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NO. COA04-60

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2004

LINDA RAY BURT, by and through
County of Wake Adult
Guardianship Program

v

North Carolina Industrial Commission

I.C. No. TA-17293

NORTH CAROLINA DEPARTMENT
OF CORRECTIONS

Appeal by Defendant from Opinion and Award entered 26 September 2003 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 October 2004.

R. James Lore for plaintiff-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Amar Majmundar, for the State.

WYNN, Judge.

Defendant, North Carolina Department of Corrections, appeals an Opinion and Award entered 26 September 2003 by the North Carolina Industrial Commission, awarding compensation under the State Tort Claims Act to Plaintiff, Linda Ray Burt, for injuries to her face sustained after a corrections' officer used excessive force to restrain her. For the reasons stated herein, we affirm.

At the time of the hearing before the Deputy Commissioner Plaintiff was a twenty-two-year-old woman who suffered from a

multitude of problems and had an IQ of fifty-nine. Plaintiff had been diagnosed with fetal alcohol syndrome, mental retardation, conduct disorder, schizo-affective disorder, major depressive disorder with psychotic features, post-traumatic stress disorder, impulse control disorder, bipolar affective disorder, and anti-social personality disorder. Plaintiff had been hospitalized for psychiatric reasons at least twenty times, had attempted suicide numerous times, and was known to bang her head and burn herself with cigarettes. At the age of eighteen, Plaintiff was declared mentally incompetent.

On 30 March 2001 Plaintiff was being housed in the Acute Mental Health Unit at NCCIW (women's prison). Plaintiff became very agitated, made suicidal threats, and began banging her head. A nurse called corrections officers in to place Plaintiff in a "four-point restraint." Several female staff members placed Plaintiff in the "four-point restraint" while Sergeant Tony Spearman waited outside the cell door to record the procedure. Plaintiff began trying to sit up and the nurse determined the restraints needed to be tighter. Sergeant Spearman entered the cell and applied force to Plaintiff's shoulders. Plaintiff then spit in Sergeant Spearman's face and Spearman immediately and spontaneously hit Plaintiff twice in the face with a closed fist.

Plaintiff suffered a nasal fracture and medial orbital blowout fracture of the right eye. Plaintiff's nasal injury required her to undergo a nasal septal fracture surgery on 21 May 2001. As a result of the right orbital fracture, for a period after the

incident, Plaintiff was unable to fully open her eye and experienced blurry vision. The full Commission agreed with Deputy Commissioner Bradley W. Houser and awarded Plaintiff damages in the amount of \$50,000, which Defendant now appeals.

Under the Tort Claims Act, "jurisdiction is vested in the Industrial Commission to hear claims against the State of North Carolina for personal injuries sustained by any person as a result of the negligence of a State employee while acting within the scope of his employment." *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 536, 299 S.E.2d 618, 626 (1983). The North Carolina Tort Claims Act provides,

[t]he 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) (2003). This Court can review the decision of the full Commission "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 (2003). See *Hummel v. Univ. of N.C.*, 156 N.C. App. 108, 112, 576 S.E.2d 124, 127 (2003).

Defendant argues in its assignments of error that the full Commission erred when it: (1) failed to review a computer printout

of the employee's criminal record; (2) failed to consider testimonial and documentary evidence which proved the employee acted intentionally and not negligently; and (3) failed to consider testimonial and documentary evidence which proved the employee acted beyond the scope of his employment. We disagree.

We first take note of the numerous errors in Defendant's brief. Defendant failed to properly include specific references to the record or transcript in its assignments of error. N.C. R. App. P. 10(c). Nevertheless, we will examine the first and second assignments of error under our authority to suspend the rules. N.C. R. App. P. 2. As the argument for the third assignment of error cites no authority, it is deemed abandoned. N.C. R. App. P. 28(b)(6).

Since Defendant did not assign any errors to the findings of fact or conclusions of law by the full Commission, this review will determine solely if the findings of fact support the conclusions of law. *Hummel*, 156 N.C. App. at 116, 576 S.E.2d at 129.

Defendant argues that the full Commission erred by sustaining Plaintiff's objection to the admission of a computer printout of Spearman's criminal record, based upon Rules 403 and 404(b) of the North Carolina Rules of Evidence. We disagree.

Rule 403 allows relevant evidence to be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule

403 (2003). Whether the probative value of relevant evidence is outweighed by its tendency unfairly to prejudice a party is a question to be decided initially in the trial court's discretion. *State v. Meekins*, 326 N.C. 689, 696, 392 S.E.2d 346, 350 (1990). Therefore, we will reverse this decision only if the full Commission abused its discretion, which is not the case here.

The criminal record printout at issue here is confusing. It indicates that the employee, Spearman, was charged with felony "assault inflict serious injury." However, it indicates only that he was convicted of a lesser offense that is a misdemeanor. It is not clear if the employee pled guilty or was convicted by a jury. This could confuse the issues, and therefore the full Commission did not abuse its discretion by excluding the printout from evidence.

Defendant's next assignment of error asserts that the full Commission erred when it failed to consider testimonial and documentary evidence which proved the employee acted intentionally and not negligently. In its brief Defendant instead argues that the full Commission misapplied controlling authority in concluding the employee acted negligently. We disagree.

The full Commission relied on *Jackson v. N.C. Dep't. of Crime Control & Pub. Safety*, in determining that the employee acted negligently while attempting to physically restrain Plaintiff. 97 N.C. App. 425, 388 S.E.2d 770 (1990). In *Jackson* police arrested the plaintiff. After putting him in the patrol car he attempted to get out. *Id.* at 427, 388 S.E.2d at 771. One officer then struck

the plaintiff on the shoulders, neck, and head about five times with a "blackjack." *Id.*, 388 S.E.2d at 772. Another officer grabbed the plaintiff by the wrists and banged the handcuffs more tightly closed with his metal flashlight. *Id.* The full Commission found that "although the defendant's agents intended to violently restrain the plaintiff, they did not intend to use excessive force, but in fact did." *Id.* at 432, 388 S.E.2d at 774. This Court, in rejecting the defendant's argument that the act was intentional and therefore not in the State Tort Claims Act, stated that "an actor may intend to act in one way, yet inadvertently act in another way ... '[o]ne who undertakes to do something and does it negligently commits a *negligent* act.'" *Id.* (citation omitted) (emphasis in original).

The facts in *Jackson* are very similar to the instant case. Here, in its findings of fact the full Commission found that "it is admitted that Sergeant Spearman's use of force was excessive. Based on the totality of the credible evidence of record, the undersigned finds that in his efforts to restrain plaintiff on 30 March 2001, Sergeant Spearman did not intend to use excessive force, but rather acted spontaneously." The full Commission's findings support the theory in *Jackson*, that the employee intended to restrain Plaintiff, but did not intend to use excessive force when doing so, thereby performing the intended act negligently. *Id.* Since the findings of fact support the conclusions of law, we find no error.

Affirmed.

Judges HUNTER and THORNBURG concur.

Report per Rule 30(e).