

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-429

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

PAUL C. RHOADES, JR.,
ARTHUR L. RHOADES, and
MARY ANN ANDERS,
Plaintiffs,

v.

Forsyth County
No. 03 CVS 4918

JANET R. SNYDER,
Executrix of the Estate
of Ethel G. Rhoades,
Defendant.

Appeal by defendant from judgment entered 29 September 2004 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 28 November 2005.

John G. Knight, for plaintiff-appellees.

Carol L. Teeter, for defendant-appellant.

JACKSON, Judge.

On 6 August 2003, plaintiffs Paul C. Rhoades, Arthur L. Rhoades, and Mary Ann Anders filed a complaint against Janet R. Snyder. The parties are all siblings and are the children of Ethel G. Rhoades, deceased. Defendant is the executrix of Ethel G. Rhoades' estate. Plaintiffs alleged waste and sought compensatory and injunctive relief, as well as treble damages pursuant to North Carolina General Statutes, section 1-538. The trial court granted

plaintiffs a temporary restraining order. On 19 August 2003, the trial court granted a preliminary injunction.

On 29 September 2004, after defendant failed to appear in court, the trial court entered judgment in favor of the plaintiffs. The court awarded plaintiffs \$25,518.77 with interest and trebled the damage award pursuant to North Carolina General Statutes, section 1-538. The judgment was served on defendant by mail on 1 October 2004. On 10 November 2004, defendant moved for an order setting aside the judgment and for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. Defendant appeals.

The threshold issue to consider in this case is whether defendant's appeal is timely. The record on appeal indicates that judgment was entered on 29 September 2004, yet the notice of appeal was not filed until 30 November 2004. The appeal was, therefore, untimely unless the 30-day time limitation was tolled under N.C. R. App. P. 3(c). "'The running of the time for filing and serving a notice of appeal in a civil action . . . is tolled . . . by a timely [Rule 59] motion' for a new trial or to alter or amend a judgment." *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997) (citing N.C. R. App. P. 3(c), (c)(3), and (c)(4)). Rule 59(b) of the North Carolina Rules of Civil Procedure provides that motions for new trial "shall be served not later than 10 days after entry of the judgment." N.C. Gen. Stat. § 1A-1, Rule 59(b). Here, however, defendant did not move for a new trial until 10 November 2004, long after this ten day period had expired. Thus, the time for giving notice of appeal was not tolled, and notice of

appeal was not timely filed. Accordingly, we dismiss the appeal as untimely filed.

Appeal dismissed.

Judges WYNN and CALABRIA concur.

Report per Rule 30(e).