Article 5.

Depositions and Discovery.

Rule 26. General provisions governing discovery.

(a) Discovery methods. – Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. – Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. – Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it grounds for objection that the examining party has knowledge of the information as to which discovery is sought. For the purposes of these rules regarding discovery, the phrase "electronically stored information" includes reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author, and recipients. The phrase does not include other metadata unless the parties agree otherwise or the court orders otherwise upon motion of a party and a showing of good cause for the production of certain metadata.

(1a) Limitations on Frequency and Extent. – The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(1b) Specific Limitations on Electronically Stored Information. – In addition to any limitations imposed by subdivision (b)(1a) of this rule, discovery of electronically stored information is subject to the limitations set forth in Rule 34(b). The court may specify conditions for the discovery, including allocation of discovery costs.

(2) Insurance Agreements. – A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is

not by reason of disclosure admissible in evidence at trial. For purposes of this subsection, an application for insurance shall not be treated as part of an insurance agreement.

(2a) Bankruptcy Trust Personal Injury Claims. –

a. Within 30 days after a civil action is filed asserting personal injury claiming disease based upon exposure to asbestos, the plaintiff shall provide to all parties a sworn statement indicating that an investigation of all bankruptcy trust claims has been conducted and that all bankruptcy trust claims that can be made by the plaintiff have been filed.

b. The plaintiff shall provide the parties with the identity of all bankruptcy trust claims made and all materials submitted to or received from a bankruptcy trust.

c. The plaintiff shall supplement the information and materials that plaintiff provides pursuant to this subsection within 30 days after the plaintiff files an additional bankruptcy trust claim, supplements an existing bankruptcy trust claim, or receives additional information or materials related to any claim against a bankruptcy trust.

d. If a defendant has a reasonable belief that the plaintiff can file additional bankruptcy trust claims, the defendant may move the court to stay the civil action until the plaintiff files the bankruptcy trust claim.

e. A defendant in the civil action may seek discovery from a bankruptcy trust. The plaintiff may not claim privilege or confidentiality to bar discovery and shall provide consent or other expression of permission that may be required by the bankruptcy trust to release information and materials sought by the defendant.

(3) Trial Preparation; Materials. – Subject to the provisions of subsection (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's consultant, surety, indemnitor, insurer, or agent only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court may not permit disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation in which the material is sought or work product of the attorney or attorneys of record in the particular action.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (i) a written statement signed or otherwise adopted or approved by the person making it, or (ii) a stenographic, mechanical, electrical, or other recording, or

a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation; Discovery of Experts. – Discovery of facts known and opinions held by experts, that are otherwise discoverable under the provisions of subdivision (1) of this subsection and acquired or developed in anticipation of litigation or for trial, may be obtained only as provided by this subdivision:

a. 1. In general. – In order to provide openness and avoid unfair tactical advantage in the presentation of a case at trial, a party must disclose to the other parties in accordance with this subdivision the identity of any witness it may use at trial to present evidence under Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence.

2. Witnesses providing a written report. – The parties shall have the option, in connection with the disclosures required by this subdivision, of accompanying the disclosure with a written report prepared and signed by the witness if the witness is one retained or specifically employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. If the parties agree to accompany their disclosure pursuant to this subdivision with a written report, the report must contain all of the following:

I. A complete statement of all opinions the witness will express and the basis and reasons for them.

II. The facts or data considered by the witness in forming them.

III. Any exhibits that will be used to summarize or support them.

IV. The witness' qualifications, including a list of all publications authored in the previous 10 years.

V. A list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition.

VI. A statement of the compensation to be paid for the study and testimony in the case.

3. Witnesses not providing expert reports. – Unless otherwise stipulated to by the parties, or ordered by the court, a party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify pursuant to Rule 702, Rule 703, or Rule 705 of the North Carolina Rules of Evidence and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

b. Depositions. –

1. Depositions of an expert who may testify. – A party may depose any person who has been identified as an expert pursuant to this subdivision, with such deposition to be conducted after any written report is provided or identification

by response to interrogatory has been made pursuant to sub-subdivision f. of this subdivision.

2. Expert employed only for trial preparation. – Except as otherwise provided in this sub-sub-subdivision, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. A party may take such discovery only as provided in Rule 35(b) or upon showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

c. Payment. – Unless manifest injustice would result and absent court order, the party seeking discovery under sub-subdivision b. of this subdivision shall pay the expert a reasonable fee for the time spent at that expert's deposition.

d. Trial preparation protection for draft reports or disclosures. – Drafts of reports provided under sub-sub-subdivision 2. of sub-subdivision a. of this subdivision are protected from disclosure and are not discoverable regardless of the form in which the draft is recorded.

e. Trial preparation protection for communications between a party's attorney and expert witness. – Except as otherwise provided in this sub-subdivision, communications between a party's attorney and any witness providing a report pursuant to sub-sub-subdivision 2. of sub-subdivision a. of this subdivision or identified under sub-sub-subdivision 3. of sub-subdivision a. of this subdivision, regardless of the form of the communication, are protected from disclosure and are not discoverable. Such communications are discoverable only to the extent that the communications do any of the following:

1. Relate to compensation for the expert's study or testimony.
2. Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed.
3. Identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

f. Time to disclose expert witness testimony. – Parties agreeing to the submission of written reports pursuant to sub-sub-subdivision 2. of sub-subdivision a. of this subdivision or parties otherwise seeking to obtain disclosure as set forth herein by interrogatory shall, unless otherwise stipulated, set by scheduling order or otherwise ordered by the court, serve such written report or in the case of no agreement on the submission of written reports, interrogatory:

1. At least 90 days before the date set for trial or the case to be ready for trial; or
2. If the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under sub-subdivision a. of this subdivision, within 30 days after the other party's disclosure. If a party fails to provide timely disclosure under this rule, the court may, upon motion, take such action as it deems just, including ordering that the

party may not present at trial the expert witness for whom disclosure was not timely made.

The time requirements of this sub-subdivision shall not apply if all parties had less than 120-days' notice of the trial date.

g. Supplementation. – The parties must supplement these disclosures when required under subsection (e) of this rule.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

a. Information withheld. – When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must (i) expressly make the claim and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

b. Information produced. – If information subject to a claim of privilege or protection as trial-preparation material is inadvertently produced in response to a discovery request, the party that produced the material may assert the claim by notifying any party that received the information of the claim and basis for it. After being notified, a party (i) must promptly return, sequester, or destroy the specified information and any copies it has, (ii) must not use or disclose the information until the claim is resolved, (iii) must take reasonable steps to retrieve the information if the party disclosed it before being notified, and (iv) may promptly present the information to the court under seal for determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) Protective orders. – Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the judge of the court in which the action is pending may make any order which justice requires to protect a party or person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (i) that the discovery not be had; (ii) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (iii) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (iv) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (v) that discovery be conducted with no one present except persons designated by the court; (vi) that a deposition after being sealed be opened only by order of the court; (vii) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (viii) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

A party seeking a protective order on the basis that electronically stored information sought is from a source identified as not reasonably accessible because of undue burden or cost has the burden of showing that the basis exists. If the showing is made, the court may nonetheless order discovery from the source if the requesting party shows good cause, but only after considering the limitations of subsection [subdivision] (b)(1a) of this rule.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and timing of discovery. – Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of

discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. Any order or rule of court setting the time within which discovery must be completed shall be construed to fix the date after which the pendency of discovery will not be allowed to delay trial or any other proceeding before the court, but shall not be construed to prevent any party from utilizing any procedures afforded under Rules 26 through 36, so long as trial or any hearing before the court is not thereby delayed.

(e) Supplementation of responses. – A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the party's response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the party's response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which (i) the party knows that the response was incorrect when made, or (ii) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) Discovery meeting, discovery conference, discovery plan. –

(1) No earlier than 40 days after the complaint is filed in an action, any party's attorney or an unrepresented party may request a meeting on the subject of discovery, including the discovery of electronically stored information. If such a request is filed, the parties shall meet in the county in which the action is pending not less than 21 days after the initial request for a meeting is filed and served upon the parties, unless agreed otherwise by the parties or their attorneys and unless an earlier time for the meeting is ordered by the court or agreed by the parties. Even if the parties or their attorneys do not seek to have a discovery meeting, at any time after commencement of an action the court may direct the parties or their attorneys to appear before it for a discovery conference.

(2) During a discovery meeting held pursuant to subdivision (f)(1) of this rule, the attorneys and any unrepresented parties shall (i) consider the nature and basis of the parties' claims and defenses and the possibilities for promptly settling or resolving the case and (ii) discuss the preparation of a discovery plan as set forth in subdivision (f)(3) of this rule. Attorneys for the parties, and any unrepresented parties, that have appeared in the case are jointly responsible for arranging the meeting, for being prepared to discuss a discovery plan, and for attempting in good faith to agree on a discovery plan. The meeting may be held by telephone, by videoconference, or in person, or a combination thereof, unless the court, on motion, orders the attorneys and the unrepresented parties to attend in person. If a discovery plan is agreed upon, the plan shall be submitted to the court within 14 days after the meeting, and the parties may request a conference with the court regarding the plan. If the parties do not agree upon a discovery plan, they shall submit to the court within 14 days after

the meeting a joint report containing those parts of a discovery plan upon which they agree and the position of each of the parties on the parts upon which they disagree. Unless the parties agree otherwise, the attorney for the first plaintiff listed on the complaint shall be responsible for submitting the discovery plan or joint report.

(3) A discovery plan shall contain the following: (i) a statement of the issues as they then appear; (ii) a proposed plan and schedule of discovery, including the discovery of electronically stored information; (iii) with respect to electronically stored information, and if appropriate under the circumstances of the case, a reference to the preservation of such information, the media form, format, or procedures by which such information will be produced, the allocation of the costs of preservation, production, and, if necessary, restoration, of such information, the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation materials if different from that provided in subdivision (b)(5) of this rule, the method for asserting or preserving confidentiality and proprietary status, and any other matters addressed by the parties; (iv) any limitations proposed to be placed on discovery, including, if appropriate under the circumstances of the case, that discovery be conducted in phases or be limited to or focused on particular issues; (v) when discovery should be completed; and (vi) if appropriate under the circumstances of the case, any limitations or conditions pursuant to subsection (c) of this rule regarding protective orders.

(4) If the parties are unable to agree to a discovery plan at a meeting held pursuant to subdivision (f)(1) of this rule, they shall, upon motion of any party, appear before the court for a discovery conference at which the court shall order the entry of a discovery plan after consideration of the report required to be submitted under subdivision (f)(2) of this rule and the position of the parties. The order may address other matters, including the allocation of discovery costs, as are necessary for the proper management of discovery in the action. An order may be altered or amended as justice may require.

The court may combine the discovery conference with a pretrial conference authorized by Rule 16. A discovery conference in a medical malpractice action shall be governed by subsection (f1) of this rule.

(f1) Medical malpractice discovery conference. – In a medical malpractice action as defined in G.S. 90-21.11, upon the case coming at issue or the filing of a responsive pleading or motion requiring a determination by the court, the judge shall, within 30 days, direct the attorneys for the parties to appear for a discovery conference. At the conference the court may consider the matters set out in Rule 16 and subdivision (f)(3) of this rule and shall:

(1) Rule on all motions;

(2) Establish an appropriate schedule for designating expert witnesses, consistent with a discovery schedule pursuant to subdivision (3), to be complied with by all parties to the action such that there is a deadline for designating all expert witnesses within an appropriate time for all parties to implement discovery mechanisms with regard to the designated expert witnesses;

(3) Establish by order an appropriate discovery schedule designated so that, unless good cause is shown at the conference for a longer time, and subject to further orders of the court, discovery shall be completed within 150 days after the order is issued; nothing herein shall be construed to prevent any party from utilizing any procedures afforded under Rules 26 through 36, so long as trial or any hearing before the court is not thereby delayed; and

(4) Approve any consent order which may be presented by counsel for the parties relating to subdivisions (2) and (3) of this subsection, unless the court finds that the terms of the consent order are unreasonable.

If a party fails to identify an expert witness as ordered, the court shall, upon motion by the moving party, impose an appropriate sanction, which may include dismissal of the action, entry of default against the defendant, or exclusion of the testimony of the expert witness at trial.

(g) Signing of discovery requests, responses, and objections. – Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in that attorney's name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state that party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the request, response, or objection and that to the best of the knowledge, information, and belief of that attorney or party formed after a reasonable inquiry it is: (1) consistent with the rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee. (1967, c. 954, s. 1; 1971, c. 750; 1975, c. 762, s. 2; 1985, c. 603, ss. 1-4; 1987, c. 859, s. 3; 2011-199, s. 2; 2015-153, s. 1; 2018-4, s. 1.)