

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-719

NORTH CAROLINA COURT OF APPEALS

Filed: 7 March 2006

CHARLES S. HONACHER, and  
CATHERINE M. HONACHER,

Plaintiffs,

v.

Rockingham County  
No. 03 CVS 1334

DAVID K. EVERSON, and  
PATRICIA M. EVERSON,

Defendants.

Appeal by defendants from the order entered 6 December 2004 by Judge Richard L. Doughton in Rockingham County Superior Court. Heard in the Court of Appeals 7 December 2005.

*B. Douglas Martin, for plaintiff-appellees.*

*Patricia M. Everson and David K. Everson, Pro Se, for defendant-appellants.*

JACKSON, Judge.

Defendants appeal from an order entered 6 December 2004 in the Superior Court of Rockingham County by the Honorable Richard L. Doughton denying their Amended Motion to Rehear Motion for New Trial.

A jury verdict in favor of plaintiffs was returned 27 August 2004 finding that defendants had committed breach of contract and awarding plaintiffs monetary damages for those breaches.

Defendants filed written Motions for Judgment Notwithstanding the Verdict and for New Trial 7 September 2004 on the grounds that the verdict was contrary to law, the evidence was insufficient to justify the verdict, and that the verdict resulted from a misapplication of law. Judgment in accordance with the jury verdict was entered 17 September 2004. The trial court entered an order denying defendants' Motions for Judgment Notwithstanding the Verdict and New Trial 22 September 2004.

Defendants then filed an Amended Motion to Rehear Motion for New Trial 22 October 2004 based on alleged perjury and fraud on the court committed by plaintiffs. Defendants' amended motion was served on plaintiffs by facsimile and first class mail 14 October 2004. The trial court entered an order denying defendants' Amended Motion to Rehear Motion for New Trial 6 December 2004. Defendants filed their notice of appeal from the 6 December order on 5 January 2005.

Only one of defendants' fourteen assignments of error pertains to the denial of the Amended Motion to Rehear Motion for New Trial, which plaintiffs argue on appeal was based upon the discovery of new evidence. The remainder of defendants' assignments of error pertain to the trial court's original order denying their Motion for New Trial. As no notice of appeal from the trial court's order denying defendants' Motion for New Trial has been filed, assignments of error pertaining to that order are not properly before this Court. N.C. R. App. P. Rule 3(d) (2005); *Finley Forest Condo. Ass'n. v. Perry*, 163 N.C. App. 735, 594 S.E.2d 227 (2004)

(failure to file notice of appeal as to a judgment or order prevents this Court from acquiring jurisdiction over an appeal from that judgment or order). Accordingly, defendants' thirteen assignments of error referencing that order are not considered.

Defendants' sole assignment of error pertaining to the order from which notice of appeal was filed states that the trial court erred in denying defendants' Amended Motion to Rehear Motion for New Trial and Motion for Relief from Judgment on the ground that the arguments contained in the motions already had been presented at trial. Defendants argue that the amended motions were based upon newly discovered evidence which had not been presented at trial.

A new trial may be granted based upon, *inter alia*, "[n]ewly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial." N.C. Gen. Stat. § 1A-1, Rule 59(a)(4) (2005). A motion for new trial based upon newly discovered evidence is within the discretion of the trial court and will only be disturbed on appeal upon a showing of an abuse of that discretion. *State v. Beaver*, 291 N.C. 137, 143, 229 S.E.2d 179, 183 (1976).

In order for a new trial to be granted on the ground of newly discovered evidence, it must appear by affidavit that (1) the witness or witnesses will give newly discovered evidence; (2) the newly discovered evidence is probably true; (3) the evidence is material, competent and relevant; (4) due diligence was used and proper means were employed to procure the testimony at trial; (5) the newly discovered evidence is not merely cumulative or

corroborative; (6) the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness; and (7) the evidence is of such a nature that a different result will probably be reached at a new trial.

*Id.* (citing *State v. Casey*, 201 N.C. 620, 161 S.E. 81 (1931)).

The bank records submitted in support of defendants' amended motion, which defendants contend constitute newly discovered evidence, all bear dates in 2003 and therefore existed at the time of trial in August 2004. These documents could have been obtained by defendants during pretrial discovery as evidenced by defendants' ability to obtain them by subpoena post-trial. As these records could have been discovered and produced at trial through reasonable diligence, we hold that the trial court did not abuse its discretion in denying defendants' motion.

A party may be relieved from a final judgment on the basis of "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." N.C. Gen. Stat. § 1A-1, Rule 60(b)(2) (2005). As we already have stated, the evidence upon which defendants' motions were based could have been discovered and produced at trial had defendants exercised due diligence. Accordingly, we hold that defendants' Motion for Relief from Judgment also was properly denied.

Affirmed.

Judges BRYANT and CALABRIA concur.

Report per Rule 30 (e).