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NO. COA10-1462
NORTH CAROLINA COURT OF APPEALS

Filed: 5 July 2011

CAMERON SCHNEIDER,
a Minor, by and through
CARMEN L. SCHNEIDER,
Guardian *Ad Litem*, and
CARMEN L. SCHNEIDER,
Individually,
Plaintiffs,

v.

North Carolina
Industrial Commission
I.C. No. TA-19424

N.C. DEPARTMENT OF
TRANSPORTATION,
Defendant.

Appeal by plaintiffs from decision and order entered 6 July 2010 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 May 2011.

Collins & Maready, PA, by George L. Collins, for plaintiffs-appellants.

Attorney General Roy Cooper, by Assistant Attorney General Melody R. Hairston, for the State.

HUNTER, Robert C., Judge.

Plaintiffs Cameron Schneider and his mother and guardian *ad litem* Carmen L. Schneider appeal from the Industrial Commission's decision and order denying the Schneiders'

negligence claim against defendant North Carolina Department of Transportation ("DOT"). The Schneiders primarily argue that the Commission erroneously concluded that they failed to establish, as an essential element of their claim, that DOT had actual or constructive notice of the pothole into which Cameron drove his bicycle, breaking his right leg. As the Commission's unchallenged findings establish that DOT did not have notice of the pothole, we affirm.

Facts

On 15 March 2005, Cameron, who was 12 years old at the time, rode his bicycle with several friends along Balsam Road to a grocery store near his home in Jacksonville, North Carolina. After leaving the grocery store, the kids began riding back to a friend's house when one of them realized that he had lost his wallet. Cameron agreed to help look for his friend's wallet, and so he and his friend began riding down Balsam Road, back toward the grocery store. As Cameron was "look[ing] up the hill to see if a car was coming," he "hit [a] pothole" in Balsam Road, fell off his bike, and hurt his right leg. Ms. Schneider took Cameron to the emergency room, where x-rays revealed a fractured right tibia.

On 19 December 2005, Ms. Schneider filed this claim for damages under the Torts Claim Act in the Industrial Commission,

alleging that DOT "negligent[ly] . . . allowed a hazardous condition to exist on Balsam Road for an unreasonable period of time after which [DOT] either knew or should have known that the condition [sic] existed." DOT filed an answer on 10 April 2006, generally denying the Schneiders' claim as well as asserting the defense of contributory negligence. After holding an evidentiary hearing on 9 November 2009, the deputy commissioner entered a decision and order on 8 January 2010 in which the commissioner concluded that DOT had constructive notice of the pothole on Balsam Road and that DOT had "breached a duty of care owed to the [Schneiders]" by failing to properly repair the road. The deputy commissioner further determined, however, that DOT had established that Cameron "was contributorily negligent in failing to see the pothole in his line of travel and avoid contact with it." Consequently, the deputy commissioner denied the Schneiders' claim.

The Schneiders appealed to the Full Commission, which affirmed the deputy commissioner's decision with modifications. The Commission concluded that the Schneiders had failed to establish negligence on the part of DOT based on its "find[ing] that the greater weight of the competent credible evidence fails to show that [DOT] had actual or constructive notice of the

pothole over which [Cameron] Schneider rode his bicycle on March 15, 2005." The Schneiders timely appealed to this Court.

Discussion

"In reviewing a decision of the Industrial Commission in a case arising under the Tort Claims Act, we are limited to addressing (1) whether the Commission's findings of fact are supported by any competent evidence, and (2) whether the findings of fact support the Commission's conclusions of law and decision." *Davidson v. Univ. of N.C. at Chapel Hill*, 142 N.C. App. 544, 552, 543 S.E.2d 920, 925, *disc. review denied*, 353 N.C. 724, 550 S.E.2d 771 (2001). The Commission's findings of fact are binding on appeal if there is any competent evidence to support them, even if there is evidence in the record that might support contrary findings. *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405, 496 S.E.2d 790, 793 (1998). The Commission's conclusions of law are, however, reviewed de novo. *Holloway v. N.C. Dep't of Crime Control & Pub. Safety*, 197 N.C. App. 165, 169, 676 S.E.2d 573, 576 (2009).

On appeal, the Schneiders challenge the Commission's determination that they failed to prove that DOT was negligent. "Negligence is a mixed question of law and fact, and the reviewing court must determine whether the Commission's findings

support its conclusions." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988).

Actions to recover for negligence under the Tort Claims Act "are to be determined under the same rules as those applicable to litigation between private individuals." *Barney v. Highway Comm.*, 282 N.C. 278, 284, 192 S.E.2d 273, 277 (1972); N.C. Gen. Stat. § 143-291 (2009). In order to set out a *prima facie* case of negligence, the Schneiders were required to establish: (1) that DOT owed the Schneiders a duty of care under the circumstances; (2) that actions or omissions by at least one of the named employees of DOT constituted a breach of that duty; (3) that the breach was the actual and proximate cause of the Schneiders' injuries; and (4) that the Schneiders suffered damages as a consequence of that breach. *Davidson*, 142 N.C. App. at 553, 543 S.E.2d at 926.

With respect to the first element, N.C. Gen. Stat. § 143B-346 (2009) provides that "[t]he general purpose of the Department of Transportation is to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods as provided for by law." This Court has held, consistent with N.C. Gen. Stat. § 143B-346, that DOT owes a "duty to the general public . . . to

plan, design, locate, construct and maintain the public highways in the State of North Carolina, with reasonable care." *Phillips v. N.C. Dep't of Transp.*, 200 N.C. App. 550, 560-61, 684 S.E.2d 725, 732 (2009) (internal quotation marks omitted); *Reid v. Roberts*, 112 N.C. App. 222, 227, 435 S.E.2d 116, 120-21 (negligence action; citing § 143B-346 for proposition that "[t]he duty owing to the public to maintain highways falls upon the DOT"), *disc. review denied*, 335 N.C. 559, 439 S.E.2d 151 (1993). While DOT "is not an insurer of the safety of travellers" on the state's public highways, it does have a duty to "exercis[e] ordinary care to maintain [the highways] . . . in a condition reasonably safe for those who use them in a proper manner." *Smith v. Hickory*, 252 N.C. 316, 318, 113 S.E.2d 557, 559 (1960).

However,

[l]iability arises only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect in the street . . . and the injury: he must also show that the [defendant] knew, or by ordinary diligence, might have known of the defect, and the character of the defect was such that injuries to travellers using its street . . . in a proper manner might reasonably be foreseen.

Id.; accord *Phillips*, 200 N.C. App. at 558, 684 S.E.2d at 731

("The happening of an injury does not raise the presumption of

negligence. There must be evidence of notice either actual or constructive.'" (quoting *Willis v. City of New Bern*, 137 N.C. App. 762, 765, 529 S.E.2d 691, 693 (2000)).

"[N]otice may be either actual, which brings the knowledge of a fact directly home to the party, or constructive, which is defined as information or knowledge of a fact imputed by law to a person (although he may not actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it."

Phillips, 200 N.C. App. at 558, 684 S.E.2d at 731 (quoting *State v. Poteat*, 163 N.C. App. 741, 746, 594 S.E.2d 253, 255-56, *disc. review denied*, 358 N.C. 548, 599 S.E.2d 915-16 (2004)).

With respect to whether DOT had notice of the pothole on Balsam Road over which Cameron rode his bicycle prior to the incident on 15 March 2005, the Commission found:

1. [The Schneiders] allege that on March 15, 2005, [Cameron] Schneider suffered a broken leg while riding his bicycle on Balsam Road in Onslow County, North Carolina when he ran into a pothole.

2. At the time of the incident, [Cameron] Schneider was twelve-years old.

3. Carmen Schneider . . . lived in the Balsam Road community prior to and at all times relevant to the incident leading to this civil action.

4. The competent credible evidence establishes that several potholes existed on Balsam Road prior to [Cameron] Schneider's accident, and that repairs were made to the

potholes in the years leading up to [Cameron] Schneider's accident consistent with [DOT] policy and practice.

5. Warren Wethington is County Maintenance Engineer for Onslow County. His testimony establishes that when potholes are reported by citizens, [DOT]'s crews travel to the area to observe the condition and make any necessary repairs. The NCDOT Citizen Action Response System reports entered into evidence by [DOT] indicated that no reports of potholes were received for at least one year prior to [Cameron] Schneider's accident. Furthermore, Carmen Schneider acknowledged that she never contacted [DOT] to report any of the potholes until after the incident occurred.

Based on these evidentiary findings, the Commission ultimately found that "the greater weight of the competent credible evidence fails to show that [DOT] had actual or constructive notice of the pothole over which [Cameron] Schneider rode his bicycle on March 15, 2005." Accordingly, the Commission concluded:

In the instant case, [the Schneiders] alleged that [DOT]'s employees breached a duty by failing to repair potholes on Balsam Road at the time of the incident. However, [the Schneiders] failed to provide sufficient evidence to show that NCDOT had actual or constructive notice of the pothole involved in the incident, and have therefore failed to establish their claims of negligence.

On appeal, the Schneiders contend that "[t]he Industrial Commission erred in concluding that sufficient evidence was not

presented to show that N.C. DOT had actual or constructive notice of the hazardous condition of Balsam Road." The Schneiders, however, fail to challenge any of the Commission's findings of fact with respect to whether DOT had notice of the pothole over which Cameron rode his bike. The findings are, consequently, binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). The Commission's uncontested findings support its conclusion that the Schneiders failed to establish that DOT had notice – actual or constructive – of the pothole prior to Cameron's riding his bike over it. *See Phillips*, 200 N.C. App. at 559-60, 684 S.E.2d at 732 (concluding that Commission's "unchallenged findings" that plaintiff did not report a "drop-off" between roadway and shoulder to DOT prior to accident and that DOT, if it had been notified of a drop-off, would have inspected and repaired the hazard or put out warning signs until repairs could be made were sufficient to establish that "DOT lacked both actual or constructive notice of the drop-off").

The Schneiders nonetheless point to evidence in the record which they contend would support a finding that DOT did, in fact, have notice of the pothole. As this Court has explained with respect to the Commission's findings in cases arising under the Tort Claims Act, "the existence of contrary evidence is

irrelevant if there [i]s also competent evidence to support the Full Commission's findings." *Smith v. N.C. Dep't of Transp.*, 156 N.C. App. 92, 98, 576 S.E.2d 345, 350 (2003). Here, however, the sufficiency of the evidence to support the Commission's findings is not at issue on appeal as the Schneiders did not contest any of the Commission's findings on the issue of notice.

The Schneiders also contend that "[t]he Industrial Commission erred in adopting [the] Deputy Commissioner['s] . . . conclusion of law that the minor plaintiff was contributorily negligent." The Commission, in its decision and order, explained that "[d]ue to [the Schneiders]' failure to provide sufficient evidence to show that NCDOT had actual or constructive notice of the pothole involved in the incident, [it would] not reach the issue of whether [Cameron] Schneider was contributorily negligent in striking the pothole with his bicycle." Thus, contrary to the Schneiders' contention, the Commission, by explicitly not addressing the issue of contributory negligence, necessarily did not adopt the deputy commissioner's "decision" on the issue. This argument is overruled.

Affirmed.

Judges BRYANT and McCULLOUGH concur.

Report per Rule 30(e).