An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-617

Filed: 15 January 2019

Caldwell County, No. 16 CVS 768

BEVERLY M. SWANSON, Plaintiff,

v.

DEREK SHEA ENLOE and wife, LISA A. ENLOE, Defendants.

Appeal by plaintiff from order entered 9 January 2018 by Judge Nathaniel J. Poovey in Caldwell County Superior Court. Heard in the Court of Appeals 13 November 2018.

*Joseph C. Delk, III, for plaintiff-appellant.*

*Wilson, Lackey & Rohr, P.C., by Destin C. Hall, for defendant-appellee Derek Shea Enloe.*

*No brief was filed for defendant-appellee Lisa A. Enloe.*

BRYANT, Judge.

Where plaintiff Beverly M. Swanson (hereinafter "plaintiff") failed to serve notice of appeal on all parties in violation of our Rules of Appellate Procedure and where there is no indication the right to service of the notice of appeal was waived, we dismiss plaintiff's appeal.

On 6 July 2016, plaintiff filed a complaint against defendants Derek Shea Enloe (hereinafter "defendant Derek Enloe") and wife Lisa A. Enloe (hereinafter "defendant Lisa Enloe") in Caldwell County Superior Court. Plaintiff is the daughter of Dolly Moretz, who died intestate on 27 September 2013. In 1999, a General Warranty Deed purporting to reflect the signature of Moretz was recorded in the Caldwell County Registry which transferred forty-eight and one-half acres of Moretz's real property to defendants. In 2004, a second General Warranty Deed also purporting to reflect the signature of Moretz was recorded with the Caldwell County Registry which transferred an additional five and one-third acres of real property from Moretz to defendants. Plaintiff alleged that Moretz's signatures on both the 1999 and 2004 General Warranty Deeds were forgeries, and thus, the deeds were invalid. Plaintiff filed notice of lis pendens describing the property with the Superior Court.

Defendant Lisa Enloe (plaintiff's daughter) responded to the complaint by submitting a "To whom it may concern" letter to the Clerk of Court. Defendant Derek Enloe (plaintiff's son-in-law) answered the complaint and raised statute of limitations as an affirmative defense. Defendant Derek Enloe subsequently filed a motion for summary judgment. Following a 4 December 2017 hearing on the motion, the trial court concluded that Defendant Derek Enloe was entitled to summary judgment. The court concluded that defendant Lisa Enloe was also entitled to summary judgment.

On 9 January 2018, the court entered an order allowing summary judgment as to both defendants. Plaintiff appeals.

---

Motion to Dismiss

On appeal, we first consider defendant Derek Enloe's motion to dismiss plaintiff's appeal for failing to satisfy the requirements of Appellate Procedure Rule 3(a) (Filing the Notice of Appeal). Defendant Derek Enloe argues that plaintiff violated Rule 3(a) by failing to serve notice of appeal on defendant Lisa Enloe (defendant Derek Enloe's wife, though the two were separated); the violation warrants the sanction of dismissal; and the issue presented on appeal is not so rare or exceptional as to warrant a suspension of our Rules of Appellate Procedure pursuant to Rule 2. We grant defendant Derek Enloe's motion[1] and dismiss plaintiff's appeal.

Pursuant to Rule 3 of our Rules of Appellate Procedure (Appeal in Civil Cases—How and When Taken), "[a]ny party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special

---

[1] Even if defendant Derek Enloe lacks standing to raise a motion to dismiss based on a failure to serve another party with a notice of appeal, "this Court still may and will consider whether plaintiff-appellant[] complied with Rule 3(a)." *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 98, 693 S.E.2d 684, 687 (2010) (citing *Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008); *Guthrie v. Conroy*, 152 N.C. App. 15, 17, 567 S.E.2d 403, 406 (2002) ("[D]efendant's motion for dismissal presents a question of jurisdiction, which may be addressed by this Court at any time, *sua sponte*, regardless of whether defendants properly preserved it for appellate review." (citation omitted)). Thus, we consider the question presented.

proceeding may take appeal by filing notice of appeal with the clerk of superior court *and serving copies thereof upon all other parties* . . . ." N.C. R. App. P. 3(a) (2018) (emphasis added) (Filing the Notice of Appeal). We note that the record on appeal does not contain a certificate of service as proof that the notice of appeal to this Court had been served on defendant Lisa Enloe.

In *Hale*, the appellant failed to provide proof of service of the notice of appeal on the appellee. Our Supreme Court adopted the dissenting opinion which reasoned that while failure to provide proof of service rendered this Court "jurisdictionally infirm[,] . . . the filing and service of the Notice of Appeal . . . [is] analogous to the Complaint and service thereof[,]" which could be waived. *Hale v. Afro-Am. Arts Int'l*, 110 N.C. App. 621, 625, 430 S.E.2d 457, 459 (Wynn, J., dissenting), *rev'd for reasoning stated in the dissenting opinion*, 335 N.C. 231, 436 S.E.2d 588 (1993). Therein, the party for whom proof of service had not been included in the record had nevertheless participated in the appeal by filing a brief with this Court. *Id.*

In *Lee v. Winget Rd., LLC*, 204 N.C. App. 96, 693 S.E.2d 684 (2010), this Court noted that "pursuant to *Hale*, *filing* of the notice of appeal is jurisdictional, but where a notice of appeal is filed, *service* of the notice of appeal upon all parties may be waived." *Id.* at 100, 693 S.E.2d at 688 (citation omitted).

> [N]onjurisdictional requirements [are] designed primarily to keep the appellate process flowing in an orderly manner. . . . And, notably, the appellate court faced with a default of this nature possesses discretion in fashioning a remedy

> to encourage better compliance with the rules.
>
> We stress that a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal. . . .
>
> Rules 25 and 34, when viewed together, provide a framework for addressing violations of the nonjurisdictional requirements of the rules. . . .
>
> . . . .
>
> In the event of substantial or gross violations of the nonjurisdictional provisions of the appellate rules, however, the party . . . responsible for such representational deficiencies opens the door to the appellate court's need to consider appropriate remedial measures. Rules 25 [(Penalties for Failure to Comply with Rules)] and 34 [(Frivolous Appeals; Sanctions)] vest the appellate court with the authority to promote compliance with the appellate rules through the imposition of one or more enumerated sanctions. . . .
>
> . . . Noncompliance with the rules falls along a continuum, and the sanction imposed should reflect the gravity of the violation. We clarify, however, that only in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate.

*Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198–99, 657 S.E.2d 361, 365–66 (2008) (citations omitted).

> To determine the severity of the rule violation, this Court is to consider: "[ (1) ] whether and to what extent the noncompliance impairs the court's task of review[,] [ (2) ] . . . whether and to what extent review on the merits would frustrate the adversarial process . . . [, and (3) ] [t]he court may also consider the number of rules violated[.]" *Id.* at 200, 657 S.E.2d at 366–67 (citations omitted).

*Lee*, 204 N.C. App. at 102, 693 S.E.2d at 689–90 (alterations in original) (quoting *Dogwood Dev. & Mgmt. Co.*, 362 N.C. at 200, 657 S.E.2d at 366–67).

(1) Whether Noncompliance Impairs the Court's Review and

(2) Whether Review on the Merits Would Frustrate the Adversarial Process

As defendant Derek Enloe points out in his motion to dismiss the appeal, "[b]ecause Defendant Lisa A. Enloe was never informed of the fact that there was an appeal which affects . . . [her] interests, this Court has no way of knowing the positions . . . [Defendant Lisa Enloe] would have taken in this appeal." Unlike in *Hale*, defendant Lisa Enloe, the party for whom there is no proof of service in the record, has not participated in this appeal by filing a brief, and there is no indication that notice of service was waived. Moreover, the record does not contain a hearing transcript or a narrative of the arguments made during the hearing on defendant's motion for summary judgment.

> Failure to serve notice of appeal on all parties is a significant and fundamental violation. A notice of appeal is intended to let all parties to a case know that an appeal has been filed by at least one party. Because [one] of the parties to this case w[as] never informed of the fact that there was an appeal which affects [her] interests, this Court has no way of knowing the positions th[is] part[y] would have taken in this appeal. . . . *The unserved [defendant] ha[s] been denied the opportunity to be heard* . . . .

*Id.* at 102–03, 693 S.E.2d at 690 (emphasis added).

Thus, because the unserved defendant has been denied the opportunity to participate in this appeal, that denial impairs our review and would frustrate the adversarial process. *See id.* at 103, 693 S.E.2d at 690 ("[F]ailure to serve the notice of appeal upon all parties is a 'gross violation' of the rules 'which frustrates the adversarial process[.]' " (citation omitted)).

Conclusion

We hold that on these facts, plaintiff's failure to provide proof of service of the notice of appeal on defendant Lisa Enloe in violation of Rule 3 of our Rules of Appellate Procedure frustrates the adversarial process sufficiently to warrant the sanction of dismissal. Accordingly, we grant defendant Derek Enloe's motion to dismiss plaintiff's appeal.

DISMISSED.

Judges DILLON and ZACHARY concur.

Report per Rule 30(e).