

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA10-256

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

JOSEPH S. MILLER DBA CUSTOM FIT
STAIRS,
Plaintiff,

v.

Wake County
No. 09 CVD 2027

ROSLIN ELWOOD AKA ROSALIND
ELLWOOD,
Defendant.

Appeal by defendant from the order and judgment dated 13 August 2009 by Judge Christine M. Walczyk in Wake County District Court. Heard in the Court of Appeals 14 September 2010.

No brief for plaintiff-appellee.

Rosalind Ellwood, pro se.

BRYANT, Judge.

Where an appellant abandons by rule all of her assignments of error and precludes substantive review of the case by her failure to discuss the appropriate standard of review, cite legal authority or make legal arguments, dismissal of her appeal is proper.

Facts and Procedural History

This appeal arises from a dispute over the construction of stairs and related work performed by plaintiff Joseph S. Miller in the home of defendant Rosalind Ellwood. Plaintiff filed a complaint against defendant for money owed (\$5000) in small claims

court in Wake County in October 2008. Defendant, through counsel, answered stating several defenses including that plaintiff failed to obtain necessary permits, performed substandard work, and failed to complete the project. Defendant also counterclaimed for breach of contract based on plaintiff's failure to finish the project according to the agreed terms. By judgment dated 27 January 2009, the magistrate awarded \$1560 to plaintiff. Defendant then appealed to the district court, and the cause came on for hearing on 10 August 2009 with both parties appearing *pro se*. The evidence tended to show the following.

Defendant hired plaintiff to build a main staircase and basement staircase railing in her Cary home. The parties discussed the project and agreed on a price of \$2967.50 but did not enter into a written contract. Defendant then paid plaintiff a deposit of \$1500, and plaintiff began work. Defendant was upset with some aspects of plaintiff's work, particularly the fact that he built the staircase in his shop rather than on-site in her home. As work progressed, defendant asked plaintiff to do additional work for an additional fee and plaintiff agreed. However, defendant then changed aspects of the additional project, and plaintiff asked for more money. Defendant wrote two checks to plaintiff: one for \$500 for the staircase project, and one for \$400 for the additional project. Due to continued disputes about the quality and method of work, defendant eventually told plaintiff that she would not pay him and stopped payment on the two checks she had given him. Plaintiff, in turn, did not complete the project.

At trial, defendant argued that plaintiff's work was shoddy, did not comply with applicable building codes, and was left uncompleted. Defendant subsequently hired another contractor to complete some of plaintiff's work as well as to do other projects in her home. She paid \$1906 for this work, but the trial court was not able to determine what portion of that cost was associated with the work which plaintiff had started. Defendant sought \$4000 in damages but was only able to show costs of \$3024 (from the cost paid to the second contractor, receipts for lumber and supplies and an estimate from a third contractor for finishing the projects). Plaintiff testified on her own behalf but called no other witnesses. The trial court found that defendant failed to prove that plaintiff's work was substandard or out of compliance with applicable building codes, or that plaintiff committed fraud. Instead, the trial court found that defendant had terminated the relationship and that the reasonable value of the work plaintiff did was \$3080.

Because defendant had already paid plaintiff \$1500, plaintiff was awarded the balance of \$1580 plus interest. The trial court concluded that: there had been no meeting of the minds between the parties; defendant failed to prove breach or fraud by plaintiff; and that plaintiff was entitled to the reasonable value of the work he performed. Defendant appeals.

Defendant made eleven assignments of error which she purports to bring forward in her brief to this Court. However, as noted

below, defendant fails to cite any legal authority or make any legal arguments in her brief, and thus, each of her assignments are deemed abandoned.

Analysis

We begin by noting that defendant's *pro se* brief contains numerous violations of our Appellate Rules, including, but not limited to: no index to her brief or table of authorities (N.C.R. App. P. 28(b)(1)); no inside caption (N.C.R. App. P. 26(g)(1) and Appxs. B and E); improperly formatted caption (N.C.R. App. P. 26(g)(1) and Appx. B); improperly positioned and formatted page numbering (N.C.R. App. P. 26(g)(1) and Appx. B); improperly formatted topical headings (N.C.R. App. P. 26(g)(1) and Appx. B); no statement of grounds for appellate review (N.C.R. App. P. 28(b)(4)); improper type size (N.C.R. App. P. 28(j)(1)(B)); and an argumentative statement of the facts (N.C.R. App. P. 28(b)(5)). Our Supreme Court has instructed that "a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008). "Noncompliance with rules of this nature, while perhaps indicative of inartful appellate advocacy, does not ordinarily give rise to the harms associated with review of unpreserved issues or lack of jurisdiction." *Id.* The Court in *Dogwood* set forth three factors relevant to consideration of dismissal or lesser sanctions for nonjurisdictional appellate rules violations:

In determining whether a party's noncompliance with the appellate rules rises to the level of

a substantial failure or gross violation, the court may consider, among other factors, whether and to what extent the noncompliance impairs the court's task of review and whether and to what extent review on the merits would frustrate the adversarial process. . . . The court may also consider the number of rules violated

Id. at 200, 657 S.E.2d at 366-67 (internal citations omitted). However, the Court went on the single out noncompliance with N.C. R. App. P. 28(b)(6) as an exception that "may constitute a default precluding substantive review." *Id.* at 200, 657 S.E.2d at 367. Rule 28(b)(6) states, in pertinent part: "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." N.C. R. App. P. 28(b)(6) (2009).

Here, in addition to her numerous other rules violations, defendant fails to cite any legal authority in her brief - no case, statute, ordinance or even a treatise. Instead of making legal arguments for this Court to consider, she simply recounts her version of the facts underlying the case and argues that the trial court should have resolved various contested matters in her favor. Defendant's attempted appeal impedes meaningful review of her contentions in two respects.

First, defendant asserts, without citing any authority, that the applicable standard of review is an abuse of discretion, but the nature of the discussion in her brief suggests that she believes our task is to reweigh each piece of testimony, make credibility determinations and resolve contradictions in the evidence. We note that on review of a bench trial, we consider

only "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. Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163 (citations omitted), *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001). Defendant's failure to understand our scope of review leads her to make misplaced contentions that we cannot consider on appeal.

More importantly, defendant fails to cite any authority in support of her assignments of error. Her brief makes clear that she disagrees with the trial court's resolution of her case. However, without arguments based on legal points and supported by case or statutory citations, we are unable to comprehend and review her appeal without creating legal arguments on her behalf. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."); *see also Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 ("It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein."), *disc. review denied*, 360 N.C. 63, 623 S.E.2d 582 (2005).

Under *Dogwood*, this Court retains discretion, in rare instances, to apply Rule 2 and reach the merits of an appeal to prevent manifest injustice. 362 N.C. at 201, 657 S.E.2d at 367; N.C.R. App. P. 2. However, as discussed above, defendant's

failure to make legal arguments or cite legal authority prevents us from considering the merits of her case, and we cannot create legal arguments on her behalf. To do so would frustrate the adversary process and work an injustice on plaintiff-appellee who has chosen not to file a brief in this appeal.

Because defendant abandoned by rule all of her assignments of error and precluded substantive review of the case by her failure to discuss the appropriate standard of review and make legal arguments, dismissal of her appeal is proper.

Dismissed.

Judges HUNTER, Robert C., and HUNTER, Robert N., Jr., concur.

Report per Rule 30(e).