

RULE 48
SETTING DOWN FOR TRIAL

WHEN AND BY WHOM ACTION MAY BE SET DOWN FOR TRIAL

48.01 After the close of pleadings and after a pre-trial conference judge authorizes trial dates, the matter will be set down for trial, together with any counterclaim or crossclaim, by the court.

HOW ACTION IS SET DOWN FOR TRIAL

Defended Action

48.02 (1) Where an action is defended, and after a pre-trial conference judge authorizes trial dates, the plaintiff shall serve a trial record prepared in accordance with Rule 48.03 on every party to the action or to a counterclaim or crossclaim in the action and on any third or subsequent party who has delivered a statement of defence in the main action, and forthwith file the trial record with proof of service no later than sixty days prior to the trial date.

Undefended Action

- (2) Subject to Rule 70, where the court orders the trial of an undefended action, the plaintiff shall contact the trial coordinator in writing to request the court to set a trial date and then file a trial record prepared in accordance with Rule 48.03, no later than sixty days prior to the trial date.
- (3) A judge may, on their own initiative or at a party's request, abridge the time for filing the trial record when the judge considers it necessary or advisable to do so.

TRIAL RECORD

- 48.03** (1) The trial record shall contain, in the following order,
- (a) a table of contents, describing each document by its nature and date;
 - (b) a copy of any jury notice;
 - (c) a copy of the pleadings, including those relating to any counterclaim or crossclaim;
 - (d) a copy of any financial statement delivered under Rule 70.14 or 71.04 or waiver of financial statements filed under subrule 70.14(3);
 - (e) a copy of any demand or order for particulars of a pleading or financial statement and the particulars delivered in

- response;
- (f) a copy of any notice of amounts and particulars of special damages delivered under subrule 25.06(9)(b);
 - (g) a copy of any order respecting the trial;
 - (h) a memorandum setting forth the number of witnesses proposed to be called, the number of expert witnesses proposed to be called, the number of documents proposed to be presented and an estimate of the number of hours or days required to present the case; and
 - (i) a certificate (Form 48B) signed by the solicitor for the plaintiff, stating,
 - (i) that the record contains the documents required by clauses (a) to (g);
 - (ii) that the time for delivery of pleadings has expired; and
 - (iii) where applicable, that judgment has been obtained or that the action has been discontinued or dismissed against a defendant.
- (2) It is the responsibility of the party who filed the trial record to place with the record, before the trial, a copy of
- (a) any notice of amounts and particulars of special damages delivered after the filing of the trial record;
 - (b) any order respecting the trial made after the filing of the trial record;
 - (c) any memorandum signed by counsel or any order made by the court, following a pre-trial conference;
 - (d) in an undefended action, any affidavit to be used in evidence; and
 - (e) any report of the Public Guardian and Trustee or Official Guardian (as the case may be) and supporting affidavit and any dispute of, or waiver of the right to dispute, the report or affidavit.

SETTING UNDEFENDED ACTION DOWN FOR TRIAL

- 48.04** (1) In an undefended action, where a trial has been ordered, the court shall set a date, time, and place for the trial.
- (2) When the court sets down a matter for trial, the trial coordinator shall mail a notice (Form 48 BB) of the date, time and place of trial to all parties.
- (3) Where an action is an undefended third party claim, a party who

has obtained a trial date shall serve a trial record on the plaintiff in the main action within five days after the third party claim is set down for trial and shall forthwith file the notice with proof of service.

SETTING DOWN FOR TRIAL

- 48.05** (1) In a defended action and after a pre-trial conference has been held, after a pre-trial judge authorizes trial dates, the court shall set a date, time, and place for the trial.
- (2) The trial coordinator shall mail a notice (Form 48BB) to every party to the action of the date, time and place set for the trial.
- (3) Where a defended action is a third party claim, a party who has obtained a trial date shall in addition serve the trial record on the plaintiff in the main action within the time for service on the parties to the third party claim, and shall forthwith file the notice with proof of service.

CONSEQUENCES OF ACTION BEING PLACED ON TRIAL LIST

- 48.06** (1) Where an action is set down for trial,
- (a) all parties shall be deemed to be ready for trial;
- (b) no party to the action shall initiate or continue any motion or form of discovery without leave of the court, but this does not relieve a party from complying with their undertaking on an examination for discovery or relieve a party from any obligation imposed by,
- (i) Rule 30.07 (disclosure of documents or errors subsequently discovered),
- (ii) Rule 30.09 (abandonment of claim of privilege),
- (iii) Rule 31.07 (disclosure of information refused on discovery),
- (iv) Rule 31.09 (disclosure of information subsequently obtained),
- (v) Rule 51.03 (duty to respond to request to admit),
- (vi) Rule 53.03 (service of report of expert witness) or
- (vii) Rule 70.14 (delivery of financial statement);
- (c) all parties shall be precluded from resorting to the provisions of Rule 51.02 (request to admit facts or documents);

- (d) the trial shall proceed on the date set for trial unless a judge orders otherwise.
- (2) Leave of the court is not required for a motion to compel compliance with any obligation imposed by a rule listed in subrule 48.06(1)(b).

ACTIONS ADJOURNED

48.07 Where an action is set for trial and is adjourned at the request of counsel, it shall not thereafter be given a new trial date except with leave of a pre-trial judge.

DUTY TO INFORM TRIAL COORDINATOR OF SETTLEMENT

48.08 Every party to an action, whether it is set for trial or not, shall promptly inform the trial coordinator of any settlement of the action and shall confirm in writing that the action has been settled.

APPLICATION OF THE RULE

48.09 Rules 48.01 to 48.08 apply to any proceeding in which the court has directed the trial of an issue, unless the court orders otherwise.

PRE-TRIAL BRIEF

- 48.10(1)** Unless ordered otherwise, each party to an action shall, at least seven days prior to the date for trial, deliver to the trial judge and to each opposite party a brief containing,
- (a) a succinct outline of the facts the party intends to establish,
 - (b) a concise statement of the principle of law on which the party relies, and
 - (c) citation of relevant statutory provisions and leading authorities.
- (2) Documentary evidence shall not be included with the pre-trial brief unless all parties have consented to its admission as evidence.

DISMISSAL OF ACTION FOR DELAY

Status Notice

48.11 (1) Where an action in which a statement of defence has been filed has not been set for trial or terminated by any means within two years after filing of a statement of defence, the case management coordinator shall serve on the parties a status notice (Form 48 C) that the action will be dismissed for delay unless it is set down

for trial or terminated within ninety days after service of the notice.

Dismissal by Registrar

- (2) The registrar shall dismiss the action for delay, with costs, ninety days after service of the status notice, unless
 - (a) the action has been set down for trial;
 - (b) the action has been terminated by any means; or
 - (c) a judge presiding at a status hearing has ordered otherwise.
- (3) Where an action is not set down for trial or terminated by any means within the time specified in an order made at a status hearing, the registrar shall dismiss the action for delay, with costs and shall serve on the parties a copy of the order (Form 48D).

Status Hearing

- (4) Where a status notice has been served, any party may request the case management coordinator to arrange a status hearing, in which case the case management coordinator shall mail to the parties a notice of the hearing, and the hearing may be held in person or by telephone or video conference, at the judge's discretion.

Attendance at Status Hearing

- (5) The lawyers of record shall attend, and the parties may attend, the status hearing.

Disposition at Status Hearing

- (6) At the status hearing, the plaintiff shall show cause why the action should not be dismissed for delay, and,
 - (a) if the presiding judge is satisfied that the action should proceed, the judge may set time periods for the completion of the remaining steps necessary to have the action set down for trial and may order that it be set down for trial within a specified time, or may adjourn the status hearing to a specified date, on such terms as are just; or
 - (b) if the presiding judge is not satisfied that the action should proceed, the judge may dismiss the action for delay.

Plaintiff Under Disability

- (7) Where the plaintiff is under disability, the action may be

dismissed for delay only if,

- (a) the defendant gives notice to the Official Guardian or, if the Public Guardian and Trustee is litigation guardian, guardian or trustee of the plaintiff, to the Public Guardian and Trustee; or
- (b) the presiding judge or a judge on motion orders otherwise.

Effect of Dismissal

- (8) Rules 24.03 to 24.05 (effect of dismissal for delay) apply to an action dismissed for delay under subrule (3), (4) or (8).
- (9) An order under this rule dismissing an action may be set aside under Rule 37.13.

Zenner & Zerd v. Flanagan et ors., 2022 PESC 29

Rule 48.06(b) prohibits a motion unless leave is granted. Relying on *McInnis*, the trial judge noted that where a substantive right which is considered to be fundamental to the proceeding is in issue, the test is less vigorous. Here, the motion involved the right to a jury trial, a substantive right. In granting leave, the court found that prejudice to the moving party if leave were to be denied would greatly outweigh that experienced by the responding party in being required to address the motion on its merits. However, the court also questioned whether Rule 48 leave is required in a motion to the trial judge to strike a jury notice.

Fraser v. Runighan, 2019 PECA 3

An order for production of documents was set aside because there was no request pursuant to Rule 48.06(b) for leave of the court, and leave was not judicially granted. A process error occurred because the leave requirement was not evaluated and determined upon consideration of applicable criteria for leave where an action is set down for trial.

Kennedy v. MacDonald, 2016 PESC 13

The motions judge granted leave pursuant to Rule 48.06(b) for the plaintiff to present a motion for bifurcation, notwithstanding the matter had been set down for trial.

Metro Credit Union Limited v. McInnis, 2011 PECA 7

Pursuant to Rule 48.06(b), leave of the court is required to bring a motion to strike a jury notice after the proceeding has been placed on the trial list (Rule 48.05). Except where substantive rights are affected, only a substantial or unexpected change in circumstances will justify granting leave to resume interlocutory proceedings after a proceeding has been placed on the trial list.