# End of Trial Motions:

## Text of Rules 50, 55, 59, and 60, and Supplemental Materials on Motions for New Trial and to Set Aside the Verdict

## TEXT OF RULES

**Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.**

(a) When made; effect. – A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order granting a motion for a directed verdict shall be effective without any assent of the jury.

(b) Motion for judgment notwithstanding the verdict. –

(1) Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the submission of the action to the jury shall be deemed to be subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. In either case the motion shall be granted if it appears that the motion for directed verdict could properly have been granted. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the judge may allow the judgment to stand or may set aside the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the judge may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. Not later than ten (10) days after entry of judgment or the discharge of the jury if a verdict was not returned, the judge on his own motion may, with or without further notice and hearing, grant, deny, or redeny a motion for directed verdict made at the close of all the evidence that was denied or for any reason was not granted.

(2) An appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, may not direct entry of judgment in accordance with the motion unless the party who made the motion for a directed verdict also moved for judgment in accordance with Rule 50(b)(1) or the trial judge on his own motion granted, denied or redenied the motion for a directed verdict in accordance with Rule 50(b)(1).

(c) Motion for judgment notwithstanding the verdict – Conditional rulings on grant of motion. –

(1) If the motion for judgment notwithstanding the verdict, provided for in section (b) of this rule, is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for new trial has been conditionally granted and

the judgment is reversed on appeal, the new trial shall proceed unless the appellate division has otherwise ordered. In case the motion for new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate division.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Motion for judgment notwithstanding the verdict – Denial of motion. – If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate division concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate division reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

**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.

**Rule 59. New trials; amendment of judgments.**

(a) Grounds. – A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:

(1) Any irregularity by which any party was prevented from having a fair trial;
(2) Misconduct of the jury or prevailing party;
(3) Accident or surprise which ordinary prudence could not have guarded against;
(4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;
(5) Manifest disregard by the jury of the instructions of the court;

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

(8) Error in law occurring at the trial and objected to by the party making the motion, or

(9) Any other reason heretofore recognized as grounds for new trial.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for motion. – A motion for a new trial shall be served not later than 10 days after entry of the judgment.

(c) Time for serving affidavits. – When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 30 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On initiative of court. – Not later than 10 days after entry of judgment the court of its own initiative, on notice to the parties and hearing, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) Motion to alter or amend a judgment. – A motion to alter or amend the judgment under section (a) of this rule shall be served not later than 10 days after entry of the judgment.

**Rule 60. Relief from judgment or order.**

(a) Clerical mistakes. – Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

(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.

## NEW TRIALS AND AMENDING JUDGMENTS UNDER RULE 59

**Summary:** The judge may alter or amend the judgment upon motion served not later than 10 days after entry of judgment. Failure to timely serve motion is grounds for its denial. *E.g., Garrison ex rel. Chavis v. Barnes,* 117 N.C. App. 206 (1994). The judge also may amend or supplement judgment on his or her own initiative**,** even if the amendments is of a substantial character, if the action is taken no later than 10 days after entry of judgment. *Fox v. Fox,* 103 N.C. App. 13 (1991); *Housing, Inc. v. Weaver,* 305 N.C. 428 (1982).

The 10-day period applies to service of the motion. The judge may *act* on the motion after the ten-day period. *Housing, Inc. v. Weaver*, 305 N.C. 428 (1982).

In a bench trial, the judge may amend findings or make additional findings upon a motion made not later than 10 days after entry of judgment. The motion may accompany a motion for new trial. N.C. R. Civ. P. 52(b).

**Consent Judgments:** Special rules apply to amendment of consent judgment. Consent judgments are treated as contracts and, as a result, cannot be changed without consent of parties or allegation and proof that consent was not given or that it was obtained by fraud or mutual mistake. E.g., *In re Will of Baity*, 65 N.C. App. 364 (1983); *Blankenship v. Price,* 27 N.C. App. 20 (1975).

**Legal Errors**: Judge has power to grant new trial based on an error of law that occurred at the trial *and* that was objected to by the party moving for a new trial. Again, motion must be filed in 10-day period. Otherwise, only remedy for errors of law is appeal.

## CORRECTING CLERICAL ERRORS AND SETTING ASIDE JUDGMENTS UNDER RULE 60

### Correcting Clerical Errors:

**Summary:** Historically, judge had inherent authority to correct clerical errors. E.g., *Utica Mut. Ins. Co. v. Johnson*, 41 N.C. App. 299 (1979). Rule 60 codifies this practice, permitting the judge to correct clerical mistakes in judgments, orders, or other parts of the record at any time on the judge's own initiative or on a party's motion after such notice, if any, as the judge orders. N.C. R. Civ. P. 60(a).

**Effect of appeal:** The judge may correct clerical mistakes while an appeal is pending before the appeal is docketed in the appellate division and, if the appeal has been docketed, may also correct clerical errors with leave of the appellate court.

**Limit on authority:** However, the judge does not have power to affect substantive rights of the parties or to correct substantive errors in his or her decisions. *Watson* v. *Watson,* 118 N.C. App. 534 (1995). E.g., *Food Serv. Specialists v. Atlas Restaurant Mgmt., Inc.,* 111 N.C. App. 257 (1993).

A change is considered substantive and thus impermissible when it alters the effect of the original order. *Ice v. Ice*, 136 N.C. App. 787 (2000); *Gordon v. Gordon*, 119 N.C. App. 316 (1995).

**Examples:**

**Correcting date of entry of judgment**: *Food Service Specialists v. Atlas Restaurant Mgmt., Inc*., 111 N.C. App. 257 (1993): Rule 60(a) did not authorize trial court to correct an erroneous date of entry of judgment to reflect a date other than when judgment was actually entered. Such a change affected substantive rights by extending the period in which parties could file a notice of appeal.

**Dismissal of additional claims**: *Pratt v. Staton*, 147 N.C. App. 771 (2001): Where original order dismissed two, but not all, of the claims asserted against defendant, court lacked authority to amend order to dismiss remaining claims and certify judgment for immediate appeal. Amendment affected substantive rights of parties by allowing plaintiffs to appeal an otherwise nonappealable order.

**Setting Aside Judgments:**

**Summary:** Rule 60(b) authorizes the judge to grant a party relief from a final judgment if one of the listed criteria is satisfied. The rule only applies to final judgments, including default judgments, and does not apply to interlocutory orders. *Rupe v. Hucks-Follis*, 170 N.C. App. 188 (2005); *Rockingham Square Shopping Ctr., Inc. v. Integon Life Ins. Corp.*, 52 N.C. App. 633 (1981).

**Timing:** Party must file motion within a reasonable time. What constitutes "reasonable time" depends on the circumstances. *Brown v Windhom,* 104 N.C. App. 219 (1991) (judge did not abuse discretion in concluding one-year delay in filing Rule 60(b) motion unreasonable when defendant offered little explanation for delay beyond "confusion associated with the trial court's disposition" of his case and his resulting "uncertainty ... as to his legal rights"). For motions under 60(b)(1) (alleged mistake, etc.), 60(b)(2) (newly discovered evidence), and 60(b)(3) (fraud, etc.), the motion *must* be made no more than one year after the judgment, order or proceeding was entered or taken. However, a void judgment is a legal nullity and may be attacked at any time. E.g., *Allred v. Tucci,* 85 N.C. App. 138 (1987).

A judgment is void when the issuing court has no jurisdiction over the parties or the subject matter, or when it has no authority to render judgment entered. *Ottway Burton, P.A. v. Blanton,* 107 N. C. App. 615 (1992).

**Effect of appeal:** When an appeal is taken, the trial court is divested of jurisdiction to consider matters related to the appeal. The trial court retains limited jurisdiction, however, to rule on a Rule 60(b) motion to indicate what action it would be inclined to take were an appeal not pending. E.g., *Talbert v. Mauney,* 80 N.C. App. 477 (1986).

**Findings of fact:** Required only when requested by a party, though probably the better practice is to make them. *Compare Nations v. Nations,* 111 N.C. App. 211 (1993) (not needed) with *York v. Taylor,* 79 N.C. App. 653 (1986) (trial judge must make findings).

**Not appropriate for correcting errors of law:** Rule 60(b) does not permit the court to relieve a party of the effect of a judgment based on errors of law. Instead, the party must file a motion under Rule 59(a)(8) – which requires the motion to be served within 10 days of entry of the judgment and also requires that the party have objected to the error – or must appeal. *Hagwood v. Odom,* 88 N.C. App. 513, 519 (1988); *see also Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206 (1994) (60(b) motion may not be granted because of error of law); *Ottway Burton, P.A. v. Blanton*, 107 N.C. App. 615 (1992) (judgment entered according to proper court procedures but contrary to the law may be corrected only by appeal [though motion under 59(a)(8) might be appropriate in some circumstances]).

**Not appropriate for relieving from effect of consent judgment:** Consent judgments are governed by contract principles and may be avoided only if consent was not in fact given, as when based on fraud or mutual mistake (mistake common to both parties and because of it each has done what neither intended). A unilateral mistake, unaccompanied by fraud, imposition, or like circumstances, is not sufficient to avoid a contract or consent judgment. *Stevenson v. Stevenson,* 100 N.C. App. 750 (1990); *Blankenship v. Price*, 27 N.C. App. 20 (1975); *see also Royal v. Hartle*, 145 N.C. App. 181 (2001) (whether consent judgment should be set aside because it was entered without a party's authority, consent, or knowledge requires application of the following principles: (1) general desirability that a final judgment not be lightly disturbed; (2) where relief is sought from a judgment of dismissal or default, the relative interest of deciding cases on the merits and the interest in orderly procedure; (3) opportunity movant had to present his claim or defense; and (4) any intervening equities.).

> *State ex rel Envt'l Mgt. Comm'n v. House of Raeford Farms, Inc.,* 101 N.C. App. 433 (1991): Judge erred in modifying consent judgment by substituting less stringent interim schedule of effluent pollution limits when plaintiff commission did not consent to modification and record did not show that limits in original consent order were obtained by fraud or mistake.

**Grounds for relief:**

> **Rule 60(b)(1): Mistake, inadvertence, excusable neglect:** Movant must show grounds under this section and, **in addition**, that he or she has a **meritorious defense.** *E.g.*, *Grant v. Cox.,* 106 N.C. App. 122 (1992). The party seeking relief need not prove that a meritorious defense in fact exists, only that a *prima facie* defense exists. *U.S.I.F. Wynnewood Corp. v. Soderquist,* 27 N.C. App. 611 (1975). Better practice is to make findings as to the presence of a meritorious defense even if no excusable neglect is present. *Dishman v. Dishman*, 37 N.C. App. 543 (1978), *overruled on other grounds Pulliam v. Smith*, 348 N.C. 616, 620 n.1 (1998).
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> > **Standard:** Person must give the lawsuit the care which a person of ordinary prudence would give important business. *JMM Plumbing & Utilities, Inc. v. Basnight Const. Co., Inc.,* 169 N.C. App. 199 (2005).
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> > **Attorney negligence:** Generally this does not constitute excusable neglect, etc., but a party may be relieved from a judgment rendered against

him or her as a result of litigant's attorney's negligence in cases where the litigant is not at fault, so long as litigant is not at fault. E.g., *Wood v. Wood*, 297 N.C. 1 (1979); *Barclays Am. Corp. v. Howell*, 81 N.C. App. 654 (1986); *Jim Walter Homes, Inc. v. Peartree*, 28 N.C. App. 709 (1976).

**Other examples:** Failure to obtain an attorney does not constitute excusable neglect. *Scoggins v. Jacobs*, 169 N.C. App. 411 (2005); *JMM Plumbing*, 169 N.C. App. 199 S.E.2d 725. Protracted failure to maintain registered agent for service of process as required by statute, or to notify secretary of state of change in address, was not excusable neglect. *See Partridge v. Associated Cleaning Consultants & Servs., Inc.*, 108 N.C. App. 625 (1993).

**Rule 60(b)(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):** Evidence must have existed at time of first trial. E.g., *Cole v. Cole,* 90 N.C. App. 724 (1988). Failure to produce evidence earlier must not be due to lack of due diligence. E.g., *Conrad Indus., Inc. v. Sonderegger,* 69 N.C. App. 159 (1984).

**Rule 60(b)(3): Fraud.**

**Rule 60(b)(4): Judgment void:** A judgment is void if it lacks an essential element that would authorize a court to proceed to judgment, such as jurisdiction or service of process. E.g., *Bumgardner v. Bumgardner,* 113 N.C. App. 314 (1994) (judgment rendered in court but not entered until draft signed nearly two months later was void**,** when in interim another judge had dismissed complaint for lack of service and service of process and record contained no indication of prior judgment). A judgment is not void if the court had jurisdiction over the subject matter and the parties and had the authority to render its judgment.

**Rule 60(b)(5): Judgment satisfied, released or discharged, or prior judgment upon which it is based has been reversed or vacated, or it is no longer equitable that judgment should have prospective application.**

**Rule 60(b)(6): Any other reason justifying relief.** This "catch-all" does not authorize court to set aside judgment for errors of law [see above].

**Two-pronged test:** (1) Extraordinary circumstances exist, e.g., *Able Outdoor, Inc., v. Harrelson,* 341 N.C. 167 (1995), and justice demands relief, e.g., *Howell v. Howe11,* 321 N.C. 87 (1987); *Thacker v. Thacker,* 107 N.C. App. 479 (1992).

**Meritorious defense:** In addition, movant must show he or she has a meritorious defense. E.g., *State ex rel. Envt'l Mgt. Comm'n v. House of Raeford Farms, Inc.,* 101 N.C. App. 433 (1991).