An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority.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. COA07-1015

NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2008

RANDY LEE BARNARD, SR.,
Plaintiff,

v.

N.C. DEPARTMENT OF TRANSPORTATION,
Defendant.

North Carolina Industrial Commission
I.C. File No. TA-18275

Appeal by defendant from decision and order entered 27 April 2007 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 February 2008.

Wheatly, Wheatly, Weeks & Lupton, P.A., by Stevenson L. Weeks, for plaintiff-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Dahr Joseph Tanoury, for the State.

GEER, Judge.

Defendant North Carolina Department of Transportation ("DOT") appeals from the Industrial Commission's decision and order awarding plaintiff Randy Lee Barnard, Sr. $500,000.00 in damages based on its conclusion that DOT's employee, Robert Wayne Corey, negligently injured Barnard, and Barnard was not contributorily negligent. Although DOT contends that the evidence relied upon by the Commission was unreliable and incompetent, we hold that the record contains competent evidence supporting the Commission's findings of fact,

and those findings support its conclusions of law and award of compensatory damages. Accordingly, based upon our standard of review, we affirm.

Facts

At the hearing before the deputy commissioner, Barnard testified that, on 1 February 2002, he rode his motorcycle to a motorcycle shop about 45 miles east of his home in New Bern. As he left the shop, he talked with Josiah McKamey and two other men. He then left to return home by traveling west on U.S. Highway 70. Along this section of Highway 70, there are two eastbound lanes and two westbound lanes, divided by a grassy median. A median crossover is located in front of the motorcycle shop. Barnard rode out of the parking lot and stopped at the stop sign for eastbound Highway 70.

At the stop sign, Barnard checked for eastbound traffic and then drove across the eastbound lanes, stopping in the median crossover to wait for a westbound vehicle to turn left. Barnard then checked the westbound traffic to ensure he could merge safely. He saw a truck approaching "[i]n the far lane, right-hand side," but with respect to the inside, left-hand lane, he testified: "I saw that I was clear. I saw that I had - in my lane I had more than enough room to get out without causing somebody to have to hit the brake. I saw the truck and another - and a car further down." Barnard pulled into the inside, left-hand lane and started to accelerate.

The truck Barnard saw traveling westbound on Highway 70 was a DOT truck pulling a "lowboy" trailer. According to Barnard, as he began to accelerate in the inside lane, "the truck started - was coming on by me. And then when he got down a little ways, he was just coming in my lane." In response, Barnard "hit the brakes and hit the horn, tried to get away from him, move over." Because Barnard was unable to move over far enough, the rear left side of the trailer

collided with the rear right side of his motorcycle. Barnard does not remember anything from the time of the collision until he woke up in the hospital.

McKamey, the man with whom Barnard talked after leaving the shop, also testified, stating:

> A. . . . . I remember hearing the bike as he started out to cross the first lane. I heard him cross it, momentarily stop. At that point I turned around to face the store, and I could hear the bike as he was merging into traffic. I heard the bike start, and it - I heard the engine rev and go for maybe a second and a half.
>
> . . . .
>
> A. . . . . Then I heard the impact of the accident. And at that time, I turned around and saw the gentleman in the air.

McKamey immediately rushed to the scene and found Barnard lying in the middle of the inside lane, semiconscious and in visible pain.

Corey, who was driving the truck that collided with Barnard, testified for DOT. Corey's tractor-trailer had a combined length of approximately 60 feet, with the trailer extending 40 feet. At the time of the accident, he had been employed by DOT for approximately three years and had about six to eight months of on-the-job training operating lowboy trailers. He possessed a valid North Carolina commercial driver's license, but was restricted from operating vehicles with trailers, such as the one he was operating on the day of the accident.

According to Corey, well before the accident occurred, he had been driving in the outside westbound lane on Highway 70. After passing through an intersection before the median crossover where Barnard had stopped, Corey began shifting into the inside lane. He testified that when he approached the median crossover, he had an unobstructed view. As he passed by the median crossover, he looked in his left side-view mirror and saw Barnard's motorcycle collide

with the trailer, somewhere along the rear 15 feet. Corey could not remember whether Barnard had entered the inside lane prior to Corey's passing him.

Another DOT employee, Edward Thomas Wright, was riding in the truck with Corey. He testified that their truck was in the inside lane prior to passing the median crossover where Barnard had stopped. When he first saw Barnard, Barnard was in the median crossover at an angle to the westbound lanes, getting ready to merge into traffic. He was certain that Corey did not shift from the outside lane into the inside lane and swerve into Barnard's motorcycle.

Richard Lore, who was driving behind Corey testified:

> A. . . . . [W]e were tracking behind the Lowboy in question. . . . And we were in the left-hand passing lane. We were following them, had been following them for two, two and a half, three minutes at about 50 miles an hour, when suddenly the accident occurred. The motorcycle appeared out of nowhere about ten o'clock in my field of vision. Remember we're in the left-hand lane, and the motorcycle is coming up on the median, very narrow asphalt median there and then a wider dirt median over there. And as [Barnard] passed me and got on at the rear end of the truck, he gradually very obliquely took his motorcycle into the truck. He hit it about the middle axle or the rear axle on the outside left tire, and it threw his motorcycle into a terrible wobble, and he went down. Fortunately for him, he went down on the median and didn't go down on the road.

Lore also stated that it appeared as if Barnard was trying to accelerate past his vehicle to get behind the truck; that he did not notice Corey make any unsafe movements; and that up until the collision, the truck remained at a "steady speed" of about 47 to 51 miles per hour. He recalled that "the motorcycle had encroached on [Corey], not the other way around." Lore's wife, Linda, also remembered being in the inside lane prior to passing the median crossover. She stated that Corey's driving was "completely consistent, no swerving or anything."

The accident was investigated by State Trooper Joseph Hoffman, who prepared an accident report, including a field sketch. Hoffman's measurements indicated that the skid marks from the left side of the trailer, which were longer than those on the right side, started 80 feet 11 inches beyond the westernmost point of the median crossover and were five feet one inch from the inside edge of the left-hand lane. The skid marks continued for 346 feet seven inches down the inside lane, running straight and parallel to the lane, with no indication of any evasive maneuver to avoid the motorcycle. The skid marks were consistent with the tires of the lowboy trailer.

According to Hoffman's measurements, the width of the lane where the accident occurred was 12 feet one-half inch. DOT's trailer was 8 feet wide. Based on these measurements, Hoffman concluded that the trailer must have been in both lanes at the moment Corey applied the brakes, causing the tires to leave skid marks, because the left-hand lane was 12-feet wide, the skid marks from the left side of the trailer were five feet one inch from the left edge of the left lane, and the trailer was eight-feet wide. Hoffman was, however, unable to determine where Barnard was located when he entered the inside westbound lane.

Walking from the median crossover toward the skid marks, Hoffman did not find any debris until he reached the beginning of the skid marks. In other words, the debris field from the collision was located at the point on the road where the skid marks started. Hoffman found no skid marks from either vehicle before the debris field. Barnard's motorcycle traveled an additional 70 feet past the debris field. Hoffman's inspection of DOT's trailer showed that the impact occurred on the first tire on the left side of the trailer, approximately 15 feet from the end of the trailer. The impact to the motorcycle occurred on the back of the right side.

As a result of the collision, Barnard sustained serious injuries, including multiple facial fractures; a cerebral hematoma; broken fingers; abrasions on his upper body, arms, and face; and chronic back pain. On 19 December 2003, Barnard filed a claim against DOT under North Carolina's Tort Claims Act, alleging that Corey had been negligent. The deputy commissioner entered a decision on 12 January 2006, finding that Corey had been negligent in the operation of his motor vehicle, that his negligence was a proximate cause of the accident and Barnard's injuries, that Barnard was not negligent in the operation of his motorcycle, and that Barnard was entitled to recover $500,000.00 in compensatory damages.

DOT appealed this decision to the Full Commission. The matter was heard by a panel comprised of Chairman Buck Lattimore, Commissioner Diane C. Sellers, and Commissioner Thomas J. Bolch. On 27 April 2007, the Commission filed a decision and order written by Chairman Lattimore and joined by Commissioner Sellers. The decision and order stated that "as of the time of the filing of the Opinion and Award, Commissioner Bolch was not available for signature because his term as commissioner had ended and he was no longer a member of the Commission." The Commission noted that this Court in *Tew v. E.B. Davis Elec. Co.*, 142 N.C. App. 120, 541 S.E.2d 764, *appeal dismissed and disc. review denied*, 353 N.C. 532, 548 S.E.2d 742 (2001), and *Pearson v. C.P. Buckner Steel Erection*, 139 N.C. App. 394, 533 S.E.2d 532 (2000), *disc. review denied*, 353 N.C. 379, 547 S.E.2d 434 (2001), had upheld opinions and awards signed by only two commissioners although the matter had been reviewed by three commissioners.

In its decision and order, the Full Commission affirmed the decision and order of the deputy commissioner. The Commission concluded:

> Because Mr. Corey encroached upon Plaintiff's use of the inside lane of Highway 70 westbound; because Defendant has failed to

> show that Mr. Corey first ascertained that such movement could be made with safety, and in fact denies that any such encroachment ever took place; and because Mr. Corey's encroachment upon Plaintiff's use of the inside lane proximately caused Plaintiff's injuries, the Full Commission concludes that Plaintiff's injuries are the result of the negligence of Mr. Corey, and that such negligence is imputed to Defendant under the doctrine of *respondeat superior*.

In connection with this conclusion, the Commission noted that Corey's driving violated N.C. Gen. Stat. §20-146(d)(1) (2007) and, therefore, constituted negligence *per se*. The Commission further concluded that even if Corey's testimony had been deemed credible, his driving a truck pulling a lowboy trailer while in possession of a commercial driver's License with a restriction of no trailers also constituted negligence *per se*. After concluding that Barnard was not contributorily negligent, the Commission determined that Barnard was entitled to compensatory damages in the amount of $500,000.00. DOT timely appealed the Commission's decision and order to this Court.

Discussion

"Under the Tort Claims Act, 'when considering an appeal from the Commission, our Court 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.'" *Fennell v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001) (quoting *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App.402, 405-06, 496 S.E.2d 790, 793 (1998)), *cert. denied*, 355 N.C. 285, 560 S.E.2d 800 (2002). A finding of fact by the Industrial Commission is binding if there is any competent evidence to support it. *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 708-09, 365 S.E.2d 898, 900 (1988).

In this appeal, DOT challenges the Commission's determinations that Corey was negligent, that his actions constituted negligence *per se*, and that Barnard was not contributorily negligent. "Negligence is a mixed question of law and fact, and the reviewing court must determine whether the Commission's findings support its conclusions." *Id.* at 709, 365 S.E.2d at 900.

I

As an initial matter, we address DOT's contention that the Commission improperly relied on incompetent evidence in concluding that Corey was negligent. DOT argues, citing *Shaw v. Sylvester*, 253 N.C. 176, 116 S.E.2d 351 (1960), *superseded by statute as stated by State v. Hazelwood*, ___ N.C. App. ___, 652 S.E.2d 63 (2007), that the Commission was barred from considering Hoffman's testimony regarding the location of the impact and the position of the vehicles relative to the inside and outside lanes at the moment of impact.

In *Shaw*, the Supreme Court held:

> [O]ne who does not see a vehicle in motion is not permitted to give an opinion as to its speed. A witness who investigates but does not see a wreck may describe to the jury the signs, marks, and conditions he found at the scene, including damage to the vehicle involved. From these, however, he cannot give an opinion as to its speed. The jury is just as well qualified as the witness to determine what inferences the facts will permit or require.

Id. at 180, 116 S.E.2d at 355. We observe first that Hoffman did not express any opinion about speed and, therefore, *Shaw* is inapplicable. *See State v. Purdie*, 93 N.C. App. 269, 276, 377 S.E.2d 789, 793 (1989) (holding that principle set out in *Shaw* and applied in *Hicks v. Reavis*, 78 N.C. App. 315, 337 S.E.2d 121 (1985), *cert. denied*, 316 N.C. 553, 344 S.E.2d 7 (1986), "is limited to opinions regarding *speed*; it does not apply to opinions concerning other elements of an accident" from an accident reconstruction expert).

Regardless, the Commission stated: "[B]ecause Plaintiff's counsel never tendered Mr. Hoffman as an expert in accident reconstruction before the Commission, and because Defendant's counsel appropriately objected to Mr. Hoffman's testimony on that basis, the Full Commission declines to consider Mr. Hoffman's opinion testimony regarding matters beyond those he experienced and measured directly." The Commission thus did not base its determination that Corey was negligent on Hoffman's opinions, but rather on its findings regarding the physical evidence, some of which was described by Hoffman in his testimony.

DOT concedes that "Hoffman's testimony regarding his observation of the skid marks" is competent, yet argues that the Commission "stretched" Hoffman's observations to reach its findings regarding the location of the impact on the highway and the spatial relationship of the vehicles. To the contrary, the Commission, as permitted by *Shaw*, considered the physical evidence from the accident, including Hoffman's measurements, and decided what inferences to draw - a decision vested in the Commission as the fact-finder. *See Norman v. N.C. Dep't of Transp.*, 161 N.C. App. 211, 224, 588 S.E.2d 42, 51 (2003) ("The decision regarding which inference to draw was for the Commission and may not be overturned on appeal. Inferences from circumstances when reasonably drawn are permissible and that other reasonable inferences could have been drawn is no indication of error; deciding which permissible inference to draw from evidentiary circumstances is as much within the fact finder's province as is deciding which of two contradictory witnesses to believe." (internal quotation marks omitted)), *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).

As our Supreme Court has previously pointed out, triers of fact are "thoroughly familiar with the operation of automobiles, and are capable of determining what inferences the facts will

permit or require." *Glenn v. Smith*, 264 N.C. 706, 709, 142 S.E.2d 596, 599 (1965). It is immaterial that the Commission, upon considering the physical evidence - including the length and location of the skid marks and the location of the damage to the vehicles - happened to reach a similar conclusion regarding the collision as Hoffman. DOT has, therefore, shown no error in the Commission's reliance on Hoffman's testimony in reaching its decision.

II

DOT next challenges the Commission's determination that Corey was negligent. DOT argues that the Commission erred in relying upon Hoffman's and Barnard's testimony rather than on the testimony of DOT's witnesses. We disagree.

The Commission described all of the testimony presented at the hearing, including the following finding of fact regarding Hoffman's testimony: "Mr. Hoffman described a pair of skid marks in the inside lane of Highway 70 westbound, with the left skid mark, slightly longer than the right skid mark, beginning 80 feet 11 inches beyond the westernmost end of the median crossover and 5 feet 1 inch in from the edge of the lane, and continuing for 346 feet 7 inches down the inside lane." The Commission then found:

> [B]ased on the skid marks described by Mr. Hoffman and the testimony of Mr. Corey, that Mr. Corey witnessed the impact of Plaintiff's motorcycle with the lowboy trailer and immediately began braking Defendant's truck. On the basis of the testimony before the Full Commission that Plaintiff's motorcycle struck the lowboy trailer approximately 15 feet from its end, the Full Commission finds, based on the greater weight of the evidence before it, that Plaintiff's motorcycle impacted with the lowboy trailer approximately 80 to 100 feet west of the westernmost end of the median crossover.

The Commission then noted that Barnard's photographs of the condition of his motorcycle following the accident "show significant damage to the right rear of Plaintiff's motorcycle," but

"the photographs show virtually no damage to the front of the motorcycle, including an intact front windshield and fender and a front headlight with only a small scrape in its chrome."

Based on these findings regarding the physical evidence, the Commission explained why it gave less weight to the testimony of DOT's witnesses:

> The Full Commission gives reduced weight to the descriptions of the accident by Mr. Corey, Mr. Wright, and Mr. and Mrs. Lore, because their testimony is inconsistent with the physical evidence of the accident presented before the Commission. If, as Mr. Lore testified, Plaintiff had accelerated from the median crossover sufficiently to pass Mr. and Mrs. Lore and then impact with the lowboy trailer some 125 to 200 feet in front of them, the accident would necessarily have taken place considerably farther from the median crossover than 80 to 100 feet. However, if, as Mr. Corey and Mr. Wright testified, Plaintiff was stopped in the median crossover at the time the cab of the truck passed him, and Plaintiff then accelerated out of the median crossover directly into the lowboy trailer before it had fully passed him, the accident would have taken place within mere feet of the median crossover, considerably less than 80 to 100 feet. Furthermore, Mr. Corey, Mr. Wright, and Mr. Lore all described Plaintiff's motorcycle striking Defendant's truck largely head-on, which is inconsistent with the evidence showing that Plaintiff's motorcycle was substantially undamaged on its front, with the considerable majority of its damage to the motorcycle's rear.

The Commission followed that finding with an explanation of why it gave greater weight to Barnard's and McKamey's testimony:

> The Full Commission gives increased weight to the descriptions of the accident by Plaintiff and Mr. McKamey, because their testimony is consistent with the physical evidence of the accident presented before the Commission. Mr. McKamey's description of hearing Plaintiff accelerate for about a second and a half and shift from first to second gear before striking Defendant's truck is broadly consistent with an impact taking place between 80 and 100 feet from the median crossover, given that a vehicle traveling 35 mph moves51.3 feet per second. Although Plaintiff could not remember how far he had traveled on Highway 70 before being hit by Defendant's truck, and could not recall how fast he was traveling at the time, Plaintiff's description of being hit by the lowboy trailer from behind and from the right is substantially

> consistent with the damage to Plaintiff's motorcycle as shown to the Commission.

The Commission then made the following ultimate finding of fact:

> The Full Commission . . . finds, based on the greater weight of the evidence before it, that Plaintiff properly ascertained that the inside lane of Highway 70 westbound was free from oncoming vehicles, and began traveling within that lane; that Mr. Corey was driving Defendant's truck in the outside lane of Highway 70 westbound, and encroached upon Plaintiff's use of the inside lane as he began to pass Plaintiff; and that the impact between Plaintiff's motorcycle and Defendant's lowboy trailer was a direct and proximate result of Mr. Corey's encroachment upon Plaintiff's use of the inside lane.

Based on these findings, the Commission concluded that Corey had violated N.C. Gen. Stat. §20-146.1(a) (2007) (providing that "[a]ll motorcycles are entitled to full use of a lane and no motor vehicle shall be driven in such a manner as to deprive any motorcycle of the full use of a lane") and N.C. Gen. Stat. §20-146(d)(1) (providing that "[w]henever any street has been divided into two or more clearly marked lanes for traffic, . . . [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety").

The Commission noted that a violation of N.C. Gen. Stat. §20-146(d)(1) constitutes negligence *per se*, citing *Ligon v. Stickland*, 176 N.C. App. 132, 136, 625 S.E.2d 824, 828 (2006) ("As this Court has previously stated, '[o]ur Courts have consistently held that the violation of [N.C. Gen. Stat. §20-146(d)(1)] constitutes negligence *per se*, and when it is the proximate cause of injury or damage, such violation is actionable negligence.'" (quoting *Sessoms v. Roberson*, 47 N.C. App. 573, 579, 268 S.E.2d 24, 28 (1980)). It then concluded, based on this principle and its findings of fact that Corey had encroached on Barnard's use of the inside lane of Highway 70 westbound and had failed to first ascertain that such movement could be made with safety, that

Corey had been negligent, that "Plaintiff's injuries are the result of the negligence of Mr. Corey, and that such negligence is imputed to [DOT] under the doctrine of *respondeat superior*."

Thus, the Commission's conclusion that Corey was negligent was based on its consideration of the eyewitness testimony and the physical evidence of the scene, the inferences it drew from the physical evidence, and its determination that Barnard's evidence was more credible and entitled to greater weight. DOT acknowledges that the Commission's determination that Corey was negligent was supported by Barnard's testimony and Hoffman's testimony regarding his measurements and observations, but contends that the testimony of its witnesses was more reliable. According to DOT, its evidence "overwhelming[ly]" supported a determination that DOT's truck "had the right-of-way because it was in the inside lane of travel immediately before and during the impact." DOT is thus arguing that its evidence was entitled to greater credibility and weight**[Note 1]**. The Commission, however, is the ultimate fact-finding body and the sole judge of the credibility of the witnesses and the weight to be given to their testimony. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000).

It is apparent from the Commission's decision and order that it primarily based its decision on its view of the physical evidence. As our Supreme Court has observed, "[s]ometimes, physical facts at the scene of a collision speak louder than the testimony of a witness or witnesses." *State v. Hancock*, 248 N.C. 432, 434, 103 S.E.2d 491, 493 (1958). Indeed, "[a]s a great trial lawyer once said, 'We better know there is a fire whence we see much smoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot.'" *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992) (quoting *Unsent Letter from Abraham Lincoln to J.R. Underwood & Henry Grider* (Oct. 26, 1864), in *The Quotable Lawyer* 323 (Schrager & Frost eds. 1986)). *See also Headley v. Williams*, 150 N.C.

App. 590, 593, 563 S.E.2d 630, 632 (2002) ("There are differing inferences which may be drawn from the various skid and gouge marks found at the scene and from the damage to the motorcycle and to defendant's automobile; although the opinions of the reconstruction witnesses based upon the physical evidence are admissible as helpful to a jury in understanding such evidence, the weight and credibility to be given to those opinions is for the jury.").

The Commission was entitled to decide which evidence to find credible and what weight to give the parties' respective evidence. Since the record contains competent evidence supporting the Commission's findings of fact and those findings support its conclusion of law based on N.C. Gen. Stat. §§20-146.1(a) and 20-146(d)(1), we uphold the Commission's determination that Corey was negligent.

DOT also challenges the Commission's conclusion that Corey was negligent *per se* for violating N.C. Gen. Stat. §20-37.12(a) (2007)**[Note 2]**, which provides that "no person shall operate a commercial motor vehicle on the highways of this State unless he has first been issued and is in immediate possession of a commercial drivers license with applicable endorsements valid for the vehicle he is driving . . . ." The Commission included this conclusion as an alternative basis for its decision: "The Full Commission further concludes that, even had the Full Commission found Mr. Corey's testimony credible, Mr. Corey's driving of a truck pulling a lowboy trailer, while in possession of a Commercial Driver License with a restriction of no trailers, constituted negligence *per se*."

We agree with DOT that, even assuming *arguendo* that a violation of N.C. Gen. Stat. §20-37.12(a) constitutes negligence *per se*, Corey's violation of the statute cannot be a basis for DOT's liability because the record contains no evidence, and the Commission made no finding, that Corey's violation of the statute was a proximate cause of Barnard's injuries. *See* N.C. Gen.

Stat. §143-291(a) (2007) ("If the Commission finds that there was negligence on the part of an officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority *that was the proximate cause of the injury* and that there was no contributory negligence on the part of the claimant or the person in whose behalf the claim is asserted, the Commission shall determine the amount of damages that the claimant is entitled to be paid . . . ." (emphasis added)); *Beaman v. Duncan*, 228 N.C. 600, 604, 46 S.E.2d 707, 710 (1948) (holding that party failed to prove negligence *per se* when record contained no evidence of "causal relationship" between driver's failure to have required license and "injury inflicted").

Nevertheless, this error does not warrant reversal since the Commission only included its conclusion of negligence *per se* under N.C. Gen. Stat. §20-37.12(a) as an *alternative* basis for liability. As we have upheld the Commission's conclusion that Corey was negligent under N.C. Gen. Stat. §§20-146.1(a) and 20-146(d)(1), the Commission's error as to §20-37.12(a) is harmless and does not warrant reversal. *See Vaughn v. N.C. Dep't of Human Res.*, 37 N.C. App. 86, 90, 245 S.E.2d 892, 895 (1978) (holding that appellate courts will not reverse Commission's order for harmless error; "the error must be material and prejudicial"), *aff'd*, 296 N.C. 683, 252 S.E.2d 792 (1979).

III

Finally, DOT contends that Barnard is not entitled to recover under the Tort Claims Act because he was contributorily negligent in causing the collision. DOT argues that Barnard "breached his duty to keep a reasonable lookout, and drive his motorcycle with due caution and circumspection, when he rapidly accelerated into the left-rear portion of [DOT's] Lowboy trailer." The Commission, however, concluded that "Plaintiff is not contributorily negligent in

regard to his injuries" because "Plaintiff's use of the inside lane of Highway 70 westbound was appropriate and justified, [and] Defendant has failed to prove any want of due care on the part of Plaintiff that proximately led to Plaintiff's injuries."

Contributory negligence is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant to produce the plaintiff's injury. *Seay v. Snyder*, 181 N.C. App. 248, 251, 638 S.E.2d 584, 587 (2007). "To establish contributory negligence, a defendant must demonstrate: '(1) a want of due care on the part of the plaintiff; and (2) a proximate connection between the plaintiff's negligence and the injury.'" *Id.* (quoting *Whisnant v. Herrera*, 166 N.C. App. 719, 722, 603 S.E.2d 847, 850 (2004)).

In arguing that the Commission erred in concluding that Barnard was not contributorily negligent, DOT simply repeats its assertions that Hoffman's testimony was incompetent, Barnard's testimony was unreliable, and that the Commission should have relied on DOT's evidence supporting a determination that Barnard caused the collision. DOT asserts that "[a]ll the competent evidence in this case shows that Plaintiff approached Defendant's vehicle from the rear and struck the rear left corner of the trailer."

As we have concluded above, however, with respect to the issue of negligence, the Commission's finding otherwise is supported by competent evidence. Competent evidence - including Barnard's testimony, Hoffman's testimony to the extent relied upon by the Commission, and the physical evidence - supports the Commission's finding that Barnard was already traveling in the inner westbound lane and that Corey improperly encroached on that lane, resulting in the collision that caused Barnard's injuries. Since DOT presents no argument on the contributory negligence issue distinct from what it asserted in connection with the negligence

issue, we hold that the Commission did not err in determining that Barnard was not contributorily negligent. Accordingly, we affirm the Commission's decision.

Affirmed.

Judges TYSON and STROUD concur.

Report per Rule 30(e).

NOTES

1. DOT's contention that Barnard's perception was impaired by the lay of the land and his wearing sunglasses related to the credibility of Barnard's testimony and was a question for the Commission to resolve.

2. The Commission referred to N.C. Gen. Stat. §20-31.12(a), but it is apparent that this was a typographical error, and it meant to cite N.C. Gen. Stat. §20-37.12(a).