

# Federal civil trials teeter on the edge of extinction

As criminal cases take priority and pressure to mediate grows, judges anticipate the passing of civil juries

By SHARON McCLOSKEY, Staff Writer  
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In the 12 months ending Sept. 30, 2010, only one civil jury trial took place in federal court for the Eastern District of North Carolina. That wasn't because of a lack of cases. In fact, there were plenty — 1,780 cases were pending during that time period.

The Middle District fared a little

better, with four civil jury trials. The Western District saw nine civil jury trials in that period.

South Carolina thrived, in relative terms, with 46 civil jury trials.

No matter how you look at it — as a percentage of all pending cases, or in number of cases per judge in a district — and even after accounting for the usual fluctuations in case type and other factors, the numbers confirm what many

have been bemoaning in recent years: The civil jury trial is becoming extinct.

"The civil jury trial is said to be going the way of the buggy whip, the Edsel automobile, the typewriter and the American textile industry," U.S. District Judge Joseph F. Anderson, Jr. wrote in a 2010 article for the Federal Courts Law Review, "Where Have You Gone Spot Mozingo? A Trial Judge's Lament Over the Demise of the Jury Trial." Anderson,

who sits in South Carolina, only had to look at his own numbers for proof. In 1996, he tried 16 civil cases to a jury verdict. In 2009, he tried four.

It's no easy task getting a complaint to trial anymore. And hopes for a quick verdict once that complaint is filed are soon dashed. There's the push for non-jury resolutions — motions and media-

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Robert Orr  
reflects on past  
battles and those  
soon to be engaged

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After spending the past several years as the founding executive director of the N. C. Institute for Constitutional Law, former Supreme Court Justice Robert Orr is returning to private practice, joining Raleigh's Poyner Spruill.

It's the next step in the career of a man who shows little interest in retiring and little inclination to retreat from the issues that fuel his passion. And one who, throughout his career, has defied labels and expectations.

Although a Republican, Orr opposes the use of economic incentives to lure businesses to the state, and wrote the dissent in the Supreme Court's decision upholding the use of such incentives, *Maready v. Winston-Salem*. When he left the bench, Orr took that fight to the Institute for Constitutional Law.

He also authored the opinion confirming the constitutional right of all N.C. children to a sound and basic education (*Leandro II*), which is now at the heart of the battle between education advocates and the

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Photo by Donn Young

## New direction, same old fighting spirit

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The Industrial Commission overturns a 1976 agreement for which the plaintiff — who had permanently lost the use of both legs -- received no consideration and which allowed the defendants to stop paying benefits if plaintiff returned to work.

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Republican-controlled legislature. As he leaves the Institute, he's about to take that battle over student rights in a different direction.

Orr sat down recently with Lawyers Weekly staff reporter Sharon McCloskey to reflect on his career thus far and to share what lies ahead. An edited version of the interview follows.

**After spending the past several years as the executive director of the North Carolina Institute for Constitutional Law, you're moving on. Why now?**

When we started the Institute, one of the primary purposes was the incentive litigation. Although we did other things, and were successful in other matters, we essentially couldn't get past first base in having the courts revisit the *Maready* decision and take a broader look at the constitutional issues involving incentives. And that aspect of the initial mission was pretty well run out.

The second part of the original mission was education. We never really had a kind of comfortable fit with the advocacy on the one hand and neutral education on the other.

Also, we made a proposal to the law school at North Carolina Central [University], and there was some push back on that.

It's a good time for the Institute to re-evaluate its mission and decide the direction in which it wants to go. And a good time for me to move on.

**What went right, and what went wrong, with the incentive litigation?**

The initial guidance I was given was to bring a major lawsuit to attack the *Maready* decision, which was being used to sort of open the floodgates for incentives. We originally started looking at Merck, over in Durham, but then the Dell legislation hit, so we refocused on Dell. We poured an enormous amount of time and energy into a very broad-based constitutional attack in the Dell case. Then we go into court and we're facing the county attorneys from Forsyth, the city attorneys from Winston, the attorney general's office, Womble Carlyle, Jones Day – we're sitting there with two lawyers. We put a huge amount of resources into the Dell case and were unsuccessful.

In retrospect I think a better strategy would have been to start out with smaller, more limited challenges to incentives, rather than this sort of huge, broad-based approach. But who knew at that point in time what the best strategy would have been? If I had to do it all over again, though, I would have approached it in a strategically different way.

The other thing that I found over the years was that if you had real plaintiffs who were aggrieved, you had a much better chance to prevail – versus what I would consider to be public interest lawsuits where you go out and bring in individuals to serve as plaintiffs because they're interested in the principle of the case, but there's no damage to anybody other than the limited damage of having your tax dollars used for purposes you don't think are proper. We probably filed five or six other cases, after Dell, involving other aspects of incentives, and the courts were just not buying the arguments, and frankly were making worse law, from our



Photo by Donn Young

“ I worry about the state constitution. That may sound like a funny thing to say, but the law schools don't really put much focus on it. ”

perspective. So at a certain point you just have to say, “Look, this is not a good use of time and resources. And the courts have made up their mind. We see nothing that indicates that they're going to change anyway.”

**Do you think the current economy has an impact on how people react to incentives?**

The interesting thing is, we certainly raised the profile of the issue, both from a constitutional perspective and a public policy perspective. Elected officials and business people are far more attuned and sensitive to the issue. And consistently everybody says, “I really hate incentives, I wish we didn't have to do them. They're bad public policy.” It's just that there's no vehicle to limit them legally. And from a policy standpoint, everybody's terrified of the four-letter word “jobs.” They're not willing to do anything that would be perceived politically as reducing North Carolina's opportunity, even though they consistently say it's bad policy.

**With the filming of “Arthur Newman, Golf Pro” in North Carolina last month, there's been some renewed talk about film incentives. Your view?**

That's a specific offshoot of the historical incentive – you know, find a big manufacturer and subsidize its move to the state. The interesting thing about film incentives is the earned income tax credit. If a film company is entitled to \$4 million in tax credits, but only has a \$2 million tax liability, then the state writes them a check for the other \$2 million. That makes it a little different from the

normal incentive. Plus you're arguably not creating permanent jobs, though there are certainly benefits and values to the community where they're filming. There was a report a few weeks back that said our primary competition is Louisiana and South Carolina – everybody's in it. But there are a few states now that are starting to say, “Look, this is a no-win proposition, it doesn't make sense economically.” That does not seem to be the position of the political leadership of the state. In fact, the governor has pushed for greater use of them.

**Are you taking your fight against incentives to another team?**

Not really, though I hate losing, whether it's in sports or elections or the courts. I think going with a firm, particularly Poyner Spruill, offers a broad array of opportunities that really wasn't present in a small nonprofit with a limited focus. Obviously my experience and degree of expertise with issues like the state constitution, has a broader application, but I have other areas of interest.

**Tell us about those interests.**

I don't know if you've kept up with my involvement with the NCAA, and my representation of some of the UNC football players. I've become really interested in that area.

It first started when I read a newspaper story about the mother of a UNC football player [Devon Ramsey], who had been declared guilty of academic fraud and permanently ineligible. She drives all the way from New Jersey and sits in a coffee shop with a sports reporter, saying, “This just isn't right. What's

happened to my son is wrong.” Through an intermediary, I told Devon's mother that I'd be interested in talking about it, and gosh, once I got into it, I realized this kid had just been totally shafted. And like his mother said, you may not really care whether he plays football next year, but as a parent, when you see your child – granted he may have been 6-2, 240 pounds – labeled as guilty of academic fraud and unethical conduct, that has a lifelong impact, on their job opportunities and their post-graduate opportunities. And so I represented Devon in challenging what had happened to him.

The more I got into it, the more I was horrified, as a lawyer and former judge – you treat these kids like this. I mean, they really don't have any rights. One of the more prophetic phone calls I had was with the director of compliance for the NCAA and one of their staff lawyers. I said, “Where in this 435-page manual, that I've read, will you find something about the rights of these student athletes?” And there's this long silence, and finally one of them said, “That's a really good question.” And yet there are literally hundreds of millions, if not billions, at stake in the system. The money is driven on the backs of maybe five or six thousand elite athletes at the football and basketball competition level. I ended up representing three other players on some minor issues, and I followed and consulted on the [Michael] McAdoo case that's getting ready to go up on appeal.

As I told my wife, I need to stop picking issues that are mammoth and unsolvable. I'm not going to reform the NCAA. But maybe I can play a role in it.

You know there is all this attention, but it's sort of like incentives. Everybody says, “This is really terrible, the NCAA's terrible, the system's terrible, but we're making a lot of money off of this, and we don't really have any solutions.”

**So we can expect to see you more involved in NCAA issues?**

I spoke with Taylor Branch [author of “The Shame of College Sports,” Atlantic Monthly, Oct. 2011] who will be teaching at UNC in the spring.

And I've talked with a professor at NCCU, Emmett Gill, who has an interest in this as well. We've talked about getting a panel together, with Taylor Branch, maybe Jay Bilas and others. I tried to get the News & Observer to do a more expansive story on Devon's case, but the reporter said the editors just didn't think these players were sympathetic. I think they're starting to come around though, seeing that these players are just being used. As Emmett and I were just talking about – what's the tipping point? Maybe Penn State is the tipping point.

The most interesting thing I've heard – and you have to understand that I love college sports, I love Carolina. But I heard several of their higher-ups say, “Our first responsibility is to protect the institution.” If the players get thrown under the bus ... that's just an unfortunate casualty.

**You mention North Carolina Central University. Can you talk a bit about the controversy over the proposed Center for the North Carolina Constitution there?**

This originally came up when

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