NO. COA09-1026

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

YAODONG JI,
Plaintiff-Appellant,

v.

Wake County
No. 08 CVS 5464

CITY OF RALEIGH, NORTH CAROLINA;
SUPERVISOR OF SPECIAL VICTIMS
UNIT, RALEIGH POLICE DEPARTMENT;
DONNA G. BEAN,
Defendants-Appellants.

Appeal by Plaintiff from order entered 18 May 2009 by Judge James E. Hardin, Jr., in Wake County Superior Court. Heard in the Court of Appeals 3 December 2009.

Yaodong Ji, pro se, for Plaintiff-Appellant.

Raleigh City Attorney Thomas A. McCormick by Deputy City Attorney Hunt K. Choi, for Defendants-Appellees.

ERVIN, Judge.

Plaintiff Yaodong Ji appeals from an order entered by the trial court denying his motion for relief from an order granting Defendants' motion to dismiss Plaintiff's complaint. After careful consideration of the record in light of the applicable law, we conclude that the trial court's order should be affirmed.

I. Factual Background

On 17 March 2008, Plaintiff filed a complaint against the City of Raleigh, the Supervisor of the Special Victims Unit of the

Raleigh Police Department, and Detective Donna G. Bean of the Raleigh Police Department. In his complaint, Plaintiff asserted that he had been arrested by officers of the Raleigh Police Department on 28 March 2005 for the alleged rape of his wife, Yan Sun, based on an investigation performed by Detective Bean. Plaintiff's complaint attempted to assert various claims against Detective Bean, the City of Raleigh, and the Supervisors of the Raleigh Police Department's Special Victims Unit arising from his arrest.

According to Plaintiff's complaint, Ms. Sun was a citizen of the People's Republic of China. Plaintiff and Ms. Sun met through an online dating website in 2002, after which Plaintiff applied for a visa that allowed Ms. Sun to visit the United States in February 2003 as Plaintiff's fiancee. At the conclusion of her visit, Ms. Sun did not wish to return to the People's Republic, so Plaintiff married her in March 2003. The marriage between Plaintiff and Ms. Sun was apparently not a happy one. According to Plaintiff, he had informed Ms. Sun in early 2005 that he wanted a divorce.

According to Plaintiff's complaint, Ms. "Sun made false statements on March 28, 2005[,] in [the] Emergency Room of WakeMed Center" to officers of the Raleigh Police Department to the effect that "Plaintiff had . . . [nonconsensual] intercourse with her and caused her vaginal tear at 2:00 [a.m.], March 26, 2005." In addition, Plaintiff alleged that, "[s]ince [Ms.] Sun's vaginal tear was fresh and there was no healing when Dr. Tascone did the exam at 9:40 [p.m.], March 28, 2005, the age of [her] vaginal tear did not

match the time that [the] alleged event occurred (at 2:00 [a.m.], March 26, 2005)." Among other things, Plaintiff alleged that Detective Bean "did not verify the age of the vaginal tear" with the emergency room physician who examined Ms. Sun.

On the basis of these allegations, Plaintiff claimed that:

PLAINTIFF'S FIRST CLAIM FOR RELIEF

> 35. Under color of state law, Bean and Supervisors of Special Victims Unit, Raleigh Police Department, acting individually and in concert, initiated and continued criminal prosecution against Plaintiff on charges of second degree rape.
>
> 36. Bean and Supervisors of Special Victims Unit's actions were ignorant, malicious and evidenced a reckless and callous disregard for, and deliberate indifference to, Plaintiff's constitutional rights.
>
> 37. As result of this wrongful prosecution, Plaintiff was seized and deprived of his rights under the Fourth and Fourteenth Amendments to the United States Constitution.
>
> . . . .
>
> **PLAINTIFF'S SECOND CLAIM FOR RELIEF**
>
> . . . .
>
> 42. On or about March 28, 2005, the Supervisory Defendants and, upon information and belief, other officials with final policymaking authority in the City of Raleigh and the Raleigh Police agreed that Bean would direct the Raleigh Police investigation into the allegations of rape, sexual assault made by Yan Sun.
>
> 43. Before and after Bean was given authority to direct the Raleigh Police investigation, the Supervisory Defendants and other officials with final

policymaking authority in the City of Raleigh and the Raleigh Police had actual or constructive knowledge that Bean did not have adequate experience or training to direct a complex criminal investigation.

44. In these circumstances, adequate scrutiny of Bean's ability, experience, and background would have made it plainly obvious to a reasonable policymaker that the decision to permit her to direct this investigation would lead to deprivations of Plaintiff's constitutional rights.

45. Nevertheless, the Supervisory Defendants and other officials in the City of Raleigh and the Raleigh Police Department allowed Bean to direct the investigation knowing, or with deliberate indifference to the likelihood, that their decision would result in a violations [sic] of Plaintiff's constitutional rights.

46. As a direct and foreseeable consequence of these policy decisions, Plaintiff was deprived of his rights under the Fourth and Fourteenth Amendments to the United States Constitution.

PLAINTIFF'S THIRD CLAIM FOR RELIEF

. . . .

49. Upon information and belief, the Supervisory Defendants and other officials in the City of Raleigh and the Raleigh Police established a policy or custom encouraging Raleigh Police officers to target the alleged for selective enforcement of the criminal laws without doing their careful investigation.

50. It would have been plainly obvious to a reasonable policymaker that such conduct would lead to deprivations of Plaintiff's constitutional rights.

51. Upon information and belief, the Supervisory Defendants and other officials in the City of Raleigh and the

Raleigh Police nevertheless agreed to, approved, and ratified this unconstitutional conduct by Bean and their subordinates in Raleigh Police.

52. As a direct and foreseeable consequence of these policy decisions, Plaintiff was deprived of his rights under the Fourth and Fourteenth Amendments to the United States Constitution.

PLAINTIFF'S FOURTH CLAIM FOR RELIEF

. . . .

55. On or about March 28, 2005, Bean, with the acquiescence or approval of the Supervisory Defendants assumed direct responsibility for the police investigation into allegations of rape, sexual assault made by Yan Sun.

56. The Supervisory Defendants knew, or should have known about the shoddy police investigation based on Bean's limited experience and failed to take meaningful preventative or remedial action.

57. The Supervisory Defendants' actions evidenced a reckless and callous disregard for, and deliberate indifference to, Plaintiff's constitutional rights.

58. As a direct and foreseeable consequence of these acts and omissions, Plaintiff was deprived of his rights under the Fourth and Fourteenth Amendments to the United States Constitution.

. . . .

PLAINTIFF'S FIFTH CLAIM FOR RELIEF

. . . .

63. At the time of the event alleged above, Bean owed Plaintiff a duty to use due care with respect to the investigation of Sun's allegations.

64. At the time Bean committed the acts and omissions alleged above, she knew or should have known that she violated or departed from Raleigh Police policies and procedures, violated or departed from professional standards of conduct, violated constitutional rights, and was likely to cause Plaintiff's harm.

65. In committing the aforementioned acts and/or omissions, Bean negligently breached said duties to use due care which directly and proximately resulted in the injuries and damages to the Plaintiff as alleged herein.

PLAINTIFF'S SIXTH CLAIM FOR RELIEF

. . . .

67. At the time of the event alleged above, each of the Supervisory Defendants, and the City of Raleigh owed Plaintiff a duty to use due care in the hiring, training, supervision, discipline, and retention of Raleigh Police personnel, including the personnel involved in the investigation of Sun's claims.

68. The Supervisory Defendants negligently supervised Defendant Bean by assigning her to the police investigation into Sun's allegations, notwithstanding Bean's lack of prior experience in complex felony investigations.

69. The Supervisory Defendants negligently supervised Defendant Bean, failed to provide her with proper training, and failed to outline proper procedure to her in various respects relating to the appropriate conduct of criminal investigations, including determining when the alleged event occurred by investigating the age of the vaginal tear.

70. In committing the aforementioned acts or omissions, each Supervisory Defendant negligently breached said duty to use due care, which directly and proximately

> resulted in the injuries and damages to Plaintiff as alleged herein.

Plaintiff attached various documents as exhibits to his complaint, including the Raleigh Police Department incident report and supplemental report relating to Ms. Sun's allegations against him; the depositions of Dr. Arthur H. Tascone, the emergency room physician who examined Ms. Sun, and Detective Bean, both taken in a separate civil action between Plaintiff and Ms. Sun; and an article derived from a website concerning the topic of "wound healing," as exhibits to his complaint.[1] As a result of Defendants' allegedly wrongful conduct, Plaintiff requested the court to award compensatory and punitive damages, attorneys fees, the costs, and any other appropriate relief.

On 1 April 2008, Defendants filed a motion to dismiss Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6). In seeking dismissal of Plaintiff's complaint, Defendants alleged that:

> 2. Although the causes of action that plaintiff wishes to assert in his Complaint are unclear, a liberal reading of plaintiff[']s Complaint suggests potential pleadings for (1) a 42 U.S.C. § 1983 claim premised on malicious prosecution and/or false arrest; (2) a 42 U.S.C. § 1983 claim premised on failure to train or supervise; (3) a 42 U.S.C. § 1983 claim premised on negligent investigation and/or selective enforcement; (4) a [42] U.S.C. § 1983

[1] Plaintiff's decision to attach these documents to his complaint made them part of that document. N.C. Gen. Stat. § 1A-1, Rule 10(c) (providing that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes").

claim premised on failure to train or supervise and[/]or negligent investigation; (5) a 42 U.S.C. § 1983 claim premised on the alleged negligence of Sgt. Bean; (6) a state law claim for negligent hiring, training, supervision, discipline, and retention; and (7) a claim for punitive damages.

3. As stated in the Complaint, the facts giving rise to plaintiff[']s presumed causes of action occurred on March 28, 2005 when Sgt. Bean placed plaintiff under arrest for second degree forcible rape.

4. As of the date of filing of this Motion, plaintiff has failed to have any summons issued against any defendant.

5. The five day period prescribed by [N.C. Gen. Stat.] § 1A-1, Rule 4(a) during which plaintiff was required to have summonses issued following the filing of his Complaint has expired.

6. The three year statute of limitations set forth in [N.C. Gen. Stat.] § 1-52 and applicable to plaintiff's presumed causes of action has expired.

7. On March 20, 2008, a copy of the Complaint was delivered to the Raleigh City Attorney's Office by United States Postal Service Priority Mail. The mailing was sent by the plaintiff and was addressed to "Mr. Thomas A. McCormick, City Attorney, City Attorney Department."

8. City Attorney Thomas A. McCormick has not been authorized by law or in fact to accept service of process on behalf of the City or any of its officers.

9. On March 21, 2008, Sgt. Bean discovered a copy of the Complaint which had been delivered to her desk at the Raleigh Police Department by United States Postal Service Priority Mail. The mailing was sent by the plaintiff and was addressed to "Sgt. Donna G. Bean, Raleigh Police

Department, 110 S. McDowell St., Raleigh, NC 27602."

10. No person at the Raleigh Police Department has been authorized by law or in fact to accept service of process on behalf of Sgt. Bean.

11. On March 24, 2008 or March 25, 2008 the current Raleigh Police Department Special Victims Unit Supervisor discovered a copy of the Complaint which had been delivered to her desk at the Raleigh Police Department by United States Postal Service Priority Mail. The mailing was sent by the plaintiff and was addressed to "Supervisors, Special Victims Unit, Raleigh Police Department, 110 S. McDowell St., Raleigh, NC 27602."

12. No person at the Raleigh Police Department has been authorized by law or in fact to accept service of process on behalf of any supervisor of the Raleigh Police Department Special Victims Unit.

13. The physical address of the Raleigh Police Department is 110 S. McDowell Street.

14. Neither Sgt. Bean nor any supervisors of the Raleigh Police Department Special Victims Unit reside at 110 S. McDowell Street.

15. As of the date of filing of this Motion, plaintiff has failed to accomplish service of the Complaint upon any defendant in a manner prescribed by [N.C. Gen. Stat.] § 1A-1, Rule 4.

16. As of the date of filing of this Motion, plaintiff has failed to accomplish service of any summons upon any defendant.

17. Insofar as plaintiff has failed to have summonses issued or served upon the defendants, and has failed to achieve service upon any defendant in the manner prescribed by [N.C. Gen. Stat.] § 1A-1, Rule 4, this matter should be dismissed

> pursuant to [N.C. Gen. Stat.] § 1A-1, Rule 12(b)(2), Rule 12(b)(4), and Rule, l2(b)(5) for lack of jurisdiction over the defendants, insufficiency of process, and insufficiency of service of process.
>
> 18. For the following reasons, this matter should also be dismissed pursuant to [N.C. Gen. Stat.] § 1A-1, Rule l2(b)(6):
>
> a. the facts giving rise to plaintiffs[‘] claims for relief occurred on March 28, 2005;
>
> b. plaintiff filed his Complaint on March 17, 2008;
>
> c. plaintiff failed to have summonses issued against the defendants within five days of the filing of his Complaint;
>
> d. upon plaintiff’s failure to have summonses issued within five days of the filing of his Complaint, this action abated;
>
> e. the statute of limitations applicable to plaintiffs claims is three years, and the limitations period has now expired, and
>
> f. therefore, plaintiff’s claims are barred by the statute of limitations.
>
> 19. This matter should also be dismissed pursuant to [N.C. Gen. Stat.] § 1A-1, Rule 12(b)(6) as the allegations set forth in the Complaint in conjunction with information set forth in exhibits attached to the Complaint demonstrate that defendants are entitled to judgment as a matter of law.

After Defendants sought dismissal of the complaint, Plaintiff filed an amended complaint on 4 April 2008 clarifying that "[t]his action arises under the Fourth and Fourteenth Amendments to the Constitution of the United States; Article I, Section 19, of the

North Carolina State Constitution; 42 U.S.C. § 1983; 42 U.S.C. § 1985; 42 U.S.C. § 1986; 42 U.S.C. § 1988(b); and North Carolina law" and alleging that "Defendants were trying to stall for [the] three year limitation [period]." On 4 April 2008, Plaintiff also obtained the issuance of summonses directed toward Defendants in accordance with N.C. Gen. Stat. § 1A-1, Rule 4.

On 13 June 2008, the trial court entered an order granting Defendants' motion to dismiss on the basis of the following logic:

> Defendants contend that the Complaint should be dismissed pursuant to North Carolina Rules of Civil Procedure 12(b)(2), 12(b)(4), and 12(b)(5) on grounds that Plaintiff failed to have summonses issued within five days of the filing of the Complaint as required by Rule 4(a), and that Plaintiff failed to achieve service in the manner required by Rule 4(j)(1) and 4(j)(5). In addition, Defendants urge dismissal pursuant to Rule 12(b)(6) on grounds that Plaintiff has failed to properly commence this action within the applicable statute of limitations, and that recovery is barred because the Complaint discloses facts which necessarily defeat Plaintiff[']s causes of action, specifically that the Complaint reveals the existence of probable cause which defeats claims challenging the lawfulness of arrest. The Court agrees with the Defendants.
>
> Therefore, for the reasons set forth in the Memorandum in Support of Defendants' Motion to Dismiss, it is hereby ORDERED, ADJUDGED, and DECREED that Defendants' Motion to Dismiss is ALLOWED in its entirety. Accordingly, this matter is DISMISSED as to all claims and all defendants. Further, by virtue of the rulings herein, Plaintiff[']s Motion to Extend the Statute of Limitations filed on April 7, 2008 is MOOT and no ruling is required or made thereupon.[2]

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[2] Plaintiff's Motion to Extend Statute of Limitations does not appear in the record on appeal.

On 17 December 2008, Plaintiff filed a motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60, seeking the entry of an order vacating the trial court's dismissal order.[3] In seeking relief from the trial court's dismissal order, Plaintiff alleged that:

> 2. Plaintiff filed the Complaint on March 17, 2008, File 08 CVS004564. Plaintiff acts in the Complaint, File 08 CVS 004564, as *Pro se*. Because of the Court clerk mistake, the Summon[s] for the Complaint was not filed with the Court on March 17, 2008
>
> 3. Defendants filed [a] Motion to Dismiss on April 1, 2008. The Court hearing for the Motion to Dismiss was scheduled on June 13, 2008.
>
> 4. Plaintiff filed [an] Amended Complaint, File 08 CVS004564 on April 4, 2008. A Summon[s] was also filed with the Amended Complaint. The Amended Complaint and Summon[s] were sent to Defendants by Wake County Sheriff.
>
> 5. Plaintiff filed [a] Motion to Extend the Statute of Limitation on April 4, 2008.
>
> 6. Defendants filed [a] Motion and Order for Continuance on April 29, 2008.
>
> 7. Plaintiff filed Plaintiff's Memorandum in Response to Defendant[s]' Motion to Dismiss on May 20, 2008.
>
> 8. Defendant hand delivered "Memorandum in Support of Defendants' Motion to Dismiss"

[3] According to the information in the record, Plaintiff also filed a motion seeking relief from the trial court's dismissal order pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. However, the record does not reflect that Plaintiff's motion was ever ruled on. At a minimum, since Plaintiff has not advanced any issues arising from his motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 59, on appeal, the filing of this motion has no impact on our ultimate disposition of Plaintiff's appeal.

to Plaintiff in the Court hearing on June 13, 2008. Defendant signed the "Memorandum in Support of Defendants' Motion to Dismiss" on June 13, 2008, and there is no Court time stamp on the "Memorandum in Support of Defendants' Motion to Dismiss[.]"

9. During the Court hearing on June 13, 2008, Judge gave a chance to Plaintiff for the representation for Plaintiff's Motion to Extend the Statute of Limitation.

10. After Plaintiff's representation for Plaintiff's Motion to Extend the Statute of Limitation, Judge gave the Defendant a chance to represent Defendant[s'] Motion to dismiss.

11. Defendant[s'] representation for "Motion to Dismiss" was based on his "Memorandum in Support of Defendants' Motion to Dismiss", which was hand delivered to Plaintiff in the Court hearing on June 13, 2008.

12. During the hearing, the Plaintiff was not given any chance to express his objection to Defendant[s'] representation based on Defendant[s'] "Memorandum in Support of Defendants' Motion to Dismiss."

13. Defendant[s'] "Memorandum in Support of Defendants' Motion to Dismiss" should be served at least two days before the hearing (NC rule 5 (a1)).

14. The Order entered on June 13, 2008 said: "Therefore, for the reason set forth in the Memorandum in Support of Defendants' Motion to Dismiss, it is hereby ORDERED, ADJUDGED, and DECREED that Defendants' Motion to Dismiss is ALLOWED in its entirety." And, the delivery of "Memorandum in Support of Defendants' Motion to Dismiss" . . . failed to observe NC Rule 5(a1). Therefore, there is no proper statut[ory] ground to the Order.

15. Upon information and belief, Plaintiff is entitled to relief pursuant to Rule 60 of North Carolina Rules of Civil Procedure and Plaintiff has a meritorious defense to offer at the Court hearing of this matter. Relief from an order may be granted to a party for the grounds listed in the statute. The statut[ory] grounds that are particularly applicable to the matter at hand include, but are not limited to the following:

    (a) Mistake, inadvertence, surprise, or excusable neglect;

    (b) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

16. Mistake, inadvertence, surprise, or excusable neglect.

    (a) Defendant hand delivered "Memorandum in Support of Defendants' Motion to Dismiss" to Plaintiff in the Court hearing on June 13, 2008. Pursuant to North Carolina Rules of Civil Procedure 5(a1) on grounds that Defendant failed to deliver the "Memorandum in Support of Defendants' Motion to Dismiss" to Plaintiff at least 2 days before the Court hearing.

    (b) Upon information and belief, Defendant[s'] presentation in the Court hearing for the Motion to Dismiss was based on "Memorandum in Support of Defendants' Motion to Dismiss."

    (c) The Order entered on June 13, 2008 for the Motion to Dismiss is based on "Memorandum in Support of Defendants' Motion to Dismiss".

    (d) Plaintiff was not given any chance to express his objection to Defendant[s'] action in the Court hearing.

(e) Plaintiff did not have enough time to prepare his arguments against the arguments presented by Defendant[s] based on his "Memorandum in Support of Defendants' Motion to Dismiss".

(f) Upon information and belief, Plaintiff has meritorious arguments to offer at hearing or trial of this matter.

(g) Upon information and belief, Defendant[s'] representation at the hearing in this matter regarding certain issues was not truthful. As a matter of fact, it was misleading. Plaintiff's arguments have been presented in the file "Memorandum in Opposition to Defendants' Motion to Dismiss."

17. Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(a) All of the grounds and allegations stated in the above paragraphs and subparagraphs are asserted again as a basis for fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party entitling Plaintiff to a new hearing.

On 18 May 2009, the trial court entered an order denying Plaintiff's motion for relief from judgment on the following grounds:

> The Court finds that Plaintiff has failed to produce any competent evidence which would support a finding of mistake, inadvertence, surprise, or excusable neglect. The Court further finds that the Plaintiff has failed to produce any competent evidence which would support a finding of fraud, misrepresentation, or misconduct of an adverse party. Nor does the Court find any other evidence which would support relief pursuant to N.C. [Gen. Stat.]

> §1A-1, Rule 60. Therefore, the Court finds in its sound discretion that Plaintiff has failed to show any basis for relief from the Court's June 13, 2008 Order.

Plaintiff noted an appeal to this Court from the trial court's order denying his request for relief from judgment.

II. Legal Analysis

A. Scope of Issues Properly Before the Court

As an introductory matter, a "'[n]otice of appeal from [the] denial of a motion to set aside a judgment which does not also specifically appeal the underlying judgment does not properly present the underlying judgment for our review.'" *Ice v. Ice*, 136 N.C. App. 787, 790, 525 S.E.2d 843, 845 (2000) (quoting *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990)). Because Plaintiff noted an appeal to this Court from the trial court's "order entered on May 18, 2009[,] . . . which order included a denial of Plaintiff's Rule 60 Motion," without mentioning the order granting Defendants' dismissal motion, our review on appeal is limited to determining whether the trial court abused its discretion by denying Plaintiff's motion for relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60. *See Wallis v. Cambron*, 194 N.C. App. 190, 193, 670 S.E.2d 239, 241 (2008) (stating that "[m]otions entered pursuant to [N.C. Gen. Stat. § 1A-1,] Rule 60 do not toll the time for filing a notice of appeal"). For that reason, any direct attacks which Plaintiff makes on the trial court's dismissal order, such as his contention that the trial court erred by concluding that Defendants had not been properly served, by failing to determine that the statute of

limitations was extended pursuant to N.C. Gen. Stat. § 1-15(c), and by finding that Plaintiff's complaint did not state a claim for relief, are not cognizable on appeal.

B. Standard of Review

"[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523, 631 S.E.2d 114, 118 (2006) (citing *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975)). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are 'manifestly unsupported by reason.'" *Id.* (quoting *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980)). "'A ruling committed to a trial court's discretion is to be accorded great deference and will be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.'" *Id.* (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

C. General Considerations Applicable to Rule 60 Motions

N.C. Gen. Stat. § 1A-1, Rule 60(b) does not contain language authorizing a trial judge to grant relief from a judgment or order on the basis of errors of law. *See Id.*, (citing *Hagwood v. Odom*, 88 N.C. App. 513, 519, 364 S.E.2d 190, 193 (1988)). Instead, "'[t]he appropriate remedy for errors of law committed by the [trial] court is either appeal or a timely motion for relief under N.C. [Gen. Stat. §] 1A-1, Rule 59(a)(8).'" *Id.* (citing *Odom*, 88 N.C. App. at 519, 364 S.E.2d at 193). "'Motions pursuant to Rule 60(b) may not be used as a substitute for appeal.'" *Id.* (citing *Jenkins v.*

Richmond Cty., 118 N.C. App. 166, 170, 454 S.E.2d 290, 293, *disc. review denied*, 340 N.C. 568, 460 S.E.2d 318 (1995)). As a result, relief is not available pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 based solely upon any error that the trial court allegedly committed in its order dismissing Plaintiff's complaint.

Plaintiff contends that he is entitled to relief from the order dismissing his complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 60(b)(1)[4] and 60(b)(3), which provide that:

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[4] In the trial court and before this Court, Plaintiff contends that the failure of the office of the Clerk of Superior Court of Wake County to issue appropriate summonses at the time that he filed his original complaint constituted a "clerical error" subject to correction pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(a). However, "'[w]hile [N.C. Gen. Stat. § 1A-1,] Rule 60(a) allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment.'" *Spencer v. Spencer*, 156 N.C. App. 1, 10-11, 575 S.E.2d 780, 786 (2003) (quoting *Food Service Specialists v. Atlas Restaurant Management, Inc.*, 111 N.C. App. 257, 259, 431 S.E.2d 878, 879 (1993). "'A change in an order is considered substantive and outside the boundaries of [N.C. Gen. Stat. § 1A-1,] Rule 60(a) when it alters the effect of the original order.'" *Pratt v. Staton*, 147 N.C. App. 771, 774, 556 S.E.2d 621, 624 (2001) (quoting *Buncombe County ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784, *disc. review denied*, 335 N.C. 236, 439 S.E.2d 143 (1993)). Thus, "[t]rial courts 'do not have the power under [N.C. Gen. Stat. § 1A-1,] Rule 60(a) to affect the substantive rights of the parties or correct substantive errors in their decisions.'" *Spencer*, 156 N.C. App. at 11, 575 S.E.2d at 786 (quoting *Hinson v. Hinson*, 78 N.C. App. 613, 615, 337 S.E.2d 663, 664, *disc. review denied*, 316 N.C. 377, 342 S.E.2d 895 (1986)). The effect of granting the relief sought by Plaintiff would be the vacating of the trial court's dismissal order, which would clearly work a substantive change in Defendants' rights. As a result, Plaintiff's challenge to the trial court's refusal to grant relief from the dismissal order on the basis of the failure of the Wake County Clerk of Superior Court's office to issue summonses at the time of the filing of the original complaint is more appropriately viewed as a request for relief premised on "excusable neglect" pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) than as a request for the correction of a "clerical error" pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(a).

> (b) . . . 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;
>
> . . . .
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party[.]

N.C. Gen. Stat. § 1A-1, Rule 60(b) (2009). As a result, in order to properly evaluate the validity of Plaintiff's request for relief from the trial court's dismissal order, we must examine the circumstances under which relief is available pursuant to those two provisions of the North Carolina Rules of Civil Procedure.

1. Excusable Neglect

"The issue of 'what constitutes "excusable neglect" is a question of law which is fully reviewable on appeal.'" *McIntosh v. McIntosh,* 184 N.C. App. 697, 704-05, 646 S.E.2d 820, 825 (2007) (quoting *In re Hall*, 89 N.C. App. 685, 687, 366 S.E.2d 882, 884, *disc. rev. denied*, 322 N.C. 835, 371 S.E.2d 277 (1988)). "While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment, what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case." *Thomas M. McInnis & Assocs., Inc. v. Hall*, 318 N.C. 421, 425, 349 S.E.2d 552, 554-55 (1986). Litigants are expected to pay "that attention which

a [person] of ordinary prudence usually gives his [or her] important business, and failure to do so is not excusable." *Jones v. Statesville Ice & Fuel Co.*, Inc., 259 N.C. 206, 209, 130 S.E.2d 324, 326 (1963), (quoting Strong, N.C. Index, *Judgments*, § 22). "[T]he failure of a party to obtain an attorney does not constitute excusable neglect." *Scoggins v. Jacobs*, 169 N.C. App. 411, 415, 610 S.E.2d 428, 432 (2005). Furthermore, excusable neglect generally does not stem from a party's ignorance of the judicial process. *In re Hall*, 89 N.C. App. at 688, 366 S.E.2d at 885; *see also Lerch Bros. v. McKinne Bros.*, 187 N.C. 419, 420, 122 S.E. 9, 10 (1924) (stating that "[i]gnorance of a material fact may excuse a party, but ignorance of the law does not excuse him from the legal consequences of his conduct"). Thus, in order to show excusable neglect for purposes of N.C. Gen. Stat. § 1A-1, Rule 60(b)(1), a party must establish that he or she acted reasonably in light of the available factual information.

2. Fraud

"'To obtain relief under [N.C. Gen. Stat. § 1A-1,] Rule 60(b)(3), the moving party must 1) have a meritorious defense, 2) that he was prevented from presenting prior to judgment, 3) because of fraud, misrepresentation or misconduct by the adverse party.'" *Milton M. Croom Charitable Remainder Unitrust v. Hedrick*, 188 N.C. App. 262, 268, 654 S.E.2d 716, 721 (2008) (quoting 2 G. Gray Wilson, *North Carolina Civil Procedure* § 60-8, at 60-22 (3d ed. 2007)). In order words, relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(3), is only available in the event that the adverse

party prevented the moving party from asserting a valid claim or defense prior to judgment because of some sort of misconduct.

D. Substantive Rule 60(b) Issues

1. Service of Memorandum

First, Plaintiff contends that Defendants "failed to observe N.C. [Gen. Stat.] § 1A-1, Rule 5(a1)[,]" by failing to "deliver their Memorandum at least two days before the hearing on the motion." More particularly, Plaintiff contends that the fact that Defendants tendered a memorandum in support of their dismissal motion at the 13 June 2008 hearing and served it upon him at that time prejudiced his ability to adequately participate in that proceeding and was tantamount to fraudulent conduct, thereby entitling him to relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(3). We disagree.

N.C. Gen. Stat. § 1A-1, Rule 5(a1) provides that:

> In actions in superior court, every brief or memorandum in support of or in opposition to a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment, or any other motion seeking a final determination of the rights of the parties as to one or more of the claims or parties in the action shall be served upon each of the parties *at least two days before the hearing on the motion*. If the brief or memorandum is not served on the other parties at least two days before the hearing on the motion, the court may continue the matter for a reasonable period to allow the responding party to prepare a response, proceed with the matter without considering the untimely served brief or memorandum, or take such other action as the ends of justice require. The parties may, by consent, alter the period of time for service. For the purpose of this two-day requirement only, service shall mean personal delivery, facsimile transmission, or other

> means such that the party actually receives the brief within the required time.

N.C. Gen. Stat. § 1A-1, Rule 5(a1) (2009) (emphasis added). Although "a party has no constitutional right to demand notice of further proceedings in the cause" "[a]fter the court has once obtained jurisdiction in a cause through the service of original process," *Collins v. North Carolina State Highway & Public Works Com.*, 237 N.C. 277, 281, 74 S.E.2d 709, 713 (1953),

> [t]he law recognizes that it must make provision for notice additional to that required by the law of the land and due process of law if it is to be a practical instrument for the administration of justice. For this reason, the law establishes rules of procedure admirably adapted to secure to a party, who is served with original process in a civil action or special proceeding, an opportunity to be heard in opposition to steps proposed to be taken in the civil action or special proceeding where he has a legal right to resist such steps and principles of natural justice demand that his rights be not affected without an opportunity to be heard. These rules of procedure require proper notice of a motion for a judgment or an order affecting the rights of such party to be given to him "when notice of a motion is necessary." [N.C. Gen. Stat. §] 1-581[.] . . . The notice required by these rules of procedure is . . . called procedural notice to distinguish it from the constitutional notice required by the law of the land and due process of law.

Id. at 281-82, 74 S.E.2d at 713-14 (internal citations omitted). Thus, since Plaintiff's argument does not involve issues arising from the service of a summons and complaint, the extent to which Plaintiff is entitled to relief based on the late submission of Defendant's memorandum is a matter of procedural rather than constitutional notice.

In *Anderson v. Anderson*, 145 N.C. App. 453, 456, 550 S.E.2d 266, 268 (2001), we explained in the context of the notice requirements of N.C. Gen. Stat. § 1A-1, Rule 56, that "notice is mandatory," but that "notice can be waived." *Anderson*, 145 N.C. App. at 456, 550 S.E.2d at 268. As a result, this Court has stated that "'dismissing a party's claim or defense by summary judgment is too grave a step to be taken on short notice; unless, of course, the right to notice that those opposing summary judgment have under Rule 56(c) is waived.'" *Id.*, (quoting *Tri City Building Components v. Plyler Construction*, 70 N.C. App. 605, 608, 320 S.E.2d 418, 421 (1984)). "This waiver is possible because '[t]he notice required by [Rule 56] is procedural notice as distinguished from constitutional notice[.]'" *Id.* at 456, 550 S.E.2d at 268-69 (quoting *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 667, 248 S.E.2d 904, 907 (1978)). "A party waives notice of a motion by attending the hearing of the motion and by participating in the hearing without objecting to the improper notice or requesting a continuance for additional time to produce evidence." *Id.* at 456, 550 S.E.2d at 269 (citing *Raintree*, 38 N.C. App. at 668, 248 S.E.2d at 907). Although Plaintiff's argument hinges upon the notice requirement set out in N.C. Gen. Stat. § 1A-1, Rule 5(a1), rather than the notice requirement set out in N.C. Gen. Stat. § 1A-1, Rule 56(c), the notice at issue here, like that at issue in the summary judgment context, is clearly "procedural notice" which a party may waive by "attending the hearing of the motion and participating in it." *Collins*, 237 N.C. at 282, 283 74 S.E.2d 714, 715.

As we read the record, Plaintiff attended the hearing held with respect to Defendants' dismissal motion without objecting to the untimely service of Defendants' memorandum.[5] Plaintiff's failure to object to the late service of Defendants' memorandum resulted in a waiver of any objection he may otherwise have had to the consideration of Defendants' memorandum. *See Nicholson v. Jackson County School Bd.*, 170 N.C. App. 650, 654, 614 S.E.2d 319, 322 (2005) (stating that "[a] party waives [procedural] notice . . . by attending the hearing of the motion and by participating in the hearing without objecting to the improper notice or requesting a continuance for additional time to produce evidence") (quoting *Anderson*, 145 N.C. App. at 456, 550 S.E.2d at 269). Nothing contained in the present record indicates that Plaintiff's failure to object resulted from any fraudulent conduct on the part of Defendants or their counsel of the type necessary to support an award of relief from judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(3). As a result, the trial court did not abuse its

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[5] Although Plaintiff argues vigorously that he was denied an opportunity to object to the untimely filing of Defendants' memorandum, we do not consider unsupported factual statements in parties' briefs in deciding the issues presented to us on appeal. The documents actually in the record indicate that Plaintiff was, in fact, given an opportunity to be heard at the hearing held with respect to Defendants' dismissal motion. For example, the trial court's dismissal order specifically states that it considered Plaintiff's arguments at the hearing on Defendants' dismissal motion. In addition, Plaintiff's motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 indicates that he was given an opportunity to make a presentation to the trial court at that hearing. In the absence of a transcript of the hearing on Defendants' dismissal motion, we have no choice except to conclude that Plaintiff was, in fact, given an opportunity to object to the trial court's decision to consider Defendants' memorandum and failed to do so.

discretion by declining to grant relief from its decision to dismiss Plaintiff's complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(3).

2. Failure to Issue Summonses

Secondly, Plaintiff contends that he is entitled to relief from the trial court's dismissal order because "an inexperienced court clerk made a mistake in issuing summonses on time." In essence, Plaintiff argues that the Wake County Clerk of Superior Court's office erroneously failed to inform him that he needed to have summonses issued at the time that he filed his complaint, resulting in the deficiencies in process and service of process that contributed to the entry of the trial court's dismissal order. Plaintiff's argument lacks merit.

This Court has upheld the denial of a motion for relief from judgment made pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b), when the moving party "was under the impression that he would be informed of a hearing time by [the opposing party] and did not contact an attorney until after the default judgment was entered." *JMM Plumbing & Utils., Inc. v. Basnight Constr. Co., Inc.*, 169 N.C. App. 199, 202-03, 609 S.E.2d 487, 490 (2005); *see also Jones*, 259 N.C. at 209, 130 S.E.2d at 326 (stating that litigants are expected to pay "'that attention which a man of ordinary prudence usually gives his important business, and failure to do so is not excusable'") (quoting Strong, N.C. Index, *Judgments*, § 22. Plaintiff has not provided us with any authority establishing that employees of a Clerk of Superior Court's office are responsible for

advising litigants concerning the steps that need to be taken in order to properly commence and maintain a civil action, and we have not located any such authority in the course of our own research.[6] For that reason, we conclude that the trial court did not abuse its discretion by denying that portion of Plaintiff's claims under N.C. Gen. Stat. § 1A-1, Rule 60, that appear to rest upon an allegation of "excusable neglect."

III. Conclusion

For the reasons set forth above, we conclude that the trial court did not err by denying Plaintiff's motion for relief from the dismissal order pursuant to N.C. Gen. Stat. § 1A-1, Rule 60. As a result, the trial court's order should be, and hereby is, affirmed.

AFFIRMED.

Judges Robert N. HUNTER, JR., and BEASLEY concur.

Report per Rule 30(e).

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[6] In his brief, Plaintiff cites N.C. Gen. Stat. § 1A-1, Rules 4(a) and 4(g), in support of his position that the Clerk of Superior Court's office should have ensured that the necessary summonses were properly issued. However, neither N.C. Gen. Stat. § 1A-1, Rule 4(a), which speaks of the issuance of the required summons, N.C. Gen. Stat. § 1A-1, Rule 4(b), which provides that the required summons shall be signed by an agent of the Clerk of Superior Court, nor N.C. Gen. Stat. § 1A-1, Rule 4(g), which requires the Clerk of Superior Court's office to keep certain records relating to issued summonses, in any way suggests that the Clerk of Superior Court's office has any obligation to provide information to litigants about the necessity for obtaining the issuance or service of a summons in civil litigation or to prepare summonses for civil litigants.