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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1220

Filed: 16 October 2018

North Carolina Industrial Commission, No. TA-20198

CHRISTOPHER D. BROWN, Executor of the Estate of VANUILA W. ARCHIBLE,
Plaintiff

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant.

Appeal by plaintiff from decision and order entered 7 December 2016 in the
North Carolina Industrial Commission. Heard in the Court of Appeals 17 April 2018.

Bowens & Averhart, PLLC, by Stephon J. Bowens, for plaintiff-appellant.

*Attorney General Joshua H. Stein, by Assistant Attorney General Zachary
Padget, for defendant-appellee.*

BRYANT, Judge.

Where plaintiff failed to establish that an alleged breach of duty was the proximate cause of the injury plaintiff sustained to his left foot, we affirm the Full Commission's order and decision which denied plaintiff's claim for damages due to negligence.

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On 1 March 2005, plaintiff Vanuilla Archible was incarcerated in Central Prison. He underwent a health screening and was assessed as suffering from non-insulin-dependent diabetes and left foot neuropathy due to his diabetes. Plaintiff testified that he had suffered from diabetes since the age of seventeen and that over the years “he had ‘received a lot’ of education” on how to manage diabetes from various health care providers.

On 22 March 2005, plaintiff was transferred to Caledonia Correctional Institution (hereinafter Caledonia) where he was medically assessed by Dr. Eurgia Land. Dr. Land noted that plaintiff presented with “a burning sensation in his feet” indicative of peripheral neuropathy. Dr. Land prescribed additional medication for plaintiff’s diabetes regimen and ordered blood glucose testing twice a day. He also prescribed a special diet with limited caloric intake, as well as arch innersoles for plaintiff’s shoes.

To take his morning blood glucose test, plaintiff was required to wake up between 4:00 a.m. and 5:00 a.m. for custody staff to escort him to a nurses’ station. Plaintiff testified that he was not used to getting up that early in the morning, and per Caledonia records, plaintiff refused blood glucose testing on all but seven mornings between 24 March and 20 June 2005.

Caledonia policy was that inmates without a high school diploma or GED were required to take GED classes. Plaintiff was required to submit to an evaluation to

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determine if he qualified for the GED program in late April or early May 2005. The evaluation for the program was conducted in the Caledonia vocational building where other classes were held which utilized heavy equipment, power tools, cinder blocks, and bags of concrete. Upon entering the building, Caledonia inmates were required to wear steel-toed boots. On the first day of the GED evaluation, plaintiff arrived wearing tennis shoes. Corrections Officer Michael Collins informed plaintiff that he would be required to wear steel-toed boots when he entered the building. Plaintiff informed Officer Collins that he was diabetic and that the condition prevented him from wearing steel-toed shoes. Officer Collins gave plaintiff an ultimatum: he could either wear the steel-toed shoes or be sent to solitary confinement. Plaintiff chose to wear the steel-toed shoes.

During a hearing conducted in 2014, Officer Collins testified that he did not recall the events at issue from 2005 but when an inmate reported a medical problem to him, he would instruct the inmate to fill out a "sick call" request form. Officer Collins would then contact the appropriate medical staff about the reported condition and, if verified, would notify the unit commander that the inmate would not be participating in the scheduled activities. It was undisputed that plaintiff knew the sick call procedure in 2005.

At some point after four days of participation in the GED evaluation conducted in the vocational building, plaintiff noted that his left foot was bleeding. On 5 May

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2005, plaintiff submitted a sick call request and was seen by medical staff on 9 May 2005. Medical staff noted a split in the skin on plaintiff's left big toe. Plaintiff was directed to keep the wound dry and was referred to a podiatrist. The podiatrist prescribed a rocker bottom shoe for plaintiff's left foot, but plaintiff failed to wear the shoe. And although medical staff directed plaintiff to keep his foot dry, plaintiff was not issued a cover for his foot to use in the shower. When plaintiff asked Officer Collins for a plastic bag to cover his foot while taking a shower, plaintiff was provided an unused plastic trash bag taken from the bottom of a trash can.

On 21 June 2005, plaintiff was transferred from Caledonia to Harnett Correctional Institution. Plaintiff was scheduled to undergo surgery on his left big toe on 28 July 2005, but the wound became infected and the surgery was cancelled. On 5 August 2005, plaintiff's left big toe was amputated.

On 27 June 2007, plaintiff filed with the North Carolina Industrial Commission a claim for damages against the North Carolina Department of Correction (hereinafter the Department) under the Tort Claims Act.

In 2009, plaintiff lost two more toes from his left foot to amputation and by the July 2014 hearing before a Deputy Commissioner, plaintiff was scheduled to undergo surgery in August 2014 to amputate his left leg below the knee.

In a decision and order entered 30 September 2015, Deputy Commissioner J. Brad Donovan ordered the Department to pay plaintiff \$50,000.00 for actual damages

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and pain and suffering resulting from the amputation of his left big toe. Plaintiff's claim for damages resulting from the loss of subsequent toes was denied. Both plaintiff and the Department appealed to the Full Commission (hereinafter the Commission). On 7 December 2016, the Commission filed a decision and order denying plaintiff's claim for damages under a theory of negligence. Plaintiff appeals.¹

On appeal, plaintiff argues the Commission erred by (I) holding that Officer Collins was not negligent; (II) finding that plaintiff was contributorily negligent in the loss of his toes; (III) finding that the testimony of plaintiff's medical expert was not competent or credible; and (IV) concluding that plaintiff was not entitled to damages.

Standard of Review

“Our review of decisions and orders from the Full 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.’” *Holloway v. N.C. Dep't of Crime Control & Pub. Safety*, 197 N.C. App. 165, 169, 676 S.E.2d 573, 575–76 (2009) (quoting *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405–06, 496 S.E.2d 790, 793 (1998)).

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¹ Plaintiff died on 18 October 2014. Christopher Darnell Brown was appointed administrator of his estate and proceeded under the filed complaint.

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Plaintiff first argues that the Commission erred by concluding that Officer Collins did not breach his duty of care and was not negligent in regard to plaintiff, an inmate in his custody and care. More specifically, plaintiff contends that because Officer Collins was aware that wearing steel-toed boots could cause injury with inmates suffering from diabetes, Officer Collins breached his duty of care to plaintiff when he directed plaintiff to either wear steel-toed boots or be subjected to solitary confinement after plaintiff informed him that plaintiff was diabetic and the shoes may cause him injury. We disagree.

Tort Claims Act

It is a fundamental rule of law that the State is immune from suit unless it expressly consents to be sued.” *Zimmer v. North Carolina Dep’t of Transp.*, 87 N.C. App. 132, 134, 360 S.E.2d 115, 117 (1987) (citation omitted). “By enactment of the Tort Claims Act, N.C.G.S. § 143-291, *et seq.*, the General Assembly partially waived the sovereign immunity of the State to the extent that it consented that the State could be sued for injuries proximately caused by the negligence of a State employee acting within the scope of his employment.” *Id.*

“The State may be sued in tort only as authorized in the Tort Claims Act.” *Guthrie v. State Ports Auth.*, 307 N.C. 522, 535, 299 S.E.2d 618, 625 (1983) (citation omitted).

Chastain v. Arndt, ___ N.C. App. ___, ___, 800 S.E.2d 68, 72–73 (2017).

The Tort Claims Act, as codified within Chapter 143, Article 31 of our General Statutes, provides that:

[t]he North Carolina Industrial Commission is . . .

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constituted a court for the purpose of hearing and passing upon tort claims against . . . departments, institutions and agencies of the State. The 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) (2017). “Under the Act, negligence is determined by the same rules as those applicable to private parties.” *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988) (citation omitted).

To recover upon a claim for negligence under the Tort Claims Act, a plaintiff must prove that (1) defendant owed plaintiff a duty of care; (2) the actions or failure to act by the named NCDOC employee breached that duty; (3) the breach was the actual and proximate cause of the injury and (4) plaintiff suffered damages as a result.

Bryson v. N.C. Dep't of Corr., 169 N.C. App. 252, 253, 610 S.E.2d 388, 389 (2005) (quoting *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 406, 496 S.E.2d 790, 793 (1998)).

The Commission concluded that “[p]laintiff failed to prove any negligent breach of duty was the *proximate cause* of [plaintiff]’s injuries and, therefore, [p]laintiff’s claim must be denied.” (emphasis added).

The Commission’s unchallenged findings of fact provide that on the first day of GED testing, plaintiff reported to the test site wearing tennis shoes. Officer Collins

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informed plaintiff that he would have to wear steel-toed boots while in the vocational building. Plaintiff protested on the basis that he was diabetic. Officer Collins gave plaintiff an ultimatum—wear steel-toed boots or go to solitary confinement; plaintiff chose to wear steel-toed boots.

It is undisputed that [plaintiff] knew the sick call procedures in 2005 . . . [plaintiff] simply wore the steel-toed boots to the GED test. The testing took place over the course of four days, during which time [plaintiff] remained seated in the classroom. There is no evidence of record that [plaintiff] made any complaints during the course of the testing that the steel-toed boots were ill-fitting or were otherwise hurting his feet. [Plaintiff] took the steel-toed boots off each day when the class ended and put on his tennis shoes to engage in his regular sports activities after class.

After the four-day GED evaluation was completed, plaintiff noticed that his left foot was bleeding. He notified Officer Collins who directed plaintiff to file a sick call. Plaintiff filed a sick call request on 5 May and was seen in the medical department on 9 May 2005. Medical staff noted a split in plaintiff's big toe but no sign of infection. Staff also noted that the skin around the wound appeared to have been trimmed. The Commission found that

[t]rimming the skin around calluses on the feet is contraindicated for diabetics because it can lead to infection and ultimately amputation. It is unclear from the evidence of record whether [plaintiff] trimmed the skin on the bottom of his foot, or whether the skin was pulled off when he took off his sock.

At the time of his incarceration in 2005, plaintiff's diabetes was not well controlled.

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Dr. Eurgia Land assessed plaintiff on 22 March 2005. “His blood glucose levels were documented to be extremely high Patients with poorly controlled diabetes are more susceptible to infections, including bone infections such as osteomyelitis.” Plaintiff presented with “‘a burning sensation in his feet’ indicative of peripheral neuropathy.” Dr. Land prescribed medication to be added to his diabetes regimen, ordered a special diet with limited caloric intake, and prescribed arch innersoles for plaintiff’s shoes. Plaintiff refused the special diet. Between 24 March and 20 June 2005, afternoon tests reflected that plaintiff’s glucose levels were consistently “out of control.” “When asked what are some of the most important things a patient can do to manage his diabetes, Dr. Land responded, ‘[i]n a word, compliance.’ . . . [Plaintiff] was not compliant with the medical treatment he was offered for his diabetes” “Dr. Land opined, and the Commission so f[ound], that [p]laintiff failed to take appropriate and recommended care of his feet during his time at Caledonia” The Commission further found that “[t]he credible evidence of record is insufficient to show that [Officer] Collins^[1] . . . alleged breach[—requiring a diabetic inmate to wear steel-toed boots—]was the proximate cause of the injury [plaintiff] sustained to his left foot.”

We briefly address an argument plaintiff raises in Issue III: whether the Commission erred by ignoring the evidence presented by plaintiff’s expert witness, Dr. Denis I. Becker. The Commission found that Dr. Becker was an expert in

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endocrinology. Dr. Becker testified that wearing steel-toed boots was the proximate cause of the amputation of plaintiff's left big toe; however, the record contains an unchallenged finding of fact that Dr. Becker never examined plaintiff and had no knowledge of how many days or how long each day plaintiff wore steel-toed boots. Moreover, in response to a question regarding whether it would have been more appropriate for Officer Collins to direct plaintiff to put in a sick call when the issue of the steel-toed boots was first brought up, Dr. Becker testified that "whatever the training of . . . [Officer] Collins, . . . I wouldn't want him to take responsibility for that decision and the outcome"

Based on the aforementioned findings of fact, we uphold the Commission's conclusion that "[p]laintiff failed to prove any negligent breach of duty was the proximate cause of [plaintiff]'s injuries." Thus, plaintiff failed to establish a claim for negligence against the Department under the Tort Claims Act. *See* N.C. Gen. Stat. § 143-291(a) ("The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any . . . employee . . . while acting within the scope of his . . . employment, service, . . . 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."); *Bryson*, 169 N.C. App. at 253, 610 S.E.2d at 389 ("To recover upon a claim for negligence under the Tort Claims Act, a plaintiff must prove that (1) defendant owed plaintiff a duty of

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care; (2) the actions or failure to act by the named NCDOC employee breached that duty; (3) the breach was the actual and proximate cause of the injury and (4) plaintiff suffered damages as a result.”). As plaintiff failed to establish actionable negligence under the Tort Claims Act, we affirm the Commission’s order and decision denying plaintiff’s claim.

AFFIRMED.

Judges CALABRIA and HUNTER, JR., concur.

Report per Rule 30(e).