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NO. COA04-762

NORTH CAROLINA COURT OF APPEALS

Filed: 5 April 2005

GAYLE KEARNEY, Administratrix
of the Estate of KIM WILLIAMS, JR.,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. TA-16855

VANCE COUNTY BOARD
OF EDUCATION,
Defendant.

Appeal by plaintiff from a decision and order entered 24 February 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 January 2005.

Richard B. Harper for plaintiff appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmudar, for the State.

McCULLOUGH, Judge.

Plaintiff, the administratrix of the estate of the decedent, Kim Williams, Jr., appeals from a decision and award of the North Carolina Industrial Commission denying her claim under the North Carolina Tort Claims Act, N.C. Gen. Stat. §143-291, *et seq.* We affirm.

On 1 June 1999 decedent Kim Williams, Jr., (“Kim”) was riding Vance County School Bus No. 108 home from E.M. Rollins Elementary School in Henderson, North Carolina. Kim was a seven-year-old student. Four of Kim’s siblings were also riding the same bus home that afternoon.

During the afternoon trip home, the bus was traveling on Parham Street when the driver activated the bus' cautionary lights and stop sign, and stopped the bus at the "T" intersection of Parham Street and Spring Street to let Kim and his siblings ("the Williams children") disembark. The location of this stop required the Williams children to cross Parham Street to get to their home on Spring Street.

According to bus driver Jeffrey Strong, he followed the procedure in place for dropping off students by counting all five Williams children as they exited the bus, watching them cross the street, and counting them again after they had crossed Parham Street. According to Strong, his count revealed that all five children had safely traversed the street and were proceeding in the direction of their home.

After his final count, Strong checked the bus' mirrors and became distracted upon noticing that a few of the student riders were not seated. He admonished these children to return to their seats, and they quickly complied. While Strong was dealing with the unseated children, Kim returned to retrieve a piece of paper that he had dropped. Angel Evans, a student aboard the bus, witnessed Kim "actually g[et] all the way across the street" before coming back for the paper. Evans later indicated that nobody told Strong that Kim was again near the bus.

Following the distraction occasioned by the unseated passengers, Strong checked the mirrors that provide a view of the areas around the bus and saw nothing amiss. He then disengaged the bus' warning lights, and proceeded to move forward. After moving only a few feet, Strong felt what he described as a "bump" that he believed to be debris in the roadway. He immediately felt a second bump. Upon looking in the rearview mirror, Strong then saw Kim's body lying in the road behind the bus. Unfortunately, Kim suffered fatal cranial injuries as a result of this accident.

Plaintiff Gale Kearney, administratrix of Kim's estate, filed a claim for damages against defendant Vance County Board of Education under the North Carolina Tort Claims Act. The claim asserted that "[b]us driver Jeff Strong negligently ran over Kim Williams, Jr. after discharging him from the school bus . . . [in that] he was not paying attention when he drove off . . ." The defendant contested the claim.

Following a hearing, Deputy Commissioner George R. Hall, III, entered a decision and order denying plaintiff's claim. Plaintiff appealed to the Full Commission ("the Commission"), which also entered a decision and order denying plaintiff's claim. The Commission made the following findings of fact:

10. . . . While they were disembarking from the bus, Mr. Strong counted the five Williams children. Mr. Strong then observed the five children cross in front of the bus, go across Parham Street, and reach safety on Spring Street. At that time, Mr. Strong then again counted the five Williams children, who were beginning to proceed to their home.

11. After counting the five Williams children on Spring Street, Mr. Strong began a check of the various mirrors on the bus, including a rectangular mirror that provides a view of the children seated behind him. Upon checking this mirror, Mr. Strong noticed that a couple of students were not seated. Therefore, Mr. Strong turned in his driver's seat and indicated to the students that the bus was about to move and that they needed to return to seated positions. The students immediately responded to Mr. Strong's instructions.

12. Thereafter, Mr. Strong continued his check of mirrors, including those mirrors that provided views of possible traffic and those that provide a view of the areas around the bus. Satisfied that he could safely proceed, Mr. Strong disengaged the various warning lights and began to move forward. Within a few feet, [the bus struck Kim, causing fatal cranial injuries].

. . . .

16. Following [an] investigation, [police officers who responded to the accident] determined that there was no basis upon

which to file charges against Mr. Strong, and concluded that Mr. Strong had operated the bus properly.

17. Two eyewitnesses, Mr. Strong and 11-year[-]old Angel Evans, testified at the hearing before Commissioner Hall that they observed decedent disembark from the school bus, cross in front of the school bus on Parham Street, and reach a point of safety on the other side of Parham Street. No evidence was offered to refute this testimony. Angel Evans was sitting on the driver's side of the bus[,] and she stated that decedent dropped something and came back across the street. However, the evidence does not show how far behind Mr. Strong Angel Evans was sitting or whether she had the same or a different vantage point than Mr. Strong.

18. . . . Vance County School officials . . . conducted an independent investigation that was later analyzed by a collection of school bus traffic safety experts. After reviewing the investigation findings and reading the transcript of a deposition that had been taken of Mr. Strong, these traffic safety experts determined that Mr. Strong properly operated School Bus No. 108.

19. The School Bus Drivers' Handbook requires drivers to make sure no one is in front of the bus by counting the passengers as they unload and counting them again when they are safely off the roadway. Mr. Strong counted the children as they got off the bus and counted the same number of children on the side of the road after they had safely crossed Parham Street.

20. The School Bus Drivers' Handbook for Vance County instructs drivers to "never let a discipline problem on the bus or any other distraction interfere with checking your passenger mirrors before leaving a passenger stop." Mr. Strong was momentarily distracted after the Williams children had reached the safe side of Parham Street, but after he got his students to sit down, he closed his door, checked all his mirrors for students and traffic, and proceeded on his route as he is required to do.

21. The School Bus Drivers' Handbook requires a driver to get out and check around the bus if he cannot account for each passenger at a stop. Mr. Strong had already observed the children reach safety along Spring Street after crossing Parham Street in front of the bus. Some of the Williams children were running toward their home and some were walking. Mr. Strong then got his remaining passengers seated and checked all his mirrors prior to leaving that stop.

22. [An expert witness] testified that danger zones exist in front of the bus and along a ten[-]foot area on either side of the bus. These areas are considered danger zones because there are blind spots that may not be covered by the various mirrors around the bus. [The expert] acknowledged that small children may be in areas around the bus and not be visible to the driver in the mirrors. However, once the discharged passengers have reached safety after crossing the road and have been accounted for by the driver, the driver would have no reason to get out of the bus and check under it unless he saw someone when he checked his mirrors.

2[3]. Mr. Strong watched [Kim] and his siblings safely cross the lanes of traffic on Parham Street, reach a place of safety on the other side of the street, and start down Spring Street toward their home. Mr. Strong counted all of the children after they reached the other side of the street and checked his mirrors, as he was required to do. Having seen all the children safely across Parham Street, Mr. Strong was not required to get out and check under and around the bus, according to the School Bus Drivers' Handbook.

2[4]. [T]he evidence of record fails to prove that decedent's death was due to the negligence of Mr. Strong. As shown by the expert witness testimony, Mr. Strong followed proper procedures and was paying attention to his duties as a school bus driver. Therefore, Mr. Strong acted in conformity with the school bus driver standards of care and was not negligent in the performance of his duties. There is no evidence of record to indicate Mr. Strong breached his duty of care in this matter and that such breach of duty proximately caused the death of decedent.

The Commission concluded that Kim's death was not the result of negligence by Strong. One Commissioner dissented and concluded that defendant should be liable because Strong negligently breached a duty "to use due care to avoid injury to any child whom he reasonably knew to be in the vicinity of the bus."

Plaintiff now appeals to this Court, contending that the Commission misapprehended the duty owed by a school bus driver to a child passenger who has recently disembarked from the school bus. Specifically, plaintiff insists that the Commission failed to recognize that Strong was

under a duty to, *inter alia*, be sure that Kim remained in a safe place by accounting for his whereabouts a final time before moving the bus or to exit the bus and inspect the area around and under it if Kim could not be again accounted for. Plaintiff further asserts, as an alternative theory, that Strong necessarily breached his duty to use due care to avoid injury to a child whom he knew to be within the vicinity of the bus.

We begin our analysis of plaintiff's arguments with the standard of review. The North Carolina Tort Claims Act empowers the Industrial Commission to adjudicate tort claims against a county board of education arising from allegations of negligence by

the driver . . . of a public school bus . . . when . . . [t]he driver is an employee of the county . . . administrative unit of which that board is the governing body, and the driver is paid or authorized to be paid by that administrative unit . . . and which driver was at the time of the alleged negligent act or omission operating a public school bus . . . in accordance with [N.C. Gen. Stat. §] 115C-242 in the course of his employment by . . . that administrative unit or board

N.C. Gen. Stat. §143-300.1(a)(1) (2003). Under the Act, a decision of a hearing Commissioner may be appealed to the Full Commission, which "may issue its own findings of fact and conclusions of law." N.C. Gen. Stat. §143-292 (2003). A decision and order of the Full Commission may be appealed to this Court; "[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." N.C. Gen. Stat. §143-293 (2003). Thus, the standard of review in this Court is: "(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 v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998). Where the Commission acts under a misapprehension of law, an appellate court "will, where the ends of

justice require, remand the cause so that the evidence may be considered in its true legal light.” *Bailey v. Dept. of Mental Health*, 272 N.C. 680, 684, 159 S.E.2d 28, 31 (1968).

With these principles in mind, we first address plaintiff’s primary argument on appeal, in which she contends that the Commission failed to recognize that Strong had a duty to be sure that Kim remained in a safe place by accounting for his whereabouts a final time before moving the bus, and if Kim could not be accounted for, to exit and inspect the areas around and under the bus. We are not persuaded that the Commission erred in its application of the law to the facts of the instant case.

“Under the [Tort Claims] 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). Thus, to make a *prima facie* case, “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.” *Id.*

Our Supreme Court has held that the following principles govern the duty of a school bus driver to young passengers:

[T]he presence of children on or near a highway is a warning signal to a motorist. He must recognize that children have less capacity to shun danger than adults; are more prone to act on impulse, regardless of the attendant peril; and are lacking in full appreciation of danger which would be quite apparent to a mature person. When, therefore, he sees, or by the exercise of due care should see, that children are on the highway, he must immediately bring his vehicle under control and, in the exercise of ordinary care, proceed in such manner and at such speed as is reasonably calculated to enable him to avoid striking such child or children.

This duty to exercise a high degree of caution in order to meet the standard of care required of a motorist when he sees or by the exercise of ordinary care should see children on a highway

applies with peculiar emphasis to the operator of a school bus transporting children to their homes after school. His passengers are in his care and he knows that many of them must cross the road after they alight from the bus. It is his duty to see that those who do alight are in places of safety before he again puts his vehicle in motion.

Greene v. Mitchell County Bd. of Educ., 237 N.C. 336, 340, 75 S.E.2d 129, 131 (1953) (citations omitted). In *Greene*, five children disembarked from a school bus at the same time and place, and three of them had to cross over to the left side of the road to reach their destination. *Id.* at 341, 75 S.E.2d at 132. The Supreme Court affirmed the Commission's finding of negligence where the driver began moving the bus forward as soon as the last child had alighted, failed to give the children time to cross in front of the bus, and "drove away in a hasty manner while simultaneously closing the bus door," thus causing fatal injury to one of the children *Id.* On these facts, the Court concluded that the driver was negligent because he "failed to exercise proper care to ascertain that [the children] 'had crossed the highway in safety' or were 'otherwise out of danger'" after discharging them from the bus. *Id.* at 342, 75 S.E.2d at 132.

Likewise, this Court has subsequently affirmed a finding that a school bus driver was negligent where the driver discharged a six-year-old passenger and left him alone to attempt to maneuver through the traffic of a busy highway, thus permitting the child to be hit by another vehicle. *Slade v. Board of Education*, 10 N.C. App. 287, 292, 178 S.E.2d 316, 319, *cert. denied*, 278 N.C. 104, 179 S.E.2d 453 (1971). In *Slade*, the child had been on a school bus only twice before and, on those occasions, had been discharged on the side of the street closest to his house; the Commission found that the driver was negligent in discharging the child on the opposite side of the street, immediately driving off, and releasing traffic before the youth had crossed a busy street. *Id.* In upholding the Commission's award, this Court reiterated that "[t]he element of negligence present in *Greene* was not the failure of the driver to exercise caution in the operation

of his bus, but his failure to ascertain that his discharged passenger was in a place of safety before starting the bus forward.” *Id.* at 291, 178 S.E.2d at 319. Further, we provided the following guidance with respect to when a student reaches a place of safety after alighting from a school bus:

What constitutes a place of safety depends upon the age, experience and ability of the passenger. A place of safety for an eighteen-year-old high school senior of ordinary experience and intelligence might be a place of peril for an inexperienced six-year-old first grader. The care which a school bus driver must exercise toward a school bus passenger is proportionate to the degree of danger inherent in the passenger’s youth and inexperience. We hold that under the circumstances of this case the Commission correctly refused to limit the responsibility of the school bus driver to the mere discharge of the minor plaintiff in a place where he would be safe so long as he remained.

Id. at 295, 178 S.E.2d at 321.

The present plaintiff’s argument relies heavily upon isolated passages from *Greene* and *Slade*. In particular, she notes that the Supreme Court indicated that “[i]t is [a bus driver’s] duty to see that those who do alight [from his bus] are in places of safety **before** he again puts his vehicle in motion,” *Greene*, 237 N.C. at 340, 75 S.E.2d at 131 (emphasis added), and that this Court refused “to limit the responsibility of the school bus driver to the mere discharge of the minor plaintiff in a place where he would be safe **so long as he remained**,” *Slade*, 10 N.C. App. at 295, 178 S.E.2d at 321 (emphasis added). According to plaintiff, the emphasized language mandates that, even if a bus driver has seen a young passenger disembark, reach a place of safety, and begin to travel away from the driver’s field of vision, the driver must again account for the whereabouts of the child before moving the bus forward notwithstanding that the driver may have no indication that the child has returned to an area where he may be struck by the bus. Put differently, plaintiff essentially insists that the quoted passages require a driver to be sure that

a disembarked student passenger remains in a safe place. However, plaintiff's reading of the foregoing passages divorces the emphasized language from the factual context of the quoted decisions and ignores the significant factual differences between cases like *Greene* and *Slade* and the case *sub judice*.

As further support for her contention that Strong was required to again account for Kim or to inspect the exterior of the bus, plaintiff also relies upon the following admonition in the North Carolina Handbook for School Bus Drivers:

Do not release the stop sign until all students are either on the bus or well off the road on their side of the street or highway. **Always check the passenger mirrors just before leaving a passenger stop. If the driver cannot account for each passenger at a stop, he should not move the bus until he gets out and checks around and under the bus.** Students should remain seated until the bus has come to a complete stop and only then move forward to leave the bus. After passengers have boarded the bus, the driver should not move the bus until students are seated.

(Emphasis in original). We agree that, to comply with this directive, a school bus driver sometimes may be required to exit the bus to ensure that children who have not been accounted for and who may be within a dangerous area near the bus will not be harmed. However, we are unpersuaded that a driver is necessarily required to do so if a youthful passenger has disembarked and reached a place of safety and the driver has no reason to believe that the child has returned to an area where he may be harmed.

In the instant case, we conclude that the Commission correctly applied the law respecting a bus driver's duty of care to its findings of fact, which are in turn supported by competent evidence in the record. Specifically, the Commission found that Strong watched Kim and all of his siblings cross Parham Street and travel down Spring Street towards their home and that he had no reason to suspect that any of the children had come back within a zone of danger. Further,

it is implicit in the Commission's findings that Strong was reasonable in believing that Kim had reached, and remained in, a place of safety. Given these factual determinations, the Commission properly determined that the driver was not under a duty to exit the bus and inspect the areas around and beneath it. The corresponding assignments of error are overruled.

Plaintiff also argues as an alternative theory that the dissenting Commissioner correctly concluded that Strong breached his duty to use due care to avoid injury to a child whom he knew to be within the vicinity of the bus. However, as already indicated, a majority of the Commission necessarily determined that Strong reasonably believed that Kim had moved out of the area in which the bus might cause him harm and that Strong properly inspected his mirrors to determine whether anyone was in the vicinity of the bus. In light of these factual determinations, the Commission did not err by failing to find that Strong breached his duty to avoid injury to a child reasonably known to be in the vicinity of the bus. The corresponding assignments of error are overruled.

In addition, we have considered the remaining assignments of error brought forward in plaintiff's brief and have determined that they lack merit. Though we lament the tragic loss of young life involved in the present case, we are unable to conclude that the Commission erred in denying plaintiff's claim. Therefore, the Commission's decision and order denying plaintiff's claim must be

Affirmed.

Judges ELMORE and LEVINSON concur.

Report per Rule 30(e).