

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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

2022-NCCOA-108

No. COA21-122

Filed 15 February 2022

Wake County, No. 19CVS15587

SAMUEL NEHEMIAH, Plaintiff,

v.

AMERIGLIDE, INC., Defendant.

Appeal by plaintiff from order entered 7 October 2020 by Judge George B. Collins, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 19 October 2021.

*Carnes Warwick PLLC, by Amy Lynne Schmitz and Jonathan Carnes, for plaintiff-appellant.*

*Burns, Day & Preshnell, P.A., by Julia Young Kirkpatrick, for defendant-appellee.*

STROUD, Chief Judge.

¶ 1 We do not reach the merits of this appeal because we do not have jurisdiction.

As our Supreme Court has explained:

Under Rule 3(a) of the Rules of Appellate Procedure, a party entitled by law to appeal from a judgment of superior court rendered in a civil action may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties in a timely manner.

This rule is jurisdictional.<sup>[1]</sup> *Booth v. Utica Mutual Ins. Co.*, 308 N.C. 187, 301 S.E.2d 98 (1983). If the requirements of this Rule are not met, the appeal must be dismissed. *Currin-Dillehay Building Supply, Inc. v. Frazier*, 100 N.C. App. 188, 394 S.E.2d 683 (1990). The appellant has the burden to see that all necessary papers are before the appellate court. *State v. Stubbs*, 265 N.C. 420, 144 S.E.2d 262 (1965). *The notice of appeal must be contained in the record. Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971).

*Cromwell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563, 402 S.E.2d 407, 408 (1991) (per curiam) (emphasis added). North Carolina Rule of Appellate Procedure 9(a)(1)(i) requires the notice of appeal to be included within the record on appeal. In *Cromwell Constructors*, when the record did not contain a notice of appeal, our Supreme Court directed this Court to dismiss the case because this Court lacked jurisdiction. 328 N.C. at 563–64, 402 S.E.2d at 408.

¶ 2

Here, the record on appeal does not contain a notice of appeal as required by Rules of Appellate Procedure 3 and 9. N.C. R. App. P. 3(a), 9(a)(1)(i). Although the parties included a statement in the record that “Plaintiff-Appellant appeals from the 4 October 2020 Order Allowing Relief From and Denying Enforcement of foreign judgment . . . . Plaintiff filed and served written notice of appeal on 2 November

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<sup>1</sup> The Supreme Court later clarified only proper filing of a notice of appeal is jurisdictional; proper service of that notice impacts personal jurisdiction rather than subject matter jurisdiction, so a service issue can be waived. *MNC Holdings, LLC v. Town of Matthews*, 223 N.C. App. 442, 446, 735 S.E.2d 364, 366 (2012) (citing *Hale v. Afro-American Arts Int’l*, 335 N.C. 231, 436 S.E.2d 588 (1993)).

2020,” this statement is not sufficient to confer jurisdiction upon this Court. “It is well established law that the parties cannot, by consent, give a court jurisdiction over *subject matter* of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver or estoppel.” *State v. Fisher*, 270 N.C. 315, 318, 154 S.E.2d 333, 336 (1967) (emphasis in original). Without the notice of appeal, we cannot confirm the timely filing of the notice or the substance of the notice. The appellant has therefore failed to meet his “burden to see that all necessary papers are before the appellate court.” *Cromwell Constructors*, 328 N.C. at 563, 402 S.E.2d at 408. Because the notice of appeal is not contained in the record, we dismiss due to a lack of jurisdiction. *See id.*, 328 N.C. at 563–64, 402 S.E.2d at 408 (directing this Court to dismiss an appeal for lack of jurisdiction because the record on appeal did not contain a notice of appeal).

DISMISSED.

Judges INMAN and GORE concur.

Report per Rule 30(e).