

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA06-107

NORTH CAROLINA COURT OF APPEALS

Filed: 17 October 2006

JANNIE S. CORNELIUS,

Plaintiff,

v.

Rowan County
No. 05 CVD 1261

JESSE D. CORRY, and wife,
CLARA W. CORRY,

Defendants.

Appeal by defendants from judgment entered 3 November 2005 by Judge Charlie Brown in Rowan County District Court. Heard in the Court of Appeals 18 September 2006.

Woodson, Sayers, Lawther, Short, Parrott & Walker, LLP, by Donald D. Sayers and Andrew J. Abramson, for plaintiff-appellee.

Hancock, Faust and Nance, PLLC, by R. Darrell Hancock, for defendant-appellants.

JACKSON, Judge.

On 25 May 2005, Jannie Cornelius ("plaintiff") filed an action seeking a mandatory injunction to have a house owned by Jesse Corry, Jr. and his wife, Clara Corry, (collectively "defendants") removed from her property. Plaintiff and defendants own adjoining tracts of land. In 1985, defendants moved a house onto their property. The house actually was located partially on defendants' property, and extended approximately twenty-two feet onto the

property owned by plaintiff's predecessor in title. At the time the house came to be moved to the property, both defendants and plaintiff's predecessor in title were under a mutual mistake of fact as to the location of the house, both believing it to be located entirely upon defendants' property.

Plaintiff acquired her tract of land by deed in 2001. Approximately three years later, she had the property surveyed. The survey revealed that defendants' house was located approximately twenty-two feet across the boundary line separating her property from defendants.

In a judgment filed 3 November 2005, the trial court granted plaintiff a mandatory permanent injunction, and ordered defendants to remove the encroaching structure within 180 days of the date of the order. From this judgment defendants appeal.

Before addressing the substance of defendants' appeal, we note that defendants' brief fails in several ways to comply with our Rules of Appellate Procedure. Defendants' brief is single-spaced, in violation of the requirements of Rule 26(g). N.C. R. App. P. Rule 26(g)(1) (2006). Further, defendants' brief is typed in the proportionally spaced type Times New Roman, however defendants failed to include a certificate indicating compliance with the required page limitations and word-count limits, as required by the rules. N.C. R. App. P. 28(j)(2) (2006). We also note the statement of facts in defendants' brief fails to include citations to page references in the record, and the brief does not include the required statement of the Court's standard of review. N.C. R.

App. P. 28(b)(5) and (6) (2006). These requirements have been a part of the Rules of Appellate Procedure for many years, and the Rules are mandatory, and serve an important purpose. Specifically, the rules regarding the spacing and typeface of the briefs are designed to "facilitate[] the reading and comprehension of large numbers of legal documents by members of the Court and staff." *State v. Riley*, 167 N.C. App. 346, 347-48, 605 S.E.2d 212, 214 (2004). Due to numerous violations of our Rules of Appellate Procedure, we invoke our powers pursuant to Rule 25(b), and order as a sanction that defendants' counsel pay the printing costs of this appeal. We instruct the Clerk of this Court to enter an order accordingly.

On appeal, the standard of review "for a decision rendered in a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (2001) (citing *G. R. Little Agency, Inc. v. Jennings*, 88 N.C. App. 107, 362 S.E.2d 807 (1987)). When an appellant fails to assign error to a trial court's findings of fact, the findings are "'presumed to be correct.'" *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998) (citation omitted). "As [d]efendant failed to assign error to any findings of fact, our review is limited to the question of whether the trial court's findings of fact, which are presumed to be supported by competent evidence, support its conclusions of law and judgment." *State v.*

Downing, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (2005) (citing *Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591-92, 525 S.E.2d 481, 484 (2000)). However, we review the trial court's conclusions of law *de novo*. *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

Defendants contend the trial court erred in granting plaintiff a mandatory permanent injunction requiring defendants to remove the encroaching structure from plaintiff's property. Defendants argue that in so ordering, the trial court failed to consider and make findings of fact regarding the relative convenience and inconvenience, and the comparative injuries to the parties, as required by the Court's holding in *Clark v. Asheville Contracting Co., Inc.*, 72 N.C. App. 143, 323 S.E.2d 765 (1984), *modified in part, aff'd in part, and remanded*, 316 N.C. 475, 342 S.E.2d 832 (1986).

In *Clark*, the plaintiff property owners brought suit against a contracting company seeking a mandatory injunction to have the company remove waste rock material being placed near their homes, as by placing the materials there, the defendants had created a nuisance. The evidence in *Clark* indicated that the cost to remove the waste would be \$13,500,000.00, and would take nine years, however the trial court failed to make any findings of fact on the evidence. *Id.* at 149, 323 S.E.2d at 769. This Court held, and our Supreme Court reiterated, that prior to granting an injunction and ordering removal of the waste, the trial court was required to make findings of fact regarding "the relative convenience-inconvenience

and the comparative injuries to the parties." *Id.* (citation omitted).

However, this Court's holding in *Clark* is not the most compelling precedent which should be taken into consideration in determining whether or not to order the removal of an encroachment. This Court has held that "[w]hen one builds upon another's land without permission or right, a continuing trespass is committed. '[T]he usual remedy for a continuing trespass is a permanent injunction which in this case would be a mandatory injunction for removal of the encroachment.'" *Young v. Lica*, 156 N.C. App. 301, 305-06, 576 S.E.2d 421, 424 (2003) (quoting *Williams v. South & South Rentals*, 82 N.C. App. 378, 383, 346 S.E.2d 665, 669 (1986)). In addition to a consideration of the "relative convenience-inconvenience and the comparative injuries to the parties," as stated in *Clark*, a trial court must also consider "whether the owner acted in good faith or intentionally built on the adjacent land and whether the hardship incurred in removing the structure is disproportionate to the harm caused by the encroachment. Mere inconvenience and expense are not sufficient to withhold injunctive relief. The relative hardship must be disproportionate.'" *Id.* at 306-07, 576 S.E.2d at 425 (quoting *Williams*, 82 N.C. App. at 384, 346 S.E.2d at 669).

In the instant case, defendants contend the trial court failed to make any findings regarding the injury plaintiff would suffer as a result of granting or not granting the mandatory injunction. The trial court found the cost to defendants to move the house would be

approximately \$10,000.00 to \$15,000.00. The trial court also found that in initially moving the house to its present location in 1985, defendants paid \$12,800.00 in expenses, and that the house currently had a tax value of approximately \$78,000.00. We hold the trial court's findings, which are binding upon this Court, are sufficient to satisfy the requirements of both *Clark* and *Lica*. The instant case is distinguishable from that in *Clark*, in that the cost and time associated with removing the encroachment is minimal in comparison with that in *Clark*. Also, the instant case involves the removal of an encroaching structure, whereas *Clark* involved the removal of waste that constituted a nuisance and was not actually located on the plaintiffs' properties. Moreover, this Court has held that when an encroachment and continuing trespass has been established, and the trespass is being committed by an entity that is not quasi-public, then the plaintiff is entitled to the relief of having the encroaching structure removed. See *Young*, 156 N.C. App. at 307, 576 S.E.2d at 425; *Williams*, 82 N.C. App. at 383-84, 346 S.E.2d at 669 (Court held that an encroachment by even one foot is sufficient to constitute a trespass warranting removal of the encroaching structure); *Bishop v. Reinhold*, 66 N.C. App. 379, 311 S.E.2d 298 (1984).

Therefore, we are bound by our prior holdings in *Young*, *Williams*, and *Bishop*, and as the trial court properly found that defendants' house encroached onto plaintiff's property by approximately twenty-two feet and as defendants are not a quasi-public entity, plaintiff therefore is entitled to a mandatory

injunction ordering the removal of the encroaching structure. Defendants' assignment of error is overruled.

Defendants also contend the trial court erred in holding they failed to satisfy their burden of proving the equitable defenses that they had asserted. Specifically, defendants alleged in their answer the equitable defenses of laches, estoppel, and statute of limitations. Defendants also alleged that plaintiff's predecessor in title failed to take action to stop defendants' placement of their house in its present location, nor had she ever objected to the placement, and therefore her inaction or failure to protest the location constituted consent to defendants' placement of their house.

The trial court found as fact that both defendants and plaintiff's predecessor in title were under a mutual mistake of fact as to the location of the subject house. When the house was placed on the property, all parties believed the house was being located entirely upon property owned by defendants. Also, at the time plaintiff received her property by deed, she had no knowledge that the house was located partially on her property until she had it surveyed approximately three years after receiving the property.

Defendants asserted the equitable defense of laches, arguing the house had been in its present location since 1985, and that plaintiff's delay in bringing the instant action would cause injury and prejudice to defendants. "Laches" has been defined as such neglect or omission to assert a right, taken in conjunction with lapse of time and other circumstances causing prejudice to an

adverse party, as will operate as a bar in equity.'" *Young v. Young*, 43 N.C. App. 419, 424, 259 S.E.2d 348, 351 (1979) (citation omitted). A delay constituting laches is based "upon the facts and circumstances of each case." *Id.* "'The doctrine of laches applies only when circumstances have so changed during the lapse of time it would be inequitable and unjust to permit the prosecution of the action.'" *Id.* (quoting *Rape v. Lyerly*, 287 N.C. 601, 620, 215 S.E.2d 737, 749 (1975)). The trial court concluded as a matter of law that

Defendants failed to meet their burden of proof in asserting the defense of laches in part because the Defendants failed to show the passage of time attributed to Plaintiff's predecessor in title could be attributed to the Plaintiff, and also that the Defendants have failed to show any injury or prejudice to the Defendant[s] as a result of the passage of time in this case.

As the trial court's findings of fact are binding on appeal, our role is to determine if the findings support the trial court's conclusions of law. *See Downing*, 169 N.C. App. at 794, 613 S.E.2d at 38. We hold the conclusion of law cited above is supported by the trial court's findings that neither plaintiff nor her predecessor in title were aware of the improper location of the house, and that plaintiff had no knowledge of the house's improper location until she caused a survey to be done approximately three years after she received the property.

Further, there is no evidence before this Court indicating that defendants suffered any specific injury by plaintiff's initiating this action three years after receiving the property.

Defendants' arguments concerning the amount of money spent to move the house to its location in 1985 and on improvements to the house at that same time is irrelevant to the present analysis, in that defendants had spent this money long before anyone involved became aware of the improper location of the house. Regardless of when the encroachment was discovered, whether it had been ten days or ten years after the placement of the house, they already would have paid the initial setup monies and they still would have to pay for the removal. Plaintiff promptly filed the instant action upon learning of the encroachment, thus she did not delay unjustly the prosecution of her action thereby causing injury or prejudice to defendants.

The trial court's conclusions of law regarding the defendants' affirmative defenses therefore are properly supported by the findings of fact, and defendants' assignment of error is overruled.

Affirmed; sanctions ordered.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).