

IN THE SUPERIOR COURT OF MONROE COUNTY

STATE OF GEORGIA

FORSYTH SECOND BAPTIST CHURCH, :  
INC., NETTIE PARKER, ESSIE :  
HERNDON, LINDA HARRIS, WAYNE :  
HARRIS, and VIVIAN YOUGHN, :

Plaintiffs, :

vs. :

JOHN HESTER and CHARLOTTE :  
HESTER, Individually and as Former :  
Officers of FORSYTH SECOND BAPTIST :  
CHURCH, INC., ROCK SPRINGS :  
CONGREGATIONAL METHODIST :  
CHURCH, INC., ABC and XYZ :  
CORPORATIONS and JOHN DOE, :

Defendants. :

CIVIL ACTION NO.: 2016-CV-57

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR NEW TRIAL**

COMES NOW, John Hester, Charlotte Hester, and Rock Springs Congregational Methodist Church, Inc., Defendants in the above-styled matter, and moves this Court to dismiss the Plaintiffs' Motion for New Trial, and in support thereof, states as follows:

**PROCEDURAL BACKGROUND**

The Court had a hearing on the Defendants' Motion to Dismiss on April 7, 2016. The Court granted the Defendants' Motion, dismissing the matter with prejudice. That Final Order was signed on April 11, 2016, and filed with the Court on April 18, 2016. No trial was had on this matter. On or about May 11, 2016, the Plaintiffs filed a Motion for a New Trial, alleging that the Court failed to consider evidence at the April 7, 2016, hearing. For the reasons that follow, the Motion for a New Trial must be denied.

## ARGUMENT AND CITATION OF LAW

A motion for a new trial is not the proper vehicle to review the Court's judgment as there was no trial in which a verdict was rendered, either by the Court or a jury.

Objections which go to the judgment only, and do not extend to the verdict, cannot properly be made grounds of a motion for new trial. A motion for new trial seeks to set aside the verdict. No new trial is necessary to correct a judgment or decree. If a judgment or decree is erroneous or illegal, direct exception should be taken to it at the proper time.

*Barber v. Barber*, 157 Ga. 188, 121 S.E. 317 (1924). The Supreme Court has explicitly held that a Motion for New Trial is not the proper procedural vehicle to review a Court's ruling on a Motion to Dismiss. *Pillow v. Seymour*, 255 Ga. 683, 683, 341 S.E.2d 447, 447 (1986). "Where a motion for new trial is not a proper vehicle for review of a trial court's action, the motion has no validity..." *Id.* at 683, 448.

Moreover, "[a] motion for new trial must be predicated upon some intrinsic defect which does not appear upon the face of the record or pleadings." O.C.G.A. § 9-11-60. The Plaintiffs' Motion fails to articulate what intrinsic defect gives rise to a right to a new trial. The Motion only articulates that the Court failed to consider certain evidence. However, the Court never excluded any evidence at the April 7, 2016, hearing or prohibited the Plaintiffs from introducing evidence. The Plaintiffs cannot now complain that the Court should have considered certain evidence when they never sought to present that evidence to the Court. "OCGA § 9-11-60 provides the exclusive method by which civil judgments may be attacked. It does not permit the use of post-judgment motions to raise arguments or introduce evidence previously known to the parties but not addressed at trial." *Kim v. McCullom*, 222 Ga. App. 439, 441, 474 S.E.2d 654, 657 (1996) (internal citations omitted).

Even if a Motion for New Trial were the appropriate vehicle to reexamine the Court's judgment, it would only be proper where new evidence has been uncovered since the hearing. *See Debter v. Stephens*, 297 Ga. 652, 653, 777 S.E.2d 244 (2015). However, the Plaintiffs' Motion for New Trial makes it clear that the evidence in question has always been available. The Plaintiffs had the opportunity to present evidence at the hearing, if they so chose, but failed to do so. Through the Plaintiff's Motion for New Trial, the Plaintiff is seeking to present "evidence that he should have produced, but failed to, earlier in the case." *Debter v. Stephens*, 297 Ga. 652, 653, 777 S.E.2d 244 (2015). This type of evidence is not suitable to be admitted through a Motion for New Trial.

Here, the Plaintiffs seek review of the Court's judgment on a Motion to Dismiss via a Motion for New Trial. This simply is not the proper procedural vehicle for challenging the Court's judgment. Accordingly, the Plaintiffs' Motion is "without validity." Even if the Motion were valid, the Plaintiffs are simply seeking to introduce evidence available to them from the beginning of this case after forgoing the opportunity to do so at the April 7, 2016, hearing. They cannot now attack the judgment after choosing not to introduce the evidence at the hearing. For these reasons, the Defendants respectfully request that the Court dismiss or strike the Plaintiffs' Motion for a New Trial.

Additionally, the time for an appeal of this matter has now passed.

A notice of appeal shall be filed within 30 days after entry of the appealable decision or judgment complained of; but when a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the notice shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.

O.C.G.A. § 5-6-38(a). The judgment in this case was signed on April 11, 2016, and filed into the record on April 18, 2016. Thus, even in the most favorable scenario for the Plaintiffs, the 30-day

deadline ran as of May 18, 2016, and that deadline is not tolled due to the filing of the improper motion for new trial.


“Where a motion for new trial is not a proper vehicle for review of a trial court's action, the motion has no validity and will not extend the time for filing the notice of appeal.” *Pillow v. Seymour*, 255 Ga. 683, 683, 341 S.E.2d 447, 448 (1986); *Shine v. Sportservice Corp.*, 140 Ga. App. 355, 355, 231 S.E.2d 130, 130 (1976); *Debter v. Stephens*, 297 Ga. 652, 653, 777 S.E.2d 244 (2015) (“because his motion for new trial was not a proper vehicle for review of the trial court's action, his notice of appeal was untimely filed and this appeal must be dismissed.”).


“The proper and timely filing of a notice of appeal is an absolute requirement to confer jurisdiction upon an appellate court.” *Moncrief v. Tara Apartments, Ltd.*, 162 Ga. App. 695, 695, 293 S.E.2d 352, 353 (1982). Accordingly, where a Notice of Appeal has been untimely filed, the Trial Court must dismiss the appeal. O.C.G.A. § 5-6-48(b)(1); *Sunn v. Mercury Marine*, 173 Ga. App. 593, 593, 327 S.E.2d 562, 563 (1985) (“Appellant having failed to timely file her notice of appeal, the trial court properly dismissed her appeal.”).

As such, the Defendants would respectfully request that this Court also dismiss any late filed Notice of Appeal filed by the Plaintiffs and bring this matter to a full and final conclusion.

Respectfully submitted this 8<sup>th</sup> day of June, 2016.

**SMITH, WELCH, WEBB & WHITE, LLC**

  
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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the within and foregoing **DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR NEW TRIAL** upon all parties to this matter by hand delivery and depositing a true copy of same in the U.S. Mail, proper postage prepaid, addressed as follows:

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This 8<sup>th</sup> day of June, 2016.

**SMITH, WELCH, WEBB & WHITE, LLC**

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