NO. COA07-894

NORTH CAROLINA COURT OF APPEALS

Filed: 6 May 2008

SUSAN NORMAN,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. TA-12343

N.C. DEPARTMENT OF TRANSPORTATION,
Defendant.

Appeal by plaintiff from decision and order entered 2 February 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 3 March 2008.

Daniel J. Park for plaintiff-appellant.

Roy Cooper, Attorney General, by William H. Borden, Special Deputy Attorney General, for defendant-appellee.

MARTIN, Chief Judge.

This case, brought by plaintiff against defendant the North Carolina Department of Transportation ("DOT") pursuant to the Tort Claims Act, N.C. Gen. Stat. §§143-291 to -300.1A (2007), is before this Court for the second time. Plaintiff's claim arises out of a collision on Standard Street in Elkin, North Carolina, between the automobile she was driving and a Norfolk Southern train, which plaintiff attributes to a negligently placed stop sign near the railroad tracks. A thorough summary of the facts giving rise to the action, and its procedural history, are fully set forth in our previous opinion, *see Norman v. N.C. Dep't of Transp.*, 161 N.C. App. 211, 212-15,

588 S.E.2d 42, 44-46 (2003), *cert. denied*, 358 N.C. 545, 599 S.E.2d 404-05 (2004), and we will supplement them only as required to fully discuss the issues raised in this appeal. In our previous opinion, we concluded that the Industrial Commission had erroneously granted summary judgment in plaintiff's favor on the issue of DOT's negligence, but the Commission's findings of fact fully supported its conclusion that plaintiff was not contributorily negligent. *Id.* at 220-21, 588 S.E.2d at 49. We remanded the case to the Commission for an evidentiary hearing on the issue of DOT's negligence. *Id.* at 224, 588 S.E.2d at 51.

Upon remand, a deputy commissioner took additional evidence on the issue of DOT's negligence and, at the close of plaintiff's evidence, granted DOT's motion to dismiss pursuant to N.C.G.S. §1A-1, Rule 41(b), and dismissed plaintiff's claim with prejudice. Plaintiff appealed to the Full Commission, which affirmed the decision of the deputy commissioner and dismissed plaintiff's claim. Plaintiff again appeals to this Court.

Plaintiff argues the Commission erred in dismissing her claim because she presented sufficient evidence to show DOT's negligence. To prove negligence, a plaintiff must show: "(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). As this Court discussed in its earlier opinion, the facts of plaintiff's case raised the following alternative theories of negligence.

First, plaintiff contends DOT breached its duty to properly install a stop sign at the intersection of N.C. Highway 268 and Standard Street. However, as we noted in our previous opinion, DOT's duty to install the sign turns on whether it knew or should have known the

intersection was hazardous. *Norman*, 161 N.C. App. at 218, 588 S.E.2d at 48. To prove negligence, plaintiff would have to show (1) the intersection of Standard Street and N.C. Highway 268 was hazardous, (2) DOT failed to erect a stop sign at the intersection, and (3) the failure to erect a stop sign at the intersection with N.C. Highway 268 was the proximate cause of plaintiff's injury on the railroad tracks. The Commission specifically found, based on the testimony of DOT's Division Traffic Engineer, that "there was no history of accidents at the intersection of NC 268 and Standard Street, [and] there was no indication that the intersection was hazardous." Plaintiff did not assign error to this finding of fact. Where a party does not except to a finding of fact it is "presumed to be correct and supported by evidence." *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982). Furthermore, the Commission's findings of fact are conclusive if supported by any competent evidence. N.C. Gen. Stat. §143-293 (2007); *accord Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 405, 496 S.E.2d 790, 793 (1998). Since plaintiff did not meet her burden of proving the intersection was hazardous, the Commission properly concluded under this theory that "[t]here was no evidence that defendant owed a duty to plaintiff as to the placement, installation, or maintenance of the stop sign."**[Note 1]**

Even so, plaintiff argues that even if DOT did not have a duty to erect the stop sign, if it undertook to erect the stop sign, it had a duty to erect it properly. "[I]f the evidence established that DOT did erect a stop sign to govern that intersection, then it was obligated to do so in conformity with the Manual on Uniform Control Devices for Streets and Highways ["MUCDSH"], published by the United States Department of Transportation." *Norman*, 161 N.C. App. at 218-19, 588 S.E.2d at 48. Installation of the stop sign by DOT, therefore, could create a duty to properly place and maintain the sign. To prove negligence under this theory, plaintiff would have to show (1) DOT actually installed the stop sign in question, (2) DOT failed

to comply with the MUCDSH requirements in installing the stop sign, and (3) the improper installation of the stop sign proximately caused plaintiff's injury.

The Commission found "[t]here was no evidence that the stop sign was placed, installed, or maintained by defendant . . . or any . . . officer, employee, agent, or involuntary servant of defendant." Plaintiff contends that the evidence did not support such a finding, and she points to testimony of the Municipal Attorney for the Town of Elkin that the Town never had a traffic engineer and that the Town would call DOT with regard to placing the signage from time to time because DOT was more knowledgeable about such matters. Despite evidence to the contrary, the Commission's findings of fact are "conclusive if there is any competent evidence to support them." N.C. Gen. Stat. §143-293; *accord Simmons*, 128 N.C. App. at 405-06, 496 S.E.2d at 793.

At the hearing, DOT's Division Traffic Engineer testified that the stop sign in question did not have a sticker on the back to indicate it had been installed by DOT:

> A. . . . We put vandal-proof stickers on all of our stop signs and it would indicate the date that it was installed.
>
> Q. And when you say "vandal-proof," what does that mean?
>
> A. It means that you can't remove it without severely scratching the sign. You'd have to about grind it off to get it off.
>
> Q. Is there any evidence in these pictures that you've looked at that anything was - like that was ground off and removed?
>
> A. No, sir."

This evidence supports the Commission's finding that the stop sign was not installed by DOT. Thus, the Commission properly concluded based on this finding that DOT did not owe any duty to plaintiff under this theory.

Finally, plaintiff argues that even if DOT did not have a duty to install the stop sign, and did not install the stop sign, DOT could have a duty "to inspect for and remedy the improperly placed stop sign" if it was installed within DOT's right-of-way. *Norman*, 161 N.C. App. at 219, 588 S.E.2d at 48. On this theory, the Commission concluded:

> Defendant cannot be held liable for failing to discover a defective sign without a finding that the sign was within the State right-of-way. Because the stop sign near the scene of plaintiff's accident was outside the State right-of-way and was, thus, outside the jurisdiction and control of defendant, the plaintiff has failed to offer evidence tending to show that defendant owed a duty to plaintiff or that defendant breached such duty.

(citation omitted). To prove negligence, plaintiff would have to show (1) the stop sign was in DOT's right-of-way, (2) DOT failed to inspect and remedy the stop sign, and (3) DOT's failure to inspect and remedy the sign proximately caused plaintiff's injury.

The Commission made three relevant findings of fact. Finding of fact 3 stated:

> Defendant had no recorded right of way along NC 268; therefore, its right of way only extended to the edge of the pavement. At intersections, the right of way followed a straight path along where the edge of the state highway would have been if there had been no intersecting roadway.

Finding of fact 8 stated, "[t]he stop sign was located about ninety to one hundred feet south of the right of way of NC 268, well outside of defendant's jurisdiction." Finding of fact 16 stated, "the stop sign . . . was not on [DOT's] right of way." Plaintiff failed to assign findings of fact 3 and 8 as error; therefore, they are presumed to be correct. *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133. Because DOT's right-of-way ended at the edge of the pavement, and the stop sign was at least ninety feet away from the edge of the pavement, the Commission correctly found that the stop sign was not in DOT's right-of-way. As supported by the Commission's findings of

fact, we affirm the Commission's conclusion that "plaintiff has failed to offer evidence tending to show that defendant owed a duty to plaintiff or that defendant breached such duty."

Our review of decisions from the Industrial 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*, 128 N.C. App. at 405-06, 496 S.E.2d at 793. We conclude that upon remand the Commission made adequate findings of fact, supported by the competent evidence, to conclude that DOT was not negligent under any of the possible theories.

Additionally, plaintiff argues that the trial court erred in excluding testimony of Dean Ledbetter, a witness under subpoena and subpoena duces tecum, in violation of Civil Procedure Rule 43(c). Rule 43(c) states "if an objection to a question propounded to a witness is sustained by the court, the court on request of the examining attorney shall order a record made of the answer the witness would have given." N.C. Gen. Stat. §1A-1, Rule 43(c) (2007). Rule 43(c) is inapplicable in the present case because it governs "an objection to a *question propounded to a witness*," not an objection to calling a witness to the stand. *Id.* Furthermore, even if Rule 43(c) did control in this situation, plaintiff did not request the court to make an offer of proof. Accordingly, plaintiff's argument is without merit.

Affirmed.

Judges CALABRIA and GEER concur.

Report per Rule 30(e).

NOTE

1. Although this statement is labeled a finding of fact in the Commission's decision and order, it is actually a conclusion of law, and we treat it as such. *See Johnson v. Adolf*, 149 N.C. App. 876, 878 n.1, 561 S.E.2d 588, 589 n.1 (2002).