An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-935

Filed: 20 March 2018

North Carolina Industrial Commission, I.C. NO. TA-23903

ROBERT A. BARTLETT SR., Plaintiff

v.

NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, Defendant.

Appeal by plaintiff from decision and order entered 24 May 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 6 February 2018.

Robert A. Bartlett Sr., plaintiff-appellant, pro se.

Attorney General Joshua H. Stein, by Assistant Attorney General Barry H. Bloch, for defendant-appellee.

BRYANT, Judge.

Where the Full Commission's findings of fact are supported by competent evidence in the record, we affirm the Full Commission's decision and order dismissing plaintiff's claim for damages under the Tort Claims Act.

On 15 May 2013, plaintiff Robert A. Bartlett, Sr., filed a claim pursuant to the Tort Claims Act, *see* N.C. Gen. Stat. §§ 143-291 *et seq.*, in which he alleged that on 13 December 2012, while in the custody of defendant North Carolina Department of Public Safety at Tabor Correctional Institution, he was negligently denied a meal by

two correctional officers employed by defendant. Plaintiff also claimed that one officer searched his cell and vandalized his property on that same evening. According to his complaint, plaintiff was damaged by being denied a meal and having his property vandalized, and as a result, incurred pain and suffering.

Plaintiff's claim came before the presiding Deputy Commissioner on 13 September 2016, and on 20 September 2016, the Deputy Commissioner entered a decision and order denying his claim, concluding plaintiff had failed to prove negligence. Plaintiff appealed to the Full Commission, which affirmed the Deputy Commissioner's decision and order on 24 May 2017. Plaintiff appeals.

On appeal, plaintiff argues the Industrial Commission erred by (I) excluding speculative testimony and hearsay evidence; and (II) finding plaintiff presented no evidence that the employees or agents of defendant breached their duty owed to plaintiff and refusing to grant relief.[1]

> The standard of review for an appeal from the Full Commission's decision 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."

[1] Plaintiff's Issues Presented 1–2 are addressed in Section I, and plaintiff's Issues Presented 3–4 are addressed in Section II and have been broken down into three more digestible subparts (A, B & C) for ease of reading.

Simmons v. Columbus Cty. Bd. of Educ., 171 N.C. App. 725, 727–28, 615 S.E.2d 69, 72 (2005) (quoting N.C. Gen. Stat. § 143-293 (2003)). "To recover under the Tort Claims Act, [the] plaintiff must show that the injuries sustained . . . were the proximate result of a negligent act of a state employee acting within the course and scope of his employment." *Bolkhir v. N.C. State Univ.*, 321 N.C. 706, 709, 365 S.E.2d 898, 900 (1988) (citations omitted), *abrogation on other grounds recognized by Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 516 S.E.2d 643 (1999).

I

Plaintiff first argues the Deputy Commissioner erred by excluding plaintiff's speculative testimony and hearsay evidence. For the following reasons, we dismiss this argument on appeal.

This Court reviews decisions and orders issued by the *Full Commission*, not the Deputy Commissioner. Pursuant to N.C Gen. Stat. § 143-293 ("Appeals to the Court of Appeals"),

> [e]ither the claimant or the State may, within 30 days after receipt of the decision and order of the *full Commission*, to be sent by registered or certified mail, but not thereafter, appeal from the decision of the *Commission* to the Court of Appeals. Such appeal 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 (2017) (emphasis added).

Here, the Full Commission's order, which we may review, does not address the issues plaintiff raises regarding the Deputy Commissioner's evidentiary rulings. Because this Court reviews decisions and orders of the Full Commission and the Full Commission's decision and order in the instant case contains no findings of fact or conclusions of law as to this issue plaintiff raises now on appeal, we have nothing to review. Thus, plaintiff's argument is dismissed.

II

Plaintiff also argues the Full Commission erred by finding plaintiff presented no evidence that the employees or agents of defendant breached their duty owed to plaintiff and refusing to grant relief. Specifically, plaintiff contends the Industrial Commission (A) improperly gave greater probative weight to defendant's responses to plaintiff's written grievances; (B) incorrectly held that plaintiff failed to offer evidence of injury, damages, and proximate harm; and (C) improperly applied the law to the facts in evidence. We disagree.

"Findings of Fact of the Industrial Commission, if supported by any competent evidence, are binding on appeal even though there is evidence which would support a contrary finding." *Bullman v. N.C. State Hwy Comm'n*, 18 N.C. App. 94, 98, 195 S.E.2d 803, 806 (1973) (citation omitted). "The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433–34, 144 S.E.2d 272, 274 (1965).

A. Plaintiff's Written Grievances

Pursuant to N.C. Gen. Stat. § 148-118.2, defendant implemented an administrative remedy procedure whereby prisoners may file written grievances and complaints with potential available remedies. Plaintiff's written grievances were submitted to Tabor Correctional Institution and copies of his grievances—along with defendant's responses to those grievances—were offered by plaintiff and received into evidence at plaintiff's hearing before the Deputy Commissioner. The Commission found as follows regarding plaintiff's grievances:

> 7. Plaintiff submitted two grievances on 13 December 2012 and went through the entire Administrative Remedy Procedure (ARP). At the hearing before the Deputy Commissioner, Plaintiff submitted his first grievance and the ARP responses as Plaintiff's Exhibit #1. The Step One Institution Response on Plaintiff's Exhibit #1 states:
>
> > On 12/13/12 you were observed leaving the unit with the special diets. You were also observed returning to the unit with the special diets. You were then observed trying to leave the unit with the regular diets. You were stopped and sent back to your pod.
>
> 8. Plaintiff submitted his second grievance and the ARP responses as Plaintiff's Exhibit #2. The Step One Institution Response on Plaintiff's Exhibit #2 states:
>
> > Complete shakedown searches of inmates [sic] quarters and effects are authorized regardless of whether there is a reason to suspect any particular inmate of concealment of contraband. Officer Norris stated he

> conducted the search in a professional manner and that no items were damaged nor [sic] destroyed.
>
> 9. Other than his own testimony, Plaintiff offered no additional evidence regarding his alleged injury, damages, or proximate cause. The Full Commission finds that the ARP responses submitted by Plaintiff himself contradict Plaintiff's testimony regarding the events of 13 December 2012. *The Full Commission gives greater weight to the contents of the ARP responses than to the testimony of Plaintiff*.

(Emphasis added).

Plaintiff argues that the Commission erred in assigning greater weight to defendant's responses to plaintiff's grievances or, alternatively, that defendant's responses were admitted in violation of the Rules of Evidence.

First, Rule 803(8) permits the introduction of records, statements, and reports of public agencies and offices that set forth their activities and matters observed pursuant to a duty imposed by law. N.C. Gen. Stat. § 8C-1, Rule 803(8) (2015). Second, plaintiff himself offered the copies of defendant's responses to his grievances into evidence, and they were accepted and admitted by the Commission. Thus, where the records of which plaintiff complains on appeal were offered by him at the hearing and were admissible pursuant to Rule 803 of the Rules of Evidence, plaintiff's argument on this point is overruled.

Second, plaintiff cannot establish error where the Commission gave greater weight to defendant's grievance responses than to plaintiff's testimony. "The

Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony." *Anderson*, 265 N.C. at 433–34, 144 S.E.2d at 274. Further, the Commission's findings of fact are supported by evidence which plaintiff himself submitted into evidence. Accordingly, these findings of fact are binding on appeal, *Bullman*, 18 N.C. App. at 98, 195 S.E.2d at 806, and we overrule plaintiff's argument.

B. Evidence of Injury, Damages, and Proximate Harm

The Full Commission found that "Plaintiff has presented no evidence that the employees or agents of Defendants, through a breach of their duty owed to Plaintiff, proximately caused Plaintiff to be injured. Plaintiff has failed to produce evidence of any damages he incurred as a result of the alleged incident." Plaintiff argues this finding was in error. However, as described in Section II.A., *supra*, the Commission correctly determined that plaintiff's testimony failed to satisfy his burden of proof. This argument is overruled.

C. Application of the Law to the Facts in Evidence

Lastly, plaintiff challenges the application of the law to the facts in evidence. The only relevant conclusion of law that applied the law to the facts in the instant case is Conclusion of Law No. 5:

> Plaintiff has failed to prove the essential elements of a negligence action. Plaintiff has not shown that Defendant was negligent as a result of the actions of its employees or agents, nor that he has sustained any damages as a direct result of any negligence on the part of Defendant. *Pulley v. Rex Hospital*, 326 N.C. 701, 392 S.E.2d 380 (1990).

Plaintiff also lumps into this argument the fact that the Commission erred by failing to acknowledge certain facts, specifically that the parties stipulated that plaintiff was denied meal service for more than twelve hours on the day in question.

"Before making findings of fact, the Industrial Commission must consider *all* of the evidence. The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it." *Weaver v. Am. Nat'l Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (citing *Harrell v. J.P. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835 (1980)).

First, plaintiff cannot point to the evidence in the record which supports his claim that the parties stipulated to the fact that he had been denied meal service for more than twelve hours on 13 December 2012. Thus, where nothing in the record substantiates or supports this claim, plaintiff cannot show that this was evidence that the Commission failed to consider. Instead, the competent evidence in the record supports the Industrial Commission's legal conclusion that no breach of a duty owed to plaintiff occurred. Plaintiff's argument is overruled.

AFFIRMED.

Judges ZACHARY and MURPHY concur.

Report per Rule 30(e).