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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA20-26

Filed: 17 November 2020

North Carolina Industrial Commission, No. 14-002870

JERRY MCSWAIN, Employee, Plaintiff

v.

INDUSTRIAL COMMERCIAL SALES & SERVICE, LLC, Employer, and
AIG/CHARTIS CLAIMS, INC., Carrier, Defendants.

Appeal by plaintiff from order entered 20 September 2019 by Commissioner
Charlton L. Allen in the North Carolina Industrial Commission. Heard in the Court
of Appeals 28 April 2020.

*McSwain Law Firm, LLC, by Gayla S. L. McSwain, pro hoc vice, and The
Bollinger Law Firm, PC, by Bobby L. Bollinger, Jr., for plaintiff-appellant.*

*McAngus, Goudelock & Courie, PLLC, by Derek Wagner, for defendant-
appellees.*

BRYANT, Judge.

Where plaintiff's underlying substantive appeal from an order of the Full
Commission was heard and decided by this Court, plaintiff's appeal from an order
settling the record on appeal, is dismissed as moot.

Factual and Procedural Background

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Plaintiff Jerry McSwain, an employee of defendant Industrial Commercial Sales & Service, LLC, brought a claim for worker's compensation before a Deputy Commissioner of the Industrial Commission. After the Deputy Commissioner entered an order, plaintiff appealed the matter to the Full Commission ("the Commission"). On 27 February 2019, the Commission entered its order, denying plaintiff's claim.

On 14 March 2019, plaintiff filed a petition in the Commission to appeal to this Court as an indigent person. The Commission allowed the petition in an order dated 29 March 2019. Plaintiff filed an amended notice of appeal to this Court. Plaintiff's employer, defendants Industrial Commercial, and its insurance carrier, AIG/Chartis Claims, Inc., filed an amended notice of cross-appeal. On 5 August 2019, the Commission entered an order settling the record for appeal.

On 12 August 2019, plaintiff filed a motion to reopen the record or, alternatively, for reconsideration of the order settling the record on appeal. On 19 August 2019, plaintiff filed amended versions of these alternative motions before the Commission. On 20 August 2019, plaintiff filed a petition for writ of certiorari in this Court, seeking review of the 5 August 2019 order settling the record on appeal. On 22 August 2019, defendants filed a response to plaintiff's alternative motions, and on 23 August 2019, plaintiff filed an amended petition for writ of certiorari. The petition

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was denied. *See McSwain v. Indus. Com. Sales & Serv., LLC*, ___ N.C. App. ___, ___ n.1, 841 S.E.2d 345, 347 n.1 (2020).

This Court heard plaintiff's appeal of the denial of his worker's compensation claim and, in an opinion issued 7 April 2020, *id.*, affirmed the Order and Award of the Commission. Thus, plaintiff's appeal in the instant case, which challenges the jurisdiction of the Commission to settle the record on appeal, is moot.

Nevertheless, even though it constitutes dicta in light of our dismissal, because plaintiff raises the issue of subject matter jurisdiction, we will address it for the sake of the parties.

Subject Matter Jurisdiction

"The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court." *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986) (citation omitted). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

On 29 August 2019, the Commission entered an amended order scheduling a status conference to determine whether the Commission retained jurisdiction to hear plaintiff's alternative motions in light of plaintiff's appeal. The parties were ordered to submit authorities on that point in advance of the conference. In response, defendants filed a statement alleging that, because plaintiff's petition for writ of

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certiorari constituted an appeal, the Commission lacked jurisdiction to hear plaintiff's motions. Plaintiff, likewise, filed a statement suggesting the following: that this Court did not seize jurisdiction until a discretionary writ was granted, that while this Court obtains jurisdiction over the appeal, that the Commission retains jurisdiction over the motion, and that an inferior court retains the ability to settle the record on appeal even during the pendency of an appeal.

On 20 September 2019, the Commission entered an order on plaintiff's alternative motions and found the arguments presented "unpersuasive." Specifically, the Commission noted that plaintiff's appeal and his alternative motions sought the same relief—to review the order settling the record on appeal. The Commission concluded that it was divested of jurisdiction and denied plaintiff's alternative motions on that basis. This is the basis of plaintiff's appeal in the instant case.

Plaintiff raised two separate motions before the Commission, which the Commission denied: one motion, to reopen the record on appeal, and the other motion, to reconsider its order settling the record on appeal. On appeal, in two separate arguments, plaintiff contends that the Commission erred in denying these motions, as its denial was premised upon a lack of jurisdiction, which plaintiff contends the Commission possessed. We disagree. As both arguments address the same issue, that of jurisdiction, we address them together.

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In support of his position that an inferior court retains jurisdiction to settle the record on appeal, plaintiff cites our Supreme Court's longstanding decision in *Bowen v. Motor Co.*, 292 N.C. 633, 234 S.E.2d 748 (1977). In *Bowen*, the Court held:

The Court of Appeals correctly recognized our long-standing general rule that an appeal removes a case from the jurisdiction of the trial court and, pending the appeal, the trial judge is *functus officio*. The rule is subject to two exceptions and one qualification. The exceptions are that notwithstanding the pendency of an appeal the trial judge retains jurisdiction over the cause (1) during the session in which the judgment appealed from was rendered and (2) for the purpose of settling the case on appeal.

Id. at 635, 234 S.E.2d at 749.

Ordinarily, an inferior court retains jurisdiction to settle the record on appeal; however, plaintiff's contention is an incomplete statement of law. Our General Statutes provide that when an appeal is perfected it stays all further proceedings in the matter, but the lower court may proceed on matters "not affected by the judgment appealed from." N.C. Gen. Stat. § 1-294 (2019). The settlement of the record—the very thing which defines an appellate Court's scope of consideration—by necessity affects the appeal.

This is not a novel holding. This Court addressed a similar issue in *Morgan v. Nash Cnty.*, 224 N.C. App. 60, 735 S.E.2d 615 (2012). In that case, the plaintiffs sued Nash County over zoning issues. In response, the County filed a Rule 56 motion for summary judgment and a Rule 12(b)(1) motion to dismiss for lack of standing.

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Following a hearing, the trial court dismissed some of the plaintiffs and granted summary judgment on all claims in favor of the County. The plaintiffs appealed. Pending their appeal, the plaintiffs filed a Rule 60(b) motion to review the court's award of attorney's fees and expenses in favor of the County. The trial court denied this motion on the merits, finding no justiciable issue raised by it, and the plaintiffs sought certiorari review of that decision in this Court. In examining the issue of the Rule 60(b) motion, we held:

Once plaintiffs gave notice of appeal from the 30 June 2011 order, the trial court was divested of jurisdiction over all matters included in the action that were "not affected by the judgment appealed from[.]" N.C. Gen. Stat. § 1-294. The subject matter of plaintiffs' Rule 60(b) motion is the same subject matter underlying the appeal from the trial court's 30 June 2011 order: whether the City of Wilson has standing to challenge Nash County's rezoning of the subject property and whether the rezoning constituted an illegal contract zoning. Thus, we conclude the Rule 60(b) motion is necessarily one that is affected by the outcome of this appeal, and the trial court did not have jurisdiction to enter a final order on the Rule 60(b) motion or make an award of attorneys' fees and expenses related to the motion. *See McClure v. County of Jackson*, 185 N.C. App. 462, 466, 471, 648 S.E.2d 546, 548, 551-52 (2007) (concluding the trial court did not have jurisdiction to award attorneys' fees after notice of appeal had been entered and where the award was based on the outcome of the proceeding from which the appeal was taken).

Id. at 76–77, 735 S.E.2d at 626.

In *Morgan*, the subject matter of the Rule 60(b) motion was the same as the subject matter of the plaintiffs' appeal and was necessarily affected by the outcome

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of the appeal. Thus, we held that the trial court lacked jurisdiction to enter an order on the merits of plaintiffs' Rule 60(b) motion and vacated the order. In the instant case, as in *Morgan*, the subject matter of plaintiff's alternative motions is the same as that of plaintiff's appeal: to wit, whether the Commission erred in its settlement of the record. By appealing that specific issue, as opposed to some other issue related to his worker's compensation claim or the Commission's order, plaintiff divested the Commission of jurisdiction to consider the record further.

The general rule established in *Bowen*, *Morgan*, and N.C. Gen. Stat. § 1-294, is premised on the notion that "two courts cannot ordinarily have jurisdiction of the same case at the same time." *RPR & Assocs., Inc. v. Univ. of N.C. Chapel Hill*, 153 N.C. App. 342, 347, 570 S.E.2d 510, 513 (2002) (citation omitted). Once plaintiff perfected his appeal from the order settling the record, the matter was before this Court. To permit the Commission to simultaneously rule on plaintiff's alternative motions could result in inconsistent decisions, running contra to the entire notion of inferior and superior jurisdiction.

Plaintiff had a choice in this matter. He could have filed his motion to reopen the record on appeal, or alternatively to reconsider the order settling the record on appeal, and if that motion was denied, appeal therefrom. Or he could have appealed directly from the order settling the record on appeal. Either option was viable. Instead, he chose both. But by vesting this Court with jurisdiction to consider the

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matter via an appeal, he divested the Commission of jurisdiction to do the same. Had we not dismissed this appeal as moot, we would have held that the Commission lacked jurisdiction to consider plaintiff's alternative motions once he brought an appeal before this Court and therefore, that the Commission did not err in denying plaintiff's alternative motions for lack of subject matter jurisdiction.

DISMISSED.

Judges YOUNG and BROOK concur.

Report per Rule 30(e).