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NO. COA08-165

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2008

BRENDA EASON STALLINGS,
Plaintiff-Appellee

v.

NORTH CAROLINA DEPARTMENT
OF THE STATE TREASURER,
RETIREMENT SYSTEMS DIVISION,
Defendant-Appellant

North Carolina Industrial Commission
I.C. File No. TA-18810

Appeal by defendant from an Opinion and Award entered 8 October 2007 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 27 August 2008.

Elliot Pishko Morgan, P.A., by Robert M. Elliot, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for defendant-appellant.

CALABRIA, Judge.

The North Carolina Department of the State Treasurer, Retirement Systems Division ("defendant" or "retirement system") appeals from an Opinion and Award of the North Carolina Industrial Commission ("the Commission") concluding that Brenda Eason Stallings ("plaintiff") was entitled to damages caused by defendant's negligence in calculating her retirement. We affirm the Commission's Opinion and Award in part, and reverse in part.

Plaintiff, a counselor for the Rocky Mount/Nash County Schools, submitted an "Application to Purchase Service Credits" to defendant on 13 December 2001. Plaintiff sought a determination of the cost to buy back the years of service she had previously withdrawn from the retirement system. No response was received from defendant. Between 13 December 2001 and 17 July 2002, plaintiff called the telephone number provided in the state retirement brochure dozens of times. Plaintiff was never able to speak with anyone who could assist her. She was either placed on hold indefinitely, or transferred from employee to employee without reaching anyone who could assist her.

On 17 July 2002, because she could not reach defendant over the phone and had not received a response from the application she submitted in December, plaintiff traveled from Winston-Salem with her daughter to speak with a retirement system counselor located in Raleigh. Plaintiff met with Robert McKane ("Mr. McKane") a retirement counselor employed by the defendant, to determine how many years of service she had accrued, the amount she would need to pay to buy back the years of service she had previously withdrawn, when she would be eligible to retire, and the amount of her monthly benefits upon retirement.

Mr. McKane determined that plaintiff had accrued seven years of credited service, and that plaintiff could buy back approximately thirteen years of previously withdrawn credit for "somewhere around $37,000." Based on that information, Mr. McKane informed plaintiff that she could retire immediately and would receive a monthly retirement benefit of $1,675.13. Plaintiff's daughter asked Mr. McKane to explain the accuracy of the estimates. Mr. McKane indicated that the numbers he provided were accurate within "1-3%" and indicated that the final retirement figure would be determined using the same software Mr. McKane used to calculate the estimate. Plaintiff indicated to Mr. McKane that she would likely retire based on the

information she had received from him. Plaintiff testified that Mr. McKane said "[w]ell, if you're going to, you need to retire before August the 1st. That way, your benefits, all that stuff [will -] you'll have time to get things straightened out and you won't have a lapse."

On 22 July 2002, plaintiff submitted her retirement notice to the Rocky Mount/Nash County Schools with an effective date of 1 August 2002. At the time of her retirement, plaintiff was informed that within thirty days she would receive confirmation of her benefits, confirmation of the purchase price for her previously withdrawn years of service, and notification regarding retiree healthcare benefits.

By early October 2002, plaintiff still had not received information regarding her withdrawn credit, retirement, or benefits. Plaintiff attempted to reach defendant by phone to obtain information regarding her retirement. Her repeated attempts were unsuccessful. Just prior to Thanksgiving, four months after providing notice of her retirement, plaintiff received a letter from defendant that included the purchase price required to buy back her previously withdrawn years of service. The amount quoted in the letter was, $39,528.29. This amount was over $2,000 higher than the original estimate Mr. McKane had provided plaintiff. It was later determined that Mr. McKane's original estimate of $37,000 was the correct amount and that the amount plaintiff was required to pay was incorrect. Plaintiff learned in defendant's letter that the deadline to pay the withdrawn credit was 1 December 2002, less then a week from the receipt of the letter. However, this deadline was also incorrect. Nevertheless, plaintiff, with the help of her family, paid the amount required prior to the incorrect deadline provided by defendant.

On 10 December 2002, plaintiff received notice of her monthly retirement benefits. The notice indicated that plaintiff's monthly benefit would be $1,232.35, not $1,675.13, the amount that had been provided by Mr. McKane. Based on the communication problems and delays she

had previously experienced working with defendant, plaintiff assumed that this amount was a mistake and spoke with multiple retirement system employees hoping to resolve the issue. Finally, plaintiff was referred to the head of the retirement system, Michael Williamson ("Mr. Williamson"). Mr. Williamson assured plaintiff he would look into the error and told plaintiff to cash her retirement benefit checks while they worked to resolve the error.

Subsequently, it was discovered that Mr. McKane had erred in entering plaintiff's information into the system when plaintiff met with him in July. Because of this error, plaintiff's benefits were determined as if she had been employed in law enforcement. Specifically, the error provided estimates based on benefits called "unreduced" benefits. These "unreduced" benefits were not available to her as a school counselor at plaintiff's age, and with plaintiff's years of service. It was also discovered that defendant erred in calculating the amount required to buy back plaintiff's withdrawn years of service. Plaintiff was required to pay $2,410.89 more than she expected in order to buy back her years of service. Defendant also inexplicably paid plaintiff her accrued retirement payments twice, to which plaintiff returned the overpayment.

Although defendant recognized Mr. McKane's error, on 7 March 2003, defendant denied plaintiff's claim for the retirement amount provided by Mr. McKane. On 8 October 2007, the Full Commission of the North Carolina Industrial Commission adopted the decision and award entered by Deputy Commissioner Wanda Blanche Taylor finding in favor of plaintiff. The defendant appeals.

<u>Subject Matter Jurisdiction</u>

The defendant argues that the Commission lacked subject matter jurisdiction to hear this matter because the State's sovereign immunity bars this action. We disagree.

As an initial matter, the parties stipulated that the Commission had subject matter jurisdiction. However, “parties cannot stipulate to give a court subject matter jurisdiction where no such jurisdiction exists.” *Northfield Dev. Co. v. City of Burlington*, 165 N.C. App. 885, 887, 599 S.E.2d 921, 924 (2004). A “lack of jurisdiction of the subject matter may always be raised by a party, or the court may raise such defect on its own initiative.” *Dale v. Lattimore*, 12 N.C. App. 348, 352, 183 S.E.2d 417, 419 (1971).

The Commission only has jurisdiction to hear claims involving negligence of state employees and officers, and does not have jurisdiction to hear contract claims involving the State. N.C. Gen. Stat. . 143-291(a) (2007). The defendant argues that this is a contract dispute. We disagree. The plaintiff does not claim that defendant breached a contract. Defendant is currently paying plaintiff $1,232.35 per month, the amount to which the plaintiff is entitled under the retirement contract. Plaintiff alleged that defendant negligently misrepresented plaintiff’s retirement benefits. More importantly, plaintiff relied on these misrepresentations, and plaintiff was harmed through her reliance on these misrepresentations. Plaintiff alleged the tort of negligent misrepresentation, a negligence action, to which the State’s sovereign immunity has been waived under the Tort Claims Act. The Commission had jurisdiction to hear this matter.

Negligent Misrepresentation

”The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.” *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206, 367 S.E.2d 609, 612 (1988). On appeal, the defendant argues that Mr. McKane did not owe a duty of care to plaintiff, Mr. McKane did not breach any duty of care, plaintiff did not reasonably rely upon Mr. McKane’s representations, and that any breach of duty on the part of defendant was not

the proximate cause of plaintiff's injuries. If competent evidence supports the Commission's findings of fact and the findings of fact justify the Commission's conclusions of law, we must affirm the Industrial Commission's findings.

I. Duty of Care

Defendant argues that Mr. McKane did not owe plaintiff a duty of care. We disagree. The Commission found as fact that Mr. McKane was employed as a state retirement counselor, that at the request of plaintiff, Mr. McKane calculated both her buy back and her monthly retirement benefits, and that the retirement system lacked a higher level of review for the calculation of benefits. Plaintiff was unable to seek a second opinion because there are no other counselors above Mr. McKane that could have confirmed his calculations. The defendant does not challenge these findings of fact, and therefore they are binding on appeal. The defendant challenges the Commission's conclusion of law that defendant owed a duty to plaintiff to use reasonable care to calculate plaintiff's benefits accurately.

The defendant contends that Mr. McKane had no duty to provide accurate retirement calculations because the documents he provided to plaintiff were entitled "PRELIMINARY ESTIMATE." Furthermore, the State argues, the words "estimate" and "estimated" are used several times throughout the document. Finally, plaintiff was informed that all legal requirements had to be met before an "estimated report of retirement benefits" would be mailed to her.

Defendant is mistaken regarding Mr. McKane's duty. The defendant argues that Mr. McKane had no duty to provide an actual retirement benefit. We agree. Mr. McKane had a duty to exercise reasonable care when preparing the information provided to plaintiff. *Id.* This duty required Mr. McKane to exercise care in completing the forms in the software program that he used to calculate plaintiff's retirement benefits.

In other words, if Mr. McKane had correctly entered plaintiff's information into the system but for reasons entirely beyond his control, the software returned erroneous information regarding the retirement benefits, Mr. McKane's duty to exercise reasonable care when he prepared information for plaintiff would not have been breached.

II. Breach of Duty

The Commission found as fact that Mr. McKane incorrectly calculated plaintiff's retirement as if she were employed in law enforcement, resulting in an erroneous calculation. The Commission also found that the form Mr. McKane provided plaintiff indicated that the benefits were "unreduced" and Mr. McKane failed to notice the word "unreduced" that would have indicated he had erred in his calculations. The Commission further found that Mr. McKane assured the plaintiff that his calculations were accurate within a 3% margin of error, and that the final determination would be made using the same software he used when making his calculations. Defendant did not assign error to these findings of fact and therefore, they are binding on appeal. These findings justify the Commission's conclusion of law that Mr. McKane breached his duty to use reasonable care when calculating plaintiff's retirement benefits.

III. Reasonable Reliance

The Commission found as fact that Mr. McKane assured plaintiff that she could rely on the figures provided and that the final calculations would be made using the same software he used. The Commission further found that the defendant employs no one who could confirm whether Mr. McKane's calculations were correct or not prior to plaintiff's decision to retire. Defendant does not challenge these findings of fact and they are binding on appeal. The Commission held that plaintiff was justified in relying on Mr. McKane's assertions. "Ordinarily, the question of whether an actor is reasonable in relying on the representations of another is a

matter for the finder of fact." *Olivetti Corp. v. Ames Business Systems*, Inc., 319 N.C. 534, 544, 356 S.E.2d 578, 584 (1987).

> What is reasonable is, as in other cases of negligence, dependent upon the circumstances. It is, in general, a matter of the care and competence that the recipient of the information is entitled to expect in the light of the circumstances and this will vary according to a good many factors. The question is one for the jury, unless the facts are so clear as to permit only one conclusion.

Marcus Bros. Textiles, Inc. v. Price Waterhouse, L.L.P, 350 N.C. 214, 225, 513 S.E.2d 320, 327 (1999) (quoting *Restatement (Second) of Torts §552 cmt. e*).

Defendant argues that plaintiff was not justified in relying on Mr. McKane's estimate because the estimate stated the benefits were unreduced and plaintiff should have known that she was ineligible for unreduced benefits based on information available in the Retirement System Handbook. We cannot agree that, under the circumstances, the facts are so clear as to permit only the conclusion that plaintiff was not justified in relying upon Mr. McKane's calculations because of information available in the employee handbook.

Specifically, the Commission held that the term "unreduced" appeared on plaintiff's estimate "in such small font at the bottom of a full page of typed information, that a reasonable person would not have seen or attached any significance to the term . . . ." In fact, Mr. McKane himself did not notice the term unreduced on the document, for if he had, he may have realized his error. Further, the document does not indicate that the calculations were made assuming that plaintiff was employed in law enforcement. Had this information been included on the document, plaintiff, exercising reasonable care, may have noticed a mistake had been made.

IV. Proximate Cause/Contributory Negligence/Mitigation

Defendant's arguments regarding proximate cause, plaintiff's contributory negligence, and plaintiff's failure to mitigate damages are all essentially the same. Defendant contends that

plaintiff, upon learning of the error, and the correct monthly retirement benefit, should have returned to work. Defendant argues that it was this failure to return to work that caused plaintiff's harm, not Mr. McKane's error.

The Commission held

> Because of inordinate delays in its processing of plaintiff's retirement documentation, defendant did not notify plaintiff of its error until after plaintiff had retired from her long-time position of employment with the Rocky Mount/Nash County Schools, had lost her health care and other benefits which she had during her employment, had paid to defendant with borrowed funds over $39,000 for the buy back of her credits, and had committed herself wholeheartedly to her family to care for her grandchild and to permit her daughter and son-in-law to advance their careers. This was a decision and commitment which had been made as a proximate result of the counselor's misrepresentations of her benefits.

We agree with the Commission and include additional facts that clarify the reasonableness of plaintiff's actions. Given that defendant erred in calculating plaintiff's buy back amount, with Mr. McKane's original estimate regarding plaintiff's buy back being correct, and that defendant paid plaintiff's accrued monthly retirement payment twice, it was reasonable for plaintiff to believe that the notification received 10 December 2002, stating that her benefits were only $1,232.35 per month, was another error on the part of defendant.

Mr. Williamson acknowledged the seriousness of the error, assured plaintiff he would look into the discrepancy and *suggested plaintiff cash her first retirement benefit check*, even though the act of cashing the first retirement check made the retirement official. On 3 January 2003, plaintiff still believed that the correct monthly benefit was $1,675.13, and that defendant was working to resolve the discrepancy. It was not until 7 March 2003, that plaintiff received a final notice that Mr. McKane's calculations were incorrect, and it was not until then, over seven months after her retirement, she became aware that the amount of her retirement benefits were in

fact only $1,232.35 per month. By this time, as the Commission held, plaintiff had taken irreversible steps based on the information she had been provided.

Defendant argues that plaintiff could have obtained a job as a counselor with the Rocky Mount/Nash County Schools to mitigate her damages. "The rule in North Carolina is that an injured plaintiff . . . must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong. If he fails to do so, for any part of the loss incident to such failure, no recovery can be had." *Miller v. Miller*, 273 N.C. 228, 239, 160 S.E.2d 65, 73-74 (1968). Defendant argues that plaintiff could have returned to work to minimize her loss from defendant's negligence. They offered evidence that a position similar to her prior position in Rocky Mount/Nash County Schools was available.

We do not agree that to lessen the consequences of defendant's wrong it would have been reasonable to require plaintiff to return to her prior employment. In reliance upon defendant's representation, plaintiff moved from her home in Macclesfield to Winston-Salem. Plaintiff interviewed with Forsyth Technical Community College for a position, but was unsuccessful. As a result of her retirement, plaintiff incurred obligations to her family that prohibited returning to Macclesfield and resuming a position in the public school system.

<u>Interest on the Award</u>

Defendant argues that the Commission erred in ordering defendant to pay interest on plaintiff's award. We agree. Our Courts have held that "post-judgment interest was not collectible against the State and may not be awarded against the State unless the State has manifested its willingness to pay interest by an Act of the General Assembly or by a lawful contract to do so." *Myers v. Dept. of Crime Control*, 67 N.C. App. 553, 555, 313 S.E.2d 276, 277

(1984) (internal quotations omitted). The General Assembly has not done so, and therefore the Commission's award of interest to plaintiff was error and is reversed.

Affirmed in part and reversed in part.

Judges TYSON and ELMORE concur.

Report per Rule 30(e).