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NO. COA12-1254
NORTH CAROLINA COURT OF APPEALS

Filed: 4 June 2013

RICHARD BERNHARDT,
Plaintiff,

v.

North Carolina Industrial
Commission
No. TA-20918

NORTH CAROLINA DEPARTMENT OF
PUBLIC SAFETY/HIGHWAY PATROL,
Defendant.

Appeal by defendant from Decision and Order of the Full Commission entered 31 July 2012 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 March 2013.

Law Offices of D. Hardison Wood, by Adam A. Smith, for plaintiff-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majundar, for defendant-appellant.

BRYANT, Judge.

Where there exists competent evidence in the record to support the findings of fact and conclusions of law, we affirm the Decision and Order of the Industrial Commission concluding that plaintiff was injured as a result of the negligence of defendant.

Facts and Procedural History

On 17 June 2007, plaintiff Richard Bernhardt sustained a dislocated elbow during his arrest by Trooper Matthew Cape ("Trooper Cape") of defendant North Carolina State Highway Patrol. Plaintiff had been observed by Trooper Cape at approximately 3:00 a.m., driving erratically and failing to obey several traffic laws, including driving above the speed limit. Trooper Cape followed plaintiff to the Craven Regional Medical Center where plaintiff had brought his wife who was suffering from complications due to cancer. While investigating his suspicions that plaintiff had been driving while impaired, forceful contact occurred between Trooper Cape and plaintiff that led to plaintiff's injury.

On 6 October 2008, plaintiff filed an affidavit with the North Carolina Industrial Commission ("Commission") alleging \$75,000.00 in damages under the Tort Claims Act pursuant to N.C. Gen. Stat. § 143-291, *et seq.* Plaintiff alleged that he had been damaged by the negligent conduct of Trooper Cape in effectuating an arrest of plaintiff on 17 June 2007. Plaintiff also alleged that Commander of the North Carolina State Highway Patrol, W. Fletcher Clay ("Commander Clay"), was negligent in failing to adequately train, instruct, and retain Trooper Cape.

On 13 April 2011, the Commission entered an order removing the individual parties, Trooper Cape and Commander Clay, from the case caption on the grounds that the Commission lacks jurisdiction to hear claims against individuals and leaving the North Carolina State Highway Patrol as sole defendant.

Following a hearing on 23 September 2011, a Deputy Commissioner entered a Decision and Order denying plaintiff's claim for compensation under the Tort Claims Act on 4 January 2012. The 4 January 2012 Decision and Order concluded that

Trooper Cape was authorized . . . to [e]ffect an arrest of plaintiff who he reasonably knew had committed numerous moving traffic violations, was driving under the influence, had been verbally abusive to the Trooper and had engaged in some physical contact with the Trooper, however minor. Once the arrest was being attempted, plaintiff's failure to cooperate and his continuing resistance to Trooper Cape's orders justified the force used to effectuate the arrest.

As a result, the Deputy Commissioner further concluded that plaintiff failed to show his injuries were the result of negligence by Trooper Cape and denied compensation to plaintiff. Plaintiff appealed the Decision and Order to the Full Commission.

Following a hearing on 5 June 2012, the Full Commission, on 31 July 2012, entered a Decision and Order reversing the

Decision and Order of the Deputy Commissioner and concluding that:

3. As a direct and proximate result of the negligence of [defendant]'s employee, plaintiff suffered a traumatic injury to his right elbow. Plaintiff is entitled a reasonable value for damages for any past, present or future injury including amounts for a) medical expenses; b) loss of earnings; c) pain and suffering; d) permanent injury; and e) any other type of damage supported by the evidence. N.C. Gen. Stat. § 143-291 *et seq.*

Plaintiff was awarded \$8,594.67 in compensatory damages and defendant was ordered to pay \$8,000.00 to plaintiff's counsel for attorney's fees.

From the Full Commission's 31 July 2012 Decision and Order, defendant appeals.

The sole issue on appeal is whether the Industrial Commission's findings of fact and conclusions of law support its decision that plaintiff was injured as a result of the negligence of defendant.

The North Carolina Tort Claims Act provides that the

Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service,

agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C. Gen. Stat. § 143-291(a) (2011).

The standard of review for an appeal from a decision of the Commission under the Tort Claims Act is "for errors of law only under the same terms and conditions as govern appeals in ordinary civil actions, and the findings of fact of the Commission shall be conclusive if there is any competent evidence to support them." N.C. Gen. Stat. § 143-293 (2011). Thus, "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. We "[do] not have the right to weigh the evidence and decide the issue on the basis of its weight. [Our] duty goes no further than to determine whether the record contains any evidence tending to support the finding."

Turner v. N.C. DOT, __ N.C. App. __, __, 733 S.E.2d 871, 874 (2012) (citations omitted).

The Full Commission made the following pertinent findings of fact which set out the actions of plaintiff and Trooper Cape:

1. On June 16, 2007, plaintiff was living with his wife in New Bern, North Carolina. On that date, plaintiff and his wife entertained dinner guests in their home, during which plaintiff consumed some amount of wine. After the guests left, plaintiff

and his wife retired for the night.

2. At approximately 3:00 a.m. on the morning of June 17, 2007, plaintiff awoke to find his wife, who was suffering from cancer, running a significant fever. He telephoned his wife's oncologist who recommended getting Mrs. Bernhardt to the hospital. Plaintiff, still intoxicated, decided to transport his wife himself.

3. During the trip to the hospital, plaintiff exceeded the speed limit and committed several moving violations, including running red lights and stop signs. Plaintiff was observed by Trooper [Cape] and by Deputy Daniel Garden of the Craven County Sheriff's Office, both of whom began to follow plaintiff to the hospital in their individual patrol cars.

4. Upon arrival at Craven Regional Hospital, plaintiff, Trooper Cape, and Deputy Garden all exited their vehicles. Trooper Cape approached plaintiff on the driver's side of plaintiff's vehicle. Plaintiff turned away from Trooper Cape and walked around the front of his vehicle to assist Mrs. Bernhardt from the front passenger seat. Trooper Cape followed, but made no apparent attempt to stop plaintiff. While they walked around the car, plaintiff verbally berated Trooper Cape.

5. Hospital personnel brought out a wheelchair for Mrs. Bernhardt, and plaintiff assisted her into the chair at the rear driver's side of his vehicle. While he did so, Trooper Cape stood a few feet away, with plaintiff between him and the wheelchair. Plaintiff was approximately one step away from Trooper Cape.

6. As hospital personnel took Mrs. Bernhardt

into the hospital, plaintiff turned and squared his shoulders to face Trooper Cape. As he turned, Trooper Cape stepped towards plaintiff closing the distance between the two to a few inches. Plaintiff was a few feet from the back of his car.

7. Trooper Cape testified that he considered it important to give plaintiff five to six feet of space to give himself room to react in case plaintiff decided to attack him. Trooper Cape also testified that he wanted to give plaintiff space to comply with his verbal commands.

8. Plaintiff's testimony, *and the videotape of the incident taken from Trooper Cape's vehicle*, demonstrate, and the Commission finds as fact; that Trooper Cape did not position himself five to six feet away from plaintiff and that plaintiff did not close the gap between them.

9. Trooper Cape's testimony that plaintiff approached him "in a hostile manner, stormed towards" him until he was only a foot away from Trooper Cape is not credible in light of the evidence.

10. Trooper Cape's testimony that plaintiff made an exaggerated movement towards him with his elbow and arm and intentionally struck him with his "shoulder/elbow area in my abdominal/chest region" is not credible in light of the evidence.

11. Plaintiff attempted to remove his driver's license from his wallet. In doing so, plaintiff did not make intentional, forceful contact with Trooper Cape that could be reasonably construed as constituting an assault.

12. If plaintiff made any contact with

Trooper Cape, it was incidental and unintentional, and was not an assault.

13. If plaintiff made any contact with Trooper Cape, it was the result of Trooper Cape placing himself in very close proximity to plaintiff and instructing plaintiff to show him his identification.

14. Trooper Cape had no reason to believe, based on any perceived or actual physical contact with plaintiff, that plaintiff had assaulted him or posed any risk of future assault.

15. Trooper Cape placed plaintiff under arrest and attempted to subdue him using physical, nonlethal force.

16. Plaintiff did not intentionally resist arrest.

17. Plaintiff acted reasonably under the circumstances and attempted to place his hands on the trunk of his car to protect his face from being pushed into the trunk of his vehicle by Trooper Cape.

18. Plaintiff's arrest took place suddenly and plaintiff did not have time to understand or comply with any verbal instructions from Trooper Cape.

19. Trooper Cape nonetheless tugged at plaintiff's arms, forcing them behind plaintiff's back, and then kned him in the back of the thigh.

20. Trooper Cape's actions were not reasonable in light of the circumstances.

21. Trooper Cape testified, and the Commission so finds, that applicable guidelines require State Troopers, when

attempting to subdue an individual, to use one level of force above what they are facing.

22. State Troopers are required to comply with their department's written Use of Force Policy.

23. Pages 3-4 of the Use of Force Policy provide that, when lethal force is not required, the amount of force which may be used in subduing an individual must be determined by the surrounding circumstances, including but not limited to:

- a) the nature of the offense,
- b) the behavior of the suspect against whom force is to be used,
- c) actions by third parties who may be present, and
- d) the feasibility or availability of alternative actions.

24. The offense for which Trooper Cape was placing plaintiff under arrest was for suspicion of Driving While Impaired.

25. Trooper Cape did not have reasonable grounds to believe that plaintiff had assaulted him.

26. At the time Trooper Cape determined to arrest plaintiff, Trooper Cape understood that plaintiff had been traveling to the hospital for an emergent medical situation.

27. Trooper Cape had no knowledge of any prior criminal record for plaintiff and did not at that time take any actions to determine whether plaintiff had any criminal record.

28. The area in front of the emergency room was well-lit.

29. At the time of incident, plaintiff was 5' 8" tall, weighed 180 pounds, and was 67 years of age. Trooper Cape was 6' tall, weighed 190 pounds, and was 27 years of age.

30. Trooper Cape testified that he did not have any reason to believe plaintiff had a weapon on his person and that plaintiff appeared to not have any weapon on his person.

31. In addition to Trooper Cape, there were 2 or 3 other law enforcement officers at the scene who could have assisted Trooper Cape if requested, but Trooper Cape never indicated to them he needed assistance.

32. Plaintiff did not in any way threaten Trooper Cape, either verbally or with gestures.

33. Even after plaintiff was placed under arrest and secured in Trooper Cape's vehicle, plaintiff did not raise his voice, curse, threaten anyone, kick or strike at anything, or exhibit a threatening nature in any way.

34. Plaintiff called Trooper Cape "Sonny," but said nothing that Trooper Cape himself considered threatening in nature.

35. Trooper Cape testified that he was trained to use "verbal judo" when confronting suspects, if it is feasible to do so. Trooper Cape determined to not utilize "verbal judo" with plaintiff, but to resort to physical force based on his opinion that plaintiff had assaulted him.

36. It was not objectively or subjectively reasonable for Trooper Cape to believe that plaintiff assaulted him, or to dispense with his training in the methods of "verbal

judo." Trooper Cape's actions were not reasonable when considered in light of the factors set forth in the State Highway Patrol's Use of Force Policy.

37. The Commission finds as fact that plaintiff's actions during the arrest do not constitute contributory negligence.

38. Plaintiff was injured during the altercation with Trooper Cape, and sustained a dislocated elbow due to Trooper Cape's twisting of his arm.

(emphasis added).

Findings of fact 1 through 6, 15, 17, 25 through 35, and 37 through 38 are not challenged by defendant, and thus, are binding on appeal. *Pernell v. Piedmont Circuits*, 104 N.C. App. 289, 292, 409 S.E.2d 618, 619 (1991) ("Plaintiff did not except to this finding; therefore, it is binding on appeal.").

First, defendant argues that findings of fact numbers 7 through 12 and 14 were not supported by competent evidence in the record and were therefore, entered in error. Our review of the record indicates that the challenged findings were supported by competent evidence reflected in testimony and in a videotape of the incident. We note the following portion of Trooper Cape's testimony as it relates to finding of fact number 7:

Q. In [plaintiff's] interaction with you, you stated that he closed about a six-foot gap, from six feet to one foot?

A. Best I can recall, yes, sir.

. . .

Q. Why would it be important to give him five or six feet of space?

A. In case he does decide to turn and attack you or do something like that, you have a bit of reaction room.

Q. So that's within your training, to give somebody space?

A. Yes, sir.

. . .

Q. When you give somebody a command to take out their driver's license, is it important to give them the space to take out their driver's license without making contact with you?

A. Yes, sir.

Finding of fact number 7 is supported by competent evidence in the record consisting of Trooper Cape's own testimony regarding why it was important "to give plaintiff space to comply with his verbal commands."

We note the existence of stipulated exhibit #2, a video recording of the incident.¹ See *Bowman v. Cox Toyota Scion*, __

¹ Stipulated Exhibit #2, a DVD containing a video recording of the actions leading to plaintiff's arrest, was entered in to evidence at the hearing. The recording starts when Trooper Cape followed plaintiff's vehicle to the hospital and ends when plaintiff was arrested. That video recording is part of the

N.C. App. __, __, 737 S.E.2d 384, 390 (2012) (citation omitted) (stating that “[a]ccording to well-established North Carolina law, [v]ideotapes are admissible . . . for both illustrative and substantive purposes.”). The video recording was entered into evidence used by the Full Commission to support many of their findings of fact.

Defendant challenges the Commission’s findings 8-12 and 14 which describe in detail the type of forceful contact exhibited during the arrest of plaintiff. It is clear that in addition to the testimony of Trooper Cape and of plaintiff, the Full Commission relied on actions as recorded by the video.

The video shows that Trooper Cape was not positioned five to six feet away from plaintiff but was rather much closer in proximity to plaintiff – less than one foot away. The video also illustrates that plaintiff did not close the gap between the Trooper and plaintiff, but that they were standing stationary. Trooper Cape testified that “[plaintiff] approached [him] in a hostile manner, stormed towards [him]” and that plaintiff “struck [Trooper Cape] with his shoulder-elbow area in [Trooper Cape’s] abdominal-chest region[.]” However, a review of the video of the incident fails to show that plaintiff

record on appeal.

approached Trooper Cape in a hostile manner and "stormed towards" Trooper Cape. Instead, plaintiff appears to take steps towards Trooper Cape calmly and slowly, stops about a foot away from Trooper Cape, and takes out his wallet. Trooper Cape's testimony that plaintiff made any sort of exaggerated movement towards Trooper Cape with his elbow or that plaintiff intentionally struck Trooper Cape with his shoulder or elbow area in Trooper Cape's abdominal and chest region is not supported by the video.

Based on our review, the video of the incident and testimony in the record serves as competent evidence to support challenged findings of fact 7 - 12, and 14.

Next, defendant argues that findings of fact 13, 16, 18, 19, 20, and 36 are not supported by any evidence and are more appropriately classified as conclusions of law. Competent video evidence in the record supports findings of fact numbers 18 and 19 indicating the manner of arrest. However, we agree with defendant that what the trial court labels as findings of fact numbers 13, 16, 20, and 36 are more appropriately classified as conclusions of law.

A "conclusion of law" is a statement of the law arising on the specific facts of a case which determines the issues between the parties. . . . As a general rule[,] any

determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law. We will review conclusions of law *de novo* regardless of the label applied by the trial court.

Puckett v. Norandal USA, Inc., __ N.C. App. __, __, 710 S.E.2d 356, 359-60 (2011) (citations omitted).

After a thorough review, we hold that the challenged conclusions of law are supported by the Commission's findings of fact. The conclusion of law ("finding of fact number 13") that "[if] plaintiff made any contact with Trooper Cape, it was the result of Trooper Cape placing himself in very close proximity to plaintiff and instructing plaintiff to show him his identification" is supported by the Commission's findings that: Trooper Cape did not position himself five to six feet away from plaintiff; plaintiff did not close the gap between them; plaintiff did not approach Trooper Cape in a hostile manner; plaintiff attempted to remove his driver's license from his wallet; and in removing plaintiff's driver's license from his wallet, plaintiff did not make intentional, forceful contact with Trooper Cape. The Commission's conclusion of law ("finding of fact number 16") that "[p]laintiff did not intentionally resist arrest" is supported by the unchallenged finding that plaintiff attempted to place his hands on the trunk of his car

to protect his face from being pushed into the trunk of his vehicle by Trooper Cape during his arrest. The Commission's conclusion of law ("finding of fact number 20") is supported by all of the foregoing findings of fact. Finally, the Commission's conclusion of law ("finding of fact number 36") is supported by the findings that plaintiff did not approach Trooper Cape in a hostile manner and did not make intentional, forceful contact with Trooper Cape. It is also supported by the testimony of Trooper Cape regarding the Use of Force Policy applicable to State Troopers.

Next, defendant argues that the Commission erred in entering findings of fact 21, 22, and 23 by "ignoring" testimony from several law enforcement personnel that Trooper Cape did not "breach the applicable use of force policies in effect" and that his performance was "entirely appropriate." We are reminded that our review is limited to whether there is any competent evidence to support the Commission's findings of fact and that we do not have the authority to re-weigh the evidence as defendant suggests. "Findings of fact by the Commission, if supported by competent evidence, are conclusive on appeal even though there is evidence which would support a contrary finding." *McGee v. N.C. Dep't of Rev.*, 135 N.C. App. 319, 324,

520 S.E.2d 84, 87 (1999) (citation omitted). Finding of fact 21 is supported by testimony from Trooper Cape:

Q. What are the guidelines that you believe would apply to your use of force in that situation?

A. Our use of force, where - you typically want to use one level of force above what you're being dealt with or what you're facing. . . .

Finding of fact 22 is supported by the following testimony from Trooper Cape:

Q. Trooper Cape, you've heard opposing counsel's motion there about the standard of care. The use of force report that we placed in earlier, the State Highway Patrol policy manual, are there any other standards that you're aware of besides that?

. . .

Q. Is this the use of force policy what you're bound by as a trooper?

A. That's our guideline that outlines how we're supposed to interact, arrest, have any type of use of force situations.

Q. And are you bound to follow that?

A. Yes, sir. And if there's found to be a policy violation, we're usually reprimanded or receive some type of documentation.

Further, finding of fact 23 is supported by defendant's Use of Force Policy, which was stipulated into evidence before the Commission as exhibit #3.

Defendant argues that finding of fact 24 is not supported by the evidence and we agree. Finding of fact 24 provides that

24. The offense for which Trooper Cape was placing plaintiff under arrest was for suspicion of Driving While Impaired.

Here, Trooper Cape testified that he informed plaintiff he was under arrest for assaulting an officer, not for driving while impaired. Although this finding was entered in error, it is irrelevant to the Commission's conclusions of law.

Based on the foregoing, the Commission's 31 July 2012 Decision and Order is affirmed.

Affirmed.

Judges HUNTER, JR., ROBERT N. and MCCULLOUGH concur.

Report per Rule 30(e).