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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-206

Filed: 19 September 2017

From the North Carolina Industrial Commission IC No. TA-23111

ELBA McLAWHORN, Plaintiff,

v.

N.C. DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, Defendant.

Appeal by Plaintiff from Decision and Order entered 5 December 2016 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 7 September 2017.

Dodge Jones Law Firm, LLP, by Robert C. Dodge, for Plaintiff-Appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander G. Walton, for Defendant-Appellee.

HUNTER, JR., Robert N., Judge.

Elba McLawhorn ("Plaintiff") appeals from a Decision and Order filed 5 December 2016 by the Full North Carolina Industrial Commission. We affirm the Commission's Decision and Order.

I. Factual and Procedural Background

On 9 July 2012, Plaintiff filed a Form T-1 (Claim for Damages Under Tort Claims Act) alleging she was injured as a result of a fall that occurred at the North Carolina Aquarium at Pine Knoll Shores. Plaintiff contends Defendant, through its director, Allen Monroe, was negligent in maintaining the common area of the property in a safe condition and in failing to warn visitors of the dangerous condition. Plaintiff alleged damages in the amount of $250,000. On 1 October 2012 Defendant answered, denying Plaintiff's allegations of negligent conduct and asserting Plaintiff was contributorily negligent.

On 27 May 2015, Deputy Commissioner J. Brad Donovan heard Plaintiff's case. The parties stipulated the following facts. On 27 October 2011, Plaintiff visited the North Carolina Aquarium at Pine Knoll Shores for a Halloween event. After parking, Plaintiff walked to the Aquarium among a crowd of people. When she came to a wooden bridge, she fell forward, and fractured her right hip. Her injuries required hip replacement surgery, as well as in-patient physical and occupational therapy at a skilled nursing facility. Plaintiff's medical expenses totaled $22,691.71.

Deputy Commissioner Donovan issued a Decision and Order dated 24 November 2015. The Decision and Order found and concluded Defendant breached a duty of care owed to Plaintiff which resulted in her injuries, and Plaintiff was not contributorily negligent. Deputy Commissioner Donovan awarded Plaintiff $72,691.71 for her medical costs and in compensation for her pain and suffering.

Defendant gave proper notice of appeal to the Full Commission ("the Commission") on 8 December 2015.

The Commission filed its Decision and Order on 5 December 2016. The Commission found the following facts.

Plaintiff, an eighty-eight year old female at the time of the hearing, owned her own beauty salon where she worked over forty hours per week until the date of her injury. She had no prior medical conditions that would affect her ability to walk. Plaintiff had suffered a venous stasis ulcer on her left leg earlier in 2011, however the condition had fully healed prior to the time of Plaintiff's injury.

On 27 October 2011, Plaintiff visited the Aquarium for the first time with her family for the "Trick or Treat Under the Sea" Halloween event. The event is held for two nights and each night approximately 2,000 visitors attend. The Aquarium has several concrete walkways connecting the parking lots to the main entrance. One of the walkways to the main entrance contains a wooden bridge that crosses over a pond. Where the concrete walkway adjoins the wooden bridge there is a one and a half inch vertical disparity between the surface of the walkway and the surface of the bridge. The first wooden board is beveled, or rounded, to accommodate wheelchairs. Due to the board's beveled edge, the resulting vertical disparity between the walkway and the first wooden board of the bridge is approximately one half inch.

Around 5:15 p.m., Plaintiff and her family walked from a parking lot to the main entrance of the Aquarium via one of the concrete walkways. It was a clear,

sunny day. One of Plaintiff's grandsons, Justin Baysden, walked ahead of her. As he stepped onto the wooden bridge, he struck his toe on the first board and stumbled forward. As Justin stumbled forward, Plaintiff also struck her right foot against the edge of the first board. She fell forward, and landed on her right hip.

Plaintiff testified she "didn't pay attention" to the bridge as she was walking, but rather she was looking at the crowd of people around her. Plaintiff further testified she was not distracted by anyone at the time she tripped, she was not talking to anyone, she was not in a hurry, the sun did not obstruct her vision, and there was no trash or debris on the bridge that would have prevented her from seeing the edge of the first board.

Pine Knoll Shores EMS and fire department personnel quickly responded to the scene and transported Plaintiff to Carteret General Hospital. Plaintiff was diagnosed with a displaced right femoral neck fracture, which necessitated hip replacement surgery as well as in-patient physical and occupational therapy.

At the time of Plaintiff's injury, Mr. James Lewis, the Aquarium's security chief, also responded to the scene and prepared an incident report. In his report, Mr. Lewis documented a description of the area where Plaintiff fell, noting the ground was "settling to the right side where visitors approach the bridge." Additionally, he noted the "first board is rounded so that visitors would not trip." Mr. Lewis testified following Plaintiff's fall the security team continued to observe the area for over twenty minutes, and did not notice any other incidents of visitors tripping.

As the Aquarium's security chief, Mr. Lewis inspects the facilities and grounds daily, including the concrete walkway and bridge where Plaintiff fell. He reports unsafe conditions or potential hazards to the appropriate department for handling. Additionally, Mr. Lewis runs a safety subcommittee, which meets once a month for the purpose of addressing any safety concerns throughout the facility. Defendant requires Mr. Lewis to maintain incident reports, noting accidents or injuries occurring at the Aquarium. Mr. Lewis, other security staff, and other employees of Defendant regularly complete the reports.

The safety meeting minutes and the incident reports from January 2008 to September 2011 do not reveal any issue regarding a potential trip hazard where Plaintiff fell. Mr. Lewis testified since he began working at the Aquarium in 2007, there had not been any other incident where someone tripped and fell at the particular spot where Plaintiff was injured. Furthermore, Ms. Cindy Lou Ferguson Meyers, the Aquarium's visitor member services coordinator, testified from the time she commenced working in this position in 2006, she never personally received any report of a tripping or falling incident in the location where Plaintiff fell. Ms. Meyers supervises the security and safety department, and serves on the safety committee as well as the Trick or Treat Under the Sea committee.

In addition to the daily safety inspections and monthly safety meetings, the North Carolina Department of Insurance performs an annual inspection of the Aquarium grounds and facilities. This inspection includes checking for trip hazards

and completing a safety audit. The Association of Zoos and Aquariums also performs a safety inspection every five years as part of the re-accreditation process. The Commission found none of these inspections since 2006 revealed any trip hazards in the location where Plaintiff fell.

Based on this evidence the Commission found "Defendant, through its named employee did not have express or implied knowledge that a hidden hazard existed at the location where Plaintiff fell and under the circumstances in which Plaintiff fell." The Commission further found "Plaintiff fell as a result of her failure to observe any potential open and obvious sight irregularities or hazards in the walkway." The Commission found "[b]ased upon a preponderance of the evidence, any slight changes in the height of the ground were the type of normal, minor irregularities that are to be expected of an outdoor walkway and did not present an unreasonable safety hazard."

Thus, the Commission concluded as a matter of law Plaintiff failed to prove Defendant breached its duty to exercise reasonable care in maintaining its premises. The Commission also concluded Plaintiff failed to prove Defendant had express or implied knowledge the vertical disparity between the walkway and the bridge, combined with the large crowd, would create a trip hazard. Further, Plaintiff did not demonstrate the obvious nature of the defect should be negated by reasonably foreseeable conditions. Therefore, the Commission ultimately concluded Plaintiff failed to satisfy her burden of proof to show Defendant was negligent.

Plaintiff filed notice of appeal of the Commission's Decision and Order to this Court on 16 December 2016.

II. Jurisdiction

This Court has jurisdiction over appeals from the Industrial Commission pursuant to N.C. Gen. Stat. § 7A-29(a) and N.C. Gen. Stat. § 97-86 (2015).

III. Standard of Review

Review of a Decision and Order of the Industrial Commission under the Tort Claims Act "shall be 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 (2015). "As long as there is competent evidence in support of the Commission's decision, it does not matter that there is evidence supporting a contrary finding." *Simmons v. Columbus Cty. Bd. of Educ.*, 171 N.C. App. 725, 728, 615 S.E.2d 69, 72 (2005).

Therefore, in reviewing a decision of 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." *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 405-06, 496 S.E.2d, 790, 793 (1998). The Commission's conclusions of law are reviewed *de novo*. *Starco, Inc. v. AMG Bonding & Ins. Servs.*, 124 N.C. App. 332, 336, 477 S.E.2d 211, 215 (1996).

IV. Analysis

On appeal, Plaintiff contends the Commission erred in three respects: (1) in failing to find and conclude Defendant breached its duty to exercise reasonable care in the maintenance of its premises; (2) in failing to find and conclude Plaintiff has not shown the obvious nature of the defect should be negated by reasonably foreseeable conditions; and (3) in failing to find and conclude Defendant had constructive notice of the dangerous condition. We examine each contention in turn.

Plaintiff first alleges the Commission erred in failing to find and conclude Defendant breached its duty to exercise reasonable care. We disagree.

Under the Tort Claims Act, "negligence is determined by the same rules as those applicable to private parties." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988). Therefore, a plaintiff must demonstrate: "(1) defendant failed to exercise due care in the performance of some legal duty owed to plaintiff under the circumstances; and (2) the negligent breach of such duty was the proximate cause of the injury." *Id.* The North Carolina Supreme Court in *Nelson v. Freeland*, held a landowner owes a duty of "reasonable care in the maintenance of their premises for the protection of lawful visitors." 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998) *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999). However, the court went on to say "we do not hold that owners and occupiers of land are now insurers of their premises. Moreover, we do not intend for owners and occupiers of land to undergo unwarranted burdens in maintaining their premises." *Id.*

This Court has defined a landowner's duty of "reasonable care" as requiring "the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge." *Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 430, 562 S.E.2d 602, 604 (2002). But a landowner is under "no duty to protect a lawful visitor against dangers which are either known to him or so obvious and apparent that they reasonably may be expected to be discovered." *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162, 516 S.E.2d 643, 646 *cert. denied*, 351 N.C. 107, 541 S.E.2d 148 (1999). The North Carolina Supreme Court has held a type of danger visitors should be expected to discover are "[s]light depressions, unevenness and irregularities in outdoor walkways, sidewalks and streets." *Evans v. Batten*, 262 N.C. 601, 602, 138 S.E.2d 213, 214 (1964). The court stated such conditions "are so common that their presence is to be anticipated by prudent persons." *Id.*

Yet, in light of *Evans* the court later noted, "none of our prior cases . . . establish a rule that a plaintiff can never state a valid case for recovery based upon tripping on a sidewalk." *Pulley v. Rex Hosp.*, 326 N.C. 701, 706, 392 S.E.2d 380, 384 (1990). Instead the facts must be considered in their totality in order to determine whether a defendant breached his duty of care. For example, a court may consider "the nature of the defect in the sidewalk, the lighting at the time of the accident, and whether any other reasonably foreseeable conditions existed which might have distracted the attention of one walking on the sidewalk." *Id.*

Upon review of the Commission's Decision and Order this Court does not reweigh the evidence to determine whether it is capable of supporting other findings of fact and conclusions of law. Rather, we only consider whether the Commission's findings are supported by competent evidence that justify its conclusions. *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 408, 496 S.E.2d 790, 794 (1998).

In Plaintiff's first assignment of error, she does not challenge any of the Commission's findings of fact. Therefore, the Commission's findings are conclusive and our only consideration is whether they support the Commission's conclusions of law.

The Commission's findings of fact tend to show the vertical disparity between the walkway and the wooden bridge were the type of normal, minor irregularities expected of an outdoor walkway. The incident occurred during daylight and there were no obstructions that would have prevented Plaintiff from viewing the disparity. Furthermore, the Aquarium has procedures in place to regularly inspect the premises for unsafe conditions. The security chief, Mr. Lewis, inspects the facilities and grounds daily, including the concrete walkway and bridge where Plaintiff fell. Additionally, the Aquarium has a safety committee for the purpose of addressing any concerns regarding the facility. The incident reports and minutes of the safety committee meetings for over three years prior to the incident show no indication of a potential trip hazard at the location where Plaintiff fell. The North Carolina Department of Insurance and the Association of Zoos and Aquariums conduct further

inspections and safety audits. Since 2006, none of these inspections indicate a potential problem in the area where Plaintiff was injured.

These facts tend to demonstrate Defendant used reasonable care in maintaining the premises, and any defect in the walkway was minor and to be expected. Therefore, the Commission's conclusion Plaintiff failed to demonstrate Defendant breached its duty to exercise reasonable care is logically supported by the findings of fact.

Plaintiff next argues the Commission erred in in failing to find and conclude Plaintiff has not shown the obvious nature of the defect should be negated by reasonably foreseeable conditions. We disagree.

Plaintiff contends the large crowd attending the event constituted a foreseeable condition which negates the obvious nature of the vertical disparity between the walkway and the bridge. Again, Plaintiff does not specifically assign error to any of the Commission's findings of fact; however Plaintiff's argument is related to the Commission's finding of fact number fifteen. This finding states:

> 15. The preponderance of the evidence shows that when Plaintiff was walking from the concrete walkway onto the bridge, there was a disparity of [one half] inch between the concrete and the edge of the first board of the bridge. It was daylight, with no obstructions that would have prevented Plaintiff from looking at the ground and seeing the disparity in height. Plaintiff was not distracted, was not in any hurry, and was not talking with anyone. Plaintiff did not see the edge of the bridge because she was not looking at the ground and, in her own words, wasn't paying attention to the bridge at all. Plaintiff fell as a

> result of her failure to observe any potential open and obvious slight irregularities or hazards in the walkway.

Plaintiff argues the large crowd attending the event was a foreseeable condition, which interfered with her ability to observe the defect in the walkway. She contends the nature of the crowded walkway caused her to look ahead as she was walking, rather than down at her feet. Yet, Plaintiff does not point to any evidence in the record tending to show the large crowd actually prevented Plaintiff from noticing the condition of the pathway, had she chose to look down. Because there is competent evidence in the record to support the Commission's conclusion, we reject Plaintiff's argument as to assignment of error number two.

Lastly, Plaintiff contends the Commission erred in failing to find and conclude Defendant had constructive notice of the dangerous condition. Again, we disagree. The Commission found the following facts, which are unchallenged, and therefore binding on appeal:

> 10. Mr. Lewis has been the Aquarium's [s]ecurity [c]hief since February 2007. For four years prior, Mr. Lewis worked as a security officer at the North Carolina Aquarium at Fort Fisher. Mr. Lewis also served in the U.S. Navy for over [sixteen] years, working in various positions related to safety, training, and maintenance. Mr. Lewis has completed [five] different [thirty-two]-hour courses related to OSHA standards. As part of his responsibilities, he inspects the facilities and grounds, including the concrete walkway and bridge. If he finds something that is unsafe or is a potential issue, Mr. Lewis reports it to the appropriate department for handling. Mr. Lewis also meets monthly with a safety committee in which the departments can address any concerns about the facility.

An assistant took minutes at these meetings and Mr. Lewis retained the minutes. Mr. Lewis was also responsible for maintaining incident reports completed by himself, other security staff, and other employees of Defendant. The incident reports document incidents or accidents that occurred to visitors while at the Aquarium. The safety meeting minutes and the incident reports from January 2008 through September 2011 do not reveal that an issue with regard to a potential trip hazard where Plaintiff fell was raised, reported, or noted. Mr. Lewis testified that during his time at the Aquarium there had not been an incident where someone tripped and fell at this particular spot prior to Plaintiff's incident.

. . . .

12. Ms. Cindy Lou Ferguson Meyers is the visitor member services coordinator for the Aquarium. She manages the visitor services department, which concerns itself with the visitor experience at the Aquarium. She supervises the admissions and cashier staff, and the security and safety department, including Mr. Lewis. She also serves on the safety committee and the Trick or Treat Under the Sea committee. Since 2006, when Ms. Myers began working as the visitor member services coordinator, she never personally received any report of a tripping or falling incident in the area where Plaintiff fell.

13. In addition to Mr. Lewis' daily inspections, the North Carolina Department of Insurance performs an annual inspection of the Aquarium grounds and facilities that includes checking for trip hazards. Further, an annual safety audit is conducted[.] The Aquarium is also accredited by the Association of Zoos and Aquariums and, as part of the re-accreditation process, a safety inspection is performed every [five] years. None of these inspections done since 2006 revealed any trip hazards in the area where Plaintiff fell.

Plaintiff does not challenge these factual findings; accordingly, they are conclusive on appeal. In turn, these findings fully support the Commission's conclusion:

> Plaintiff has failed to prove that Defendant breached its duty to exercise 'reasonable care in the maintenance of their premises for the protection of lawful visitors' . . . . Plaintiff failed to prove that Defendant had express or implied knowledge that the [half inch] vertical disparity between the concrete walkway and the first board of the bridge, combined with a crowd of over 100 people, would create a trip hazard . . . . Further, Plaintiff has not shown that the obvious nature of the defect should be negated by reasonably foreseeable conditions . . . . Therefore, Plaintiff has failed to satisfy her burden of proof to show Defendant was negligent as a result of any actions of its named employees or agents.

Plaintiff argues the evidence showing the Aquarium took action to bevel the first wooden board on the bridge illustrates the Aquarium had notice the vertical disparity would create a trip hazard. However, the Commission's findings of fact demonstrates the Aquarium altered the board in such a manner in order to make the bridge accessible for wheelchairs. Because the unbeveled board was not suitable for wheelchairs does not necessarily lead to the conclusion the height disparity would cause pedestrians to trip.

Plaintiff further argues Defendant had constructive notice of the unsafe condition due to the shifting ground in the location where Plaintiff fell. However, the record does not demonstrate, and Plaintiff does not argue, Defendant had notice of the shifting ground at this location prior to Plaintiff's fall.

Therefore, the findings of fact and competent evidence in the record justify the Commission's conclusion Plaintiff failed to prove Defendant had express or implied knowledge the vertical disparity would create a trip hazard.

V. Conclusion

For the foregoing reasons, we affirm the Commission's Decision and Order.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).