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NO. COA06-492

NORTH CAROLINA COURT OF APPEALS

Filed: 17 April 2007

JAMES E. PRICE,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. TA-17385

NORTH CAROLINA DEPARTMENT
OF CORRECTION,
Defendant,

Appeal by plaintiff from decision and order entered 16 November 2005 by the North Carolina Industrial Commission. Heard in the Court of Appeals 2 November 2006.

James E. Price, pro se, plaintiff-appellant.

Attorney General Roy A. Cooper, III, by Associate Attorney General Olga Vysotskaya, for defendant-appellee.

JACKSON, Judge.

On 6 March 2002, James E. Price (“plaintiff”), an inmate confined in the custody of the North Carolina Department of Correction (“DOC”), filed a claim for damages with the North Carolina Industrial Commission, seeking approximately \$1,560.00 for the loss of a pair of dress shoes, a pair of eyeglasses, and numerous legal texts. On 30 October 2002, after DOC failed to file an answer, plaintiff filed a motion for default judgment. DOC responded with an answer on 29 April 2003, more than a year late, and shortly thereafter, plaintiff filed a motion to strike DOC’s answer.

Deputy Commissioner Chrystal Redding Stanback, after granting plaintiff's motion to strike and denying plaintiff's motion for summary judgment,[**Note 1**] conducted a full evidentiary hearing on 27 October 2003, allowing both plaintiff and DOC to present evidence. On 22 November 2004, Deputy Commissioner Stanback issued a decision and order concluding that DOC negligently misplaced plaintiff's legal materials and awarding plaintiff \$370.35 for the depreciated value of the lost texts. With respect to plaintiff's dress shoes and eyeglasses, however, Deputy Commissioner Stanback concluded that plaintiff failed to prove by the greater weight of the evidence that DOC was negligent.

Both plaintiff and DOC appealed the deputy commissioner's decision to the Full Commission. In a decision and order filed 16 November 2005, the Full Commission affirmed the opinion and award of the deputy commissioner with minor modifications. Plaintiff filed timely notice of appeal to this Court.

As a preliminary matter, we note that plaintiff's brief fails to comport with Rule 10 of the North Carolina Rules of Appellate Procedure. First, we decline to address arguments made by plaintiff in his brief that were not the subject of a proper assignment of error. *See* N.C. R. App. P. 10(a) (2006). Additionally, plaintiff's Assignments of Error numbers 1 through 3 violate Rule 10(c), which expressly requires that "[e]ach 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." N.C. R. App. P. 10(c)(1) (2006).

In the record on appeal, plaintiff's first three assignments of error allege the following:

- I. The industrial commission erred when, after allowing plaintiff's motion to strike defendant's Answer for being time-barred, the commission permitted defendant to rebut plaintiff's evidence establishing his claim or right to relief at the tort claim hearing and when filing briefs, and created a conflict of interest by allowing counsel for Defendant to represent her in a

writ of mandamus action filed by Plaintiff against her while Plaintiff and Defendant still had an action pending before her.

II. The industrial commission erred when denying plaintiff's motion for default judgment; motion for summary judgment; motion to admit into evidence the affidavit of James C. Scotton; and his uncontested motions to amend or to verify his claim for damages and out-of-pocket expenses.

III. The industrial commission erred in its findings of fact when omitting that inmates are permitted by prison policy to possess personal shoes for *medical* and work release purposes; and after allowing plaintiff's motion to strike defendant's Answer for being time-barred the commission allowed defendant to rebut plaintiff's evidence establishing his claim or right to relief and then found as fact that defendant's rebuttal evidence had the greater weight, let alone any weight, particularly regarding plaintiff's destroyed eyeglasses, boots, 2000 plus pages of case law, out-of-pocket expenses and pre-judgment interest; and when reducing the value of plaintiff's lost law books and paralegal course materials to half price or less. Findings of Fact Numbers 2, 3, 4 and 7.

(Emphasis in original).

Although Rule 10(c) provides that “[q]uestions 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) (2006), it is equally well-established that “[w]here one assignment of error is based on separate exceptions and attempts to present several separate questions of law, it is ineffectual as a broadside assignment.” *Braswell v. Purser*, 16 N.C. App. 14, 26, 190 S.E.2d 857, 865 (citing *Hines v. Frink*, 257 N.C. 723, 729, 127 S.E.2d 509, 514 (1962)), *aff'd*, 282 N.C. 388, 193 S.E.2d 90 (1972). None of plaintiff's first three assignments of error are limited to a single issue of law; rather, plaintiff raises several issues and questions of law in what is tantamount to the “kitchen sink” approach. See Hon. Jacques L. Wiener, Jr., Essay, *Ruminations from the Bench: Brief Writing and Oral Argument in the Fifth Circuit*, 70 Tul. L. Rev. 187, 190 (1995) (cautioning appellants against

“throw[ing] in everything but the proverbial kitchen sink”). In addition, the second assignment of error simply states that the Commission erred in denying various motions filed by plaintiff without stating “the legal basis upon which error is assigned.” N.C. R. App. P. 10(c)(1) (2006). As such, this assignment of error “essentially amount[s] to no more than an allegation that the court erred because its ruling was erroneous.” *Hubert Jet Air, LLC v. Triad Aviation, Inc.*, ___ N.C. App. ___, ___, 628 S.E.2d 806, 808 (2006) (internal quotation marks and citation omitted). Accordingly, we dismiss plaintiff’s first three assignments of error.

In his fourth assignment of error, plaintiff contends that the Industrial Commission’s findings of fact do not support its conclusions of law that plaintiff failed to prove by the greater weight of the evidence that DOC was negligent as to his dress shoes and eyeglasses. We disagree.

Preliminarily, we note that as part of this assignment of error, plaintiff has assigned error to Conclusions of Law numbers 2 and 4. In the Industrial Commission’s decision and order, Conclusion of Law number 4 relates solely to the value of plaintiff’s lost textbooks and Officer Payne’s negligence with respect to those textbooks. The substance of the assignment of error, however, makes no mention of plaintiff’s textbooks or Officer Payne’s negligence, and plaintiff has not argued in his brief that the Commission erred in making such a determination. Accordingly, we will confine our review to Conclusion of Law number 2 and dismiss plaintiff’s assignment of error to the extent it challenges Conclusion of Law number 4. *See* N.C. R. App. P. 28(b)(6) (2006) (“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. 10(a) (2006) (“[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . .”).

Pursuant to North Carolina General Statutes, section 143-291(a), the North Carolina Industrial Commission is charged with determining whether a tort claim against DOC arose as a result of the negligence of any DOC officer or employee acting within the scope of his office or employment. *See* N.C. Gen. Stat. . 143-291(a) (2005).

If the Commission finds that there was negligence . . . that was the proximate cause of the injury and that there was no contributory negligence on the part of the claimant . . . , the Commission shall determine the amount of damages that the claimant is entitled to be paid, including medical and other expenses, and by appropriate order direct the payment of damages

Id. As this Court explained in a previous appeal brought by plaintiff, “[t]he scope of review on appeal to this Court under the Tort Claims Act is limited to whether there was any competent evidence before the Commission to support the findings of fact and whether the findings support the legal conclusions and decision.” *Price v. N.C. Dep’t of Corr.*, 103 N.C. App. 609, 613, 406 S.E.2d 906, 908 (1991). “[T]he findings of fact of the Industrial Commission are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.” *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552.53 (2000) (quoting *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965) (per curiam)). Furthermore, in the instant case, neither Assignment of Error number 4 nor Assignment of Error number 5 _ plaintiff’s remaining assignments of error which have not been dismissed _ assigns error to any of the Commission’s findings of fact. As such, the Industrial Commission’s findings of fact are deemed binding on this Court. *See Pollock v. Reeves Bros., Inc.*, 313 N.C. 287, 294, 328 S.E.2d 282, 286 (1985) (“Defendants did not except to this finding of fact, therefore it is deemed to be supported by competent evidence and it is binding upon appeal.”). Thus, our sole task is to determine whether the Commission’s findings support

its conclusions. *See Vogler v. Branch Erections Co., Inc.*, __ N.C. App. __, __, 640 S.E.2d 419, 421 (2007).

Plaintiff contests the Industrial Commission's Conclusion of Law number 2, which provides that "Plaintiff has failed to prove by the greater weight of the evidence that any officer, employee, involuntary servant or agent of the North Carolina Department of Correction was negligent in the confiscation and destruction of his dress shoes, or in causing damage to his eyeglasses." The findings of fact that are binding on this Court, however, fully support Conclusion of Law number 2. Specifically, the Commission found that

[o]n or about July 23, 1999, a shakedown of the correctional facility was ordered, and all items considered to be contraband were confiscated from inmates' cells. Officers searching the plaintiff's cell removed his dress boot shoes, as they were no longer allowed. Plaintiff had been given until July 1, 1999 to send home his dress shoes; however, no proper address had been provided as to where to send the items. Therefore, during the shakedown, the boots were confiscated and destroyed. The plaintiff has failed, by the greater weight of the evidence, to prove that any of the named defendant officers were negligent in confiscating and/or destroying plaintiff's dress shoes.

Similarly, with respect to plaintiff's eyeglasses, the Commission found that

[p]laintiff alleges that also during the shakedown, his eyeglasses were damaged, however there is insufficient evidence in the record to establish that any of the named defendant officers damaged the eyeglasses or were negligent in any manner with respect to plaintiff's eyeglasses. Plaintiff has failed, by the greater weight of the evidence, to prove that any of the named defendant officers were negligent in causing damage to plaintiff's eyeglasses.

In sum, Conclusion of Law number 2 was supported by Findings of Fact numbers 3 and 4, and accordingly, plaintiff's fourth assignment of error is overruled.

In his final assignment of error, plaintiff contends that the Industrial Commission denied him "his sixth amendment right to compulsory process to obtain and present witnesses in his

favor, and when failing to continue the hearing to allow plaintiff's subpoenaed witnesses to appear." We disagree.

First, it is well-settled that the Sixth Amendment does not apply to civil cases such as this one. *See State v. Adams*, 345 N.C. 745, 748, 483 S.E.2d 156, 157 (1997) ("By its terms, the Sixth Amendment applies only to criminal cases."). Therefore, this portion of plaintiff's assignment of error is overruled.

With respect to plaintiff's contention that the Industrial Commission erred in failing to continue the hearing, we note that "the postponement or continuance of a duly scheduled hearing . . . rest[s] entirely in the discretion of the Commission." *McPhaul v. Sewell*, 36 N.C. App. 312, 314, 244 S.E.2d 158, 160 (1978) (internal quotation marks and citation omitted); *see also* 4 N.C. Admin. Code 10B.0206(e) (2004) ("A motion for a continuance shall be allowed only in the discretion of a Commissioner or Deputy Commissioner before whom the case is set."). Plaintiff, however, has failed to argue or offer any showing that Deputy Commissioner Stanback abused her discretion, and there is no indication in the record to support such an allegation. Additionally, when plaintiff gave notice of appeal to the Full Commission, plaintiff did not assign as error that the deputy commissioner abused her discretion in failing to continue the hearing. As required pursuant to the procedural rules governing Tort Claims Act proceedings, "[p]articular grounds for appeal not set forth in the written statement will be deemed to be abandoned and argument thereon will not be heard before the Full Commission." 4 N.C. Admin. Code 10B.0303 (2004). Accordingly, plaintiff's assignment of error is overruled.

Affirmed in Part; Dismissed in Part.

Judge GEER concurs in the result only.

Judge LEVINSON concurs.

Report per Rule 30(e).