An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1383

NORTH CAROLINA COURT OF APPEALS

Filed: 5 September 2006

JERRY CHAPPELL WALLACE, II,
Plaintiff,

v. Richmond County
No. 04 CVD 638

JERRY CHAPPELL WALLACE,
Defendant.

Appeal by defendant from order entered 5 July 2005 by Judge Tanya Wallace in Richmond County District Court. Heard in the Court of Appeals 16 May 2006.

Sharpe & Buckner, PLLC, by Richard G. Buckner, for plaintiff-appellee.

Henry T. Drake for defendant-appellant.

GEER, Judge.

This lawsuit arose when plaintiff Jerry Chappell Wallace, II, instituted eviction proceedings against his father, defendant Jerry Chappell Wallace. After a magistrate entered judgment in favor of plaintiff, defendant filed a series of motions in district court pursuant to Rules 59 and 60 of the North Carolina Rules of Civil Procedure, all of which were denied. Since the district court's order denying defendant's final motion under Rules 59 and 60 is the only order properly before us at this time, and defendant has

failed to demonstrate that the district court abused its discretion in denying that motion, we affirm.

Facts and Procedural History

This litigation arises out of a dispute between the parties over a piece of real estate ("the property") located at 213 Wallace Road in Ellerbe, North Carolina. The property was originally owned by Robert and Kate Wallace, plaintiff's uncle and aunt, who granted it by general warranty deed to plaintiff in January 1986. Plaintiff was five years old at that time.

In 1989, defendant divorced plaintiff's mother, Cynthia Cooper. Plaintiff contends that, at the time of the divorce, Ms. Cooper, acting on his behalf, agreed to allow defendant to live in a mobile home on the property as long as he would pay the taxes on the land. Plaintiff remained with his sister and mother in the family home on another tract of land in Ellerbe. According to Ms. Cooper, the agreement regarding the paying of taxes was "part of [defendant's] child support for [plaintiff]." Subsequently, defendant sought permission from Ms. Cooper to plant crops on the property, to build a garage and a greenhouse, and to add a porch and deck to the mobile home. Ms. Cooper agreed because defendant "was getting a cash break on his child support, but he was [also] creating value for" plaintiff.

In January 1991, defendant came to plaintiff's home with a gun and threatened Ms. Cooper and the children. Ms. Cooper immediately moved to another county and was no longer able to keep close watch

over the property, although she did drive by a few times each month. For the rest of plaintiff's childhood, according to Ms. Cooper, defendant "always kept our deal, paying the taxes and upkeep as his rent."

When plaintiff turned 18, the same arrangement continued. Plaintiff stated in his affidavit: "I was already very much aware of the lease agreement my mother had negotiated with my father on my behalf and I was very much satisfied with it and we continued with it. I certainly then had no need for my land, whether to sell it or rent it and it suited me very well to have my father living there as tenant, paying the taxes and upkeep as rent."

After plaintiff became a student at UNC-Wilmington, he decided to sell some of the property to help mitigate his student loans. He suggested to defendant that the lease arrangement be modified so that defendant would continue to lease a portion of the land, but plaintiff could sell the rest. According to plaintiff, "for the first time my father told me that I could not sell the land because it was his. At first, he said that I did not own any of it. Then, he said my deed was null and void . . . . Eventually, his words were to the effect that I only owned the 'back half,' the swampy portion where the hogs were."

Plaintiff renewed his offer in writing, and when defendant did not respond, plaintiff initiated eviction proceedings. On 19 November 2003, he filed a complaint in summary ejectment in the small claims division of the Richmond County District Court. The complaint stated, "Defendant is a tenant at will and has refused to

vacate the premises after demand has been given for him to vacate the premises."

On 16 December 2003, the Chief Magistrate conducted a hearing at which both plaintiff and defendant presented evidence. Following the hearing, the Chief Magistrate determined that there was a lease agreement between the parties, that a landlord-tenant relationship existed between the parties, and that defendant was in possession of the premises in violation of the lease agreement. An eviction order was entered 9 January 2004, and the actual eviction took place on 20 January 2004.

On 3 June 2004, six months after the entry of the eviction order, defendant filed an "answer to complaint for summary ejectment," accompanied by a number of exhibits including documents relating to the alleged incompetence of Robert and Kate Wallace. On the same date, he also filed a motion to set aside and dismiss the summary ejectment and for a new trial, citing N.C.R. Civ. P. 59 and 60.

On 9 July 2004, when the Chief Magistrate was unavailable to rule on defendant's motion due to illness, defendant filed a notice of appeal to the district court from the Chief Magistrate's 16 December 2003 order. With the consent of the parties, District Court Judge Tanya Wallace conducted a hearing on the motion on 14 October 2004. Following the hearing, by written order entered 18 November 2004, Judge Wallace dismissed as untimely (1) defendant's 9 July 2004 notice of appeal from the Chief Magistrate's 16 December 2003 decision and (2) defendant's Rule 59 motion dated 3

June 2004. After separately considering defendant's request for relief under Rule 60, she concluded that defendant had "failed to carry his burden of establishing any grounds for relief" under that Rule. The record contains no indication that defendant ever filed a notice of appeal from the 18 November 2004 order.[1]

On 29 November 2004, defendant filed a new motion with the district court, entitled "Motion to Amend Judgment, and for a New Hearing," again citing Rules 59 and 60. This motion contained no exhibits, but in April 2005 defendant filed another motion attaching (1) new affidavits from defendant and other members of the community, (2) documents related to a pending fraud action that defendant had filed against plaintiff, and (3) the same documents relating to Robert and Kate Wallace's alleged incompetency that defendant had previously filed. The April 2005 motion, which was captioned simply "Motion," cited no statutory or case authority, and, somewhat enigmatically, requested the district court "to reconsider it's [sic] Motion to Set Aside a proper Motion."

These motions were heard on 3 June 2005 by Judge Wallace. In a written order filed 5 July 2005, Judge Wallace denied the motions based on defendant's failure (1) to cite authority, (2) to present

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[1]The district court considered the Rule 60 motion pursuant to its power under N.C. Gen. Stat. § 7A-228(a) (2005) (giving authority to "the district court to hear motions pursuant to Rule 60(b)(1) through (6) of the Rules of Civil Procedure for relief from a judgment or order entered by a magistrate"). By contrast, we note it is not clear what jurisdiction the district court had to consider the merits of the Rule 59 motion. The parties' mutual consent to submit to jurisdiction is not alone sufficient in this context. *Foley v. Foley*, 156 N.C. App. 409, 411, 576 S.E.2d 383, 385 (2003) ("Subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel.").

or forecast "evidence, in addition to the evidence which was submitted to this Court and argued before this Court and considered by this Court, at the time of the entry of the Order which was filed by this cause on November 18, 2004," or (3) to suggest any grounds upon which relief should be granted. On 15 July 2005, defendant filed a notice of appeal to this Court from the 5 July 2005 order.

Discussion

At the outset, we note that "[n]otice of appeal from 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." *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (appeal of denial of Rule 59 motion did not include appeal of underlying child support order); *Chaparral Supply v. Bell*, 76 N.C. App. 119, 120, 331 S.E.2d 735, 736 (1985) (appeal of denial of Rule 60 motion to set aside entry of summary judgment did not include appeal of underlying summary judgment order).

Here, the underlying decisions of the Chief Magistrate (entered 16 December 2003) and the district court (entered 18 November 2004) are not referenced in defendant's notice of appeal. The notice of appeal states in its entirety: "NOW COMES, Defendant having received the Court['s] Ruling on July 8, 2005, and gives Notice of Appeal to the North Carolina Court Of [sic] Appeal[s]." Since the notice of appeal does not reference either of the underlying orders, our review is limited to the district court's 5

July 2005 order. We have no jurisdiction to review either the Chief Magistrate's 16 December 2003 ruling or the district court's 18 November 2004 order denying defendant's first motion under Rules 59 and 60.

We review a trial court's decision to deny a motion pursuant to Rules 59 and 60 for an abuse of discretion. *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975) (regarding Rule 60); *Ollo v. Mills*, 136 N.C. App. 618, 624, 525 S.E.2d 213, 217 (2000) (regarding Rule 59). To establish an abuse of discretion, the appellant must demonstrate that the decision is manifestly unsupported by reason or is one so arbitrary that it could not have been the result of a reasoned decision. *Briley v. Farabow*, 348 N.C. 537, 547, 501 S.E.2d 649, 656 (1998).

In the present case, defendant had ample opportunity to provide evidence before both the Chief Magistrate and the district court. Indeed, the record indicates that defendant received two full hearings during which the merits of his arguments were considered. Furthermore, the additional affidavits and other evidence that defendant attached to his April 2005 motion, which he contends the district court did not adequately consider, pertain principally to the credibility of plaintiff and his mother and sister. The materials suggest no new grounds for setting aside the prior orders. We, therefore, find no abuse of discretion on the part of the trial court in denying defendant's second motion under Rules 59 and 60. *See Loeb v. Loeb*, 72 N.C. App. 205, 218-19, 324 S.E.2d 33, 42-43 (no abuse of discretion in trial court's denial of

Rule 59 motion when movant did not make use of opportunity to present evidence attached to Rule 59 motion during trial and otherwise failed to show prejudice resulting from the denial of her Rule 59 motion), *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985), *overruled on other grounds by Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988).

Affirmed.

Judges WYNN and STEPHENS concur.

Report per Rule 30(e).