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NO. COA08-693

NORTH CAROLINA COURT OF APPEALS

Filed: 3 February 2009

EARTHMOVERS EQUIPMENT
COMPANY,
Plaintiff

v.

Wake County
No. 07CVS5022

NORTH CAROLINA DEPARTMENT
OF CRIME CONTROL AND PUBLIC
SAFETY, DIVISION OF STATE
HIGHWAY PATROL,
Defendant

Court of Appeals

Appeal by defendant from an order entered 26 February 2008 by Judge Ripley E. Ransd in Wake County Superior Court. Heard in the Court of Appeals 19 November 2008.

Slip Opinion

Parker Poe Adams & Bernstein LLP, by Kevin L. Chignell and Susan L. Dunathan, for plaintiff-appellee.

Attorney General Roy A. Cooper, III, by Assistant Attorneys General John W. Congleton and Tamara S. Zmuda, for defendant-appellant.

HUNTER, Robert C., Judge.

This case arises out of a violation of N.C. Gen. Stat. § 20-119 (2007), whereby plaintiff trucking company was fined \$1,000.00 for two operational violations of a special permit and \$22,120.00 for a weight violation based on the statutory weight parameters of N.C. Gen. Stat. § 20-118 (2007). Pursuant to litigation, the trial court interpreted these two statutes, held that the \$22,120.00 fine

was unlawful, granted summary judgment for plaintiff, and ordered defendant North Carolina Department of Crime Control and Public Safety ("defendant" or "NCDCCPS") to reimburse plaintiff the \$22,120.00. Defendant appeals this grant of summary judgment for plaintiff. After careful review, we affirm.

Background

On 1 December 2006, Earthmovers Equipment Company ("plaintiff" or "Earthmovers"), obtained a special "single trip permit" ("the permit") from the North Carolina Department of Transportation, Division of Highways, to transport a truck and trailer with a gross weight of no more than 165,000 pounds through the state. Without this permit, the truck and trailer could not legally exceed 80,000 pounds. N.C. Gen. Stat. § 20-118(b)(3).

On 7 December 2006, plaintiff's driver, Mark Duck ("Mr. Duck") was stopped on the west bound side of Interstate 40 when a State Highway Patrol officer drove by and noticed that the truck did not have any escorts. Mr. Duck was instructed to proceed to the nearby weigh station. Upon examination, a second officer noted that plaintiff's special permit required a rear escort, and an additional front escort if the gross weight exceeded 149,999 pounds. The gross weight of the truck and trailer at the time was 160,260 pounds, thus requiring a rear and front escort. It is undisputed that no escorts accompanied the truck. It is further undisputed that the truck did not comply with the permit's dimensional restrictions.

Plaintiff was fined \$1,000.00 pursuant to N.C. Gen. Stat. § 20-119(d) (1) for not having the proper number of escorts and for failing to comply with the permit's dimensional restrictions. In addition, plaintiff was penalized \$22,120.00 as a weight violation based on the failure to travel with an escort pursuant to section 20-119(d) and sections 20-118(e) (1) and (3). This weight violation was calculated based on the difference between 80,000 pounds (the statutory pound limit for a truck without a special permit) and the 160,260 pounds it actually weighed. Plaintiff's truck was not in excess of the 165,000 pounds listed on the special permit. After receiving the citations, Mr. Duck paid the fines with a company check, obtained two escorts, and was allowed to resume his trip with the original permit. No modifications of weight or dimensions were required.

On 3 January 2007, Earthmovers, though its attorney, filed a letter with NCDCCPS protesting the overweight vehicle penalty. On 23 February 2007, NCDCCPS informed Earthmovers that its administrative review revealed that the officer followed state law and patrol policy in issuing the citation and penalty.

Plaintiff filed a complaint in Wake County Superior Court on 30 March 2007 seeking a refund of the \$22,120.00 penalty. Plaintiff filed a motion for summary judgment on 7 January 2008 alleging, *inter alia*, that defendant had no authority to impose the weight citation under the statutory scheme set out in section 20-119(d) and section 20-118(e). Defendant filed a motion for summary

judgment on 12 February 2008 claiming that the citations issued were authorized by law.

On 26 February 2008, the trial judge ordered summary judgment in favor of plaintiff, finding that there is no legal basis for the State Highway Patrol to impose penalties for overweight violations based on the statutory weight limits set forth in N.C. Gen. Stat. § 20-118(b) when the "'offending'" vehicle operator has a lawfully acquired special permit exempting the vehicle from those requirements. Having found that defendant unlawfully cited plaintiff for the weight violation, the court ordered defendant to refund plaintiff the amount of \$22,120.00, plus interest. Defendant appeals this order.

I.

Pursuant to our holding in *Daily Express, Inc. v. N.C. Dep't of Crime Control & Public Safety*, ___ N.C. App. ___, ___ S.E.2d ___ (No. COA08-562 filed 3 February 2009), we affirm the trial court's grant of summary judgment for plaintiff.

Affirmed.

Judges ELMORE and JACKSON concur.

Report per Rule 30(e).