An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA01-1087

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

BERNICE ALVA RAY,
Plaintiff,

v.

PAMELA YOUNG and SAMUEL JACKSON STROUD, JR.,
Defendants.

Wake County
No. 98 CVS 6514

Appeal by plaintiff from order entered 12 February 2001 by Judge Abraham Penn Jones in Wake County Superior Court. Heard in the Court of Appeals 22 April 2002.

Rush-Lane & Lane, P.L.L.C., by Freddie Lane, Jr., for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Ann S. Estridge, for defendant-appellee, Samuel Jackson Stroud, Jr.

HUDSON, Judge.

On 2 June 1998, Bernice Alva Ray ("plaintiff"), through her attorney Laurence Colbert ("Colbert"), filed a negligence action against defendants Pamela Young and Samuel Jackson Stroud, Jr. Plaintiff sought to recover compensatory damages for injuries she suffered in an automobile accident on 3 June 1995. Defendant Young was dismissed from the suit for plaintiff's failure to obtain service upon her. On 17 August 1998, defendant Stroud served

discovery requests upon plaintiff. Colbert obtained an extension of time, up to and including 11 October 1998, in which to respond to the discovery requests. Plaintiff, however, failed to provide defendant Stroud with responses.

Defendant Stroud filed a motion to compel discovery on 30 June 1999, which came on for hearing before Judge Donald W. Stephens in August of 1999. In an order signed 3 September 1999, Judge Stephens found "[p]laintiff's counsel has not provided the Court with any written or verbal justification for plaintiff's failure to respond to the outstanding discovery requests and no just cause exists for the refusal of plaintiff to respond to the discovery requests." Judge Stephens ordered plaintiff's case be dismissed with prejudice. Colbert did not attempt to appeal Judge Stephen's order.

On 15 August 2000, plaintiff, through her new attorney, filed a motion in the cause pursuant to Rule 60(b)(1) and (6) of the North Carolina Rules of Civil Procedure (1999) to set aside the order of dismissal. In her motion, plaintiff alleged that she was not aware that her responses to defendant Stroud's discovery requests were overdue nor was she aware that defendant Stroud had filed a motion to compel. Plaintiff further alleged that she was not aware that her case had been dismissed until June of 2000, when she saw Colbert in his office and he informed plaintiff that he "was about to be disbarred and that he would no longer be handling her file."

Judge Abraham Penn Jones heard plaintiff's Rule 60(b) motion

on 9 October 2000. In an order entered 31 October 2000, Judge Jones denied plaintiff's motion. The order, however, did not contain any findings of fact. On 1 December 2000, plaintiff noticed appeal from Judge Jones' 31 October 2000 order. Upon the request of plaintiff's counsel, Judge Jones entered a second order on 12 February 2001 denying plaintiff's motion and containing findings of fact. Plaintiff filed an amended notice of appeal on 15 March 2001 appealing Judge Jones' second order entered 12 February 2001.

Plaintiff contends the order should be set aside as permitted by Rule 60(b)(1) and (6) because "her former attorney's conduct not only involves gross negligence and fraud, but the commission of gross improprieties to conceal from her the actual status of her case[.]"

To set aside a judgment on the grounds of excusable neglect pursuant to Rule 60(b)(1), "'the moving party must show that the judgment rendered against him was due to his excusable neglect and that he has a meritorious defense.'" *Higgins v. Michael Powell Builders,* 132 N.C. App. 720, 726, 515 S.E.2d 17, 21 (1999) (quoting *Thomas M. McInnis & Assoc., Inc. v. Hall,* 318 N.C. 421, 424, 349 S.E.2d 552, 554 (1986)). In determining whether to grant relief under Rule 60(b)(1), the trial court acts within its sound discretion. *See Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983). The ruling will be disturbed only upon a showing of abuse of discretion. *See id.*

In *Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655

(1998), our Supreme Court addressed whether Rule 60(b)(1) may be used to grant relief from sanctions imposed for an attorney's failure to abide by discovery rules. Our Supreme Court held that "[c]learly, an attorney's negligence in handling a case constitutes inexcusable neglect and should not be grounds for relief under the 'excusable neglect' provision of Rule 60(b)(1)." *Id.* The Court reasoned that "[a]llowing an attorney's negligence to be a basis for providing relief from orders would encourage such negligence and present a temptation for litigants to use the negligence as an excuse to avoid court-imposed rules and deadlines." *Id.*

Recently, this Court applied the holding in *Briley* to a case factually similar to the case at bar. *See Parris v. Light,* ___ N.C. App. ___, 553 S.E.2d 96 (2001). In *Parris,* the injured motorist's attorney failed to respond to discovery requests for six months and failed to appear at the hearing on the motion to compel. This Court held that the attorney's neglect was inexcusable and justified the trial court's denial of relief from judgment of dismissal. *See id.* at ___, 553 S.E.2d at 99.

Here, the evidence shows plaintiff's counsel failed to respond to discovery requests despite being given an extension of time; failed to provide the trial court with any justification for not responding to the discovery requests; and failed to appeal the dismissal of plaintiff's complaint. As in *Parris,* plaintiff's counsel's neglect was inexcusable and justified the trial court's denial of relief from Judge Stephen's order dismissing plaintiff's case. Moreover, plaintiff has not shown nor do we find the trial

court abused its discretion in denying plaintiff's motion.

Plaintiff next argues that she is entitled to relief from Judge Stephens order under Rule 60(b)(6), which provides that the court may relieve a party from a final judgment for "[a]ny other reason justifying relief from the operation of the judgment." The setting aside of a judgment under Rule 60(b)(6) should only take place where (1) extraordinary circumstances exist and (2) there is a showing that justice demands it. *See Partridge v. Associated Cleaning Consultants,* 108 N.C. App. 625, 632, 424 S.E.2d 664, 668, *disc. rev. denied*, 333 N.C. 540, 429 S.E.2d 560 (1993). Furthermore, the movant must also show that he has a meritorious defense. *See Sides v. Reid,* 35 N.C. App. 235, 241 S.E.2d 110 (1978). Rule 60(b)(6) is equitable in nature and authorizes the trial judge to exercise his discretion in granting or withholding the relief sought. *See State ex rel. Envir. Mgmt. Comm. v. House of Raeford Farms,* 101 N.C. App. 433, 448, 400 S.E.2d 107, 117, *disc. rev. denied,* 328 N.C. 576, 403 S.E.2d 521 (1991). Our Supreme Court has indicated that this Court cannot substitute "what it consider[s] to be its own better judgment" for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it "probably amounted to a substantial miscarriage of justice." *Worthington v. Bynum and Cogdell v. Bynum,* 305 N.C. 478, 486-87, 290 S.E.2d 599, 604-05 (1982).

This Court, in *Henderson v. Wachovia Bank of N.C.*, 145 N.C. App. 621, 623-24, 551 S.E.2d 464, 467, *disc. rev. denied*, 354 N.C. 572, 558 S.E.2d 869 (2001), addressed the issue of whether an

attorney's fraud on a client could be grounds for setting aside a trial court's order under Rule 60(b)(6). In *Henderson,* the trial court entered a default judgment as a sanction against defendant after defendant failed to appear for depositions on three separate occasions. *See id.* at 623, 551 S.E.2d at 466. Defendant argued that "its attorneys' repeated failure to keep defendant informed of upcoming depositions amounted to fraud" and entitled it to relief from the trial court's order. *Id.* at 623, 551 S.E.2d at 467. This court found that defendant's attorneys' conduct did not "constitute a fraud upon the court or upon defendant." *Id*. at 628, 551 S.E.2d at 469. Rather, defendant's attorneys did not apprize defendant of court orders to appear for depositions. *See id.* at 623, 551 S.E.2d at 466.

Like *Henderson*, plaintiff's affidavit shows that her attorney did not keep her informed of the developments of her case. Furthermore, plaintiff has not shown that justice demands setting aside the order. The trial court found that in a recorded statement given by plaintiff on 17 August 1995, plaintiff could not remember the location of the vehicles involved in the collision, what happened in the accident, nor who she thought was at fault for the accident. We are unable to say that the trial court abused its discretion in its decision to deny plaintiff's motion. Accordingly, the trial court's order denying plaintiff's Rule 60(b) motion is affirmed.

Affirmed.

Judges GREENE and TYSON concur.

Report per Rule 30(e).