

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-1438

NORTH CAROLINA COURT OF APPEALS

Filed: 1 September 2009

YARBROUGH TRANSFER COMPANY,
Plaintiff,

v.

Forsyth County
No. 07 Cvs 7845

BRYAN E. BEATTY, SECRETARY
NORTH CAROLINA DEPARTMENT OF
CRIME CONTROL AND PUBLIC
SAFETY,

Defendant.

Appeal by defendant from judgment entered 28 July 2008 by Judge John O. Craig, III in Superior Court, Forsyth County. Heard in the Court of Appeals 6 May 2009.

Keziah, Gates & Samet, L.L.P., by Andrew S. Lasine, for plaintiff-appellee.

Attorney General Roy A. Cooper, III, by Assistant Attorney General John W. Congleton, for defendant-appellant.

STROUD, Judge.

On or about 1 November 2007, plaintiff filed a complaint against defendant alleging, *inter alia*:

3. On August 1, 2007, plaintiff applied for and the North Carolina DOT Division of Highways issued Single Trip Permit #707311A0361 ("Permit No. 1") for the purpose of allowing plaintiff to operate its Kenworth model truck, license number LE4993, VIN 70727 ("Truck No. 1") on a trip from Asheville to Charlotte at a gross vehicle weight of 132,000 pounds. . . .

4. Prior to transporting the load for which plaintiff had obtained Permit No. 1, Truck No. 1 developed mechanical problems which required service at plaintiff's facility in Winston-Salem, North Carolina.

5. While Truck No. 1 received mechanical service, plaintiff's driver used a Freightliner truck, license number LE5031, VIN 31839 ("Truck No. 2") to move the permitted load from Asheville to Charlotte.

6. Truck No. 1 and Truck No. 2 have identical axle configuration and similar weights.

7. In obtaining Permit No. 1, plaintiff inadvertently substituted the license and VIN of Truck No. 1 for that of Truck No. 2 and through this clerical mistake erroneously identified Truck No. 1 to be the truck used during the permitted trip when in actuality Truck No. 2 was used for the permitted trip.

8. Truck No. 2 operates under a blanket permit authorizing it to transport gross weights up to 90,000 pounds (the "Blanket Permit"). . . .

9. When plaintiff's vehicle arrived at the weigh station in Hendersonville, North Carolina, the officer reviewed Permit No. 1 and noted that Truck No. 2 did not match the description of the power unit identified in Permit No. 1.

10. Plaintiff therefore applied for and received a corrected Single Trip Permit, #707311A0362, which correctly designated the power unit by substituting Truck No. 2 for Truck No. 1 ("Permit No. 2"). . . .

11. Permit No. 2 is identical to Permit No. 1 in all material respects except for the truck license number and VIN number.

12. After plaintiff obtained Permit No. 2 and transmitted it to plaintiff's driver, the weigh station officer issued a citation, Citation Number 4004222-8 (the "First Citation") because the "truck and/or trailer

do not match the permit" and assessed a penalty of \$100.00. . . .

13. At the same time that the First Citation was issued, plaintiff was additionally issued a Citation and Notice of Assessment, Number 3117225-7 (the "Second Citation"), which assessed an additional penalty of \$9,290.00, for weight in excess of the registered gross vehicle weight as if plaintiff's vehicle was not permitted for a weight in excess of 80,000 pounds, purportedly pursuant to N.C. Gen. Stat. § 20-119(d). . . .

Plaintiff requested, *inter alia*, "a refund of the penalties paid under protest in the amount of \$9,390.00, with interest" On or about 11 December 2007, defendant answered plaintiff's complaint requesting, *inter alia*, "[t]hat the citations be upheld and the Complaint dismissed."

On or about 10 April 2008, plaintiff filed a motion for summary judgment. On or about 18 June 2008, defendant filed a motion for summary judgment. On 28 July 2008, the trial court allowed plaintiff's motion for summary judgment and denied defendant's motion for summary judgment because "defendant . . . exceeded its authority under N.C. Gen. Stat. § 20-118 and § 20-119(d) in issuing this citation when plaintiff's vehicle in fact operated with the required permit, Single Trip Permit No. 707311A0361, as revised by Single Trip Permit No. 707311A0362." The trial court ordered defendant to "refund to plaintiff the sum of \$9,290.00, plus interest at the rate of six (6%) per annum" Defendant appeals, arguing, *inter alia*, it "acted within its authority, pursuant to N.C. Gen. Stat. § 20-118 and § 20-119, to assess an overweight penalty against the Plaintiff[.]"

We need not engage in a lengthy analysis of defendant's arguments and N.C. Gen. Stat. §§ 20-118 and -119 as our Court has already considered the dispositive issues in the case of *Daily Express v. NCDCCDS*, ___ N.C. App. ___, 671 S.E.2d 587 (2009). For a thorough review of N.C. Gen. Stat. §§ 20-118 and -119 please see *Daily Express*, ___ N.C. App. ___, 671 S.E.2d 587. For the purposes of this case, it is enough to quote *Daily Express, Inc.*, which states that

[i]f the legislature intended to impose an additional weight penalty against a special permit holder as if that permit holder had no permit at all, then the language of section 20-119 must be clarified to relate that intent. Without such unambiguous language, we must construe the statute in favor of plaintiff, the party being penalized.

Id. at ___, 671 S.E.2d at 591. As we are bound by *Daily Express, Inc.*, we conclude that defendant did indeed exceed its authority in assessing an overweight penalty. See *id.* Accordingly, summary judgment for plaintiff was properly allowed.

AFFIRMED.

Judges ELMORE and ERVIN concur.

Report per Rule 30(e).