NO. COA01-827

NORTH CAROLINA COURT OF APPEALS

Filed: 6 August 2002

EASTERN OUTDOOR, INC.,
Petitioner-Appellant,

v.

Wake County
No. 00 CVS 03194

DAVID MCCOY, Secretary of Transportation of the State of North Carolina,
Respondent-Appellee.

Appeal by petitioner from an order entered 2 March 2001 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 17 April 2002.

Waller Law Firm, PLLC, by Betty S. Waller, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Gaines M. Weaver, for the State.

McGEE, Judge.

Eastern Outdoor, Inc. (petitioner) is a North Carolina corporation engaged in the business of providing outdoor advertising. Petitioner submitted an application for an outdoor advertising permit to the North Carolina Department of Transportation (DOT) in February 1999, requesting permission to place a back-to-back sign with two displays adjacent to Interstate 95 in Johnston County, North Carolina. DOT staff inspected the site informally and advised petitioner that DOT would only permit

a single-faced sign for the site petitioner had requested. Petitioner re-submitted an application for an outdoor advertising permit for a single-faced sign on or about 5 May 1999. DOT granted petitioner's application for a single-faced sign in a letter dated 10 May 1999. This same letter denied petitioner's application for a back-to-back sign and informed petitioner of petitioner's right to appeal the decision. Petitioner did not appeal the denial of the back-to-back sign application.

During the course of site preparation and construction of the sign, petitioner decided to erect a back-to-back sign. Petitioner did not inform DOT. In September 1999, DOT observed that petitioner had erected the back-to-back sign in contravention of the permit DOT had issued. DOT revoked petitioner's permit in a letter dated 13 October 1999. Petitioner submitted an administrative appeal to the Secretary of Transportation, David McCoy (respondent), who upheld the permit revocation in a Final Decision dated 14 February 2000. Petitioner filed a petition for judicial review pursuant to N.C. Gen. Stat. § 136-134.1. The matter was heard on 15 November 2000, and the trial court affirmed the Secretary's decision in an order dated 2 March 2001. Petitioner appeals from this order.

I.

Petitioner first argues the trial court erred in applying the doctrine of collateral estoppel to petitioner's request for review, thereby failing to consider the issues necessary to a proper *de novo* review of respondent's final decision.

"'Collateral estoppel precludes relitigation of an issue decided previously in judicial or administrative proceedings provided the party against whom the prior decision was asserted enjoyed a full and fair opportunity to litigate that issue in an earlier proceeding.'" *Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 268, 488 S.E.2d 838, 840 (1997) (quoting *In re McNallen*, 62 F.3d 619, 624 (4th Cir. 1995)). Petitioner contends the 10 May 1999 letter denying the permit for a back-to-back sign was not a final decision. Our Court has stated that

> [w]hether an administrative decision is *res judicata* depends upon its nature; decisions that are "judicial" or "quasi-judicial" can have that effect, decisions that are simply "administrative" or "legislative" do not. 2 Am. Jur. 2d *Administrative Law* Sec. 497 (1962). Though the distinction between a "quasi-judicial" determination and a purely "administrative" decision is not precisely defined, the courts have consistently found decisions to be quasi-judicial when the administrative body adequately notifies and hears before sanctioning, and when it adequately provides under legislative authority for the proceeding's finality and review.

In re Mitchell, 88 N.C. App. 602, 605, 364 S.E.2d 177, 179 (1988). While *Mitchell* dealt with disciplinary proceedings, the same principles apply in this case. In the case before us, petitioner applied for a permit. Thus, petitioner had adequate notice DOT would be making a decision; furthermore, DOT orally notified petitioner of its decision before officially issuing it. DOT gathered information and orally informed petitioner it would not accept petitioner's original application, but disclosed conditions under which it would accept an application. Petitioner complied

with these instructions. DOT then denied the original permit in writing, clearly stating the reasons for the denial and informing petitioner of petitioner's appeal remedies.

DOT is authorized to regulate outdoor advertising pursuant to N.C. Gen. Stat. § 136-130 (1999) and is authorized to issue permits pursuant to N.C. Gen. Stat. § 136-133 (1999). DOT has set out its procedures for the application and approval of permits, including the authority of the district engineer to approve or deny application requests, in N.C. Admin. Code tit. 19A, r. 2E.0208 (June 2000) and N.C. Admin. Code tit. 19A, r. 2E.0211 (June 2000). We hold the district engineer's decision to revoke or grant a permit is a final decision for purposes of collateral estoppel. Petitioner was given adequate remedies to contest the denial of its permit, and petitioner failed to pursue those remedies.

Petitioner also argues collateral estoppel does not apply because the original permit was denied on one ground, while the revocation of the permit was based on separate grounds. However, in both instances, the underlying issue present was that the erection of a back-to-back structure with two display signs was in violation of N.C. Admin. Code 19A r. 2E.0211 because one side of the structure would not be visible when trees in the area reached maturity. This rule is the reason petitioner's permit was denied on 10 May 1999, and, after petitioner ignored the denial of this permit, this rule is the reason petitioner's permit was revoked on 13 October 1999. We overrule this assignment of error.

II.

Petitioner next argues the trial court erred in that the trial court's findings of fact are not supported by the evidence; therefore, the trial court's conclusions of law are erroneous. Petitioner contends there was insufficient evidence to support the Secretary's revocation of the permit because of "misrepresentations based on material facts on the application."

In the case before us, petitioner applied for a permit for a back-to-back sign, which was denied. Petitioner then received a permit for a single-faced sign, but petitioner chose to erect a back-to-back sign. Petitioner did not inform DOT of its intent to erect a back-to-back sign in contravention of the permit issued; instead, it remained silent. Petitioner's employee testified petitioner intended to inform DOT but forgot to do so.

In a non-jury trial, on appeal the standard of review for this Court "is whether there existed competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. The trial judge acts as both judge and jury and resolves any conflicts in the evidence." *G.R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 110, 362 S.E.2d 807, 810 (1987) (citations omitted). In such a case, the trial court "is empowered to assign weight to the evidence presented at trial as it deems appropriate." *Id.*, 88 N.C. App. at 112, 362 S.E.2d at 811.

The trial court found as fact that petitioner

> intended to erect a double backed sign all along, remained silent, accepted the permit as issued and erected the double backed sign. This constituted a material (omission)

> misrepresentation of an existing fact in accepting the single sided permit without disclosing its ultimate intention which was to erect a double backed sign.

The trial court apparently assigned little weight to petitioner's explanation of remaining silent. Nonetheless, there is competent evidence to support the trial court's finding of fact that petitioner misrepresented material facts at the time of its application. Furthermore, there is sufficient evidence in the record that petitioner altered the sign from what the permit allowed. The permit allowed a single-faced sign; petitioner erected a back-to-back sign. Petitioner continues to assert in all of its arguments that DOT does not have authority to regulate the number of sides of a billboard. We reiterate petitioner lost the opportunity to contest the denial of its request for a back-to-back sign when petitioner failed to appeal from the denial of its original permit. We overrule this assignment of error.

The trial court's order affirming respondent's decision is affirmed.

Affirmed.

Judges WALKER and CAMPBELL concur.

Report per Rule 30(e).