RULE OF CIVIL PROCEDURE 60(b)(6)

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Contents

I. Introduction. There are several ways for a party to a civil action to seek relief from a final judgment or order. Within 10 days after a judgment's entry, a party may move the trial court for amendment of a judgment (N.C. R. CIV. P. 52(b)), for judgment notwithstanding the verdict (N.C. R. CIV. P. 50), or for a new trial (N.C. R. CIV. P. 59). And, of course, within 30 days after entry of certain orders or the resolution of the post-trial motions just listed, parties may appeal. N.C. R. APP. P. 3. But in circumstances not typically encompassed by these rules, North Carolina Rule of Civil Procedure 60(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. The first five bases contemplate specific situations:

> (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[.]
>
> N.C. R. CIV. P. 60(b)(1)-(5)

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). 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 of Rule 60 is not a "catch-all." *Id.* Rule 60(b)(6) provides relief only in "extraordinary circumstances" where the ends of justice require it. This chapter discusses the uses and limitations of Rule 60(b)(6).

II. Limitations of Rule 60(b)(6)

A. Not a Substitute for Appellate Review. Although the language of Rule 60(b)(6) is broad, it is clear that the Rule is not to be used to correct errors of law. 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)). It is not, therefore, a substitute for bringing a timely appeal or making a motion under Rule 59 for relief from an erroneous judgment: "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)." Hagwood v. Odom, 88 N.C. App. 513, 519 (1988). Examples:

1. Wallis v. Cambron, 194 N.C. App. 190, 194 (2008). Plaintiffs filed a Rule 60(b)(6) motion after a number of their claims were dismissed, asserting that the trial court misapplied the law related to shareholder demands and erred in determining there was no cause of action for civil conspiracy. *Id.*. The Court of Appeals affirmed the trial court's denial of this motion, stating that "judgments involving misapplication of the law may be corrected only by appeal and Rule 60(b) motions cannot be used as a substitute for appeal." *Id.* at 194–95 (quotation omitted).

2. Catawba Valley Bank v. Porter, 188 N.C. App. 326, 329 (2008). In this case, the restriction against use of the rule to correct errors of law produced a harsh result. On December 11, 2006, the trial court entered judgment and a separate order denying attorney fees to the prevailing plaintiff. The same day, the defendant filed a motion to reconsider under Rule 60. *Id.* at 327–28. The trial court amended its order awarding attorney fees, finding that it had "applied the wrong legal standard upon Defendants' initial Motion for Attorney fees and Costs and erroneously held that a failed attempt to settle the action after its institution was a necessary finding in awarding a prevailing party attorney fees and costs…pursuant to N.C. Gen. Stat. § 75-16.1." *Id.* at 329. The plaintiff appealed the amended judgment on grounds it corrected an error of law. The Court of Appeals agreed with the plaintiff, and held:

> Defendants' motion raised an issue of law – whether the trial court applied the correct legal standard in its initial ruling on Defendants' motion for attorney's fees. … [I]t is well settled that Rule 60(b)(6) does not include relief from errors of law or erroneous judgments. … We conclude that Defendants improperly sought relief from an error of law by means of a Rule 60 motion. … [T]he trial court's amended order was entered, not pursuant to its inherent authority

> nor under N.C. Gen. Stat. § 1A-1, Rule 59 (2005), but in an order granting Defendants' motion under Rule 60. As discussed above, Rule 60 is an improper mechanism for obtaining review of alleged legal error. For the reasons discussed above, the trial court's order awarding attorney's fees to Plaintiff's counsel is Vacated.

Id. at 329-30 (citations omitted). The Rule 60 motion was brought well within the 10 days allowed for a motion to alter or amend the judgment under Rule 59(a) or 52. If the movant had invoked one of these rules instead of Rule 60, the outcome of this case would surely have been different.

3. Spangler v. Olchowski, 187 N.C. App. 684, 687-88 (2007). In this medical malpractice action involving bariatric surgery, the trial court ordered plaintiff to produce complete medical records from all known medical providers including mental health providers. Plaintiff later moved for relief from this order pursuant to Rule 60(b), and the trial court denied any relief. *Id.* On appeal (based on substantial right), the court ordered plaintiff to produce all the medical records, noting:

> We have consistently held that judgments involving the misapplication of the law 'may be corrected only by appeal and Rule 60(b) motions cannot be used as a substitute for appeal.' Therefore, plaintiff's reliance on an oral motion for the trial judge to reconsider the [earlier] order pursuant to Rule 60(b) is misplaced.

Id. at 689 (citation omitted).

4. Baxley v. Jackson, 179 N.C. App. 635, 637-38 (2006). Defendants appealed a contempt order, but the appeal was dismissed after defendants failed to perfect it. They later requested the trial court vacate the contempt order under Rule 60(b) as "contrary to established law," and the trial court denied this motion. *Id*. at 638. The Court of Appeals held:

> [D]efendants based their Rule 60(b)(6) motion for relief on alleged errors of law. Rule 60(b)(6) many not be used as an alternative to appellate review, however. Although defendants properly appealed the…order to this Court, they failed to perfect such appeal, leading to dismissal….Defendants may not now seek a "second bite at the apple" through Rule 60(b)(6).

Id. at 638-39. *See also* Draughon v. Draughon, 94 N.C. App. 597, 599 (1989) (where defendant had failed to make a timely appeal, Rule 60(b)(6) could not be used to modify an order simply because the defendant was dissatisfied with it).

5. Lang v. Lang, 108 N.C. App. 440, 452 (1993). The trial court rejected defendant's Rule 60(b)(6) motion for relief from a superior court decree allowing enforcement of a foreign divorce judgment. Defendant argued that the wrong exchange rate had been used in calculation of the judgment amount. Defendant had earlier filed an appeal of the judgment, but failed to perfect it, and that appeal had been dismissed. The Court of Appeals affirmed the trial court, noting that "erroneous judgments may be corrected only by appeal" and that Rule 60 "cannot be used as a substitute for appellate review." *Id.* at 452–53 (citation omitted); *see also* McKyer v. McKyer, 182 N.C. App. 456, 459–62 (2007) (rejecting Rule 60(b)(6) motion for relief from attorney fee award and order dismissing notices of appeal).

6. Garrison v. Barnes, 117 N.C. App. 206, 208-10 (1994). Defendant sought relief under Rule 60(b)(6) where the trial court entered judgment by default against him adjudicating him to be the father of a child and ordering him to pay child support. Defendant based the motion on his alleged right to obtain a blood paternity test prior to adjudication of paternity. *Id.* at 209. Defendant never appealed the default judgment order on this basis. The appellate court rejected defendants attempt to ""use a Rule 60(b)(6) motion as a substitute for appellate review." *Id.* at 210.

B. Not for Arguments That Could Have Been Raised at Trial. Rule 60(b)(6) is also not to be used to raise arguments that could have been raised at trial but were not. It is not broad enough to provide a second chance to make a legal assertion or defense that was available to the party at the time of trial. Concrete Supply Co. v. Ramseur Baptist Church, 95 N.C. App. 658, 659–660 (1989). In *Concrete Supply*, a supplier sued to enforce a lien against a church for money owed by a contractor in constructing the church's driveway. After a bench trial, the court found the church liable to the supplier. The church did not appeal, but some months later filed a Rule 60(b)(6) motion arguing that it had paid the contractor in full, thus the supplier was not subrogated to the rights of the contractor and could not hold the church liable for the contractor's debts. *Id.* at 659. The Court of Appeals agreed with the church's legal point, but because the church "failed to assert this defense at trial and then failed to bring an appeal", Rule 60(b)(6) could not be used to seek relief on this basis. *Id.* at 660; *see also* Piedmont Rebar, Inc. v. Sun Constr., Inc., 150 N.C. App. 573, 576–77 (2002) (Rule 60(b)(6) not available to property owner to assert that subcontractor had no right to enforce a lien where property owner did not make the argument/defense at trial).

C. 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. Examples:

1. State ex rel. Richmond County Child Support Agency v. Adams, 153 N.C. App. 512, 515 (2002). Defendant filed a motion to void an order of paternity and support agreement on grounds that a later paternity test revealed that he was not the father. The motion was filed more than one year after the order was entered. Noting that the motion made allegations of fraud and mistake, the court stated that "the facts supporting the motion are facts which…more appropriately would support consideration pursuant to (b)(1) or (b)(3)." *Id*. Because the motion was filed outside the one-year limit, defendant's motion was untimely and Rule 60(b)(6) could not be used to extend the time limit. The court noted that the one-year limitation "is an explicit requirement which our Court cannot ignore." *Id.* at 515.

2. 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 judgment by default was entered against Defendants. 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 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; *see also* DeLote Builders, LLC v. Conley, __ N.C. App. __, 734 S.E.2d 140, *3 (2012) (unpublished) (providing a thorough discussion of whether a party's neglect of his case was "sufficient to draw water from the grand reservoir of Rule 60(b)(6)").

3. Norton v. Sawyer, 30 N.C. App. 420 (1976). Defendant's counsel neglected to file an answer, resulting in a default judgment against defendant. Defendant filed a motion under Rule 60 more than one year later. Noting that defendant had missed the one-year deadline to bring an excusable neglect motion under Rule 60(b)(1), the Court of Appeals declined to interpret "grand reservoir of equitable power" to allow relief for the same basis under Rule 60(b)(6). *Id.* at 426 (citation omitted).

D. Not to be Used to Relax 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. Akzona, Inc. v. American Credit Indemnity Co. of New York, 71 N.C. App. 498, 505 (1984). In *Akzona*, the defendants sought relief from summary judgment on grounds of new evidence. Rule 60(b)(2) requires that the new evidence "could not have been discovered by the exercise of due diligence in time to present it in the original proceeding." *Id*. The defendants could not make this showing, so they made their motion under (b)(6). *Id.* Affirming the trial court's denial of relief, the Court of Appeals explained:

> Defendants attempted to circumvent the definitional requirements for new evidence under Rule 60(b)(2) by designating their motion as one made under Rule 60(b)(6), which grants relief from a judgment or order for "any other reason justifying relief from the operation of the judgment." … Defendants' motion…was expressly based on newly discovered evidence, which brings it within the scope of Rule 60(b)(2), and not within the scope of Rule 60(b)(6), which speaks of any *other* reason, *i.e.,* any reason other than those contained in Rule 60(b)(1)-(5). Thus, this motion was not properly brought under Rule 60(b)(6), and defendants' discussion of Rule 60(b)(6) is inapposite.

Id.

III. Requirements for Rule 60(b)(6) Relief. Rule 60(b)(6) allows relief "for [a]ny other reason justifying relief from the operation of the judgment." Our courts have established that such justifications only exist if 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 this section will therefore refer to them together as "extraordinary circumstances."

A. Extraordinary Circumstances

1. Situations Constituting Potential "Extraordinary Circumstances"

a. "Irregular Judgments" Related to Court Practice. Unlike "erroneous" judgments—where the court's decision is based on an error of law—*"irregular"* judgments can form a basis for relief under Rule 60(b)(6). 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). It includes, for example, notice and calendaring errors that are not the fault of the movant. Most of the opinions in this category date from before electronic court records and communications, so the exact factual scenarios are less likely to happen today. The general concept of an "irregular" judgment is no less valid, however, so these cases remain useful guidance.

i. Windley v. Dockery, 95 N.C. App. 771 (1989). Defendant's appeal of a small claims judgment was dismissed by the district court judge upon finding that Defendant had not appeared. *Id.* at 771–72. Defendant moved for relief under 60(b)(6) asserting he did not receive notice. The Court of Appeals held that the relief should have been granted because the only evidence was that there had been no notice: "It is clear that the court may give relief from a judgment pursuant to Rule 60(b)(6) if the party making the motion has not had notice that the case was duly calendared." *Id.* at 773.

ii. Oxford Plastics v. Goodson, 74 N.C. App. 256 (1985). The trial court mailed a calendar notice to an attorney (who was also a defendant), but the calendar notice was returned with a "moved and no forwarding address" notation. *Id.* at 257–58. The trial court later denied Rule 60(b) relief finding that defendant/attorney had received notice, and notice upon one partner constitutes notice upon all. *Id*. at 260. The Court of Appeals reversed because there was no evidence that such notice had been received, and "under these circumstances, a reasonable application of the provisions of Rule 60(b)(6) require [sic] that defendants be excused from attendance at trial, and, if defendants have shown a meritorious defense, require reversal of the trial court's judgment."
Id. at 261.

iii. Butler Serv. Co. v. Butler Serv. Group, Inc., 66 N.C. App. 132 (1984). Late on a Monday afternoon, plaintiff's case was called for trial at 9:30 a.m. the next morning in superior court. Plaintiff's counsel was set to try a non-jury

case in district court starting at 9:00 the same morning. Plaintiff's attorney advised both courtroom clerks of the conflict and attempted to find the superior court judge and clerk of court to inform them as well. After learning of the conflict, the district court judge nevertheless ordered counsel to proceed with his client's case at 9:00 a.m. While counsel was proceeding with his client's evidence in district court, he was informed that his case in superior court would be dismissed if he did not appear in 5 minutes. He was excused to go speak to the superior court judge, who then dismissed the case for failure to prosecute. In a scathing opinion, the Court of Appeals held that relief under Rule 60(b)(6) was required, noting:

> The harshness of a Rule 41 dismissal with prejudice is seldom more apparent than on the facts of this case. Plaintiff...was standing outside of superior courtroom #304, ready and willing to prosecute its case at the time the case was dismissed. … This case does not involve an attorney who has repeatedly taken action to delay the trial of its case. … In this case, plaintiff's counsel's failure to proceed did not arise out of a deliberate attempt to delay the progress of the action to its conclusion, but rather, arose out of a very typical and practically expected situation that was handled in an atypical manner.

Id. at 135–36.

iv. LaRoque v. LaRoque, 46 N.C. App. 578 (1980). A divorce judgment was entered after trial, but defendant wife, who lived in Maryland, had received no notice of an early calendaring of the case for trial. *Id.* at 579. The Court of Appeals held that this "irregular" judgment should have been vacated, stating:

> There is no…neglect of her lawsuit by the defendant in the present case. Furthermore, were we to apply the rule of constructive notice, that when a case is listed on the court calendar, a party has notice of the time and date of hearing, such a rule bends to embrace common sense and fundamental fairness. We think

> common sense and fundamental fairness required that before the divorce could be granted, notice be given defendant of the trial when the trial was had one day after an answer was filed by the out-of-state defendant who had no reason to know that the case had been listed on the calendar.

Id. at 582 (citation omitted).

v. Taylor v. Triangle Porsche-Audi, Inc., 27 N.C. App. 711, 715–17 (1975). 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.

vi. Lowe's Charlotte Hardware, Inc. v. Howard, 18 N.C. App. 80, 82–83 (1973). The Court of Appeals affirmed a grant of relief under 60(b)(6) where trial court found that plaintiff and plaintiff's counsel had no notice that a case would be called for trial.

vii. Brady v. Town of Chapel Hill, 277 N.C. 720, 721-24 (1971). After this case was transferred from superior to district court, a clerk overlooked the order of transfer and calendared the case on the superior court calendar. The case was called for trial, plaintiff did not appear, and his case was dismissed. *Id.* at 721. Without ruling on the question, the Court of Appeals noted that the proper remedy for this "mischance, which need not, and should not, have occurred" would be a motion under Rule 60, which the trial court could grant if plaintiff could show he exercised proper diligence and had a meritorious defense. *Id.* at 722–724.

b. "Irregular Judgments" – Improper Amount of Relief

i. Sharyn's Jewelers, LLC v. IPayment, Inc., 196 N.C. App. 281, 287–88 (2009). 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.

ii. Jorgensen v. Seeman, 95 N.C. App. 767, 770 (1989). Relief was proper where the trial court unilaterally reduced the amount of plaintiff's jury verdict (remittitur).

c. Gross Negligence by Movant's Counsel or Representative. In general, an attorney's inexcusable negligence is imputed to the client and is, therefore, not an "extraordinary circumstance" under Rule 60(b(6). Henderson v. Wachovia Bank of North Carolina, N.A., 145 N.C. App. 621, 626 (2001). In certain rare circumstances, however, an attorney's or representative's negligence may be considered so gross as to rise to the level of an extraordinary circumstance. Royal v. Hartle, 145 N.C. App. 181, 185 (2001). In *Poston v. Morgan*, 83 N.C. App. 295, 297-300 (1986), the movants' attorney severely neglected and manipulated his clients' cases, including failing to perfect appeals in four different matters, failing to file appeal records, failing to appear at hearings, and systematically misleading the movants about case status. The Court of Appeals held that the attorney's misdeeds resulted in movants' inability to explore all avenues of appeal, entitling them to Rule 60(b) relief. *Id.* at 300.

d. Loss of Right to Pursue Remedy Through no Fault of Movant. In *Fox v. Health Force, Inc.*, 143 N.C. App. 501, 503-07 (2001), an incompetent plaintiff with multiple sclerosis sued a medical care center for alleged negligence that left her in a vegetative state. Originally her mother sued on her behalf purportedly as her guardian ad litem, but the mother was never properly appointed guardian ad litem under Rule of Civil Procedure 17 and had not been appointed guardian under Chapter 35A. The attorney hired by plaintiff's mother neglected the case, causing the incompetent plaintiff's claims to be dismissed as outside the relevant statutes of limitation and an attorney fee award to be assessed against her. Later, new counsel was hired, the plaintiff was properly adjudicated legally incompetent with a general guardian, and a guardian ad litem was appointed, who soon filed a Rule 60 motion. The trial court found that Rule 60(b)(6) relief was proper. *Id.* at 504–505. The Court of Appeals affirmed, making clear that this was not a mere case of attorney neglect imputable to the client. Here:

> The person representing [her] as her "guardian *ad litem* " was not in actuality her guardian or guardian *ad litem.* At that time, none of the parties was entitled to act on Gail's behalf, as incompetent plaintiffs *must* be represented by a general or testamentary guardian or guardian *ad litem.* N.C. Gen.Stat. § 1A-1, Rule 17(b)(1) (1999). Moreover,

> …[counsel's] inexcusable negligence could not be charged against [her] because she is an incompetent "entitled to the greatest possible protection by this court."

Id. at 506–07.

e. Impossibility of Enforcement. In *Curran v. Barefoot*, 183 N.C. App. 331, 334 (2007), the trial court ordered specific performance of a contract including the conveyance of certain watercraft. The defendant moved for relief on grounds that he was not the record owner of some of the boats, and he presented new (apparently uncontroverted) evidence in support of the motion. The trial court denied the relief. The Court of Appeals reversed, holding:

> "[E]xtraordinary circumstances exist" and "justice demands"' the judgment be modified. The trial court ordered defendant to convey personal property it did not own. "Specific performance may not be granted where the performance of the contract is impossible" and "specific performance will not be decreed against a defendant who is unable to comply with the contract even though the inability to perform is caused by the defendant's own act."

Id. at 343 (citations omitted).

f. To Clarify the Judgment. In *Alston v. Federal Express Corp.*, 200 N.C. App 420, 423 (2009), the trial court entered an order setting a statutory lien on October 12, 2007. On 28 May 2008, the plaintiff filed a motion to clarify, and the trial court subsequently amended the order. The Court of Appeals affirmed, stating:

> Although the trial court's intentions regarding the distribution of attorney's fees is not clear from the record, subsequent correspondence by the parties suggested that neither [party] could agree on how to interpret the trial court's order. Pursuant to Rule 60(b)(6)'s "grand reservoir of equitable power," the trial court had jurisdiction to revisit its order so that its intentions could be made clear.

Id. at 423–24.

g. To Account for Certain Changes in the Law. In *Hamby v. Profile Products, LLC,* 197 N.C. App. 99, 110 (2009), the Court of Appeals stated generally that "Rule 60(b)(6) is properly employed to revisit a judgment affected by a subsequent change in the law." The court cited as authority the cases of *Barnes v. Taylor and McNeil v. Hicks*, so this language should be viewed through the relatively limited lens of those cases:

i. Barnes v. Taylor, 148 N.C. App. 397, 398-400 (2002). In *Barnes*, the trial court entered a judgment on October 8, 1997 ordering defendants to remove a manufactured home from a subdivision on grounds it violated the neighborhood's restrictive covenants prohibiting trailers. One day earlier, the Court of Appeals had filed an opinion setting forth the factors to determine if a structure is a trailer or a modular home. A third-party defendant shortly thereafter brought the appellate opinion to the trial court's attention on a Rule 60 motion. The trial court then determined that "'it is clear that [defendants'] home does not violate the restrictive covenants…and, therefore, the October 8, 1997 ruling was erroneous.'" *Id.* at 398–99. On appeal, the plaintiff argued that the trial court had no authority to set aside the order on motion of a third-party defendant rather than the defendants against whom the order had been issued. The Court of Appeals rejected this argument, noting in any event that the court would have been authorized to grant relief under Rule 60(b)(6) on its own initiative where extraordinary circumstances exist. The court held that "[d]ue to the extraordinary circumstances present here, we reject plaintiff's contention that the trial court lacked authority to act on its own initiative in order to accomplish justice." *Id.* at 400.

ii. McNeil v. Hicks, 119 N.C. App. 579, 580 (1995). In *McNeil*, the plaintiff sued her insurance company under the uninsured motorist coverage of her policy when an unknown driver caused another car to collide with hers. The trial court granted partial summary judgment for the plaintiff. Not long after, the North Carolina Supreme Court issued an opinion holding that there must be physical contact with the unidentified vehicle in order for uninsured motorist coverage to apply. Based on this holding, the trial court granted the insurance company relief from the partial summary judgment order under Rule 60(b)(6). The Court of Appeals affirmed. *Id.* at 580–81.

2. Situations *Not* Constituting Extraordinary Circumstances.

a. Lack of Understanding of Law; Failure to Procure Counsel.

i. In *Thacker v. Thacker*, 107 N.C. App. 479 (1992), defendant wife executed a consent judgment dividing marital assets. She later moved for relief pursuant to 60(b), arguing that the judgment was "patently unfair and

inequitable," and that plaintiff had fraudulently induced her to sign by telling her "we will work things out and we will get back together, but we still have to get these papers done to keep from going to court." *Id.* at 480. The Court of Appeals stated, "[t]his Court has held on numerous occasions that a lack of counsel and/or an ignorance of the law does not amount to 'extraordinary circumstances' without some showing that the lack of counsel or ignorance was due to reasons beyond control of the party seeking relief." *Id.* at 482.

ii. In *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).

Id. at 671.

b. Movant's Failure to Prosecute/Defend.

i. Trivette v. Trivette, 162 N.C. App. 55, 57 (2004). During a court date the defendant and his attorney did not attend (but had notice of), defendant's custody modification hearing was continued to the following month. He found out the new court date on the Friday before the new Monday court date, but he was scheduled to fly out of state and could not attend. He called the court twice, but proceeded to go on his vacation. *Id.* at 57–58. The Court of Appeals stated that, "Defendant's telephone calls requesting a continuance three days before the scheduled hearing were not sufficient to excuse his failure to attend the hearing or mandate a setting aside of the judgment pursuant to Rule 60(b)(6)." *Id.* at 63.

ii. Parks v. Green, 153 N.C. App. 405, 413 (2002). Where defendant failed to attend arbitration or be properly represented at arbitration despite a rule requiring attendance, the trial court did not err in refusing to grant Rule 60(b)(6) relief from the order enforcing the arbitration award.

iii. Sides v. Reid, 35 N.C. App. 235, 237 (1978). The Court of Appeals reversed an order setting aside a default judgment against a defendant. 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.

iv. Campbell v. First-Citizens Bank and Trust Co., 23 N.C. App. 631 (1974). The trial court dismissed a case for plaintiff's failure to prosecute the action during the discovery phase. *Id.* at 632. The court later set aside the dismissal because "plaintiff was not represented by counsel during the period February 1, 1974 to and including February 17, 1974 but made this Motion with diligence upon retaining substitute counsel." *Id.* at 633. The Court of Appeals reversed, holding:

> Plaintiff was aware of her scheduled trial and the need to obtain legal counsel in sufficient time to procure such representation. She had consented to the court order on 1 February 1974 which relieved her attorneys from their obligation to appear for her, and there is no finding that any diligent effort was made to secure other legal services. The absence of counsel for plaintiff was before the court and considered when the original judgment of dismissal was entered. Plaintiff did not appeal from that dismissal order or petition for certiorari, but chose to present to a second superior court judge upon motion to set aside the judgment the identical circumstances which resulted in the original dismissal for failure to prosecute her action.

Id. at 634–35.

c. Unilateral Mistake (without misrepresentation)

i. Griffith v. Curtis, 205 N.C. App. 462 (2010). Plaintiff moved pursuant to Rule 60 to set aside a mediated settlement agreement incorporated into a duly-executed consent judgment on grounds that the result of one of the provisions was "completely and utterly unfair." *Id.* at 463–64. The Court of Appeals determined that she showed only unilateral mistake, not mutual mistake or unilateral mistake procured by misconduct, thus there was no basis for finding extraordinary circumstances. *Id.* at 465.

ii. In re Will of Baity, 65 N.C. App. 364 (1983). Parties to a will contest reached a settlement agreement and executed a consent judgment. They later discovered a hand-written will and moved to be relieved from the consent judgment. *Id.* at 365. The Court of Appeals held that the existence of the will was not a "mutual mistake" that would allow relief under Rule 60(b)(6), and did not motivate the parties' consent to the settlement agreement. *Id.* at 367–68. The court noted that a "unilateral mistake, unaccompanied by fraud, imposition, undue influence, or like oppressive circumstances, is not sufficient to avoid a contract or conveyance." *Id.* at 368 (citation omitted).

d. Procedural Blunder not Amounting to Gross Negligence. In *Royal v. Hartle*, 145 N.C. App. 181, 185 (2001), defendants could

not show gross negligence establishing "extraordinary circumstances" where defendants' counsel allegedly entered into a consent agreement resolving an easement dispute without defendants' knowledge or permission.

e. Notice Issues Where Fault Shared by Movant or Movant's Agent or Attorney.

i. Milton M. Croom Charitable Remainder Unitrust v. Hedrick, 188 N.C. App. 262, 269–70 (2008). Where a defendant's counsel was allowed to withdraw, and defendant hired no new counsel, her failure to receive actual notice of a hearing date was not an "extraordinary circumstance" because there was evidence that the trial calendar had been duly published by the court. *Id.* at 269–70.

ii. 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.

iii. Henderson v. Wachovia Bank of North Carolina, N.A., 145 N.C. App. 621, 626-28 (2001). The trustee defendant failed to obey two orders to appear at depositions, and the trial court entered judgment against him. The trustee moved for relief from the judgment on grounds that his attorneys never informed him of the deposition notices or orders. The motion was denied. After a discussion of whether an attorney's inexcusable neglect of a case is imputed to the client, the court rejected the defendant's Rule 60(b)(1) arguments, and then addressed whether the attorney's actions amount to fraud, entitling the defendant to relief under Rule 60(b)(6). *Id*. at 627-28. The court rejected the fraud argument:

> At most the affidavits show that defendant's attorneys did not fully apprise defendant of court orders to appear for depositions. Without so holding today, there may be situations so egregious that would entitle a party to be relieved of fraud on it by its own attorney, but this is not one of those situations.

Id. at 628.

iv. Partridge v. Associated Cleaning Consultants & Servs., Inc., 108 N.C. App 625, 632 (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 that the circumstances did not warrant a finding of extraordinary circumstances under 60(b)(6). *Id.* at 630–33.

v. 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. Under circumstances such as this, we cannot say that the trial judge's discretionary ruling allowing the judgment to stand was "manifestly unsupported by reason."

Id. at 43 (citation omitted).

vi. Rose v. Forester, 201 N.C. App. 159, *4 (2009) (unpublished). Where defendant Maryland corporation's registered process agent in North Carolina failed to forward a complaint and summons to defendant, the process agent's inexcusable neglect was imputed to the defendant, and defendant could not establish extraordinary circumstances due to the lack of notice.

f. Foreseeable Changes in Circumstances. In *Lee v. Lee*, 167 N.C. App. 250, 252 (2004), a qualified domestic relations order was entered in a divorce, part of which provided the wife with the greater of a lump sum of approximately $400,000 or one half of the value of a retirement account. By the date of distribution, the value of the account had dropped to $498,000.00, effectively giving the wife – who opted for the lump sum—a far greater than one-half share of the original value. The husband moved for relief under Rule 60(b)(6) citing the "extraordinary circumstance" of the stock market downturn. *Id.* at 257–58. The Court of Appeals rejected this argument, stating that, "[a] change in the value of the stock market over the course of five years does not amount to an extraordinary or even unforeseeable circumstance. There was therefore no abuse of discretion by the trial court in its denial of defendant's Rule 60(b) motion." *Id.* at 258.

g. To Modify a Judgment Merely to Resolve Dissatisfaction. In *Draughon v. Draughon*, 94 N.C. App. 597, 598 (1989), the trial court allowed a Rule 60(b)(6) motion to modify an equitable distribution order where the parties were both dissatisfied but could not agree on a resolution, and the plaintiff had let his appeal period run. The Court of Appeals reversed, explaining:

> The parties' failure to agree as to the order's modification is not a justifiable reason for setting the order aside; for they resorted to the court in the first place because of their inability to agree and the

> stability of the judicial order arrived at after an adversarial hearing cannot be made to depend upon their agreement to it. And setting the order aside because plaintiff lost his right to appeal through his own oversight amounted to using Rule 60(b)(6) as a substitute for appeal, which our law does not permit. If the order remained set aside we have no reason to suppose that the next equitable distribution order would be acquiesced in by both parties; and under the circumstances recorded the integrity and stability of our judicial process requires that the duly entered and presumably correct order be reinstated and upheld.

Id. at 599 (citation omitted).

B. 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). As the Court of Appeals has explained, "the 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." Norton v. Sawyer, 30 N.C. App. 420, 423 (1976) (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 by his allegations, *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.* While a meritorious defense is a requirement in Rule 60(b)(6) motions, the issue most often arises in the context of Rule 60(b)(1) motions seeking relief based on "excusable neglect."