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NO. COA05-1365

NORTH CAROLINA COURT OF APPEALS

Filed: 15 August 2006

RUBY CARLAND UNDERWOOD,
Guardian of JEANETTE CARLAND
McLENDON,

v.

Buncombe County
No. 99 CVS 3626

NORTH CAROLINA DEPARTMENT
OF TRANSPORTATION

Appeal by third-party defendant from judgment entered 19 January 2005 by Judge James L. Baker, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 11 May 2006.

McGuire, Wood & Bisette, P.A., by Joseph P. McGuire and Mary E. Euler, for plaintiff-appellee.

Dameron Burgin Parker Lorenz & Jackson, P.A., by Phillip T. Jackson, and Attorney General Roy Cooper, by Assistant Attorney General Donna B. Wojcik, for defendant-appellant.

STEELMAN, Judge.

Jeanette McLendon (McLendon) was driving on Interstate 40 in Buncombe County when traffic came to a stop in front of her to allow a lo-boy tractor-trailer, owned by Hendrix & Dail, Inc., to exit the interstate onto the center median. Hendrix & Dail was under contract with the North Carolina Department of Transportation (defendant) to provide fumigation services for median wildflowers

maintained by defendant. Larry Webb Boyner (Boyner) was driving a tractor-trailer on Interstate 40 for Werner Enterprises, Inc., and was unable to stop when he came upon McLendon's stationary car. Boyner's tractor-trailer hit McLendon's car, pushing it into other stopped vehicles. McLendon suffered severe traumatic brain injuries.

McLendon's guardian, Ruby Carland Underwood (plaintiff) initiated this negligence action against Boyner, Werner Enterprises, and Hendrix & Dail on 10 August 1999. Boyner and Werner Enterprises filed a third-party complaint against defendant seeking indemnification and contribution on 29 August 2000. On 29 March 2001, plaintiff and defendant signed a stipulation whereby plaintiff was allowed to add defendant as a named party and assert a direct negligence claim against it. Plaintiff's amended complaint, adding the negligence claim against defendant, was filed on 1 May 2001.

The trial court *ex mero motu* dismissed plaintiff's claim against defendant, believing it lacked subject matter jurisdiction to hear the claim under the North Carolina Tort Claims Act. N.C. Gen. Stat. § 143-291 *et. seq.* Plaintiff appealed, and this Court reversed and remanded to the trial court for further proceedings. *Underwood v. Boyer*, 160 N.C. App. 710, 2003 N.C. App. LEXIS 2341 (2003); 2003 N.C. App. LEXIS 1948. During the pendency of the 2003 appeal, plaintiff settled with Werner Enterprises, Larry Boyer, and Hendrix & Dail for \$2,312,500.00. Plaintiff's trial against defendant commenced on 23 August 2004. The jury was instructed on

the issues, including the potential negligence of defendant and two of its employees. The jury returned a verdict finding defendant negligent, but finding no negligence on the part of defendant's two named employees. The jury awarded plaintiff \$1,950,000.00.

Plaintiff filed a motion for costs, and defendant filed a motion for entry of judgment and costs. Defendant contended the jury acted improperly in finding it negligent under the Tort Claims Act without finding negligence on the part of any of its employees. The trial court denied defendant's motions, and awarded plaintiff costs in the amount of \$71,645.33. From this judgment, defendant appeals.

In defendant's first and second arguments, it contends that the jury's verdict was internally inconsistent and the trial court erred in its instructions to the jury. We agree.

Plaintiff sued defendant for negligence pursuant to the Tort Claims Act. The Tort Claims Act allows recovery from the State for "negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority that was the proximate cause of the injury ... [where] there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted...." N.C. Gen. Stat. § 143-291 (2005). Therefore, in order to recover under the act, plaintiff must prove negligence on the part of at least one of defendant's officers, employees, involuntary servants or agents, and cannot recover for the negligence of defendant directly. *Smith v N.C. DOT*, 156 N.C.

App. 92, 100, 576 S.E.2d 345, 351 (2003); *Register v. Administrative Office of Courts*, 70 N.C. App. 763, 766, 321 S.E.2d 24, 27 (1984).

In the instant case, the issues were presented to the jury as follows:

1. Was the Plaintiff, Jeanette Carland McLendon, injured by the negligence of the Defendant, the North Carolina Department of Transportation?

(If your answer to Issue #1 is "yes," answer Issues 1(a) and 1(b), and then answer Issue #2. If your answer to Issue #1 is "no," do not answer Issues # 1(a), 1(b) or 2.)

1(a) - - Was the Plaintiff injured by the negligence of the Defendant's employee Gayle Briggs?

1(b) - - Was the Plaintiff injured by the negligence of the Defendant's employee Gail McDowell?

2. What amount is the Plaintiff Ruby Underwood, Guardian of Plaintiff Jeanette McLendon, entitled to recover for the personal injuries of Plaintiff Jeanette McLendon?

The Jury charge contained the following relevant instructions:

Your duty is to determine whether there was negligence on the part of the defendant North Carolina Department of Transportation or its employees

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Now, ladies and gentlemen of the jury, in this case the plaintiff contends and the defendant denies that the defendant was negligent in one or more of the following ways: that the defendant, North Carolina Department of Transportation, through its employees Gale Briggs and Gail McDowell, first made no effort to control traffic or provide any warnings to motorists approaching the site of the fumigation work; [Here the trial court

lists additional ways in which plaintiff contended negligence on the part of defendant.]

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Finally, then, members of the jury, as to this first issue on which the plaintiff has the burden of proof, if you find, by the greater weight of the evidence, that the defendant was negligent in any one or more of the ways contended by the plaintiff and that such negligence was a proximate cause of the plaintiff's injury, then it would be your duty to answer this issue "yes" in favor of the plaintiff. If, on the other hand, you fail to so find, then it would be your duty to answer this issue "no" in favor of the defendant.

Members of the jury, following Issue 1 there are two sub-issues which I read to you earlier designated as Issue 1A and 1B. You'll answer these sub-issues if you have answered Issue 1 "yes" in favor of the plaintiff. These issues, members of the jury, are to be answered following the same instructions that I have just given you in Issue No. 1, and require you to make findings as to the specific employee or employees of the N.C. Department of Transportation that you determined to have been negligent.

The first error in these instructions is the suggestion that the jury could find for plaintiff if it determined *either* the Department of Transportation *or* one or more of its officers, employees, involuntary servants or agents was negligent. Under the Tort Claims Act, defendant can *only* be found negligent through the negligence of one or more of its officers, employees, involuntary servants or agents, yet the trial court's charge to the jury did not make this clear. N.C. Gen. Stat. § 143-291 (2005).

It is evident from the trial transcript that the jury was confused on this issue. The jury sent a note to the trial court

during deliberations inquiring: "If the jury decides 'yes' to 1, can we answer 'no' to 1A and 1B?" The trial court instructed the jury that they could answer "yes" to issue 1, and "no" to issues 1A and 1B. It is evident from the transcript that the trial court feared instructing the jury it could not answer issue 1 "yes" unless it also answered "yes" to issue 1A or 1B might influence the jury's determination of those issues. The jury returned a verdict sheet which answered issue 1 "yes" and issues 1A and 1B "no," and awarded plaintiff \$1,950,000.00.

We hold that the jury verdict was inconsistent, and incompatible with the specific instructions of the trial court in this case. The instructions specifically limited the jury to a finding of negligence by defendant based upon the negligence of either Gale Briggs or Gail McDowell. Therefore, the manner in which the jury answered issues 1, 1A and 1B is in conflict with the instructions and internally inconsistent in light of the relevant law. We feel compelled to reverse and remand for a new trial on the merits, with instruction that the jury be fully and accurately instructed on the relevant law. See *Walker v. Walker*, 143 N.C. App. 414, 421, 546 S.E.2d 625, 630 (2001); *Johnson v. Friends of Weymouth*, 120 N.C. App. 255, 259, 461 S.E.2d 801, 804 (1995); *D. W. Ward Constr. Co. v. Adams*, 90 N.C. App. 241, 245, 368 S.E.2d 31, 33 (1988). In light of this holding, we do not address defendant's remaining arguments.

We note that in some instances it may be proper to find a state defendant negligent based upon the acts of an unnamed

employee. See *Smith v. N.C. DOT*, 156 N.C. App. 92, 101, 576 S.E.2d 345, 351 (2003); see also *Cherney v. N.C. Zoological Park*, 166 N.C. App. 684, 691, 603 S.E.2d 842, 846 (2004), reversed, dissent adopted by, 359 N.C. 419, 613 S.E.2d 498 (2005). In the instant case, however, the trial court specifically limited the jury's consideration to two named employees. We are not prepared to affirm this verdict on the assumption that the jury ignored those instructions and found negligence on the part of defendant's employees not named in the jury charge.

NEW TRIAL.

Judges McGEE and ELMORE concur.

Report per Rule 30(e).