Slip-ups happen, but when are they “excusable neglect”?

Defendant fails to answer the complaint on time, so plaintiff seizes the moment and obtains default judgment. A party does not understand a notice of hearing, fails to attend, and the court enters a final order in the opponent’s favor. These and similar scenarios happen regularly in North Carolina courts, and afterward the most common argument for relief from the judgment is “excusable neglect.” Rule of Civil Procedure 60(b) allows relief from a “final judgment, order, or proceeding” on this basis. But just what does excusable neglect mean?

In general, “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.” Thomas M. McInnis & Assocs., Inc. v. Hall, 318 N.C. 421 (1986). Still, excusable neglect is a question of law, Sellers v. FMC Corp., 216 N.C. App. 134 (2011), and our appellate courts have analyzed it many times in many contexts. Taken together, the opinions set some helpful parameters for deciding whether relief is appropriate:

Reasonable attention to the case is required. As a baseline, excusable neglect depends on what “may be reasonably expected of a party in paying proper attention to his case” under all the surrounding circumstances. *Sellers*, 216 N.C. App. at 141. In only a few cases have the courts allowed relief when analyzing the movant’s conduct under this standard. *See* Barclays American Corp. v. Howell, 81 N.C. App. 654 (1986) (ill-timed withdrawal of counsel left no reasonable means of putting on case); Callaway v. Freeman, 71 N.C. App. 451 (1984) (defendant never received trial calendar); U.S.I.F. Wynnewood Corp. v. Soderquist, 27 N.C. App. 611 (1975) (movant’s deficient mental processes prevented prudent action). Much more often the courts have found that relief was inappropriate, such as where:
• Defendants failed to attend to their own defense during the period when they were not represented by counsel, McKinley Bldg. Corp. v. Alvis, 183 N.C. App. 500 (2007);
• Defendants failed to timely respond to an answer because their insurer wanted first to evaluate the case for settlement possibilities, Gibson v. Mena, 144 N.C. App. 125 (2001);
• Defendants’ insurer informed them of its refusal to defend two weeks before the answer was due; plaintiff then waited an additional three months to seek entry of default and also gave further advance notice; and defendants still did not respond, Hayes v. Evergo Telephone Co., Ltd., 100 N.C. App. 474 (1990);
• Movants’ confusion caused by receiving two different trial calendars could have been resolved by a simple call to the court, Harrington v. Harrington, 38 N.C. App. 610 (1978);
• Defendant’s 24-year-old manager, on the job less than a month, believed the insurer would handle the complaint because it had been in negotiations with plaintiff’s insurer, Commercial Union Assurance Cos. v. Atwater Motor Co., Inc., 35 N.C. App. 397 (1978); and
• Plaintiff had consented to withdrawal of her prior counsel, was aware of the scheduled trial, and showed no diligent efforts to secure other legal services, Campbell v. First-Citizens Bank and Trust Co., 23 N.C. App. 631 (1974).

Failure to keep a current service address is a big no-no. The movant’s neglect will not be

excused if judgment resulted from its failure to maintain a registered agent or to inform the court of a current address. *See, e.g.*, Smith ex rel. Strickland v. Jones, 183 N.C. App. 643 (2007); Advanced Wall Systems, Inc. v. Highlande Builders, LLC, 167 N.C. App. 630 (2004); Standard Equip. Co. v. Albertson, 35 N.C. App. 144 (1978). In one such case, the Court of Appeals denied relief where failure to maintain a current North Carolina registered agent left a Maryland corporation responsible for a $300,000 default judgment. Anderson Trucking Serv., Inc. v. Key Way Transport, Inc., 94 N.C. App. 36 (1989).

Ignorance of the law is no excuse. A party will not be excused from paying attention to its case due to ignorance of the law, ignorance of court processes, or failure to obtain counsel. Grier ex rel. Brown v. Guy, 741 S.E.2d 338 (2012); Creasman v. Creasman, 152 N.C. App. 119 (2002); Moore v. City of Raleigh, 135 N.C. App. 332 (1999); Hall v. Hall, 89 N.C. App. 685 (1988). Relief has, for example, been denied where:

- A party failed to retain new counsel because she believed the opposing party would inform her of important developments, Milton M. Croom Charitable Remainder Unitrust v. Hedrick, 188 N.C. App. 262 (2008);
- Defendant failed to respond because he thought the complaint was a mere “prelude” to litigation, Scoggins v. Jacobs, 169 N.C. App. 411 (2005);
- Defendant did not obtain counsel or respond because he assumed plaintiff’s counsel would contact him with a hearing date, JMM Plumbing and Utilities, Inc. v. Basnight Constr. Co., Inc., 169 N.C. App. 199 (2005); and
- A self-represented litigant had a ninth grade education, could read and write, and had previously hired counsel in other matters, but did not attend to the case because “he did not believe plaintiffs could prevail,” Boyd v. Marsh, 47 N.C. App. 491 (1980).

An attorney’s neglect is imputed to the party. Finally, a party will not be relieved from judgment on grounds that its attorney was the cause of the neglect. In *Briley v. Farabow*, 348 N.C. 537 (1998), the Supreme Court stated 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).” The court reasoned that, “[i]n 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.” Under this rule, the Court of Appeals has repeatedly declined to grant relief based on attorney mistakes, such as when counsel: failed to note the date of entry of dismissal, resulting in a missed refiling deadline, Nieto-Espinoza v. Lowder Constr., Inc., 748 S.E.2d 8 (2013); failed to ensure a notice of appeal had been filed, Sellers v. FMC Corp., 216 N.C. App. 134 (2011); entered into a settlement agreement without his clients’ knowledge, Purcell Int’l Textile Grp, Inc. v. Algemene AFW N.V., 185 N.C. App. 135 (2007); neglected to forward discovery to his clients, Brown v. Foremost Affiliated Ins. Svcs, Inc., 158 N.C. App. 727 (2003); failed to meet court-ordered discovery deadlines, Parris v. Light, 146 N.C. App. 515 (2001); mistook one docket entry for another, Clark v. Penland, 146 N.C. App. 288 (2001); and misapprehended the ramifications of a dismissal, Couch v. Private Diagnostic Clinic, 133 N.C. App. 93 (1999).

Even where a party gets over these hurdles and establishes excusable neglect, the court should not grant relief unless the party also shows a “meritorious defense” to the underlying claim. Norton v. Sawyer, 30 N.C. App. 420 (1976). In short, the court need not set aside the judgment if it must then turn around and grant the same judgment on the merits. There is, of course, more to say about the meritorious defense requirement, and I’ll address it in a later post.