

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA04-198

NORTH CAROLINA COURT OF APPEALS

Filed: 19 April 2005

WILLIAM A. LUCAS,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. TA-16861

NORTH CAROLINA DEPT. OF
CORRECTION
Defendant.

Appeal by defendant from decision and order entered 20 November 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 November 2004.

William A. Lucas, pro se plaintiff-appellant.

Attorney General Roy Cooper, by Associate Attorney General Iain M. Stauffer, for defendant-appellee.

STEELMAN, Judge.

On 11 May 2000 at approximately 4:00 am, while plaintiff William Lucas was incarcerated in the Marion Correctional Institution of the North Carolina Department of Corrections, he was awakened by corrections officers to perform an urinalysis drug screen. Plaintiff attempted to provide urine several times, but was unable to do so because of a previous spinal injury. Plaintiff requested a catheter to facilitate the flow of his urine, but this request was denied. Plaintiff also offered to give a blood sample to comply with the drug test, but this request was also denied. At approximately 8:00 am that same morning, plaintiff was provided a catheter

and gave a urine sample. However, this sample was rejected because it was not provided at the time of the initial request. Because of plaintiff's failure to provide a timely urine sample, he was disciplined by the Department of Corrections, and incurred a \$5.00 medical appointment charge.

On 16 February 2001 plaintiff filed a claim against the North Carolina Department of Corrections pursuant to Article 31 of Chapter 143 of the North Carolina General Statutes (Tort Claims Against State Departments and Agencies) alleging that the Department of Corrections (defendant) was negligent in refusing to accommodate his medical condition in the context of the drug test, and that he suffered damages. Specifically, plaintiff alleged that he was sentenced to 30 days in sequestration; he lost visitation privileges; he lost telephone privileges for four months; he was assessed five points, which will result in a two to five year delay in his achieving medium security status; that he was falsely "slandered/libeled and labeled a drug user;" that he was denied medical treatment; that he suffered a permanent loss of his prison job paying \$4.90 per week; and that he suffered "emotional, mental and physical pain as a result of these negligent acts."

In a decision and order filed 31 March 2003, Deputy Commissioner Nancy W. Gregory concluded that defendant was negligent in failing to implement its drug screening policy in a reasonable manner in light of plaintiff's medical condition, and that this negligence resulted in damages to plaintiff in the amount of \$255.00. Plaintiff appealed to the Full Commission asserting that the amount of the award was inadequate. Defendant did not appeal. The Full Commission agreed with plaintiff and increased the award to \$1005.00, otherwise adopting all the Deputy Commissioner's findings of fact and conclusions of law. From the decision and order of the Full Commission, defendant appeals.

In its sole argument (encompassing all four of its assignments of error in the record), defendant contends that the Commission erred in finding and concluding that defendant's negligence caused plaintiff's pain, a \$5.00 appointment charge, unnecessary disciplinary action, and emotional distress. We agree in part and disagree in part.

Defendant initially argues that the Commission erred in its findings of fact numbers four and twelve, because they were not supported by sufficient evidence. The contested portions of these findings, respectively, state that plaintiff "was angry considering the circumstances and suffered emotional distress," and that plaintiff "has proven that defendant's negligence proximately caused damages including pain, a \$5.00 charge for a medical visit and the consequences of baseless disciplinary action, which all resulted in frustration, anger, and emotional distress on the part of plaintiff." Defendant then contests the Commission's conclusion of law number two that "[d]efendant's negligence proximately caused plaintiff's pain, a \$5.00 appointment charge incurred by plaintiff, unnecessary disciplinary action, and emotional distress. Accordingly, plaintiff is entitled to reasonable damages in the amount of \$1005.00."

"A finding of fact by the Industrial Commission in a proceeding under the Tort Claims Act is binding if there is any competent evidence to support it. Negligence is a mixed question of law and fact, and the reviewing court must determine whether the Commission's findings support its conclusions." *Bolkhir v. North Carolina State University*, 321 N.C. 706, 708-09, 365 S.E.2d 898, 900 (1988). The Commission properly included the same language in its conclusion of law number two. Our review of the record shows that there is competent evidence to support the Commission's finding of fact number four, and thus it is binding on appeal. As defendant fails to contest any other findings of fact, they too are binding on appeal. *Pernell v. Piedmont Circuits*, 104 N.C. App. 289, 292, 409 S.E.2d 618, 619 (1991).

“To recover under the Tort Claims Act, plaintiff must show that the injuries sustained . . . were the proximate result of a negligent act of a state employee acting within the course and scope of his employment.” *Bolkhir*, 321 N.C. at 709, 365 S.E.2d at 900. “To establish actionable negligence, plaintiff must show that: (1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury.” *Id.*

In the instant case, the Commission found and concluded that defendant was negligent, and through defendant’s negligence plaintiff was injured resulting in physical pain, unnecessary discipline, and the unwarranted loss of \$5.00. The Commission further concluded that these injuries warranted compensation in the amount of \$1005.00. Defendant does not contest the Commission’s conclusions that it owed a legal duty to plaintiff and that it was negligent in its treatment of plaintiff. Defendant does argue that the evidence does not support the Commission’s conclusion that defendant’s negligence was the proximate cause of the specific injuries listed by the Commission, and that the evidence does not justify the award of \$1005.00 in damages.

Defendant’s brief argues three points. First, defendant argues that the evidence is insufficient to support an award under the theory of negligent infliction of emotional distress. We agree. In order to support such a claim the plaintiff must demonstrate that he suffered “severe emotional distress.” *Johnson v. Ruark Obstetrics & Gynecology Assoc., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). The Commission made no finding of fact that plaintiff suffered “severe emotional distress” nor do we find any evidence in the record that would support such a finding.

Second, defendant argues that the evidence is insufficient to support the Commission’s conclusion that defendant’s negligence caused plaintiff pain. Finding of fact number three of the

Commission's decision and order states in relevant part: "plaintiff was unable to urinate on command due to his back condition and suffered pain and frustration in attempting to urinate." This finding supports the Commission's conclusion of law that defendant's negligence proximately caused plaintiff some pain.

Third, defendant argues that the findings of fact do not support the Commission's award of \$1005.00. Because defendant does not contest the Commission's conclusion that defendant's negligence proximately caused injury to plaintiff, plaintiff is entitled to at least nominal damages. *Hawkins v. Hawkins*, 331 N.C. 743, 745, 417 S.E.2d 447, 449 (1992). Because defendant makes no argument in its brief that the Commission erred in concluding defendant's negligence was the proximate cause of plaintiff incurring physical pain and a \$5.00 appointment charge, or that defendant's negligence was the proximate cause of plaintiff receiving unnecessary disciplinary action, defendant has abandoned the right to contest these conclusions. N.C. R. App. P. Rule 28(b)(5); *Strader v. Sunstates Corp.*, 129 N.C. App. 562, 567-58, 500 S.E.2d 752, 755 (1998).

The award of the Industrial Commission was in a lump sum of \$1005.00. This award included an improper award of damages for negligent infliction of emotional distress. The award of the Industrial Commission must be vacated and the matter remanded for entry of an award consistent with this opinion.

AFFIRMED IN PART, VACATED AND REMANDED IN PART.

Chief Judge MARTIN and Judge McCULLOUGH concur.

Report per Rule 30(e).