DEFAULT JUDGMENT
(RULE OF CIVIL PROCEDURE 55)

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Contents

I. Introduction. After being properly served with the complaint and summons in a civil action, the defendant has a certain amount of time—typically thirty days—in which to respond or request an extension. N.C. R. CIV. P. 12(a). If the defendant fails to do so, the plaintiff may obtain judgment for "affirmative relief" against the defendant by default pursuant to "a two-step process requiring (1) the entry of default and (2) the subsequent entry of a default judgment." McIlwaine v. Williams, 155 N.C. App. 426, 428 (2002). Rule of Civil Procedure 55 governs this two-step process. *See* N.C. R. CIV. P. 55 (Appendix A) ("Rule 55"). Default applies not only to initial claims, but also to counterclaims, cross-claims, and third party claims. Rule 55(e). The law heavily favors resolution of disputes on their merits, however, rather than through technical default, so the requirements of Rule 55 must be carefully followed. In certain circumstances, defendants may obtain

relief from entry of default and/or default judgment at the trial court level, as discussed below.

II. Entry of Default. The first step in obtaining default judgment is the entry of default. Entry of default is an interlocutory notation in the record made on plaintiff's motion "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute." Rule 55(a).

A. Judge has Authority. The rule provides that "the clerk shall enter" default. The trial judge, however, "has concurrent jurisdiction and can order entry of default." Ruiz v. Mecklenburg Utils, Inc., 189 N.C. App. 123, 126 (2008); Hasty v. Carpenter, 51 N.C. App. 333, 336–37 (1981).

B. "Failed to Plead." Responsive pleadings are defined in Rule of Civil Procedure 7 to include the answer; reply to counterclaim; answer to cross-claim; or third-party answer. See N.C. R. CIV. P. 7. Failure to file the relevant response within the required time subjects the claim to entry of default. The initial time to respond to a claim typically is 30 days, but it may be extended by the clerk (before time expires) or judge (before or after time expires). *See* N.C. R. CIV. P. 12(a); N.C. R. CIV. P. 6(b) (extensions of time); 6(e) (additional three days where "mail box rule" applies).

1. Effect of Rule 12 Motions. Service of a motion under Rule 12 tolls the time to plead until "20 days after notice of the court's action in ruling on the motion or postponing its disposition until the trial on the merits[.]" N.C. R. CIV. P. 12(a)(1). It is error, therefore, to enter default when a motion by the defendant under Rule 12 is pending. Strauss v. Hunt, 140 N.C. App. 345, 352–53 (2000) (trial court erred in granting default on same date as court's denial of Rule 12 motion).

2. Untimely Filing of Pleading. Default may not be entered after the pleading is filed, even if the filing was untimely. N. Carolina Nat. Bank v. Virginia Carolina Builders, 307 N.C. 563, 567–68 (1983); Hartwell v. Mahan, 153 N.C. App. 788, 791 (2002); *see also* Fieldcrest Cannon Employees Credit Union v. Mabes, 116 N.C. App. 351, 352–53 (1994) (trial court erred in striking late answer and entering default).

3. Technical Deficiency. An answer that was technically deficient because it was filed by an attorney not admitted to practice in North Carolina also precluded entry of default because the complaint was nevertheless "on the record." *N. Carolina Nat. Bank*, 307 N.C. at 568 (stating that the plaintiff should first have moved to strike the answer).

C. Evidence Required. The court may determine whether a pleading has been timely filed by looking to the court record: **"**Rule 55(a) plainly does not require proof solely by affidavit; the [court] may act upon any proof he or she deems appropriate, including the record alone." Silverman v. Tate. 61 N.C. App. 670,

673 (1983). There is also no additional requirement of proof of personal jurisdiction over the defendant: **"**We conclude the language of G.S. 1-75.11 indicates that proof of jurisdiction is required only when a *judgment* is to be entered against a nonappearing defendant. Such proof is not required for an entry of default." *Id.*

D. Effect of Entry of Default

1. Allegations Deemed Admitted. Upon entry of default, "the substantive allegations contained in plaintiff's complaint are no longer in issue, and for the purposes of entry of default and default judgment, are deemed admitted." Luke v. Omega Consulting Grp., LC, 194 N.C. App. 745, 751 (2009); Blankenship v. Town & Country Ford, Inc., 174 N.C. App. 764, 767 (2005). "Upon entry of default, the defendant will have no further standing to defend on the merits or contest the plaintiff's right to recover." *Luke*, 194 N.C. App. at 751; Spartan Leasing v. Pollard, 101 N.C. App. 450, 460 (1991). In *Luke*, the defaulting defendant was properly denied the opportunity to introduce evidence refuting the substantive grounds for plaintiff's claims for unpaid commissions where the relevant allegations were admitted upon default. 194 N.C. App. at 751.

2. No Affirmative Defenses May Be Asserted. In *Hartwell v. Mahan*, the trial court erred in granting summary judgment to defaulting defendant on his affirmative defense asserted after entry of default. The court stated that, "where an entry of default has not been set aside and the complaint is sufficient to state a claim, the defendant in default may not defend its merits by asserting affirmative defenses in a motion for summary judgment." 153 N.C. App. 788, 792 (2002).

3. May Contest Sufficiency of Allegations. Although the defendant may no longer contest the allegations themselves, defendant has the right to challenge whether those allegations are sufficient to state a claim for relief. Old Salem Foreign Car Serv., Inc. v. Webb, 159 N.C. App. 93, 99–100 (2003) (no treble damages allowed where the allegations did not support a finding of an unfair or deceptive trade practice); Hunter v. Spaulding, 97 N.C. App. 372, 377 (1990) (defaulting defendant allowed to challenge sufficiency of fraud complaint); *see also* Kniep v. Templeton, 185 N.C. App. 622, 629–30 (2007) ("[E]ntry of default did not preclude Defendant from responding to Plaintiffs' requests for admissions because Defendant was free to contest the sufficiency of Plaintiffs' complaint to state a claim for recovery.").

4. Entitled to Damages Trial. Although the allegations in the complaint are deemed admitted, defendant is entitled to a trial regarding damages. Luke v. Omega Consulting Grp, LC, 194 N.C. App. 745, 751 (2009) (citing Potts v. Howser, 274 N.C. 49, 61 (1968)). See section II.C.3. below for further discussion of determining damages.

E. Prerequisite to Default Judgment. Default judgment should not be entered without prior entry of default. Strauss v. Hunt, 140 N.C. App. 345, 348 (2000). *But see* Ruiz v. Mecklenburg Utils, Inc., 189 N.C. App. 123, 127 (2008) (excusing the requirement under specific facts and where court found defendant suffered no prejudice; concurring judge would find prior entry of default mandatory). The two motions sometimes are made in the same document, however, and when this occurs, entry of default and default judgment typically are performed at the same time.

F. Interlocutory. Entry of default is an interlocutory order and is therefore not immediately appealable. Autec v. Southlake Holdings, LLC, 171 N.C. App. 147, 149 (2005).

II. Default Judgment. This second step in the process constitutes a final judgment on the merits as to the defaulting defendant. The trial court judge has authority to enter default judgment in all cases in which such judgment is authorized. In a narrow set of circumstances, default judgment may be entered by the clerk.

A. Proof of Service and Personal Jurisdiction Required. Prior to entering a default judgment, the court must find proof that the complaint and summons were properly served on the defaulting defendant pursuant to Rule of Civil Procedure 4 and G.S. 1-75.10. In addition, the party seeking default judgment must make sufficient allegations in a verified complaint or affidavit of the facts necessary to establish grounds for personal jurisdiction over the plaintiff. G.S. 1-75.11. Personal jurisdiction is not presumed by the service of summons and unverified complaint "but must be proven and appear of record as required by GS 1-75.11." McIlwaine v. Williams, 155 N.C. App. 426, 430 (2002) (quotation omitted). A default judgment is void if entered without this showing. *Id.*

B. Default Judgment by Clerk. Default judgment may be entered by a clerk (or assistant clerk) of superior court where (1) the claim is for a "sum certain"' (2) the defendant has not appeared in the action; *and* (3) the defendant is not an infant or incompetent person. Rule 55(b)(1).

1. "Sum Certain."[1] "When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant[.]" Rule 55(b)(1). Typically, a bare allegation of the amount owed in the affidavit (or verified pleading) will not suffice to establish the judgment amount. In many cases, the clerk should and will require documentation to support the amount asserted. As the Court of Appeals has explained, "for damages to be certain, more evidence is needed 'than simply the

[1] A detailed discussion of the "sum certain" requirement is set out in Chapter 31 of the CLERK OF SUPERIOR COURT PROCEDURES MANUAL, (School of Government, 2d ed. 2012) (available to North Carolina judges on the AOC intranet and for purchase by others at www.sog.unc.edu).

plaintiff ['s] bare assertion of the amount owed.' …What would help identify the amount owed with some level of certainty would typically be the contract or submitted invoice, with which the Clerk could accurately calculate or verify the money owed." Basnight Const. Co., Inc. v. Peters & White Constr. Co., 169 N.C. App. 619, 623–24 (2005) (citation omitted).

2. **No Appearance.** A clerk may enter default judgment upon a sum certain "if the defendant has been defaulted for failure to appear." Rule 55(b)(1). The Court of Appeals has held that, "this statute is clearly intended to allow a clerk to enter default judgment against a defendant only if he has never made an appearance." Roland v. W & L Motor Lines, Inc., 32 N.C. App. 288, 291 (1977). In all cases in which the defendant has appeared, default judgment must be entered by the judge. For a discussion of what constitutes an appearance, see Section II.C.1.b. below.
3. **Not Against Infants or Incompetent Persons.** All default judgments against these two types of defendants must be entered by the trial court judge, and even then may not be entered unless the person is "represented by a guardian ad litem or other such representative who has appeared" in the action. Rule 55(b)(2)a.
4. **Additional Recovery of Property Securing Debt.** The clerk is also permitted to enter orders allowing foreclosure of an instrument securing the debt that is the subject of the default "in accordance with the procedure provided in Article 29A of Chapter 1 of the General Statutes, entitled 'Judicial Sales'". Rule 55(b)(1).

C. Default Judgment by Judge. In all matters in which the clerk does not have authority to enter default judgment, default judgment must be entered by a judge in the proper trial division. Rule 55(b)(2)a.

1. **Notice.** If the defaulting party has not appeared in the action, no notice of the motion for default judgment is required. Where defendant has appeared in the action, defendant is entitled to be served written notice of the hearing at least three days prior to the hearing. Rule 55(b)(2)a.
   - **a. Rule 5.** Written notice should be served pursuant to Rule 5 of the Rules of Civil Procedure.
   - **b. "Appearance."** "As a general rule, an 'appearance' in an action involves some presentation or submission to the court." Roland v. W & L Motor Lines, Inc., 32 N.C. App. 288, 289 (1977). *See, e.g.*, Strauss v. Hunt, 140 N.C. App. 345, 352 (2000) (defendant appeared by filing a motion to dismiss for improper service); Cabe v. Worley, 140 N.C. App. 250, 253 (2000) (defendant appeared by filing motion to set aside entry of default); Williams v. Jennette, 77 N.C. App. 283, 289 (1985) (defendants appeared by filing a motion for extension of time to plead). A defendant does not, however, "have to respond directly to a complaint in order for his actions to constitute an appearance. In fact, an appearance may

arise by implication when a defendant takes, seeks, or agrees to some step in the proceedings that is beneficial to himself or detrimental to the plaintiff." *Roland*, 32 N.C. App. at 289 (citation omitted). In *Roland*, the defendants appeared when their vice president sent a letter to plaintiff's attorney, copied to the clerk of court, acknowledging and responding to some of the allegations in the complaint. *Id.* at 290; *see also* Stanaland v. Stanaland, 89 N.C. App. 111, 114 (1988) (defendant appeared by meeting with plaintiff and attorney to discuss divorce matters); Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, __ (1975) (post-filing letter from registered agent constituted appearance).

A communication prior to the filing of the action—or prior to defendant's knowledge of the filing—does not constitute an appearance. Highfill v. Williamson, 19 N.C. App. 523, 531–32 (1973) ("We hold that no appearance in an action can be made prior to the institution of such action."). In *Highfill*, negotiations between the parties that took place (and ended) prior to the filing of the action were not an appearance. *Id.* In *Howard Stallings, From & Hutson, P.A. v. Douglas*, defendant's counsel's letter to plaintiff's counsel, after a complaint had been filed but prior to receiving notice or service, neither mentioning the action nor indicating that the author represented defendant in the litigation, was not an appearance. 354 N.C. 346 (2001), *reversing per curiam for reasons stated in the dissent***,** 143 N.C. App. 122 (2001) ("[A] response to a complaint, even if not direct, requires some knowledge of a complaint, and…a 'step in the proceedings,'…requires some knowledge of the existence of a proceeding in which one might take a step.").

2. **Hearing**. In general, default judgments are entered only after the court conducts a hearing. But a motion "may be decided by the court without a hearing" if the following two conditions are met:

1. The motion specifically provides that the court will decide the motion for judgment by default without a hearing if the party against whom judgment is sought fails to serve a written response, stating the grounds for opposing the motion, within 30 days of service of the motion; and
2. The party against whom judgment is sought fails to serve the response in accordance with this sub-subdivision.

Rule 55(b)(2)b.

3. **Determining Damages.**

a. **Generally.** As discussed above, entry of default prevents defendant from refuting the allegations in the complaint or

defending itself against a liability determination. Unless the complaint establishes a "sum certain," however (see Section II.B.1 above), a defendant is entitled to put on evidence and to cross-examine plaintiff's witnesses regarding damages. Luke v. Omega Consulting Grp, LC, 194 N.C. App. 745, 751 (2009) (citing Potts v. Howser, 274 N.C. 49, 61 (1968)). Upon determining that default judgment is appropriate, therefore, the court must generally conduct an evidentiary hearing before awarding an amount of damages or otherwise making an award. Rule 55 provides:

> If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as the judge deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina.

Rule 55(b)(2)a*; see, e.g.*, Webb v. McJas, Inc., __ N.C. App. __, 745 S.E.2d 21, 25 (2013) (trial court held evidentiary hearing to determine damages against guarantor after entry of default against guarantor and tenant).

b. **Jury or Non-jury Trial?** Although these hearings typically are held as non-jury trials, the plaintiff has the right to a jury trial if demanded in the complaint. N.C. R. CIV. P. 39(a). The trial court may also order a jury trial in its discretion absent a demand from either party pursuant to Rule of Civil Procedure 39(b).

c. **Punitive Damages.** The Supreme Court determined in *Hunter v. Spaulding* that due process requires a defendant be given the opportunity to present evidence to a jury as to the question of punitive damages. 97 N.C. App. 372, 379–380 (1990). In *Decker v. Homes, Inc./Construction Management & Finance Group*, the Court of Appeals further explained, "[t]his is because of the peculiar nature of punitive damages. While the entry of default established the basis for punitive damages under [G.S. 1D-15], it did not establish the factors which the jury was to consider in determining the amount of punitive damages under [G.S. 1D-35]." 187 N.C. App. 658, 667 (2007) (ordering new trial in which "both plaintiffs and defendants may present evidence pursuant to [G.S. 1D-35].")

d. **May Not Exceed Amount Demanded.** "In all cases a judgment by default is subject to the limitations of Rule 54(c)." Rule 55(e). Rule 54(c) states that "[a] judgment by default shall not be

different in kind from or exceed in amount that prayed for in the demand for judgment."

i. In *Sharyn's Jewelers, LLC v. IPayment, Inc.*, defendant was entitled to relief where a default judgment awarded punitive damages, but the complaint itself had not sought such damages against the defendant who had defaulted. 196 N.C. App. 281, 287–88 (2009).

ii. In *Meir v. Walton*, where the complaint sought an injunction preventing one defendant from entering land, it was error to enter judgment preventing both defendants and plaintiffs from going on the land of the others. 6 N.C. App. 415, 418 (1969).

e. Unfair and Deceptive Trade Practices. The court of appeals has held that, when the plaintiff seeks treble damages under G.S. 75-1.1, plaintiff must prove at the hearing that defaulting defendant's unfair and deceptive trade practice was a proximate cause of plaintiff's harm. *Decker*, 187 N.C. App. at 666 (ordering new trial). .

D. Restrictions on Default Judgment for Certain Defendants.

1. Infants and Incompetent Persons. No default judgment may be entered against an infant or incompetent defendant unless he or she is represented by a guardian ad litem or other representative who has appeared in the action. Rule 55(b)(2)a.; *cf.* Fox v. Health Force, Inc., 143 N.C. App. 501, 503-07 (2001).

2. Joint Tortfeasors. The availability of default judgment against a defaulting defendant is limited in certain multiple-defendant cases alleging joint liability.

a. Joint Liability Cases. If a complaint has alleged that the defendants are jointly liable to plaintiff, "a default judgment should not be entered against the defaulting defendant if one or more of the defendants do not default." Moore v. Sullivan, 123 N.C. App. 647, 650 (1996). This rule is based on the United States Supreme Court decision in *Frow v. De La Vega*, 82 U.S. 552, 554 (1872). Under the *Frow* principal, in joint liability cases the entry of default cuts off the defaulting defendant's right to participate on the merits, but otherwise the defaulting defendant "await[s] an adjudication as to the liability of the non-defaulting defendant(s)." *Moore*, 123 N.C. App. at 650 (quotation omitted). If the remaining defendants ultimately prevail on the merits, the complaint will be dismissed against the defaulting defendant. If the remaining defendants are adjudicated liable, judgment will be entered against the defaulting defendant as well. Hartwell v. Mahan, 153

N.C. App. 788, 792–93 (2002). A complaint alleges joint liability when the claims against the defendants

> are undivided and must therefore be prosecuted in a joint action against them all. Because the liability cannot be divided, the matter can be decided only in a like manner as to all defendants. Therefore, if one is liable, then all must be liable, and if one is not liable, then all are not liable.

Harlow v. Voyager Communications V, 348 N.C. 568, 571 (1998) (internal quotation and citation omitted). For example, in *Jackson v. Culbreth*, a default judgment quieting title was improper where only one defendant had defaulted because the judgment effectively cut off the property rights of the remaining, non-defaulting defendants. 199 N.C. App. 531, 535–37 (2009).

b. **Joint and Several Liability Cases**. If, however, the complaint alleges joint *and several* liability, the *Frow* principal does not apply. *Harlow*, 348 N.C. at 571. Liability is joint and several where each party is individually liable for the amount of the judgment (*e.g.*, cosigners of a note), and the creditor may sue one or more of the parties at the creditor's option. In such cases, "the defendants are not so closely tied that the judgment against each must be consistent." *Id.* The plaintiff may, therefore, obtain default judgment against a defaulting defendant prior to adjudication of the claims against the remaining defendants. *Id.*; Grier ex rel. Brown v. Guy, __ N.C. App. __, 741 S.E.2d 338, 344 (2012). In *Hartwell v. Mahan*, for example, plaintiff alleged that defaulting and remaining defendants were involved in a civil conspiracy to defame her and were jointly *and* severally liable for her harm; thus the plaintiff could pursue a judgment against the defaulting defendant prior to adjudication of the claim against the other. 153 N.C. App. 788, 792–93 (2002); *see also* Cole v. Erwin, __ N.C. App. __, 729 S.E.2d 128 (2012) (unpublished) (refusing to grant relief to defaulting defendant where the adjudication against him did not affect the rights of the non-defaulting defendants).

3. **The State.** **"**No judgment by default shall be entered against the State of North Carolina or an officer in his official capacity or agency thereof unless the claimant establishes his claim or right to relief by evidence." Rule 55(f).

4. **A Party Served by Publication.** Because of due process concerns, when a defendant has been served the summons and complaint by publication (and thus is far less likely to have actual notice of the action), plaintiff must file a bond in order to obtain default judgment. The bond must be in an amount approved by the court, sufficient to protect the defendant in the event defendant later obtains relief from the default

judgment. Rule 55(c). The bond is in the discretion of the court, but the court should set an amount reasonably calculated to remedy any harm from an erroneously or inequitably-entered judgment. (In practice, most plaintiffs avoid this bond requirement by pursuing summary judgment rather than default judgment.) A bond is not required "in actions involving the title to real estate or to foreclose mortgages thereon or in actions in which the State of North Carolina or a county or municipality thereof is the plaintiff." *Id.*

E. No Default in Divorce and Annulment Actions. Divorces may not be obtained by default judgment. G.S. 50-10 ("[N]o judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a judge or jury."); Adair v. Adair, 62 N.C. App. 493, 498-99 (1983) ("In North Carolina a plaintiff cannot obtain judgment by default in a divorce proceeding. A divorce will be granted only after the facts establishing a statutory ground for divorce have been pleaded and actually proved."). Neither may an annulment be obtained by default. Hawkins ex rel. Thompson v. Hawkins, 192 N.C. App. 248, 250–51 (2008).

F. Actions by "Debt Buyers". In 2009, consumer protection legislation enacted by the General Assembly added certain prerequisites for default judgments obtained by "debt buyers." A "debt buyer" is "a person or entity that is engaged in the business of purchasing delinquent or charged-off consumer loans or consumer credit accounts, or other delinquent consumer debt for collection purposes, whether it collects the debt itself or hires a third party for collection or an attorney-at-law for litigation in order to collect such debt." G.S. 58-70-15(b)(4). Prior to entry of default judgment in favor of a debt buyer, the plaintiff must "file evidence with the court to establish the amount and nature of the debt." G.S. 58-70-155(a). The "only evidence sufficient to establish the amount and nature of the debt shall be properly authenticated business records that satisfy the requirements of Rule 803(6) of the North Carolina Rules of Evidence." G.S. 58-70-155(b). These records "shall include at least all of the following items:

(1) The original account number.
(2) The original creditor.
(3) The amount of the original debt.
(4) An itemization of charges and fees claimed to be owed.
(5) The original charge-off balance, or, if the balance has not been charged off, an explanation of how the balance was calculated.
(6) An itemization of post charge-off additions, where applicable.
(7) The date of last payment.
(8) The amount of interest claimed and the basis for the interest charged.

G.S. 58-70-155(b).

G. Paternity Actions. "If the plaintiff seeks to establish paternity under Article 3 of Chapter 49 of the General Statutes and the defendant fails to appear, the judge shall enter judgment by default." Rule 55(b)(2)a.

III. Setting Aside Entry of Default and Default Judgment. Under certain circumstances, parties may obtain relief from the trial court from entry of default and default judgment. Rule 55(d). Relief is governed by Rule 55(d) and should be sought by motion filed pursuant to Rule of Civil Procedure 7. Setting aside entry of default and setting aside default judgment are separate decisions governed by different standards. Setting aside entry of default is discussed below in Section IV. Setting aside default judgment is discussed below in Section V.

IV. Setting Aside Entry of Default. A party who has been defaulted for failure to timely respond may believe the failure is justifiable or should otherwise be excused. Upon motion, the trial court may set aside an entry of default when there is "'good cause shown." Rule 55(d).

A. "Good Cause" Determination. The court does not assess the merits of the action when deciding whether the defendant has shown good cause: "[T]he burden is on the defendant, as the defaulting party, not to refute the allegations of plaintiff's complaint, nor to show the existence of factual issues as in summary judgment, but to show *good cause* why he should be allowed to file answer to plaintiff's complaint." Bell v. Martin, 299 N.C. 715, 721 (1980) (emphasis added). Whether a defaulting party has shown "good cause" for relief from entry of default "depends on the facts and circumstances of each particular case." Old Salem Foreign Car Service, Inc. v. Webb, 159 N.C. App. 93, 97 (2003). Because the law disfavors default, "any doubt should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits." Automotive Equip. Distr., Inc. v. Petroleum Equip. & Serv., Inc., 87 N.C. App. 606, 608 (1987) (citations omitted). The good cause standard is not as stringent as the standard for setting aside default judgment (see subsection B below). Bailey v. Gooding, 60 N.C. App. 459, 462 (1983); *see also* Beard v. Pembaur, 68 N.C. App. 52, 56 (1984) (court erred to the extent it required "excusable neglect" on motion to set aside entry of default). "[A]n inadvertence which is not strictly excusable may constitute good cause, particularly where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant. Lewis v. Hope, __ N.C. App. __, 736 S.E.2d 214, 216 (2012) (quotation omitted); Vares v. Vares, 154 N.C. App. 83, 90 (2002).

B. Standard of Review. "A motion pursuant to this rule to set aside an entry of default is addressed to the sound discretion of the court." Britt v. Georgia–Pacific Corp., 46 N.C. App. 107, 108 (1980); Security Credit Leasing, Inc. v. D.J.'s of Salisbury, Inc., 140 N.C. App. 521, 528 (2000). The trial court's determination

will not be disturbed on appeal unless a clear abuse of discretion is shown. *Old Salem,* 159 N.C. App. at 97; Silverman v. Tate, 61 N.C. App. 670, 674 (1983). The Court of Appeals has stated that, when a trial court refuses to set aside entry of default, it will evaluate abuse of discretion by considering: "(1) was defendant diligent in pursuit of th[e] matter; (2) did plaintiff suffer any harm by virtue of the delay; and (3) would defendant suffer a grave injustice by being unable to defend the action." First Citizens Bank & Trust Co. v. Cannon, 138 N.C. App. 153, 157 (2000) (quotation omitted).

C. Examples

1. Good Cause Shown

a. City of Wilson Redevelopment Comm. v. Boykin, 193 N.C. App. 20, 34 (2008). The trial court did not abuse its discretion in finding good cause to set aside entry of default against one of several defendants in a condemnation action where the defendant was a 97-year-old nursing home resident who had given power of attorney to one of the other defendants.

b. Atkins v. Mortenson, 183 N.C. App. 625, 629 (2007). The trial court set aside entry of default against physician who, upon receiving the summons and complaint, immediately faxed it to his insurance carrier per his company policy, but the carrier did not receive it. Plaintiff obtained entry of default less than 60 days after filing the complaint. The physician soon thereafter was notified of the motion for default judgment and immediately informed his carrier, whose attorney then filed an answer and moved to set aside entry of default. The court of appeals affirmed the granting of the motion on grounds that the physician clearly had a meritorious defense (summary judgment was later granted in his favor), and the plaintiff suffered no prejudice because "the lapse of time from the point when plaintiff filed the complaint to when defendant filed his answer was not so great as to cause harm to plaintiff if the entry of default were set aside."

c. Vares v. Vares, 154 N.C. App. 83, 91 (2002). It was not error to find good cause where defendant's insurance carrier was handling the litigation and failed to answer on time. The "delay in answering plaintiff's complaint was primarily due to negligence by [her] insurance company" and "the delay…was relatively short and caused no prejudice to plaintiff." *See also* Brown v. Lifford, 136 N.C. App. 379, 384–85 (2000) (affirming a finding of good cause where defendant relied on the representations of his insurance carrier).

d. Moore v. F. Douglas Biddy Constr., Inc., 161 N.C. App. 87, 89-90 (2003). The trial court did not abuse its discretion in setting aside entry of default where, on the same day default was entered, defendant's newly-retained counsel informed plaintiff's counsel that an answer was forthcoming, and plaintiffs suffered no prejudice because they knew from a prior round of litigation the defenses that defendant would likely raise.

e. Miller v. Miller, 24 N.C. App. 319, 320 (1974). The trial court did not abuse its discretion in setting aside default against landowner defendants who were sued for cutting down a neighbor's hedges. Defendants submitted evidence that they met with the Town of Garner after receiving the complaint, and the Town advised them that it would handle the lawsuit against them because the hedge grew on a Town easement.

2. Good Cause Not Shown

a. Lewis v. Hope, __ N.C. App. __, 736 S.E.2d 214, 216-17 (2012). The trial court did not abuse its discretion in refusing to set aside entry of default where defendant cited his correspondence with plaintiff's counsel as evidence of "his intent to address the matter."

b. Luke v. Omega Consulting Grp, LC, 194 N.C. App. 745, 749 (2009). Defendant did not give sufficient attention to the matter to warrant a finding of good cause where, as soon as defendant found out about the suit, it consulted with its out-of-state attorneys and reviewed its records regarding plaintiff, but did not respond due to "the advice of its…attorneys as well as its conclusion that plaintiff was not owed any further compensation."

c. Old Salem Foreign Car Service, Inc. v. Webb, 159 N.C. App. 93, 98 (2003). Defendant business did not show good cause for not responding to the complaint where the defendant's representative acknowledged receiving the papers but did not take action because the company had never been sued before (instead, it usually "did the suing") and she was not sure what was supposed to happen.

d. Cabe v. Worley, 140 N.C. App. 250, 252–53 (2000) (internal quotation and citation omitted). Trial court did not err in refusing to find good cause where "[d]efendant's only action…was to deliver the suit papers to his insurance company. After delivery, he took no further action to inquire into the progress of the case." The court stated that, "[i]f a defendant gives the claim papers to

his insurer and continues to actively monitor the case, this Court has been amendable to allowing claims to be litigated. Where a defendant gives the claim papers to the insurance company and does not inquire further, however, we have been far less receptive to a contention that an entry of default was inappropriate."

e. First Citizens Bank & Trust Co. v. Cannon, 138 N.C. App. 153, 158 (2000). The trial court did not abuse its discretion in refusing to set aside entry of default where defendant filed the motion to set aside default more than six months after entry of default and cited ignorance of the legal process and reliance on defenses raised by her co-defendant former husband related to property they jointly owned.

f. Howell v. Halliburton, 22 N.C. App. 40, 42 (1974). Defendant did not show good cause to set aside default where it merely forwarded the summons and complaint to its insurance carrier and took no further action until it learned that default had been entered.

V. Setting Aside Default Judgment. "[I]f a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)." Rule 55(d). Rule 60(b) of the Rules of Civil Procedure (Appendix B) allows a trial court to "relieve a party or his legal representative from a final judgment, order, or proceeding" for a number of specified reasons based in equity. Relief is available for the following bases:

(1) Mistake, inadvertence, surprise, or excusable neglect;
(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
(4) The judgment is void; [or]
(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
(6) Any other reason justifying relief from the operation of the judgment.

N.C. R. Civ. P. 60(b)(1)–(6). While any of the six bases may be argued, the vast bulk of the cases center on arguments of excusable neglect (60(b)(1)); void judgments (60(b)(4)); and the general category that allows relief for "any other reason" (60(b)(6)). Each is discussed below.

A. Prerequisite for Appeal. A party must first move pursuant to Rule 55(d) and Rule 60(b) for relief from default judgment in trial court before it can have the matter heard on appeal. In *Golmon v. Latham*, the court stated that "defendants should have first filed a motion pursuant to N.C.R. Civ. P. 55(d) or 60(b). They

would then have been able to appeal to this Court from any denial of that motion. Because defendants failed to follow this procedure, we are precluded from reviewing the issues they raise." 183 N.C. App. 150, 151–52 (2007).

B. Findings of Fact and Conclusions of Law. Unless requested by a party, the trial court is not required to make written findings of fact and conclusions of law on its determination whether to set aside a default judgment pursuant to Rule 60(b). N.C. R. CIV. P. 52(a)(2); Monaghan v. Schilling, 197 N.C. App. 578, 582–83 (2009); Texas Western Financial Corp. v. Mann, 36 N.C. App. 346, 349 (1978). If the trial court does not make written findings and conclusions, the appellate court will look at the record to determine "whether, on the evidence before it, the trial court could have made findings of fact sufficient to support its legal conclusion[s]." *Monaghan*, 197 N.C. App. at 584.

C. Excusable Neglect (60(b)(1)). By far the most common basis argued for relief from default judgment is excusable neglect. If a party succeeds in the difficult task of showing excusable neglect, it must also show that it has a meritorious defense to the action.

1. Standard of Review. Whether excusable neglect has been shown is a question of law, not of fact, and the trial court's determination is reviewable *de novo*. Monaghan, 197 N.C. App. at 584 (2009). However, the facts found by the trial court necessary to make this legal determination are conclusive on appeal if supported by any competent evidence. Norton v. Sawyer, 30 N.C. App. 420, 422 (1976); Estate of Teel v. Darby, 129 N.C. App. 604, 607 (1998); Anderson Trucking Serv., Inc. v. Key Way Transport, Inc., 94 N.C. App. 36, 41 (1989).

2. Timing. "The motion shall be made within a reasonable time, and…not more than one year after the judgment…was entered or taken." N.C. R. CIV. P. 60(b).

3. What is "Excusable Neglect"? Although "there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment," *McIntosh v. McIntosh*, 184 N.C. App. 697, 704–05 (2007) (quotation omitted), our courts have established the following standards:

a. "Ordinary and Prudent" Attention. As a baseline, "what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case." *Id.* This assessment depends on "all the surrounding circumstances." Overnite Transport Co. v. Styer, 57 N.C. App. 146, 149 (1982); Dishman v. Dishman, 37 N.C. App. 543, 547 (1978).

i. Monaghan v. Schilling, 197 N.C. App. 578, 566-67 (2009). The trial court was correct in finding that there was no excusable neglect where defendants failed to respond to

complaint two months after obtaining extension of time to do so and failed to respond to plaintiff's subsequent motion for default judgment. Defendants' counsel acknowledged that "errors and mistakes were made" but the "explanations were not sufficient to excuse the mistakes."

ii. Partridge v. Assoc. Cleaning Consultants & Services, Inc., 108 N.C. App. 625, 631 (1993). Defendant did not receive actual notice of substitute service upon the Secretary of State because its address on file with the Secretary of State's office was not current. The trial court did not err in finding that defendant's failure to appoint a registered agent and notify the Secretary of State of its address change was inexcusable neglect.

iii. Kimzay Winston-Salem, Inc. v. Jester, 103 N.C. App. 77, (1991). Where a prevailing plaintiff on a default judgment discovered that the judgment included only past rents, it was error for trial court to "open" the judgment to also include future rents. There was no "excusable neglect" by the plaintiff in executing the default documents, accepting the judgment amount stated in them, and later executing on that judgment. In addition, the trial court was not authorized to essentially amend a judgment under Rule 60(b) rather than relieve a party of the judgment.

iv. Gallbronner v. Mason, 101 N.C. App. 362, 364–65 (1991). It was not excusable for a defendant to fail to respond to a complaint in hopes that the attorney that formerly represented him would do so after the attorney made it clear that they no longer had an attorney-client relationship. The court agreed that defendant "did not give the [matter] the attention which an ordinary and prudent person would give to important business."

v. Hayes v. Evergo Telephone Co., Ltd., 100 N.C. App. 474, 481 (1990). Defendants did not show excusable neglect where their insurance carrier informed them of its refusal to defend the action with two weeks remaining before the answer was due, and defendants did not thereafter retain counsel and file an answer. In addition, the plaintiff waited an additional three months before moving for entry of default and gave defendants advance warning. Because

the defendants still "did nothing", the trial court properly denied their motion for relief.

vi. Anderson Trucking Serv., Inc. v. Key Way Transport, Inc., 94 N.C. App. 36, 41-42 (1989). Default judgment was entered in the amount of $309,926 against a Maryland Corporation that conducted business in North Carolina but failed to maintain a registered agent for service in North Carolina. The Maryland service agent received the summons and complaint and then forwarded them to defendant, but they were lost in mail and never received. The trial court denied the motion for relief, finding that that defendant "failed for eight years to designate a new registered agent, and further failed, for at least five years, to honor [its agent's] request to be replaced by another registered agent." Thus its "own neglect, not any intervening negligence of the postal service, was responsible for its failure to appear in the action."

vii. Texas Western Financial Corp. v. Mann, 36 N.C. App. 346, 349-50 (1978). Trial court erred in finding excusable neglect where defendant's only justification (presented in an unverified affidavit) for not responding was that plaintiff's counsel stated he would give defendant time to review defendant's files.

viii. Commercial Union Assurance Companies v. Atwater Motor Co., Inc., 35 N.C. App. 397, 399 (1978). It was not error to find no excusable neglect where the 24-year-old manager of defendant, on the job less than a month, believed insurance company would handle the complaint because plaintiff's and defendant's insurance companies had been negotiating over the conflict for more than a year.

ix. U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611, 615 (1975). Trial court did not err in finding that defendant, under the circumstances, exhibited excusable neglect because he was "deficient in his usual mental processes," where defendant presented competent evidence of being partially disabled due to depression and on prescription drugs that prevented him from having the "sound mind" to properly handle his affairs.

b. Inexcusable Neglect of Attorney (Or Representative) is

Imputed to the Defendant. In *Briley v. Farabow*, the N.C. Supreme Court held that "[c]learly, an attorney's negligence in handling a case constitutes inexcusable neglect and should not be grounds for relief under the 'excusable neglect' provision of Rule 60(b)(1). 348 N.C. 537, 546 (1998). The court stated:

> In enacting Rule 60(b)(1), the General Assembly did not intend to sanction an attorney's negligence by making it beneficial for the client and to thus provide an avenue for potential abuse. … Looking only to the attorney to assume responsibility for the client's case, however, leads to undesirable results. … If the lawyer's neglect protected the client from ill consequences, neglect would become all too common. It would be a free good—the neglect would protect the client, and because the client could not suffer the lawyer would not suffer either. Thus, we hold that an attorney's negligent conduct is not "excusable neglect" under Rule 60(b)(1) and that in determining such, the court must look at the behavior of the attorney.

Id. at 546–47 (internal quotation and citations omitted); *see also* Purcell Int'l Textile Grp, Inc. v. Algemene AFW N.V., 185 N.C. App. 135, 140 (2007) (attorney's inexcusable neglect was imputed to defendants, thus precluding relief under Rule 60(b)(1)); Parris v. Light, 146 N.C. App. 515, 522–23 (2001) (same); Rose v. Forester, 201 N.C. App. 159, *3-4 (2009) (unpublished) (where defendant Maryland corporation's N.C. process agent failed to forward a complaint to defendant, the agent's inexcusable neglect was imputed to defendant). Note that this "imputation" rule does not necessarily apply when assessing the more lenient "good cause" standard for setting aside entry of default. See Section IV.A.1 above for further discussion of the "good cause" standard.

4. **Meritorious Defense.** In addition to demonstrating excusable neglect, the defaulting party must also show the court that it has a "meritorious defense" to the underlying cause of action. Norton v. Sawyer, 30 N.C. App. 420, 423 (1976). As the Court of Appeals has explained, "[t]he defendant must have a real or substantial defense on the merits, otherwise the court would engage in the vain work of setting a judgment aside when it would be its duty to enter again the same judgment on motion of the adverse party." *Id*. (quotation omitted). In addition, "it would be a waste of judicial economy to vacate a judgment or order when the movant could not prevail on the merits of the civil action." Oxford Plastics v. Goodson, 74 N.C. App. 256, 259 (1985).

In determining the existence of a meritorious defense, the court's task is to examine whether the movant "has, in good faith, presented…*prima facie,* a valid defense." *Id.* at 260 (quotation omitted). The court does not actually weigh the evidence and thereby deprive the movant of his right to a jury trial. *Id.*

D. Void Judgment (Rule 60(b)(4)). A defaulting defendant is entitled to relief under Rule 60(b)(4) as a matter of law where the default judgment is void. The motion must be made within a "reasonable time." N.C. R. CIV. P. 60(b).

1. No Authority. A default judgment is void where the court is not authorized to enter it. *See, e.g.*, Basnight Const. Co., Inc. v. Peters & White Constr. Co., 169 N.C. App. 619, 623–24 (2005) (clerk had no authority to enter default judgment where the complaint did not establish a demand for a "sum certain."); Hyder v. Dergance, 76 N.C. App. 317, 320 (1985) (judgment entered prior to expiration of time to plead is void).

2. No Service on the Defendant. A failure to properly serve the complaint and summons on defendant is grounds for relief under Rule 60(b)(4). Estate of Teel v. Darby, 129 N.C. App. 604, 608 (1998).

3. No Proof of Personal Jurisdiction. Where the trial court entered judgment based on an unverified complaint and an affidavit that made no representations regarding personal jurisdiction as required by G.S. 1-75.11, "the trial court lacked authority to enter the default judgment against [defendant]." McIlwaine v. Williams, 155 N.C. App. 426, 430 (2002); *see also* Lemon v. Combs, 164 N.C. App. 615, 625 (2004) (if court lacks personal jurisdiction over defendant, default judgment is void).

E. "Any Other Reason" (Rule 60(b)(6)). Beyond the specific categories listed above is the broadly-worded, general sixth category, which allows a court to relieve a party for "[a]ny other reason justifying relief from the operation of the judgment." N.C. R. CIV. P. 60(b)(6). A motion under this rule must be made within a "reasonable time." N.C. R. CIV. P. 60(b).

1. Limited Application. Rule 60(b)(6) has long been called "a grand reservoir of equitable power to do justice in a particular case." Norton v. Sawyer, 30 N.C. App. 420, 426 (1976) (quotation omitted). To one seeking escape from a final order, this is promising language by any measure. In practice, though, this general category is not a "catch-all." *Id.*[2]

[2] The specific limitations of this rule are discussed in greater detail in Ann Anderson, *Rule of Civil Procedure 60(b)(6)* in this Benchbook, http://benchbook.sog.unc.edu/civil/rule-civil-procedure-60b6. It is clear, for example, that the rule is not to be used to correct errors of law or as a substitute for appeal. Brown v. Cavit Sciences, Inc., __ N.C. App. __, 749 S.E.2d 904, 908 (2013) (citing Baxley v. Jackson, 179 N.C. App. 635, 638 (2006)); *see also* Hagwood v. Odom, 88 N.C. App. 513, 519 (1988)("The appropriate remedy for errors of law committed by the court is either appeal or a timely motion for relief under…Rule 59(a)(8)."). This restriction is less relevant in the default judgment context because, by their

a. Not for Relaxing the Standards for (b)(1) Through (b)(5). Rule 60(b)(6) is not a mechanism to effectively widen the scope of the first five bases. For example, where Rule 60(b)(1) allows relief for "excusable neglect", (b)(6) cannot be invoked where the neglect in question is something short of excusable. *See* Partridge v. Associated Cleaning Consultants & Services, Inc., 108 N.C. App. 625, 632–33, 424 S.E.2d 664, 668–69 (1993). ("inexcusable neglect" not a basis for relief under (b)(1) or (b)(6)); *see also* Akzona, Inc. v. American Credit Indemnity Co. of New York, 71 N.C. App. 498, 505 (1984)(Rule 60(b)(6) could not invoked where defendants could not meet the standard for (b)(2)).

b. Not a Substitute for Other Rule 60(b) Bases Not Timely Raised. All motions under Rule 60(b)(6) must be made within a "reasonable time." Motions under Rule 60(b)(1), (2), and (3), however, must also be made "not more than one year after the judgment, order, or proceeding was entered or taken." N.C. R. CIV. P. 60(b). Where a party fails to meet this one-year limit, Rule 60(b)(6) cannot be used as a substitute when the basis for the motion is encompassed by one of the first three categories. For example, in *Bruton v. Sea Captain Prop., Inc.*, 96 N.C. App. 485, 487-89 (1989), the out-of-state defendants moved for relief over sixteen months after judgment was entered against them in a foreclosure action. Defendants had retained Pennsylvania counsel, who then hired North Carolina counsel, but then the North Carolina attorneys resigned and no further North Carolina counsel were retained. Ultimately default judgment was entered. The court explained:

> [N]o one was "minding the shop" in North Carolina, including the appellants, and a judgment of nearly $500,000.00 was entered against them in this action. Defendants argue that because their Pennsylvania attorney had competently procured North Carolina counsel in the past, and had made representations to them in this case that "everything was taken care of" and "not to worry", they should be excused for failing to take further measures to keep informed about the status of their case.

Id. at 488. The court declined to grant relief, explaining that "[a]t its very best," their argument, "would bring their motions under Rule

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nature, default judgments are not the result of trials on the merits and typically do not require the court to apply the law to the facts.

60(b)(1) 'excusable neglect'", and because they "waited well over one year after entry of the judgment," their motion was not timely: "Rule 60(b)(6) cannot be the basis for a motion to set aside judgment if the facts supporting it are facts which more appropriately would support one of the five preceding clauses." *Id.* at 488–89.

2. Specific Requirements. Our courts have established that relief under this subsection is permitted only when the movant shows that (1) extraordinary circumstances exist; (2) justice demands it; and (3) the movant has a meritorious defense to the underlying claims. Oxford Plastics v. Goodson, 74 N.C. App. 256, 259–60 (1985). Our courts routinely discuss the first two requirements as a unified concept; so the following section will refer to them together as "extraordinary circumstances."

3. "Extraordinary Circumstances." The following cases have analyzed "extraordinary circumstances" specifically in the context of default judgment.

a. "Extraordinary Circumstances" Found.

i. "Irregular Judgments" Related to Court Practice. An irregular judgment is one "rendered contrary to the cause and practice of the court." Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 717 (1975). An irregular judgment may include, for example, a notice or calendaring error that is not the movant's fault. *Id.* at 715–17. In *Taylor*, the court affirmed a grant of relief from default judgment entered without the required notice after defendant had made an appearance under Rule of Civil Procedure 55(b)(2). The court noted that, "[u]nder the broad power of [Rule 60(b)(6)] an erroneous judgment cannot be attacked, but irregular judgments, those rendered contrary to the cause and practice of the court, come within its purview." *Id.* at 717.

ii. "Irregular Judgments" Due to Excessive Damages. Where the damage awarded in default judgment exceed what was sought in the complaint, the judgment is "irregular" and relief under Rule 60(b)(6) is appropriate. Pruitt v. Taylor, 247 N.C. 380, 384 (1957); Triangle v. Porsche-Audi, 27 N.C. App. 711, 717 (1975) (trial court properly set aside default judgment under Rule 60(b)(6) as irregular where the plaintiff was awarded treble damages unsupported by the allegations in the complaint). In *Sharyn's Jewelers, LLC v. IPayment, Inc.*, relief under Rule 60(b)(6) was justified where a default judgment awarded punitive damages, but the complaint itself had not sought

such damages against the defaulting defendant. 196 N.C. App. 281, 287–88 (2009).

iii. Failure to File Formal Answer Excusable Due to Nature of the Action. In *City of Durham v. Woo*, the trial court set aside default judgment against a landowner (defendant in a complicated condemnation action) who did not file a formal answer but had clearly communicated in writing his dispute regarding just compensation for the property. In light of the unique circumstances of the case and the special nature of eminent domain actions, the Court of Appeal held that there was no abuse of discretion in setting aside the default judgment. 129 N.C. App. 183, 187-88 (1998).

b. No "Extraordinary Circumstances" Found.

i. Lack of Understanding of Law; Failure to Hire Counsel.

(a) Baylor v. Brown, 46 N.C. App. 664, 666-67 (1980). The Court of Appeals reversed a grant of relief under Rule 60(b)(6) where defendants had repeatedly ignored plaintiff's counsel's warning that plaintiffs would seek default judgment if defendants did not obtain new counsel and file an answer. Defendants essentially argued an inability to pay counsel's retainer and fee and failure to procure help from Legal Aid because Legal Aid already represented plaintiffs. The court said:

> To us, defendants made a free choice to take the risk of not defending the action against them and to use [available funds] for another purpose other than defending the action in question. In view of this fact, we hold that the record does not reveal any extraordinary circumstance which would warrant the trial court to use its discretion as provided by Rule 60(b)(6).

(b) Sides v. Reid, 35 N.C. App. 235, 237–38 (1978). The Court of Appeals reversed an order setting aside a default judgment. Defendant had argued that he received and understood the complaint and summons and that "he mailed a handwritten note to the court which he thought would be sufficient

answer, but does not remember when or to what court he mailed it." *Id.* at 236. There was no evidence in the record of the letter's existence. The court of appeals stated:

> [A]lthough defendant owned and managed three corporations and admitted reading and generally understanding the summons and complaint, he made no effort to consult an attorney until after the supplemental proceeding. In fact, defendant took no action other than the handwritten note for which he cannot account until this time, some thirteen months after he was personally served with process.
>
> In view of defendant's failure to use proper diligence in the case at bar, we cannot say that equity should act to relieve him from the judgment by default.

Id. at 238.

ii. Notice/Service Issues Where Fault Shared by Movant (or Movant's Agent or Attorney).

(a) Venters v. Albritton, 184 N.C. App. 230, 237-38 (2007). Where defendant, a self-represented litigant, provided a confusing array of addresses to which service could be made upon him, and plaintiff was diligent in attempting service and did not violate Rules 4 and 5 of the Rules of Civil Procedure, defendant did not establish extraordinary circumstances entitling him to relief from default judgment in the amount of $13,000.

(b) Partridge v. Associated Cleaning Consultants & Servs., Inc., 108 N.C. App 625, 630–33 (1993). A Pennsylvania Corporation was sued for negligence in North Carolina. Plaintiff made service on the North Carolina registered agent, but the registered agent was no longer in contact with defendant, and process was returned unserved. Plaintiff then made service on the Secretary of State's office, which forwarded process to the registered address,

but defendant had since moved. Defendant later learned of the lawsuit from the City of Charlotte, a co-defendant, but defendant was informed by the clerk's office that plaintiff had not yet obtained service on defendant. Plaintiff had, however, received entry of default against defendant (over $100K), and later moved for and received default judgment. Defendant never received the summons and complaint. *Id.* at 627–28. The court held that defendant's neglect in failing to keep an up-to-date registered agent and a current business address on file in North Carolina constituted inexcusable neglect and did not warrant a finding of extraordinary circumstances under 60(b)(6).

(c) Anderson Trucking Serv., Inc. v. Key Way Transport, Inc., 94 N.C. App. 36 (1989). Default judgment was entered in the amount of $309,926 against a Maryland Corporation that conducted business in North Carolina but failed to maintain a registered agent for service in North Carolina. The Maryland service agent received the summons and complaint and then forwarded them to defendant, but they were lost in mail and never received. The trial court denied the motion for relief, finding that that defendant "failed for eight years to designate a new registered agent, and further failed, for at least five years, to honor [its agent's] request to be replaced by another registered agent." *Id.* at 41. The Court of Appeals affirmed, stating:

> Had this simply been a "lost mail" case, particularly in light of the large judgment awarded, we might be inclined to say that extraordinary circumstances existed and that justice demanded relief from the judgment. We will not do so when, as here, the evidence suggests that the corporation exhibited a longstanding pattern of irresponsibility and disregard of legal matters and failed to respond to *two* communications about a pending suit, only one of which allegedly was

lost in the mail.

Id. at 43 (citation omitted).

4. Meritorious Defense. In addition to demonstrating extraordinary circumstances, a Rule 60(b)(6) movant must also show the court that it has a "meritorious defense" to the underlying cause of action. Royal v. Hartle, 145 N.C. App. 181, 184 (2001). See Section V.C.4, above for further discussion of the requirement of a meritorious defense in the context of Rule 60(b)(1).

Appendix A: North Carolina Rule of Civil Procedure 55 (N.C. Gen. Stat. § 1A-1, Rule 55)

Rule 55. Default.

(a) Entry.--When a party against whom a judgment for affirmative relief is sought has failed to plead or is otherwise subject to default judgment as provided by these rules or by statute and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default.

(b) Judgment.--Judgment by default may be entered as follows:

(1) By the Clerk.--When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and if the defendant is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust or other contractual security in respect of which foreclosure may be had, or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414, the clerk may likewise make all further orders required to consummate foreclosure in accordance with the procedure provided in Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales".

(2) By the Judge. --

a. In all other cases the party entitled to a judgment by default shall apply to the judge therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, that party (or, if appearing by representative, the representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as the judge deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina. If the plaintiff seeks to establish paternity under Article 3 of Chapter 49 of the General Statutes and the defendant fails to appear, the judge shall enter judgment by default.

b. A motion for judgment by default may be decided by the court without a hearing if:

1. The motion specifically provides that the court will decide the motion for judgment by default without a hearing if the party against whom judgment is sought fails to serve a written response, stating the grounds for opposing the motion, within 30 days of service of the motion; and

2. The party against whom judgment is sought fails to serve the response in accordance with this sub-subdivision.

(c) Service by publication.--When service of the summons has been made by published notice, no judgment shall be entered on default until the plaintiff shall have filed a bond, approved by the court, conditioned to abide such order as the court may make touching the restitution of any property collected or obtained by virtue of the judgment in case a defense is thereafter permitted and sustained; provided, that in actions involving the title to real estate or to foreclose mortgages thereon or in actions in which the State of North Carolina or a county or municipality thereof is the plaintiff such bond shall not be required.

(d) Setting aside default.--For good cause shown the court may set aside an entry of default, and, if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b).

(e) Plaintiffs, counterclaimants, cross claimants.--The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a crossclaim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

(f) Judgment against the State of North Carolina.--No judgment by default shall be entered against the State of North Carolina or an officer in his official capacity or agency thereof unless the claimant establishes his claim or right to relief by evidence.

Appendix B: North Carolina Rule of Civil Procedure 60(b) (G.S. 1A-1, Rule 60(b))

Rule 60. Relief from judgment or order
…

(b) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.--On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

(c) Judgments rendered by the clerk.--The clerk may, in respect of judgments rendered by himself, exercise the same powers authorized in sections (a) and (b). The judge has like powers in respect of such judgments. Where such powers are exercised by the clerk, appeals may be had to the judge in the manner provided by law.