

NO. COA99-1525

NORTH CAROLINA COURT OF APPEALS

Filed: 29 December 2000

SANDRA H. AUSTIN, Administrator
of the Estate of JAMES EUGENE
AUSTIN, Deceased,
Plaintiff,

v.

From the North Carolina
Industrial Commission
I.C. File No. TA-12771

THE CASWELL CENTER,
Defendant.

Appeal by plaintiff from Decision and Order entered 27 September 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 October 2000.

Ward and Smith, P.A., by Donald S. Higley, II, and A. Charles Ellis, and Wayland J. Sermons, Jr., P.A., by Wayland J. Sermons, Jr., for plaintiff-appellant.

Michael F. Easley, Attorney General, by Philip A. Baddour III, Assistant Attorney General, for the State.

EDMUNDS, Judge.

Plaintiff, Sandra H. Austin, Administrator of the Estate of James E. Austin (James), appeals from the Industrial Commission's Decision and Order finding there was insufficient evidence to prove James died as a result of alleged negligence by defendant. We reverse.

James was born in 1956 and brain damage caused by an illness during his infancy left him with severe mental retardation. Throughout his lifetime, James had the mental capacity of a five-

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year-old and communicated by grunts and gestures. By age eleven, he required twenty-four hour supervision, which his family was unable to provide. Accordingly, in 1967, James became a voluntary resident at defendant Caswell Center in Kinston, North Carolina, a state-operated institution that provides care and treatment for patients suffering from mental retardation. James remained at the Caswell Center until 14 February 1977, at which point he was transferred to Cherry Hospital in Goldsboro, North Carolina. At Cherry Hospital, James was placed in a building known as the Caswell Annex, which was used to house mentally retarded patients with mental illnesses who could benefit from Cherry Hospital's psychiatric staff, a resource not provided by the Caswell Center. The Caswell Annex was given its name because the majority of its occupants came from the Caswell Center; however, the Caswell Annex was a part of Cherry Hospital, which was a separate state facility from the Caswell Center.

James was transferred back to the Caswell Center on 1 March 1977, but due to behavioral problems, he was returned to Cherry Hospital on 28 March 1978 where he again resided primarily in the Caswell Annex. He remained at Cherry Hospital from 28 March 1978 until he returned to the Caswell Center on 27 November 1986. The record indicates that James was either in the Caswell Center or in the Caswell Annex at Cherry Hospital after 1970, except for short periods when he was released into the custody of his parents and one occasion when he escaped or "eloped" from Cherry Hospital campus for approximately twenty-four hours.

In April 1991, James was diagnosed with "full blown" acquired immunodeficiency syndrome (AIDS) caused by the human immunodeficiency virus (HIV). He died from complications of AIDS on 28 July 1993. Although there are several means by which an individual may become infected with HIV, the Industrial Commission found that "it is reasonably certain that [James] contracted the HIV virus by unprotected sexual activity." Plaintiff's expert witness, Dr. Engels, testified in his deposition that "the average number of years from the time of infection to the time of symptoms and full-blown AIDS is ten years."

Despite his difficulties, James and other patients at these institutions possessed natural human sex drives. Although James' treatment plan called for twenty-four hour supervision, all parties understood James would not literally be watched twenty-four hours a day. It was not out of the ordinary for workers at the Caswell Center to discover patients masturbating or engaging in sexual activity, and according to Dr. Cromer, patients responding to their biological urges did not "distinguish necessarily between hetero[-] and homosexuality." James masturbated "a lot," and on 8 September 1986, he was found engaged in homosexual activity with another patient at Cherry Hospital.

James' accident reports, while he was at Cherry Hospital and the Caswell Center, indicate sexual activity. In 1985, when James was at Cherry Hospital, he complained about a blister on the head of his penis. Also at Cherry Hospital, on 11 March 1986, a report noted, "[w]hile getting James Austin ready for his bath, I noticed

his penis was very red and what appeared to be teeth marks on the end of it.'" Similar signs of sexual activity were observed at the Caswell Center. On 2 July 1987, an accident report noted, "'At bath time, I found what appear to be teeth marks on [James'] penis.'" One month later, a supervisor noted, "'James has circle abrasions on the foreskin of his penis, but it does look like as if it is an old injury as it is scabbed over.'" A worker who reported one of these injuries died of AIDS in 1995. Although allegations had been made that this worker may have been sexually molesting patients, an investigative team found these allegations to be unsubstantiated.

In response to the accident reports completed while James was at Cherry Hospital, second- and third-shift workers were notified so that they could improve their supervision of James. At the Caswell Center, when the marks were noted, bed checks of James were increased to every fifteen minutes.

On 11 March 1993, Sandra Austin, James's mother and guardian of James, filed a claim for damages under the Torts Claims Act, N.C. Gen. Stat. §§ 143-291 to -300.1 (1999), alleging that James contracted AIDS as a result of negligent supervision at the Caswell Center. The Caswell Center's answer denied negligence. When James died on 23 July 1993, his mother was substituted as plaintiff. The parties conducted discovery, as will be detailed below. After a hearing, the Deputy Commissioner dismissed plaintiff's complaint. On appeal, in a split decision, the Full Commission modified and affirmed the Deputy's Decision and Order, finding that there was

insufficient proof that plaintiff contracted AIDS as a result of a breach of duty at the Caswell Center or Cherry Hospital. Plaintiff appeals.

Upon appeal from an award of the Industrial Commission, our inquiry is limited to two questions of law: (1) Whether there was any competent evidence before the Commission to support its findings of fact; and (2) Whether the findings of fact of the Commission justify its legal conclusions and decision.

Stroud v. Memorial Hospital, 15 N.C. App. 592, 593, 190 S.E.2d 392, 393 (1972) (citation omitted). The Commission's findings of fact are conclusive on appeal when supported by any competent evidence, see N.C. Gen. Stat. § 143-293, even when there is evidence that would support findings to the contrary, see *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 159 S.E.2d 28 (1968).

Although plaintiff raises several issues on appeal, we address only one issue. Plaintiff's claim named only the Caswell Center. During discovery, in its verified response to plaintiff's interrogatories, the Caswell Center stated that James was under its care, custody, and control from 17 January 1967 through 14 February 1977, from 1 March 1977 through 28 March 1978, and from 1 July 1982 until his death on 23 July 1993. Prior to the hearing, defendant stipulated that there was no issue of non-joinder of parties. In response to another interrogatory request by plaintiff for details of medical care given to James during his institutionalization at the Caswell Center, defendant provided accident reports. Those reports covering the time James resided at Cherry Hospital in the Caswell Annex were titled "Caswell Center Resident Accident/Injury

Report." However, when the matter was heard before the Deputy Commissioner, defendant presented evidence that James was not in its care during the time he contracted AIDS, showing that James was in the Caswell Annex at Cherry Hospital from 28 March 1978 until 27 November 1986. The Deputy Commissioner dismissed plaintiff's claim. On appeal, the Full Commission modified and affirmed the Decision and Order of the Deputy Commissioner without conducting a new hearing.

The Full Commission concluded defendant was "not estopped" by virtue of its "responses to plaintiff's interrogatories" from denying responsibility for James' care while he was at the Caswell Annex. We disagree. Plaintiff was entitled to rely on defendant's responses to its interrogatories, *see Hunter v. Spaulding*, 97 N.C. App. 372, 388 S.E.2d 630 (1990), and thus defendant was estopped from denying its responsibility for James' care while he was at the Caswell Annex. As this error of the Full Commission appears to be the basis of its order of dismissal, the decision and order must be reversed and remanded for a determination of whether James' HIV infection was proximately caused by a breach of defendant's duty to James while he was at either the Caswell Center or the Caswell Annex.

Reversed and remanded.

Judges GREENE and MARTIN concurs.

Report per Rule 30(e).