

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-1530

NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

MARIE ALBRIGHT and MAURICE ALBRIGHT, as co-trustees on behalf of the Marie Albright Trust; JEAN BISSETTE; KEVIN BRIGHT; SANDRA BRIGHT; DAVID BYERLY; ELIZABETH BYERLY; DANIEL CANTU; NANCY CANTU; FAYE DANIEL; STEPHEN DANIEL; GEORGE DESANTO; MICHELINE DESANTO; VANISE HARDEE; DEBORAH HARDEE; JOHN LEPOSA; TAMMY LEPOSA; JOSEPH LYBRAND; AMY LYBRAND; DAVIS MILLER a/k/a THOMAS DAVIS MILLER; JEANEEN MILLER; ADA MORGAN; RAY MORGAN; JUDITH SCULL a/k/a JUDITH THOMPSON SCULL; DAVID SCULL; MELINDA MOSELEY a/k/a MELINDA SCHMITZ; RAYMOND SCHMITZ; GAIL SULLIVAN; LAWRENCE SULLIVAN a/k/a LARRY SULLIVAN; BERNARD WHITE; TONI WHITE; KATHY WILLIAMSON; THOMAS WILLIAMSON; ROGER PARKER a/k/a BILLY ROGER PARKER, Jr.; and the CITY OF WILSON, a North Carolina municipal corporation,
Plaintiffs,

v.

Nash County
No. 10 CVS 2141

NASH COUNTY,
Defendant.

Appeal by plaintiff from order entered 1 July 2011 by Judge W. Russell Duke, Jr., in Nash County Superior Court. Heard in the Court of Appeals 9 May 2012.

Brough Law Firm, by Robert E. Hornik, Jr., for plaintiff-appellant City of Wilson.

Smith Moore Leatherwood LLP, by Thomas E. Terrell, Jr. and Elizabeth Brooks Scherer, and Battle, Winslow, Scott & Wiley, P.A., by G. Vincent Durham, Jr., for defendant-appellee.

HUNTER, Robert C., Judge.

Plaintiff City of Wilson ("the City") appeals from the trial court's order granting defendant Nash County's motion to dismiss the City and its claims after concluding the City lacked standing to maintain its claims against Nash County. In light of this Court's decision in *Morgan v. Nash County*, __ N.C. App. __, __, __ S.E.2d __, __ (No. COA11-1544) (Aug. 21, 2012), we dismiss this appeal as moot.

Background

The majority of the facts pertinent to this appeal are set forth in *Morgan*, __ N.C. App. at __, __ S.E.2d at __, filed contemporaneously with this decision, and only a portion of the facts will be repeated here. On 1 November 2010, the Nash County Board of County Commissioners ("the Board") voted to

rezone a 147-acre tract of land in Nash County ("the subject property") from "Rural Commercial" and "Residential" districts, to a "General Industrial" zoning district. The subject property was then owned by Cecil and Bertine Williams who are not a party to the underlying action.

On 19 November 2010, the City of Wilson joined thirty-three individual plaintiffs¹ and filed the underlying action in Nash County Superior Court challenging the rezoning. On 1 July 2011, Judge W. Russell Duke, Jr., entered an interlocutory order granting the County's Rule 12(b)(1) motion dismissing, with prejudice, the City and all its claims. The trial court concluded the City failed to establish that it had standing to

¹ The plaintiffs in the underlying action consist of: Marie Albright and Maurice Albright, as co-trustees on behalf of the Marie Albright Trust; Jean Bisette; Kevin Bright; Sandra Bright; David Byerly; Elizabeth Byerly; Daniel Cantu; Nancy Cantu; Faye Daniel; Stephen Daniel; George Desanto; Micheline Desanto; Vanise Hardee; Deborah Hardee; John Leposa; Tammy Leposa; Joseph Lybrand; Amy Lybrand; Davis Miller a/k/a Thomas Davis Miller; Jeaneen Miller; Ada Morgan; Ray Morgan; Judith Scull a/k/a Judith Thompson Scull; David Scull; Melinda Moseley a/k/a Melinda Schmitz; Raymond Schmitz; Gail Sullivan; Lawrence Sullivan a/k/a Larry Sullivan; Bernard White; Toni White; Kathy Williamson; Thomas Williamson; Roger Parker a/k/a Billy Roger Parker, Jr.; and the City of Wilson, a North Carolina municipal corporation (collectively "plaintiffs").

maintain its challenge to the rezoning of the subject property. The City appeals from this interlocutory order.²

Discussion

A. Standing

As discussed in *Morgan*, __ N.C. App. at __, __ S.E.2d at __, we conclude the City cannot establish that it has standing to challenge the County's rezoning of the subject property. As the City's appeal in this case is controlled by our decision in *Morgan*, we dismiss this appeal as moot. See *Roberts v. Madison County Realtors Ass'n, Inc.*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) ("A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy.").

B. Plaintiffs' Petition for Writ of Certiorari

During the pendency of this appeal, plaintiffs filed a Rule 60(b) motion with the trial court seeking relief from the trial court's order granting the County's motion to dismiss the City of Wilson and its claims. The trial court entered an advisory opinion stating that it would deny plaintiffs' motion had plaintiffs not appealed from the interlocutory order. See *Bell*

² Upon entry of the trial court's final order at issue in the companion case *Morgan*, __ N.C. App. at __, __ S.E.2d at __, the trial court stayed further proceedings in the underlying action until the issues in *Morgan* were resolved on appeal.

v. Martin, 43 N.C. App. 134, 142, 258 S.E.2d 403, 409 (1979) (describing a procedure whereby a trial court may “consider a Rule 60(b) motion filed while the appeal is pending for the limited purpose of indicating, by a proper entry in the record, how it would be inclined to rule on the motion were the appeal not pending”), *rev’d on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980). The trial court also entered an order awarding Nash County attorneys’ fees and expenses incurred in responding to plaintiffs’ motion. Plaintiffs ask this Court to review the trial court’s disposition of the Rule 60(b) motion by a petition for writ of certiorari. We grant certiorari, and after careful review, we discern no abuse of discretion in the advisory opinion, but we vacate the trial court’s order awarding attorneys’ fees and expenses to Nash County.

The basis for plaintiffs’ Rule 60(b) motion was plaintiffs’ discovery of new evidence they allege supports their claims challenging Nash County’s rezoning of the subject property. Plaintiffs’ evidence and the arguments proffered in support of the motion need not be discussed here as they are discussed in *Morgan*, ___ N.C. App. at ___, ___ S.E.2d at ___.

In response to plaintiffs’ motion, the trial court concluded that because the 1 July 2011 order dismissing the City

and its claims for lack of standing was an interlocutory order, plaintiffs' Rule 60(b) motion had no basis in law. See *Sink v. Easter*, 288 N.C. 183, 196, 217 S.E.2d 532, 540 (1975) ("Rule 60(b) . . . has no application to *interlocutory* judgments, orders, or proceedings of the trial court. It only applies, by its express terms, to *final* judgments."); N.C. Gen. Stat. § 1A-1, Rule 60(b) (2011) ("[T]he court may relieve a party or his legal representative from a final judgment, order, or proceeding"). Accordingly, the trial court concluded that had plaintiffs not filed their appeal it would dismiss plaintiffs' Rule 60(b) motion.

We agree with the trial court's reasoning and discern no abuse of discretion by the trial court in reaching its conclusion in the advisory opinion. See *Kingston v. Lyon Const., Inc.*, ___ N.C. App. ___, ___, 701 S.E.2d 348, 353 (2010) ("Denial of a Rule 60(b) motion is reviewed under an abuse of discretion standard."). However, as discussed in *Morgan*, ___ N.C. App. at ___, ___ S.E.2d at ___, we conclude the trial court was without jurisdiction to enter its 30 April 2012 order awarding attorneys' fees and expenses to Nash County. That order must be vacated. An award of attorneys' fees, if any, may be addressed only upon remand of this case to the trial court.

Conclusion

In summary, we dismiss the City's appeal from the trial court's 1 July 2011 order dismissing the City for lack of standing. We remand the trial court's 30 April 2012 advisory opinion for the trial court to enter an order denying plaintiffs' Rule 60(b) motion. We vacate the trial court's 30 April 2012 order awarding attorneys' fees and expenses to Nash County.

DISMISSED as to the 1 July 2011 order.

REMANDED as to the 30 April 2012 advisory opinion for entry of an order consistent with this decision.

VACATED as to the 30 April 2012 order awarding attorneys' fees and expenses.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).