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NO. COA09-1101

NORTH CAROLINA COURT OF APPEALS

Filed: 1 June 2010

LUCHINA C. EVERETT, Individually,
and JOHN ROBERT EVERETT, JR.,
Administrator of the Estate of
ANANASHA JASMINE EVERETT,
Plaintiffs,

v.

N.C. DEPARTMENT OF TRANSPORTATION,
Defendant.

North Carolina
Industrial Commission
I.C. Nos. TA-18993
TA-18994

Appeal by plaintiffs from Decision and Order entered 15 May 2009 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 February 2010.

Jeremy K. McDonald for plaintiff appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General William H. Borden, for defendant appellee.

HUNTER, JR., Robert N., Judge.

In 2003, Luchina and Ananasha Everett were involved in a car accident. Ananasha, Luchina's daughter, was killed in the wreck, and Luchina suffered numerous injuries. On 16 March 2005, Luchina and Ananasha's estate ("plaintiffs") filed suit against the North Carolina Department of Transportation ("defendant") alleging that the car accident was caused by defendant's failure to maintain the shoulder of the road. Following a hearing on plaintiffs' sole

claim of negligence, the deputy commissioner awarded plaintiffs \$575,000 in combined damages.

Defendant appealed to the Full Commission of the North Carolina Industrial Commission (the "Commission"), which reversed the deputy commissioner's decision. The Commission found that defendant did not breach its duty to plaintiff and that the condition of the road shoulder did not proximately cause plaintiffs' accident. Plaintiffs appeal the Commission's decision to this Court, and argue that the Commission erred by: (1) finding that defendant did not have notice of the dangerous shoulder, (2) finding that defendant did not breach its duty to plaintiffs, (3) finding that the road shoulder did not proximately cause plaintiffs' damages, and (4) concluding as a matter of law that defendant was not negligent toward plaintiffs.

After review, we conclude that the Commission's finding of fact that the accident was not proximately caused by the road shoulder is supported by competent evidence. Accordingly, we affirm the Decision and Order of the Commission and decline to address plaintiffs' further assignments of error.

I. BACKGROUND

On 17 March 2003, Luchina and Ananasha were traveling south on a two-lane road called Piney Green Road in Jacksonville, North Carolina. As they approached a curve in the road, Luchina noticed an oncoming vehicle encroaching the center line. Luchina swerved her vehicle to the right of the lane to avoid the encroaching vehicle. In taking this action, the car's tires briefly left the

roadway, and Luchina had to redirect the car back to the pavement. Luchina exited the road and entered the shoulder just south of a driveway located at 1236 Piney Green Road. In the process of leaving and re-entering the roadway, Luchina lost control of her car, crossed the center line, and collided with another oncoming vehicle. Ananasha was killed on impact, and Luchina suffered numerous lacerations to her body, renal contusions, and a broken hip.

Plaintiffs filed suit against defendant on 16 March 2005, alleging that defendant was negligent in its maintenance of the shoulder of the road at the scene of the collision. Plaintiffs claimed that a rut immediately adjacent to the pavement, in front of a mailbox and more than five inches deep, caused Luchina to lose control of her vehicle just prior to crossing into oncoming traffic. Defendant answered by raising several defenses, including lack of proximate cause and failure to show breach of a duty. At trial, plaintiff and defendant offered a plethora of evidence regarding the condition of the road's shoulder and whether the edge of the pavement near the mailbox proximately caused Luchina to lose control of the vehicle.

Plaintiffs' Evidence

Luchina testified that she was in control of the vehicle until it left the pavement. When she attempted to correct her tires back to the roadway, she stated that it felt as if the tires were slipping against the pavement. This resistance against the edge of the road was Luchina's last recollection before the collision.

George Edwards was following directly behind Luchina at the time the accident occurred, and he corroborated Luchina's claim that an oncoming car was drifting toward the center line. He also moved his car to the right of the lane to avoid the car, but did not leave the pavement. In observing plaintiffs' re-entry onto the road from the shoulder, Mr. Edwards testified:

A. . . . And as [Luchina] went off, I noticed she must have been trying to get back on because I noticed her back right tire was spinning real fast like she had gunned her car, like she accelerated . . . , which means to me that she had turned back to the left and tried to get back on the road, and instead of her front wheels getting on the road, they were just sort of slipping on the edge of the asphalt because it had been wet. And it was just sliding along, and the back - the back right-hand tire was spinning because it wasn't getting - taking ahold

Q. Okay.

A. ---wasn't getting traction. And as she was moving on down, all of a sudden, by the time I'd say when the back tires caught up with where the front tire was, it got a grip and it just - she had accelerated so much that it just threw her across the road.

Q. When you say it threw her across the road, can you describe that?

A. Slingshot her.

. . . .

Q. And could you see her front tires at all?

A. No, huh-uh, I couldn't see the front tires. But in my mind, I just - I just know that they were turning in such a position that her left - left front tire was pushing her along, and her right was

wanting to push, but it was slipping or spinning, and the front tire is spin - I mean just rubbing along, and it wasn't getting any traction.

Q. Are you showing kind of a situation where the front tire is pressing against the asphalt?

A. Yeah, it was pressing against the asphalt, and it just won't - just won't make a bite to get up---

Q. Won't climb up?

A. ---on the asphalt.

Ernest Mallard, plaintiffs' expert in forensic engineering and accident reconstruction, testified that the shoulder drop-off on Piney Green Road caused plaintiffs' accident. Mr. Mallard stated that the marks left on the road from plaintiffs' vehicle showed that plaintiffs' tires suddenly redirected toward oncoming traffic upon meeting the edge of the pavement. Mr. Mallard also constructed a computer model to demonstrate the resistance Luchina encountered in trying to overcome the drop-off next to the road.

Defendant's Evidence

Contrary to Luchina's and Mr. Edwards' claims that the tires of the car were rubbing against the curb prior to re-entry onto the roadway, a field sketch of the accident scene by Officer H.A. Hiatt, Jr., showed that plaintiffs' car traveled in an arc on the dirt shoulder. Officer Hiatt, in his report, did not mention that the road edge contributed to the accident. Instead, Officer Hiatt wrote that plaintiffs' car "traveled off the right side of [Piney Green Road]" and then Luchina "overcorrected her steering, causing the vehicle to slide out of control."

Michael Sutton, defendant's expert in automobile accident reconstruction, opined before the Commission that the pavement edge at the collision site was not related to plaintiffs' accident. In responding to Mr. Mallard, plaintiffs' expert, Mr. Sutton testified in relevant part:

Q. . . . Is there anything in [Mr. Mallard's deposition exhibits] that you feel would [be] useful in explaining your testimony today?

A. Some of this I've already gone over, which is just the general description of what is the reason for pavement-edge drop-off. And the one thing that I don't think he explained clearly is just the importance of this whole scrubbing issue. He did explain what scrubbing i[s] and talked about it in his deposition, but for example, if you look on page seventy-four, tab B, this is the document - it's by the Department of Transportation on pavement-edge drop-offs.

Q. Is that the U.S. department or---?

A. Yes. It talks about - it says, "The method developed by Patel and counsel in 2004 included a filter requiring that some indication of scrubbing to exist for the crash to be considered edge drop-off-related." And again, that's - just the point I'm getting to is that a car can enter the shoulder and lose control especially if it's a loose shoulder. The end result looks the same. The car comes across the road and gets into a wreck with an oncoming car, but the question is that, Is it edge-drop-off-related? And you have to have scrubbing for it to be edge-drop-off-related. There are plenty of other ways that you can lose control by steering onto the shoulder that are not edge drop-off-related, but that's again, an important point just to think about in this case, at least, in the area that was photographed and measured by the trooper, that *there's no interaction of*

the car with the drop-off that causes it to lose control.

(Emphasis added.)

In giving more weight to defendant's evidence on the issue of proximate cause, the Commission found in favor of defendant.

II. ANALYSIS

A. *Jurisdiction and Standard of Review*

On review from the Commission, this Court's duty goes no further than determining: "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Hassell v. Onslow Cty. Bd. of Educ.*, 362 N.C. 299, 305, 661 S.E.2d 709, 714 (2008) (citation omitted). If the findings of fact are supported by competent evidence, they are conclusive on appeal though other evidence in the record may support a contrary finding. *Id.* Findings by the Commission may only be reversed on appeal where there is a complete lack of competent evidence to support them. *Munns v. Precision Franchising, Inc.*, ___ N.C. App. ___, ___, 674 S.E.2d 430, 433 (2009). "Competent evidence is evidence 'that a reasonable mind might accept as adequate to support the finding.'" *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (quoting *Andrews v. Fulcher Tire Sales & Serv.*, 120 N.C. App. 602, 605, 463 S.E.2d 425, 427 (1995)).

The Commission is the finder of fact, and "is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000) (citation omitted). "[O]n appeal,

this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. Th[is] [C]ourt's duty goes no further than to determine whether the record contains any evidence tending to support the finding.'" *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted). Conclusions of law are reviewed *de novo*. *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004).

This appeal is properly before this Court from a final decision of the Commission pursuant to N.C. Gen. Stat. § 7A-29(a) (2009).

B. Proximate Cause

Plaintiffs argue that the Commission erred in finding that the shoulder drop-off near 1236 Piney Green Road did not proximately cause the accident. Plaintiffs claim that the Commission erred in its articulation of the law on proximate cause, because the Commission did not consider in its Decision and Order whether the drop-off was "a" proximate cause as opposed to "the" proximate cause. We do not agree.

Proximate cause is an issue of fact to be determined solely by the finder of fact. *Acosta v. Byrum*, 180 N.C. App. 562, 569, 638 S.E.2d 246, 251 (2006) ("proximate cause is a factual question").

Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). "Causation is an inference of fact to be drawn from other facts and circumstances." *Turner v. Duke University*, 325 N.C. 152, 162, 381 S.E.2d 706, 712 (1989). By a preponderance of the evidence, a plaintiff must prove that "[t]he breach of duty must be the cause of the damage. The fact that the defendant has been guilty of negligence, followed by an injury, does not make him liable for that injury . . . unless the connection of cause and effect is established[.]'" *Carter v. Realty Co.*, 223 N.C. 188, 192, 25 S.E.2d 553, 555 (1943) (emphasis added) (citation omitted); see *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541-42, 463 S.E.2d 259, 261 (1995) (plaintiff must prove causation by a preponderance of the evidence), *aff'd per curiam*, 343 N.C. 302, 469 S.E.2d 552 (1996).

On the issue of proximate cause, the Commission made the following findings of fact:

15. Whether a shoulder drop off caused Ms. Everett to lose control of her vehicle depends on whether there was scrubbing of her tires with the pavement. The evidence in this case does not show that plaintiffs' tires were scrubbing against the pavement. Moreover, the evidence shows that Ms. Everett lost control of her vehicle before she left the pavement when her vehicle tires began yawing (sliding sideways). If the shoulder drop off had caused plaintiffs to lose control of their vehicle, plaintiffs' tire marks would originate from the edge of the pavement, not on the shoulder as they do.

16. As the testimony of Mr. Mallard was speculative, the Full Commission gives greater weight to the testimony of Mr. Sutton.

17. The Full Commission finds that the greater weight of the evidence shows that [the] shoulder drop off was not **the proximate** cause of plaintiffs' March 17, 2003 vehicular accident.

(Emphasis added.)

Plaintiffs challenge these findings on two grounds: (1) the Commission's findings are not supported by competent evidence, and (2) the Commission erred in its articulation of the legal standard of proximate cause in Finding of Fact 17.

Considering plaintiffs' first argument, we need not expound further on the evidence underpinning these findings. As the finder of fact, the Commission was the sole judge of the weight to be given the evidence on the factual issue of proximate cause. The Commission chose to give greater weight to Officer Hiatt's accident report and Mr. Sutton's expert testimony - items of evidence showing that the pavement edge was not a factor at all in Luchina's losing control of the car. The testimony of Luchina, Mr. Edwards, and Mr. Mallard certainly support plaintiffs' contrary contention, however, it nevertheless remains outside the scope of this Court's review to reweigh the evidence¹ presented to the Commission. Mr. Sutton's testimony and Officer Hiatt's accident report are clearly the kind of evidence "that a reasonable mind might accept as adequate to support" a finding of fact. *Andrews*, 120 N.C. App. at

¹ Plaintiff also contends that Mr. Sutton's testimony was not "credible" because Mr. Sutton testified against the State in a prior case involving an alleged pavement edge drop-off car accident. On its face, this argument asks this Court to place greater weight on plaintiffs' evidence in contravention of our standard of review. We therefore decline to address this argument.

605, 463 S.E.2d at 427. Thus, under our standard of review, we must uphold the Commission's factual findings on proximate cause given that they are supported by competent evidence.

Regarding plaintiffs' second argument that the Commission misapplied the law on the issue of proximate cause in making its findings, section 143-346(a) of this State's General Statutes provides in relevant part:

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[.]

N.C. Gen. Stat. § 143-291(a) (2009) (emphasis added). Comparing this statute to Finding of Fact 17, it is apparent that the Commission applied the standard outlined in this section.

We agree with plaintiffs that the State's negligence need not be the sole proximate cause in order to establish a cause of action under the State Tort Claims Act. See *Trust Co. v. Board of Education*, 251 N.C. 603, 609, 111 S.E.2d 844, 849 (1960) ("[I]t was not the intent of the Legislature to limit liability under the Tort Claims Act to situations where the negligence of an employee was the sole proximate cause of the injury or damages inflicted."). However, the language in section 143-291 shows that the Commission did not err *per se* in using "the" rather than "a" as the definite article in its Decision and Order, because "the" is the definite

article prescribed by statute. Moreover, looking at the Commission's conclusions of law in light of the evidence presented, the record shows that the Commission applied the correct law on the issue of proximate cause:

3. In order to recover on a civil claim for negligence, a claimant must prove: (1) the existence of a duty to her; (2) a breach of that duty by the defendant (the named employees thereof in a tort claim); (3) injury sustained, and (4) that the injury sustained was **a proximate** result of the breach of duty. Plaintiffs have the burden of proof on all these elements and must prove her case by a preponderance of the evidence. The evidence must be sufficient to raise more than speculation, guess, or mere possibility.

. . . .

6. Although defendant had a duty to plaintiffs to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of plaintiffs, plaintiffs failed to prove by the greater weight of the evidence that defendant breached a duty of care to plaintiffs or that plaintiffs' injuries were proximately caused by a breach of duty. Therefore, plaintiffs have failed to prove negligence.

(Citations omitted and emphasis added.)

These conclusions of law, in context, show that the Commission gave due consideration as to whether the road edge was "a" proximate cause rather than just "the" sole proximate cause. The Commission simply did not agree with plaintiffs' position, and gave greater weight to defendant's competent evidence that the road's shoulder did not contribute to the accident. Therefore, since the Commission relied on competent evidence in its findings on

proximate cause and those findings support the Commission's conclusions of law, they must be upheld on appeal. Plaintiffs' assignments of error as to the Commission's findings of fact and conclusions of law on proximate cause are overruled.

C. Plaintiffs' Further Assignments of Error

Plaintiffs assign error to several other portions of the Commission's Decision and Order. However, plaintiffs' sole claim against the State is for negligence. Without a finding of proximate cause, plaintiffs cannot carry their burden of proving their cause of action. Accordingly, we decline to address plaintiffs' further assignments of error on the factual issues of notice and breach of duty and the correlating conclusions of law.

III. CONCLUSION

The Commission's findings of fact on the issue of proximate cause are supported by competent evidence, and the findings support the Commission's conclusion of law that plaintiffs have failed to carry their burden of proof on their negligence claim. Accordingly, the Decision and Order of the Commission must be

Affirmed.

Judges JACKSON and ERVIN concur.

Report per Rule 30(e).