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NO. COA08-1029

NORTH CAROLINA COURT OF APPEALS

Filed: 4 August 2009

JEFFREY PHILLIPS, D.V.M.,
Ph.D., and Wife, DAWN
PHILLIPS,

Plaintiffs,

v.

N.C. Industrial Commission
I.C. No. TA-18680

NORTH CAROLINA STATE
UNIVERSITY,

Defendant.

Appeal by Plaintiffs and Defendant from Decision and Order entered 6 May 2008 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 March 2009.

Knott & Berger, L.L.P., by Kenneth R. Murphy, III, for Plaintiffs.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for Defendant.

STEPHENS, Judge.

I. Procedural History

On 23 August 2004, Dr. Jeffrey Phillips and his wife Dawn Phillips ("Plaintiffs") filed a Tort Claim Affidavit with the North Carolina Industrial Commission, alleging that the death of their breeding horse, Menetti, was caused by the negligence of employees of the Equine Educational Unit ("EEU"), a horse breeding management

facility operated by North Carolina State University ("Defendant"). Plaintiffs sought compensatory damages for the loss of Menetti and for the loss of the opportunity to breed Menetti.

The matter was heard by Deputy Commissioner Wanda Blanche Taylor on 13 April 2007. On 18 October 2007, Deputy Commissioner Taylor filed a Decision and Order finding Defendant negligent in its care of Menetti, and holding Defendant liable for compensatory damages in the amount of \$149,000, consisting of \$50,000 to replace Menetti with a comparable horse and \$99,000 to compensate Plaintiffs for the lost opportunity to breed Menetti.

From Deputy Commissioner Taylor's Decision and Order, Defendant appealed. The matter was reviewed by the Full Commission on 12 March 2008. On 6 May 2008, the Full Commission entered a Decision and Order affirming Deputy Commissioner Taylor's findings and conclusion that Defendant's negligence proximately caused Menetti's death, but reducing the damages awarded Plaintiffs from \$149,000 to \$50,000. In reducing the damages awarded, the Full Commission neglected to address Plaintiffs' allegations and evidence of their lost opportunity to breed Menetti as an element of damages.

From the Full Commission's Decision and Order finding Defendant negligent and awarding Plaintiffs \$50,000 in damages, Defendant appeals. From the Full Commission's Decision and Order awarding Plaintiffs \$50,000 in damages, Plaintiffs appeal.

For the reasons stated herein, we affirm the Full Commission's Decision and Order in part and remand the matter to the Full

Commission to make further findings of fact and conclusions of law regarding the award of damages.

II. Evidence

On 3 May 2004, Plaintiffs brought Menetti to the EEU to be bred. At that time, Menetti was a young mare in excellent health. Menetti was boarded at the EEU from 3 May to 25 May 2004, during which time Menetti's care was the responsibility of Justine Smith, a managing supervisor at the EEU. During the first ten days of Menetti's boarding, Plaintiff Dawn Phillips visited the EEU and observed Menetti outside during the daytime with inadequate water in her water bucket. Mrs. Phillips cleaned Menetti's bucket, filled it with water, and attempted to inform Ms. Smith that Menetti had been left outside with no water. Ms. Smith was not on the premises, however, so Mrs. Phillips reported the incident to a young, male EEU staff member. Soon thereafter, Mrs. Phillips reported the incident to Ms. Smith via telephone, and Ms. Smith assured Mrs. Phillips that the situation would be addressed.

On 25 May 2004, Brandon Velie, Melody Davis, Nicole Wrench, and Jason Reitmeyer, the four EEU employees under Ms. Smith's supervision who cared for Menetti on that day, noted that Menetti was coughing repeatedly. Shortly before noon, Ms. Davis and Ms. Wrench reported Menetti's condition to Ms. Smith, who instructed Ms. Davis and Ms. Wrench to check Menetti's temperature, pulse, and respiration ("TPR"). The check of Menetti's TPR was normal and no veterinary medical attention was sought.

According to the testimony of the four EEU employees who cared

for Menetti on 25 May 2004, Menetti was kept in the barn with access to water the entire day. However, Dr. Carlos Pinto, a North Carolina State University ("NCSU") Veterinary School professor, testified that Ms. Smith told him that Menetti was kept outside that day until around 1:00 p.m.

On the evening of 25 May 2004, Tammi Kelly, who was hired by Plaintiffs to transport Menetti to and from the EEU, arrived at the EEU and loaded Menetti into an open stock horse trailer to transport Menetti to Plaintiffs' residence. While preparing Menetti for transportation, Ms. Kelly noted that Menetti's "sides were moving heavily" and that Menetti's breathing was "labored." As no EEU staff was present and Ms. Kelly did not have a cell phone at the time, Ms. Kelly proceeded to transport Menetti to Plaintiffs' home in Benson, North Carolina, about thirty minutes from the EEU. During the course of the transport, Ms. Kelly noticed a slight shift in the trailer. However, Ms. Kelly testified that such a shift was not an unusual occurrence. Upon arrival at Plaintiffs' home, shortly before 9:30 p.m., Ms. Kelly and Plaintiff Dr. Jeffrey Phillips, a doctor of veterinary medicine, discovered Menetti dead in the trailer with no apparent signs of injury or trauma.

Menetti's body was transported to the NCSU Veterinary Teaching Hospital, where a necropsy¹ was performed the morning of 26 May 2004 by Dr. Kevin Douglas Woolard and Dr. Donald J. Meuten, both doctors of veterinary medicine. The clinical findings of the

¹ A necropsy is an autopsy performed on an animal.

necropsy led Drs. Woolard and Meuten to conclude that Menetti likely died from heat stress.

Dr. Mary Katherine Sheats, a doctor of veterinary medicine, testified that a horse Menetti's size needs to consume more than 30 gallons of water on days where the high temperatures are above 90 degrees Fahrenheit - like the day of and the four days preceding Menetti's death. Dr. Phillips also testified that deprivation of five gallons of water per day could lead to a heat-stress-induced death, and that, in horses, coughing is a symptom of overheating.

Rebecca Sue Pennington, a certified equine appraiser, testified that Menetti was a rare Knabstrupper broodmare, whose "few spot, white born" coat made Menetti valuable for breeding. Ms. Pennington valued Menetti's replacement cost at \$45,639. Because Ms. Pennington's testimony indicated that a comparable Knabstrupper mare could only be purchased in Europe, the total cost to replace Menetti was approximately \$50,000, taking into account the exchange rate between the U.S. dollar and the Euro.

Evidence was presented that Menetti would likely breed in 11 of the next 15 years, and that the estimated economic value of a foal would be \$9,000. Although it was shown that Menetti had successfully produced offspring in 75% of the years preceding her death, it was also shown that the last two attempts to breed Menetti had been unsuccessful. Deputy Commissioner Taylor found the cost of replacing Plaintiffs' lost opportunity to breed Menetti was \$99,000.

III. Discussion

A. Defendant's Appeal

By Defendant's assignments of error, Defendant argues that the Commission erred in finding Defendant negligent as Plaintiffs "failed to submit any competent evidence of negligence on the part of . . . Defendant." We disagree.

"Under the Tort Claims Act, 'when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision.'" *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001) (quoting *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998)), *cert. denied*, 355 N.C. 285, 560 S.E.2d 800 (2002). A finding of fact by the Industrial Commission is binding if there is any competent evidence to support it. *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 708-09, 365 S.E.2d 898, 900 (1988). We review the Industrial Commission's conclusions of law *de novo*. *Starco, Inc. v. AMG Bonding and Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

The Commission made the following findings of fact relevant to Defendant's negligence:

8. The EEU contains a barn with covered stalls as well as a large pasture. Mares housed at the EEU are sometimes kept in a stall and sometimes kept in a pasture.

10. When the plaintiffs placed Menetti in the exclusive care, custody and control of Justine Smith and the other agents and employees of the EEU, Menetti was a young mare in an excellent state of overall general health.

11. During the first week Menetti was housed at the EEU, Mrs. Phillips visited Menetti twice. On one occasion, Mrs. Phillips observed Menetti outside during the daytime and observed that Menetti's water bucket contained only "sludge" and not water. Mrs. Phillips attempted to inform Justine Smith of Menetti's lack of water, but Justine Smith was not then on the premises. Mrs. Phillips rinsed out Menetti's water bucket and filled it with water, and then informed EEU staff members that Menetti had been outside with no water. . . .

12. Each of Mrs. Phillips' visits with Menetti occurred during the first week to ten days Menetti was housed at the EEU.

. . . .

15. Tammi Kelly arrived at the EEU at approximately 8:30 p.m. on the evening of May 25, 2004 and loaded Menetti onto her open stock horse trailer. When Ms. Kelly arrived at the EEU to pick up Menetti, she immediately noticed that Menetti's breathing was "labored" and that Menetti's sides were moving heavily as she breathed. Ms. Kelly could not find any EEU staff from whom to inquire about Menetti's condition. Ms. Kelly suspected something might be wrong with Menetti and considered taking Menetti straight from the EEU to the veterinary hospital, but she decided to take Menetti to the plaintiffs' residence instead because she knew plaintiff, Dr. Phillips, was a veterinarian.

16. The trip from the EEU to the plaintiffs' residence passed without incident. Tammi Kelly arrived at the plaintiffs' residence with Menetti shortly before 9:30 p.m. on the evening of May 25, 2004. Immediately thereafter, the trailer door was opened and Menetti was discovered lying on her side inside the trailer, dead, with no apparent signs of any injury.

. . . .

19. Tammi Kelly and Dr. Phillips transported Menetti's body directly from the plaintiffs' residence to the NCSU Veterinary Teaching

Hospital ("VTH") in Raleigh so that Dr. Pinto could attempt to harvest a viable embryo from Menetti, and so that a necropsy could be performed.

20. Upon their arrival at the VTH, Dr. Pinto began his harvesting procedure. . . . The harvesting procedure took between fifteen and twenty minutes.

21. Upon completion of Dr. Pinto's procedure, between 10:00 and 11:00 p.m. [,] Menetti's body was transported to the VTH's cooler and placed inside. The cooler is a large refrigerated section of the VTH where animals are stored pending necropsy, in order to preserve the tissue. . . .

22. The next morning, a necropsy to determine the cause of Menetti's death was performed by Dr. Donald J. Meuten and Dr. Kevin Woolard. . . .

23. Dr. Woolard retrieved Menetti from the cooler between 7:30 and 7:45 a.m. on the morning of the necropsy. Both doors of the cooler were closed and sealed, the cooler appeared to be functioning properly, and the temperature was cold enough to preserve the tissue.

24. Dr. Woolard delivered Menetti to the necropsy suite and the necropsy began within ten minutes of removing Menetti from the cooler. The necropsy was performed within twelve hours of Menetti's death.

25. Dr. Meuten and Dr. Woolard made the following clinical findings during Menetti's necropsy: there was a marked degree of autolysis (tissue degradation) throughout the carcass; there was a large amount of fluid in the lungs, and the blood vessels in the lungs were expanded and congested; there was fluid in the upper gastrointestinal tract; there were large amounts of calcium oxalate crystals in the kidneys; there was an absence of any gross lesions that could have been responsible for Menetti's death; and there was an absence of any sign of infection, fever, or disease process.

26. Based upon their findings, Dr. Meuten and Dr. Woolard were each of the opinion that the cause of Menetti's death was more likely than not heat stress.

27. When all of the clinical findings noted during Menetti's necropsy are found together in the same animal, it is strongly indicative that, more likely than not, the cause of the animal's death was heat stress.

. . . .

29. Menetti's body temperature was likely elevated for some period of time before she died.

30. Menetti was not suffering from an infection or a disease that would have caused a fever when she died.

31. The amount of calcium oxalate crystals found in Menetti's kidneys was much higher than normal and is strongly indicative of at least moderate dehydration.

32. Water ingestion is a major cooling mechanism for a horse and lack of adequate water could contribute to a horse developing heat stress.

33. On June 21, 2004, a written report of the necropsy findings was issued that confirmed the conclusion of Dr. Meuten and Dr. Woolard, that Menetti most likely died from heat stress due to dehydration. . . . Based upon Menetti's body, it was Dr. Meuten's opinion Menetti died of heat stress.

. . . .

35. On May 25, 2004, the day that Menetti died, the high temperature . . . was [93 degrees] For the four days immediately preceding Menetti's death, the high temperature each day was likewise in the nineties.

. . . .

38. On the day Menetti died, four undergraduate student employees of the EEU who

cared for her while she was housed at the EEU noted that Menetti had been coughing repeatedly during that day at the EEU. Although the person charged with Menetti's care, Justine Smith and the undergraduate students, have stated that Menetti was in the barn all day on the date of her death, Dr. Carlos Pinto indicated that when Justice Smith called him to come to the hospital to receive Menetti's body, she said "around 1:00 p.m., when the mare was brought to the barn, they did a TPR. [. . .] I just remember that when she was brought to the barn at 1:00, they saw the need to do a TPR. [. . .] I think she came from the outside paddock, to the barn, around midday. [. . .]"

39. Some time after 11:00 a.m. on May 25, 2004, the day Menetti died, one of the undergraduate student employees of the EEU called Justine Smith, who was not at the EEU that day, and informed her of Menetti's repeated coughing. Ms. Smith instructed the students to perform a TPR checking Menetti's temperature, pulse and respiration. Although no record exists of this test, the students charged with conducting the test indicated that the results were normal. However, an increased rectal temperature in a horse will not be noticed until the horse has reached a more advanced heat stroke, it would not be coincident with early dehydration.

40. After being notified of Menetti's repeated coughing, Justine Smith instructed the undergraduate student employees of the EEU to move Menetti to a stall without hay or grain but with a fan.

. . . .

42. Menetti's coughing on the day that she died could be indicative that her lungs were then filling with fluid.

. . . .

58. The Full Commission finds that Justine Smith and the EEU personnel under Justine Smith's supervision breached their duty of care and were negligent in the following respects:

a. Allowing Menetti to become dehydrated and overheated while in their exclusive care, custody and control, such that she died of heat stress within an hour of being released from their exclusive care, custody and control, was a negligent tort act.

b. Failing, in the extraordinarily hot and humid days prior to Menetti's death, to provide Menetti with a quantity of water sufficient to prevent Menetti from becoming dehydrated and overheated and sufficient to prevent Menetti from developing heat stress was a negligent act.

c. Failing, on the day that Menetti died, to appreciate from her repeated coughing that she was in respiratory distress such that she was in need of medical attention from a doctor of veterinary medicine, and failing to obtain said veterinary medical attention for Menetti, was a negligent act.

d. Justine Smith's failing, after being informed of Menetti's repeated coughing, to order the undergraduate employees of the EEU under her supervision to obtain medical attention for Menetti from a doctor of veterinary medicine on the day that Menetti died, was a negligent act.

59. As a direct and proximate cause of the negligence of the EEU . . . by and through the negligence of its agent Justine Smith and the EEU personnel under her supervision, the plaintiffs were severely and permanently injured.

Defendant's assignments of error challenge only findings of fact numbers 8, 12, 16, 27, 29, 30, 38, 39, 58, and 59 of the findings recited above. Thus, the remaining recited findings are binding on this Court. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Additionally, although Defendant assigned error to findings of fact numbers 7, 16, 27, and 29, Defendant

failed to argue these assignments of error in its brief on appeal. These assignments of error are, therefore, abandoned, and those findings are likewise binding on appeal. See N.C. R. App. P. 28(a).

The evidence of record reveals the following: Plaintiff Dawn Phillips visited the EEU during the first ten days of Menetti's stay and observed Menetti outside during the daytime with inadequate water in her water bucket. Mrs. Phillips cleaned Menetti's bucket, filled it with water, and, as Ms. Smith was not on the premises, reported the incident to an EEU staff member. Soon thereafter, Mrs. Phillips reported the incident to Ms. Smith via telephone.

Ms. Wrench testified that she noticed Menetti coughing when Ms. Wrench arrived at the EEU at around seven or eight in the morning on 25 May 2004. Mr. Velie, Mr. Reitmeyer, and Ms. Davis also observed Menetti coughing throughout the day. At around 11:50 a.m., Ms. Wrench, along with Ms. Davis, called Ms. Smith to inform her of Menetti's cough. Ms. Smith advised Ms. Wrench to check Menetti's TPR. Ms. Wrench testified that she and Ms. Davis performed the TPR check, and the results were normal. After Ms. Wrench and Ms. Davis informed Ms. Smith of the results, they moved Menetti to a stall with a fan. Although Menetti's cough continued after the TPR check, no veterinary care was sought for Menetti. Ms. Wrench did not think that the TPR results were recorded anywhere, although she did recall making a written statement of the results "either the day of or the day after" Menetti's death as Ms.

Smith "said that it would be nice for us to do something like that[.]"

When Tammi Kelly arrived at the EEU on the evening of 25 May 2004 to transport Menetti to Plaintiffs' residence, Ms. Kelly noticed that Menetti's "sides were moving heavily" and that Menetti's breathing was "labored." As there was no EEU staff present, and Ms. Kelly had no cell phone at the time, Ms. Kelly proceeded to transport Menetti to Plaintiffs' home. Upon arriving at Plaintiffs' home shortly before 9:30 p.m., Ms. Kelly and Dr. Phillips discovered Menetti dead in the trailer. Menetti showed no apparent signs of injury or trauma.

Mrs. Phillips immediately telephoned Ms. Smith to inform her that Menetti had died. Ms. Smith called Dr. Pinto that night to ask him to receive Menetti's body at the hospital for a necropsy and to attempt to harvest a fertilized egg from Menetti. Dr. Pinto testified that Ms. Smith told him, "around 1:00 p.m., when the mare was brought to the barn, they did a TPR, because they noticed she was breathing a little faster, maybe, or - - they had some reason the mare was taking a TPR that day." Dr. Pinto further testified, "I just remember that when [Menetti] was brought to the barn at 1:00, they saw the need to do a TPR." Based on his conversation with Ms. Smith, Dr. Pinto understood that Menetti had been outside in the front paddocks until she was brought into the barn around midday.

Dr. Meuten and Dr. Woolard performed a necropsy on Menetti the following morning. Dr. Meuten testified that "the horse appear[ed]

cooked in that there [was] just autolysis that happened quickly." Dr. Meuten further explained that "the cooked appearance . . . is the deterioration of tissues postmortem, in essence rotten. And that should not happen quickly if the body is chilled. . . . I felt as if that process had occurred too quickly." Given the high degree of autolysis, the fact that the necropsy was performed within 12 hours of Menetti's death, and the fact that Menetti's body was kept in a cooler until the necropsy was performed, Menetti's body temperature had likely been elevated for some period of time before Menetti died. Dr. Meuten further testified it was his opinion that the cause of Menetti's death was more likely than not heat stress.

Dr. Woolard testified that the predominant finding of the necropsy was the marked degree of autolysis throughout the carcass. Additionally, there was a large amount of vascular vasodilation² and congestion, both within Menetti's skin and the mucous membranes in her mouth. Additionally, Menetti's kidney tissue was moderately to markedly distended and filled with large aggregates of calcium oxalate crystals. The large amount of calcium oxalate crystals was "strongly indicative of at least a moderate level of dehydration." Based primarily "on the advanced degree of autolysis within the short interval . . . from the time of death to the post-mortem examination, given the horse was refrigerated properly[,] " Dr. Woolard opined that the cause of Menetti's death was heat stress. The written report of the necropsy findings confirmed Dr. Meuten's

² Vascular vasodilation is expansion of the blood vessels.

and Dr. Woolard's conclusion that Menetti most likely died from heat stress due to dehydration.

Accordingly, based on careful review of the record, we conclude that the challenged findings of fact made by the Commission are supported by ample competent evidence and, thus, are conclusive on this Court. *Bolkhir*, 321 N.C. at 708-09, 365 S.E.2d at 900. Based on the findings of fact, the Full Commission concluded, *inter alia*:

3. Justine Smith and the EEU personnel under Justine Smith's supervision breached their duty of care and were negligent. The negligence of Justine Smith, acting within the course and scope of her employment, and the other EEU personnel under Justine Smith's supervision, acting within the course and scope of their employment, was a proximate cause of Menetti's death from heat stress, and therefore a proximate cause of plaintiffs' injuries. N.C. Gen. Stat. § 143-291 *et seq.*

4. As a direct and proximate cause of the negligence of the EEU, by and through the negligence of its agent Justine Smith and the EEU personnel under her supervision, the plaintiffs were severely and permanently injured. Thus, plaintiffs are entitled to compensatory damages in an amount sufficient to restore them to their "original condition" and give them back that which was lost. N.C. Gen. Stat. § 143-291 *et seq.*; see *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E.2d 343, 347 (1950).

We hold that the Full Commission's findings of fact fully support the conclusions of law.

Nonetheless, Defendant asserts that "Plaintiffs have failed to submit any direct evidence of negligence on the part of any employee of defendant[.]" Such assertion is inaccurate. Defendant's arguments merely address the weight and credibility of

the evidence presented. It is well settled, however, that the Commission is the ultimate fact-finding body and the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000). Accordingly, the assignments of error upon which Defendant's argument is based are overruled.³ We affirm that part of the Full Commission's Decision and Order determining that Plaintiffs are entitled to damages as a result of Defendant's negligence.

B. Plaintiffs' Appeal

Plaintiffs argue that the Full Commission erred in reducing the amount of compensatory damages awarded to Plaintiffs by excluding the amount of damages awarded by Deputy Commissioner Taylor for Plaintiffs' lost opportunity to breed Menetti.

Generally, where a plaintiff is injured by the tortious conduct of a defendant, "the plaintiff is entitled to recover the present worth of all damages naturally and proximately resulting from [the] defendant's tort." *King v. Britt*, 267 N.C. 594, 597, 148 S.E.2d 594, 597 (1966).

Plaintiffs presented evidence that Menetti had successfully produced offspring in 75% of the years preceding her death, although the last two attempts to breed Menetti had been unsuccessful. Plaintiffs also presented evidence that Menetti would likely have bred in 11 of the 15 years following her death,

³ Defendant's assignment of error number 18 was not argued in Defendant's brief and is deemed abandoned. N.C. R. App. P. 28(b)(6).

and that the estimated economic value of each foal would have been \$9,000.

In her Decision and Order, Deputy Commissioner Taylor held Defendant liable to Plaintiffs in the amount of \$99,000 for the lost opportunity to breed Menetti. This holding was supported by nine findings of fact regarding Menetti's breeding history and likely breeding potential. Without addressing the Deputy Commissioner's findings of fact or conclusions regarding the award of damages for Plaintiffs' lost opportunity to breed Menetti, the Full Commission limited Plaintiffs' recovery to \$50,000, the cost to replace Menetti with a comparable horse.

When the Commission's findings of fact "are insufficient to determine the rights of the parties, the court may remand to the Industrial Commission for additional findings.'" *Johnson v. Southern Tire Sales & Serv.*, 358 N.C. 701, 705, 599 S.E.2d 508, 512 (2004) (quoting *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982)). In this case, as the Commission's findings are insufficient to determine whether the proper measure of compensatory damages should include Plaintiffs' lost opportunity to breed Menetti, we remand this matter to the Full Commission with instructions to make findings of fact and conclusions of law concerning the issue of Plaintiffs' lost opportunity to breed Menetti.

AFFIRMED in part and REMANDED with instructions in part.

Judges JACKSON and STROUD concur.

Report per Rule 30(e).