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NO. COA11-1294
NORTH CAROLINA COURT OF APPEALS

Filed: 21 August 2012

JOHN M. REBER
Plaintiff,

v.

N.C. Industrial Commission
I.C. No. TA-18483

N. C. DEPARTMENT OF CORRECTION,
Defendant.

Appeal by plaintiff from Decision and Order entered 14 July 2011 by the Industrial Commission. Heard in the Court of Appeals 11 June 2012.

The Vincent Law Firm, P.C., by Branch W. Vincent, III, for the plaintiff-appellant.

Roy Cooper, Attorney General, by Adrian Dellinger, Associate Attorney General, for the defendant-appellee.

THIGPEN, Judge.

John Reber ("plaintiff") was an inmate at the Pasquotank Correctional Institution on 18 May 2001. On 17 May 2004, plaintiff filed a negligence action with the North Carolina Industrial Commission ("the Commission") pursuant to the Tort Claims Act. Plaintiff alleged defendant, by and through "Officer Todd and Officers Respass, Jordan and Coppersmith," was

negligent and as a result plaintiff was assaulted by another inmate.

A hearing was held before Deputy Commissioner James Gillen on 22 September 2010. On 7 December 2010, Deputy Commissioner Gillen filed a Decision and Order denying plaintiff's claim. Plaintiff filed notice of appeal to the Full Commission. The Full Commission reviewed the matter and filed a Decision and Order on 14 July 2011 which contained the following findings of fact:

1. At approximately 10:00 p.m. on May 18, 2001, Plaintiff, an inmate in N.C. Department of Correction's (hereafter DOC) custody at Pasquotank Correctional Institution, was stabbed in the eye with a pencil by inmate Larry Stanfield. Inmate Stanfield attacked Plaintiff apparently because Stanfield was mentally unstable and had racist beliefs. Stanfield was a validated member of the "Five Percenter" and/or "Security Threat Group" gangs. These gangs hold tenants [sic] that include a very negative view of Caucasian people. Plaintiff, who is Caucasian, was in an HVAC class with Stanfield. In approximately March 2001 Stanfield did not like the way Plaintiff talked to the HVAC class instructor. In the HVAC class, Stanfield subsequently called Plaintiff a "wizard" and threatened Plaintiff in a general way.

2. Although Plaintiff reported Stanfield's remarks to the HVAC instructor and Plaintiff's unit manager, Plaintiff did not request protective custody or convey a belief that an attack was imminent.

3. Stanfield's cell neighbored Plaintiff's cell. On the evening of May 18, 2001 Plaintiff was attacked by Stanfield and two other inmates in Plaintiff's cell. The three men beat Plaintiff nearly unconscious and stabbed Plaintiff in the left eye with a pencil. The optic nerve in Plaintiff's left eye was crushed by the pencil.

4. Plaintiff alleges that defendant was negligent in failing to prevent inmate Stanfield's May 18, 2001 attack on Plaintiff.

5. The May 18, 2001 incident was investigated by prison personnel. Plaintiff was charged with "provoking an assault" in connection to the assault. Furthermore, the report compiled regarding the May 18, 2001 incident resolved that horseplay led to the incident.

6. Defendant had no reasonable way to predict and/or prevent inmate Stanfield's assault. Notwithstanding Stanfield's words to Plaintiff approximately two months previous, until the attack was underway, inmate Stanfield was not believed to be a threat to assault or injure Plaintiff. The Full Commission finds Plaintiff's assault from inmate Stanfield was not reasonably foreseeable based on the evidence presented.

7. The Full Commission finds that Plaintiff did not present sufficient evidence to establish negligence of any named DOC employee.

The Commission concluded:

7. Given that no duty owed to Plaintiff was breached by any named defendant, Plaintiff has failed to prove any negligence on the

part of any named officer, employee, involuntary servant, or agent of the State while acting within the scope of his or her office, employment, service, agency, or authority that proximately caused Plaintiff an injury. N.C. Gen. Stat. § 143-291 *et seq.*

Consequently, plaintiff's claim was denied. Plaintiff appealed.

On appeal, plaintiff argues the Commission committed reversible error when it found as fact and concluded as a matter of law that the evidence was insufficient to show that defendant was negligent. "Appellate review is limited to two questions of law: (1) whether there was any competent evidence before the Commission to support its findings of fact; and (2) whether the findings of fact of the Commission justify its legal conclusion and decision." *Taylor v. North Carolina Dep't of Correction*, 88 N.C. App. 446, 448, 363 S.E.2d 868, 869 (1988) (citation omitted). "The Industrial Commission's findings of fact are conclusive on appeal when supported by competent evidence, even though there is evidence which would support findings to the contrary." *Id.*

To prevail on a claim of negligence under the Tort Claims Act, the plaintiff must establish: "(1) that defendant owed plaintiff a duty of care under the circumstances; (2) that actions or omissions by at least one of the named employees of defendant constituted a breach of that duty; (3) that the breach was the actual and

proximate cause of plaintiff's injury; and
(4) that plaintiff suffered damages."

Simmons v. Columbus County Bd. of Educ., 171 N.C. App. 725, 730, 615 S.E.2d 69, 74 (2005) (quoting *Davidson v. Univ. of N.C. at Chapel Hill*, 142 N.C. App. 544, 553, 543 S.E.2d 920, 926 (2001)).

It is clear from the record that the Commission's findings of fact are supported by competent evidence. Plaintiff testified that he informed Mr. Partika, the HVAC class instructor, and Officer Todd that inmate Stanfield told plaintiff that the way plaintiff talked to Mr. Partika made Stanfield want to maim plaintiff. However, he also testified that after this statement was made by inmate Stanfield he did not request protective custody or communicate a belief that an attack was imminent.

The findings of fact indicate: 1) The threat was general and defendant "had no reasonable way to predict" an assault; 2) inmate Stanfield's words to plaintiff were made "approximately two months" prior to the incident; and 3) "[p]laintiff did not request protective custody or convey a belief that an attack was imminent."

"[D]efendant had a duty of reasonable care to protect the plaintiff from reasonably foreseeable harm." *Taylor*, 88 N.C.

App. at 451, 363 S.E.2d at 871. Here, inmate Stanfield's threat was made approximately two months prior to the assault on 18 May 2001. No evidence was presented to suggest that an attack by inmate Stanfield was imminent and plaintiff did not request protective custody. Accordingly, we find the Commission's findings support the conclusion that no duty owed to Plaintiff was breached by defendant, and that plaintiff has failed to prove negligence. Thus, the Decision and Order of the Commission is affirmed.

AFFIRMED.

Chief Judge Martin and Judge Steelman concur.

Report per Rule 30(e).