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NO. COA09-411

NORTH CAROLINA COURT OF APPEALS

Filed: 19 January 2010

DOUGLAS LEE HUSKETH, JR.,  
Plaintiff-Appellant,

v.

N.C. Industrial Commission  
No. TA-19402

NORTH CAROLINA DEPARTMENT  
OF CORRECTION,  
Defendant-Appellee.

Appeal by Plaintiff from decision and order entered 22 April 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 November 2009.

*Douglas Lee Husketh, Jr., Plaintiff-Appellant, pro se.*

*No brief filed by Defendant-Appellee.*

McGEE, Judge.

Plaintiff filed an affidavit for a claim of damages under the Tort Claims Act, N.C. Gen. Stat. § 143-291 *et seq.* (2005), on 5 January 2006 with the North Carolina Industrial Commission. Plaintiff claimed in his affidavit that Defendant, through certain of its employees, was negligent in failing to apply the appropriate sentencing statutes for his convictions. According to Plaintiff, due to Defendant's negligence, Plaintiff has remained incarcerated beyond the term allowed by the applicable sentencing guidelines.

Defendant filed a motion to dismiss Plaintiff's claim

alleging, *inter alia*, that the Industrial Commission lacked personal jurisdiction over Defendant and lacked subject matter jurisdiction over Plaintiff's claim. By a decision and order filed 9 May 2007, Deputy Commissioner Robert J. Harris made the following conclusions of law:

1. As long as a public official lawfully exercises the judgment and discretion with which he/she is invested by virtue of his/her office, keeps within the scope of his/her official authority and acts without malice or corruption, he/she is protected from liability. *Collins v. N.C. Parole Comm'n*, 344 N.C. 179 (1996) (affirming Industrial Commission's dismissal of plaintiff's claim on grounds that members of the Parole Commission and Secretary of Correction are public officials). See also *Harwood v. Johnson*, 326 N.C. 231 (1990).

2. Because there are no allegations of malice or corruption in regard to [the public officials'] action[s] in this matter, Plaintiff's claim against Defendant based on the negligence of [the public officials] is not allowed, as the State has not waived its immunity for negligence of public officials. As such, the Industrial Commission lacks personal and subject matter jurisdiction in this claim. N.C. Gen. Stat. § 143-291.

Plaintiff appealed to the Full Commission (the Commission), which filed a decision and order on 22 April 2008, adopting the conclusions of law of the Deputy Commissioner and ordering that Plaintiff's claim be dismissed with prejudice. Plaintiff appeals.

In Plaintiff's first argument, he contends that the Commission erred in concluding that it lacked personal jurisdiction over Defendant and subject matter jurisdiction over Plaintiff's claim. We agree.

"Because this appeal is before us on [a] motion to dismiss, we

treat the factual allegations in Plaintiff's affidavit as true. *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998)." *Patrick v. N.C. HHS*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 666 S.E.2d 171, 172 (2008). The Tort Claims Act was enacted for the specific purpose of waiving the State's sovereign immunity for the negligent acts of its employees acting within the scope of their employment.

(a) The North Carolina Industrial Commission is hereby constituted a court for the purpose of hearing and passing upon tort claims against . . . all . . . departments, institutions and agencies of the State. The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C. Gen. Stat. § 143-291 (2005). The statute does not require an allegation of malice or corruption. In *Patrick*, the plaintiff filed an affidavit of claim before the Commission against the North Carolina Department of Health and Human Services (DHHS), alleging that the negligence of certain DHHS employees led to the repeated sexual assault of a minor. *Patrick*, \_\_\_ N.C. App. at \_\_\_, 666 S.E.2d at 172. Based upon public official immunity, DHHS moved to dismiss the plaintiff's claim. The Deputy Commissioner rejected DHHS's public official immunity argument and the Commission upheld the decision and order of the Deputy Commissioner. *Id.* at \_\_\_, 666 S.E.2d at 172-73. In its decision rejecting DHHS's public official immunity defense, the Commission correctly concluded that because

the plaintiff's claim was brought pursuant to the Tort Claims Act, the state agency, DHHS, was the only defendant, and therefore, the public official immunity doctrine did not apply. The decision of the Commission was upheld by our Court. *Patrick*, \_\_\_ N.C. App. at \_\_\_, 666 S.E.2d at 173 ("Because public official immunity only applies to claims brought against public officials in their individual capacities, and because the Tort Claims Act only confers jurisdiction in the Industrial Commission over claims brought against State Agencies, the doctrine of public official immunity does not bar Plaintiff's claim in this case.").

Although DHHS in *Patrick*, and the Commission in the present case, cited *Collins v. N.C. Parole Comm'n*, 344 N.C. 179, 473 S.E.2d 1 (1996), in support of a public immunity doctrine argument, our Court soundly rejected the idea that *Collins* in any manner supports the argument that under the Tort Claims Act the State is protected from the negligence of its employees acting within the scope of their employment pursuant to the public immunity doctrine. "We do not, however, find *Collins* instructive[.]" *Patrick*, \_\_\_ N.C. App. at \_\_\_, 666 S.E.2d at 174.

The Supreme Court in *Collins* did not hold, as DHHS suggests, that no action may be brought under the Tort Claims Act against DHHS on allegations that a county department of social services, through its social workers, negligently failed to investigate reports of suspected child abuse or failed to implement adequate policies and procedures for the investigation of such reports.

*Id.*

The Commission in its decision and order also relied on

*Harwood v. Johnson*, 326 N.C. 231, 388 S.E.2d 439 (1990), but this reliance was equally misplaced. *Harwood* was a civil action filed in superior court against "the Secretary of the North Carolina Department of Correction, the Chairman and the members of the Parole Commission, and a parole case analyst, personally and in their official capacities[.]" *Id.* at 236, 388 S.E.2d at 442. Our Supreme Court held in *Harwood* that these individual defendants could not be sued in their official capacities in the superior court, which in reality constituted an action against the State, because "the State ha[d] not consented to being sued in [the superior court] for violations by [its agencies.]" *Id.* at 238, 388 S.E.2d at 443. The State has, however, consented to being sued in the Industrial Commission for the negligent acts of its employees done within the scope of their employment. N.C. Gen. Stat. § 143-291. As has previously been determined by the Commission itself and this Court, "the doctrine of public official immunity does not apply to the [kind of] case at bar[.]" *Patrick*, \_\_\_ N.C. App. at \_\_\_, 666 S.E.2d at 175; *see also Gammons v. North Carolina Dep't of Human Resources*, 344 N.C. 51, 64, 472 S.E.2d 722, 729 (1996) ("the Industrial Commission has jurisdiction under the Tort Claims Act to determine the Department of Human Resources' liability for alleged negligence of the Cleveland County Director of Social Services and his staff while acting within the scope of their obligation[s]").

Plaintiff's action alleging the negligence of Defendant, through the acts of its employees acting within the scope of their

employment, is precisely the kind of action the Tort Claims Act was enacted to cover. Through the Tort Claims Act, the State has waived its sovereign immunity with respect to the facts alleged in this action, and suit in the Commission is proper. We reverse the 22 April 2008 decision and order of the Commission dismissing Plaintiff's claim, and we remand for a hearing on the merits by the Commission. Upon remand, either party may file or renew any appropriate motions, including those addressed in Plaintiff's second and third arguments on appeal.

Reversed and remanded.

Judges WYNN and BRYANT concur.

Report per Rule 30(e).