal by Notice (Voluntary Dismissal).

a. General Rule. If the first action is dismissed by notice, the one-year refiling period begins to run at the *earlier* of (1) the date the plaintiff states the dismissal in open court; or (2) the date the plaintiff files a written notice of dismissal with the clerk of court. If the plaintiff has stated its dismissal in open court, no subsequent written notice is required. Danielson v. Cummings, 300 N.C. 175, 179 (1980); *see also* Cassidy v. Cheek, 308 N.C. 670, 674 (1983) (stating the rule). If the plaintiff does file a subsequent written notice, however, the date the one-year period begins to run is *still*

the date that the dismissal was stated in open court. *Danielson*, 300 N.C. at 180; *see also Cassidy*, 308 N.C. at 674 (restating the rule). In *Danielson*, plaintiff's counsel gave notice of voluntary dismissal in open court, and the trial judge stopped the trial and dismissed the jury. Three months later, plaintiff filed a written notice of dismissal. Plaintiff's second action was filed one year and fourteen days after plaintiff made notice of dismissal in open court. Because the one-year refiling period ran from the date of oral notice, the second complaint was untimely. *Danielson*, 300 N.C. at 178–180.

b. Limited Exception. If plaintiff's counsel announces in court an intention to take a voluntary dismissal, and the judge then *permits or instructs* plaintiff to file written notice during the same session, the refiling period begins to run as of the date written notice is filed. This exception was stated in *Thompson v. Newman*, 331 N.C. 709 (1992), in which counsel announced before trial that his client would take a voluntary dismissal. The judge then said, "All right. Thank you. I'm sure it's a difficult matter, *and you may file that later in the week*." The courtroom clerk's minutes also reflected a notice "to be filed by atty[.]" The notice was then filed two days later, and plaintiff filed a second action within one year of the notice's filing, but one year and a day after stating his dismissal in open court. Holding that the refiling was timely, the court held that,

> when a trial court instructs, or expressly permits, a plaintiff who has given oral notice . . . to file written notice to the same effect at a later date during the [same] session of court . . . the one-year period for refiling provided by the rule begins to run when written notice is filed.

Id. at 712. Relying on the *Thompson* exception is quite risky, however. Whether a judge has given "instruction" or "express permission" may ultimately be a matter of interpretation. In *Baker v. Becan*, 123 N.C. App 551 (1996), for example, plaintiff announced his "intention to file a written notice of dismissal" and that he planned to prepare the document upon returning to his office. Thus the judge did not hear the pending motions, and the courtroom clerk noted "V.D. to be filed by [counsel]." *Id.* at 552. Distinguishing these facts from *Thompson*, the Court of Appeals stated that the situation might suggest the trial judge's "tacit approval", but it was in no way "express permission" or "instruction." *Id*. at 554. Thus plaintiff's second action, filed more than a year after his counsel's statement in open court of his intent

to file notice of voluntary dismissal, was barred by the statute of limitations. *Id.*

2. **Dismissal by Stipulation.** If the original complaint is dismissed pursuant to the parties' stipulation, the one-year refiling period begins to run at the time the signed stipulation is filed with the clerk of court. Keyzer v. Amerlink, Ltd., 164 N.C. App. 761, 764–65 (2004) (one-year period did not begin to run at the time the parties' agreement to stipulate was announced in court).
3. **Dismissal Pursuant to Court Order.** The rule allowing voluntary dismissal by court order contemplates that the court will enter a written order of dismissal. Thus it appears that the refiling period (one year or whatever shorter period the order specifies) begins to run at the time the court's written order of voluntary dismissal is entered. Rule 41(a)(2).

B. "New Action Based on the Same Claim." After voluntary dismissal pursuant to Rule 41(a)(1) or (2), the one-year savings provision will only toll the statute of limitations on a "new action based on the same claim." In the time between voluntary dismissal and filing a second action, however, claimants often have reason to re-evaluate or reformulate their allegations. What new matters included for the first time in the second action will "relate back" to the first action for statute of limitations purposes?

1. **Do Not Relate Back:**
   a. **Independent Causes of Action.** An "independent cause of action with unique elements" alleged for the first time in a refiled action will not relate back to the date of filing of the first action. Staley v. Lingerfelt, 134 N.C. App. 294, 299 (1999). The statutes of limitations on such new claims are not, therefore, tolled pursuant to Rule 41(a). *Id*. This is true even if the claims arise from the same events as the claim(s) in the first action, because "defendants were not placed on notice that they would be asked to defend these claims within the time required by the statute of limitations." *Id.* In *Staley*, the plaintiff's voluntarily-dismissed action stated claims under 42 U.S.C. § 1983 and for loss of consortium. His second action stated additional claims for assault and battery, false arrest and imprisonment, malicious prosecution, intentional and negligent infliction of emotional distress, and trespass. As to each of the new claims, the original statute of limitations had run before the second action was filed. Because they were "independent causes of action with unique elements", they did not relate back to the first action. *Id.* at 299–300. Other representative cases:

      • Williams v. Lynch, __ N.C. App. __, 741 S.E.2d 373, 376–77 (2013). Plaintiff's first action against bank and closing attorney

alleged negligence. Upon refiling, plaintiff alleged professional malpractice, breach of contract, and conversion. The breach of contract and conversion claims, for which the original statute of limitations had already run, did not relate back to the first action and thus were properly dismissed. Because the professional malpractice claim was essentially a relabeling of the original negligence claim, it related back to the original complaint and was tolled under Rule 41(a).

- Losing v. Food Lion, L.L.C., 185 N.C. App. 278, 284 (2007). The original complaint stated claims for defamation and negligent infliction of emotional distress. An additional claim for invasion of privacy appearing in the second action—for which the original statute of limitations had run at the time of filing—was properly dismissed as time-barred. *See also* Barbee v. Transit Management of Charlotte, __ N.C. App. __, 745 S.E.2d 375, *5 (2013) (unpublished) (citing *Losing* in affirming dismissal of claims stated for the first time in second action, except Ch. 75 claim for which original limitations period had not yet run).

- Renegar v. R.J. Reynolds Tobacco Co., 145 N.C. App. 78, 85 (2001). Original complaint, filed in federal court, stated various federal law and constitutional claims against employer. The second action, filed in state court, alleged a state wrongful discharge claim for which the original statute of limitations had run. Although the federal claims and the wrongful discharge claim "arose from the same event," they were unique causes of action, and thus the wrongful discharge claim did not relate back to the filing of the first action.

- Stanford v. Owens, 76 N.C. App. 284, 289 (1985). Plaintiff's first complaint alleged negligent misrepresentation. Upon refiling, the plaintiff added a claim for fraud. The fraud claim—a "fundamentally different" claim that was "filed for the first time seven years after it accrued"—could not relate back to the filing of the original complaint.

- Strawbridge v. Sugar Mountain Resort, Inc., 243 F. Supp. 2d 472, 479–480 (2003) (citing *Stanford*, 76 N.C. App. at 289). A second complaint alleging a claim under the Uniform Fraudulent Claims Act—a claim "analogous to the common law tort of fraud"—was not tolled under Rule 41(a) where

original, voluntarily-dismissed action was based on negligence.

b. Claims Against "Distinct and Separate" Defendant. Plaintiff voluntarily dismissed its complaint against "Reinsurance Intermediaries, Inc." In its second action, it named as defendant "R/I aka Reinsurance Intermediaries," and stated substantially the same allegations. Although the two corporations shared officers and an address, they were "distinct and separate corporate entities." Thus the second complaint, filed after the original statute of limitations had run, did not relate back to the original complaint. Cherokee Ins. Co. By & Through Weed v. R/I, Inc., 97 N.C. App. 295, 296–97 (1990).

2. Likely Relate Back:

a. Certain Damages Related to Existing Claims.

i. Punitive Damages. If a party seeks punitive damages for the first time in a refiled action incident to the same causes of action sought in the previously-dismissed complaint, the request for punitive damages typically will relate back to the filing of the first action. Holley v. Hercules Inc., 86 N.C. App. 624, 627–28 (1987). In *Holley*, the first action stated "an adequate factual basis" for a jury to find that defendant had acted in reckless disregard for plaintiff's safety. The failure to specifically request punitive damages—which are not a separate, cognizable cause of action on their own—did not prevent plaintiff from seeking them in a subsequent action. *Id.* at 628; *see also* Staley v. Lingerfelt, 134 N.C. App. 294, 299–300 (1999) (allowing punitive damages for the first time in refiled complaint against officer sued in his individual capacity under 42 U.S.C. § 1983).

ii. Emotional Damages. Plaintiff's second complaint was essentially identical to his first, but the second alleged for the first time that Defendant's negligence had caused plaintiff emotional harm. The court explained that this request for damages was not a separate cause of action (such as negligent or intentional infliction of emotional distress), but rather was a "description of the damage that he claims to have suffered" due to the negligence that already had been alleged in the first action. Thus the trial court erred in dismissing the request for compensation for emotional harm. Royster v. McNamara, 218 N.C. App. 520, 532–33 (2012).

b. Certain Claims Derivative of Existing Claims.

i. **Loss of Consortium.** Plaintiff voluntarily dismissed his first negligence action. His second action included for the first time his wife's claim for loss of consortium. The statute of limitations for loss of consortium expired after plaintiff's voluntary dismissal and before the filing of the second action. The court, however, determined that the loss of consortium claim was derivative of plaintiff's underlying negligence claims, and because his first complaint had been dismissed, the wife's claim could not have been brought at the time the original statute of limitations expired. Because her claim "was required to be joined with his personal injury claim," the time for filing her derivative cause of action was "coextensive with the time within which he could re-file his personal injury claim." Sloan v. Miller Building Corp., 128 N.C. App. 37, 41(1997).

ii. **Piercing the Corporate Veil.** In *Strawbridge*, the federal district court found that an allegation of piercing the corporate veil could relate back to the filing date of the original action against the corporation because piercing, in general, is "a method of imposing liability on an underlying cause of action," and is a derivative rather than independent cause of action. 243 F. Supp. 2d at 479.

C. Payment of Costs. A plaintiff who has voluntarily dismissed an action under Rule 41(a) (unilaterally or by stipulation) must pay the costs of the action unless the action was brought *in forma pauperis*. Rule 41(d); *see* G.S. 7A-305(d) (listing assessable costs). If plaintiff refiles an action "based upon or including the same claim against the same defendant" and has not already paid the costs of the first action, the court must, on defendant's motion, order payment within 30 days and stay the proceedings until payment is made. If the plaintiff does not comply with the order, the court shall dismiss the action. *Id.* Dismissal for failure to pay costs within the time allowed is mandatory. Kahn v. Sturgil, 66 F.R.D. 487, 491 (M.D.N.C. 1975); Sanford v. Starlite Disco, Inc., 66 N.C. App. 470, 471–72 (1984). The 30-day time limit may not be extended under Rule of Civil Procedure 6(b). Welch v. Lumpkin, 199 N.C. App. 593, 596–97 (2009).

VIII. Federal Court and North Carolina's Rule 41(a). Unlike the North Carolina Rule, Federal Rule of Civil Procedure 41 contains no savings provision tolling the statute of limitations for a period of time after an action is dismissed. Renegar v. R.J. Reynolds Tobacco Co., 145 N.C. App. 78, 81 (2001). Whether a plaintiff who voluntarily dismisses state law claims from a federal court action may take advantage of North Carolina's Rule 41(a) savings provision "is governed by *how* the federal court gained jurisdiction over the state issues." Harter v. Vernon, 139 N.C. App. 85, 92 (2000).

A. Diversity Jurisdiction. When a plaintiff voluntarily dismisses a case in which the federal court sits in diversity jurisdiction applying North Carolina substantive law, the plaintiff *is* entitled to the benefit of the savings provision pursuant to North Carolina's Rule 41 when refiling in either federal court or state court. Bockweg v. Anderson, 328 N.C. 436, 441–42 (1991); *Renegar*, 145 N.C. App. at 80; *Harter*, 139 N.C. App. at 93–94. Similarly, when a plaintiff first brings an action in state court, then voluntarily dismisses it and refiles in federal court under the court's diversity jurisdiction, the statute of limitations on the state law claims is tolled pursuant to North Carolina Rule 41(a). Strawbridge v. Sugar Mtn Resort, Inc., 243 F. Supp. 2d 472, 477 (W.D.N.C. 2003); Porter v. Groat, 713 F. Supp. 893, 896–97 (M.D.N.C. 1989).

B. Supplemental Jurisdiction. When the federal court has federal question jurisdiction over a case, and has only obtained jurisdiction over plaintiff's state law claims *supplementally* pursuant to 28 U.S.C. §1367, North Carolina's Rule 41(a) savings provision does *not* apply to toll the statute of limitations on the state law claims beyond the 30-day tolling provided by federal law. *Harter*, 139 N.C. App. at 93–94; *Renegar*, 145 N.C. App. at 83. *See also* Glynne v. Wilson Medical Ctr. __ N.C. App. __, 762 S.E.2d 645 (2014) (discussing application of 28 U.S.C. § 1367 in North Carolina courts).

C. Actions Under 42 U.S.C. § 1983. Although actions under § 1983 involve federal question jurisdiction, North Carolina's savings provision *may* nevertheless apply to supplemental jurisdiction actions where the federal question involves a claim under § 1983. *See, e.g.*, Leardini v. Charlotte-Mecklenburg Board of Educ., 2011 WL 1234743 (W.D.N.C. 2011) (unpublished) (discussing *Board of Regents of the Univ. of the State of New York v. Tomanio,* 446 U.S. 478, 483–84 (1980), and declining to grant summary judgment against defendant refiling § 1983 and state law claims after voluntary dismissal in federal court). Actions under 42 U.S.C. § 1983 and other civil rights statutes are a complex area of litigation; parties are strongly encouraged to seek the advice of counsel well-versed in federal jurisdiction before determining the impact of voluntary dismissal of such an action.

IX. Rule 60(b) for Relief From Voluntary Dismissal. Rule of Civil Procedure 60(b) is an appropriate mechanism for seeking relief from a voluntary dismissal *with prejudice*. Carter v. Clowers, 102 N.C. App. 247, 252 (1991). If a party has dismissed its case *without prejudice*, however, that party may not seek relief from that dismissal under Rule 60(b) because a dismissal without prejudice is not a "[final] order, judgment or proceeding," at least during the one-year refiling period. Troy v. Tucker, 126 N.C. App 213, 215 (1997); Robinson v. General Mills Restaurants, Inc., 110 N.C. App. 633, 637 (1993). *But see* In re E.H., __ N.C. App. __, 742 S.E.2d 844, 847-48 (2013) (allowing a Rule 60(b) motion to relieve a dismissal without prejudice in a juvenile case because "[n]o judgment or order is ever truly 'final' in the juvenile context."). When the party

seeking to have the plaintiff's dismissal without prejudice set aside is the *opposing party*, however, our appellate courts have approved of the use of Rule 60(b). Bradley v. Bradley, 206 N.C. App. 249, 254 (2010) (citing *Carter v. Clowers* as authority without discussing the fact that *Carter* dealt with a dismissal *with prejudice*).

Appendix: North Carolina Rule of Civil Procedure 41
(N.C. Gen. Stat. § 1A-1, Rule 41)

Rule 41. Dismissal.

(a) **Rule 41. Dismissal of actions**

(a) Voluntary dismissal; effect thereof. –

(1) By Plaintiff; by Stipulation. -- Subject to the provisions of Rule 23(c) and of any statute of this State, an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case, or; (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal unless a stipulation filed under (ii) of this subsection shall specify a shorter time.

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

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

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

(d) Costs. -- A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the costs of the action unless the action was brought in forma pauperis. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant before the payment of the costs of the action previously dismissed, unless such previous action was brought in forma pauperis, the court, upon motion of the defendant, shall make an order for the payment of such costs by the plaintiff within 30 days and shall stay the proceedings in the action until the plaintiff has complied with the order. If the plaintiff does not comply with the order, the court shall dismiss the action.