

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA04-1262

NORTH CAROLINA COURT OF APPEALS

Filed: 19 July 2005

TERRY ARNELL MORTON,
Plaintiff

v.

North Carolina Industrial Commission
I.C. File No. TA-17130

NORTH CAROLINA DEPARTMENT
OF CORRECTION,
Defendant

Appeal by plaintiff from decision and order filed 10 May 2004 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 June 2005.

Terry Arnell Morton, pro se, for plaintiff-appellant.

Attorney General Roy Cooper, by Associate Attorney General Iain Stauffer, for defendant-appellee.

BRYANT, Judge.

Terry Arnell Morton (plaintiff) appeals his decision and order filed 10 May 2004, denying his tort claim for negligence.

Plaintiff, an inmate of defendant North Carolina Department of Correction, housed at Marion Correctional Institution at the time of the incident, instituted this tort claim by the filing of an affidavit alleging he was wrongfully assaulted by a correctional officer on 22 July 2001, when the officer sprayed him with pepper spray. After conducting an evidentiary hearing on 21

May 2003, Deputy Commissioner Edward Garner, Jr. issued a decision and order denying the claim.

The Deputy Commissioner found that on the date in question, plaintiff was confined to his cell after being involved in a fight with another inmate. Correctional Sergeant Wesley Corn appeared and requested plaintiff to submit to handcuffs. Officer Samuel Dotson, unit manager, also came to plaintiff's cell and asked plaintiff to submit to handcuffs. Plaintiff moved his hands out of the sight of the officers. Because they feared for their safety, plaintiff was sprayed with pepper spray.

The Deputy Commissioner found that the action of spraying plaintiff was reasonable under the circumstances. He concluded plaintiff presented no credible or competent evidence to prove the named employees were negligent. Plaintiff appealed to the Full Commission, who denied the claim by decision and order filed 10 May 2004.

The issues on appeal are whether: (I) the Commission properly found and concluded plaintiff did not present sufficient evidence to show defendant's employees were negligent; (II) the Deputy Commissioner erred in denying plaintiff's motion for a continuance; (III) plaintiff was given adequate notice of the hearing; and (IV) one of the officers committed perjury.

I

Plaintiff first challenges the Commission's finding and conclusion that he did not present sufficient evidence to show defendant's employees were negligent. Our review of a decision of 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 v. N.C. Dep't of Transp.*, 128 N.C. App.

402, 405-06, 496 S.E.2d 790, 793 (1998) (citation omitted). “The Commission’s findings of fact are conclusive on appeal if supported by any competent evidence, whether or not the evidence would support contrary findings.” *Price v. N.C. Dep’t of Corr.*, 103 N.C. App. 609, 613, 406 S.E.2d 906, 908 (1991) (citation omitted).

To recover under the Tort Claims Act, a plaintiff must show that injuries sustained were the proximate cause of a negligent act by a named employee of the State acting in the course and scope of his employment. N.C. Gen. Stat. §143-291 (2003). The action is guided by the same principles of negligence that are applicable to actions against a private citizen. *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). To establish an actionable claim for negligence, a plaintiff must show: (1) a defendant failed to exercise due care in the performance of a duty owed to the plaintiff, and (2) that the negligent breach of duty proximately caused injury to the plaintiff. *Id.*

Evidence at the hearing showed the standard operating procedure manual utilized by Marion Correctional Institution provides pepper spray “should be used as the first level of response . . . [t]o control or deter violent, threatening or aggressive acting inmates.” Ten minutes before the incident in question, plaintiff had been involved in a fight with another inmate, who was injured in the fight. The officers repeatedly requested plaintiff to submit to handcuffs. Instead of complying, plaintiff turned his back to the officers and dropped his hands, leading the officers to believe that plaintiff might have a weapon in his hand. Under these circumstances the employees acted reasonably in accordance with standard operating procedure by spraying plaintiff with pepper spray. This evidence supports a finding and conclusion that they did not breach a duty of care owed to plaintiff. This assignment of error is overruled.

Plaintiff next contends the Deputy Commissioner erred by not allowing a continuance so plaintiff could obtain a witness and obtain discovery from defendant.

The record fails to show plaintiff requested a continuance. Even if plaintiff had made the motion, the Commission's decision upon a motion to continue is within the discretion of the Commission and will not be disturbed in the absence of a showing of abuse of discretion. *McPhaul v. Sewell*, 36 N.C. App. 312, 314, 244 S.E.2d 158, 160 (1978). No abuse of discretion is shown. Plaintiff does not show what testimony his witness would have given or how he was prejudiced. This assignment of error is overruled.

III

Plaintiff next contends he was not given adequate notice of the hearing. "In order to preserve a question for appellate review, a party must have presented to the [tribunal] a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make[.]" N.C. R. App. P.10(b)(1). The record does not show plaintiff objected in a timely fashion to any purported lack of notice. Accordingly, this issue has not been properly preserved for appellate review.

IV

Plaintiff next contends one of the officers committed perjury. The credibility of witnesses is for the Commission to decide. *McGee v. N.C. Dep't of Revenue*, 135 N.C. App. 319, 324, 520 S.E.2d 84, 87 (1999) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 413 (1998)). The Commission adjudged the testimony of this witness to be credible and this Court is bound by that determination. *Id.* at 324, 520 S.E.2d at 87.

The decision and order is affirmed.

Affirmed.

Judges ELMORE and GEER concur.

Report per Rule 30(e).