IN THE
[redacted] COURT OF APPEALS

Case No. [redacted]

| | | |
|---|---|---|
| [redacted], | ) | Appeal from the [redacted] County Superior Court |
| Appellant, | ) | |
| | ) | Trial Court Case No. [redacted] |
| v. | ) | |
| | ) | |
| [redacted], | ) | Hon. [redacted] |
| | ) | |
| Appellee. | ) | |

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BRIEF OF APPELLANT

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[redacted]

Attorney for Appellant

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## STATEMENT OF ISSUES

1. Did the Trial Court Err in Denying Defendant's Motion to Set Aside the Default Judgment.

## STATEMENT OF CASE

This case is about a pro se Defendant-Tenant who, right before her trial on a tenant-landlord matter, was hospitalized due to her high risk [redacted] and as a result, default judgment was entered against her. Tenant sought to set aside judgment but being a pro se litigant committed an error when filling out a court approved motion to set aside judgment form. Instead of providing the required information on meritorious defenses, Tenant provided hospital documentation proving her unavailability at trial. Because of this minor procedural defect in filling out the court approved form, the trial court denied her motion without holding a hearing.

Tenant, by counsel, filed a Motion to Reconsider/Second Motion to Vacate Default Judgment on [redacted]. Landlord filed a Response to Tenant's Motion on [redacted]. The trial court again denied Tenant's second motion [redacted] without a hearing. This Appeal follows.

## STATEMENT OF FACTS

On or about [redacted], Tenant leased a condo from Landlord in [redacted] for approximately [redacted] per month. Appellant's App.. p. 11. At the time, Tenant was an [redacted] at a private university. In the lease between Tenant and Landlord, there was a clause titled "Job Transfer" that permitted a tenant to terminate the lease upon notice that the tenant's job had been transferred to a different geographic location. Appellant's App. p. 11. In other words, if Tenant's job was transferred to another geographic location, Tenant could terminate the lease without penalty. Additionally, the lease contained a clause titled "Early Termination" that provided early termination of the lease must be in writing. Appellant's App. p. 13.



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Approximately six months into the lease, Tenant's [redacted] job was eliminated by the university and Tenant was not given a replacement position. Appellant's App. p. 39. Tenant notified Landlord that her [redacted] position had been eliminated and that her employer was not providing her with a different position. Appellant's App. p. 39. Further, Tenant asked for an arrangement going forward while Tenant looked for new work. Appellant's App.. p. 39, Landlord refused to provide an arrangement and instead, notified Tenant that she had thirty days to vacate the premises upon which date the lease would be terminated. Appellant's App. p. 18, 39. Tenant timely vacated, moved her belongings, and surrendered the property. Appellant's App.. p. 18. Six months after vacating the property, Landlord sued Tenant for the balance of rent on the lease. Appellant's App.. p. 1. On [redacted], trial was held while Tenant was hospitalized and default judgment was entered against her for a total sum of $[redacted]. Appellant's App.. p. 26-31.

## SUMMARY OF ARGUMENT

Tenant is entitled to an order setting aside default judgment and the trial court erred in not granting one. Tenant could not attend trial because she was hospitalized due to her high risk [redacted], which was communicated to Landlord's counsel. Clearly, Tenant's non-attendance in trial court is excusable neglect given the facts and circumstances of the case. Moreover, Tenant has a strong meritorious defense in the case that there is no lease to sue on by the Landlord; Landlord terminated the lease when Landlord ordered Tenant to vacate the premises upon learning of Tenant's job loss and Tenant complied. Therefore, Tenant was entitled to an order vacating the default judgment which the trial court denied erroneously. If the default judgment is not set aside, not only will the case be decided on solely a procedural defect and not the merits contrary to state law and policy, but will greatly prejudice Tenant's interests.



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## ARGUMENT

### Standard of Review

The decision of whether to set aside default judgment typically is given substantial deference on appeal and is ordinarily reviewed for an abuse of discretion. *Kmart Corporation v. Englebright*, 719 N.E.2d 1249, 1253 (Ind.Ct.App.1999); *Baird v. Lake Santee Reg'l Waste & Water Dist.*, 945 N.E. 2d 711, 714 (Ind. Ct. App. 2011).

However, when a trial court rules on such a motion on a paper record without conducting an evidentiary hearing, the standard of review on appeal is de novo.[1] *Id.* The rationale for de novo review is that the appellate court is in as good a position as the trial court to determine the force and effect of the evidence. *Id.*

As a matter of policy, default judgments are not favored in Indiana, for it has long been the preferred policy of this state that courts decide a controversy on its merits. *Walker v. Kelley*, 819 N.E.2d 832, 837 (Ind.Ct.App.2004). A default judgment is "an extreme remedy and is available only where that party fails to defend or prosecute a suit. It is not a trap to be set by counsel to catch unsuspecting litigants." *Smith v. Johnston*, 711 N.E.2d 1259, 1264 (Ind. 1999). Any doubt of the propriety of a default judgment should be resolved in favor of the defaulted party. *Shane v. Home Depot USA, Inc.*, 869 N.E.2d 1232, 1234 (Ind. Ct. App. 2007). When reviewing the denial of a motion to set aside a default judgment, the courts seek to balance the need for finality of judgments and judicial efficiency with "marked preference for deciding disputes on their merits and for giving parties their day in court" especially in cases involving

[1] A party seeking to set aside a default judgment is frequently entitled to a hearing under Trial Rule 60(D), which requires among other things that the court "hear any pertinent evidence" related to the motion. *Bunch v. Himm*, 879 N.E.2d 632, 635 (Ind. Ct. App. 2008). Appellant was not granted a hearing in either motion she filed to set aside default judgment.



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material issues of fact, substantial amounts of money, or weighty policy determinations. *Butler v. State*, 933 N.E.2d 33, 36 (Ind. Ct. App. 2010); *Bunch*, at 635 (Ind. Ct. App. 2008).

## I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SET ASIDE DEFAULT JUDGMENT.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from an entry of default, final order, or final judgment, including a judgment by default, for the following reason: (1) mistake, surprise, excusable neglect. Ind. Trial Rule 60(B)(1). The motion shall be filed not more than one year after the judgment, order or proceeding was entered or taken for reason (1). A movant filing a motion for reason (1) must allege a meritorious claim or defense. *Id*. In other words, a default judgment may be set aside because of mistake, surprise, or excusable neglect so long as the motion to set aside the default is entered not more than one year after the judgment and the moving party also alleges a meritorious claim or defense. *Anderson v. State Auto Ins.* Co., 851 N.E.2d 368, 370 (Ind. Ct. App. 2006).

### A. Appellant is Entitled to an Order Setting Aside Default Judgment Under Ind. Trial Rule 60(B)(1) Because Her Motions Were Timely Filed within One Year of Judgment.

Default judgment was entered against Tenant on [redacted]. Appellant's App. p 2. Tenant's first Motion to Set Aside Default Judgment was filed within a two weeks of judgment. Appellant's App. p. 2. When the trial court set a hearing on proceedings supplemental, Tenant secured counsel, and by counsel, filed a Motion to Reconsider/Second Motion to Set Aside on [redacted], which is within one year from judgment. Appellant's App. p. 4.

### B. Appellant is Entitled to an Order Setting Aside Default Judgment Under Ind. Trial Rule 60(B)(1) Because of Excusable Neglect and Mistake.



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When deciding whether or not default judgment may be set aside because of excusable neglect, the trial court must consider the unique factual background of each case because no fixed rules or standards have been established as the circumstances of no two cases are alike. *Coslett v. Weddle Bros. Const. Co., Inc*., 798 N.E.2d 859 (Ind. 2003). Though a trial court deciding whether to set aside default judgment should do what is "just" in light of the facts of individual cases, that discretion should be exercised in light of disfavor in which default judgments are held. *Id.* In making its determination, the trial court must balance the need for an efficient judicial system with the judicial preference for resolving disputes on the merits. *Z.S. v. J.F*., 918 N.E.2d 636, 640 (Ind. Ct. App. 2009).

**i. <u>Hospitalization for High Risk [redacted] Complications Shortly Before and Through Trial is Excusable Neglect.</u>**

Here in this case, Tenant was ready to attend trial but for her being hospitalized shortly prior to and through the day of trial. This was communicated to the Landlord's counsel. Since Tenant was a pro se Defendant, there was no one else to represent her in court on the day of trial. The court should have excused Tenant's non-attendance considering the special circumstances in this case and allowed her motion to vacate default judgment under Ind. Trial Rule 60(B)(1).

In *Bunch v. Himm*, 879 N.E.2d 632 (Ind. Ct. App. 2008), the Court of Appeals, based on the evidence and in light of Indiana courts' deference for deciding disputes on their merits, upheld the decision of the trial court that Himm's failure to attend a hearing was excusable neglect pursuant to T.R. 60(B)(1). *Id.* at 636. In that case, Himm was on active military duty, but had made arrangements for a friend to receive and respond to her mail. Her friend notified her of a possible upcoming hearing on a motion to modify a child support order, but she was never informed of the exact date. Yet, she made her attorney aware of her inability to attend any


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future court hearings and instructed him to attend the hearing for her. The attorney was never served notice of a hearing and told her there was no hearing. Moreover, as soon as she discovered the adverse order entered against her increasing her child support obligation, she contacted the trial court and had her attorney file a T.R. 60(B)(1) motion to set aside the default order together with a motion to stay proceedings until she returned from her deployment and could attend the hearing. The court found that there was no "foot dragging" on the part of Himm leading her to a default judgment, only her inability to immediately appear in court because of her active military status. Likewise, in the case at hand, there was no foot dragging on the part of Tenant. But for hospitalization, she would have been before the court representing her interests and meritorious defense. Additionally, she filed her T.R. 60(B)(1) motion immediately upon learning of the default judgment.

**ii. Confusion Caused By Court-Provided Forms That Interferes With The Ability To Obtain A Hearing Is Mistake And Excusable Neglect.**

Proceeding as a pro se Defendant, Tenant also misunderstood that the court approved form she filled out requested information about her meritorious defense against Landlord's claim. In the field asking for any meritorious defenses, Tenant instead mistakenly provided documentation demonstrating why she was unable to attend trial. Appellant's App. p. 27. Tenant mistakenly did not mention that she had a meritorious defense – that there was indeed no lease for Landlord to sue on since it terminated upon her surrender of the premises and Landlord's acceptance of said surrender.


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In *Butler v. State*, 933 N.E. 2d 33 (Ind. Ct. App. 2010), the issue on appeal was whether his motions to set aside the default judgment were improperly denied by the trial court. Butler was issued a traffic citation and appeared for the first hearing date to challenge the citation, only to have the hearing rescheduled. Butler knew his hearing was rescheduled to March 16, 2009, and claimed to have sought in a March 1, 2009 letter a further continuance or a clarification of the time of his March 16 hearing. Butler further alleged that he called the court on March 13, 2009 to obtain confirmation of his hearing time and was told that his hearing was scheduled for 1:00 p.m. Upon arriving late for his March 16 hearing and learning of the default judgment, Butler immediately submitted a letter to the trial court, which the court construed as a motion to set aside the default judgment. He submitted a second such motion on a court-provided form less than one month later. Each of these was denied. The Appellate court observed that Butler engaged in no "foot dragging" or other behavior seeking to delay the process and attempted to immediately address the effects of his absence from the March 16th hearing. *Id*. at 36. The court noted that "the form provided by the trial court, which Butler used to prepare his second motion, appears to be inadequate to the purpose of providing an adequate opportunity for a pro se litigant to seek the set-aside of a default judgment. The form provides a few blank lines on the top half of the page prefaced with the phrase, "I am asking the Court to set aside the default judgment in this case because." *Id*.

Further, the court noted that Butler had clearly made efforts to attend his hearing but did not arrive on-time and had an alleged meritorious defense, due process safeguards like those in Rule 60(D) appear to have been lax, and court-provided forms led to confusion and surprise on the part of the litigant. *Id*. These factors combined to deprive him of his day in court. The court held that "Where, as here, Butler alleges a meritorious defense to set aside the default judgment



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and procedural issues interfered with his ability to obtain a hearing, we cannot agree with the State that the trial court was within its discretion to deny Butler's motions to set aside the default judgment". *Id. at* 37. The appellate court held that Butler's actions clearly comport with Trial Rule 60(B)'s requirement that he became subject to the default judgment as a result of mistake, surprise, or excusable neglect. *Id*. at 36.

Likewise, Tenant herein, a pro se litigant, had made every effort to pursue her case but could not attend and when she attempted to redress the situation, Tenant was unable to understand the type of information to be provided in the court approved form she used to seek a setting aside of the default judgment. And instead of providing the details of her meritorious defense, Tenant mistakenly stated the meritorious reason for not being able to make the trial.

The trial court should have excused Tenant's non-attendance for the trial considering the special situation she was in and also, excused Tenant's mistake, being a pro se litigant, in providing the wrong information on the court approved form. The statute, T.R. 60(B) is remedial in character and "must be liberally construed and applied". *Indiana Travelers' Accident Assoc. v. Doherty*, 70 Ind. App. 214, 217-18, 123 N.E. 242, 243 (Ind. Ct. App. 1919). Tenant's actions clearly comport with T.R. 60 (B)'s requirement that she became subject to the default judgment as a result of mistake, surprise, or excusable neglect.

### C. Appellant is Entitled to an Order Setting Aside Default Judgment Under Ind. Trial Rule 60(B)(1) Because Tenant has alleged a Meritorious Defense of Termination of Lease.

In addition to showing excusable neglect, Indiana case law makes clear the movant for relief from judgment must also show a meritorious defense to the judgment. *State, Dept. of Natural Resources v. Van Keppel*, 583 N.E.2d 161, 163 (Ind.Ct.App.1991); see also *Bunch v. Himm*, at 637. A meritorious defense is one that would lead to a different result if the case were



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tried on the merits. *Id.* Absolute proof of the defense is not necessary to establish a meritorious defense, as required to set aside a default judgment, but there must be enough admissible evidence to make a prima facie showing that the judgment would change and that the defaulted party would suffer an injustice if the judgment were allowed to stand. *Id*. see also, *Butler v. State*, 933 N.E.2d 33 (Ind. Ct. App. 2010).

The trial court erred in denying Tenant's motion to set aside the default judgment because Tenant had a meritorious defense in the underlying case. A review of the record in this case shows Tenant was held to pay the balance lease amount when the fact was that the lease was no longer in existence. Tenant defense is meritorious because there was a surrender of the property by Tenant and acceptance of that surrender by Landlord.

**i. Appellant Surrendered The Lease And Landlord Accepted The Surrender.**

Termination of a lease agreement occurs when the tenant surrenders the tenancy and the landlord accepts the tenant's surrender." *Eppl v. DiGiacomo*, 946 N.E.2d 646, 650-51 (Ind. Ct. App. 2011). "A surrender of tenancy is a yielding of the tenancy to the owner of the reversion or remainder, wherein the tenancy is submerged and extinguished by the agreement." *Id*. "Surrender may be express or by operation of law. Surrender arises by operation of law when the parties to a lease "take an action that is so inconsistent with the subsisting landlord-tenant relationship as to imply they have both agreed to deem the surrender to have taken effect." *Eppl* at 651. In order that there be surrender and acceptance thereof, there must be some form of mutual agreement between parties to effect that lease should cease to be binding on them and agreement must cause separation of privity of contract when there is written lease. *N. Ind. Steel Supply Co. v. Chrisman*, 139 Ind. App. 27, 204 N.E.2d 668 (1965). In other words, termination


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of the lease by operation of law is implied from the acts of the parties. The conduct of the parties must be so inconsistent with the subsisting relationship of landlord and tenant, that it may be implied that both lessor and lessee have agreed to consider the lease as ended. *N. Ind. Steel Supply Co. at 671*.

In the case before this Court, when Tenant's [redacted] job was eliminated by the university and she was not given a replacement position, Tenant informed Landlord of the job elimination and asked for an alternate arrangement while Tenant sought a new job. However, Landlord did not want an unemployed tenant and refused to provide an arrangement and instead, ordered Tenant to vacate immediately within thirty days. Tenant vacated within the demanded period. Therefore, actual termination of the lease occurred when Tenant surrendered the premises – in absence of a default on the lease - and Landlord accepted Tenant's departure (and presumably the keys). This series of actions by the parties is so inconsistent with the relationship of landlord-tenant. The reasons are that a tenant, who timely paid rent and was not in default under any circumstances, was ordered to vacate in speculation and fear of the implications of a unemployed tenant. Thirty days later, Tenant moves. These actions support the notion that no one intended for the lease to continue, especially Landlord, who clearly wanted a new tenant. As such, Landlord is not entitled to claim the rent on the balance lease.

**ii. The Absence Of A Writing Does Not Make The Termination Inoperative.**

This meritorious defense is not defeated because the termination was not in writing. Even though the Lease contained a clause that early termination of a lease must be in writing, Landlord should be estopped from raising that argument as it was Landlord who ordered the tenant to vacate and Tenant complied with Landlord's express instructions. In *Siller v. Dunn*


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(1930), 103 Cal.App. 154, 284 P. 232, 110 A.L.R. 375, the lessor re-entered the premises within the term of the lease and remodeled the premises making it untenantable for the purpose that it had originally been leased. There was a clause which provided for the collection of rent for the rest of the term from the lessee if the lessee surrendered the premises during the term. The court stated that notwithstanding the savings clause in the lease, the plaintiff (lessor) abandoned the lease by his actions and is estopped to maintain an action for the balance of the lease. The court noted that estoppel may occur contrary to the actual intent because it is to be inferred from the acts of the parties. *Id*; see also, *N. Ind. Steel Supply Co., at* 673-74.

In the case at hand, the Landlord sued Tenant for the balance on the lease 6 months after she vacated from the premises. It is to be noted that the Tenant –prior to vacating the premises - had not sought to abandon the lease; she only sought a payment arrangement. Landlord ordered Tenant to vacate and Tenant complied within the timeframe demanded by Landlord, and as such, Landlord should be held estopped from raising the argument that the termination was invalid since it was not in writing. Landlord's acceptance of Tenant's surrender of the lease and Landlord's subsequent control over the leased premises supports Tenant's position that the lease was terminated. Since there was surrender and acceptance of the lease, causing termination of that lease, there is no covenant to collect accrued rent collection. In *N. Ind. Steel Supply Co.*, the court held that by lessor's own acts of acceptance, after surrender by lessee, lessor has terminated the lease, and because the lease is terminated, all of the covenants, including the covenant allowing the collection of accrued rent for the residue of the term, are thereby abrogated. *N. Ind. Steel Supply Co. at* 38-39. Therefore, Tenant's defense remains meritorious despite the fact the early termination was not in writing.

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## CONCLUSION

Tenant has made a showing of excusable neglect and has a strong meritorious defense to Landlord's claims and allegations. The procedural defect should not prevent her from obtaining a trial court decision on the merits of her case. Given the law and policy of the Indiana Courts, Tenant's motion to set aside default judgment should have been granted and the trial court erred in not doing so. Based thereon, Tenant respectfully requests that this Court reverse the trial court's judgment and remand for further proceedings.

Respectfully Submitted,

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**WORD COUNT CERTIFICATE**

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