

Municipal Law Notes

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Procedure; Motion to Enforce a Settlement; Public Enterprises; Impact Fees; Appellate Procedure; Rules Violations; Dismissal; Sanctions Applied to Counsel

Quality Built Homes, Inc. v. Town of Aberdeen, ___ N.C. App. ___ (No. COA19-240, Moore— 11/19/19) (*unpublished*)

- ***Holding***— In plaintiffs’ appeal from order granting defendant-Town’s motion to enforce a settlement, Court of Appeals dismisses plaintiffs’ appeal, imposes sanctions, and remands to the trial court to determine costs and fees. “Our ability to conduct meaningful appellate review is impaired due to Plaintiffs’ gross and substantial noncompliance with the North Carolina Rules of Appellate Procedure.”
- ***Key Excerpt***— The Court initially stated, “The order appealed from is presumed to be correct, and the burden of showing error rests with the appellant. See London v. London, 271 N.C. 568, 570-71, 157 S.E.2d 90, 92 (1967). Rule 28 of the North Carolina Rules of Appellate Procedure lists nonjurisdictional requirements that are ‘designed primarily to keep the appellate process flowing in an ordinary manner’ and provide this

Court with both a basis and understanding to review a party’s assertions and arguments. Dogwood Dev. & Mgmt. Co. v. White Oak Transp. Co., 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) (citations and quotations omitted). Compliance with these rules is mandatory. *Id.* at 194, 657 S.E.2d at 362; *see also* Viar v. N.C. Dep’t of Transp., 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2004). This Court notes Plaintiffs petitioned for and were granted a ‘motion for extension of time’ to file their brief.”

The Court then observed that plaintiffs’ brief violated the following: (1) N.C. R. App. P. Rule 28(b)(5), by both: (a) failing to provide a complete *Statement of the Facts*, and (b) failing to provide any references in the *Statement of the Facts* to the corresponding pages in the record; and, (2) N.C. R. App. P. Rule 28(b)(6), by failing to cite any cases, statutes, or other authority in their argument concerning any error in the trial court’s order granting defendant-Town’s motion to enforce a settlement.

The Court emphasized, “The Rules of Appellate Procedure ‘are necessary in

order to enable the courts to properly discharge their duty of resolving disputes.” Dogwood, 362 N.C. at 193, 657 S.E.2d at 363 (citations, ellipses, and quotations omitted). ‘[N]oncompliance with the appellate rules does not, *ipso facto* mandate dismissal of an appeal.’ *Id.*”

“Our Supreme Court in Dogwood held: ‘the appellate court may not consider sanctions of any sort when a party’s noncompliance with nonjurisdictional requirements of the rules does not rise to the level of a “substantial failure” or “gross violation.”’ *Id.* at 199, 657 S.E.2d at 366. ‘[O]nly in the most egregious instances of nonjurisdictional default will dismissal of the appeal be appropriate.’ *Id.* at 200, 657 S.E.2d at 366.”

The Court observed, “The ‘Statement of Facts’ contained in Plaintiffs’ brief states in its entirety: ‘During the latter half of 2018 the parties engaged in settlement negotiations.’ The foregoing statement is neither complete nor references the record as is required by Rule 28(b)(5). Thus, Plaintiffs’ failure to provide a ‘summary of all material facts underlying the matter in controversy which are necessary to understand all issues presented for review’ interferes with this Court’s understanding of the issues on appeal. N.C. R. App. P. 28(b)(5); see State v. Cagle, 182 N.C. App. 71, 74, 641 S.E.2d 705, 708 (2007) (sanctioning defendant’s counsel for failure to comply with Rule 28(b)(5) when he did not provide a full, complete, and non-argumentative statement of facts or supporting references to the record on appeal).”

The Court further observed, “Also, under Rule 28(a), where a party ‘does not set forth any legal argument or citation to authority to support this contention, [it is] deemed abandoned.’ State v. Evans, 251 N.C. App. 610, 625, 795 S.E.2d 444, 455 (2017); see N.C. R. App. P. 28(a). Here, Plaintiffs failed to

cite any legal authority in support of and when making their argument. Their claims are deemed abandoned. See Hines v. Arnold, 103 N.C. App. 31, 404 S.E.2d 179 (1991) (dismissing plaintiff’s appeal for violation of Rule 28(b)(5) because she failed to reference in her brief the assignment of error supporting the argument).”

The Court concluded its opinion by emphasizing, “Plaintiffs’ brief and arguments fail to cite any facts, cases, statutes, or other authority to show purported error in the trial court’s order. Plaintiffs have failed to comply with this Court’s mandatory appellate rules. However, we conclude ‘that it would be unjust to penalize [Plaintiffs] for the conduct of [their] counsel.’ Cagle, 182 N.C. App. at 74, 641 S.E.2d at 708. Instead, we choose to sanction Plaintiffs’ counsel. Plaintiffs’ counsel shall personally pay the costs of this appeal and reimburse Plaintiffs for their attorneys’ fees incurred with the preparation and filing of their appellate brief and pay for the fees incurred for preparing Defendant’s appellate brief. Pursuant to Rules 25 and 34 of the Rules of Appellate Procedure, this matter is remanded to the trial court for a hearing to determine and assess such costs and fees. N.C. R. App. P. 34(b)(2). Plaintiffs’ appeal is dismissed, and this cause is remanded.”

- **Synopsis**— Appeal by plaintiffs from November 2018 order. Dismissed and remanded in a *per curiam* opinion. (Panel consisting of Judge Tyson, Judge Collins and Judge Brook.)

***Nota Bene* (N.B.)**

Other Recent Decision of Note

**Land Use; UDO; Notice of Violation;
Electronic Gaming Operations;**

Affidavit of Service; Proper Parties Hancock v. City of Monroe, ___ N.C. App. ___ (No. COA19-236, Union— 11/19/19) (*unpublished*) (Court of Appeals affirms trial court’s order upholding respondent-City Board of Adjustment’s order dismissing as untimely petitioners’ appeal from a Notice of Violation of the Code of Ordinances regarding electronic gaming operations. In so holding, Court of Appeals rejects petitioners’ contentions that trial court erred by affirming Board of Adjustment’s order in light of petitioners’ allegations that: (1) the Notice of Violation was not sent to the proper parties and (2) no affidavit of service concerning the Notice of Violation was filed. (Appeal by petitioners from December 2018 order. Affirmed. Opinion by Judge Collins, with Judge Berger and Judge Arrowood concurring.))