

Appeal Deadlines and Tolling under Rule 3(c)(2): Don't Be So Sure!

Even if you don't know much about North Carolina's [Rules of Appellate Procedure](#), you probably know this: There's a 30-day time frame in which to appeal a civil judgment, and this deadline is *jurisdictional*—an untimely notice of appeal “mandates dismissal” of the appeal. *E.g.*, *Bailey v. State*, 353 N.C. 142, 156 (2000). In other words, Thou Shalt Not Miss Thy Appeal Deadline. Naturally, then, a would-be appellant needs to know when the 30-day appeal period begins and ends.

The general time requirement is set out in Rule 3(c)(1), which makes clear that the notice of appeal must be filed and served within 30 days *after entry of judgment* as long as “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.” (Served pursuant to Rule 5 within three days of entry of judgment.) Under Rule 3(c)(2), however, when the party is **not** served within that three day period, the notice of appeal must be filed and served within 30 days “after service upon the party of a copy of the judgment.”

By the plain language of Rule 3(c)(2), a party not served within three days would be led to think that its 30-day appeal clock starts when service is made. Not so fast. In a series of fairly recent opinions, the Court of Appeals has held that, **if the appellant had some sort of actual notice of the judgment during those three days after its entry, Rule 3(c)(2) does not apply**. If there was actual notice, the 30 days instead began to run upon entry of judgment. Here, in brief, are the opinions:

- First, in [Manone v. Coffee](#), 217 N.C. App. 619 (2011), the trial court's order was entered on August 16. A staff member from defense counsel's office picked up the order from the courthouse on August 19. Defense counsel herself didn't see it until the next day, August 20, and she then served a copy by mail to plaintiff. Defense counsel then filed and served a notice of appeal 30 days later on September 20. The trial court dismissed the appeal as untimely, and the Court of Appeals affirmed. Noting that while service was not made within the three days after entry of the order, the appealing party had *actual notice* of the order within those three days, and therefore should not be permitted to take advantage of the tolling provision in Rule 3(c)(2). The court held that “when a party receives actual notice of the entry and content of a judgment, as was done in this case by obtaining the...Order directly from the court house...the party's actual notice essentially substitutes for the service requirements.” The court further noted that it did not matter that defense counsel herself did not see the order until August 20; “actual notice” came about when a person in her office saw it. Defendant was therefore required to file and serve the notice of appeal within 30 days after *entry of the order* under Rule 3(c)(1).

- Next, in [Magazian v. Creagh](#), 759 S.E.2d 130 (2014), the trial court's order was entered on September 20. Plaintiff was not served the order within three days, but did receive an email notifying him of the order within that time frame. (Reminder: Email is not a proper service method. Presumably the email came from defense counsel, but the email itself was not in the record so we don't know for sure.) Plaintiff appealed within 30 days of receiving the email. Citing *Manone*, the Court of Appeals dismissed the appeal, holding that receipt of actual notice during the three-day service window "substitutes for proper service." Plaintiff was therefore required to file and serve the notice of appeal within 30 days of entry of the trial court's order, which he had not done. See also [Kennedy v. Ramirez](#), 233 N.C. App. 599 (2014) (unpublished) (dismissing an appeal as untimely based on notice in the form of an email copy of the order without a certificate of service).
- And finally, earlier this year, in [Wilkins v. WakeMed](#), _ S.E.2d _ (Jan. 5, 2016), the Court of Appeals again affirmed dismissal of an appeal where the notice was filed and served more than 30 days after entry of judgment. Plaintiff had received actual notice within three days after entry. The court stated that, "[I]f plaintiff had actual notice of the orders within three days of entry, but waited more than thirty days (from the date the orders were entered) before filing the notice of appeal, its notice would be untimely." [An interesting threshold question was whether service by the court, rather than by a party, counted as "service" for purposes of the appeal deadline despite the "party" language of Rule 58. Spoiler alert: Yes it did.]

In light of *Manone*, *Magazian*, and *Wilkins*, it is a risky proposition to rely on Rule 3(c)(2) if there is *any* possibility the appellee could show that the appellant received actual notice of the judgment within three days of entry. We know from *Manone* that a law firm employee getting a copy from the court file counts as actual notice (even if the attorney actually working on the case doesn't see it), and from *Magazian* that getting an email about it (from apparently anyone?) also can be considered actual notice. But what else? Perhaps a voicemail from opposing counsel noting the contents of the orders? A text message? A courtesy message from a trial court administrator? A Facebook post by opposing counsel bragging about the result? A tweet? LinkedIn? The point is, it's probably not worth taking the risk. So, attorneys new to this issue may want to grab their copies of the appellate rules, go to Rule 3(c)(2), and note in the margin, "EXCEPT WHERE THERE'S ACTUAL NOTICE!" Or, perhaps better yet, as suggested on the [North Carolina Appellate Practice Blog](#), **play it safe, pretend Rule 3(c)(2) doesn't exist, and file and serve the notice of appeal within 30 days after entry of judgment.**

A lot more could be (and has been) said about these cases. My point with this post is to give an alert rather than analyze merits. But if you're interested in more thoughts, see, for example, discussions by appellate specialists, [here](#), [here](#), and [here](#). Also note that the North Carolina Bar Association Appellate Rules Committee [web page](#) provides various educational resources about appellate practice, including a new [Notice of Appeal Tip Sheet](#).