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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-478

Filed: 6 December 2016

North Carolina Industrial Commission, I.C. Nos. TA 22209-10

JAMES TOWNSEND and LUCRETIA TOWNSEND, Plaintiffs,

v.

N.C. DEPARTMENT OF TRANSPORTATION, Defendant.

Appeal by Plaintiffs from Decision and Order entered 28 January 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 October 2016.

Knox, Brotherton, Knox & Godfrey, by Lisa G. Godfrey, and Mark C. Tanenbaum, PA, by Mark C. Tanenbaum, for Plaintiffs.

Attorney General Roy Cooper, by Special Deputy Attorney General Melody R. Hairston, for Defendant.

STEPHENS, Judge.

In this appeal from the denial of Plaintiffs' claims brought pursuant to the State Tort Claims Act, N.C. Gen. Stat. § 143-291, *et seq.*, ("the Act"), we apply our well-established standard of review, decline to second guess the North Carolina Industrial Commission in its role as finder of fact, and affirm the Commission's Decision and Order.

Factual and Procedural Background

At approximately 5:40 p.m. on 26 June 2008, Plaintiff James Townsend, M.D., was driving a 2000 Toyota pickup in the northbound lane of Highway 701 north of Tabor City in moderate to heavy rain when he lost control of his vehicle. Townsend's truck crossed the center line and collided head-on with a southbound vehicle driven by Douglas Wayne McClure of Raleigh, who was killed in the collision. After striking McClure's vehicle, Townsend's truck flipped and came to rest upside down on the roadway. Townsend suffered multiple injuries as a result of the incident, including a broken right ankle; a broken L3 vertebra with resulting sciatic nerve compression requiring open fixation with prosthetic devices; a complete tear of the rotator cuff of his left shoulder; a detached retina in his right eye, requiring surgery and leaving him with double vision; and neurological injuries including proprioception, halting speech, and memory problems.

The accident was investigated by Trooper Brian Ezzell of the North Carolina Highway Patrol, who arrived at the scene at approximately 6:00 p.m. Ezzell documented the accident scene and took photographs of standing water in the northbound lane. Townsend testified that he had been driving his truck at the posted speed limit of 55 miles per hour just before he lost control. Ezzell opined that, based upon his investigation, Townsend had been driving at an unreasonable speed given the rainy conditions and wet roadway. Townsend was charged with misdemeanor

death by vehicle and driving at a speed greater than was reasonable and prudent under the conditions then existing, but those charges were dismissed after Townsend reached a settlement with McClure's estate.

On 17 February 2011, Townsend and his wife, Plaintiff Lucretia Townsend,[1] filed in the North Carolina Industrial Commission negligence claims against Defendant North Carolina Department of Transportation ("the DOT") pursuant to the Act. On 23 March 2011, the DOT filed motions to dismiss the Townsends' claims, in addition to answers denying its own negligence and asserting contributory negligence on the part of Townsend.

The matter came on for hearing before a deputy commissioner in September 2014 and January 2015. On 30 June 2015, the deputy commissioner entered a Decision and Order finding contributory negligence on the part of Townsend and denying his and his wife's claims in their entirety. On 9 July 2015, the Townsends gave notice of appeal to the Full Commission ("the Commission"), which heard written and oral arguments. On 28 January 2016, the Commission filed a Decision and Order affirming the deputy commissioner's denial of the Townsends' claims. Pertinent to the issues raised in this appeal, the Commission found as fact:

> 3. [The DOT] has a duty to exercise reasonable care to maintain Highway 701 to prevent injuries to drivers who are using the highway in a proper manner. The named employees charged with maintaining the stretch of

[1] Lucretia was not involved in the traffic incident on 26 June 2008, but alleged a claim for loss of consortium as a result of her husband's injuries.

Highway 701 in question are responsible for approximately 2400 shoulder miles in the third largest county in the state. They develop maintenance plans wherein the first goal is public safety and the second goal is preserving the infrastructure. How much they can accomplish in any given year is driven, in large part, by funding. In addition to driving the roads in good and bad weather to look for problem areas, [the DOT's] employees also rely upon citizen complaints and reports from Columbus County law enforcement and emergency personnel. There is no evidence that prior to June 26, 2008 [the DOT] had received any complaints or reports of problems with standing or ponding water on that part of Highway 701 where . . . Townsend's accident occurred.

4. On June 26, 2008, between 5:20 pm and 5:40 pm, approximately one-quarter to one-half inch of rain fell in the vicinity of . . . Townsend's accident. Alphonza McKoy, a longtime resident of the area who was traveling about three or four car lengths behind . . . Townsend on June 26, 2008, testified that the rain had gotten "real, real heavy" and that while it had started to slack up just prior to the accident, "it had been raining for quite a while." A second storm passed through the area after . . . Townsend's accident and dropped an additional half[-]inch to one inch of rain.

. . . .

7. Trooper Ezzell testified that water in the road had "a great deal of effect" on the accident which occurred, because it appeared that . . . Townsend had hydroplaned. . . . Townsend was charged with driving at a speed greater than was reasonable and prudent under the conditions then existing pursuant to N.C. Gen. Stat. § 20-141(a) and with misdemeanor death by vehicle pursuant to N.C. Gen. Stat § 20-141.4(A2) for the death of Mr. McClure.

. . .

8. At the time of the accident, the stretch of Highway 701 where the collision occurred was part of Trooper Ezzell's regular patrol area. Trooper Ezzell testified that he regularly drove that stretch of roadway, as often as three or four times a week, including during wet road conditions. Trooper Ezzell is trained to report dangerous roadway conditions to [the DOT]. Trooper Ezzell testified that prior to June 26, 2008 he had never witnessed a problem with standing or ponding water on Highway 701 and therefore had never reported any condition concerning water on the roadway to [the DOT] prior to the subject accident.

9. [The DOT] did not have actual notice of any defect or dangerous condition relating to drainage onto the roadway or standing or ponding water along Highway 701 in the vicinity of . . . Townsend's accident either prior to, or at the time of, the subject accident[.]

. . . .

12. . . . . The speed at which . . . Townsend was traveling and the extent of wear on his back tires, while not necessarily unreasonable, were contributing factors to his loss of control on June 26, 2008. . . .

13 [The Townsends'] experts implicate an alleged failure on the part of [the DOT's] named employees to identify and correct a high shoulder along the right side of the northbound travel lane of North Carolina Highway 701 prior to the June 26, 2008 accident. A high shoulder can restrict water drainage from a roadway and result in ponding at the edge of the roadway, which in turn can contribute to hydroplaning. [The Townsends] contend that at a minimum a high shoulder condition along this stretch of road should have been identified and corrected during the summer and early fall of 2007, when [the DOT] oversaw a microsurfacing project in this area[.]

14. In maintaining the unpaved shoulders of state highways, the goal is to make sure that water can get away

from the edge of the road and to give a car a secure place to go if it has to exit the highway[.] A high shoulder should be noted where the elevation difference is one inch or higher above the road surface. The height of unpaved shoulders increases over time as the root system in the vegetation grows and expands. While a high, unpaved shoulder has the potential to cause water to pond on the roadway, depending on cross-slope and topography, not every high shoulder is going to result in the accumulation of water on the road surface. Moreover, Gene Strickland, a former Transportation Supervisor III in Columbus County for [the DOT] who retired in November 2007, testified that with "some of these downpours, . . . probably even with a perfect shoulder you're going to have some water on the road . . . a reasonable length of time."

15. High shoulders on existing roads can be repaired by cutting them down with a motor grader and hauling away the dirt. In the absence of notice of a specific problem area, shoulder work is usually going to be done in conjunction with resurfacing projects. In 2007, [the DOT] undertook to repave the stretch of road where . . . Townsend's accident occurred by microsurfacing the pavement. Microsurfacing seals the pavement to provide a different texture to give better traction. It is designed to fill minor cracks and minor depressions in the road. As part of the 2007 microsurfacing project, [the DOT's] employees examined the unpaved shoulder. The microsurfacing had not created a drop-off between the pavement and the shoulder that would pose a hazard, and they did not find a shoulder that they thought was high enough to cause a problem with drainage. Mr. Strickland was still a Transportation Supervisor III for [the DOT] at the time of the microsurfacing project. Mr. Strickland testified there had not been a history of problems with the shoulders or drainage in that area, and "where there has been no history of a problem, [.] . . they're not going to schedule any shoulder work to go with the microsurface[.]" Since they hadn't had any reports of problems with standing water on the road, [the DOT] did not cut down the shoulders when

> the road was microsurfaced in 2007. [The DOT] did, however, trim back the grass that was growing onto the pavement as part of that project.
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> 16. [The Townsends'] experts testified that as of December 2011, the shoulder of Highway 701 in the vicinity of . . . Townsend's accident was five or six inches above the surface of the road. Ken Clark, [the DOT's] county maintenance engineer for Columbus County, testified that the shoulder depicted in photos taken in 2008 shortly after . . . Townsend's accident looked "slightly high[.]" However, when he examined the area in 2007 prior to the beginning of the microsurfacing project, the only thing he noted with reference to the shoulder was that the grass that had grown up on the pavement needed to be clipped back. He also observed what he described as "very, very light rutting."
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> 17. Based upon a preponderance of the credible and competent evidence in view of the entire record, the Full Commission finds that [the DOT] did not have constructive notice of a defect in the shoulder or the roadway on Highway 701 that was likely to cause injury. [The Townsends] failed to prove that at the time of the accident, the shoulder on Highway 701 was sufficiently high that it caused water to pond on the road and failed to prove that [the DOT] through its named employees failed to exercise reasonable care in maintaining Highway 701 to prevent injuries to drivers who were using the highway in a proper manner.

Based on these factual findings, the Commission concluded as a matter of law that the Townsends had "failed to prove by the preponderance of the credible, competent evidence that there existed a defect in Highway 701, of which [the DOT] had actual or constructive knowledge, that was of such a character that injuries to those using Highway 701 was reasonably foreseeable" and, thus, held that Townsend could not

recover under the Act. Further, the Commission rejected Lucretia's claim, noting that "[a] claim for loss of consortium is derivative and thus non-existent in the absence of a valid claim by the injured spouse." On 25 February 2016, the Townsends gave notice of appeal from the Decision and Order to this Court.

Discussion

On appeal, the Townsends argue that the Commission erred in holding that the DOT lacked notice that water accumulated and presented a dangerous hazard on Highway 701. We affirm.

Standard of Review

Our review of a decision and order from the Commission "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." *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998) (citation omitted). The Commission's findings of fact are conclusive if there is any competent evidence in the record to support them. *Barney v. N.C. State Highway Comm'n*, 282 N.C. 278, 283-84, 192 S.E.2d 273, 277 (1972). "As long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding." *Simmons v. Columbus Cty. Bd. of Educ.*, 171 N.C. App. 725, 728, 615 S.E.2d 69, 72 (2005) (citation omitted). However, the Commission's "conclusions of law are

reviewable *de novo* on appeal." *Starco, Inc. v. AMG Bonding & Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996) (citation omitted).

I. Notice of standing water caused by high shoulders on Highway 701

The Townsends first argue that the Commission erred in holding that the DOT lacked notice that water accumulated and presented a dangerous hazard on Highway 701. We disagree.

> To recover under the . . . Act, [a] plaintiff must show that the injuries sustained . . . were the proximate result of a negligent act of a state employee acting within the course and scope of his employment. . . . Under the Act, negligence is determined by the same rules as those applicable to private parties.
>
> The essence of negligence is behavior creating an unreasonable danger to others. To establish actionable negligence, [a] plaintiff must show that: (1) [the] defendant failed to exercise due care in the performance of some legal duty owed to [the] 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) (citations omitted). However, the occurrence

> of an injury does not raise the presumption of negligence. There must be evidence of notice either actual or constructive. Notice may be either actual, which brings the knowledge of a fact directly home to the party, or constructive, which is defined as information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it.

Phillips v. N.C. Dep't of Transp., 200 N.C. App. 550, 558, 684 S.E.2d 725, 731 (2009) (citation, internal quotation marks, and brackets omitted).

The Townsends contend that the Commission should have found as fact and concluded as a matter of law that the DOT had both actual and constructive notice of improperly high shoulders on the section of Highway 701 where the accident occurred and was aware that water could pool there and create a risk of hydroplaning. However, as noted *supra*, our task in reviewing decisions under the Act is *not* to determine whether the evidence before the Commission would have supported other findings of fact and conclusions of law. *See Simmons v. Columbus Cty. Bd. of Educ.*, 171 N.C. App. at 728, 615 S.E.2d at 72. Rather, we consider only whether the evidence supports the findings of fact the Commission *did* make and whether those findings support the Commission's conclusions of law. *See Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. at 405-06, 496 S.E.2d at 793.

As reflected in findings of fact 15 and 16, one current employee and one former employee of the DOT testified about a road resurfacing project along Highway 701 undertaken during the summer and fall of 2007—about one year before the accident. At that time, there had been no history of problems with drainage or with the shoulders of that section of Highway 701, and DOT employees working on the resurfacing project did not note any shoulder areas that were high enough to cause drainage issues. The only concern noted regarding the shoulders of Highway 701 in

the area where Townsend's accident occurred was the presence of high grass. Accordingly, no shoulder grading was undertaken as part of the resurfacing project. In addition, as noted in finding of fact 8, Ezzell, a trooper trained to observe and report dangerous roadway conditions, testified that he regularly patrolled the relevant area of Highway 701 and had never observed any hazardous water-related condition prior to Townsend's accident. The Townsends do not challenge these factual findings, and, in any event, the record reflects that they are supported by competent evidence before the Commission. Accordingly, they are conclusive on appeal. *See Barney*, 282 N.C. at 283-84, 192 S.E.2d at 277. In turn, these findings of fact fully support the Commission's determination that the DOT lacked "notice of a defect in the shoulder or the roadway on Highway 701 that was likely to cause injury." The Townsends' argument is overruled.

In light of this holding, we need not address the DOT's argument that Townsend's alleged contributory negligence was an alternate basis in law for the Commission's denial of the Townsends' claims. *See* N.C.R. App. P. 10(c).

AFFIRMED.

Judges BRYANT and CALABRIA concur.

Report per Rule 30(e).