

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA08-983

NORTH CAROLINA COURT OF APPEALS

Filed: 17 February 2009

STANTON BARRETT  
MOTORSPORTS, LLC,  
Plaintiff,

v.

Cabarrus County  
No. 07 CVS 284

INNOVATIVE TECHNOLOGIES  
CORPORATION OF AMERICA,  
INC. and STEVEN C. SMITH,  
Individually,  
Defendants.

# Court of Appeals

Appeal by Plaintiff from judgment entered 19 March 2008 by Judge W. Erwin Spainhour in Cabarrus County Superior Court. Heard in the Court of Appeals 26 January 2009.

*Law Office of G. Lee Martin, P.A., by G. Lee Martin, for Plaintiff-Appellant.*

*Hartsell & Williams, P.A., by Christy E. Wilhelm, for Defendant-Appellee.*

BEASLEY, Judge.

Plaintiff (Stanton Barrett Motorsports, Inc.) appeals the dismissal of its claim against Defendant Innovative Technologies Corporation (ITC) for lack of personal jurisdiction. We affirm.

Plaintiff is a North Carolina corporation that engages in automobile racing. Defendant is a Florida corporation that owns and markets an "energy drink" named "Hair of the Dog." In 2006 the

parties agreed that Defendant and former Codefendant Steven Smith would pay Plaintiff \$380,000.00 for a five race sponsorship commitment to Defendant, and in return, Plaintiff would conduct certain marketing activities to promote Defendant's energy drink. Defendant paid Plaintiff an initial sum of \$100,000.00, but refused to pay the remainder.

On 30 January 2007 Plaintiff filed a complaint against Defendant and Steven Smith, seeking damages for breach of contract. In June 2007 Defendants filed an answer denying the material allegations of the complaint. Defendants also filed a counterclaim for breach of contract, and a motion to dismiss Plaintiff's complaint for lack of personal jurisdiction. On 18 March 2008 the trial court granted Defendants' motion, dismissing Plaintiff's claim against Defendant. Plaintiff has appealed from the order of dismissal. In its order, the trial court also noted that the parties had "stipulated and agreed that the motion to dismiss the individual defendant Steven C. Smith should be granted." Plaintiff did not appeal the dismissal as to Smith, who is not a party to this appeal.

#### Standard of Review

"The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. Midwesterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)

(citation omitted). In this case, the trial court did not make findings of fact. However:

Either party may request that the trial court make findings regarding personal jurisdiction, but in the absence of such request, findings are not required. In the case before us, the trial court's order contained no findings, but there is nothing in the record to show that either party requested them. Where no findings are made, proper findings are presumed, and our role on appeal is to review the record for competent evidence to support these presumed findings.

*Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615, 532 S.E.2d 215, 217-18 (2000) (citations omitted).

---

Plaintiff argues that the trial court erred by failing to find that personal jurisdiction was appropriate under N.C. Gen. Stat. § 1-75.4. We disagree.

"A court must engage in a two-part inquiry to determine whether personal jurisdiction over a non-resident defendant is properly asserted. First, the court must determine whether North Carolina's 'long-arm' statute authorizes jurisdiction over the defendant. N.C. Gen. Stat. § 1-75.4 [(2007)]. If so, the court must determine whether the court's exercise of jurisdiction over the defendant is consistent with due process." *Tejal Vyas, LLC v. Carriage Park, Ltd. P'ship*, 166 N.C. App. 34, 37, 600 S.E.2d 881, 884-85 (2004), *aff'd*, 359 N.C. 315, 608 S.E.2d 751 (2005) (citing *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 500, 462 S.E.2d 832, 833 (1995)).

"Upon a defendant's personal jurisdiction challenge, the plaintiff has 'the burden of proving *prima facie* that a statutory basis for jurisdiction exists.' Where unverified allegations in the plaintiff's complaint meet plaintiff's 'initial burden of proving the existence of jurisdiction . . . and defendant . . . [does] not contradict plaintiff's allegations in [its] sworn affidavit, such allegations are accepted as true and deemed controlling." *Wyatt v. Walt Disney World, Co.*, 151 N.C. App. 158, 162-63, 565 S.E.2d 705, 708 (2002) (quoting *Godwin v. Walls*, 118 N.C. App. 341, 347, 455 S.E.2d 473, 479 (1995) and *Bush v. BASF Wyandotte Corp.*, 64 N.C. App. 41, 45, 306 S.E.2d 562, 565 (1983)). "However, where the defendant submits an affidavit in support of his motion to dismiss for lack of personal jurisdiction, the court will 'look to the uncontroverted allegations in the complaint and the uncontroverted facts in the sworn affidavit' in its determination of the issue." *Brown v. Refuel Am., Inc.*, 186 N.C. App. 631, 634, 652 S.E.2d 389, 392 (2007) (quoting *Bruggeman*, 138 N.C. App. at 616, 532 S.E.2d at 218).

On appeal, "[t]his Court must first determine whether N.C. Gen. Stat. § 1-75.4 authorizes the exercise of personal jurisdiction over the defendant. . . . A determination that the long-arm statute does not authorize jurisdiction ends the inquiry." *Brown v. Ellis*, 184 N.C. App. 547, 549, 646 S.E.2d 408, 410 (2007) (citing *Skinner v. Preferred Credit*, 361 N.C. 114, 119, 638 S.E.2d 203, 208 (2006)).

In the instant case, the trial court's order stated in relevant part that "no subsection of N.C. Gen. Stat. § 1-75.4 can be applied to the claims in [P]laintiff's Complaint to allow the court to exercise personal jurisdiction over [Defendant.]" Thus, the trial court determined that exercise of personal jurisdiction was not authorized by N.C. Gen. Stat. § 1-75.4 (2007), and did not reach the issue of due process.

Plaintiff argues on appeal that jurisdiction exists under N.C. Gen. Stat. § 1-75.4(5) (2007), which authorizes North Carolina courts to exercise jurisdiction in any action that arises out of:

- a. . . . a promise, made anywhere to the plaintiff . . .  
. by the defendant . . . to pay for services to be  
performed in this State by the plaintiff; or
- b. . . . services actually performed . . . for  
the defendant by the plaintiff within this  
State[.]

N.C. Gen. Stat. § 1-75.4(5)a and b (2007). We conclude that Plaintiff failed to offer any evidence to support this contention.

It is undisputed that the contract was not signed in North Carolina. Plaintiff's unverified complaint does not assert that Plaintiff performed, or was contractually obligated to perform, any part of the Parties' contract in North Carolina. Plaintiff also executed an affidavit, to which it attached a copy of the contract. The contract does not include any reference to North Carolina or to performance of the contract in North Carolina. Plaintiff's affidavit is similarly devoid of any assertion that Plaintiff actually performed any part of the contract in North Carolina.

Plaintiff argues that personal jurisdiction is established by "preparation" of the racing car, which took place in a North Carolina workshop:

9. Pursuant to the Contract, [Plaintiff] performed the work to prepare the car for racing with the Defendant as the sponsor at its shop in North Carolina.
10. The preparation of the car occurred mainly in North Carolina. . . .

As discussed above, the contract places no restrictions on where the Plaintiff might choose to prepare a car for performance of the contract. Moreover, Plaintiff's "preparation" to perform its duties under the contract did not constitute performance of those duties. *See, e.g., Greenson v. Byrd*, 54 N.C. App. 681, 284 S.E.2d 195 (1981) (sharecropper's preparation of field does not constitute "partial performance" of contract). "[T]he fact that [the car was] prepared in North Carolina was immaterial, the [car] could have been prepared anywhere and the connection of North Carolina to this contract was truly incidental." *United Advertising Agency, Inc. v. Robb*, 391 F. Supp. 626, 631 (M.D.N.C. 1975). *See also, e.g., Patrum v. Anderson*, 75 N.C. App. 165, 168, 330 S.E.2d 55, 57 (1985) (where "record lacks competent evidence that plaintiff was to perform or performed the agreement in North Carolina" this Court does "not find any statutory basis for personal jurisdiction").

For the reasons discussed above, we conclude that the trial court did not err and that its order dismissing Plaintiff's complaint should be

Affirmed.

Chief Judge MARTIN and Judge BRYANT concur.

Report per Rule 30(e).