

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-322

No. COA21-572

Filed 3 May 2022

Pitt County, No. 20 CVS 2648

DR. JAMES MCKERNAN, Plaintiff,

v.

EAST CAROLINA UNIVERSITY, PAUL ZIGAS, Office of Legal Counsel, DR. GRANT HAYES, Acting Provost, DR. RON MITCHELSON, Acting Chancellor ECU, DR. CHARLES COBLE, Former Dean ECU, DR. STEVEN BALLARD, Former Chancellor, DR. MARYLYN SHEERER, Former Dean, DR. HENRY PEEL, Former Acting Dean ECU, DR. RICHARD EAKIN, Former Chancellor ECU, DR. PETER HANS, President & Chair Board of Governors UNC, MR. VERN DAVENPORT, Chair ECU Board of Trustees, MS. LAKESHA ALSTON-FORBES, VC for Equity & Diversity ECU, DR. LINDA PATRIARCA, Former Dean ECU, Defendants.

Appeal by Plaintiff from Order entered 27 April 2021 by Judge Jeffery B. Foster in Pitt County Superior Court. Heard in the Court of Appeals 22 March 2022.

Dr. James A. McKernan, Pro Se.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kari R. Johnson, for defendants-appellees.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Dr. James A. McKernan (Plaintiff) appeals from an Order dismissing his Complaint against Defendants pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) of the North Carolina Rules of Civil Procedure. The Record before us tends to reflect the following:

¶ 2 Plaintiff alleged he was employed by East Carolina University (ECU) in 1992 as a tenured professor and as the appointed recipient of the “Lora Wilson King Chair” at ECU (King Endowed Chair). After a year of employment, Plaintiff requested a leave of absence from ECU to perform consulting work for the Faculty of Education in Limerick, Ireland. Plaintiff alleged ECU approved this one-year leave of absence, but upon his return to ECU a year later, ECU refused to reinstate Plaintiff to the King Endowed Chair. Thereafter, Plaintiff filed several lawsuits against ECU for its failure to reinstate Plaintiff to the King Endowed Chair position¹ and reapplied to the position several times. Indeed, most recently, Plaintiff applied to the position in 2017, and after he was not selected, filed another Complaint in the United States District Court for the Eastern District of North Carolina on 16 February 2018 (2018 Complaint).

¹ The Record does not contain a copy of all these suits; however, Plaintiff alleges in his most recent Complaint, he filed two “judicial reviews” in state court regarding the King Endowed Chair pursuant to N.C. Gen. Stat. Chapter 150B—one in Beaufort County in 1995 and one in Wake County in 2001. Moreover, Plaintiff alleges he filed nine grievances with ECU, alleging “continuing discrimination.”

¶ 3

In the 2018 Complaint, Plaintiff alleged he was discriminated against due to his race, age, and disability when he was denied the position. Plaintiff also asserted he was entitled to, but did not receive, a veteran's preference for the position when he applied. Additionally, Plaintiff asserted claims under Title VII and the ADEA, claiming he was subject to discrimination, harassment, and a "hostile work environment" over his twenty-six years of employment at ECU. In response to Plaintiff's 2018 Complaint, Defendants filed a Motion to Dismiss on 5 September 2018. Thereafter, on 22 April 2019, the United States District Court granted Defendants' Motion to Dismiss pursuant to the Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), and 12(b)(6) and dismissed all of Plaintiff's claims, some with prejudice and some without prejudice. In particular, the United States District Court dismissed Plaintiff's pending state claim, wherein he asserted he was wrongly removed from the King Endowed Chair in 1994 in violation of N.C. Gen. Stat. § 116-41.18, with prejudice based on the statute of limitations and on the grounds the statute does not provide a private cause of action.

¶ 4

In response to the 2019 Order, Plaintiff filed an Amended Complaint to address the remaining federal claims that were dismissed without prejudice. Thereafter, on 30 October 2019 the United States District Court dismissed Plaintiff's claims alleging discrimination, hostile work environment, and lack of due process with prejudice,

stating “plaintiff’s motion to amend is utterly devoid of facts that plausibly support an inference of unlawful discrimination based on race, disability, or age.”

¶ 5

Thereafter, Plaintiff filed the Complaint at issue here in Pitt County Superior Court on 30 October 2020, alleging, *inter alia*, discrimination, retaliation, a hostile work environment, and harassment. Defendants filed a Motion to Dismiss on 15 January 2021, which was calendared to be heard before Judge Jeffery B. Foster on 19 April 2021. Prior to the hearing, Plaintiff requested Judge Foster recuse himself from the case based on Judge Foster’s past affiliations with ECU and on Judge Foster’s past association with a law firm that represented Plaintiff in one of the superior court cases filed in the 1990s. Judge Foster denied Plaintiff’s request for recusal by Order entered 27 April 2021, determining “sufficient grounds [does] not exist for recusal.”

¶ 6

In the same Order, Judge Foster also granted Defendants’ Motion to Dismiss finding:

AND IT APPEARING to the Court that . . . [Plaintiff’s] Complaint references three prior actions (two in superior court and one in federal court) arising out of the events alleged in his Complaint herein; and it further appearing to the Court that the courts in the prior civil actions referenced in the Complaint ruled against Plaintiff; and

IT APPEARING to the Court that Defendants herein moved that all claims against them be dismissed with prejudice based upon numerous grounds including *res judicata*, collateral estoppel, the

statute of limitations, sovereign immunity, lack of standing, and failure of the Complaint to state claims for relief; and

IT APPEARING to the Court that after hearing arguments, reviewing the pleadings in this case, and taking judicial notice of and reviewing certain pleadings and orders in the federal action referenced in Plaintiff's Complaint, that Defendants' Motion to Dismiss should be allowed based upon *res judicata*, collateral estoppel, the statute of limitations, lack of standing, and failure of the Complaint to state claims;

Judge Foster's Order also prohibited Plaintiff from filing any further actions arising out of the same events referenced in Plaintiff's Complaint absent certification from a licensed attorney pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. Plaintiff filed Notice of Appeal from the Order on 26 May 2021.

Analysis

¶ 7 Although Plaintiff raises several issues on appeal, Plaintiff's substantial and gross violations of the North Carolina Rules of Appellate Procedure impede this Court's ability to conduct a meaningful review.

A. Appellate Rules Violations Generally

¶ 8 "[R]ules of procedure are necessary in order to enable the courts properly to discharge their duty of resolving disputes." *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 193, 657 S.E.2d 361, 362 (2008) (citation and quotation marks omitted). "It necessarily follows that failure of the parties to comply with the rules, and failure of the appellate courts to demand compliance therewith,

may impede the administration of justice.” *Id.* Rule 25 therefore allows this Court, on its own initiative, to sanction a party for noncompliance. N.C.R. App. P. 25(b) (2021). Rule 34 (b) provides a list of appropriate sanctions for appellate rule violations including dismissal of the appeal, monetary sanctions, and “any other sanction deemed just and proper.” N.C.R. App. P. 34(b)(1)-(3) (2021).

¶ 9

Nevertheless, “[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them.” *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S. Ct. 719, 85 L. Ed. 1037 (1941). Thus, “every violation of the rules does not require dismissal of the appeal or the issue” *State v. Hart*, 361 N.C. 309, 311, 644 S.E.2d 201, 202 (2007). Indeed, “a party’s failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal.” *Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365. However, when a party’s noncompliance with the appellate rules rises to the level of a substantial failure or gross violation such that the noncompliance impairs the court’s task of review and review on the merits would frustrate the adversarial process, dismissal of the appeal may be appropriate. *Id.* Moreover, although we are mindful of Plaintiff’s pro se status in this case, the Rules of Appellate Procedure “apply to everyone—whether acting pro se or being represented by all of the five largest law firms in the state.” *Bledsoe v. Cnty. of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999).

B. Plaintiff’s Various Nonjurisdictional Defaults

¶ 10 Rule 28 of the North Carolina Rules of Appellate Procedure governs the content and function of a party’s brief. The function of Rule 28 is to ensure that the parties’ briefs “define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon.” N.C.R. App. P. 28(a) (2021). Rule 28(b) contains a list of ten rules designed to promote that function. For example, before setting forth his substantive argument, the appellant’s brief must first contain a statement of the grounds for appellate review, including citation to the statute permitting appellate review; and a section containing “[a] full and complete statement of the facts”—that is, “a nonargumentative summary of all material facts . . . supported by references to pages in the transcript of proceedings, the record on appeal, or exhibits, as the case may be.” N.C.R. App. P. 28(b)(4)-(5) (2021).

¶ 11 Here, Plaintiff has failed to set forth a statement of the grounds for appellate review or a citation to any statute permitting such review, as required by Rule 28 (b)(4). Moreover, Plaintiff has failed to set out a Statement of Facts, as required by Rule 28 (b)(5). Indeed, although Plaintiff sporadically intertwines factual allegations within the statement of the case and argument sections, Plaintiff fails to set out a separate fact section or to provide any citations to the Record, exhibits, or supporting documents. Instead, Plaintiff’s brief sets out the issues on appeal and then

immediately begins with his Argument, providing this Court with no context from which to understand the various errors alleged therein.

C. Rule 28 (b)(6) Violations

¶ 12 Moreover, presuming arguendo, that the above violations do not give rise to a substantial failure or gross violation warranting dismissal,² Plaintiff's brief violates Rule 28(b)(6) to such an extent that we deem each argument presented to be abandoned.

¶ 13 Rule 28(b)(6) requires the appellant's brief to include "[a]n argument, to contain the contentions of the appellant with respect to each issue presented. . . . [and] a concise statement of the applicable standard of review for each issue" N.C.R. App. 28(b)(6) (2021). The rule expressly warns appellants that "[i]ssues . . . in support of which no reason or argument is stated, will be taken as abandoned." *Id.* An appellant avoids abandonment when it complies with the rule's mandate that "[t]he body of the argument . . . shall contain citations of the authorities upon which the appellant relies." *Id.* This Court has routinely held an argument to be abandoned where an appellant presents argument without such authority and in contravention

² See, e.g., *Hill v. West*, 177 N.C. App. 132, 135, 627 S.E.2d 662, 664 (2006) (dismissing the appeal because the appellant failed to include a statement of grounds for appellate review); *Northwood Homeowners Assn., Inc. v. Town of Chapel Hill*, 112 N.C. App. 630, 632, 436 S.E.2d 282, 283 (1993) (dismissing appeal where defendant intertwined the statements of facts, three questions, and all arguments into the body of the brief instead of setting out a full and complete statement of facts).

of the rule. *See, e.g., Fairfield v. WakeMed*, 261 N.C. App. 569, 575, 821 S.E.2d 277, 281 (2018) (“Plaintiffs do not cite any legal authority in support of this argument as required by the North Carolina Rules of Appellate Procedure. Therefore, we deem this issue to be abandoned.” (citation omitted)); *GRE Props. Thomasville LLC v. Libertywood Nursing Ctr., Inc.*, 235 N.C. App. 266, 276, 761 S.E.2d 676, 682 (2014) (“Yet, defendant cites only *State v. Kirby* [697 S.E.2d 496, 206 N.C. App. 446 (2010)] for the proposition that issues of relevance are reviewed de novo and fails to cite any further legal authority in support of its argument. As a result, we find defendant has abandoned this argument.” (citation omitted)).

¶ 14 Here, a review of Plaintiff’s Brief reveals Plaintiff violated Rule 28(b)(6) by failing to include a standard of review for any issue or cite to any legal authority in support of his arguments. Indeed, although Plaintiff makes a formulaic recitation of two North Carolina statutes, sporadically drops a cursory citation—without any reference or quotation to the rule of law contained therein—and makes vague references to his rights under the U.S. Constitution, Plaintiff fails to otherwise cite, analogize, or distinguish relevant authority in an effort to establish (1) the elements of any his claims; or (2) explain why the trial court’s Order dismissing his Complaint was inconsistent with the law. As such, Plaintiff’s Brief is merely an amalgamation of conclusory statements that fail to apply any legal authority. *See Lopp v. Anderson*, 795 S.E.2d 770, 775, 251 N.C. App. 161, 167 (2016) (concluding Plaintiff abandoned

the issues raised in his appeal where his argument consisted of declaratory statements unsupported by any citation to authority and made only a passing reference a statute). *See also, State v. Summers*, 177 N.C. App. 691, 698, 629 S.E.2d 902, 908 (declining to address one of the appellant’s arguments when he failed to include a statement of the applicable standard of review), *appeal dismissed and disc. rev. denied*, 360 N.C. 653, 637 S.E.2d 192 (2006). Consequently, we deem Plaintiff’s arguments abandoned as “it is not the role of this Court to create an appeal for an appellant or to supplement an appellant’s brief with legal authority or arguments not contained therein.” *Thompson v. Bass*, 261 N.C. App. 285, 292, 819 S.E.2d 621, 627 (2018).

Conclusion

¶ 15 Plaintiff has substantially failed to comply with several of the nonjurisdictional rules governing the form and content of appellate briefs. Presuming, arguendo, that these violations may not, standing alone, have warranted dismissal, Plaintiff’s failure to present appropriate argument supported with citations to authority and the Record consistent with Rule 28(b)(6) “constitute[s] a default precluding substantive review.” *Dogwood*, 362 N.C. at 200, 657 S.E.2d at 367. “That failure both impairs the court’s task of review and frustrates the adversarial process as any review on the merits would require this Court to construct and decide arguments that Plaintiff has not adequately presented and to which Defendants have not had an opportunity to

McKERNAN v. ECU

2022-NCCOA-322

Opinion of the Court

respond.” *K2HN Constr. NC, LLC v. Five D Constrs., Inc.*, 267 N.C. App. 207, 215, 832 S.E.2d 559, 565 (2019) (quotation and citation omitted). As a result, we dismiss Plaintiff’s appeal for the violations identified by this Court.

DISMISSED.

Chief Judge STROUD and Judge JACKSON concur.

Report per Rule 30(e).