NO. COA09-1499

NORTH CAROLINA COURT OF APPEALS

Filed: 20 July 2010

KERRY WATTS,
Plaintiff,

v.

North Carolina
Industrial Commission
I.C. No. TA-18068

NORTH CAROLINA DEPARTMENT
OF ENVIRONMENTAL AND
NATURAL RESOURCES,
Defendant.

Appeal by plaintiff from Decision and Order entered 20 July 2009 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 26 April 2010.

James, McElroy & Diehl, P.A., by Preston O. Odom, III and John R. Buric, for plaintiff-appellant.

Roy Cooper, Attorney General, by Olga Vysotskaya, Assistant Attorney General, for defendant-appellee.

MARTIN, Chief Judge.

Plaintiff appeals from a Decision and Order of the North Carolina Industrial Commission awarding plaintiff damages against the North Carolina Department of Environmental and Natural Resources ("NCDENR") and dismissing plaintiff's claim against the Montgomery County Health Department ("the Health Department") for lack of subject matter jurisdiction. We affirm in part, reverse in

part, and remand for entry of an award consistent with this opinion.

While a full recitation of the facts and procedural history of this case may be found at *Watts v. N.C. Dep't of Environment & Natural Resources* (*Watts I*), 182 N.C. App. 178, 641 S.E.2d 811, *disc. review as to additional issues denied*, 361 N.C. 704, 653 S.E.2d 878 (2007), *disc. review allowed*, 362 N.C. 349, 660 S.E.2d 899, *modified and aff'd per curiam*, 362 N.C. 497, 666 S.E.2d 752 (2008), we limit our discussion in this opinion to the facts and procedural history that are relevant to the issues before us. On 2 July 2003, plaintiff Kerry Watts filed a complaint with the North Carolina Industrial Commission under the North Carolina Tort Claims Act alleging NCDENR, the Health Department, and David Ezzell, an employee of the Health Department, negligently caused plaintiff to sustain monetary damages when defendants issued, and subsequently revoked, an improvement permit authorizing plaintiff to build a three-bedroom residence on his property. After a hearing, the Deputy Commissioner dismissed the claim against David Ezzell and found NCDENR and the Health Department jointly and severally liable for $267,733 in compensatory damages; $18,611.07 in attorneys' fees pursuant to N.C.G.S. § 1A-1, Rule 11, § 6-13, § 6-14, § 6-20, § 6-21.5, § 7A-305(d)(3), § 143-291, § 143.291.1, and § 143.291.2; and $13,034 in litigation costs. NCDENR appealed this decision to the Full Commission.

In a Decision and Order filed 3 October 2005, the Full Commission found it had jurisdiction over NCDENR and the Health

Department and affirmed the award of compensatory damages, attorneys' fees, and litigation costs as ordered by the Deputy Commissioner. In doing so, it made the following relevant findings of fact:

> 21. Plaintiff has presented evidence, and the Full Commission so finds, that it has and will cost plaintiff the sum of approximately $96,024.30 to purchase Lot 861, and construct a suitable septic system on Lot 861, which is broken down as follows:
>
> - $70,000.00 - purchase additional lot
> - $5,000.00 - closing costs
> - $5,100.00 - installation of upgraded septic system on Lot 871
> - $150.00 - perk test on Lot 861
> - $5,380.49 - taxes on Lot 861 prorated over 30 years
> - $513.81 - Lake Tillery taxes on Lot 861
> - $250.00 - April 6, 2004, appraisal
> - $500.00 - August 9, 2004, appraisal
> - $9,150.00 - homeowner's dues over 30 years on Lot 861
>
> 22. The Full Commission finds that since the time in which plaintiff intended to construct his residence in 2002 and 2003, the cost for construction has increased by at least 5.8%. As a result, Plaintiff will spend at least $21,200.00 more dollars to construct his residence, if he is able to complete construction by mid-2005.
>
> 23. During the hearing of this matter before the Deputy Commissioner, plaintiff offered

> evidence, and the Full Commission finds as fact, that as a result of not being able to start construction as intended, plaintiff will incur higher interest costs to perform construction. The undersigned finds that had plaintiff been permitted and allowed to begin construction as anticipated, he would have locked in an interest rate of 5%. Since that time, interest rates have increased. The Full Commission finds that as a result of defendants' negligence and the resulting delay in construction, plaintiff will incur an increased interest rate of at least 1.5% over the term of its loan. The cost of this 1.5% increase in interest is $174,745.54.

NCDENR appealed to this Court. *Watts I*, 182 N.C. App. at 181, 641 S.E.2d at 815. In an opinion filed 20 March 2007, this Court affirmed the Commission's conclusion that plaintiff's claim was not barred by the public duty doctrine as well as the Commission's conclusion that NCDENR admitted to negligent conduct. *Id.* at 184-85, 641 S.E.2d at 817. However, we reversed the award of future interest rate damages as being too speculative, and the award of attorneys' fees as not being authorized by any of the statutes relied upon by the Commission. *Id.* at 186-87, 641 S.E.2d at 818-19.

NCDENR appealed to the North Carolina Supreme Court. *Watts v. N.C. Dep't of Env't & Nat. Res.* (*Watts II*), 362 N.C. 497, 497, 666 S.E.2d 752, 752 (2008). In a *per curiam* opinion, the Court affirmed "the opinion of the Court of Appeals to the extent it h[eld] that the Industrial Commission did not err in failing to apply the public duty doctrine." *Id.* at 497-98, 666 S.E.2d at 753. None of the other issues addressed in our opinion were properly

before the Supreme Court, and our decision as to those issues was left undisturbed. *Id.* at 498, 666 S.E.2d at 753.

Upon remand to the Commission, plaintiff filed a Motion to Enter a Corrected Amended Decision and Order pursuant to Rule 60(a) of the North Carolina Rules of Civil Procedure. In this motion, plaintiff requested the Commission to "[c]orrect [a]ll [e]rroneous [m]athematical [c]omputations." Specifically, plaintiff asked that $20 be added to the total damage amount set forth in the Commission's previous Finding of Fact 21 to reflect the proper sum of the figures identified therein. Plaintiff also requested that the Commission change its previous Conclusion of Law 4 because it "miscalculate[d] the sum of the damages specifically delineated in Findings of Fact 21-23." Thus, he requested that the total amount of damages, after proper calculations, be $291,989.84, instead of the $267,733 which the Commission had awarded. Plaintiff also requested that the Commission's new order "[a]ccurately [r]eflect [t]he [p]resent [p]osture [o]f [t]his [a]ction" by holding both NCDENR and the Health Department liable for his injuries. NCDENR filed a reply opposing plaintiff's Rule 60(a) motion and arguing that the Commission lacked subject matter jurisdiction over the Health Department.

After considering plaintiff's motion and the mandate of this Court, the Commission entered its revised Decision and Order on 20 July 2009. In this order, the Commission corrected the computational error in its previous Finding of Fact 21 and awarded compensatory damages of $96,044.30 to remedy the injury caused by

defendant's breach of duty. The Commission, however, awarded no damages for the increased cost of construction due to the delay caused by defendant's negligence. In accordance with the decision of this Court, the Commission declined to award damages for future interest rate costs and declined to award attorneys' fees. The Commission further concluded that it had no subject matter jurisdiction over the Health Department and dismissed the Health Department as a party. As a result, the Commission's final order held NCDENR solely liable to plaintiff for $96,044.30 in compensatory damages and $13,034 in litigation costs. Plaintiff appeals.

Plaintiff argues that the Commission erred in amending its 3 October 2005 Decision and Order by concluding, in its Decision and Order on remand, that it did not have subject matter jurisdiction over the Health Department. Specifically, plaintiff suggests that the law of the case doctrine precluded the Commission from making this change.

In discussing the law of the case doctrine, our Supreme Court has stated that

> [a]s a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.

Tennessee-Carolina Transp., Inc. v. Strick Corp., 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974) (internal quotation marks omitted), *appeal after remand*, 289 N.C. 587, 223 S.E.2d 346 (1976), *opinion withdrawn on reh'g*, 291 N.C. 618, 231 S.E.2d 597 (1977). Recently, in *Boje v. D.W.I.T., L.L.C.*, 195 N.C. App. 118, 670 S.E.2d 910 (2009), this Court stated that the law of the case doctrine additionally "provides that when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes 'the law of the case' and cannot be challenged in subsequent proceedings in the same case." 118 N.C. App. at 122, 670 S.E.2d at 912. Thus, in *Boje*, this Court held that "since [the defendant] did not appeal Deputy Commissioner Berger's 2003 opinion and award finding that it did not have workers' compensation insurance coverage on the date of plaintiff's accident," this finding was the law of the case and the defendant "was barred from relitigating that issue in subsequent proceedings." *Id.*

However, "[t]he doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a flexible discretionary policy which promotes the finality and efficiency of the judicial process." *Goetz v. N.C. Dep't of Health & Hum. Servs.*, __ N.C. App. __, __, 692 S.E.2d 395, 403 (2010) (internal quotation marks omitted). Accordingly, the law of the case doctrine does not apply with equal force to every issue and may be disregarded where the issue is of special importance. *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 515-16 (4th Cir. 2003) (citing 18B Wright, Miller & Cooper, *Federal Practice*

and Procedure § 4478.5 (2d ed. 2002) ("The force of law-of-the-case doctrine is affected by the nature of the first ruling and by the nature of the issues involved. If the ruling is avowedly tentative or the issues especially important, it may be said that law-of-the-case principles do not apply.")), *appeal after remand*, 412 F.3d 536 (2005). Thus, when a tribunal is faced with a question of its subject matter jurisdiction, a significantly important issue "which call[s] into question the very legitimacy of a court's adjudicatory authority," the goals of the law of the case doctrine are outweighed by the overriding importance and value of a correct ruling on this issue. *Id.* at 515; *see also Pub. Int. Res. Grp. of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 118 (3rd Cir. 1997) (finding that "the concerns implicated by the [jurisdictional] issue of standing . . . trump the prudential goals of preserving judicial economy and finality"). This principle is in line with other areas of law in which "the value of correctness in the subject matter jurisdiction context [has] overrid[den] . . . the procedural bars in place to protect the values of finality and judicial economy." *Am. Canoe Ass'n*, 326 F.3d at 515; *see also Forsyth Cty. Bd. of Soc. Servs. v. Div. of Soc. Servs.*, 317 N.C. 689, 692, 346 S.E.2d 414, 416 (1986) ("Although they raise [the issue of standing] for the first time on appeal and would normally be barred by N.C. R. App. P. 16, questions of subject matter jurisdiction may properly be raised at any point, even in the Supreme Court.").

We hold the Commission did not err in concluding in its 20 July 2009 Decision and Order that it lacked subject matter jurisdiction over the Health Department. Although, in the previous appeal, no party challenged the Commission's 3 October 2005 conclusion to the contrary, we conclude the importance of reaching the proper conclusion as to the Commission's subject matter jurisdiction overrides the law of the case doctrine. *See Am. Canoe Ass'n*, 326 F.3d at 515. In the present case, the Commission clearly lacked jurisdiction over the Health Department. *See* N.C. Gen. Stat. § 143-291(a) (2009) ("The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against the State Board of Education, the Board of Transportation, and all other departments, institutions and agencies *of the State*." (emphasis added)); *see also Wood v. Guilford Cty.*, 143 N.C. App. 507, 511, 546 S.E.2d 641, 644 ("[T]he Tort Claims Act does not apply to county agencies, regardless of whether the county agencies are acting as an agent of the State."), *disc. review allowed*, 354 N.C. 229, 553 S.E.2d 400 (2001), *rev'd on other grounds*, 355 N.C. 161, 558 S.E.2d 490 (2002). Thus, the Commission's conclusion to that effect was proper.

Plaintiff also argues the Commission erred, in ruling on his Rule 60(a) motion, by refusing to award damages in the amount of $291,989.84, and by reducing his damages by refusing to award the damages, previously awarded, for his increased construction costs.

Rule 60(a) of the North Carolina Rules of Civil Procedure provides that "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time . . . ." N.C. Gen. Stat. § 1A-1, Rule 60(a) (2009). "While Rule 60 allows the trial court to correct clerical mistakes in its order, it does not grant the trial court the authority to make substantive modifications to an entered judgment." *In re C.N.C.B.*, __ N.C. App. __, __, 678 S.E.2d 240, 242 (2009) (internal quotation marks omitted). "A change in an order is considered substantive and outside the boundaries of Rule 60(a) when it alters the effect of the original order." *Buncombe Cty. ex rel. Andres v. Newburn*, 111 N.C. App. 822, 825, 433 S.E.2d 782, 784, *disc. review denied*, 335 N.C. 236, 439 S.E.2d 143 (1993).

In *Watts I*, this Court determined that the Commission intended, in the 3 October 2005 Decision and Order, the total award amount to equal the sum of the $96,024.30 in costs to construct a septic system on Lot 861, $174,745.54 in future interest rate costs, and $21,200 in increased construction costs. *See Watts I*, 182 N.C. App. at 186, 641 S.E.2d at 818 (noting that the Commission awarded "damages for the cost of purchasing the adjoining lot and constructing a suitable septic system on the lot[,] . . . the increased construction costs[,]" and the future interest rate damages). As plaintiff suggests, these damages amount to $291,989.84, while, due to an apparent miscalculation, the Commission awarded only $267,733.

On remand, plaintiff sought to correct this miscalculation through its Rule 60(a) motion. However, the Commission, in considering plaintiff's motion, was bound by the holdings in *Watts I* and *Watts II*. *See Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 667, 554 S.E.2d 356, 363 (2001) ("On the remand of a case after appeal, the mandate of the reviewing court is binding on the lower court, and must be strictly followed, without variation and departure." (internal quotation marks omitted)), *appeal dismissed and disc. review denied*, 355 N.C. 348, 563 S.E.2d 562 (2002). In *Watts I*, we held that the $174,745.54 in future interest rate damages, discussed in Finding of Fact 23, was too speculative and plaintiff was not entitled to recover this amount. *Watts I*, 182 N.C. App. at 185, 641 S.E.2d at 818. Thus, according to our mandate, the Commission properly declined to include this amount in the total damage award in its 20 July 2009 Decision and Order. The Commission did "correct . . . [the] typographical error in Finding of Fact 21, changing 96,024.30 to $96,044.30." As no party has challenged the validity of this corrected finding, it is binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) ("Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.").

However, the Commission inexplicably deleted its previous Finding of Fact 22 which addressed plaintiff's $21,200 in increased construction costs. This change was substantive in nature and impermissible under Rule 60(a). *See Lee v. Lee*, 167 N.C. App. 250,

254, 605 S.E.2d 222, 225 (2004) ("[T]he amount of money involved is not what creates a substantive right; rather, it is the source from which this money is derived." (internal quotation marks omitted) (alteration in original)), *appeal after remand*, 190 N.C. App. 822, 662 S.E.2d 36 (2008). Moreover, as the validity of this finding was never challenged during the previous appeal, it became the law of the case. *See Boje*, 118 N.C. App. at 122, 670 S.E.2d at 912; *see also Naddeo v. Allstate Ins. Co.*, 139 N.C. App. 311, 320, 533 S.E.2d 501, 507 (2000) (finding that the "finding was conclusive on appeal and became the law of the case" when the party failed to challenge its validity on appeal). Accordingly, the Commission erred in removing this finding.

As we indicated in *Watts I*, the Commission intended the total damage amount to equal the sum of the figures identified in Findings of Fact 21, 22, and 23 set forth in its 3 October 2005 Decision and Order. *See* 182 N.C. App. at 186, 641 S.E.2d at 818. Since we previously struck down the award of future interest rate costs contained in the previous Finding of Fact 23, the total award amount on remand should be the sum of the $96,044.30 in costs to construct the new septic system and the $21,200 in increased construction costs. Therefore, we remand to the Commission with instructions to award damages, as it previously had done, for plaintiff's increased construction costs, and to enter a total award amount of $117,244.30 in compensatory damages. The award of $13,034 for litigation costs and expenses has not been challenged on appeal, and we, therefore, express no opinion as to such award.

Affirmed in part, reversed in part, and remanded.

Judges JACKSON and BEASLEY concur.

Report per Rule 30(e).