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NO. COA13-197
NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2013

JASON MCNEILL RAYNOR,
Plaintiff,

v.

From Industrial Commission
I.C. No. TA-21549

NORTH CAROLINA DEPARTMENT OF
CRIME CONTROL & PUBLIC SAFETY,
Defendant.

Appeal by plaintiff from decision and order entered 2 November 2012 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 5 June 2013.

Attorney General Roy A. Cooper, by Special Deputy Attorney General Tina L. Hlabse, for defendant-appellee.

Thompson & Thompson, P.C., by E.C. Thompson, III, for plaintiff-appellant.

BRYANT, Judge.

Where defendant did not use excessive force or breach its duty to plaintiff, we affirm the decision and order of the Full Commission denying plaintiff's claim for compensation under the North Carolina Tort Claims Act.

Facts and Procedural History

Plaintiff Jason Raynor filed a Tort Claims Action against the North Carolina Department of Crime Control & Public Safety (defendant) alleging Trooper Devon Rich of the State Highway Patrol applied excessive force causing injuries to plaintiff's head and face.

On 26 September 2008, plaintiff was observed running into a ditch near Beulaville, in Duplin County. Beulaville police officers handcuffed plaintiff due to plaintiff's "uncooperative, abusive and threatening behavior." In a hearing before Deputy Commissioner J. Brad Donovan in the Industrial Commission, Trooper Rich testified that he arrived on the scene and, because he observed plaintiff's glassy eyes and "the way he talked," took plaintiff into custody for driving while impaired. Furthermore, plaintiff admitted to Trooper Rich that he had been drinking.

Trooper Rich transported plaintiff to the Duplin County jail in Kenansville for administration of an intoxilyzer breath test. Trooper Rich testified that during transit to the jail plaintiff was cooperative. Plaintiff conversed, and at the jail, Trooper Rich removed plaintiff's handcuffs, allowing him to use a phone and complete required paperwork. However, plaintiff's demeanor toward Trooper Rich and other law enforcement officers changed when plaintiff was told he could

not drink water prior to the completion of the breath test: plaintiff began acting with increased hostility. "[Plaintiff] would start getting real mouthy and direct his abusive language to [a Sergeant at the jail] and myself and the janitors that were walking through." When plaintiff was instructed to sit down, "he stated to us, and I quote, 'F**k you.' He would tell - he would tell us that we were taking away his rights refusing him water. And he would keep yelling - he would stand up and yell 'Momma'" "With his increased aggression, we felt - me and Sgt. Thurston both felt the need that - for his and our safety, we needed - he needed to be placed back in handcuffs so any other altercation wouldn't occur."

Q. . . . [I]t took three of you to put handcuffs back on him?

A. Yes, ma'am.

Later that evening plaintiff was transported to the Magistrate's Office, where he was joined by his mother. Trooper Rich testified that plaintiff "was verbally abusive towards his mother and myself. . . . [Plaintiff] was still handcuffed due to his aggressive state and he became more agitated. He kept getting up and walking around." Trooper Rich testified, as follows:

[As the time for the magistrate to review plaintiff's paperwork drew closer, plaintiff] started screaming obscenities to myself. He shot up out of the chair. . . . I

advised him to sit down and he replies, and I quote, 'F**k you, mother f**ker. I ain't doing sh*t.' I placed my hand on his chest to push him back in his chair and he started pushing back against me to keep from sitting down.

Trooper Rich testified that he then applied pressure to the hypoglossal nerves along plaintiff's neck "to get his attention and to get him to sit down."

Q. Okay. And what happened next?

A. . . . He was pushing against me. He would start squeezing his lips together, going like this (demonstrating), trying to collect - like he was collecting saliva to the back of his throat. I told him, "Don't spit on me." . . . So I stepped to the side and . . . I move[d] my arm to the back and place him to the ground[, the displacement technique].

When Trooper Rich executed the takedown maneuver that brought plaintiff to the ground, plaintiff's head and face hit the floor causing him to bleed from the nose and chip a tooth. As a result of the incident plaintiff required EMS attention and was briefly hospitalized.

Plaintiff filed a claim for damages under the Tort Claims Act with the North Carolina Industrial Commission. In his complaint, plaintiff sought to recover damages from defendant for injuries inflicted allegedly due to negligence, gross negligence, and agency-imputed negligence. The matter was heard by Deputy Commissioner Donovan on 14 November 2011. In a

Decision and Order filed 29 March 2012, Deputy Commissioner Donovan concluded that plaintiff's claim for compensation under the Tort Claims Act must be denied. Plaintiff then appealed to the Full Commission ("the Commission"). On 2 November 2012, after reviewing the prior Decision and Order of the deputy commissioner as well as the briefs and arguments of the parties presented during that hearing, the Commission entered its Decision and Order affirming with minor modification the Decision and Order of the deputy commissioner denying plaintiff's claim for compensation under the Tort Claims Act. Plaintiff appeals.

On appeal, plaintiff contends the Commission erred in concluding that he failed to prove Trooper Rich acted negligently by using excessive force. In seven assignments of error, plaintiff challenges whether the Commission's findings of fact are supported by competent evidence and whether the Commission erred in finding and concluding that Trooper Rich did not violate the standard of care.¹

¹ We note with extreme dismay the unprofessional tone adopted throughout plaintiff's brief to this Court. The language was demeaning, derisive, and disparaging toward defendant's witnesses who testified before the Industrial Commission, as well as directly toward one or more of the Commissioners. We do not repeat the offensive language here, as it became a matter of public record upon the filing of the brief. However, the contemptuous tone of plaintiff's brief

The North Carolina Tort Claims Act provides that

[t]he Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C. Gen. Stat. § 143-291(a) (2011). The Tort Claims Act states that the standard of review for an appeal from the Commission to the Court of Appeals is "for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." *Id.* § 143-293 (2011).

[W]hen 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. We do not have the right to weigh the evidence and decide the issue on the basis of its weight. Our duty goes no further than to determine whether the record contains any evidence tending to support the finding.

appears to be an attempt to obfuscate the legal issues to be decided by this Court. Notwithstanding, we have endeavored to properly address the legal issues raised by plaintiff in his appeal.

Turner v. N.C. Dep't of Transp., ___ N.C. App. ___, ___, 733 S.E.2d 871, 874 (2012) (citations, quotations, and brackets omitted). "The findings of the Commission are conclusive on appeal when [] competent evidence exists, even if there is plenary evidence for contrary findings. This Court reviews the Commission's conclusions of law *de novo*." *Egen v. Excalibur Resort Prof'l*, 191 N.C. App. 724, 728, 663 S.E.2d 914, 918 (2008) (citation omitted).

In his brief to this Court, plaintiff seeks to support his claim that Trooper Rich was negligent in using excessive force causing plaintiff's injury. To establish negligence under the Tort Claims Act, a plaintiff must establish that: "(1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988) (citation omitted). Plaintiff argues that the Commission erred in its findings that defendant was not negligent.

Following the 12 September 2012 hearing, the Commission made the following findings of facts:

1. On September 26, 2008, at approximately 5:00 p.m., Probation and Parole Officer Emmitt Stroud was driving in the area of NC 111 and Railroad Street near Beulaville when he observed plaintiff's vehicle run off the

road to the right and into a ditch.

2. Mr. Stroud notified the Highway Patrol. Trooper Devon Rich received a call regarding the incident and responded to the scene where he observed a single vehicle in a ditch on the side of the road. When Trooper Rich arrived on the scene, Plaintiff had already been placed in handcuffs by officers who arrived prior to Trooper Rich. This was due to plaintiff's uncooperative, abusive and threatening behavior toward the officers.

3. Plaintiff refused to take a breath test or a field sobriety test, however, Trooper Rich determined that plaintiff was visibly intoxicated. Accordingly, plaintiff was arrested for driving while impaired. Trooper Rich placed his own handcuffs on plaintiff and transported him to the Duplin County Sheriff's Department in Kenansville, North Carolina for booking and for the administration of a breath test.

4. Upon arrival at the Duplin County Sheriff's Department, Trooper Rich began the paper work incident to plaintiff's arrest and Sergeant W.L. Thurston was called to administer the breath test. During the initial stages of the breath testing procedure, plaintiff was relatively cooperative, and his handcuffs were removed so that he could use his cell phone and sign the breath test rights form. At approximately 7:23 p.m., Sergeant Thurston read plaintiff his breath test rights, and plaintiff signed the rights form.

5. At approximately 7:34 p.m., plaintiff arose from his seat and started walking toward the water fountain. As the breath test requires that the subject not have had anything to drink 30 minutes prior to the administration of the test, Sergeant Thurston advised plaintiff that he could not drink any water until the breath test was

finished. At this point, plaintiff became irate and said that it was a free country and he could drink some water if he wanted to. Sergeant Thurston advised plaintiff once again that he could not have any water until after the test and instructed him to sit down. Plaintiff then shouted numerous profane statements toward Trooper Rich and Sergeant Thurston, and accused them of depriving him of his rights. Plaintiff ultimately ignored Sergeant Thurston's instructions and took a drink from the water fountain.

6. Thereafter, Sergeant Thurston and Trooper Rich instructed plaintiff to sit back down in his seat and not to get up again. Plaintiff then became increasingly belligerent and aggressive toward the troopers and refused to sit down.

7. Due to plaintiff's increasingly aggressive behavior, Trooper Rich and Sergeant Thurston attempted to place the handcuffs back on plaintiff, at which point plaintiff became combative. One of the jailers came to assist the two troopers, and together they were able to push plaintiff forward onto a desk and handcuff him with his hands behind his back. Both Trooper Rich and Sergeant Thurston testified, and the Full Commission finds, that Trooper Rich placed the handcuffs on plaintiff appropriately and that they were not too tight.

8. Plaintiff was then seated in a chair next to the breath test instrument. Sergeant Thurston re-started the breath test observation period at approximately 7:36 p.m. At 8:00 p.m., Sergeant Thurston requested that plaintiff submit to a breath test to determine his alcohol concentration. Plaintiff refused to take the test. At approximately 8:15 p.m., Trooper Rich placed plaintiff back in his patrol vehicle and transported him to the magistrate's office

down the street from the jail, where plaintiff's mother and bail bondsman were waiting.

9. During an extended wait for the magistrate, plaintiff was irate and verbally abusive toward Trooper Rich. Plaintiff also repeatedly disregarded Trooper Rich's instructions to remain seated. Due to his aggressive behavior, Trooper Rich left plaintiff's handcuffs on.

10. At approximately 9:20 p.m., plaintiff became very aggressive and "shot up out of his chair." When Trooper Rich advised him to sit down, plaintiff began screaming obscenities and refused to do so. Trooper Rich then placed his hand on plaintiff's chest in an attempt to push him back into his chair, but plaintiff pushed back against the trooper.

11. Trooper Rich then attempted to get plaintiff to sit down by using his fingers to put pressure on a pressure point at plaintiff's jugular notch, a technique he was taught in officer training school. While he was attempting to do this, Trooper Rich observed plaintiff tilt his head back, squeeze his lips together and gather saliva in the back of his mouth. Based on this observation, Trooper Rich reasonably believed plaintiff was preparing to spit on him. In order to prevent plaintiff from spitting on him, Trooper Rich performed a balance displacement technique and redirected plaintiff toward the ground. When plaintiff fell, he hit his head on the floor and started bleeding from his nose.

12. Trooper Rich assisted plaintiff back to his feet and placed him in the chair. At this time, plaintiff was bleeding profusely. Trooper Rich assisted plaintiff's mother, who is a registered nurse, in controlling the bleeding. He then contacted Duplin County Communications to dispatch an EMS

unit to the scene. EMS transported plaintiff to Duplin General Hospital, where he was diagnosed with a mildly displaced right-sided nasal bone and anterior nasal septum fracture, and probable periapical abscess of a right-sided upper tooth.

13. In addition to contacting EMS, Trooper Rich contacted Sergeant Thurston. He reported to the magistrate's office and talked to Trooper Rich to find out what had happened. Sergeant Thurston also attempted to talk to plaintiff; but plaintiff refused to provide any useful information and instead shouted profanities.

14. At the hospital, plaintiff's mother asked Trooper Rich to remove the handcuffs from plaintiff. Trooper Rich advised her that due to plaintiff's temper and demeanor, they could not be removed, however, he agreed to loosen them to make them more comfortable. Upon loosening the handcuffs, Trooper Rich observed only the "normal markings that handcuffs leave on the hands"

15. Before plaintiff's treatment was completed, his mother signed a release allowing plaintiff to leave the hospital against medical advice. Trooper Rich then drove them back to the magistrate's office, where plaintiff was processed and released on bail. Later that night, plaintiff returned to the hospital for additional evaluation and treatment.

16. Defendant introduced the testimony of experts First Sergeant R.J. Hedgepeth (Retired) and Sergeant Shannon Whaley. Both First Sergeant Hedgepeth and Sergeant Whaley have served as the Use of Force Director with the State Highway Patrol. In that capacity, they were responsible for preparing the curriculum for the Patrol on the use of force, training troopers on the proper use of force, and helping formulate

policy for the Patrol. They also reviewed all use of force reports generated by the State Highway Patrol to determine if the use of force was appropriate or excessive. On average, they reviewed approximately 70 Use of Force reports per month. Based on their experience and training, each was admitted as an expert in the use of force and defensive tactics for the State Highway Patrol.

17. Both First Sergeant Hedgepeth and Sergeant Whaley reviewed the Use of Force report generated in connection with the incident which is the subject of this claim. They also met with Trooper Rich and reviewed his deposition testimony, as well as the deposition testimony of plaintiff. Both were present throughout the evidentiary hearing and heard all of the witnesses' testimony, including that of plaintiff, plaintiff's mother and Trooper Rich. In addition, prior to rendering their opinions in this case, both First Sergeant Hedgepeth and Sergeant Whaley witnessed Trooper Rich's demonstration at the evidentiary hearing of how he performed the balance displacement technique on plaintiff on September 26, 2008.

18. Both First Sergeant Hedgepeth and Sergeant Whaley agreed that a person under arrest and handcuffed could still pose a threat to the officers and pose a threat of escape. This was especially true in this case given plaintiff's demeanor and threats.

19. First Sergeant Hedgepeth and Sergeant Whaley opined, and the Full Commission finds, that Trooper Rich acted in accordance with the statutory requirements of N.C. Gen. Stat. § 15A-401(d)- Use of Force in Arrest, that his actions were justified, and that the force he used was not excessive. Furthermore, both opined, and the Full Commission finds, that Trooper Rich acted in accordance with the State Highway Patrol's

policy, and in accordance with his training. Finally, First Sergeant Hedgepeth and Sergeant Whaley opinion [sic], and the Full Commission finds that Trooper Rich acted reasonably under the circumstances.

20. Plaintiff offered no expert testimony to support his contention that Trooper Rich used excessive force.

The Commission then "conclude[d] as a matter of law that plaintiff ha[d] failed to show a breach of duty of care owed to him."

Plaintiff challenges findings of fact 10, 11, 12, 16, 17, 18, 19 and 20. However, most of plaintiff's challenges consist of plaintiff restating the Commission's findings and offering no explanation for his assertions that they are not supported by competent evidence. In essence, plaintiff simply challenges the credibility of defendant's witnesses and in so doing, contests the Commission's findings regarding their testimony. See *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) ("Under our Workers' Compensation Act, the Commission is the fact finding body. The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.").

Conversely, plaintiff argues the Commission failed to make several findings of fact: that plaintiff never attempted to escape; that plaintiff did not owe a duty to Trooper Rich not to use vulgar language; and, that Trooper Rich told him to sit down

and shut up before "throwing him across the room." On this record, we do not review findings the Commission failed to make. See *id.* at 681, 509 S.E.2d at 413 (the ultimate fact-finding function resides with the Commission); see also *Turner*, ___ N.C. App. at ___, 733 S.E.2d at 874 ("[W]hen considering an appeal from the Commission, our Court is limited to [determining] . . . whether the Commission's findings of fact justify its conclusions of law and decision. We do not have the right to weigh the evidence"). We will, however, review plaintiff's contentions that (1) the Commission erred when it found that Trooper Rich did not use excessive force when he brought plaintiff to the ground and (2) that Trooper Rich owed plaintiff a duty not to use excessive force when he was not resisting arrest, attempting to escape, or posing an imminent threat of injury to the trooper.

The Commission's finding that Trooper Rich did not use excessive force with plaintiff was supported by competent testimony in the record. Trooper Rich testified that because plaintiff exhibited a combative attitude throughout the evening and attempted to spit on him as he was trying to make plaintiff sit back down, Trooper Rich performed a displacement technique to protect himself from an assault by saliva.²

² See *State v. Crouse*, 169 N.C. App. 382, 388, 610 S.E.2d 454, 458 (2005) (noting that "[a]ssaults on government officials have

Plaintiff's mother also testified that just before plaintiff was displaced, Trooper Rich said, "Don't you spit on me." This testimony supports the finding of fact that Trooper Rich reasonably believed plaintiff was about to spit on him. See generally *Myrick v. Cooley*, 91 N.C. App. 209, 215, 371 S.E.2d 492, 496 (1988) ("Under the common law, a law enforcement officer has the right, in making an arrest and securing control of an offender, to use only such force as may be reasonably necessary to overcome any resistance and properly discharge his duties." (citations omitted)).

In addition, two experts on the State Highway Patrol's "Use of Force" policy, First Sergeant Hedgepeth and Sergeant Whaley, testified that Trooper Rich acted in accordance with the policy and with N.C. Gen. Stat. § 15A-401(d) ("Use of Force in Arrest").

Pursuant to North Carolina General Statutes, section 15A-401,

a law-enforcement officer is justified in using force upon another person when and to the extent that he reasonably believes it necessary:

been criminalized to punish, and prevent, attacks against government officials trying to perform public duties[, and that] the criminalization of malicious conduct by a prisoner is directed at deterring and punishing the projecting of bodily fluids or excrement at government employees by those in custody, whether or not such misconduct amounts to an assault").

a. To prevent the escape from custody or to effect an arrest of a person who he reasonably believes has committed a criminal offense, unless he knows that the arrest is unauthorized; or

b. To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect an arrest or while preventing or attempting to prevent an escape.

N.C.G.S. § 15A-401(d) (2011).

Sergeant Hedgepeth and Sergeant Whaley both served as Use of Force Liaison/Defensive Tactics Coordinator (for the State Highway Patrol). In that capacity they regularly reviewed approximately seventy Use of Force reports per month to determine if policies were violated by troopers. Both experts testified that Trooper Rich behaved reasonably when he realized plaintiff was preparing to spit at him. They both opined that Trooper Rich did not use excessive force and did not breach the standard of care.

Moreover, we note that the only evidence plaintiff brought forth to show that Trooper Rich used excessive force was his own testimony. Plaintiff failed to successfully challenge on cross-examination the opinions of defendant's experts that Trooper Rich's actions did not constitute excessive force or a violation of the Use of Force policy. Furthermore, plaintiff failed to bring forth evidence to show Trooper Rich's actions were not

reasonably necessary to overcome plaintiff's resistance and properly discharge the trooper's duties. See *Myrick*, 91 N.C. App. at 215, 371 S.E.2d 496. Accordingly, we find the Commission's findings of fact were supported by competent evidence submitted at the hearing.

The Commission's conclusion that plaintiff failed to show a breach of duty by defendant was based on findings of fact that were properly supported by competent evidence in the record. Based on the foregoing, plaintiff was unable to sustain his claim of negligence. The Commission's 2 November 2012 decision and order is affirmed.

Affirmed.

Judges STEPHENS and DILLON concur.

Report per Rule 30(e).