

RULE 4 OF THE RULES OF CIVIL PROCEDURE--PECULIAR PROBLEMS AND PITFALLS  
FOR THE PRESIDING JUDGE

Sanford L. Steelman, Jr.  
North Carolina Superior Court Judges' Conference  
Chapel Hill, North Carolina  
October 27, 2005

I. Background--Rules 1,2, and 3.

- A. Rule 1--Scope of Rules--Govern procedure in all actions and proceedings of a civil nature.
- B. Rule 2--One form of action in North Carolina, denominated as a civil action.
- C. Rule 3--Commencement of an action.

Under Rule 3, a civil action is commenced by the filing of the complaint, not the summons, except when a naked summons is filed to extend the time for filing the complaint for a period of 20 days.

II. Rule 4--Purpose of the summons.

- A. Summons is directed to the defendant under the Rules of Civil Procedure, not to the process officer, as was the prior practice. Comment to Rule 4.
- B. Rule 4(a) provides that upon filing of the complaint, the "summons shall be issued forthwith, and in any event within five days. If the summons is not issued within five days, then the action is deemed never to have commenced. *County of Wayne ex re. Williams, v. Whitley*, 72 N.C. App. 155, 323 S.E.2d 458 (1984). However, "a properly issued and served second summons can revive and commence a new action on the date of its issuance" *Stokes v. Wilson & Redding Law Firm*, 72 N.C. App. 107, 323 S.E.2d 470 (1984).
- C. "The purpose of a summons is to give notice to a person to appear at a certain place and time to answer a complaint against him. 83 C.J.S., Summons, p. 795. Fundamental fairness requires that a summons should be of sufficient particularity so as to leave no reasonable doubt as to whom it is directed. However, this requirement does not force the courts to overlook the obvious when determining the validity of a summons." *Wearing v. Belk Bros., Inc.*, 38 N.C. App. 375, 248 S.E.2d 90 (1978)

"The purpose of a service of summons is to give notice to the party against whom a proceeding is commenced to appear at a certain place and time and to answer a complaint against him." *Farr v. City of Rocky Mount*, 10 N.C. App. 128, 177 S.E. 2d 763 (1970).

- D. "The purpose of the rule is to provide notice of the commencement of an action and 'to provide a ritual that marks the court's assertion of jurisdiction over the lawsuit.'" *Wiles v. Welparnel Construction Co.*, 295 N.C. 81, 84, 243 S.E. 2d 756, 758 (1978) (quoting Wright & Miller, *Federal Practice and Procedure: Civil* § 1063 p. 204 (1969)). "Unless notice is given to the defendant of proceedings against him and he is thereby given the opportunity to appear and be heard or he appears voluntarily, the court has no jurisdiction to proceed to judgment even though it may have subject matter jurisdiction." *Harris v. Maready*, 311 N.C. 536, 541, 319 S.E.2d 912 (1984).

### III. Dormancy of Summons.

Rule 4(c) provides that a summons must be served within 60 days of issuance. Rule 4(d) provides that an endorsement to the summons may be obtained, or an *alias* and *pluries* summons may be issued within 90 days of issuance. During the period between the 60 and 90 days from issuance, the summons is "dormant", meaning that it cannot be validly served upon a defendant, but can be "revived" by endorsement or issuance of an *alias* and *pluries* summons.

### IV. Amendment of Summons: When one defendant served with a summons directed to another defendant.

- A. *Harris v. Maready*, 311 N.C. 536, 319 S.E.2d 912 (1984)

Plaintiff filed suit against Bill Maready, an attorney in Forsyth County, one of his law partners, his client, and his law firm. The Sheriff delivered the summons addressed to Maready's client to Maready. Maready moved to dismiss the complaint based upon insufficiency of process and insufficiency of service of process. At the hearing before the trial court, the plaintiff orally moved to amend the summons to substitute the correct name. This motion was denied and the complaint against Maready was dismissed. The Court of Appeals affirmed the dismissal as to Maready. The Supreme Court reversed the Court of Appeals, holding that although Maready was served with the wrong summons, "the mandates of Rule 4 have been met." The opinion states that "there was no substantial possibility of confusion in this case about the identity of Maready as a party being sued." The Court went on to quote from *Wiles v. Welparnel Construction Co.*, 295 N.C. 81, 243 S.E.2d 756 (1978):

"A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process

is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, . . . it has fulfilled its purpose; and court should not put themselves in the position of failing to recognize what is apparent to everyone else."

The Supreme Court also noted that "actual notice given in a manner other than that prescribed by statute cannot supply constitutional validity" (citing to *Philpott v. Kerns*, 285 N.C. 225, 203 S.E.2d 778 (1974)).

The Court did not specifically address the question of whether the trial court erred in denying the motion to amend the summons, but rather held that the requirements of service under Rule 4 had been met. The opinion briefly discusses the distinction between void and voidable process, stating that voidable process can be amended, while void process cannot.

B. *Lemons v. Old Hickory Council*, 322 N.C. 271, 367 S.E.2d 655 (1988)

Plaintiff filed a personal injury suit against the Old Hickory Council of the Boy Scouts of America. The plaintiff was injured on 15 May 1982, and originally filed suit on 21 March 1984. Plaintiff dismissed the action on 6 February 1985, but refiled it on 6 February 1986. An *alias* summons was issued on 2 May 1986 and was served on 5 June 1986, after the summons had become dormant. The defendant moved to dismiss the plaintiff's action. The plaintiff moved the trial court for a retroactive extension of time from 2 June 1986 to 6 June 1986 to serve the *alias* summons. The trial court denied the motion, holding that under Rule 6(b) of the Rules of Civil Procedure it did not have the authority to enlarge the time for service. *Id.* at 273, 367 S.E.2d at 656. It further held the plaintiff's failure to obtain service until 5 June 1986 was the result of "excusable neglect." *Id.* The Supreme Court reversed, stating "Rule 6(b) grants our trial courts broad authority to extend any time period specified in any of the Rules of Civil Procedure for the doing of any act, after expiration of such specified time, upon a finding of 'excusable neglect.'" *Id.* at 276, 367 S.E.2d at 658. It therefore held that "pursuant to Rule 6(b) our trial courts may extend the time for service of process under Rule 4(c)." *Id.* at 277, 367 S.E.2d at 658.

C. *Wetchin v. Ocean Side Corp.*, 167 N.C. App. 756; 606 S.E.2d 407 (2005).

This case discusses the interaction of the holdings of *Maready* and *Lemons*. On 3 April 2000, plaintiff brought suit against Ocean Side in the Brunswick County Superior Court. Plaintiffs dismissed this action without prejudice on 24 September 2001. Plaintiffs refiled their lawsuit, the instant action, on 31 May 2002, adding Can-Am as a party defendant. That same day, the Clerk of Superior Court issued separate civil summonses, directed to each of the defendants. Plaintiffs did not serve these summonses on either defendant. On 29 August 2002, the Clerk of Court issued separate *alias* and *pluries*

summons for each defendant. On 14 November 2002, plaintiffs' counsel mailed a copy of the summons and complaint to each defendant by certified mail. While each mailing included a copy of the complaint, Ocean Side was sent the summons directed to Can-Am, and Can-Am was sent the summons directed to Ocean Side. Ocean Side moved to dismiss plaintiffs' complaint, pursuant to Rule 12(b)(2), Rule 12(b)(4), and Rule 12(b)(5) of the North Carolina Rules of Civil Procedure. Plaintiffs filed a motion requesting the court "extend the summons as OCEAN SIDE CORPORATION for thirty days to and including up [sic] November 27, 2002." Plaintiff also orally moved to amend the summons to reflect the correct defendant. Plaintiff's motions were denied, and their action dismissed. The trial court held that it did not have the power to grant the motion to extend time for the service of the *alias* and *pluries* summons, and that it did not have discretion to retroactively extend the time for service of the summons.

The Court of Appeals reversed. The first holding was that the trial court erred in determining that it lacked discretion to extend the time for service of the *alias* and *pluries* summons, citing *Lemons*. This issue was remanded to the trial court to consider whether to exercise its discretion to extend time for service of the summons. The second holding was that under the rationale of *Harris*, service on Ocean Side was sufficient under Rule 4. Based upon the representations of Ocean Side's counsel at the hearing, it was clear there was no question that Ocean Side knew that it was being sued in the action.

D. *Draughon v. Harnett County Bd. of Educ.*, 166 N.C. App. 449, 602 S.E.2d 717 (2005)

This is one of four appellate cases arising out of the death of a football player from heatstroke. This case involved the suit against the football coach. Plaintiff never served Coach Honeycutt with the summons and complaint, although plaintiff did procure a number of *alias* and *pluries* summons. Honeycutt filed an answer and moved to dismiss for insufficient process and insufficient service of process. Plaintiff still failed to serve Honeycutt. The trial court dismissed plaintiff's complaint against Honeycutt, based upon the statute of limitations, and the Court of Appeals affirmed. The plaintiff did not move to amend the summons. Since plaintiff allowed the summons to lapse and the statute of limitations period had run the action could not be revived and summary judgment was proper.

E. *Bentley v. Watauga Building Supply, Inc.*, 145 N.C. App. 460, 549 S.E.2d 924 (2001).

The plaintiff filed an action for retaliatory discharge against his former employer, Watauga Building Supply. The civil summons named Watauga Building Supply as defendant in its caption, but its directory section stated "TO: Name & Address of First Defendant: Betty G. Koontz," who was the

registered agent of the corporation, but was not denominated as such in the summons. The Court of Appeals reversed the trial court's dismissal for insufficiency of process, insufficiency of service of process, and lack of jurisdiction over defendant based upon *Wiles v. Construction Co.*, 295 N.C. 81, 243 S.E.2d 756 (1978), which held under similar circumstances that “any confusion arising from the ambiguity in the directory paragraph of the summons was eliminated by the complaint and the caption of the summons which clearly indicate that the corporation and not the registered agent was the actual defendant in this action.” *Id.* at 85, 243 S.E.2d at 758. The Court appeared to rely on the fact that the affidavit of plaintiff's counsel identifying Ms. Koontz as the president and registered agent of defendant was uncontradicted. There is no discussion of a plaintiff having made a motion to amend.

F. *Brown v. King*, 166 N.C. App.267, 601 S.E.2d 296 (2004)

Defendant, Joyce Davis King, appealed judgments entered by the trial court for breach of fiduciary duty. She argued that the court erred in failing to dismiss the claims against her because she was served with process directed to another party to the action and the court never obtained jurisdiction over her. She asserted that she was served with a summons directed to DLJ Mortgage Accepting Corporation, but the only return of service in the court's file contained certification that the sheriff served Joyce King. The Court of Appeals relied upon *Harrington v. Rice*, 245 N.C. 640, 642, 97 S.E.2d 239, 241 (1977), which held that “[w]hen the return shows legal service by an authorized officer, nothing else appearing, the law presumes service.” 166 N.C. App. at 270. It is the burden of the party seeking to set aside the officer's return to rebut the evidence that service was properly based. Evidence may not be rebutted unless “the evidence consists of more than a single contradictory affidavit (the contradictory testimony of one witness) and is unclear and unequivocal.” *Id.* Because defendant failed to make an evidentiary showing or submit affidavits in support of her allegation, she failed to meet her burden of proof, and the case was properly dismissed.

G. Further Issues.

1. Amendment issue. Both *Harris* and *Wetchin* hold that there was valid service on the defendant, but do not discuss the timeliness of the motion to amend the summons, or whether it was error to deny the motion.
2. Constitutional Issue. It appears that *Harris* and *Wetchin* hold that service not in accordance with Rule 4 can pass constitutional muster. Compare with the language of *Philpott* cited in *Harris*. How does the form over substance language from *Wiles* impact the constitutional issue?

V. Amendment of Process--Rule 4(i)

"At any time, before or after judgment, in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued."

The issue in these cases appears to be when is the amendment merely the correction of a misnomer or mistake, and when is it an attempt to add a completely new party to the action?

The key cases in this area are *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995) and *Franklin v. Winn Dixie Raleigh, Inc.*, 117 N.C. App 28, 450 S.E.2d 24 (1994).

Although *Crossman* is a Rule 15 case, the principles are applicable to Rule 4(i). In that case, a motorist brought an action for injuries suffered in an automobile accident. The defendant, Van Dolan Moore, moved for summary judgment asserting that his son, Van Dolan Moore II, was the actual driver at the time of the accident. Plaintiff moved to amend the complaint to make Van Dolan Moore II a party-defendant. The court stated that Rule 15(c) makes no mention of parties. "It speaks of claims and allows the relation back of claims if the original claim gives notice of the transactions or occurrence to be proved in the amended pleading to a defendant who is not aware of his status as such when the original claim is filed. We hold that this rule does not apply to the naming of a new party-defendant to the action. It is not authority for the relation back of a claim against a new party." 341 N.C. at 185, 459 S.E.2d at 716.

In *Franklin*, plaintiff brought a slip and fall case, against "Winn Dixie Stores, Inc." An *alias* and *pluries* summons was issued to Winn-Dixie Raleigh, Inc. Defendant, Winn Dixie Stores, Inc. moved to dismiss based upon insufficiency of process and insufficiency of service of process. Plaintiff later amended the complaint under Rule 15(a), naming as defendant "Winn-Dixie Raleigh, Inc." Winn Dixie Stores, Inc. and Winn-Dixie Raleigh, Inc. were two separate corporations. The lessee and operator of the Winn Dixie store where plaintiff fell was Winn-Dixie Raleigh, Inc. The Court of Appeals held that "[w]hen the misnomer or misdescription does not leave in doubt the identity of the party intended to be sued, or even where there is room for doubt as to identity, if service of process is made on the party intended to be sued, the misnomer or misdescription may be corrected by amendment at any state of the suit. However, if the amendment amounts to a substitution or entire change of parties, however, the amendment will not be allowed." 117 N.C. App. at 34, 450 S.E.2d at 28. Winn-Dixie Stores, Inc. was "the correct name of the wrong corporate party defendant, a substantive mistake which is fatal to this action." *Id.* at 35, 450 S.E.2d at 28. The court further held that Rule 4(d) "relates only to defective original services, not defective original process," and plaintiff's subsequent

issuance and service of *alias* and *pluries* summons were consistently defective and “ineffective to confer jurisdiction over the defendant Winn-Dixie Raleigh, Inc.” *Id.* at 36, 450 S.E.2d at 28. This constituted a “substitution or entire change of parties.” The court further held that the amendment naming the new party did not relate back to the initial complaint, and consequently, the statute of limitations had run against Winn-Dixie Stores Raleigh, Inc. The Supreme Court affirmed this ruling expressly based upon *Crossman*.

## 2. Other Cases

*Piland v. Hertford County Board of Commissioners*, 141 N.C. App. 293, 539 S.E.2d 669 (2000).

Plaintiff brought suit against the Board of Commissioners, contesting their decision to allow re-zoning of property and the amending of the zoning ordinance. The Board of Commissioners filed a motion to dismiss, asserting that Hertford County was the proper defendant. Plaintiffs moved to amend the summons and complaint to substitute Hertford County for Board of Commissioners and both parties moved for summary judgment. The lower court granted the Board of Commissioners’ motion for summary judgment and never ruled on the plaintiff’s motion to amend the summons and complaint. The Court of Appeals affirmed and modified the decision, holding that under *Crossman v. Moore*, 341 N.C. 185, 459 S.E.2d 715 (1995), “an amendment to a pleading changing the name of a party-defendant could not relate back to the filing of the original complaint.” Even though subsequent cases have construed Rule 15(c) to allow “for the relation back of an amendment to correct a mere misnomer,” the county is an entity separate and distinct from its board of commissioners. 141 N.C. App. at 299, 539 S.E.2d at 673. Here, the Board of Commissioners is much like a board of directors acting on behalf of a corporation, and “[t]he corporation, being merely a legal instrumentality, is incapable of acting on its own behalf, and the board is therefore required to exercise the corporate powers.” *Id.* at 300, 539 S.E.2d at 673. This effectively seeks to add a new party, which is not permitted under Rule 15(c), and, therefore, the relation-back rule would not apply.

*Liss v. Seamark Foods*, 147 N.C. App. 281, 55 S.E.2d 365 (2001).

The Court of Appeals reversed the lower court’s dismissal and held that amending a complaint in a situation where one legal entity uses two names relates back to the date of the original complaint. Plaintiff, after becoming ill from eating oysters, brought suit against Seamark Foods, the name of the store where the oysters were bought. Upon learning that Seamark Enterprises, Inc. was a North Carolina corporation that operates a food business under the assumed name of “Seamark Foods,” plaintiff sought to amend his complaint. The court held that Seamark Enterprises, Inc. and Seamark Foods were not two separate and distinct entities and plaintiff was merely correcting a mistake in the name of defendant. Under *Crossman*, Rule 15(c) may allow for the relation back of an amendment to correct a

mere misnomer, provided that there is “evidence the intended defendant has indeed been served, and the intended defendant would not be prejudiced by the amendment.” 147 N.C. App. 286, 555 S.E.2d at 369.

*Pierce v. Johnson*, 154 N.C. App. 34, 571 S.E.2d 661 (2002).

Plaintiff brought suit against defendant, John Daniel Johnson, for injuries arising from an automobile accident. Unbeknownst to plaintiff, defendant was now deceased, and Roby Daniel Johnson was the executor for the estate. Roby Daniel Johnson accepted service of the complaint by signing the name “Daniel Johnson.” The executor did not inform plaintiff of John Daniel Johnson’s death, and plaintiff, still unaware of his death, did not seek to amend the action by substituting the estate of John Daniel Johnson as defendant. All offers of judgment, interrogatories, requests for production of documents, request for monetary relief sought, and certificates of service were signed by Ann C. Rowe, as “Attorney for Defendant.” Following the running of the statute of limitations, the trial court denied Ms. Pierce’s motion to amend, and granted the motion to dismiss the complaint, with prejudice, for failure to serve the real party in interest. The Court of Appeals reversed, holding that under *Crossman*, the plaintiff’s failure to plead the estate of John Daniel Johnson was a misnomer, and she should have been able to amend the complaint under Rule 15(c). John Daniel Johnson and the estate of John Daniel Johnson are separate, although connected and dependent legal entities. “Once death occurs, the legal entity known as the life of John Daniel Johnson can never again have legal standing. As a consequence, anyone with the legal authority to accept service of process for the estate, is necessarily apprised of an adverse legal claim even if the complaint names the decedent rather than the estate of the defendant.” 154 N.C. App. at 40, 571 S.E.2d 661 at 665.

*Stack v. Union Regional Memorial Medical Center, Inc.*, 614 S.E.2d 378 (2005).

Plaintiff filed a complaint against Union Regional Memorial Medical Center, Inc. on November 13, 2000, but voluntarily dismissed the complaint without prejudice on May 23, 2002. Plaintiff filed a second complaint on May 20, 2003 against Union Regional Memorial Medical Center, Inc. and Carolinas Healthcare Foundation, Inc d/b/a Union Regional Medical Center, but a summons was only issued for service on Scott Kerr, the registered agent for Carolinas Healthcare Foundation. On October 14, 2003 plaintiff caused a civil summons for Union Regional Memorial Medical Center, Inc. to be issued and served the summons and complaint on the registered agent. Union Regional Memorial Medical Center, Inc. asserted that the October 14, 2003 summons was a new summons and under Rule 41, any action was required to have been instituted by May 23, 2003, one year after the dismissal of the first suit. Plaintiff argued the summons directed to Union Regional Memorial Medical Center, Inc. was a valid *alias* and *pluries* summons and that this was a substitution of Union Regional Memorial Medical Center, Inc. for Carolinas Healthcare Foundation as the named defendant in the May 20, 2003 summons. The trial court granted both

defendants' motions for summary judgment, and plaintiff appealed. The Court of Appeals affirmed, holding that "that the validity of an *alias* or *pluries* summons is dependent on the validity of the original summons, and "[s]ince the original civil summons was not directed to Union Regional Memorial Medical Center, Inc., the subsequent issuance of a summons against Union Regional Memorial Medical Center, Inc. did not relate back to the original summons." 614 S.E.2d at 381. Union Regional Memorial Medical Center, Inc. is an entirely different entity from Carolinas Healthcare Foundation, Inc. Plaintiff's claims were thus barred by the applicable statute of limitations.

## VI. MISCELLANEOUS SERVICE ISSUES

### A. Failure to Properly Obtain Service

*In re. A.B.D.*, 617 S.E.2d 707 (2005).

In a termination of parental rights case, plaintiff caused a summons to be issued, which was served on defendant 41 days later. This case arose prior to the 2001 amendments, which provide for sixty days to serve a summons. Defendant did not respond or appear at the hearing, and default judgment was entered. Respondent moved to set aside the default judgment, contending that service of process was invalid because it was not served within the thirty-day provision as then required by law. The district court held the service of process was valid; and respondent appealed. The Court of Appeals held that even though the thirty days had lapsed, the summons is merely dormant at that time, and the plaintiff has ninety days after the issuance of summons to serve the party, as long as plaintiff obtains an endorsement, extension, or *alias* or *pluries* summons. Petitioner failed to do so; therefore the action should have been treated as if it had never been filed.

### B. Failure to appoint a registered agent allows for substitute service on the Secretary of State

*Advanced Wall Systems, Inc. v. Highlande Builders, LLC*, 605 S.E.2d 728 (2004).

The Court of Appeals upheld a default judgment and held that there was valid service of process where a limited liability company failed to appoint an agent in North Carolina, and plaintiff, after attempting to serve the registered agent, obtained service through the Secretary of State. Under N.C.G.S. sec. 57C-2-43, "whenever a limited liability company shall fail to appoint or maintain a registered agent in this State, or whenever its registered agent cannot with due diligence be found at the registered office, then the Secretary of State shall be an agent of the limited liability company upon whom any process, notice, or demand may be served."

*See also Nail v. Member Services*, COA 05-26 (October 18, 2005) (unpublished), which holds that a failure to maintain a registered office and registered agent under G.S. 55D-30 allows for substituted service through the Secretary of State. In this case, the record showed a history of the defendant evading process and who failed to correct its agent's address with the Secretary of State for nearly five years.

- C. Failure to file affidavit under Rule 4(j)(1) rendered service by publication ineffective.

*Cotton v. Jones*, 160 N.C. App. 701, 586 S.E.2d 806 (2003).

The Court of Appeals reversed the trial court's finding that plaintiff had made diligent efforts to locate defendant. Plaintiff did not strictly comply with the statute permitting service by publication under Rule 4(j)(1) when she failed to file an affidavit stating she used due diligence in attempting to find defendant before resorting to service by publication.

- D. Proper method of service upon out of state corporations having registered agents and office in North Carolina

*Thomas & Howard Company, Inc. v. Trimark Catastrophe Services, Inc.*, 151 N.C. App. 88, 564 S.E.2d 569 (2002)

Plaintiff filed suit against defendant, claiming negligence and breach of contract for damages sustained as a result of the deficiencies in vinyl flooring installed by defendant. Plaintiff appealed from an order granting Trimark's motion to dismiss for insufficient service of process and resulting lack of personal jurisdiction. Defendant was a Texas corporation authorized to do business in North Carolina. Rather than serving the North Carolina agent, plaintiff served the Texas agent via first class mail. The Court of Appeals held that service was not sufficient to give the trial court personal jurisdiction over the defendant: "First, the facts reveal plaintiff served defendant by mailing a copy of the summons and complaint by regular mail, rather than certified mail. Further, the mailing of the summons and complaint occurred before the documents had been filed or signed by the Clerk of Court. No additional action was taken to effectively serve defendant, even after an administrative order was issued discontinuing the case. Second, there is no evidence in the record that service was ever effectuated upon the registered agent for North Carolina...Rule 4(j)(6) provides the manner upon which service is to be made upon foreign corporations having registered offices and registered agents in the state of North Carolina. While service of process upon a registered agent in Texas may have given defendant actual notice of the lawsuit, it did not confer jurisdiction over defendant." 151 N.C. App. at 91, 564 S.E.2d at 572. As a result of improper service upon defendant's agent in Texas, the court held the plaintiff could not assert that because

defendant sought and secured extensions of time, defendant is now estopped from asserting any jurisdictional defenses.

E. Setting aside service of process by publication

*Creasman v. Creasman*, 152 N.C. App. 119, 566 S.E.2d 725 (2002).

The Court of Appeals affirmed the trial court's judgment denying defendant's motion to set aside default judgment. The summons indicated that service was unsuccessfully attempted on the defendant three times, and notice appeared in *The Enterprise Mountaineer* newspaper. Defendant found a notice of *lis pendens* at the property of the plaintiff, and also obtained a copy of the complaint, which he discussed with his church pastor. The church pastor advised him to do nothing because he needed to be personally served before he needed to appear in court. The court held that "[d]efendant's own affidavit and motion unequivocally state that he had actual notice of the pending action." 152 N.C. App. at 122, 566 S.E.2d at 727. The court further held that neither receiving erroneous legal advice nor failing to obtain an attorney constituted "excusable neglect," which would allow a court to relieve a party from a final judgment under Rule 60(b)(1). "Deliberate or willful conduct cannot constitute excusable neglect, nor does inadvertent conduct that does not demonstrate diligence." *Id.* at 124, 566 S.E.2d at 729 (quoting *Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 103, 515 S.E.2d 30, 38 (1999)).

F. Presumption of validity of service: Requirement of more than one witness to attack service.

*Gibby v. Lindsey*, 149 N.C. App. 470, 560 S.E.2d 589 (2002)

Defendant appealed the trial court's denial of his motion to set aside a default judgment against him in the amount of \$3 million. The sheriff's department served the summons and complaint on defendant by leaving a copy of these documents at his mother's house, where he was presumed to be living. However, defendant had moved out and was living with relatives in South Carolina, and his mother did not know where he was. The Court of Appeals upheld the default judgment and held that where an officer returns the summons, the burden is on the defendant "to rebut this presumption by clear and unequivocal evidence that consists of more than a single contradictory affidavit or the contradictory testimony of one witness." 149 N.C. App. at 473, 560 S.E.2d 592. The defendant presented no factual allegations that he had assumed a new dwelling house or usual place of abode, and failed to present factual allegations on the factors of mistake, inadvertence, surprise, or excusable neglect. Therefore, the motion under Rule 60(b)(4) was properly considered and decided by the trial court.

*Saliby v. Conners*, 614 S.E.2d 416 (2005).

The Sheriff served the defendant at an address in North Carolina by leaving copies with his father. Defendant moved to dismiss the action for insufficient process and insufficient service of process, asserting that he had moved to Texas at the time of the service. This contention was supported only by the testimony of defendant's father. The trial court dismissed the action, and the Court of Appeals reversed. The presumption of valid service cannot be overcome by the testimony of a single witness. *Harrington v. Rice*, 245 N.C. 640, 97 S.,E.2d 239 (1957).

G. Specific service provisions govern over general service provisions.

*Mabee v. Onslow County Sheriff's Department*, COA 04-1628 (filed October 18, 2005)

When suing a Sheriff, service must be effected in accordance with the provisions of G.S. 162-16, which states that the coroner, the clerk of superior court, or the clerk's designee must serve the Sheriff. The Sheriff cannot be served by one of his deputies.

Civil Procedure Treatises for North Carolina:

1 G. Gray Wilson, North Carolina Civil Procedure, (Supp. 2003).

Alan D. Woodlief, Jr., Shuford North Carolina Civil Practice and Procedure (6<sup>th</sup> ed., 2003).

*Judge Steelman gratefully acknowledges the assistance of law clerk, Riana Smith, and extern Lisa Brill in the preparation and editing of this manuscript.*