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NO. COA06-434

NORTH CAROLINA COURT OF APPEALS

Filed: 19 December 2006

TOWN OF KERNERSVILLE, a North
Carolina Municipal Corporation,
Plaintiff,

v.

Forsyth County
No. 05 CVD 2499

MILDRED M. BALLARD,
Defendant.

Appeal by defendant from order entered 14 December 2005 by Judge Denise S. Hartsfield in Forsyth County District Court. Heard in the Court of Appeals 12 October 2006.

John G. Wolfe, III & Associates, PLLC, by John G. Wolfe, III and Anargiros N. Kontos, for plaintiff-appellee.

Nexsen Pruet Adams Kleemeier, PLLC, by M. Jay DeVaney and Brian T. Pearce, for defendant-appellant.

GEER, Judge.

Defendant Mildred M. Ballard appeals from an order imposing \$25,000.00 in civil penalties for her failure to comply with a property ordinance of the Town of Kernersville. Ms. Ballard urges this Court to reverse the order on the ground that there is no evidence in the record showing that plaintiff Town of Kernersville properly served her with the notice of violation and subsequent civil citation. Because Ms. Ballard has not filed with this Court a transcript of the evidentiary hearing, we must presume that the

district court's findings of fact are supported by competent evidence and, therefore, we affirm.

Ms. Ballard is a resident of Forsyth County and the owner of real property located at 1325 Union Cross Road in the Town of Kernersville ("Town"). During the week of 16 April 2004, a Town employee inspected Ms. Ballard's property and noted the open presence of junked, unlicensed motor vehicles and other debris. On 16 April 2004, the Town issued a notice of violation of the Town ordinance to Ms. Ballard, describing the nature of the infractions and explaining how to bring the property into compliance with the ordinance. The notice further demanded that Ms. Ballard remedy the situation within 10 days.

Nan Kollar, Ms. Ballard's daughter, called the Town's Zoning Administrator, Kenneth Whitaker, on 26 April 2004, requesting an additional 30 days to bring the property into compliance. Mr. Whitaker granted the request. Nonetheless, the problem was still unresolved as of 12 July 2004. On that date, the Town issued a civil citation demanding the payment of penalties. The citation was addressed to Ms. Ballard and signed by Mr. Whitaker.

When Ms. Ballard did not pay any penalties, the Town initiated this suit in district court to obtain compliance with the ordinance and recover the assessed penalties. In an abatement order dated 9 August 2005, the district court found Ms. Ballard in violation of the ordinance and ordered her to discontinue the non-compliant use of her property. When Ms. Ballard still did not remedy her violations, the court entered an order to show cause why she should

not be held in contempt. Prior to the show-cause hearing, Ms. Ballard brought her property into compliance.

The Town then sought the unpaid civil penalties. On 14 December 2005, the district court entered an order finding that Ms. Ballard had accrued \$43,300.00 in penalties, but, in an exercise of discretion, the court ordered Ms. Ballard only to pay \$25,000.00 to the Town. Ms. Ballard filed a timely notice of appeal.

The sole assignment of error brought forward by Ms. Ballard in her brief contends that Findings of Fact 5 and 7 of the trial court's order are unsupported by the evidence. Specifically, the court found:

5. That on April 16, 2004 the Town properly served a Notice of Violation on the Defendant, demanding that within ten (10) days of receipt of the Notice, that the Defendant immediately either (1) clean up the property, (2) obtain a valid North Carolina License Tag and Inspection Sticker for each vehicle and ensure that each vehicle is operable as originally manufactured, or (3) entirely surround the area containing the junk with screening meeting the requirements of the Ordinance.

. . . .

7. That despite the 30 day extension, Defendant failed to comply with the Notice of Violation dated April 16, 2004, and was properly served with a Civil Citation on July 12, 2004.

The entirety of Ms. Ballard's brief is dedicated to her argument that the trial court had no basis upon which to conclude that she

was "properly served" with either the notice of violation or the civil citation.

As stated in the 14 December 2005 order, the court's findings of fact were in part based upon the "sworn testimony of Nan Kollar and Kenneth Whitaker." Yet, Ms. Ballard has filed no transcript of that testimony with this Court. When a party fails to include the transcript with the record on appeal, this omission precludes any challenge to specific factual findings of the trial court. *Hicks v. Alford*, 156 N.C. App. 384, 576 S.E.2d 410 (2003).

In *Hicks*, the appellant – like Ms. Ballard here – argued that there was insufficient evidence to support certain findings of fact of the trial court, but "failed to include in her appeal a transcript of the evidence presented to the trial court." *Id.* at 389, 576 S.E.2d at 414. Noting that "[i]t is the duty of the appellant to ensure that the record is complete," the *Hicks* Court held that "[w]ithout the transcript, we are unable to review plaintiff's argument that the trial court erred in making findings of fact that are unsupported by the evidence." *Id.* at 389-90, 576 S.E.2d at 414. As a result, the Court overruled the appellant's assignment of error as to the sufficiency of the evidence.

The principle set forth in *Hicks* has long been the rule in this State. See also *Baker v. Baker*, 115 N.C. App. 337, 339, 444 S.E.2d 478, 480 (1994) (where appellant failed to include in the record the evidence necessary to evaluate his challenge to trial court's factual findings, Court held "we must assume that the trial court's findings of fact are supported by competent evidence and we

will not consider [appellant's] assignments of error related thereto"); *Fellows v. Fellows*, 27 N.C. App. 407, 408, 219 S.E.2d 285, 286 (1975) ("The record does not contain the oral testimony; therefore, the court's findings of fact are presumed to be supported by competent evidence."). Indeed, Rule 7(a)(1) of the Rules of Appellate Procedure specifically provides: "If the appellant intends to urge on appeal that a finding or conclusion of the trial court is unsupported by the evidence or is contrary to the evidence, the appellant shall file with the record on appeal a transcript of all evidence relevant to such finding or conclusion."

Accordingly, because of Ms. Ballard's failure to supply this Court with the transcript of the testimony in this case, we must presume that Findings of Fact 5 and 7 are supported by competent evidence. As Ms. Ballard makes no other argument why the order below should be reversed, we affirm.

Affirmed.

Judges STEELMAN and STEPHENS concur.

Report per Rule 30(e).