

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-792
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

CRYSTAL GAIL DELLINGER,
Plaintiff-Appellee,

v.

McDowell County
No. 08 CVS 1006

CLIFF S. BARNES,
Defendant-Appellant.

Appeal by Defendant from judgment entered 30 December 2010
by Judge Alan Z. Thornburg in Superior Court, McDowell County.
Heard in the Court of Appeals 15 November 2011.

*Carter & Kropelnicki, P.A., by Steven Kropelnicki, for
Plaintiff-Appellee.*

*LeCroy and Willcox, PLLC, by M. Alan LeCroy, for Defendant-
Appellant.*

McGEE, Judge.

Defendant asked Plaintiff to marry him in late 1998.
According to Plaintiff's evidence, Defendant broke their
engagement in 2007 after Defendant began dating another woman.
Plaintiff filed a complaint on 30 October 2008, which was
amended on 7 May 2010, in which Plaintiff sought damages related
to Defendant's alleged breach of his promise to marry Plaintiff.

At trial, the jury found that Defendant had breached a contract to marry Plaintiff, and awarded Plaintiff \$130,000.00 in damages. Judgment was entered on 30 December 2010. Defendant appeals.

I.

In Defendant's first argument, he contends that the trial court erred "in denying Defendant's motions to dismiss Plaintiff's claims for damages for breach of a promise to marry." We disagree.

We initially note that Defendant's sole "motion to dismiss" was filed on 5 March 2009 along with Defendant's answer, and was a Rule 12(b)(6) motion to dismiss for failure to state a claim. There is no indication in the record that this Rule 12(b)(6) motion to dismiss was ever heard. Defendant directs us to portions of the transcript in which he claims he argued his "motions to dismiss." However, the first portion of the transcript to which Defendant directs us concerns Defendant's motion for partial summary judgment, which was denied. Neither the denial of a motion to dismiss for failure to state a claim, nor the denial of a motion for summary judgment, is reviewable on appeal following a final judgment on the merits. *Duke University v. Stainback*, 84 N.C. App. 75, 76-77, 351 S.E.2d 806, 807 (1987) (citations omitted).

At the close of Plaintiff's evidence Defendant purported to "renew [his] motion to dismiss" and also moved for a directed verdict. Following the close of all evidence, Defendant again purportedly renewed his motion to dismiss, and renewed his motion for a directed verdict. The record contains no evidence of any motion to dismiss that was ever argued to the trial court. Furthermore, in a civil jury trial a motion for a directed verdict is the only proper means to challenge the sufficiency of the evidence presented at trial. *Creasman v. Savings & Loan Assoc.*, 279 N.C. 361, 366, 183 S.E.2d 115, 118 (1971). Defendant made no reviewable "motion to dismiss" in the present case.

Assuming *arguendo* that the denial of Defendant's motions for directed verdict are properly before us, we cannot grant Defendant the relief he seeks. Defendant requests that this Court "dismiss with prejudice the Plaintiff's claims for breach of promise to marry and set aside the verdicts rendered in favor of Plaintiff in this matter."

However, the record contains no evidence that Defendant, following entry of judgment, moved for judgment notwithstanding the verdict.

An appellate court, on finding that a trial judge should have granted a motion for directed verdict made at the close of all the evidence, *may not direct entry of*

judgment in accordance with the motion unless the party who made the motion for a directed verdict also moved for judgment [notwithstanding the verdict] in accordance with Rule 50(b)(1) or the trial judge on his own motion granted, denied or redened the motion for a directed verdict in accordance with Rule 50(b)(1).

N.C.R. Civ. P. 50(b)(2) (emphasis added).

Since [Defendant] made no post-verdict motion and since the trial judge after verdict did not of his own motion consider whether a directed verdict should have been entered, this Court "may not direct entry of judgment in accordance with the motion" by reason of the express terms of Rule 50(b)(2).

Hensley v. Ramsey, 283 N.C. 714, 729, 199 S.E.2d 1, 9 (1973).

We cannot grant Defendant the relief requested. This argument is dismissed.

II.

We recount Defendant's second argument in its entirety below:

It is respectfully submitted that the charge in this matter concerning damages for breach of promise to marry did mislead the jury. The damage charge when reviewed in its entirety did mislead the jury to believe that reasonably certain damages are proven simply by any evidence less than those "calculated with the exactness of high degree of mathematical certainty." Moreover, the charge that evidence concerning damages meets the foreseeability requirement that "follow the breach in the usual course of events, [such that] there is sufficient reason for the defendant to

foresee [them]," misleads the jury as to how to review the foreseeability requirement.

This "argument" is insufficient to present any issue for appellate review and is therefore dismissed. N.C.R. App. P. 28 (2011).

Dismissed.

Judges STEELMAN and McCULLOUGH concur.

Report per Rule 30(e).