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Judgments -- Opening Default Judgment for Neglect of Attorney -- Discretionary Power in Trial Judge

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sentations. The common law of representations remains relatively unchanged. Materiality of representations has always been a prerequisite for cancellation of a policy of insurance or for prevention of recovery by the insured. Fraudulent, but immaterial, representations have never been considered by the common law, or under modern statutes, as warranting an avoidance of a policy of insurance. Further relaxation of the common law, then, must come in the standard selected and applied by the court for determining the materiality of the incorrect statement being contested. The "written question-written answer" doctrine certainly will do nothing toward furthering the purpose of the statute and it is hoped that this proposition will not again be heard, but that the North Carolina Supreme Court will in the future adopt some form of objective standard.

JOSEPH C. MOORE, JR.

Judgments—Opening Default Judgment for Neglect of Attorney—Discretionary Power in Trial Judge

The plaintiff sued in claim and delivery for the recovery of an automobile and had judgment by default for want of an answer. When execution issued defendant appeared and moved that the judgment be set aside for excusable neglect. The clerk allowed the motion and the plaintiff appealed to the judge of the superior court who affirmed the order vacating the judgment upon the following findings of fact: summons was duly served on defendant together with an order extending the time to file complaint (G. S. §1-121) whereupon she employed an attorney who mistakenly advised her that the plaintiff could not proceed until additional papers were served on her, and that he would request the clerk to notify him of the filing of the complaint, and would inform her when it became necessary for her to answer; the attorney then became seriously ill and was unable to attend to the duties of his office, as a result of which no further action was taken and the default judgment was entered; the defendant was unacquainted with court procedure and had not herself been negligent; she had a meritorious defense to the cause as an innocent purchaser for value. The Superior Court ruled, therefore, that the default was occasioned by the negligence of the attorney and that the same was not imputable to the defendant who was without fault. The plaintiff appealed to the Supreme Court. *Held:* order vacating the judgment affirmed.[1] Since the failure to answer was not wholly due to the attorney's erroneous belief that additional papers[2] would have to be served on the defendant, the major-

[1] Rierson v. York, 227 N. C. 575, 42 S. E. 2d 902 (1947).
[2] The complaint. Record, p. 22.

ity ruled that the judge in the exercise of a sound discretion was authorized to set the judgment aside.[3]

The statute under which relief from the judgment was allowed reads in part as follows: "The judge shall upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertance, surprise or excusable neglect. . . ."[4]

In its application, North Carolina at an early date recognized a distinction between the negligence of the litigant and that of his attorney, and ruled that the negligence of the latter, whether excusable or not, would not be imputed to the former so as to bar relief.[5] The movant's attorney, however, must be one licensed to practice in this state,[6] and his negligence on which the prayer for relief is predicated must have been some failure in the performance of professional duties[7] which occurred prior to and was the cause[8] of the judgment sought to be vacated. And the movant himself must be without fault.[9]

The rule of non-imputation is a departure from the general doctrine of agency which holds the principal responsible for the acts of his agent, and represents the minority[10] rule in the construction of statutes substantially the same as that above,[11] the majority holding that negligence of an attorney is ground for setting a judgment aside only when excusable.[12] In view of its general acceptance, it would seem that little

[3] Chief Justice Stacy dissented without opinion.

[4] N. C. GEN. STAT. (1943) §1-220.

[5] Griel v. Vernon, 65 N. C. 76 (1871) (attorney's neglect to file a plea is a surprise on the client whose failure to examine the record to ascertain that it had been filed is an excusable neglect); Meece v. Commercial Credit Co., 201 N. C. 139, 159 S. E. 17 (1931); Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926); Grandy v. Carolina Products Co., 175 N. C. 511, 95 S. E. 914 (1918); Schiele v. North State Fire Ins. Co., 171 N. C. 426, 88 S. E. 764 (1916).

[6] Manning v. Roanoke & T. R. R., 122 N. C. 824, 28 S. E. 936 (1898); *see* Harrell v. Welstead *et al.*, 206 N. C. 817, 820, 175 S. E. 283, 286 (1934).

[7] Manning v. Roanoke & T. R. R., 122 N. C. 824, 28 S. E. 936 (1898); Seawell v. Parsons Lumber Co., 172 N. C. 320, 90 S. E. 241 (1916) (in the performance of non-professional acts the attorney is an ordinary agent whose negligence is attributable to his principal).

[8] Dail v. Hawkins, 211 N. C. 283, 189 S. E. 774 (1937) (by implication); Lumber Co. v. Cottingham, 173 N. C. 323, 327, 92 S. E. 9, 11 (1917) ("Excusable negligence is something which must have occurred at or before the entry of the judgment, and which caused it to be entered, not matter ex post facto which had no relation to the action of the court or to anything which transpired before its rendition."); *see* Bradford v. Coit, 77 N. C. 72, 75 (1877).

[9] Kerr v. North Carolina Joint Stock Land Bank, 205 N. C. 410, 171 S. E. 367 (1933); Abbitt v. Gregory, 195 N. C. 203, 141 S. E. 587 (1928); Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926); Taylor v. Pope, 106 N. C. 267, 11 S. E. 257 (1890); Griel v. Vernon, 65 N. C. 76 (1871); *see* Cahoon v. Brinkley, 176 N. C. 5, 9, 96 S. E. 650, 652 (1918).

[10] *Accord,* Sullivan v. Sullivan, 266 Mass. 228, 165 N. E. 89 (1929); Jensen v. Backman *et al.*, 246 App. Div. 741, 283 N. Y. Supp. 862 (2d Dep't 1935).

[11] *E.g.,* CAL. CODE. CIV. PROC. (Deering, 1941) §473; MONT. REV. CODES (Anderson & McFarland, 1935) §9187; N. D. REV. CODE (1943) §28-2901; S. C. CODE (1942) §495; WIS. STAT. (1941) §269.46.

[12] Stub v. Harrison, 35 Cal. App. 2d 685, 96 P. 2d 979 (—— Dep't 1939);

need be said in support of the validity of the majority rule. For the minority, the rationale of the rule against imputation of the attorney's neglect is well stated in *Schiele v. North State Fire Ins. Co.*

> "And why is not this the wise and just rule and in accordance with the letter and spirit of the statute? The attorney is an officer of the court, and acts under its direction and control, and the client employs him because of his learning and skill, to do something he cannot do for himself, and his fitness for the duty is certified to by the courts who have licensed him. If so, and the client has been guilty of no neglect, and a valuable right has been lost by the failure of the attorney to file an answer, why should he not be relieved under a statute . . . which gives authority to the court to relieve a 'party' on account of 'his' surprise, etc. . . ."[13]

In 1921, the legislature of Idaho amended[14] a statute[15] substantially similar to G. S. 1-220 to require[16] the trial judge to set aside a judgment occasioned by the negligent failure of an attorney to file or serve any paper in the cause as to which his client was without fault, and to enable the judge in his discretion to require the attorney to pay the costs or actual expenses of the successful party in the judgment to be set aside and a fine of not more than one hundred dollars. This provision alleviates an undue hardship on the successful party and avoids penalizing the unsuccessful party by placing the hardship where it belongs, *i.e.*, on the attorney lacking a sufficient excuse for his delinquency. It is submitted that adoption of this amendment would promote certainty in the law as applied to motions for relief on the ground of counsel's negligence, and would make the rule of non-imputation a great deal more just.

The standard of care required of the litigant in every case is that which a man of ordinary prudence usually bestows on his important business.[17] He must show that he has been active and diligent,[18] and

Romero v. Snyder, 167 Cal. 216, 138 Pac. 1002 (1914); Rieckhoff v. Woodhull, 106 Mont. 22, 75 P. 2d 56 (1937); Smith v. Wordeman, 59 S. D. 368, 240 N. W. 325 (1932); Haskins v. Haskins' Estate, 113 Vt. 466, 35 A. 2d 662 (1944); *see* 15 R. C. L. §161; Notes, 34 HARV. L. REV. 559 (1921); 9 N. C. L. REV. 91 (1930).

[13] 171 N. C. 426, 432, 88 S. E. 764, 767 (1916).

[14] Idaho Sess. Laws 1921, c. 235, §1.

[15] IDAHO LAWS ANN. (1943) §5-905.

[16] Wagner v. Mower, 41 Idaho, 380, 237 Pac. 118 (1925) (if the judgment was occasioned by the attorney's negligence, the judge has no discretion but must set it aside).

[17] Whitaker v. Raines, 226 N. C. 526, 39 S. E. 2d 266 (1946); Johnson v. Sidbury, 225 N. C. 208, 34 S. E. 2d 67 (1945); Jones-Onslow Land Co. v. Wooten, 177 N. C. 248, 98 S. E. 706 (1919); Pierce v. Eller, 167 N. C. 672, 83 S. E. 758 (1914); Roberts v. Allman, 106 N. C. 391, 11 S. E. 425 (1890); Sluder v. Rollins, 76 N. C. 271 (1877); Elms v. Elms, 72 Cal. App. 2d 508, 164 P. 2d 936 (1946) ("If judgment be entered against a party in his absence before he can be relieved therefrom he must show that it was the result of a mistake or inadvertance which reasonable care could not have avoided, a surprise which reason-

he must have employed counsel.[19] It has been held, however, that mere employment of counsel is not enough,[20] that the litigant may not abandon his case on the employment of counsel,[21] and that when he has a case in court, he must attend to it.[22] These principles have served as the basis for decision in a number of cases[23] wherein the net result was to impute the causative negligence of the attorney to his client, on the theory that the latter had not lived up to these requirements. In other cases, indistinguishable on the facts reported,[24] the litigant was held not negligent and the rule of non-imputation applied to permit vacating the judgment. In the instant case, defendant employed an attorney and thereafter did nothing more than make a single telephone inquiry[25] (some thirty days before the default judgment was rendered), regarding the progress of the case. On the basis of previous ruling involving the question of vacating default judgments the court could have found precedent for either granting or denying the relief.[26] The allowance of relief in this case is in line with the liberal view evidenced in more recent decisions.[27]

It is true that in the case under consideration the defendant's attorney erred when he advised his client that the complaint would have to be served on her before the plaintiff could proceed to judgment.[28] Plaintiff's counsel therefore contended on appeal that the defendant was

able precaution could not have prevented, or a neglect which reasonable prudence could not have anticipated.").

[18] Carter v. Anderson, 208 N. C. 529, 181 S. E. 750 (1935); Gaster v. Thomas, 188 N. C. 346, 124 S. E. 609 (1924); Pierce v. Eller, 167 N. C. 672, 83 S. E. 758 (1914).

[19] Holland v. Benevolent Assn., 176 N. C. 86, 97 S. E. 150 (1918); Churchill v. Brooklyn Life Ins. Co., 88 N. C. 205 (1883); *see* Sutherland v. McLean, 199 N. C. 345, 347, 154 S. E. 662, 663 (1930).

[20] *E.g.*, Hyde County Lumber Co. v. Thomasville Chair Co., 190 N. C. 437, 130 S. E. 12 (1925).

[21] *E.g.*, Roberts v. Allman, 106 N. C. 391, 11 S. E. 425 (1890).

[22] *E.g.*, Pepper v. Clegg, 132 N. C. 312, 43 S. E. 906 (1903).

[23] Hyde County Lumber Co. v. Thomasville Chair Co., 190 N. C. 437, 130 S. E. 12 (1925); Hardware Co. v. Buhmann *et al.*, 159 N. C. 511, 75 S. E. 731 (1912); Reynolds v. Greensboro Boiler & Machine Co., 153 N. C. 342, 69 S. E. 248 (1910).

[24] Gunter v. Dowdy, 224 N. C. 522, 31 S. E. 2d 524 (1944); Meece v. Commercial Credit Co., 201 N. C. 138, 159 S. E. 17 (1931); Helderman v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926); Gwathney v. Savage, 101 N. C. 103, 7 S. E. 661 (1888); English v. English, 87 N. C. 497 (1882).

[25] Record, p. 22.

[26] Compare cases cited note 23 *supra* with those cited note 24 *supra*.

[27] See Craver v. Spaugh, 226 N. C. 450, 451, 38 S. E. 2d 525, 527 (1946); Gunter v. Dowdy, 224 N. C. 522, 31 S. E. 2d 524 (1944); Gosnell v. Hilliard, 205 N. C. 297, 171 S. E. 52 (1933); Meece v. Commercial Credit Co., 201 N. C. 139, 159 S. E. 17 (1931); Sutherland v. McLean, 199 N. C. 345, 154 S. E. 662 (1930).

[28] N. C. GEN. STAT. (1943) §1-121 (where the plaintiff is given additional time in which to file complaint, the statute provides that a copy of such order be served with the summons; plaintiff is required to prepare a copy of the complaint for the use of defendant and his attorney, but it is then filed with the clerk rather than being served on defendant).

barred from relief, for a mistake of law whether made by the litigant[29] or by his attorney[30] does not constitute ground for setting a judgment aside. North Carolina holds with the majority[31] that the statute has reference to mistakes of fact[32] and not of law. But since defendant's attorney promised to secure a copy of the complaint when filed,[33] and presumably would have done so had it not been for his illness, there seemed to be no real reliance on his misapprehension of the law either by himself or by the defendant. The question of the right of a litigant to have a judgment set aside on the ground of a mistake of law made by his attorney was thus not squarely before the court and therefore not decided.[34]

The court in the instant case ruled that motions under the statute to vacate judgments are addressed to the sound legal discretion of the trial court, whose ruling thereon can be reviewed only for an abuse of discretion.[35] As a general proposition, this agrees with the cases in our own reports[36] and those of other jurisdictions.[37] But it must be remembered that the existence of a discretionary power depends on whether the negligence which occasioned the judgment complained of is ex-

[29] Lerch Bros. v. McKinne Bros., 187 N. C. 419, 122 S. E. 9 (1924); Skinner v. Terry, 107 N. C. 103, 12 S. E. 118 (1890).

[30] Phifer v. Ins. Co., 123 N. C. 405, 31 S. E. 715 (1898).

[31] Kingsbury v. Brown, 60 Idaho 464, 92 P. 2d 1053 (1939); Rieckhoff v. Woodhull, 106 Mont. 22, 75 P. 2d 56 (1937); Lucas v. North Carolina Mut. Life Ins. Co., 184 S. C. 119, 191 S. E. 711 (1937); *cf.* Savage v. Cannon, 204 S. C. 473, 30 S. E. 2d 70 (1944) (where defendant's attorney was mistaken as to the time allowed for answering, order vacating the default judgment was affirmed). Plano Manufacturing Co. v. Murphy, 16 S. D. 380, 92 N. W. 1072 (1902); see Note, 153 A. L. R. 449, 455 (1944); 1 FREEMAN, JUDGMENTS §238 (5th ed., Tuttle, 1925).

[32] 1 FREEMAN, *op. cit. supra,* note 31, §241 ("Where the statute enumerates excusable neglect as one of the grounds for vacating a judgment, it seems superfluous to name any other; for such other grounds as have been named, to wit, mistake, surprise, inadvertance, unavoidable casualty or misfortune, if they or any of them exist under circumstances such as entitle the moving party to relief constitute a case of excusable neglect."); *see* Marsh v. Griffin, 123 N. C. 660, 667, 31 S. E. 840, 842 (1898) for a similar observation. *But cf.* Mann v. Hall, 163 N. C. 50, 79 S. E. 437 (1913) (relief on the ground of a mistake of fact allowed without consideration of the question of fault in making the mistake, the court holding that the several grounds for relief specified in the statute are separable and not "mere surplusage").

[33] Record, p. 22.

[34] Rierson v. York, 227 N. C. 575, 578, 42 S. E. 2d 902, 903 (1947) ("There was evidence from which the judge might find, and did find, that the neglect was due to the incapacity of the lawyer induced by serious illness. The larger part of the court's jurisdiction under this statute is invoked under 'excusable neglect' where there is neither mistake of law or fact.").

[35] *Ibid.*

[36] Dunn v. Jones, 195 N. C. 354, 142 S. E. 320 (1928); Sikes v. Weatherly, 110 N. C. 131, 14 S. E. 511 (1892); *see* Garner v. Quakenbush, 187 N. C. 603, 606, 122 S. E. 474, 476 (1924).

[37] Riskin v. Towers, 24 Cal. 2d 274, 148 P. 2d 611 (1944); Drinkard *et al.* v. Spencer, 72 Colo. 396, 211 Pac. 379 (1922); Atwood v. Northern Pac. R. R., 37 Idaho 554, 217 Pac. 600 (1923); Savage v. Cannon, 204 S. C. 473, 30 S. E. 2d 70 (1944); Green v. McLoud Co., 87 Vt. 242, 88 Atl. 810 (1913).

cusable.[38] And the question of excusability is one of law and therefore reviewable in every case.[39] The leading case for this principle is *Norton v. McLaurin*[40] wherein the court outlined the rules governing application of the statute. Upon entry of the motion to set aside, the judge finds the facts on which it is based, and these findings are conclusive on appeal when supported by the evidence. From such findings, he determines whether excusable negligence has been shown. And from this determination, either party may appeal. If he correctly determines the negligence is not excusable, that puts an end to the motion. If he correctly determines the negligence is excusable, then he may in the exercise of his discretion grant or deny relief, and it is his ruling in this particular that is reviewable only on a showing of abuse of discretion. Hence, as might be expected, most of the cases in the reports have turned on whether the legal ruling below was correct[41] rather than whether the court had abused its discretion.[42] The question of an abuse of discretion thus becomes pertinent only[43] where, as in the instant case, the supreme court decides that the trial court in vacating the judgment correctly held the negligence to be excusable.

DAVID M. MCLELLAND.

Labor—Collective Bargaining Agreements—Union Liability for Damages Under the Taft-Hartley Act

On June 23, 1947, the Taft-Hartley Act[1] made labor unions liable in damages for the breach of collective bargaining agreements[2] and for injuries resulting from certain "unlawful" strikes and boycotts.[3] In both types of cases the injured party is provided with unobstructed

[38] Manning v. Roanoke & T. R. R., 122 N. C. 824, 28 S. E. 963 (1898); Stith v. Jones, 119 N. C. 428, 25 S. E. 1022 (1896); State Bank, Ltd. v. Post Falls Land & Water Co., 29 Idaho 587, 161 Pac. 242 (1916). Movant must also show that he has a meritorious defense. Craver v. Spaugh, 226 N. C. 450, 38 S. E. 2d 525 (1946).

[39] Marsh v. Griffin, 123 N. C. 660, 31 S. E. 840 (1898); Griel v. Vernon, 65 N. C. 76 (1871); FREEMAN, *op. cit. supra*, note 31, §290 ("This discretion relates only to the question whether under the particular facts and circumstances disclosed the case is one which merits relief. . . . It has no relation to questions of law which may arise upon the facts, but such questions must, of course, be determined and be subject to review the same as any other matter of law.").

[40] 125 N. C. 185, 34 S. E. 269 (1899).

[41] Whitaker v. Raines, 226 N. C. 526, 39 S. E. 2d 266 (1946); Johnson v. Sidbury, 225 N. C. 208, 34 S. E. 2d 67 (1945); Wachovia Bank & Trust Co. v. Turner, 202 N. C. 162, 162 S. E. 221 (1931); Sutherland v. McLean, 199 N. C. 345, 154 S. E. 662 (1930); Warren v. Harvey, 92 N. C. 137 (1885).

[42] Brown v. Hale, 93 N. C. 188 (1885); Kerchner v. Baker, 82 N. C. 169 (1880); Bank of Statesville v. Foote *et al.*, 77 N. C. 131 (1877).

[43] No case has been found wherein the trial judge denied the motion to set aside notwithstanding a legally correct ruling that movant's negligence was excusable.

[1] "Labor Management Act, 1947," 61 STAT. ——, 29 U. S. C. A. §141 (Supp. 1947).

[2] *Id.* §185. [3] *Id.* §187.