

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA11-675
NORTH CAROLINA COURT OF APPEALS

Filed: 7 February 2012

THEODORE H. GASPER, JR.,
Plaintiff;

v.

Wake County
No. 08-CVS-15288

THE BOARD OF TRUSTEES OF HALIFAX
COMMUNITY COLLEGE,
Defendant.

Appeal by Plaintiff from judgment entered 11 February 2011
by Judge Howard E. Manning, Jr. in Wake County Superior Court.
Heard in the Court of Appeals 10 November 2011.

*Tin Fulton Walker & Owen, PLLC, by John W. Gresham, for
Plaintiff-appellant.*

*Cranfill Sumner & Hartzog, LLP, by Donna R. Rascoe and
Meghan N. Knight, for Defendant-appellee.*

HUNTER, JR., Robert N., Judge.

Theodore H. Gasper, Jr. ("Plaintiff") argues the trial
court committed reversible error by granting Defendant's motion
to dismiss for lack of subject matter jurisdiction. For the
following reasons, we affirm.

I. Factual & Procedural Background

Plaintiff has served as the president of Halifax Community College ("HCC") since 1998. On 31 August 1999, Plaintiff and the Board of Trustees of HCC ("Defendant" or the "Board") entered into an employment contract for a two-year term. On 1 November 2001, the parties entered a second employment contract providing for a four-year term followed by recurring one-year extensions. The 1 November 2001 contract provided that Plaintiff could be removed from office if he grossly violated the policies of HCC and failed to perform his duties. Plaintiff's removal could take place if Defendant provided notice of the charges asserted and a closed session hearing of the Board. In addition, the Administrative Regulations and Procedures Manual also provided standard grounds and procedures for the dismissal of an HCC employee.

In July 2005, Plaintiff was the subject of a number of allegations of misconduct including falsification of travel records, creation of a hostile work environment, and using college resources for "personal and political gain." The Board referred the allegations to the Office of the State Auditor, who conducted a special review of the allegations and issued a report on 25 October 2005. Prior to the release of that report, on 25 September 2005, Defendant suspended Plaintiff with pay.

The State Auditor's report contained six headings with its findings and recommendations for the Board. Its findings were as follows: (1) "a new employment contract for the President was approved without advance notice of significant contract amendments;" (2) "the President received \$12,755.66 in questionable payments for insurance-related fringe benefits;" (3) "the President received \$3,050.48 in questionable travel expense reimbursements;" (4) "the President's Executive Secretary deleted files from her computer after the College received a cease and desist letter from the State Auditor;" (5) "the Automotive Tech Instructor performed automotive services for the President's personal vehicle outside of classroom instruction;" and (6) "the President authorized the lease of College property without obtaining approval from the State Board of Community Colleges."

Defendant created a special investigative committee and conducted hearings. On 13 January 2006, the Board terminated Plaintiff's employment. In May 2006, a due process hearing was held before the Board. Using the State Auditor's report and the results of the investigative committee, Defendant concluded that Plaintiff violated various rules and regulations of HCC. In addition to the State Auditor's findings listed above, the Board

also found that Plaintiff had caused an employee to negotiate a contract without Board approval, made extensive personal use of a cell phone provided by HCC, improperly had HCC pay his Rotary Club dues, and took a leadership role in a political campaign, using a vehicle owned by HCC to transport a candidate and conducting a meeting on HCC premises. After the hearing, the Board affirmed Plaintiff's termination.

On 29 August 2008, Plaintiff filed a complaint against Defendant, seven members of the Board in their individual and official capacities, and the North Carolina State Auditor in his individual and official capacities. Plaintiff alleged breach of contract and violation of his constitutional rights to assembly and speech. Defendant brought a counterclaim against Plaintiff for fraud based on false representations surrounding the formation of the employment contract. On 22 January 2009, Judge Paul C. Ridgeway granted a motion to dismiss the contract claim against State Auditor Leslie W. Merritt. In September 2009, Plaintiff dismissed the remaining constitutional claim with prejudice against Merritt.

On 1 July 2010, Special Superior Court Judge John R. Jolly, Jr. granted summary judgment with respect to all claims against the seven named board members in their individual capacities.

Judge Jolly denied summary judgment as to the contract claims against Defendant and the seven board members in their official capacities. On 11 February 2011, Judge Howard Manning, Jr. dismissed the remainder of Plaintiff's claims. Judge Manning's order granted a motion to dismiss for lack of subject matter jurisdiction because Plaintiff failed to petition the trial court for writ of certiorari. The order also stated that Plaintiff was allowed to file a petition for writ of certiorari to request judicial review of the college's administrative hearing if he so chooses. This order did not impact Defendant's counterclaim for fraud.

II. Jurisdiction & Standard of Review

In this case, Plaintiff appeals from the trial court's 11 February 2011 order dismissing the contract claim against Defendant. However, the trial court did not dismiss Defendant's counterclaim for fraud. This leaves further action for the trial court and makes this appeal interlocutory. An order is interlocutory if it does not dispose of the case and leaves further action for the trial court to settle. *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 490 (1989).

"When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." N.C. R. App. P. 28(b)(4). A substantial right is affected "if there are overlapping factual issues between the claim determined and any claims which have not yet been determined." *Davidson*, 93 N.C. App. at 27, 376 S.E.2d at 492. "[T]he right to avoid the possibility of two trials on the same issues can be . . . a substantial right." *Id.* at 25, 376 S.E.2d at 491 (quoting *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982)). In order to determine whether there are overlapping factual issues, the court may look to whether the claims arise from the same transaction. *Fox v. Wilson*, 85 N.C. App. 292, 298, 354 S.E.2d 737, 741 (1987).

In *Davidson*, an insurance agency refused to pay the plaintiff after an automobile accident. *Davidson*, 93 N.C. App. at 22, 376 S.E.2d at 489-90. The plaintiff brought suit against the insurance agency for negligence, fraud, and unfair and deceptive trade practices. *Id.* at 23, 376 S.E.2d at 490. The trial court dismissed the unfair and deceptive claim, but not the negligence claim. *Id.* The plaintiff appealed the dismissal. *Id.* On appeal, our Court classified the action as interlocutory

because no judgment had been rendered for the negligence claim. *Id.* at 24, 376 S.E.2d at 490. The Court, however, concluded a substantial right was affected because there were factual issues common to all claims and there was a possibility of conflicting resolutions if the claims were tried separately. *Id.* at 26-27, 376 S.E.2d at 492. The claims dealt with the issue of false representation with regards to the underinsurance coverage policy. *Id.* at 27, 376 S.E.2d at 492.

Similarly, in the present case, the counterclaim is based on alleged false representations of terms in the second employment contract. The dismissed claims on appeal also focus on the terms arising out of the second employment contract. Specifically, the counterclaim is based in part on Plaintiff's "conceal[ing] from the Board that the proposed new contract also would modify other terms including . . . removing a clause from the Discharge for Cause section of the contract." Plaintiff asserts breach of contract based on that "Discharge for Cause" section of the contract. Since there are factual issues common to these claims and a substantial right exists to avoid two trials on these issues, this interlocutory appeal is appropriate.

A trial court's decision to grant a motion to dismiss for lack of subject matter jurisdiction is reviewed *de novo*. *Burton v. Phoenix Fabricators & Erectors, Inc.*, 194 N.C. App. 779, 782, 670 S.E.2d 581, 583 (2009).

III. Analysis

Plaintiff argues the trial court erred by granting Defendant's motion to dismiss for lack of subject matter jurisdiction. We disagree.

Community colleges are administrative agencies, created with the approval of the General Assembly and governed by Chapter 115D of our General Statutes. See N.C. Gen. Stat. § 115D-4 (2011) (requiring approval of the General Assembly for creation of a community college); see also N.C. Gen. Stat. § 115D-12 (2011) (creating a board of trustees for each community college). "The proper procedure to review a determination by an administrative agency where none is provided by statute is to petition for a writ of certiorari to the Superior Court." *Maines v. City of Greensboro*, 300 N.C. 126, 133, 265 S.E.2d 155, 160 (1980).

In this case, HCC created grievance procedures and other regulations which were located in the Administrative Regulations and Procedures Manual. The manual classified the dismissal of an

employee by Defendant as a final administrative action. There were no policies provided by HCC or North Carolina statute establishing procedures for the review of a dismissal decision by Defendant.¹ Since there was no statute which established a procedure for review of Defendant's decision, Plaintiff's remedy is limited to a petition for writ of certiorari. *See id.* Plaintiff's failure to petition the court for a writ of certiorari deprived the trial court of subject matter jurisdiction over Plaintiff's termination.

Plaintiff contends the trial court had subject matter jurisdiction because the 1 July 2010 order by Judge Jolly denying Defendant's summary judgment motion was the "law of the case." Plaintiff cites to *Adkins v. Stanley Cty. Bd. Of Educ.*, in which the plaintiff alleged that the Stanly County Board of Education refused to renew her employment contract because she filed a complaint against them. ____ N.C. App. ____, ____, 692 S.E.2d 470, 471 (2010). The first trial judge denied a motion to dismiss, basing the decision on the fact that the complaint

¹ We note that at all times relevant to this case, Section 115D-80 of our General Statutes specifically exempted local boards of trustees from the Administrative Procedure Act ("APA"). N.C. Gen. Stat. § 115D-80 (2009) (*repealed by* 2011 N.C. Sess. Laws 145, effective 1 July 2011). Even if the APA had applied, however, the proper procedure under the APA would have been to file a petition for review, which Plaintiff did not do.

touched on a matter of public concern. The second trial judge granted summary judgment in favor of Defendants, stating that there was no genuine issue of material fact as to whether the complaint touched on a matter of public concern. *Id.* at ___, 692 S.E.2d at 474. This directly contradicted the previous ruling by the first judge on the same legal question. This Court held that a trial judge cannot reconsider another trial judge's order. *Id.* at ___, 692 S.E.2d at 476.

The holding in *Adkins*, however, only applies where the legal issue to dismiss in both rulings is the same. For example, one judge may rule on an issue under Rule 12(b)(1) of our Rules of Civil Procedure and another judge may make a different ruling under Rule 12(b)(6).

In the present case, Judge Jolly's order was based on Defendant's amended Rule 56 motion for summary judgment based on two propositions: "1) the Defendant Board of Trustees properly terminated Plaintiff's employment for cause and 2) the individual Board member Defendants acted in accordance with their duties as members of the Board of Trustees and afforded Plaintiff the constitutional rights to which he was entitled." Subject matter jurisdiction was not raised in Defendant's amended motion for summary judgment. Judge Jolly's order denied

summary judgment as to the Board because he found there were genuine issues of material fact. Defendant then moved for dismissal based on lack of subject matter jurisdiction under Rule 12(b)(1). Judge Manning's order dismissed the claims based on subject matter jurisdiction, an issue not previously ruled on. These orders present distinct legal issues, and the second order in no way involved considerations present in the first order.

Plaintiff also argues that the trial court erred by failing to recognize his right to bring a contract claim against a state agency. Plaintiff cites two cases which recognize that a state agency is not immune from a breach of contract claim brought by an employee who is not covered by the State Personnel Act: *Archer v. Rockingham County*, 144 N.C. App. 550, 556, 548 S.E.2d 788, 792 (2001), and *Sanders v. State Personnel Comm'n*, 197 N.C. App. 314, 321, 677 S.E.2d 182, 188 (2009).

Neither *Archer* nor *Sanders*, however, involved hearings by an administrative agency. In *Archer*, the plaintiffs alleged they were underpaid for overtime hours working for the county. 144 N.C. App. at 552, 548 S.E.2d at 789. In *Sanders*, the plaintiffs were temporary employees who had worked for the state more than twelve months and alleged they had been denied proper

benefits. 197 N.C. App. at 317, 677 S.E.2d at 185. In both of these cases, since there was no administrative hearing involved, filing a complaint in Superior Court was the appropriate remedy.

In the present case, however, there was an administrative hearing, which resulted in the termination of Plaintiff, the issue underlying Plaintiff's complaint. See *Maines*, 300 N.C. at 133, 265 S.E.2d at 160 ("Plaintiff has not sought judicial review of the administrative determination . . . but rather filed an original action in . . . Superior Court."). As discussed above, the proper procedure was for Plaintiff to file a petition for a writ of certiorari. As Plaintiff instead filed a complaint, the trial court properly granted Defendant's motion to dismiss for lack of subject matter jurisdiction.

IV. Conclusion

Based on the foregoing, the trial court's order is
Affirmed.

Judges THIGPEN and MCCULLOUGH concur.

Report per Rule 30(e).