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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-257

Filed: 21 November 2017

North Carolina Industrial Commission, I.C. Nos. TA-21514, 21515

ESTATE OF TAYLOR A. PEYTON, By and Through Administrator JOHN PEYTON, and JOHN PEYTON, Individually, Plaintiffs,

v.

N.C. DEPARTMENT OF TRANSPORTATION, Defendant.

JOHN PEYTON, as Guardian *Ad Litem* for John Peyton, II, and JOHN PEYTON, Individually, Plaintiffs,

v.

N.C. DEPARTMENT OF TRANSPORTATION, Defendant.

Appeal by plaintiffs from decision and order entered 6 December 2016 by the North Carolina Industrial Commission. Heard in the Court of Appeals 19 September 2017.

Crumley Roberts, LLP, by David J. Ventura, for plaintiff-appellants.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for the State.

BRYANT, Judge.

Where the Industrial Commission's unchallenged findings of fact support its conclusion that the Department of Transportation was not negligent in performing a 2003 speed study and the Department's decisions based thereon were within its discretion, we affirm the Commission's decision and order, which denied plaintiff's claim for damages.

On 23 November 2009, plaintiff John Peyton, Sr., individually and as Administrator of the Estate of Taylor A. Peyton, and as guardian ad litem of John Peyton II filed a claim for damages in the North Carolina Industrial Commission against defendant North Carolina Department of Transportation (hereinafter "DOT") under the Tort Claims Act. In an amended claim, plaintiff sought damages in excess of $1,000,000.00. Plaintiff asserted that DOT employees were negligent in failing to "maintain[], design[], and/or install[] appropriate safety measures and/or warning and speed limit signs in a curve on [a road] . . . adjacent to a pond . . . ."

The matter was first heard before Deputy Commissioner Stephen T. Gheen on 11–13 and 24–27 March and 1–2 December 2014. A decision and order denying plaintiffs' claims was entered on 20 November 2015 by Deputy Commissioner J. Brad Donovan. Plaintiff appealed to the Full Commission (hereinafter "the Commission").

After hearing the matter, the Commission issued an amended decision and order on 6 December 2016, in which a majority of the Commission affirmed Deputy Commissioner Donovan's denial of benefits to plaintiff. Per the findings, plaintiff

John Peyton, Sr., (hereinafter "plaintiff") was delivering firewood to a residence at the end of Gladden Drive. Gladden Drive is a rural, dead-end, paved, two-lane residential road located in Lincolnton and is approximately 0.7 miles in length.

> Upon entry onto Gladden Drive, there is a short straight section, followed by an "S" curve around a pond. In 2008, there were no curve warning signs at either end of the double curve [a]s followed by another straight section, then a 90 degree left hand turn which [led] to the end of the road. There [we]re no curve warning signs at either end of the 90 degree turn.

Following behind plaintiff, in an SUV driven by Chastity Spivey, were four-year-old Taylor Peyton and two-year-old John Peyton II.[1] Plaintiff testified that after he delivered the firewood, it was "near dark." Plaintiff had traveled Gladden Drive several times, but Spivey was unfamiliar with the road. As the vehicles headed back toward the main road, both plaintiff and Spivey negotiated the ninety-degree turn without difficulty, but as plaintiff navigated the "S" curve around the pond, he heard tires screeching. Looking back, he observed the headlights of Spivey's SUV enter the pond where the vehicle landed upside down in the water. Emergency responders soon arrived at the scene and removed the vehicle's occupants. Spivey and Taylor Peyton passed away; and John Peyton II suffered severe and permanent brain damage.

The Commission noted the testimony of DOT Traffic Engineer Byron Engle, who in 2003 performed a speed study on Gladden Drive. Based on his review, Engle

[1] Chastity Spivey was the mother of Taylor Peyton and John Peyton II.

opined that "placing the 25 mph speed limit sign at the entrance to the subdivision of Gladden Drive was appropriate to address the curves and overall characteristics of the entire road." Appearing to testify before the Commission, DOT's signage expert Dr. Joseph Hummer—a licensed, professional transportation engineer—also endorsed Engle's 2003 speed study, concluding that "a 25 mph subdivision-wide speed limit was appropriate for Gladden Drive and was common on similar roads."

The Commission concluded that Engle's speed study and resulting signage were accomplished without negligent omission, and moreover, even presuming that DOT breached a duty to plaintiff, the primary factor in the accident was Spivey's failure to obey the posted 25 mph speed limit. The evidence indicated that she was traveling above the 25 mph speed limit, just before her vehicle left the roadway. "[T]herefore, [DOT] [could not] be found liable for the injuries sustained." Plaintiff appeals.

On appeal, plaintiff argues (I) that the Commission erred in entering an amended decision and order affirming a decision and order of Deputy Commissioner Donovan when Deputy Commissioner Donovan did not preside over the evidentiary hearing. Plaintiff also argues that the Commission erred by concluding that (II) DOT was not negligent; (III) DOT was not liable for decisions made pursuant to a

negligently conducted engineering speed study; and (IV) Spivey's operation of her vehicle was a superseding/intervening act.

Standard of Review

"It is a fundamental rule of law that the State is immune from suit unless it expressly consents to be sued." *Zimmer v. N.C. Dep't of Transp.*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 117 (1987) (citation omitted).

> Traditionally, the State has maintained its sovereign immunity in tort actions. However, the Tort Claims Act, as provided in North Carolina General Statute 143-291 *et seq.*, waived the sovereign immunity of the State in those instances in which injury is caused by the negligence of a State employee and the injured person is not guilty of contributory negligence, giving the injured party the same right to sue as any other litigant. The State may be sued in tort only as authorized in the Tort Claims Act.

Guthrie v. N.C. State Ports Auth., 307 N.C. 522, 535, 299 S.E.2d 618, 625 (1983) (citations omitted). "The North Carolina Industrial Commission is . . . constituted a court for the purpose of hearing and passing upon tort claims against the . . . Board of Transportation . . . ." N.C. Gen. Stat. § 143-291(a) (2015). In appeals from the Industrial Commission to the Court of Appeals under the Tort Claims Act, "[s]uch appeal shall be 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; *see also Gonzales v. N.C. State Univ.*, 189 N.C. App. 740, 744, 659 S.E.2d 9, 12 (2008) ("Thus,

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." (citation omitted)).

I

Plaintiff argues that the Commission erred in rendering the decision and order from Deputy Commissioner Donovan. More specifically, this matter was heard during a nine-day trial presided over by Deputy Commissioner Gheen. But after the trial, Deputy Commissioner Gheen left the Industrial Commission, and the case was reassigned to Deputy Commissioner Donovan, who entered the decision and order. Plaintiff argues that the Commission erred in affirming the decision and order entered by Deputy Commissioner Donovan, who did not preside over the trial. We dismiss this issue.

To appeal the decision and order of Deputy Commissioner Donovan to the Commission, plaintiff filed a Form T-44 which states in part that "[a]ll grounds for appeal not specifically set forth herein are hereby waived and abandoned except as otherwise provided by law and the rules of the Industrial Commission." Plaintiff did not challenge the decision and award on the grounds that Deputy Commissioner Donovan did not preside over the trial, and does not direct our attention to any

authority preserving the issue as a matter of law or rule of the Commission. Now, on appeal, plaintiff raises this matter for the first time.

"[The] prohibition against raising new arguments on appeal not presented to the trial court in the first instance has been applied by this Court to cases arising from the Industrial Commission." *Bentley v. Jonathan Piner Constr.*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (2017) (No. COA16-62-2) (citing *Floyd v. Exec. Pers. Grp.*, 194 N.C. App. 322, 329, 669 S.E.2d 822, 828 (2008)). And where a plaintiff has failed to challenge before the Commission the entry of a deputy commissioner's order on the basis that the deputy commissioner did not preside over the trial on the matter, this Court has held that the plaintiff's argument is barred on appeal to this Court. *Id.* at ___, ___ S.E.2d at ___ ("We hold that [the] Plaintiff's failure to raise . . . before the Commission [a challenge to the order based on the deputy commissioner's failure to preside over the trial] bars his ability to raise it in this Court in the first instance.").

Therefore, plaintiff has failed to preserve this issue for review by this Court. Accordingly, we dismiss this issue.[2]

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[2] We note that pursuant to 2017 N.C. Sess. Laws ch. 150, North Carolina General Statutes, section 97-84 was amended, as follows:

> ~~The parties may be heard by a deputy, in which event the hearing shall be conducted in the same way and manner prescribed for hearings which are conducted by a member of the Industrial Commission, and said deputy shall proceed to a complete determination of the matters in dispute, file his written opinion within 180 days of the close of the hearing record unless time is extended for good cause by the Commission, and the deputy shall cause to be issued an award~~

II

Next, plaintiff argues that the Commission erred in failing to find and conclude that DOT was negligent. Plaintiff does not challenge any specific finding of fact or conclusion of law stated in the Commission's 6 December 2016 amended decision and order. Instead, plaintiff contests the general validity of the evidence—DOT Engineer Engle's 2003 evaluation of Gladden Drive. Plaintiff contends that Engle's failure to evaluate—the pond adjacent to Gladden Drive as a hazard, the prevailing speed for the entire length of Gladden Drive, and key factors required of a speed study—imputes negligence to DOT. We disagree.

"[B]efore an award of damages can be made under the Tort Claims Act, there must be a finding of a negligent act by an officer, employee, servant or agent of the State." *Smith v. N.C. Dep't of Transp.*, 156 N.C. App. 92, 100, 576 S.E.2d 345, 351 (2003) (citation omitted). "A negligent act is but one form of negligence; whereas negligence if unrestricted, as it is in G.S. 143-291 [(codified under Chapter 143, Article 31, our Tort Claims Act)], is a term broad enough to embrace all negligent

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~~pursuant to such determination.~~ If the deputy or member of the Commission that heard the parties at issue and their representatives and witnesses is unable to determine the matters in dispute and issue an award, the Commission may assign another deputy or member to decide the case and issue an award.

2017 N.C. Sess. Laws ch. 150, § 3 (clarifying the procedure to be followed when the deputy or member of the Commission that heard the parties at issue is unable to decide the case and issue an award).

conduct, passive and active alike." *Phillips v. N.C. Dep't of Transp.*, 80 N.C. App. 135, 137, 341 S.E.2d 339, 341 (1986).

> Under the Tort Claims Act, N.C. Gen. Stat. § 143-291(a) (2003), "negligence is determined by the same rules as those applicable to private parties." Plaintiff must show 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.

Drewry v. N.C. Dep't of Transp., 168 N.C. App. 332, 337, 607 S.E.2d 342, 346 (2005); *see also Ray v. N.C. Dep't of Transp.*, 217 N.C. App. 500, 505, 720 S.E.2d 720, 724 (2011) ("In order to recover, [the] Plaintiffs must show [the] Defendant 'knew, or by ordinary diligence, might have known of the defect, and the character of the defect was such that injury to travellers [sic] using its street . . . in a proper manner might reasonably be foreseen.' " (third alteration in original) (quoting *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960)), *aff'd as modified*, 366 N.C. 1, 727 S.E.2d 675 (2012).

Plaintiff contends that DOT owed a duty to the individuals injured in the 7 October 2008 accident to perform a speed study on Gladden Drive and accordingly act on the results. We review plaintiff's challenge to the Commission's conclusion that DOT was not negligent in the performance of the speed study on Gladden Drive.

As the Commission acknowledged, General Statutes, section 143B-346 ("Department of Transportation—purpose and functions") provides that "[t]he

general purpose of the Department of Transportation is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people . . . as provided for by law." N.C. Gen. Stat. § 143B-346 (2015). This Court has previously acknowledged as consistent with section 143B-346 the proposition that DOT's duty is to the general public. *Phillips ex rel. Bates v. N.C. Dep't of Transp.*, 200 N.C. App. 550, 560, 684 S.E.2d 725, 732 (2009). "[DOT] is vested with broad discretion in carrying out its duties and the discretionary decisions it makes are not subject to judicial review unless [their] action is so clearly unreasonable as to amount to oppressive and manifest abuse." *Drewry*, 168 N.C. App. at 338, 607 S.E.2d at 346–47 (citation omitted).

As set out in the unchallenged findings of fact, in 2003, DOT Traffic Engineer Engle responded to a petition to lower the speed limit on Gladden Drive. Per Engle's testimony, the petition for a speed limit reduction triggered the performance of an engineering and traffic study on the road. Engle performed a speed study in August 2003. During the study, Engle considered the characteristics of the road, traffic composition, the condition of the road's shoulder, and roadway development.

> 12. Mr. Engle testified that as part of his study, he verified that Gladden Drive was a state road in Lincoln County. He drove to Gladden Drive and observed the road. He drove through the entire road, determined the number of homes on the road, measured the road in various locations to establish the width of the road and shoulders,

> noted their condition, noted whether there were pavement markings, and considered the alignment of the road. Mr. Engle testified he did not consider the 85th percentile speed, which is one of the ways the MUTCD proposes traffic engineers use to establish the necessity of restricted speeds when he conducted the speed study. Mr. Engle determined that the 85th percentile speed study was not necessary. Mr. Engle considered the [sic] Gladden Drive was a rural, dead-end, subdivision-type local road of seven-tenths of a mile long, that school buses used the road since children lived on the road, and that the people in the neighborhood were requesting a speed limit reduction; therefore, the people in the neighborhood would be driving at a lower speed. In addition, Mr. Engle performed a ball bank indicator test, a method often used in speed studies to set speed limits in curves by providing a degree of angle that corresponds to known speeds. Later, he drove back through the curves to verify that the curves would be safe at 25 mph, taking into account the road's relation to the pond.

Engle recommended that the speed limit of 25 mph was appropriate to address the characteristics of the road. DOT placed a 25 mph speed limit sign at the entrance to the Gladden Drive subdivision. The Commission further found that the Manual of Uniform Traffic Control Devices (MUTCD) provides that, "[i]n the case of small subdivisions and short dead-end streets the 25 mph speed zones may be [an] effective tool to help maintain [the] residential character of the location as [a] safe family living area both in rural and suburban locals [sic]."

The Commission gave particular weight to the testimony of Dr. Joseph Hummer. Dr. Hummer held a Bachelor's degree, Master's degree, and Ph.D. in Civil Engineering, had worked as a transportation engineer, and was a professor and the

department chair of Civil Environmental Engineering at Wayne State University. Previously, Dr. Hummer had spent twenty years at North Carolina State University teaching and researching transportation engineering, highway safety, highway design and traffic engineering. He had worked on fifty-five federal, state, and privately funded research projects in highway safety, highway design, and traffic engineering; had published eighty-five peer review journal articles; and was the editor of the Manual of Transportation Engineering Studies (MTES).

Pursuant to Dr. Hummer's testimony, Engle's 2003 speed study was appropriate, and Dr. Hummer concurred in Engle's judgment.

> [Dr. Hummer] noted that a 25 mph subdivision-wide speed limit was appropriate for Gladden Drive and was common on similar roads. Dr. Hummer opined that Mr. Engle appropriately considered all of the factors an engineer needed to consider when conducting a speed limit investigation, and the investigation was thorough and complete.

The Commission further noted a "strip analysis" (a record of collisions) which considered the years from 2003 to 2008 and disclosed only two reported collisions on Gladden Drive: the first was determined to be irrelevant; and the second, which occurred in the same curve as Spivey's accident, involved a driver charged with reckless driving and driving with a revoked license, was deemed to be of questionable relevancy.

Based on these unchallenged findings of fact, the Commission concluded that "Mr. Engle's speed study and resulting signage was accomplished within his discretion and without negligent omission."

Upon review of the record, we hold that the Commission's unchallenged findings of fact support its conclusions of law and decision that DOT did not breach its duty in performing a speed study on Gladden Drive. *See Gonzales*, 189 N.C. App. at 744, 659 S.E.2d at 12 ("Thus, 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." (citation omitted)). Accordingly, plaintiff's argument that the Commission erred in failing to find and conclude that DOT was negligent is overruled.

Based on this holding, we need not address the remaining issues presented on appeal.

AFFIRMED.

Judges DAVIS and INMAN concur.

Report per Rule 30(e).