

*An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA05-170

NORTH CAROLINA COURT OF APPEALS

Filed: 15 November 2005

LAURA H. SURBER,  
Employee,  
Plaintiff,

v.

North Carolina Industrial Commission  
I.C. File No. 310814

ROCKINGHAM COUNTY BOARD  
OF EDUCATION,  
Employer,  
Self-Insured,  
Defendant.

Appeal by defendant from opinion and award of the North Carolina Industrial Full Commission entered 1 December 2004 by Commissioner Bernadine S. Ballance. Heard in the Court of Appeals 12 October 2005.

*Patterson Harkavy LLP, by Henry N. Patterson, Jr., for plaintiff-appellee.*

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Gary A. Scarzafava, for Rockingham County Board of Education, defendant-appellant.*

JACKSON, Judge.

In April 2000, Laura Surber (“Plaintiff”) was employed by the Rockingham County Board of Education (“Defendant”) as a physical education teacher, when she injured her knee while attempting to break up a fight between two students. As a result of her injury, plaintiff had knee surgery on 13 September 2000, which was paid for by defendant. At the time of plaintiff’s injury, defendant failed to file any of the prescribed forms necessary to notify the Industrial

Commission of the accident and initiate a claim on the matter. Defendant's last payment of medical compensation for plaintiff's knee surgery occurred in December 2000.

In 2002, plaintiff began having additional problems with her knee, and contacted the third party administrator of defendant's workers' compensation program seeking permission to have the doctor who performed her knee surgery to reexamine her knee. The third party administrator informed plaintiff that the statute of limitations had run on the workers' compensation claim for her knee, and denied her coverage.

In November 2002, plaintiff filed a Form 18 with the Industrial Commission, notifying the Commission of the accident and seeking compensation for additional medical expenses incurred from her knee injury. Defendant asserted that plaintiff's claim was barred by the statute of limitations, and thus was untimely, based on North Carolina General Statutes, sections 97-24 and 97-25.1 (2004). Defendant argued that plaintiff's claim fell outside the statute of limitations, in that two years had elapsed since payment for her last medical treatment, and that she had failed to file the proper Form 18M with the Executive Secretary's Office in order to seek additional medical treatment. Defendant stipulated that should the Commission find that plaintiff's claim for additional medical treatment was properly before the Commission, defendant would pay for the additional medical treatment. The timeliness of plaintiff's claim was the sole issue before the Commission.

On 8 January 2004, the Deputy Commissioner's Opinion and Award found that plaintiff had filed a timely claim for payment of additional medical compensation within the statute of limitations. The Commissioner also found that the form filed by plaintiff was the first document filed with the Commission on plaintiff's claim. The Commissioner found that plaintiff's claim was properly before the Commission, and thus defendant had no reasonable grounds to defend

the claim based on statute of limitations. The Commission ordered defendant to pay plaintiff's additional medical treatment, and reasonable attorney fees. Defendant appealed the Deputy Commissioner's Opinion and Award to the full Commission.

On 1 December 2004, the full Commission affirmed the Deputy Commissioner's Opinion and Award, finding that plaintiff's claim for additional medical treatment was timely and not barred by the statute of limitations. The Full Commission affirmed the Deputy Commissioner's finding that defendant unreasonably defended plaintiff's claim based on statute of limitations, and awarded attorney's fees to plaintiff pursuant to North Carolina General Statutes, sections 97-88 and 97-88.1 (2004). Defendant now appeals from the Full Commission's Opinion and Award.

In the instant case, defendant has failed to comply with several of the requirements of the North Carolina Rules of Appellate Procedure, therefore we decline to reach a decision on the merits of this appeal. A "failure to follow these rules will subject an appeal to dismissal." *Consol. Elec. Distribs., Inc. v. Dorsey*, \_\_ N.C. App. \_\_, \_\_, 613 S.E.2d 518, 520 (2005) (quoting *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999) (citations omitted)).

Our Rules of Appellate Procedure set limitations on the matters which we may address in a case before us. Rule 10(a) provides that our "scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10." N.C. R. App. P. 10(a) (2005). Rule 10 further provides that:

A listing of the assignments of error upon which an appeal is predicated shall be stated *at the conclusion of the record on appeal* . . . . Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, *with clear and specific record or transcript*

*references.* Questions made as to several issues or findings relating to one ground of recovery or defense may be combined in one assignment of error, if separate record or transcript references are made.

N.C. R. App. P. 10(c)(1) (2005) (emphasis added). In the present case, defendant's assignments of error are found on page three of the one hundred and two page record on appeal. In addition, defendant has failed to set forth any specific references to the record or transcript where the purported errors occurred. Not one of defendant's nine assignments of error contains any reference to a page in the record or the transcript of evidence.

Our Rules of Appellate Procedure further set forth guidelines regarding the format to which an appellant's brief must adhere. Rule 28(a) provides that "[t]he function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon." N.C. R. App. P. 28(a) (2005). Rule 28 further details the format which an appellant's arguments must adhere to, and provides that:

Immediately following each question shall be a *reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal.* 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) (2005) (emphasis added). In the instant case, defendant sets out three distinct questions in the argument section of its brief. None of the questions raised by defendant reference any of its assignments of error, nor do any of the questions make reference to any pages in the record on appeal. Therefore, they are deemed abandoned pursuant to Rule 28(b)(6).

Our Rules of Appellate Procedure "must be consistently applied; otherwise, the Rules become meaningless, and an appellee is left without notice of the basis upon which an appellate

court might rule.” *Viar v. N.C. DOT*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (per curiam) (adopting dissenting opinion of Tyson, J., 162 N.C. App. 362, 590 S.E.2d 909 (2004)), *reh’g denied*, \_\_\_ N.C. \_\_\_, 617 S.E.2d 662 (2005). While we may use our discretion to invoke Rule 2 of our rules of appellate procedure, thereby suspending the requirements of the rules in order to “prevent manifest injustice,” we decline to do so in the present case. N.C. R. App. P. 2 (2005); *Symons Corp. v. Insurance Co. of North America*, 94 N.C. App. 541, 543, 380 S.E.2d 550, 551-52 (1989). It is not this court’s role to “create an appeal for an appellant.” *Viar*, 359 N.C. at 402, 610 S.E.2d at 361. Accordingly, we dismiss defendant’s appeal.

Appeal dismissed.

Judges TYSON and JOHN concur.

Report per Rule 30(e).