Affirmed
Chair, Sellers
Concurring:
Mavretic
Riggsbee

NO. COA00-230

NORTH CAROLINA COURT OF APPEALS

Filed: 5 June 2001

ELMER E. MOTE, JR.,
Plaintiff

v.

North Carolina Industrial Commission
I.C. No. TA-14394

THE UNIVERSITY OF NORTH CAROLINA AT WILMINGTON,
Defendant

Appeal by plaintiff from decision and order entered 12 November 1999 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 February 2001.

Barnes, Braswell & Haithcock, P.A., by W. Timothy Haithcock, for plaintiff-appellant.

Attorney General Michael F. Easley, by Assistant Attorney General William H. Borden, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Elmer E. Mote, Jr. ("plaintiff") appeals the Decision and Order of the North Carolina Industrial Commission ("Commission" or "Full Commission") denying his claims filed under North Carolina's Tort Claims Act ("TCA") and entering judgment in favor of The University of North Carolina at Wilmington ("defendant" or "UNC-W"). *See* N.C. Gen. Stat. § 143-291 *et seq.* (1999). Upon careful consideration of the record and arguments of counsel, we affirm the Commission's order.

Evidence before the Commission included the following: As a junior student at UNC-W, plaintiff, having had no prior camping

experience, registered for a Fall 1995 backpacking and camping trip to Pisgah National Forest ("Pisgah"). The trip was sponsored by UNC-W's Outdoor Discovery Program ("Outdoor Program"). Brock Snyder ("Snyder"), UNC-W's "assistant director of campus recreation/outdoor recreation," established and supervised UNC-W's Outdoor Program, which sponsors a variety of camping and hiking trips throughout the school year. Snyder received extensive training from the National Outdoor Leadership School and is a member of the Association of Experiential Education ("AEE"), an organization which establishes the standards and publishes safety guidelines for university adventure programs. Snyder developed standards for the UNC-W Outdoor Program and trained trip leaders in accordance with those standards implemented at other universities.

University students serve as trip leaders for the Outdoor Program's camping and hiking trips. To become a trip leader, students are required to attend a semester-long training program, which includes both classroom and practical instruction. Trip leader trainees receive instruction in, among other areas, safety, equipment, the environment, and monitoring the weather. Trip leader trainees are further required to attend outdoor trips before and after their training sessions, at which times they are under the supervision of experienced trip leaders. Upon completion of their training, trip leaders become paid employees of UNC-W.

Gus Hemmer ("Hemmer") and Jessica Classen ("Classen"), both university students, served as trip leaders for the Outdoor Program's Fall 1995 trip to Pisgah. Hemmer and Classen held two

meetings for the participants of the Fall 1995 trip, in which they instructed the students on behavior expectations, minimum-impact camping, obtaining water, campsite selection, types of campsites, proper clothing, safety, goals of the trip, equipment usage, food, bathroom usage, packing, trip preparation, and trail etiquette.

Upon arrival at Pisgah, the student campers began what was to be a three-day hiking and camping excursion. The first two days passed without incident. However, on 15 October 1995, during the second night of the trip, plaintiff awoke to the sound of heavy wind, around which time, a tree fell on the tent where he and two other students were sleeping. As a result of the incident, plaintiff suffered a broken pelvis and a severed urethra.

On 25 June 1996, plaintiff filed an "Affidavit of Claimant" with the Commission pursuant to the TCA, alleging, *inter alia*, that trip leaders were negligent in failing to inspect the campsite to insure safety or give campers any advice as to where they should pitch their tents. On 14 October 1998, Deputy Commissioner Lorrie L. Dollar concluded that plaintiff's injuries were indeed the result of the negligence of trip leaders Hemmer and Classen in failing to observe a dead tree and in failing to instruct plaintiff to move his tent. As such, Deputy Commissioner Dollar entered a decision and order in favor of plaintiff. Defendant appealed to the Full Commission.

On 12 November 1998, the Full Commission reversed the deputy commissioner's decision and entered an order in favor of defendant. The Full Commissioner's "FINDINGS OF FACT," pertinent to the issues

presented on appeal, are as follows:

> 4. . . . The training program offered by [defendant] was consistent with the standard within the university setting and the AEE.
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> . . . .
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> 10. Gus Hemmer surveyed the [camp]site for hazards around the tents which the student campers had set up. He did not observe any dead trees or limbs and there were no visible defects in the trees around the tents. . . .
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> . . . .
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> 17. According to eyewitness testimony, the tree which fell on the plaintiff was living prior to falling and had bark, green wood and was not hollow. It is impossible to determine whether the splitting or other apparent damage to the tree existed before the incident or occurred as a result of the fall. Mr. Hemmer's inspection the day before revealed that all trees around the perimeter of the campsite including that tree were living trees which were not anticipated to fall. Mr. Hemmer is knowledgeable in inspecting campsites and is capable of determining whether a tree is dead or rotten.
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> . . . .
>
> 19. The accepted practice was for trip leaders to check for obvious defects or signs that trees or limbs could fall. After reviewing all of the testimony and the exhibits, Mr. Snyder's opinion was that the training program and the trip leaders' behavior met the standard of care for a university outdoor program.
>
> 20. Sandy Kohn [sic], the director and founder of UNC-Charlotte Outdoor Adventure Program, is an expert in camping and outdoor adventure programs. Mr. Kohn [sic] is on the AEE board and has served on 4-5 peer reviews for the organization which take 1 to 3 days to review for accreditation. In that capacity, Mr. Kohn [sic] reviewed [defendant's] program and found no deficiencies in the training or practices of the student leaders.

21. . . . According to Mr. Kohn [sic], trees should be inspected for any obvious defect which would affect their stability in an area where tents would be erected.

22. . . . Mr. Kohn [sic] found that the trip leaders' training and site inspection and other behavior met the safety and other standards of university outdoor programs.

23. The expert testimony of Mr. Buck Tate which indicates that trip leaders violated the standard of care and were negligent is given less weight than the testimony of Mr. Kohn [sic] and Mr. Snyder. Mr. Tate's testimony concerned forestry, Boy Scout and National Guard programs and his own personal opinions. He is not familiar with university outdoor programs and the applicable standard of care. He has not attended the National Outdoor Leadership School nor is he a member of AEE. Moreover, he has no experience [in] accrediting university outdoor programs.

24. Trip leaders Gus Hemmer and Jessica Classen had the duty pursuant to the appropriate standard of care to inspect the campsites and perimeter to ensure the safety of the campers under their supervision. On October 15, 1995, the actions and behavior of [Hemmer and Classen] were appropriate under the applicable standard of care for university outdoor programs. They took appropriate steps to survey the campsite and to determine whether there were any diseased or defective trees in the vicinity.

25. [Defendant's] outdoor program met the standard for accredited university outdoor programs. Furthermore, trip leaders' training and site inspection and other behavior met the safety and other standards of university outdoor programs. Therefore, neither [defendant] nor trip leaders breached any duty owed to plaintiff. Furthermore, the trip leaders could not have foreseen that the living tree adjacent to the plaintiff's campsite would break or fall and injure the plaintiff . . . .

26. The trip leaders were not negligent in their conduct and the injury suffered by

plaintiff was not proximately caused by the actions of the trip leaders.

Based upon its factual findings, the Commission concluded, as a matter of law, that the accident occurring 15 October 1995 was not the result of defendant's negligence, and therefore, plaintiff was not entitled to recover any damages.

The questions before us on appeal relate to whether competent evidence supports the Commission's findings of fact. We find that the evidence, while conflicting, is sufficient to support the Commission's findings of fact and that the findings support the conclusions of law. Therefore, we affirm the Commission's order.

Our review of the Commission's decision in a case filed pursuant to the TCA is limited to determining whether competent evidence supports the Commission's factual findings, and whether those findings support the Commission's conclusions of law. *Davidson v. Univ. of N.C. at Chapel Hill*, ___ N.C. App. ___, 543 S.E.2d 920 (2001); N.C. Gen. Stat. § 143-293 (1999). The Full Commission is the ultimate finder of fact and may overrule a deputy commissioner's credibility finding without first considering "that credibility may be best judged by a first-hand observer." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998) (internal quotation marks and citation omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). Thus, "[f]indings of fact by the Commission, if supported by competent evidence, are conclusive on appeal even though there is evidence which would support a contrary finding." *Royce v. Rushco Food Stores, Inc.*, 139 N.C. App. 322,

327, 533 S.E.2d 284, 287 (2000) (citing *Bullman v. Highway Comm.*, 18 N.C. App. 94, 195 S.E.2d 803 (1973)).

As a preliminary issue, we note plaintiff's concession on appeal that the proper standard of care was established by defendant's AEE experts, Sandy Cone ("Cone") and Snyder. Cone, an AEE certified expert, testified that trip leaders had a specific duty to inspect trees in the immediate vicinity of the tents. Snyder agreed, testifying that the campers should not have selected a site "[s]olely by themselves without consultation of the trip leaders[.]"

In light of the aforementioned standards, plaintiff challenges the Commission's findings that: (1) the trip leaders actions were appropriate under the applicable standard of care for university programs; (2) that the group leaders "took appropriate steps to survey the campsite and to determine whether there were any diseased or defective trees in the vicinity;" and (3) "trip leaders' training and site inspection and other behavior met the safety and other standards of university outdoor programs."

To support his challenges, plaintiff relies upon the testimony of another student participant, Christina Shenton ("Shenton"), his own testimony, and that of his expert, Buck Tate ("Tate"). Shenton testified that she never saw Hemmer inspect the campsite and that trip leaders never instructed her where to place her tent. Plaintiff likewise testified that neither trip leader gave him any instructions as to where he should pitch his tent. According to Tate, a witness having expertise in forestry, National Guard, and

Boy Scout training, Hemmer did not follow the standard of care for inspecting a campsite for the novice campers, in that he, not the student participants, should have inspected the campsite "to make sure that everything [was] safe." Plaintiff further contends that the aforementioned evidence of Hemmer's failure to comply with the applicable standard was supported by Hemmer's own testimony that he instructed the campers concerning site selection, at which point, site selection became their responsibility.

Despite evidence to the contrary, we conclude that Hemmer's testimony represents competent evidence supporting the Commission's challenged findings of fact. According to Hemmer, he instructed the student campers on site selection before and during the trip. Hemmer testified that it was the Outdoor Program's practice to place the responsibility for pitching the tents on the participants, but that the trip leaders "*always check and see whether their set up is a safe place.*" (Emphasis added.) Concerning the final campsite, Hemmer testified that he "look[ed] up in the trees and ma[de] sure there[was] nothing that[was] going to fall on anybody" and that he "didn't notice any dead trees, dead limbs, anything like that." When asked whether he inspected trees around plaintiff's tent, Hemmer testified that he "looked at them all because [he] looked at the whole site." Although he did not notice the particular tree which subsequently fell onto plaintiff or do "core samples," he did "look[] at all the trees in there[.]"

In assessing Hemmer's actions, Cone testified that Hemmer complied with the standard of care as established by the guidelines

of the AEE and other university outdoor programs. In fact, Cone stated that UNC-W's standards regarding site selection exceeded those established by his employer, the University of North Carolina at Charlotte. Snyder likewise testified that in his opinion, Hemmer "led the trip according to the protocol for the [Outdoor Program]." Snyder testified,

> I feel confident that the trip leaders empowered the participants to pick a campsite. I also feel confident that after that decision was made, the trip leaders discussed the prudence of that decision and felt that yes, we can let them camp in this place.

Although evidence existed which may support a contrary finding, we conclude that the challenged findings of fact were supported by amble competent evidence. Therefore, plaintiff's first argument is overruled.

Plaintiff next argues that the Commission's finding of fact number seventeen was not supported by competent evidence. In finding number seventeen, the Commission found as follows:

> According to eyewitness testimony, the tree which fell on the plaintiff was living prior to falling and had bark, green wood and was not hollow. It is impossible to determine whether the splitting or other apparent damage to the tree existed before the incident or occurred as a result of the fall. Mr. Hemmer's inspection the day before revealed that all trees around the perimeter of the campsite including that tree were living trees which were not anticipated to fall. Mr. Hemmer is knowledgeable in inspecting campsites and is capable of determining whether a tree is dead or rotten.

Plaintiff contends that the only evidence presented at trial concerning the condition of the tree prior to its fall was the

testimony of his expert witness, Tate. According to Tate's examination of photographs taken after the accident, the tree which fell had several visual areas of dead wood, including a large area near the stump of the tree. Tate further testified that there appeared to be a hollow area near the stump and behind an area of fresh wood. Tate testified that he would have discovered these defects prior to the tree's fall. Plaintiff argues that Tate's testimony supports a finding contrary to that of the Commission--that the tree in question was dead prior to the fall, that the defect was discoverable, and that Hemmer should have discovered the defect. Plaintiff further argues that the Full Commission ignored Tate's testimony, particularly his examination of the photographs, as if the photographs "never existed and as if [the Commission] never looked at [them]." With plaintiff's arguments, we cannot agree.

As noted *supra*, Hemmer testified that although he did not specifically notice the particular tree which fell, he did not see *any* dead trees upon initial inspection of the campsite. Unlike Tate, Hemmer observed the tree immediately after its fall. Based upon his first-hand inspection, Hemmer testified that the tree appeared to have twisted, cracked, and fallen, and that the wood inside the split areas was live and green. Hemmer further testified that the tree was not hollow, the bark was gray, and none of the bark was missing. Tate even testified that the tree probably split when it impacted with the ground. Moreover, Tate could not definitely testify that no bark existed over the area he

identified as scarred or dead wood. Here again, Hemmer's testimony supports the Commission's finding.

Plaintiff points out that although Hemmer first testified that the tree was not hollow, he subsequently testified that the tree was classified as a "hollow wood tree." Plaintiff argues that this contradiction in Hemmer's testimony rendered it incompetent. Given Tate's testimony that even he, a forestry expert, could not "definitely say that [there] was a hollow [in the tree]," we assign no import to this alleged contradiction.

Furthermore, we find no merit in plaintiff's contention that the Commission erred in failing to find, based upon Tate's testimony, that the alleged defect in the tree was discoverable and that Hemmer should have discovered that defect. Our Court has previously recognized that "evidence of custom, general practice or optimum procedure [can] . . . 'be used by the [fact finder] in determining what the ordinary degree of care required of a reasonable person would be in the same circumstances.'" *Briggs v. Morgan*, 70 N.C. App. 57, 61, 318 S.E.2d 878, 882 (1984) (quoting *Flying Service v. Thomas*, 27 N.C. App. 107, 112, 218 S.E.2d 203, 206 (1975)). The Commission, as the fact finder, adopted the AEE customs and practices as the applicable standard of care under the circumstances--a standard even plaintiff concedes applies to the case *sub judice*. Tate testified that there was a defect in the tree and that he would have discovered it based upon his extensive forestry, National Guard, and Boy Scout training. However, the AEE experts testified that outdoor university programs do not require

forestry training and that AEE standards and customs differ from those established by the Boy Scouts and the National Guard. Given that the standards and customs in the disciplines for which Tate claimed expertise differed from the established standard of care, it was within the Commission's authority to weigh Tate's testimony concerning the standard of care with that of the AEE experts. *See Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653, 508 S.E.2d 831, 834-35 (1998) (noting that it is within Commission's authority to find facts and to weigh evidence).

A review of the Commission's order reveals that it did, in fact, consider Tate's testimony concerning the standard of care. However, the Commission chose to give the testimony "less weight than" that of Cone and Snyder, finding, based upon other competent evidence, that a discoverable defect in the tree did not exist. Contrary to plaintiff's contentions, the order also reveals that the Commission did not ignore the photographs or Tate's examination thereof in its finding concerning the condition of the tree prior to the fall. Rather, the Commission chose to rely on other evidence--Hemmer's own "eyewitness testimony"--to find that "the tree . . . was living prior to falling and had bark, green wood and was not hollow." Given the foregoing analysis, we conclude that competent evidence existed to support finding number seventeen. Accordingly, plaintiff's second argument is also meritless.

Finally, plaintiff contends that the Commission erred in finding that neither defendant nor trip leaders breached any duty owed to plaintiff, that "trip leaders could not have foreseen that

the living tree . . . would break or fall and injure the plaintiff . . . [,]" and that "the injury suffered by plaintiff was not proximately caused by [defendant]."

The aforementioned portions of the Commission's order were labeled "FINDINGS OF FACT," but were in fact mixed questions of law and fact concerning defendant's negligence. *See Woolard v. N.C. Dept. of Transportation*, 93 N.C. App. 214, 218, 377 S.E.2d 267, 269 (1989) ("Negligence is a mixed question of law and fact . . . .") We will treat them as such, *see Davidson*, ___ N.C. App. at ___, 543 S.E.2d at 925, and must therefore determine whether the facts found by the Commission support its ultimate conclusions, *Woolard*, 93 N.C. App. at 218, 377 S.E.2d at 269.

To establish a claim of negligence, the plaintiff must prove (1) that the defendant owned him a duty of care under the circumstances, (2) that the defendant or one of its employees breached that duty by some act or omission, (3) that the breach was the proximate cause of plaintiff's injuries, and (4) that the plaintiff suffered damages. *Davidson*, ___ N.C. App. at ___, 543 S.E.2d at 926 (citations omitted). Plaintiff contends, contrary to the Commission's "findings," that trip leaders Hemmer and Classen breached the standard of care in failing to warn plaintiff that the tree in question was defective, that the tree's fall was foreseeable, and that the trip leaders' breach was the proximate cause of plaintiff's injuries. We disagree.

As noted *supra*, competent evidence supported the Commission's factual findings that Hemmer inspected the campsite in accordance

with the standard of care, that the tree was living prior to the fall, and that no defect could have been detected prior to the fall. Finding no obvious defect existed, Hemmer could not have foreseen the tree's fall, and it was therefore unnecessary for him to warn plaintiff of any alleged danger. As such, the Commission's factual findings support its conclusion that neither UNC-W nor trip leaders breached any duty to warn plaintiff of the allegedly defective tree. Plaintiff's argument to the contrary must therefore fail.

Because we conclude that the Commission was correct in finding no breach on the part of UNC-W or its employees, we find it unnecessary to address plaintiff's contention that defendant's alleged failure to warn was the proximate cause of plaintiff's injuries.

For the reasons stated herein, we affirm the 12 November 1999 decision and order of the North Carolina Industrial Commission.

Affirmed.

Judges MARTIN and TYSON concur.

Report per Rule 30(e).