An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-292
NORTH CAROLINA COURT OF APPEALS

Filed: 1 November 2011

DIVERSIFIED FINANCIAL SERVICES, LLC, a Nebraska limited liability company,
Plaintiff,

v.

Macon County
No. 09 CVS 317

F & F EXCAVATING AND PAVING, INC., JAYNE BARNES and FRED BARNES
Defendants.

Appeal by defendants from orders entered 20 October 2010 and 26 January 2011 by Judge Mark E. Powell in Macon County Superior Court. Heard in the Court of Appeals 15 September 2011.

Jones, Key, Melvin, & Patton, by Richard Melvin, for Defendants.

Melrose, Seago & Lay, PA, by Kimberly C. Lay, for Plaintiff.

THIGPEN, Judge.

F & F Excavating and Paving, Inc. ("F&F Excavating"), Jayne Barnes, and Fred Barnes (together "Defendants") appeal from the 20 October 2010 order granting summary judgment in favor of

Diversified Financial Services, LLC ("Plaintiff"), and from the 26 January 2011 order denying Defendants' motion for rehearing and to vacate summary judgment. We must determine whether the 20 October 2010 order was properly appealed, such that this Court has jurisdiction, and whether the trial court erred by denying Defendants' motion for rehearing. We conclude Defendants' motion for rehearing was not a proper N.C. Gen. Stat. § 1A-1, Rule 59 (2009) motion and therefore did not toll the time for filing a notice of appeal from the 20 October 2010 order on summary judgment. We further conclude the trial court did not err by denying Defendants' motion for rehearing.

The facts of this case are not disputed. F&F Excavating entered into an installment contract ("Contract") on 2 May 2007 with Arrow Equipment, LLC, to purchase a 2006 Caterpillar CB 113 Roller. Jayne and Fred Barnes agreed to personally guarantee the Contract. On 5 May 2007, Arrow Equipment, LLC, assigned to Plaintiff its interest in the Contract and the Caterpillar. Defendants defaulted by failing to pay Plaintiff the required monthly installments.

On 5 June 2008, Plaintiff notified Defendants that the payments were past due, that Defendants were in default, and that in the event the past due amount was not paid on or before

16 June 2008, the amount due would be accelerated pursuant to the terms of the Contract. On 20 June 2008, Plaintiff notified Defendants the amount of indebtedness had been accelerated. The Caterpillar was repossessed. On 28 November 2008, Plaintiff sold the Caterpillar and applied the purchase price to the unpaid balance.

Plaintiff filed a complaint on 1 May 2009 praying for a deficiency judgment against Defendants. Plaintiff filed a motion for default judgment,[1] and on 18 June 2009, default judgment was entered against Defendants due to Defendants' failure to file an answer or otherwise plead within 30 days of service of summons.

On 1 April 2010, Defendants filed a motion to set aside the default judgment, attaching a letter dated 9 February 2009 from Plaintiff, which stated the following:

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[1]Several motions filed by Plaintiff were not included in the record on appeal, including Plaintiff's motion for default judgment and Plaintiff's motion for summary judgment. Plaintiff's request for admissions in the record on appeal is also not time stamped, which means there is no evidence of record showing the date upon which the request was filed. Because the bases of the orders of the trial court in this case were clear, and because Defendants admit they did not timely respond to Plaintiff's request for admissions, these documents are not necessary for our determination of the question presented by Defendants; however, we emphasize that "[i]t is the appellant's duty and responsibility to see that the record is in proper form and complete." *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983) (citation omitted).

> The final payment for your finance agreement has been received. If you would like additional documentation, please contact us at [phone number deleted]. Thank you for your business with Diversified Financial Services, LLC.

On 11 May 2010, the trial court granted Defendants' motion to set aside default judgment. Defendants filed a *pro se* answer on 21 May 2010.

Plaintiff filed a request for admissions, and Defendants admit they failed to respond to Plaintiff's request for admissions within thirty days. Plaintiff then filed a motion for summary judgment. On 14 September 2010, Defendants filed a motion to allow filing and for relief from admissions, a motion to allow amendment of affirmative defenses, and an amended answer, affirmative defenses and supplemental pleadings.

The trial court heard Plaintiff's and Defendants' motions on 11 October 2010, and the trial court granted Plaintiff's motion for summary judgment in open court on the same day. The trial court entered a written order granting Plaintiff's motion for summary judgment on 20 October 2010, stating the following:

> Defendants answered the Complaint pro se but failed to respond to Request for Admissions propounded by Plaintiff and therefore each matter set out within the Request for Admissions is deemed admitted pursuant to Rule 36 of the North Carolina Rules of Civil Procedure and that there is no genuine issue

> as to any material fact and that summary judgment should be allowed as a matter of law.

The trial court entered summary judgment against Defendants and also entered an order on 20 October 2010 denying Defendants' motion to allow amendment of affirmative defenses and Defendants' motion to allow filing and relief from admissions.

On 14 October 2010, after the trial court rendered its decision in open court, but before entry of the written order on summary judgment, Defendants filed a motion for rehearing and a motion to vacate summary judgment purportedly pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. The trial court heard the matter on 8 December 2010 and denied Defendants' motion for rehearing in open court the same day. On 26 January 2011, the trial court entered a written order denying Defendants' motion for rehearing and to vacate summary judgment.

On 6 January 2011, Defendants filed a notice of appeal from the summary judgment order entered 20 October 2010 and the order denying Defendants' motion for rehearing rendered in open court on 8 December 2010. Although the written order denying Defendants' motion for rehearing and to vacate summary judgment was not entered until 26 January 2011, Defendants' notice of appeal from the 8 December 2010 order rendered in open court was

sufficient to vest this Court with jurisdiction, because the 26 January 2011 order was "in substantial compliance with the judgment rendered" in open court. *Abels v. Renfro Corp.*, 126 N.C. App. 800, 804, 486 S.E.2d 735, 738, *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997) ("[R]endering of an order commences the time when notice of appeal *may* be taken by filing and serving written notice, . . . while entry of an order initiates the thirty-day time limitation within which notice of appeal *must* be filed and served") (citations omitted) (Emphasis in original).

The two pertinent dates for purposes of Defendants' appeal are 20 October 2010, the date the trial court entered the written order granting Plaintiff's motion for summary judgment, and 6 January 2011, the date Defendants filed a notice of appeal from the 20 October 2010 order.

I: Appeal from Order Granting Summary Judgment

After the trial court granted Plaintiff's motion for summary judgment in open court on 11 October 2010, Defendants filed a "Motion for Rehearing" on 14 October 2010 purportedly pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. The written order on summary judgment was entered on 20 October 2010. Defendants did not file a notice of appeal from the written order entered

20 October 2010 granting summary judgment until 6 January 2011. We must first determine whether Defendants' 14 October 2010 motion for rehearing was a proper Rule 59 motion, such that the time for filing a notice of appeal was tolled. We conclude it was not a proper Rule 59 motion and therefore did not toll the time for filing a notice of appeal. We conclude Defendants' appeal from the order granting Plaintiff's motion for summary judgment must be dismissed.

"In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3[.]" *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000) (citation omitted). N.C. R. App. P. 3(c)(1) (2011) requires that "[i]n civil actions . . . a party must file and serve a notice of appeal . . . within thirty days after entry of judgment[.]" "Failure to give timely notice of appeal in compliance with . . . Rule 3 . . . is jurisdictional, and an untimely attempt to appeal must be dismissed." *Booth v. Utica Mut. Ins. Co.*, 308 N.C. 187, 189, 301 S.E.2d 98, 99-100 (1983).

"[I]f a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties

until entry of an order disposing of the motion[.]"[2] N.C. R. App. P. 3(c)(3). "Rule 59(e) governs motions to alter or amend a judgment, and such motions are limited to the grounds listed in Rule 59(a)." *N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 469, 645 S.E.2d 105, 108 (2007). "To qualify as a Rule 59 motion within the meaning of Rule 3 of the Rules of Appellate Procedure, the motion must 'state the grounds therefor' and the grounds stated must be among those listed in Rule 59(a)." *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997). "The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of Rule 7(b)(1)." *Id.* Rule 59(a) lists nine grounds or causes upon which a new trial may be granted:

> (a) *Grounds*. - A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds:
>
> (1) Any irregularity by which any party was prevented from having a fair trial;
>
> (2) Misconduct of the jury or prevailing

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[2]N.C. Gen. Stat. § 1A-1, Rule 50(b) (2009) governs motions for judgment notwithstanding the verdict. N.C. Gen. Stat. § 1A-1, Rule 52(b) (2009) governs amendments to findings of fact, and N.C. Gen. Stat. § 1A-1, Rule 59 governs motions for a new trial. Each of these motions must be made within ten days of entry of the judgment.

party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial;

(5) Manifest disregard by the jury of the instructions of the court;

(6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

(7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;

(8) Error in law occurring at the trial and objected to by the party making the motion, or

(9) Any other reason heretofore recognized as grounds for new trial.

N.C. Gen. Stat. § 1A-1, Rule 59.

In Defendants' motion, Defendants did not make reference to any of the grounds listed in Rule 59(a), nor did they use any of the language from the rule which would tend to give notice of their reliance on any of the enumerated grounds. Rather, Defendants argued for a change in existing law, asking the trial court to apply federal law and the law of other states to interpret N.C. Gen. Stat. § 1A-1, Rule 36 (2009). A petition

for a change in existing law is not a ground listed in Rule 59(a). Moreover, a Rule 59(e) motion "cannot be used as a means to . . . put forth arguments which were not made but could have been made" and a motion that does so "cannot be treated as a Rule 59(e) motion." *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417. Because the basis for Defendants' motion was not one of the grounds listed in Rule 59(a), we conclude Defendants' motion was not a proper Rule 59 motion.

Because Defendants' motion was not a Rule 59 motion, the time to file an appeal from the 20 October 2010 order was not tolled. Therefore, Defendants' 6 January 2011 notice of appeal from the 20 October 2010 order was not timely, and Defendants' appeal from the 20 October 2010 order must be dismissed.

II: Appeal from Order Denying Motion for Rehearing

The foregoing notwithstanding, Defendants did timely appeal the 26 January 2011 order denying their motion for rehearing. Defendants' appeal from this order is properly before this Court. *See Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417 (holding, even though notice of appeal from the order was not timely and must be dismissed, the defendants timely appealed from the denial of their motion); *see also Abels*, 126 N.C. App. at 804, 486 S.E.2d at 738 ("[R]endering of an order commences

the time when notice of appeal *may* be taken by filing and serving written notice, . . . while entry of an order initiates the thirty-day time limitation within which notice of appeal *must* be filed and served").

In Defendants' sole argument on appeal pertaining to the trial court's order denying their motion for rehearing, they contend Plaintiff's request for admissions pertained to "central facts in dispute" which were "beyond the proper scope of the rule" and therefore "improper." We disagree.

"Litigants in this state are required to respond to . . . requests for admission with timely, good faith answers." *WXQR Marine Broadcasting Corp. v. JAI, Inc.*, 83 N.C. App. 520, 521, 350 S.E.2d 912, 913 (1986). According to N.C. Gen. Stat. § 1A-1, Rule 36(a), "[t]he matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney[.]" Furthermore, according to Rule 36(a), "[a] party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may,

subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it."

In this case, Defendants admit they failed to respond to Plaintiff's request for admissions. Rule 36 requires that the matters in the request for admissions, after Defendants failed to respond, were admitted. Defendants, however, prayed that the trial court, and now this Court, apply federal law and the law of other states to reach the conclusion that Plaintiff's request for admissions was improper because the request pertained to "central facts in dispute[.]" This argument is contrary to the plain language of Rule 36, which states, "[a] party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it." N.C. Gen. Stat. § 1A-1, Rule 36(a). We conclude the trial court did not err by declining to apply the federal law and law of other states to interpret Rule 36. *See In re Summons Issued to Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) ("Where the language of a statute is clear, the courts must give the statute its plain meaning") (internal quotation omitted). We affirm the 26

January 2011 order of the trial court denying Defendants' motion.

In conclusion, we dismiss Defendants' appeal from the 20 October 2010 order on summary judgment due to Defendants' failure to timely file notice of appeal. We further affirm the 26 January 2011 order of the trial court denying Defendants' motion for rehearing and to vacate summary judgment.

DISMISSED, in part; AFFIRMED, in part.

Judges GEER and STROUD concur.

Report per Rule 30(e).