NO. COA06-1647

NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2007

HELEN HORNE,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. TA-17240

NASH-ROCKY MOUNT BOARD OF EDUCATION, a Body Politic and Corporate,
Defendant.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 19 June 2006. Heard in the Court of Appeals 9 October 2007.

Early & Chandler, P.A., by Robert M. Chandler, Jr., for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorneys General Tina Lloyd Hlanse and Laura J. Gendy, for defendant-appellee.

WYNN, Judge.

For purposes of a Rule 60 motion for relief from a judgment or order, "[a] showing of carelessness or negligence or ignorance of the rules of procedure" does not constitute excusable neglect.**[Note 1]** Because the record supports the trial court's finding that the failure of the plaintiff's attorney to file timely notice of appeal was not excusable neglect, we affirm the dismissal of her Rule 60 motion for relief.

On 3 November 1998, Plaintiff Helen Horne was in a collision with Wiley Ray Moss, an employee of Defendant Nash-Rocky Mount Board of Education. Ms. Horne brought an action

under the State Tort Claims Act before the North Carolina Industrial Commission against the Board of Education alleging that Mr. Moss negligently caused the accident which resulted in injuries to her knee. The Board of Education answered, alleging contributory negligence.

Following a hearing, Deputy Commissioner Wanda Blanche Taylor filed a Decision and Order holding that Ms. Horne had failed to prove that, beyond $786.44 in charges for specific treatment immediately following the collision, her medical expenses were reasonably necessary or causally related to the collision. The Order denied payment for future injury, pain and suffering, and future lost earnings.

Deputy Commissioner Taylor's Decision and Order was faxed to Ms. Horne's attorney on 24 August 2005, but the attorney was on vacation through 5 September 2005, and, as a solo practitioner, was the only person in his office capable of filing legal documents. The attorney did not request secured leave from the Industrial Commission for this period of vacation. When he returned to the office on 6 September 2005, the attorney signed and faxed the confirmation page on the Decision and Award back to the Industrial Commission. However, he did not file Ms. Horne's Notice of Appeal from the Decision and Order to the Full Commission until 21 September 2005.

The Board of Education then filed a motion to dismiss Ms. Horne's appeal as untimely, which was granted by Commission Chairman Buck Lattimore on 19 October 2005. Ms. Horne appealed the order to dismiss to the Full Commission and also filed a Motion for Reconsideration of Order Dismissing Appeal to the Full Commission; the motion for reconsideration was denied, but Ms. Horne's appeal was allowed to go forward to the Full Commission.

On 18 May 2006, the Full Commission considered Ms. Horne's arguments that (1) her attorney did not receive the Decision and Order until 6 September 2005, and that he had fifteen days from that date to file the Notice of Appeal, which he did; and (2) even if her attorney was mistaken as to the date of receipt and the Notice of Appeal was not timely filed, such delay was excusable neglect, and the appeal should be allowed under Rule 60(b). On 19 June 2006, the Full Commission issued a Decision and Order that affirmed Chairman Lattimore's order dismissing Ms. Horne's appeal with prejudice.

Ms. Horne now appeals to this Court, arguing that she is entitled to Rule 60 relief and should be allowed to proceed with her appeal to the Full Commission because (I) the neglect was the fault of her attorney, not her own, and she properly relied on his competent representation; and (II) the Full Commission was required to make findings of fact as to both excusable neglect and meritorious defense, and since they failed to make any findings as to the latter, the order dismissing her appeal should be reversed.

I.

First, Ms. Horne argues that she is entitled to Rule 60 relief due to neglect that was the fault of her attorney, not her own, and she should not lose her right of appeal due to her reliance on his competent representation. Our Supreme Court has already decided this issue against Ms. Horne.

In *Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655 (1998), our Supreme Court explicitly held that "[a] showing of carelessness or negligence or ignorance of the rules of procedure" does not constitute excusable neglect. Moreover, this Court has likewise noted that an attorney's misapprehension of the law, and specifically his failure to file timely notice of appeal, does not constitute excusable neglect. *See Cornell v. W. & S. Life Ins. Co.*, 162 N.C. App.

106, 112, 590 S.E.2d 294, 298 (2004) ("Assuming, *arguendo*, that the issue had been properly preserved by an assignment of error, an attorney's misapprehension of law, as found by the Commission in this case, is not grounds for relief due to excusable neglect.").

Ms. Horne cites to a number of old cases as support for her argument that her attorney's negligence should not be imputed to her, and that she exercised the standard of care of a reasonably prudent person in relying on him to fulfill his obligations. In particular, Ms. Horne relies on *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E.2d 148, *disc. review denied*, 291 N.C. 176, 229 S.E.2d 689 (1976). However, although *Norton* was never overruled and did, in fact, suggest that an attorney's negligence should not be imputed to a client who had been diligent in following his case, the Court ultimately did not vacate the trial court's entry of default judgment because it concluded that doing so would not best serve the interests of justice. *Id.* at 426-27, 227 S.E.2d at 153. As such, the case is not controlling law for an attorney's negligence being considered the "excusable neglect" of the client.

In the instant case, despite Ms. Horne's attorney's notation in her Notice of Appeal that Deputy Commissioner Taylor's Decision and Order was "filed August 24, 2005 and received September 6, 2005," the Tort Claims Act expressly provides that a party has fifteen days "after receipt of such notice [of determination of a claim] within which to file notice of appeal with the Industrial Commission." N.C. Gen. Stat. §143-292 (2005). Although Ms. Horne's attorney attempted to indicate that the date of receipt of the Decision and Order was 6 September 2005, the confirmation page clearly showed that the fax was received by the attorney's fax machine on 24 August 2005. Moreover, even with having been on vacation when the fax arrived in his office, Ms. Horne's attorney still had several days after his 6 September return to timely file her Notice of Appeal within the fifteen-day statutory period. Nevertheless, it was not done.

This Court is bound to the Supreme Court ruling in *Briley* that "[a] showing of carelessness or negligence or ignorance of the rules of procedure" does not constitute excusable neglect. 348 N.C. at 546, 501 S.E.2d at 655. Accordingly, this assignment of error is overruled.

II.

Next, Ms. Horne argues that the Full Commission was required to make findings of fact as to both excusable neglect and meritorious defense before dismissing her appeal. We disagree.

Although true that a trial court or the Full Commission is required to make findings as to both excusable neglect and a meritorious defense in order to *set aside* a judgment under Rule 60(b), *see Creasman v. Creasman*, 152 N.C. App. 119, 124, 566 S.E.2d 725, 728 (2002), there is no such requirement for findings as to both elements where the Full Commission has determined to *affirm* the judgment. Indeed, once the Full Commission or a trial court has determined that there was not excusable neglect, there is no need or reason to consider the question of a meritorious defense. Ms. Horne provides no case law or statutory authority in support of her contention to the contrary. This assignment of error is without merit.

Affirmed.

Judges HUNTER and JACKSON concur.

Report by Rule 30(e).

NOTE

1. *Briley v. Farabow*, 348 N.C. 537, 546, 501 S.E.2d 649, 655 (1998).