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NO. COA06-193

NORTH CAROLINA COURT OF APPEALS

Filed: 7 November 2006

JOHN TUBIOLO and wife  
VICKI TUBIOLO,  
Plaintiffs

v.

Orange County  
No. 02 CVS 1342

ABUNDANT LIFE CHURCH, INC.,  
Defendant

Appeal by plaintiffs from orders entered 1 August 2005 and 7 September 2005 by Judge J. B. Allen, Jr. in Orange County Superior Court. Heard in the Court of Appeals 20 September 2006.

*Rudolf Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for plaintiff-appellants.*

*Katherine Freeman; Klein & Freeman, PLLC, by Paul I. Klein, for defendant-appellee.*

HUNTER, Judge.

John Tubiolo and his wife Vicki Tubiolo ("plaintiffs") appeal from an order and judgment of the trial court concluding that Abundant Life Church, Inc. ("defendant") properly adopted and amended governing bylaws, and that the trial court had no further jurisdiction over the issue of termination of plaintiffs' membership in the church. Plaintiffs also appeal from an order denying their motion for a new trial. We affirm the orders of the trial court.

This is plaintiffs' second appeal to this Court. The underlying facts of plaintiffs' dispute with defendant are recited in *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 605 S.E.2d 161 (2004), *disc. review denied*, 359 N.C. 326, 611 S.E.2d 853, *cert. denied*, \_\_\_ U.S. \_\_\_, 163 L. Ed. 2d 59 (2005) ("*Tubiolo I*"), and we need not repeat them here. The Court in *Tubiolo I* concluded that the majority of plaintiffs' claims against defendant dealt with purely ecclesiastical matters outside the jurisdiction of the courts. *See id.* However, the Court determined that it did have jurisdiction to adjudicate property disputes, and that plaintiffs' membership in the church was in the nature of a property interest. *See id.* at 329, 605 S.E.2d at 164. Plaintiffs asserted that no bylaws were ever adopted by defendant, and that the persons who terminated plaintiffs' membership in the church were without authority to take such action. *Id.* at 328-29, 605 S.E.2d at 164. The Court remanded the case to the trial court to decide the sole issue of whether or not the church's governing bylaws were properly adopted by defendant.

Following remand to the trial court, plaintiffs moved the trial court for a continuance in order to conduct discovery and prepare for trial. The trial court denied plaintiffs' motion by order entered 14 June 2005.

Plaintiffs' case came back before the trial court on 27 June 2005. Following presentation of the evidence, the trial court made the following pertinent findings:

18. Plaintiff John Tubiolo was a founding member of the Abundant Life Church in

1982 and was one of the original directors on the board of directors. In 1987, when a new procedure or plan governing the church was adopted by the congregation, John Tubiolo became the Minister of Finance.

19. Under this new plan, 12 ministers made up the Church Council.

20. Mr. John Tubiolo and his wife's membership were terminated by the Church Council, in a letter signed by 10 Council members in September of 2002.

21. Those 10 Council members, and others, were duly elected pursuant to duly adopted bylaws.

. . .

24. In 1986, Pastor Smith had a vision that there needed to be a change in the way the church was being governed. He presented a plan calling for ministers of the church to govern the church to the Board of Directors that was in existence at that time. At first, the Board of Directors was reluctant to change the procedure in which the church was run but finally approved it and . . . the congregation passed a new plan overwhelmingly in 1986. The Plaintiffs and a few other members did oppose the plan. This was a plan to be in operation for one year. The Court finds that the great majority of the congregation approved this plan.

25. In 1987 the plan involving the Church Council was made permanent. From all the evidence, the Court finds that the Plaintiffs had continuously opposed this new governing body plan for the church, the Church Council.

26. All of the evidence tends to show that there were no bylaws prior to 1987, even though the church was being governed by a board of directors.

27. Based upon all of the evidence and after duly considering the testimony of all of the witnesses and scrutinizing the exhibits that were presented, the Court finds that

bylaws were adopted by the Church Council either in late 1987 or early 1988. And the Court finds that there were amendments adopted to the bylaws in 2001 by the Church Council.

28. The Council has continuously governed the church, spoken for the church and acted for the church in all official business since 1986.

Based upon these findings, the trial court concluded that defendant properly adopted its bylaws, and that, pursuant to this Court's opinion in *Tubiolo I*, the court therefore had no further jurisdiction over the issue of the termination of plaintiffs' membership in the church. Accordingly, the trial court entered an order and judgment in favor of defendant on 1 August 2005.

Plaintiffs immediately filed a motion for a new trial pursuant to Rule 59(a)(4) of the North Carolina Rules of Civil Procedure, arguing that they had newly discovered material evidence which they could not have produced at trial. Plaintiffs attached to their motion the purported newly discovered evidence: namely, affidavits from six members of the church council during the relevant time period testifying that, contrary to the trial court's findings, no bylaws were adopted during 1987 or 1988. The trial court denied plaintiffs' motion by order entered 7 September 2005. Plaintiffs now appeal from the order denying their motion for a new trial, as well as from the order and judgment concluding that the bylaws were properly adopted.

I.

By their first assignment of error, plaintiffs argue the trial court abused its discretion in denying their motion for a new

trial. Plaintiffs argue that they were surprised at trial by testimony regarding adoption of the bylaws in late 1987 or early 1988, and that they therefore had no opportunity prior to trial to locate witnesses who might refute such testimony. Plaintiffs contend the trial court therefore abused its discretion in denying their motion for a new trial. We do not agree.

A new trial may be granted pursuant to Rule 59 of the North Carolina Rules of Civil Procedure on the grounds of "[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] court's decision on a motion for a new trial under Rule 59 is not reviewable on appeal, absent a showing of abuse of discretion." *Faulkenberry v. Faulkenberry*, 169 N.C. App. 428, 432, 610 S.E.2d 237, 240 (2005).

The term "newly discovered evidence" under Rule 59(a)(4) "refers to evidence in existence at the time of trial and of which the movant was excusably ignorant." *Id.* "Evidence which is merely corroborative or cumulative of evidence offered at trial or which contradicts evidence of the opposing party is insufficient to warrant granting a new trial." *Horne v. Trivette*, 58 N.C. App. 77, 82, 293 S.E.2d 290, 293 (1982); see also *Branch v. Seitz*, 262 N.C. 727, 729-30, 138 S.E.2d 493, 495 (1964) (holding that the trial court properly denied the plaintiff's motion for a new trial on the basis of newly discovered evidence where such evidence consisted of two affidavits tending to contradict the defendant's testimony and

corroborate the plaintiff's testimony); *Roberts Co. v. Mills, Inc.*, 8 N.C. App. 612, 618, 175 S.E.2d 289, 293 (1970) ("[e]vidence 'which is merely contradictory of the evidence of the adverse party, is insufficient to invoke the discretionary power of the court to order a new trial for newly discovered evidence'") (quoting 7 Strong's N.C. Index 2d *Trial* § 49).

In the instant case, plaintiffs submitted affidavits of former church council members during the relevant time period in support of their motion for a new trial. The affidavits averred that no bylaws were adopted by the council, in contradiction of defendant's testimony at trial. The affidavits corroborated evidence given by plaintiff John Tubiolo, who repeatedly testified at trial that bylaws were never adopted. As such, the affidavits were "merely corroborative or cumulative of evidence offered at trial" and were therefore "insufficient to warrant granting a new trial." *Horne*, 58 N.C. App. at 82, 293 S.E.2d at 293; see also *Branch*, 262 N.C. at 730, 138 S.E.2d at 495. We find no abuse of discretion by the trial court and we overrule this assignment of error.

## II.

By their second assignment of error, plaintiffs contend the trial court erred in finding that the church properly adopted the bylaws. Plaintiffs argue that defendants' failure to introduce into evidence a copy of the original bylaws at trial created a "negative inference" which should have been accorded greater weight by the trial court. We do not agree.

"It is well settled that the court's findings of fact are conclusive if supported by any competent evidence even though there is evidence to the contrary that would support different findings." *Church v. Church*, 27 N.C. App. 127, 129, 218 S.E.2d 223, 224 (1975). Pastor David Smith testified he had been defendant's pastor for twenty-three years, and he testified extensively on behalf of defendant regarding the bylaws and their adoption. Although defendant never introduced a copy of the original bylaws into evidence, it introduced a copy of the current bylaws, as well as a copy of the minutes of a council meeting in 2001 where the bylaws were amended. The amended bylaws in 2001, one year prior to plaintiffs' termination from the church, allowed for termination of membership as a form of scriptural discipline. The amended bylaws superseded the original bylaws, rendering the original bylaws irrelevant. Because plaintiffs were terminated from membership in the church under the amended bylaws, not the original bylaws, and because there was substantial evidence tending to show the bylaws were properly amended, there was no need to introduce a copy of the original bylaws. Moreover, the issue before the trial court was not the *existence* of the bylaws, but rather whether they had been properly adopted. There was competent evidence of record tending to show the original bylaws were duly adopted in either late 1987 or early 1988, and the trial court therefore did not err in finding such. We overrule this assignment of error.

III.

Finally, plaintiffs argue the trial court abused its discretion by denying their motion for a continuance prior to trial. Plaintiffs argue that defendant consistently blocked their attempts to obtain a copy of the bylaws, and that they were then unfairly surprised at trial when Pastor Smith testified regarding the adoption of the bylaws in 1987/1988. Plaintiffs argue that they must be granted a new trial. We do not agree.

The record shows that, although plaintiffs requested a copy of the bylaws from defendant by informal letter, plaintiffs never submitted formal discovery requests to defendant during the weeks prior to the instant trial, or at any point prior to the parties' first appeal, nor did they subpoena the bylaws for production at trial. Notably, plaintiffs attached relevant portions of the bylaws to their complaint. Plaintiffs have stated no grounds for abuse of discretion by the trial court, and we perceive none. We overrule this assignment of error.

Affirmed.

Judges HUDSON and CALABRIA concur.

Report per Rule 30(e).