

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-353
NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2011

APPLEWOOD PROPERTIES, LLC and
APPLECREEK EXECUTIVE GOLF CLUB,
LLC,
Plaintiffs,

v.

Gaston County
No. 06 CVS 5528

NEW SOUTH PROPERTIES, LLC, APPLE
CREEK VILLAGE, LLC and HUNTER
CONSTRUCTION GROUP, INC., and
URBAN DESIGN PARTNERS,
Defendants.

Appeal by Plaintiffs from order entered 16 April 2010 by
Judge Jesse B. Caldwell, III in Gaston County Superior Court.
Heard in the Court of Appeals 17 November 2011.

*Womble Carlyle Sandridge & Rice, by Raboteau T. Wilder, Jr.
and Amanda G. Ray, for Plaintiffs-Appellants.*

*Dean & Gibson, PLLC, by Michael G. Gibson, Jeremy S. Foster
and Sarah M. Bowman, for Hunter Construction Group, Inc.,
Defendants-Appellees.*

BEASLEY, Judge.

Applewood Properties, LLC and Apple Creek Executive Golf,
LLC (Plaintiffs) filed this action on 4 December 2006 asserting

claims of negligence, nuisance, trespass, violations of the Sedimentation Pollution Control Act (SPCA), negligence *per se*, and intentional misconduct and gross negligence against Defendants New South Properties of the Carolinas, LLC (New South), Apple Creek Village, LLC (Village), and Hunter Construction Group, Inc. (Hunter). Plaintiffs added an additional Defendant, Urban Design Partners (Urban Design), on 7 April 2009. Hunter and Village subsequently moved for partial summary judgment and New South moved for summary judgment. On 16 April 2010, the trial court granted the motions for summary judgment as to the SPCA claims, and denied the motions with respect to all other claims. The trial court filed the order on 19 April 2010 and Hunter's counsel served the order upon the other parties on the same date. The trial court tried all of the remaining claims beginning on 19 April 2010. The jury returned a verdict in favor of Plaintiffs, finding Plaintiffs were damaged by the negligence of New South/Apple Creek, Hunter, and Urban Design, and were entitled to recover damages in the amount of \$675,000. The trial court subsequently filed a judgment on 10 June 2010 awarding Plaintiffs damages in the amount of \$675,000.

Plaintiffs filed and served a notice of appeal on 23 September 2010 seeking review of the 19 April 2010 order allowing Defendants' motions for summary judgment as to the SPCA claim. On 1 July 2011, this Court allowed Plaintiffs' motion to withdraw their appeal against all Defendants except Hunter. For the following reason, we *sua sponte* dismiss the appeal in its entirety.¹

"In order to confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Bailey v. State*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). Rule 3(c) provides that in a civil action, notice of appeal must be filed and served:

(1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or

(2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period; provided that

(3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all

¹ Because the claims decided by the 10 June 2010 judgment are not before this Court, we address only the propriety of this appeal regarding the 19 April 2010 order.

parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

N.C.R. App. P. 3(c). "The provisions of Rule 3 are jurisdictional, and failure to follow the requirements thereof requires dismissal of an appeal." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 802, 486 S.E.2d 735, 737 (1997).

The record on appeal shows that the final judgment completely disposing of all pending claims was entered on 10 June 2010 but notice of appeal was not filed until 23 September 2010, well after expiration of the thirty-day period for taking appeal. The notice of appeal in this case is thus untimely unless the tolling provisions of Rule 3(c)(2) or Rule (c)(3) apply. The record does not show that the judgment was served more than three days after filing in the clerk's office or that any applicable tolling motions were filed. We are bound by the record on appeal, and if the record "fails to disclose the necessary jurisdictional facts we have no authority to do more than dismiss the appeal." *Mason v. Commissioners of Moore*, 229 N.C. 626, 629, 51 S.E.2d 6, 8 (1948).

Dismissed.

Judges ERVIN and THIGPEN, JR. concur.

Report per Rule 30(e).