2004 WL 3217439 (Ind.App.) (Appellate Brief)
Court of Appeals of Indiana.

Gene TINCH and Indiana Flooring, Apellants,
v.
Robert WHITSON Elsie Whitson, Appellee.

No. 48A02-0407-CV-589.
December 8, 2004.

Appeal from the Madison Superior Court 1.
Trial Court Case No.: 48D01-0105-CT-415
The Honorable Dennis D. Carroll, Judge.

Brief of Appellees

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***i** *TABLE OF CONTENTS*

TABLE OF AUTHORITIES ii
I. STATEMENT OF ISSUES 1
II. STATEMENT OF THE CASE 2
III. STATEMENT OF THE FACTS 5
IV. SUMMARY OF ARGUMENT 7
V. ARGUMENT 8
A. Standard of Review 8
B. The Trial Court Properly Exercised Its Discretion by Granting Plaintiffs' Motion for Relief From Judgment Pursuant to T.R. 60(B)(8) 9
I. When Client is Conseientous and Diligent in His Own Actions the Unexplainable and Inexcusable Misconduct and Misfeasance by His Attorney Will Not be Imputed to Him 9
II. The Potential Injustice to the Whitsons' Outweighs Any Potential Prejudice to Appellants if Relief From Judgment is Affirmed 13
C. Whitsons Were Not Required to File a T.R. 59 Motion or Notice or Appeal When Their Remedy is Found in T.R. 60(B)(8) 14
B. CONCLUSION 15
C. CERTIFICATE OF WORD COUNT 16
D. CERTIFICATE OF SERVICE 17

***ii** *TABLE OF AUTHORITIES*

CASES:
INDIANA
Indiana Insurance Company v. Insurance Company of North America 734 N.E.2d 276 (Ind.Ct.App. 2000) 8, 13, 14
Rose v. Rose, 390 N.E.2d 1056, 1058 (Ind.Ct.App. 1979) 10
Graham v. Schreifer, 467 N.E.2d 800 (Ind.Ct.App. 1984) 10, 14
FEDERAL
Boughner v. Sect'y of Health 572 F.2d 976 (3rd Cir. 1978) ... 11
Primbs v. U.S., 4 Cl.Ct. 366 (U.S.C.C. 1984) 11
L.P. Steuart v. Matthews, 329 F.2d 234 (D.C. App. 1964) 12
King v. Mordowanec, 46 F.R.D. 474 (U.S. Dist. Ct. R.I. 1969) 13
OTHER JURISDICTIONS

Whitt v. Bennett, 613 N.E.2d 667 (Ohio App. 1992) 11
TRIAL RULES:
Ind. Trial Rule 60(B) 7, 8, 9, 10, 12, 14, 15
Ind. Trial Rule 59 ..... 13, 14

***1** I. *RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW*

I. Whether a party is entitled to relief pursuant to Indiana Trial Rule 60(B)(8) where the uncontradicted evidence discloses that the party exercised diligence, but whose rights were adversely effected by attorney misconduct.

II. Whether it is necessary to file an Indiana Trial Rule 59 Motion to Correct Errors or file a notice of appeal when the remedy is properly found in Indiana Trial Rule 60(B)(8).

***2** *II. STATEMENT OF THE CASE*

This matter commenced on May 18, 2001, upon the filing of Plaintiffs Robert and Elsie Whitsons' Complaint for Damages. (Appellants' Appendix p. 76).

On August 23, 2001, the Defendants filed their Motion to Strike Complaint and Motion to Dismiss Complaint for Damages. (Appellants' Appendix p. 74 - 76). On April 10, 2002, the Trial Court made an entry stating that Defendants' Motion to Dismiss Complaint and Motion to Strike Complaint will be ruled upon on April 26, 2002. (Appellants' Appendix p. 5). Further, the Court will consider a Trial Rule 41(e) dismissal at said time and date. (Appellants' Appendix p. 5). On April 26, 2002, the Court granted Defendants' Motion to Strike Complaint and dismissed the cause of action pursuant to Trial Rule 41(e). (Appellants' Appendix p. 5).

On October 24. 2002, Plaintiffs' Motion to Set Aside Dismissal was filed. (Appellants' Appendix p. 5). On March 28, 2003 the Trial Court denied Plaintiffs' Motion to Set Aside Dismissal without the benefit of a hearing. (Appellants' Appendix p. 6). The Trial Court then vacated the March 28, 2003, denial of Plaintiffs' Motion to Set Aside Dismissal as it should not have been ruled upon without a hearing. (Appellants' Appendix p. 6). A hearing was held on August 8, 2003, at which time Defendants filed their Motion to Strike Plaintiffs' Motion to Set Aside Dismissal. (Appellants' Appendix p. 6). The Trial Court granted the Plaintiffs five days to file briefor argument in response and the Defendants were granted five days for reply. (Appellants' Appendix p. 7).

***3** On October 23, 2003, the Trial Court sustained Defendants' Objection to Plaintiffs' Motion to Amend, with Order Affirming Court's Dismissal of Plaintiffs' Cause of Action. (Appellants' Appendix p. 7).

On January 8, 2004, Plaintiffs filed a new Motion for Relief From Judgment. (Appellants' Appendix p. 7). Defendants filed their Objection To Plaintiffs' Motion for Relief From Judgment on January 23, 2004. (Appellants' Appendix p. 57). Plaintiffs filed their Reply to Defendants' Objection to Motion For Relief From Judgment and Memorandum In Support of Plaintiffs' Reply on February 25, 2004. (Appellants' Appendix p. 54). Plaintiffs' Memorandum in Support of Plaintiffs' Reply requested relief pursuant to Indiana Trial Rule 60(B)(8). (Appellants' Appendix p. 49).

The trial court held a hearing on Plaintiffs' Motion for Relief from Judgment on May 12, 2004. (Appellants' Appendix p. 8). The affidavit of Robert Whitson was filed in open court at that time. (Appellants' Appendix p. 13). Following the hearing the Trial Court requested counsel file supplemental briefing on attorney negligence and/or malfeasance as it relates to Plaintiffs' requested relief under Trial Rule 60. (Appellants' Appendix p. 8).

After hearing on May 12, 2004, and supplemental briefings by parties, the Trial Court issued the following “Order”:

This matter is under advisement on Plaintiffs' Motion for Relief from Judgment. The matter has been fully argued and briefed, and the Court now sustains the Plaintiffs' Motion for Relief from Judgment, all pursuant to Trial Rule 60(B)(8).

On May 18, 2001, Attorney Ron Freund entered his appearance and filed a complaint on behalf of Robert and Elsie Whitson. The record before the Court leads to the inescapable conclusion that subsequent dismissals on April 26, 2002, and October 23, 2003, were the result of gross negligence on the part of Attorney Ron Freund, plaintiffs' former counsel.

***4** Under the facts of this case, the Court will not impose the strict time requirements of Trial Rule 60(B)(1). The plaintiffs' representations that they were misled by Mr. Freund, were told their case was "on track," and that a settlement was being negotiated, are all unrefuted. Prior to August 2003, when their grandaughter, a courthouse employee, informed them about the status of their case, plaintiffs had no reason ton conclude that reliance upon their counsel was unreasonable. The Court concludes that the plaintiffs were "diligent" considering their counsel's representations and giving due consideration to their age, medical conditions, and lack of legal sophistication.

The Court is faced with an unhappy choice: reopen a case that is now more than three years old, forcing defendants who are without fault for this delay to answer a charge that was dismissed two years ago - - - or, deny these plaintiffs who are without fault, an opportunity to litigate their claim. While the Court does not minimize the prejudice implicit in substantial delay, defendants have not made a sufficient showing that they would suffer substantial prejudice by defending on the merits, even at this late date.

Accordingly, the Court's dismissal orders of April 26, 2002 and October 23, 2003 are hereby set aside. Counsel are directed to expedite discovery and mediation, if the same is appropriate. In any event, either party may request an expedited trial setting.

JUDGMENT OF DISMISSAL vacated this 17 day of June, 2004.

//s//

Dennis D. Caroll, Judge

Madison Superior Court, Division 1

(Appellants' Appendix p. 17).

The Appellants filed there notice of appeal from this decision.

III. *STATEMENT OF THE FACTS*

Robert Whitson suffered severe personal injuries when he was involved in a motor vehicle collision on May 24, 1999, in Anderson, Indiana. (Appellants' Appendix p. 13). Robert and his wife, Elsie Whitson hired attorney Ronald Freund on or about April 23, 2000, to pursue a claim for damages arising from said collision against defendants Gene Tinch and Indiana Flooring. (Appellants' Appendix p. 13). Robert, then age 72, suffered a closed head injury, as ***5** well as broken ribs and lacerations as a result of the collision, and spent substantial time in medical care and rehabilitation. (Appellants' Appendix p. 58). Robert and Elsie (hereinafter "Whitsons") believe that Robert's head injury caused permanent cognitive limitations to him. (Appellants' Appendix p. 58).

The Whitsons paid a filing fee to Mr. Freund on April 23, 2000 of $150.00. (Appellants' Appendix p. 13). A Complaint was filed by Mr. Freund on May 21, 2001. (Appellants' Appendix p. 76). A Motion to Strike the Complaint was filed based upon pleading errors. (Appellants' Appendix p. 74). Mr. Freund, already negligent in his preparation of a defective Complaint, also failed to timely correct these errors resulting in a Trial Rule § 41(E) dismissal on April 26, 2002. (Appellants' Appendix p. 5).

The Whitsons were unaware of this dismissal until approximately December, 2002, when they consulted with a second attorney Donald McClellan. (Appellants' Appendix p. 13). Mr. McClellan had special knowledge of the underlying collision as he had represented Mr. Whitson's employer in a related action. (Appellants' Appendix p. 13). After filing his appearance, Mr. McClellan withdrew as counsel on February 5, 2003. (Appellants' Appendix p. 6).

The Whitsons had great difficulty communicating with Mr. Freund. Attorney Freund failed to answer or return most telephone calls. (Appellants' Appendix p. 13). He did apologetically respond to a certified mail in March 2003, claiming illness as an excuse. (Appellants' Appendix p. 13). When questioned about the dismissal, Attorney Freund reassured the Whitsons that all was well, a mistake had occurred, but that the case was on track. (Appellants' Appendix p. 13). He also advised them that he was negotiating a settlement on their ***6** behalf. (Appellants' Appendix p. 13). Although the Whitsons were clearly frustrated with the lack of communication from their attorney, they reasonably relied upon his representations at that time. (Appellants' Appendix p. 59). Unfortunately, they were **elderly** and trusting, unaware of the attorney **neglect** that had endangered their claim. (Appellants' Appendix p. 59).

The Whitsons continued to make routine efforts to obtain information on their case. The attorney continually failed to return calls. The Trial Court's docket reveals that Mr. Freund filed a motion to set aside the dismissal and requesting a hearing date. (Appellants' Appendix p. 59).

The Whitsons were impeded in their understanding of the case by Robert Whitsons' confusion due to the closed head injury he sustained in this collision, their advanced age, and unrelated health issues. Elsie Whitson was very ill throughout 2003, having two major surgeries in the Spring (heart and kidney) which took months of rehabilitation. Both Robert and Elsie Whitson were born in 1926. Each turned seventy-seven years (77) old in 2003. (Appellants' Appendix p. 59).

The Whitsons were informnned of an August 8, 2003, hearing on their case by their granddaughter, Dannette McPherson, a Madison County courthouse employee. Without notice from their attorney they attended the hearing by sitting in the back of the room. They did not hear all of or understand the content of the hearing. Attorney Freund did not meet with the Whitsons prior to or after the hearing. (Appellants' Appendix p. 13).

Mr. Freund did not respond to further calls. He would not open the door when Robert Whitson visited his office. (Appellants' Appendix p. 59). In November 2003, the Plaintiffs were informed in by their grand-daughter that their case had been dismissed by the Trial Court. (Appellants' Appendix p. 13).

***7** The Plaintiffs contacted the Indiana Disciplinary Commission in order to complain about the conduct of Attorney Freund in handling their case and were mailed forms to file a grievance proceeding. (Appellants' Appendix p. 60). The Plaintiffs completed and returned these forms. The Plaintiffs sent Mr. Freund a letter terminating his employment. (Appellants' Appendix p. 60).

The Whitsons then retained undersigned counsel and proceeded with filing a successful motion for relief from judgment due to Mr. Fruend's gross negligence. (Appellants' Appendix p. 17).

IV. SUMMARY OF ARGUMENT

The trial court correctly vacated the judgment of dismissal pursuant to T.R. 60(B)(8). The Plaintiffs were undisputedly misled by their former counsel. He failed to follow any orders or deadlines of the trial court. The attorney's conduct led to the Plaintiffs' suit being dismissed. However, the Plaintiffs themselves were assured by Attorney Freund that the litigation was “on track” and that a settlement was being negotiated. Attorney misconduct and malfeasance cannot be imputed to the client when the client has been diligent in their own right. Because attorney misconduct and malfeasance can not be attributed to the client, a T.R. 60(B)(1) motion is not necessary. Attorney misconduct and malfeasance is an exceptional circumstance as contemplated by T.R. 60(B)(8). All motions filed pursuant to T.R.60(B)(8) are required to be filed within a reasonable time.

In addition, the trial court properly weighed the moving party's injustice with the nonmoving party and society's interest in the finality of litigation. Admittedly, the collision ***8** giving rise to this litigation was several years ago, however the facts of this motor vehicle collision claim have been firmly established through evidence presented in *Tinch v. Anderson Transit Systems*, Cause No.: 48D02-0005-CT-0301. Appellants will not be forced to investigate this collision from scratch, they are already familiar with the underlying facts. Robert Whitson submitted to a deposition in that matter on September 30, 2002. The appellants have not been prejudiced by this delay. The real prejudice would be to the Whitsons, if through no fault of their own they were denied an opportunity to pursue their lawful claim.

Finally, the Whitsons' grounds for relief from judgment do not rise from trial court error. The grounds for relief from judgment rise from attorney misconduct and malfeasance. These grounds are not contemplated by T.R.59, and as such it was not necessary for the Whitsons to file a T.R. 59 Motion to preserve a motion for relief pursuant to T.R. 60(B)(8). The Whitsons' grounds for relief from judgment are based upon exceptional circumstances and their relief is found only in T.R. 60(B)(8).

V. ARGUMENT

A. *Standard of Review*

"A motion made under T.R. 60(B) is addressed to the equitable discretion of the trial court." *Indiana Insurance Company v. Insurance Company of North America* 734 N.E.2d 276, 278 (Ind.Ct.App. 2000)(citing *Lake County Trust No. 3190 v. Highland Plan Com'n,* 674 N.E.2d 626, 628 (Ind.Ct.App.1996)). The grant or denial of the T.R. 60(B) motion will be reversed only when the trial court has abused its discretion. Id. at 278 (citing *Fairfield v. Fairfield,* 538 N.E.2d 948, 949-950 (Ind. 1989)). The trial court is required to "balance the alleged injustice suffered ***9** by the party moving for relief against the interests of the wining party and society in general in the finality of litigation." *Id.* at 278-279 (citing *Chelovich v. Ruff & Silvian Agency,* 551 N.E.2d 890, 892 (Ind.Ct.App. 1990)). Only "[w]hen the trial court's action is *clearly* erroneous, an abuse of discretion will be found." *Id.* at 279 (citing *Fairfield,* 538 N.E.2d at 950)(emphasis added).

B. *THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY GRANTING PLAINTIFFS' MOTION FOR RELIEF FRON JUDGMENT PURSUANT TO T.R. 60(B)(8).*

T.R. 60(B)(8) is an omnibus provision which gives broad equitable power to the trial court in exercising its discretion, and imposes a time limit based only upon reasonableness. The party seeking relief must show that its failure to act was not merely due to an omission involving mistake, surprise or excusable **neglect**. The grounds for relief must rise from extraordinary circumstances demonstrated affirmatively. *Id.* at 279-280 (citing *Graham v. Schreifer,* 467 N.E.2d 800 (lnd.Ct.App. 1984)).

I. *When Party is Conscientious and Diligent in His Own Actions the Unexplainable and Inexcusable Misconduct and Misfeasance by His Attorney Will Not be Imputed to Him.*

Appellants argue that the grounds for Whitsons' relief fall within the province of T.R. 60(B)(1), and are now barred pursuant to that trial rule's one year time limitation. Specifically, Appellants have argued that the Whitson's grounds for relief rise from "mistake, surprise, or excusable **neglect**," within T.R. 60(B)(1). However, in the case at bar there exist extraordinary circumstances justifying relief pursuant to T.R. 60(B)(8), due to the gross and egregious ***10** misconduct of the Whitsons' former counsel. Strong precedent exists supporting the position that misrepresentations and misconduct by the attorney to his or her client, and a showing of diligence on the part of the client in seeking information from his or her attorney regarding the progress of the case, are conditions in which **neglect** will not be imputed to the client.

The Indiana Court of Appeals, in a case on point, explains, "[i]n a case such as this, where the uncontradicted evidence discloses that the client exercised diligence but whose rights were forfeited by attorney misconduct, the latter's negligence should not be imputed to the client." *Rose v. Rose,* 390 N.E.2d 1056, 1058 (Ind.Ct.App. 1979). The facts in *Rose* are analogous to the case

at bar. The attorney hired by Mr. Rose to handle his divorce consistently misrepresented the facts to Mr. Rose regarding the litigation of the divorce proceeding and failed to meet court deadlines, including the actual hearing date. Mr. Rose never received notice of the hearing date and was therefore defaulted. *Id.* at 1057. The *Rose* Court found a California opinion persuasive and quoted heavily from that decision in their opinion. *Id.* The Court acknowledged that in most circumstances the negligence of the attorney is imputed to the client and may not be offered as a basis of relief.

> "However, excepted from [this] rule are those instances where the attorney's **neglect** is of that extreme degree amounting to positive misconduct, and the person seeking relief is relatively free from negligence. The exception is premised upon the concept the attorney's conduct, in effect, obliterates the existence of the attorney-client relationship and for this reason his negligence should not be imputed to the client."

Id. (citing *Buckert v. Briggs,* 15 Cal.App.3d 296, 93 Cal.Rptr. 61 (1971).

An additional Indiana case on point is *Graham v. Schreifer.* 467 N.E.2d 800 (Ind. App. 1984). In this case the Court affirmed the trial court's grant of relief from judgment pursuant to ***11** T.R. 60(B)(8) where the attorney failed to notify his client that the client's interests were no longer being represented. *Id.* at 802. This type of behavior on behalf of the attorney goes beyond mere failure to monitor the case, but to misconduct. The Court stated that they were cognizant of authority that holds lack of notice of certain proceedings occurring in a pending action is insufficient grounds for granting equitable relief; however, the Court continued stating,

> [w]e do not find such a rule wholly applicable where a defendant fails to receive notice of rulings which directly affect his ability to defend his cause of action. In this case the unrefuted evidence presented ... indicates ... no notice of his attorney's withdrawal, of either trial date, or of the judgment. We believe these circumstances are closely akin to a denial of due process, which on occasion has been sufficient grounds for finding a judgment totally void.

Id. at 804-805.

The results of the attorney's withdrawal without notice in *Graham* are similar to the results of the attorney misconduct in the case at bar. The Whitsons did not receive any notices from their attorney. They were not aware of any court dates. They were not even advised by their attorney that their case had been dismissed. Upon discovering this information the attorney advised that everything was on "track." (Appellants' Appendix p. 13).

Other jurisdictions have also adopted the concept that "fault should not automatically be imputed when an attorney has grossly **neglected** a diligent client's case and misleads the client to believe that his interests are being properly handled" *Whitt v. Bennett,* 613 N.E.2d 667, 670 (Ohio App. 1992)(*A persuasive case from a neighboring jurisdiction in which the Court awarded a personal injury plaintiff relief from judgment because they had provided the attorney with answers to interrogatories and authorizations ordered by the court, and the attorney failed to comply*).

***12** See also, *Boughner v. Sect'y of Health* 572 F.2d 976, 978 (3rd Cir. 1978)(*relief from judgment allowed where attorney failed to respond to motion for sumnmary judgtment for fifty-two separate clients, and default judgment wuas entered), Primbs v. U.S.,* 4 Cl.Ct. 366 (U.S.C.C. 1984)(*allowing relief from judgment where client had not been informed of hearings, and was misled by attorney), L.P. Steuart v. Matthews,* 329 F.2d 234 (D.C. App. 1964)(*allowing personal injury plaintiff relief from judgment where attorney's personal problems caused him to engage in positive misconduct and mislead the client as to the status of his case*), and *King v. Mordowanec,* 46 F.R.D. 474 (U.S. Dist. Ct. R.I. 1969)(*allowing personal injury plaintiff relief from judgment where he is unaware of and does not participate in atorney's misconduct*).

As reflected by the Indiana Court of Appeals' decisions in *Rose* and *Graham* and from cases cited from other jurisdictions, the gross **neglect** and misconduct of an attorney can not be imputed to a client when that client acts diligently in his own right.

The Whitsons tried time and again to contact their attorney and when they did reach him they were materially misled about the status of their case.

The circumstances presented in the instant case fit squarely under Trial Rule 60(B)(8), and its broad equitable intent. The behavior of the Whitsons' prior attorney in failing to communicate with them and purposefully misleading them about the status of the cause of action were affirmative acts that constitute extraordinary circumstances justifying relief from judgment. The behavior of Attorney Freund, when combined with the advanced age, cognitive impairment, and general lack of sophistication of these plaintiffs, creates an unconscionable injustice to Robert and Elsie Whitson.

13 II. *The Potential Injustice to the Whitsons' Outweighs Any Potential Prejudice to Tinch If Relief From Judgment is Affirmed.

A trial court is required to balance the moving party's alleged injustice against the interests of the nonmoving party and society's interest in the finality of litigation. *Indiana Insurance,* 734 N.E.2d at 278-279. The case at bar is unique in that the facts of this motor vehicle claim have already been firmly established through evidence presented in *Tinch v. Anderson Transit Systems*, Cause No.: 48D02-0005-CT-0301. Robert Whitson was even deposed during this proceeding. Upon information and belief, the Appellants have full access to all evidence, both demonstrative and testimonial presented in that proceeding. Any expense to Tinch in obtaining transcripts of this testimony or copies of the exhibits is well justified when compared to the alternative choice of denying the Whitsons their right to litigate this claim. Any argument on behalf of Appellants regarding lost medical records is unfounded. The mere possibility that Appellants will not be able to locate all medical records is not a substantial prejudice in this situation.

Finally, the potential injustice to the Whitsons far outweighs the interests of society in general in the finality of litigation. Society does not gain when two people such as the Whitsons, who are completely without fault, have their rights stripped away by the grossly negligent actions of an attorney. Nor does society have an interest in rewarding a defendant because the conduct of the plaintiffs' attorney was unexplainable and inexcusable. It is in the best interests of society and the Whitsons for this lawsuit to proceed on its merits.

14 C. *WHITSONS WERE NOT REQUIRED TO TO FILE T.R. 59 MOTION OR NOTICE OF APPEAL WHEN THEIR REMEDY IS FOUND IN T.R. 60(B)(8).

T.R. 59 states in relevant part:
(A) Motion to correct error - When mandatory. A Motion to Correct Error is not a prerequisite for appeal, except when a party seeks to address:

1. (1) Newly discovered material evidence, including alleged jury misconduct, capable of production within thirty (30) days of final judgment. which, with reasonable diligence, could not have been discovered and produced at trial; or

(2) A claim that a jury verdict is excessive or inadequate. All other issues and grounds for appeal appropriately preserved during trial may be initially addressed in the appellate brief.

The Whitsons' grounds for relief from judgment rise from “exceptional circumstances justifying extraordinary relief.” *Indiana Insurance,* 734 N.E.2d at 280. These circumstances are are attorney misconduct and malfeasance. The Whitsons are not alleging trial court error, nor are they alleging newly discovered material evidence as contemplated by T.R. 59. T.R. 60(B)(8) is an omnibus provision which gives broad equitable power to the trial court in the exercise of its discretion and *imposes a time limit based only upon reasonableness. Id.* at 279. (emphasis added). This remedy is not tied to a timely T.R. 59 Motion.

In *Graham, supra.* the Court discussed this exact situation. The Court stated that it recognizes there is authority that holds lack of notice of certain proceedings occurring in a pending action is insufficient grounds for granting equitable relief. "But we believe this rule is typically, and more appropriately, reserved for those cases where a party seeks sanctuary within T.R. 60(B) because he claims he failed to receive notice of a ruling within sufficient time to avail ***15** himself of a motion to correct error under *Ind.Rules of Procedure, Trial Rule 59*." *Graham,* 467 N.E.2d at 805. The Whitsons are not seeking sanctuary in T.R. 60(B) because they failed to receive notice of a ruling. They are seeking relief from judgment pursuant to T.R. 60(B)(8) because of the misconduct and misfeasance of their prior attorney. The trial court granted the T.R. 60(B)(8) motion because of the "gross negligence on the part of Attorney Ron Freund, plaintiffs' former counsel." (Appellants' Appendix p. 17). This is an extraordinary circumstance, not contemplated by T.R. 59.

Additionally, the Whitsons have never attempted to appeal any decisions made by the trial court. Their relief lies in T.R. 60(B)(8), and it is from that rule that relief was granted. Any argument that they have not properly preserved their right to appeal is without merit.

VI. CONCLUSION

The trial court acted within its sound discretion by granting the Plaintiffs' Motion for Relief from Judgment pursuant to T.R. 60(B)(8).

WHEREFORE, for all of the foregoing reasons appellees/plaintiffs, Robert and Elsie Whitson, respectfully request that this Court AFFIRM the trial court's June 17, 2004, order setting aside, pursuant to T.R. 60(B)(8), its April 26, 2002 order dismissing the Whitsons' Complaint.

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