

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-1484

NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2006

OVERCASH GRAVEL &
GRADING CO., INC.,
Plaintiff

v.

Cabarrus County
No. 04 CVS 1068

TIMOTHY L. WAHL,
Defendant

Appeal by defendant from a judgment filed 17 February 2005 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 7 June 2006.

Ferguson, Scarbrough, Hayes & Price, P.A., by James E. Scarbrough, for plaintiff-appellee.

Hanzel & Newkirk, by Robert B. Newkirk, III, for defendant-appellant.

BRYANT, Judge.

Timothy L. Wahl (defendant) appeals from a judgment filed 17 February 2005 ordering him to pay Overcash Gravel & Grading Co., Inc. (plaintiff) \$12,775.27 plus interest.

Defendant is the owner of a tract of property located in Davidson, North Carolina. Defendant initially hired D.W. Cherry to construct a riding ring and barn for horses on the property. However, D.W. Cherry did not have the appropriate equipment to grade the riding ring properly and advised defendant to locate a contractor with a laser grader to perform the necessary and proper

grading. Subsequently, defendant hired plaintiff to finely grade the riding ring to enable it to drain properly. Plaintiff possessed the necessary equipment required to complete defendant's job. Pursuant to an oral contract with defendant, plaintiff began working on the property on 27 April 2001, grading two riding rings, digging drainage ditches and clearing brush and trees. Plaintiff requested defendant to remove a fence that enclosed one ring; however defendant declined to do so, thereby limiting the slope of grade for that ring. Plaintiff completed the project on 8 June 2001. Defendant was mailed an invoice for the work performed by plaintiff in the amount of \$12,775.27 and indicated on the invoice that "past due invoices charged a 1.5% per month service charge." Defendant received several calls from plaintiff asking for payment; however, defendant did not pay plaintiff despite several promises to do so. On one occasion defendant told plaintiff he had paid plaintiff's agent, when in fact he had not.

On 12 April 2004, plaintiff commenced this civil action. At the filing of his Answer and Counterclaim, defendant for the first time, protested the amount of plaintiff's invoice and contested the quality of plaintiff's grading work. The trial court concluded "plaintiff and [] defendant entered into a valid and binding oral contract for the performance of labor and the furnishing of materials on [] defendant's property." The trial court ordered defendant to pay plaintiff \$12,775.27 with interest from 23 June 2001 at the rate of 18% per annum (1.5% per month) until the date

of the entry of judgment, 17 February 2005, and thereafter at 8% per annum until paid in full. Defendant appeals.

In the instant case, defendant has failed to comply with the North Carolina Rules of Appellate Procedure, therefore, we decline to reach the merits of this case. Rule 28(a) of the North Carolina Rules of Appellate Procedure provides that it is the "function of all briefs required or permitted by these rules . . . to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon." N.C. R. App. P. 28(a). It is further required by our rules of appellate procedure that:

Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. The body of the argument shall contain citations of the authorities upon which the appellant relies.

N.C. R. App. P. 28(b)(6). Here, defendant violated Rule 28 when he failed to reference each assignment of error under each question presented within the argument section of his brief and failed to reference each assignment of error with numbers and pages where they appear in the record on appeal. N.C. R. App. P. 28(b)(6). Defendant's assignments of error are stated:

1. The judgment entered on February 17, 2005 is not supported by the findings of fact or conclusions of law.
2. The denial of appellant[']s motion for a directed verdict was erroneous.

In these assignments of error, defendant has failed to "state plainly and concisely and without argumentation the legal basis upon which error is assigned." N.C. R. App. P. 10(c); *Collins v. St. George Physical Therapy*, 141 N.C. App. 82, 89, 539 S.E.2d 356, 361-62 (2000); *Rogers v. Colpitts*, 129 N.C. App. 421, 423, 499 S.E.2d 789, 790 (1998); *Kimmel v. Brett*, 92 N.C. App. 331, 335, 374 S.E.2d 435, 437 (1988).

Defendant fails to argue either assignment of error stated above. Rather, in the first two issues contained in his brief, he argues that the trial court's conclusion as to the "account stated" theory of recovery was based on *insufficient evidence* presented at trial. Further, none of the arguments raised by defendant references any of its assignments of error, nor do any of the arguments make reference to any pages in the record on appeal. Therefore, the first two issues raised in defendant's brief are deemed abandoned pursuant to Rule 28(b)(6). See *Walker v. Walker*, ___ N.C. App. ___, ___, 624 S.E.2d 639, 641 (2005) ("[I]t is long settled that the 'scope of appellate review is limited to the issues presented by assignments of error set out in the record on appeal; where the issue presented in the appellant's brief does not correspond to a proper assignment of error, the matter is not properly considered by the appellate court.'" (citation omitted).

In the third issue argued in the brief, defendant fails to

support his argument with "stated or cited authority." Therefore, this final issue is deemed abandoned. N.C. R. App. P. 28(b)(6); *State v. Walters*, 357 N.C. 68, 85, 588 S.E.2d 344, 355, cert. denied, 540 U.S. 971, 157 L. Ed. 2d 320 (2003) (a party's assignment of error is deemed abandoned in the absence of citation to supporting authority).

In another violation of the rules, defendant failed to provide a "full and complete statement of the facts." N.C. R. App. P. 28(b)(5). This section of the brief "should [have combined] a non-argumentative summary of all material facts underlying the matter in controversy which [were] necessary to understand all questions presented for review, supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits." *Consol. Elec. Distribs., Inc. v. Dorsey*, 170 N.C. App. 684, 686, 613 S.E.2d 518, 520 (2005) (internal citation omitted). Defendant's statement of the facts contained argumentative statements and omitted material facts, such as when plaintiff began working for defendant and the terms of their agreement. This was insufficient and in violation of Rule 28(b)(5).

Finally, defendant references transcript numbers in his statement of facts; however he has failed to provide this Court with a copy of the transcript, despite noting in the record that a transcript would be filed pursuant to Rule 9(c) of our appellate rules. Without the ability to review this transcript, we cannot determine the merits of this case. *Hicks v. Alford*, 156 N.C. App. 384, 389-90, 576 S.E.2d 410, 414 (2003) ("It is the duty of the

appellant to ensure that the record is complete. . . . 'An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.'" (internal citations omitted)). In addition, Rule 28(b)(4) requires that appellant's brief contain a "statement of the grounds for appellate review," which "shall include citation of the statute or statutes permitting appellate review." N.C. R. App. P. 28(b)(4). Defendant has failed to include this required statement.

Our rules of appellate procedure "must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate court might rule." *Viar v. North Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (citing *Bradshaw v. Stansberry*, 164 N.C. 356, 79 S.E. 302 (1913)). Due to the number and significance of the rules violations, we decline to invoke our discretionary power pursuant to Rule 2, as our Supreme Court has recently stated "it is not the role of the appellate courts . . . to create an appeal for an appellant . . . and 'failure to follow these rules will subject an appeal to dismissal.'" *Viar*, 359 N.C. at 402, 610 S.E.2d at 361 (citation omitted). Accordingly, we dismiss this appeal.

Dismissed.

Judges HUNTER and CALABRIA concur.

Report per Rule 30(e).