

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA22-940

Filed 16 May 2023

Buncombe County, No. 22CVS549

CHRISTOPHER R. MOONEY, Plaintiff,

v.

FASTENAL COMPANY, Defendant.

Appeal by plaintiff from order entered 10 August 2022 by Judge Steven Warren in Buncombe County Superior Court. Heard in the Court of Appeals 21 March 2023.

Christopher R. Mooney, pro se plaintiff-appellant.

Ogletree, Deakins, Nash, Smoak & Stewart, PC, by Benjamin R. Holland and Meredith F. Hamilton, for defendant-appellee.

GORE, Judge.

Plaintiff Christopher R. Mooney appeals the final order dismissing his amended complaint with prejudice. The trial court granted defendant's motion to dismiss the original complaint and defendant's motion to dismiss plaintiff's amended complaint. Upon review of the parties' briefs and the record, we dismiss this appeal.

I.

On 11 February 2022, plaintiff filed a complaint against defendant raising multiple claims against defendant including unlawful employment practices, employment discrimination, violations of the Retaliatory Employment Discrimination Act (“REDA”), and violations of the Occupational Safety and Health Act of North Carolina. On 21 March 2022, defendant filed a motion to dismiss pursuant to Rules 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6) of the North Carolina Rules of Civil Procedure. These rules pertain to: lack of personal jurisdiction, insufficient process, insufficient service of process, and failure to state a claim upon which relief may be granted. On 11 April 2022, the trial court heard arguments for the first motion to dismiss the original complaint. On that same day, plaintiff filed an amended complaint.

On 13 April 2022, the trial court granted defendant’s motion to dismiss the original complaint citing a lack of personal jurisdiction, insufficient process, and insufficient service of process. Plaintiff then filed a Motion for Relief from Judgment/Order on 25 April 2022, which was ultimately denied. On 9 May 2022, defendant filed a motion to dismiss plaintiff’s amended complaint, which came before the trial court on 11 July 2022. The trial court granted the motion to dismiss the amended complaint for lack of personal jurisdiction, insufficient process, insufficient service of process, lack of subject matter jurisdiction for the REDA claim, and failure to state a claim upon which relief may be granted.

Plaintiff filed a timely notice of appeal that sought notice of appeal from “the Order entered orally on July 11, 2022 by the Honorable Judge Steve Warren” and that this order “grants the defendants (sic) motion to dismiss the plaintiffs (sic) amended complaint.” This coincides with Judge Warren’s order dismissing the amended complaint which was heard 10 July 2022 and entered on 10 August 2022.

Plaintiff claims he attempted to acquire the transcripts from the multiple hearings at the trial court, but he failed to timely request transcripts from the correct transcriptionist and to comply with the requirements of Rule 7 as to obtaining and filing transcripts. He ultimately did not include the transcripts as part of the record on appeal. Defendant raised multiple objections to plaintiff’s proposed record on appeal through a supplemental record filed on 23 January 2023. The record on appeal includes plaintiff’s purported settled record on appeal along with a supplement per Rule 11(c) filed on 11 November 2022, a second filing of plaintiff’s supplemental record, and defendant’s supplemental record per Rule 9(b)(5).

II.

Plaintiff argues the trial court erred by granting defendant’s motion to dismiss the amended complaint and by granting defendant’s motion to dismiss the original complaint. Defendant argues this Court is limited jurisdictionally to review only the dismissal of the amended complaint, and that this Court should dismiss the appeal for multiple appellate rule violations. Upon review, we agree both the record and

plaintiff's brief are replete with appellate rule violations, and therefore, we do not consider the additional arguments.

Our Courts consider appellate rule violations through three lenses: waiver, jurisdictional defects, and non-jurisdictional defects. *Dogwood Dev. & Mgmt. Co., v. White Oak Transp. Co.*, 362 N.C. 191, 194, 657 S.E.2d 361, 363 (2008). A jurisdictional defect prevents this Court from asserting authority over the appeal and requires immediate dismissal. *Id.* at 197, 657 S.E.2d at 365. Whereas dismissal is only appropriate for non-jurisdictional defects when such defects fall within the categories of “substantial failure” or “gross violation.” *Id.* at 199, 657 S.E.2d at 366. “This Court identifies gross or substantial violations by examining (1) whether and to what extent the noncompliance impairs the court’s task of review and whether and to what extent review on the merits would frustrate the adversarial process, . . . and (2) the number of rules violated.” *Matter of Foreclosure of Deed of Tr. Executed by Moretz*, ___ N.C. App. ___, ___, 882 S.E.2d 572, 576 (2022) (quotation marks and citation omitted).

We first consider the jurisdictional sufficiency of plaintiff’s notice of appeal. North Carolina Rules of Appellate Procedure 3(d) specifies the notice of appeal must “designate the judgment or order from which appeal is taken.” A notice of appeal that fails to comply with Rule 3(d) limits the jurisdiction of this Court. *See Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350–51 (1994). Accordingly, we are jurisdictionally limited to review only the judgment specified in the notice of appeal.

In the present case, plaintiff filed the notice of appeal on 10 August 2022 and although the notice does not specifically refer to the filed Order of dismissal, it stated he was giving notice of appeal from “the Order entered orally on July 11, 2022 by the Honorable Judge Steve Warren” and that this order “grants the defendants (sic) motion to dismiss the plaintiffs (sic) amended complaint.” The trial court’s order dismissing the amended complaint was entered on 10 August 2022 and this order was based upon the 11 July 2022 hearing. Therefore, if we generously construe the notice of appeal, plaintiff designated appeal from the Order Dismissing the Amended Complaint.

Next, we consider the non-jurisdictional defects. Plaintiff served the record on appeal and defendant filed a supplemental record pursuant to Rules 9 and 11 to object to multiple appellate rule violations by plaintiff. Review of the record and plaintiff’s brief reveals plaintiff committed multiple rule violations including: failing to include all the pages of the amended complaint, adjusting the record without defendant’s knowledge, adding a document to the record that was not admitted at trial, and failing to substantiate his claims on appeal with legal support.

First, plaintiff only included the first page of the amended complaint followed by “duplicative slips” with reference to pages in the original complaint. Plaintiff made this revision after he settled the record with defendant and without defendant’s knowledge, which also violates the appellate rules. *See* N.C.R. App. P. 11(b) (2022). It is imperative to include the pleadings for which the appellant seeks review. The

appellate rules require the inclusion of “copies of the pleadings” and the documents “necessary to an understanding of all issues presented on appeal, unless they appear in another component of the record on appeal.” N.C.R. App. P. 9(a)(1)(d), (j) (2022). Further, “[a]n amended complaint has the effect of superseding the original complaint.” *Hyder v. Dergance*, 76 N.C. App. 317, 319–20, 332 S.E.2d 713, 714 (1985). While defendant supplemented the record under Rule 9(b)(5) with the amended complaint, this was only because plaintiff failed to properly include the complete pleading, which impeded defendant’s ability to respond to plaintiff’s arguments. Rule 9(b)(5) is not a proper vehicle to absolve plaintiff’s duty to comply with Rule 9(a)(1)(j), and plaintiff’s failure to include the amended complaint is a violation of Rule 9(a)(1)(j).

Second, plaintiff included a “determination and right to sue letter from the N.C. Department of Labor” in the record that was not properly admitted at the trial court level, which is another violation under Rule 11(c). This letter was necessary for the meaningful review of plaintiff’s REDA claim, but it cannot be brought to this Court’s attention for the first time on appeal.

Third, plaintiff fails to cite legal authority throughout his brief to ground his claims on appeal. *See* N.C.R. App. P. 28(b)(6) (2022). Plaintiff does broadly cite to Rule 12 and 15 of the North Carolina Rules of Civil Procedure, but most of his brief cites vague legal concepts without citation and when he does cite to the law, the laws cited do not pertain to nor support his arguments. It is not the duty of this Court to

create arguments on appeal when the appellant fails to do so. *See K2HN Constr. NC, LLC v. Five D Contractors, Inc.*, 267 N.C. App. 207, 215, 832 S.E.2d 559, 565 (2019) (“[I]t is not the role of this Court to create an appeal for an appellant or to supplement an appellant's brief with legal authority or arguments not contained therein.”).

Finally, plaintiff faults the trial court for the exclusion of transcripts on the record. The exclusion of transcripts from the multiple hearings occurred because plaintiff failed to meet his burden to enter into a contract with the transcriptionist for the transcripts from the hearings and to file any transcript produced within the time constraints apportioned by the appellate rules. *See* N.C.R. App. P. 7. Although plaintiff argues the court denied him access to the transcripts, we lack jurisdiction to consider this argument because he failed to appeal any order as to transcripts. Further, he failed to state any basis for this contention and the record before this Court fails to support this claim in any way.

In conclusion, the many non-jurisdictional defects are gross and substantial violations of the appellate rules when considered together. These violations have the effect of “frustrat[ing] the adversarial process” and impairing this Court’s task of meaningful review. *K2HN Constr. NC, LLC*, 267 N.C. App. at 215, 832 S.E.2d at 565. Because the record is replete with non-jurisdictional defects, it necessitates dismissal.

III.

For the foregoing reasons, we dismiss the appeal.

MOONEY V. FASTENAL CO.

Opinion of the Court

DISMISSED.

Chief Judge STROUD and Judge HAMPSON concur.

Report per Rule 30(e).