

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA13-477
NORTH CAROLINA COURT OF APPEALS

Filed: 15 October 2013

WILLIAM LEE WALKER

v.

N.C. Industrial Commission
No. TA-22147

N.C. DEPARTMENT OF CORRECTION

Appeal by plaintiff from order filed 21 December 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 October 2013.

William Lee Walker, pro se, plaintiff-appellant.

Attorney General Roy Cooper, by Associate Attorney General Adrian W. Dellinger, for defendant-appellee.

CALABRIA, Judge.

William Lee Walker ("plaintiff") appeals from an order of the North Carolina Industrial Commission ("the Commission"), denying his claim pursuant to the Tort Claims Act. We affirm.

On 31 August 2010, plaintiff, an inmate incarcerated at the North Carolina Department of Correction ("defendant" or "DOC"), filed a claim for damage or loss of personal property against the DOC under the Tort Claims Act. Plaintiff alleged that a DOC

officer searched his personal property, found that he had two radios and confiscated one of the radios. DOC has a policy that inmates can only have one radio. If more than one is found, additional radios are either sent to their family, or destroyed. Despite his attempts, plaintiff claimed that DOC employees failed to return one of the radios to him and, as a result of the DOC employees' negligent conduct, he had been damaged in the amount of \$1,000.00.

The DOC filed, *inter alia*, a motion to dismiss, which the Commission denied. After determining that plaintiff failed to prove that DOC was negligent as a result of its employees' actions, Deputy Commissioner George T. Glenn II ("Deputy Commissioner") denied plaintiff's claim. Plaintiff appealed to the Commission.

According to the Commission's order, plaintiff had "not shown good ground to reconsider the evidence, receive further evidence, or rehear the parties or their representatives." The Commission concluded that plaintiff failed to prove negligence on the part of a named employee or agent of defendant, and denied plaintiff's claim. Plaintiff appeals.

Plaintiff argues that the Commission erroneously denied his claim by not considering all of the competent evidence, by

failing to review the record regarding the Deputy Commissioner's conflict of interest, and by failing to review an interlocutory order. We disagree.

An appeal from the Commission to this Court "shall be for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2011). In reviewing a decision and award under the Tort Claims Act we determine: (1) whether the Commission's findings of fact are supported by competent evidence, and (2) whether the Commission's conclusions of law are supported by the findings of fact. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). The Commission determines the credibility and weight to be given evidence, and as long as there is some evidence in the record to support them, the findings of fact made by the Commission are conclusive on appeal. *Fennell v. N.C. Dep't. of Crime Control and Pub. Safety*, 145 N.C. App. 584, 590-91, 551 S.E.2d 486, 491 (2001).

"The burden is on an appealing party to show, by presenting a full and complete record, that the record is lacking in evidence to support the Commission's findings of fact." *Dolbow*

v. Holland Industrial, Inc., 64 N.C. App. 695, 696, 308 S.E.2d 335, 336 (1983). When "[t]he record does not contain the oral testimony . . . the [lower tribunal's] findings of fact are presumed to be supported by competent evidence." *Fellows v. Fellows*, 27 N.C. App. 407, 408, 219 S.E.2d 285, 286 (1975). Moreover, it is presumed, in the absence of a showing otherwise, that in a nonjury trial a tribunal disregarded incompetent evidence in making its decision. *City of Statesville v. Bowles*, 278 N.C. 497, 502, 180 S.E.2d 111, 114-15 (1971).

In the instant case, the Commission's specific findings of fact are as follows:

2. On August 31, 2010, plaintiff was a prison inmate incarcerated in the custody and control of defendant at Warren Correctional Institution.

3. Plaintiff alleges that, on August 31, 2010, an officer named L. Frances was searching his property when she discovered that plaintiff had two radios, one of which was a Jensen radio. Plaintiff claims that Officer Frances took the Jensen radio to Sergeant David Key for the purpose of ascertaining whether plaintiff could have two radios. Plaintiff claims that Officer Frances did not complete a Form DC-160 reflecting that she took the radio, and that the radio was never returned to him.

4. Plaintiff acknowledged that he did not have any Form DC-160s showing that he was in possession of the radio he claims was taken and never returned. Defendant's Exhibit One

consists of five form DC-160s. The DC-160s reflect that plaintiff had at the most one radio on each of the dates the forms were completed.

5. Plaintiff further claims that, when his second radio was not returned to him, he filed a grievance about the same. However, plaintiff did not produce a copy of the grievance and was unable to provide a grievance number.

6. Sergeant Key testified, and the Full Commission finds, that, if plaintiff had filed any grievance concerning his radio naming him, he would have received it and responded to it.

7. Defendant's policy provides that an inmate can have only one radio. Sergeant Key testified, and the Full Commission finds, that, although he typically gives inmates the opportunity to have confiscated items mailed home, pursuant to defendant's policy, a second radio found in the possession of an inmate is considered contraband and may be destroyed by an employee of defendant without first offering the inmate the option of sending it home or storing it.

8. The Full Commission finds, based upon the preponderance of the evidence, that plaintiff has failed to prove that any radio was taken from him by Officer Frances on August 31, 2010.

9. Moreover, even if plaintiff possessed a second radio which was taken by an officer and destroyed, such an action would be well within the officer's authority pursuant to defendant's policy regarding contraband, and, therefore, would not constitute negligence.

The record on appeal filed by plaintiff does not include the transcript of the hearing before the deputy commissioner or a narration of the testimony presented. Therefore, we must conclude that the Commission's findings of fact are supported by competent evidence.

The next issue is whether the Commission's findings of fact support their conclusions of law. The Tort Claims Act permits recovery if the plaintiff can show that he sustained an injury as a proximate result of a negligent act of a named state employee acting within the course and scope of his employment. N.C. Gen. Stat. § 143-291(a) (2011). The determination of whether a named employee is negligent is based upon whether, "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." *Id.* "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." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988).

In the instant case, in paragraph four of the Commission's binding findings of fact,

Plaintiff acknowledged that he did not have any Form DC-160s showing that he was in possession of the radio he claims was taken and never returned. Defendant's Exhibit One consists of five form DC-160s. The DC-160s reflect that plaintiff had at the most one radio on each of the dates the forms were completed.

Therefore, if the second radio never existed, DOC did not owe a legal duty to plaintiff. Since DOC had no legal duty regarding the radio, we conclude that plaintiff has not shown defendant's named employees, Sergeant Key and Officer Frances, breached a duty of care owed to plaintiff. The Commission found that plaintiff failed to prove that the property existed, was taken and not returned to him. Therefore, DOC is not liable for a breach of any duty for plaintiff's loss of personal property.

Plaintiff also argues that the Commission erred by not reviewing the record to determine whether the Deputy Commissioner had a conflict of interest. Plaintiff claims that the Deputy Commissioner should have recused himself from the case because he had heard three prior cases brought by plaintiff, and ruled the same way in each case. As an initial matter, the record does not reflect that plaintiff ever requested that the Deputy Commissioner recuse himself from the hearing. Thus, plaintiff has failed to preserve this issue for appellate review. N.C.R. App. P. 10(a)(1) (2013). Assuming,

arguendo, that plaintiff preserved this issue, he has failed to present any evidence of "personal bias, prejudice or interest on the part of the [Deputy Commissioner.]" Therefore, plaintiff has failed to meet his burden of showing "that grounds for disqualification actually exist[ed]." *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003).

Plaintiff further argues that the Commission did not review the record "as to the continuance base[d] on the Sheriff not serving the subpoenas on" L. Francis. The record indicates that there was a subpoena issued for an Officer C. Francis. Plaintiff failed to include a transcript, and therefore we are unable to determine whether a person known as Officer Francis was called as a witness at the hearing, or whether plaintiff requested a continuance. The record is devoid of any evidence that plaintiff requested a continuance. Therefore, plaintiff failed to preserve this issue for appellate review. N.C.R. App. P. 10(a)(1) (2013).

Finally, plaintiff argues that the Commission failed to review the interlocutory order denying DOC's motion to dismiss. Despite plaintiff's contentions, there is no evidence that the Commission failed to review the interlocutory order denying DOC's motion to dismiss. According to the State, plaintiff

apparently believes the Commission's order found DOC liable for negligence. However, the Commission's order merely denied DOC's motion to dismiss. Defendant's arguments are without merit. Therefore, we affirm the Commission's order.

Affirmed.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).