

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1022

NORTH CAROLINA COURT OF APPEALS

Filed: 6 June 2006

THE COUNTY OF DURHAM, and  
THE CITY OF DURHAM,  
Plaintiffs,

v.

Durham County  
No. 03 CVS 457

EDGAR R. DAYE and wife ELLA M.  
DAYE (now both deceased), Owners;  
ALL ASSIGNEES, HEIRS AT LAW and  
DEWISEES of EDGAR R. DAYE and/or  
ELLA M. DAYE together with all  
CREDITORS and LIEN HOLDERS  
regardless of how or through whom  
they claim, and ANY and ALL PERSONS  
CLAIMING ANY INTEREST IN THE  
ESTATES OF EDGAR R. DAYE and/or  
ELLA M. DAYE,  
Defendants.

Appeal by defendants from judgment entered 18 March 2005 by  
Judge John W. Smith in the Superior Court in Durham County. Heard  
in the Court of Appeals 10 April 2006.

*Assistant County Attorney Curtis Massey, for plaintiff-  
appellee County of Durham.*

*The Banks Law Firm, by Lena D. Wade, for plaintiff-appellee  
City of Durham.*

*Michaux & Michaux, P.A., by Eric C. Michaux, and Browne,  
Flebotte, Wilson & Horn, P.L.L.C., by Daniel R. Flebotte, for  
defendant-appellants.*

HUDSON, Judge.

On 27 January 2003, the City of Durham and County of Durham ("plaintiffs") initiated tax foreclosure proceedings in the district court against Edgar R. and Ella M. Daye ("the Dayes") as record owners of real property at 3603 Dearborn Drive in Durham. Edgar and Ella Daye, who had died intestate in 1999 and 1997, respectively, did not answer and default judgment was entered against them on 7 April 2003. Notice of sale was issued and the property was sold to high bidder Chidinma Nweke on 20 June 2003. On 22 April 2004, W.E. Daye, brother of Edgar Daye, filed a motion in the cause to set aside the sale of the property on behalf of himself and all other heirs. On 5 August 2004, W.E. Daye became administrator of the Dayes' estates. By supplemental motion 27 August 2004, W.E. Daye and the other defendants asked that they be declared owners of the property and be awarded damages and attorney fees. Plaintiff Durham County moved to dismiss and for sanctions. After Chidinma Nweke was joined as a necessary party, the matter was removed to superior court.

Following a hearing, on 10 December 2004, the court set aside the sale of the property to Chidinma Nweke and joined all of the heirs as owners. On 18 March 2005, following a hearing, the court dismissed the claims against plaintiff Durham County on grounds of sovereign immunity, and denied Durham County's motion for sanctions by separate order. Defendants appeal from the dismissal of their claims for damages. Plaintiffs cross-assign error to the trial court's denial of the motion to dismiss on four additional grounds. On 5 August and 22 November 2005, plaintiffs moved this Court to

dismiss defendants' appeal. On 22 November 2005, plaintiffs also moved to strike a section of defendants' response to its first motion to dismiss and a transcript of the proceedings of 26 July 2005. For the reasons discussed below, we dismiss this appeal.

In 2003, when the plaintiffs initiated the tax foreclosure, the Dayes were the owners of record of the property. Ella M. Daye died on 28 January 1997, and was survived for two years by her husband Edgar R. Daye who resided at a retirement home for the last years of his life. When there was no response to the complaint and civil summons which were mailed return receipt requested to the Dayes' last known address, plaintiffs' counsel proceeded to follow methods of service detailed in N.C. Gen. Stat. § 105-374. Plaintiff published a notice of service of process in the local newspaper once a week for three weeks. However, W.E. Daye received neither actual notice of the foreclosure action nor plaintiffs' complaint and civil summons.

We note that defendants' brief contains several technical violations of the Rule of Appellate Procedure, including the failure to bring forward assignments of error in their brief, attachment of improper materials to their brief, and failure to include required materials in the appendix to their brief. See N.C.R. App. P. 28(b)(6), 28(d), and 28(d)(1)c. More significantly, Rule of Appellate Procedure 28(b)(4) requires the appellant to include in its brief to this Court a statement of grounds for appellate review. "When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate

review on the ground that the challenged order affects a substantial right." N.C.R. App. P. 28(b)(4).

Here, only plaintiff Durham County moved to dismiss defendants' request for damages; plaintiff City of Durham made no motions. Thus, only the claims for damages against Durham County were dismissed in the trial court's 18 March 2005 order; as the remaining claims are still pending, this appeal is interlocutory. *Cunningham v. Brown*, 51 N.C. App. 264, 267, 276 S.E.2d 718, 722 (1981). The defendants' brief contains no statement of the grounds for appellate review, no Rule 54 certification by the trial judge, and no explanation of why the Court should review this interlocutory order. "It is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order; instead, the appellant has the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994). The Rules of Appellate Procedure "are mandatory and . . . failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999). Because we are dismissing this appeal, we dismiss defendant's first motion to dismiss and motion to strike, and plaintiffs' motion to amend the record as moot.

Dismissed.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).