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NO. COA08-305

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2009

ESTATE OF MICHELLE CURRAN,
Deceased, KELLY CURRAN,
Personal Representative,
Plaintiff,

v.

North Carolina Industrial Commission
I.C. File No. TA-18182

N.C. DEPARTMENT OF
CRIME CONTROL & PUBLIC SAFETY,
Defendant.

Appeal by Plaintiff from Decision and Order entered 28 November 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 September 2008.

Melrose, Seago & Lay, P.A., by Randal Seago, for Plaintiff-Appellant.

Attorney General Roy Cooper, by Assistant Attorney General Donna B. Wojcik, for the State.

STEPHENS, Judge.

On 26 September 2003, Plaintiff filed a wrongful death tort claim with the North Carolina Industrial Commission alleging gross negligence on the part of members of the North Carolina Highway Patrol in causing an automobile accident that resulted in the death of Michelle[**Note 1**] Curran, Plaintiff's decedent. On 19 November 2003, Defendant filed an answer denying negligence and asserting affirmative defenses, and moved to dismiss the action

based on the public duty doctrine and official immunity for public officers. On 2 February 2006, Defendant filed a motion for summary judgment “as to all liability issues raised by the Plaintiff.”

Defendant’s motions to dismiss and for summary judgment were heard by Chief Deputy Commissioner Stephen T. Gheen on 8 February 2006. On 22 June 2006, Deputy Commissioner Gheen entered an Interlocutory Decision and Order denying Defendant’s motions.

Defendant timely appealed to the Full Commission, which heard Defendant’s appeal on 17 April 2007. The Full Commission affirmed Deputy Commissioner Gheen’s decision denying Defendant’s motion to dismiss based on the public duty doctrine. The Full Commission reversed Deputy Commissioner Gheen’s denial of Defendant’s motion for summary judgment, concluding that there was no issue of material fact regarding the conduct of the officers named in the action and that the officers’ conduct did not rise to the level of gross negligence. Accordingly, summary judgment was entered in favor of Defendant and the matter was dismissed with prejudice. From the Decision and Order of the Full Commission, Plaintiff appeals.

Facts

On 14 April 2002, a male (“suspect”) stole a Ford Expedition at knifepoint from the vehicle’s owner in a Wal-Mart parking lot in Asheville, North Carolina, colliding with another vehicle as he was attempting to flee and picking up a female companion as he was leaving the parking lot. A radio dispatch regarding the hijacking, including a description of the suspect vehicle and a warning that the suspect was armed and dangerous, went out to area law enforcement agencies. Asheville Police Department (“APD”) officers spotted an Expedition matching the hijacked vehicle’s description heading west on Interstate 40. When the officers activated blue lights and sirens in an attempt to stop the vehicle, the suspect fled at a high rate of speed with the APD officers in pursuit.

A Department of Motor Vehicles officer, a Haywood County Sheriff's Department deputy, and troopers with the North Carolina Highway Patrol received the radio transmission and joined in the pursuit as the suspect fled west on Interstate 40 toward the Tennessee state line. An officer made an unsuccessful attempt at Exit 27 of Interstate 40 to pull out in front of the fleeing suspect in order to terminate the suspect's flight. At that time the suspect's speed was estimated to be between 80 and 110 miles per hour.

Sergeant Wike of the North Carolina Highway Patrol, who was part of the pursuit behind the suspect vehicle, radioed Troopers Travis M. Crisp, William W. Gardner, and William D. Franklin, III, and instructed them to proceed ahead to Exit 24 so they could deploy "stop sticks" in the westbound lanes of Interstate 40. Stop sticks are placed in the roadway in the path of an oncoming vehicle and are designed to stop the vehicle by puncturing the tires and causing a controlled deflation. The location at Exit 24 had approximately 1,800 feet of sight distance from the exit ramp in the direction of the suspect's approach.

It was Trooper Gardner's responsibility to deploy the stop sticks in the left lane, the anticipated location of the suspect vehicle. Troopers Crisp and Franklin were to deploy their stop sticks in the right lane and the paved emergency strip respectively.

The troopers positioned themselves to deploy the stop sticks and used the external speakers on their vehicles to continue to monitor traffic through the radio. Sergeant Wike provided radio updates regarding the progress of the pursuit. The weather was clear with very few clouds, there was good visibility, and the traffic was medium. Trooper Gardner observed a Saturn, in which Ms. Curran was a passenger, approaching in the right lane, and a tractor-trailer approximately one-tenth of a mile behind the Saturn. Further back, he observed the Expedition

traveling in the left lane followed by several allied agency law enforcement vehicles with blue lights and sirens on.

The suspect continued in the left lane, giving no indication that he would change lanes. When the suspect was approximately two to three seconds away (75 to 100 yards), Trooper Gardner deployed the stop sticks in the left lane. Troopers Crisp and Franklin did not deploy their stop sticks due to the location of the Expedition in the left lane and the proximity of the Saturn and the tractor-trailer in the right lane. As soon as the stop sticks were deployed, the suspect made a hard cut to the right into the adjacent lane of travel, colliding into the back of the Saturn. Ms. Curran died as a result of injuries sustained in the collision.

I. Interlocutory Appeal

Plaintiff first contends Defendant did not have a right of immediate appeal to the Full Commission from Deputy Commissioner Gheen's order denying Defendant's summary judgment motion as the order was interlocutory.[**Note 2**]

Under the North Carolina Tort Claims Act, N.C. Gen. Stat. §§143-291 *et seq.*, the Industrial Commission has original jurisdiction over negligence claims against the State and its departments, institutions, and agencies. N.C. Gen. Stat. §143-291(a) (2007). Pursuant to section 143-292 of the Tort Claims Act:

Upon determination of [a tort claim against the State] the Commission shall notify all parties concerned in writing of its decision and either party shall have 15 days after receipt of such notice within which to file notice of appeal with the Industrial Commission. Such appeal, when so taken, shall be heard by the Industrial Commission, sitting as a full Commission

N.C. Gen. Stat. §143-292 (2007). Plaintiff argues that "because the decision was not a 'determination' of the claim," the Full Commission lacked the authority to review Deputy Commissioner Gheen's decision to deny the summary judgment motion on gross negligence.

However, the Tort Claims Act authorizes the Industrial Commission to adopt such rules and regulations as may, in the discretion of the Commission, be necessary to carry out the purpose and intent of the Tort Claims Act. N.C. Gen. Stat. §143-300 (2007). Rule T206 of the Tort Claims Rules of the Industrial Commission provides that “[t]he Industrial Commission may, on its own motion, order a hearing or rehearing of any case in dispute.” 4 N.C.A.C. 10B.0206(a) (2000).

On 22 June 2006, Deputy Commissioner Gheen filed an Interlocutory Decision and Order denying Defendant’s motions to dismiss and for summary judgment. Defendant appealed the order to the Full Commission on 18 July 2006. The Full Commission dismissed Defendant’s appeal, concluding that the appeal was improper at that time as it was from an interlocutory order. Defendant appealed the Full Commission’s order to this Court on 11 September 2006. On 27 September 2006, the Full Commission, “[h]aving reviewed th[e] matter and after due consideration,” entered an order vacating its 7 August 2006 order and providing that, upon Defendant’s withdrawal of its appeal to this Court and its filing of a Form 44 Application for Review, the matter would be set for hearing before the Full Commission.

As “[t]he Industrial Commission may, on its own motion, order a hearing or rehearing of any case in dispute[,]” 4 N.C.A.C. 10B.0206(a), the Industrial Commission acted within its authority to set the matter for hearing before the Full Commission. Accordingly, Plaintiff’s argument is overruled.

II. Summary Judgment

Plaintiff next argues the Industrial Commission erred in granting summary judgment against Plaintiff because the record discloses a genuine issue of material fact as to whether the conduct of the officers involved rises to the level of gross negligence.

Preliminarily, we note that Deputy Commissioner Gheen, in denying Defendant's motion for summary judgment, concluded that "the standard of care in this case is that of a reasonably prudent person *under the circumstances*." The Full Commission, in reversing Deputy Commissioner Gheen's order, concluded that "[i]n any civil action resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in determining the officer's liability." Relying on *Eckard v. Smith*, 166 N.C. App. 312, 603 S.E.2d 547 (2004), *aff'd per curiam*, 360 N.C. 51, 619 S.E.2d 503 (2005), the Full Commission further concluded that although the actions of the defendant officers occurred immediately ahead of the suspect vehicle, and thus not in "pursuit" of the suspect vehicle within the literal meaning of the word, the actions of the officers in this case were part of the pursuit. Plaintiff does not assign as error the Full Commission's application of the gross negligence standard. Instead, Plaintiff argues that the conduct of the officers involved in this case rises to the level of gross negligence. We disagree.

In reviewing an entry of summary judgment by the Industrial Commission, the appellate court must determine whether the pleadings, interrogatory answers, affidavits, or other materials considered by the Commission raise a genuine question of material fact, and whether at least one party was entitled to a judgment as a matter of law. *Norman v. N.C. DOT*, 161 N.C. App. 211, 216, 588 S.E.2d 42, 46 (2003), *appeal dismissed and disc. review denied*, 358 N.C. 235, 595 S.E.2d 153, *cert. denied*, 358 N.C. 545, 599 S.E.2d 404 (2004). "[A]lthough it is seldom appropriate to grant summary judgment in a negligence action, it is proper if there are no genuine issues of material fact, and the plaintiff fails to demonstrate one of the essential elements of the claim." *Parish v. Hill*, 350 N.C. 231, 236, 513 S.E.2d 547, 550, *reh'g denied*, 350 N.C. 600, 537 S.E.2d 215 (1999). We review the Industrial Commission's conclusions of law *de novo*. *Starco, Inc. v. AMG Bonding and Ins. Services*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

Gross negligence is wanton conduct done with conscious and intentional disregard of and indifference to the rights and safety of others. *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 397 (1956). “An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.” *Wagoner v. N.C. R.R. Co.*, 238 N.C. 162, 167, 77 S.E.2d 701, 705 (1953) (quotation marks and citation omitted). “North Carolina’s standard of gross negligence, with regard to police pursuits, is very high and is rarely met.” *Eckard*, 166 N.C. App. at 323, 603 S.E.2d at 142 (footnote omitted).

Courts have discussed several factors as relevant to the issue of whether the conduct of a law enforcement officer engaged in pursuit of a fleeing suspect meets the grossly negligent standard. First, the reason for the pursuit is to be considered. . . . It is also relevant to consider whether the suspect was known to police and could be arrested through means other than apprehension via a high speed chase . . . or whether the fleeing suspect presented a danger to the public that could only be abated by immediate pursuit.

Also relevant to a determination of whether the officer’s conduct was grossly negligent is the probability of injury to the public by the officer’s decision to pursue and continue to pursue the suspect. Relevant considerations include the time of day or night when the pursuit occurred; the location of the pursuit . . . ; population of the area; presence of other vehicles on the road; posted speed limits; road conditions; weather conditions; duration of pursuit; and length of pursuit *Norris v. Zambito*, 135 N.C. App. 288, 294-95, 520 S.E.2d 113, 117 (1999) (internal citations omitted). Additionally, evidence of the law enforcement officer’s conduct in pursuing the fleeing driver is relevant to the issue of gross negligence, including “whether the officer used emergency lights, sirens and headlights; . . . followed relevant departmental policies regarding chases; [or]

violated generally accepted standards for police pursuits[.]” *Id.* at 295, 520 S.E.2d at 117 (internal citations omitted).

Applying the above-stated factors to the evidence before the Full Commission in this case, we conclude that Plaintiff did not demonstrate the existence of a genuine issue of material fact as to gross negligence on the part of the officers, so as to survive Defendant’s motion for summary judgment. The officers were attempting to apprehend a driver who had stolen an Expedition at knifepoint from the vehicle’s owner in a parking lot and collided with another vehicle while fleeing the lot. The officers did not know the identity of the driver and could not have apprehended him at a later time or in an alternative manner. Due to the immediate and significant potential danger to the public posed by the suspect’s driving, as evidenced by his collision in the parking lot and his high rate of speed on Interstate 40, the officers had good reason to remove him from the public highway as quickly as possible. The location where the officers were instructed to deploy stop sticks allowed the officers approximately 1,800 feet of sight distance to observe the suspect vehicle and oncoming traffic, and the officers continued to monitor vehicular traffic throughout the pursuit.

As the Expedition, the Saturn, and the tractor-trailer approached Exit 24, the Saturn slowed and appeared to be headed toward the shoulder on the right side of the highway. Troopers Crisp and Franklin were prepared to deploy stop sticks in the right lane and adjoining right shoulder of the highway. However, due to the location of the Expedition in the left lane[**Note 3**] and the proximity of the Saturn and the tractor-trailer in the right lane, they did not do so. Trooper Gardner deployed his stop stick when the Expedition was approximately 75 to 100 yards away, in order to eliminate the possibility that the Expedition would maneuver around the device. At the time the device was deployed, Trooper Gardner estimated that the Expedition had

slowed to approximately 50 or 55 miles per hour. We conclude that this evidence, as a matter of law, does not demonstrate that the officers acted with conscious or reckless disregard for the rights and safety of others.

Plaintiff does not dispute the evidence, but instead argues the evidence reveals that a crucial violation of State policy “in fact caused the collision[.]” The North Carolina State Highway Patrol Policy Manual establishes guidelines related to forced vehicle stops and includes tire deflation devices as a type of forced vehicle stop. The Policy Manual provides:

The site for all forced vehicle stops shall be selected with due regard for the safety of motorists and the members executing the stop. Sufficient distance must be provided to allow a motorist to stop in a safe manner under the existing conditions.

Plaintiff argues that this “State policy requires the patrolman to throw the sticks in time to allow the offender to stop safely,” but that “[Trooper] Gardner deliberately chose instead to try to wait until the last moment to throw the sticks, giving the offender no opportunity to stop safely.” Plaintiff’s argument misinterprets the State policy. This policy requires that the *site* of a forced vehicle stop, including the site for the deployment of stop sticks, must be a sufficient distance in front of where a motorist would first see it to allow the motorist to stop in a safe manner. The policy does not, however, require an officer to throw stop sticks in time to allow the offender to stop. In fact, the Guidelines for Use of Stop Stick instruct an officer to “consider deploying [stop sticks] so that a suspect has limited ability to avoid striking the device.” Here, the site designated for the forced stop could be seen by approaching motorists, including the driver of the Saturn and the suspect, for 1,800 feet before they reached it, providing sufficient distance to allow all motorists to stop in a safe manner. Furthermore, Trooper Gardner deliberately threw the stop sticks in front of the Expedition at the last minute so that the suspect had limited ability to avoid driving over them. Accordingly, the site chosen for the deployment of the stop sticks complied

with State policy and the method of the officer's deployment of the stop sticks complied with the Guidelines for Use.

Plaintiff further argues the evidence shows that Trooper Gardner knew when he deployed the stop sticks that the Expedition would swerve into the Saturn. However, a thorough review of the record reveals no evidence to support this contention.

Because Plaintiff has not forecast sufficient evidence to demonstrate that a genuine issue of material fact exists as to whether the officers involved acted with gross negligence, an essential element of Plaintiff's claim is missing. Defendant is entitled to judgment as a matter of law. Accordingly, the Full Commission's Decision and Order dismissing Plaintiff's claim against Defendant is affirmed.

AFFIRMED.

Chief Judge MARTIN and Judge McGEE concur.

Report per Rule 30(e).

NOTES

1. Ms. Curran's first name is spelled both "Michele" and "Michelle" by Plaintiff, Defendant, and the Industrial Commission.

2. An appeal based on the public duty doctrine involves a substantial right of the defendant, warranting immediate appellate review. *Clark v. Red Bird Cab Co.*, 114 N.C. App. 400, 403, 442 S.E.2d 75, 77, *disc. review denied*, 336 N.C. 603, 447 S.E.2d 387 (1994). Plaintiff does not argue that Defendant did not have a right of immediate appeal to the Full Commission from the order denying Defendant's motion to dismiss based on the public duty doctrine.

3. The Expedition remained in the left lane throughout the time Trooper Gardner observed its approach.