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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-1008

Filed 3 December 2024

N.C. Industrial Commission, Nos. TA-26021 & TA-26022

MARY ANN DAVIS, Administratrix of the Estate of TAYLOR NICOLE THOMPSON
and Administratrix of the Estate of MEGAN MARIE DAVIS, Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION and NORTH
CAROLINA BOARD OF TRANSPORTATION, Defendants.

Appeal by Plaintiff from decision and order entered 21 June 2023 by the North
Carolina Industrial Commission. Heard in the Court of Appeals 14 August 2024.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General David
D. Larson, Jr., for the Defendants-Appellees.*

*Vannoy, Colvard, Triplett & Vannoy, PLLC, by John G. Vannoy and Brandon
York, and Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Jason White, for
Plaintiff-Appellant.*

PER CURIAM.

Plaintiff Mary Ann Davis appeals from the Industrial Commission's decision
and order finding and concluding that Plaintiff had failed to meet her burden of
showing that Defendants breached a duty owed to Plaintiff's deceased which
proximately caused their deaths. Because the Commission failed to make sufficient

findings of fact to allow meaningful appellate review, we vacate the decision and order and remand for further findings of fact and conclusions of law supported by those findings.

I. Background

On the evening of 24 November 2014, Dakota Goss was driving northbound on US Highway 52 in Pinnacle, North Carolina, in a 2001 Ford Taurus with three passengers: his fifteen-year-old brother Brendan Goss, his seventeen-year-old girlfriend Taylor Nicole Thompson, and Taylor's twelve-year-old sister, Megan Marie Davis. The four were returning from viewing Christmas lights in Tanglewood. At approximately 7:52 p.m., the Taurus traveled off the roadway to the right between mile markers 126 and 127, crossed the right shoulder into grass, and was oversteered back to the left. The oversteering caused the car to rotate counterclockwise and slide sideways into a guardrail end treatment. The end of the guardrail penetrated the car through the front passenger door and continued diagonally through the back seat passenger compartment. Taylor and Megan, who were in the right-front and left-rear passenger seats respectively, were killed.

Plaintiff, as Administratrix of the Estate of Taylor Nicole Thompson and as Administratrix of the Estate of Megan Marie Davis, filed claims on 22 November 2016 against the North Carolina Department of Transportation ("DOT") and the North Carolina Board of Transportation under the Tort Claims Act. Plaintiff sought damages in excess of \$1,000,000 for the wrongful deaths of Taylor and Megan by

reason of the negligent conduct of Nick Tennyson, in his capacity as Secretary of the DOT. The suit alleged that the “end treatment of the guardrail” that penetrated the car was a Breakaway Cable Terminal (“BCT”) that should have been replaced prior to the accident.

The claims were consolidated for trial purposes and heard before Deputy Commissioner David Mark Hullender in 2021. Deputy Commissioner Hullender entered and filed an order on 13 May 2022 in favor of Defendants. Plaintiff appealed to the Full Industrial Commission. After a hearing, the Commission entered its decision and order on 21 June 2023 in favor of Defendants. Plaintiff timely appealed to this Court.

II. Evidence Before the Commission

The Commission received the following exhibits into evidence: a pretrial agreement that was stipulated to by the parties, 136 exhibits from Plaintiff, and twenty-two exhibits from Defendants. At the hearing, the video deposition of Trooper Lawrence Kevin Johnson, the State Highway patrolman who arrived at the accident scene, was entered into evidence. The following witnesses testified at the hearing: Mr. Michael Mosley, a fireman who arrived at the scene; Mr. James Kevin Lacy, the DOT’s traffic engineer; Mr. John Rhyne, an engineer for the DOT; Mr. Thomas Griffin, Plaintiff’s expert in traffic engineering and transportation; Dr. Thomas Owens, Chief Medical Examiner of Mecklenburg County; Mr. Lawrence Wilson, an

automotive safety engineer and accident reconstructionist; Mr. Joel Howerton, an engineer with the DOT; and Mr. Brian Boggess, an engineer.

III. Discussion

Plaintiff argues that the Commission erred by applying an erroneous standard of care and by determining that the DOT was not negligent.

“The [DOT] is subject to a suit to recover damages for death caused by its negligence only as is provided in the Tort Claims Act.” *Drewry v. N.C. Dep’t of Transp.*, 168 N.C. App. 332, 336 (2005) (citation omitted). Under the Tort Claims Act,

[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 (2023).

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 (2023).

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." *Simmons v. N.C. Dep't of Transp.*, 128 N.C. App. 402, 405-06 (1998) (citation omitted). 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." *Drewry*, 168 N.C. App. at 337 (quotation marks and citation omitted).

1. Standard of care

Plaintiff first argues that the Commission erred by applying an erroneous standard of care. Specifically, Plaintiff argues that she was only required to prove that the DOT "knew or in the exercise of reasonable care should have known" of the dangerous condition and that the Commission's requirement that Plaintiff prove the DOT's negligence was "so clearly unreasonable to amount to oppressive and manifest abuse" was error.

"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 (1988) (citation omitted). "To establish actionable negligence, plaintiff must show that: (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.* (citation omitted).

"The 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.” N.C. Gen. Stat. § 143B-346 (2023). Consistent with this statute, the DOT’s “duty to the general public is 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 (2009) (quoting a finding by the North Carolina Industrial Commission and concluding that it was consistent with the duty of the DOT as prescribed by N.C. Gen. Stat. § 143B-346) (citation omitted).

While the 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 (1960) (citations omitted).

Liability arises only for a negligent breach of duty, [however,] 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.

Here, the Commission made the following relevant finding of fact:

Plaintiffs have presented insufficient evidence that

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Defendants' decisions and actions regarding the installation and maintenance of the guardrail end treatment struck in this accident were unreasonable, that Defendants' determination not to replace the BCT guardrail end treatment prior to 24 November 2014 was unreasonable, or that Defendants had actual or constructive notice that a dangerous condition existed at the accident location prior to 24 November 2014.

This finding of fact correctly states the standard of care applicable in this case –whether Defendants' decisions and actions were “unreasonable.” *See Phillips*, 200 N.C. App. at 560. However, in its conclusions of law, the Commission recited a “standard of care to which Defendants in this case must adhere with regard to its discretionary decisions” that is inapplicable to the present case:

In this case, the existence of a duty is established by statute: “[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.” N.C. Gen. Stat. § 143B-346 (2021). Regarding the standard of care to which Defendants in this case must adhere with regard to its discretionary decisions, the North Carolina Court of Appeals has held: “[t]he NCDOT is vested with broad discretion in carrying out its duties and **the discretionary decisions it makes are not subject to judicial review ‘unless [their] action is so clearly unreasonable as to amount to oppressive and manifest abuse.’**” *Drewry*, 168 N.C. App. at 338, 607 S.E.2d at 345-347 (2005) (*quoting State Hwy. Comm’n v. Greensboro City Bd. of Educ.*, 265 N.C. 35, 48, 143 S.E.2d 87, 97 (1935)). In the present case, Plaintiffs presented insufficient evidence to show that Defendants' maintenance of the accident area, including the guardrail end treatment struck in the accident, was unreasonable or that the discretionary decisions made and actions taken by

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Defendants in this case regarding the maintenance of this area, including the guardrail end treatment, were so clearly unreasonable as to amount to oppressive and manifest abuse. *Drewry*, 168 N.C. App. at 338, 607 S.E.2d at 345-347.

(Emphasis added).

In analyzing the State Highway Commission's authority to acquire property by condemnation, our Court stated:

[T]he State Highway Commission is vested by statute with broad discretionary authority in the performance of its statutory duties, and the court cannot substitute its judgment for that of the State Highway Commission, and control the discretion vested in the State Highway Commission to acquire by condemnation the property here sought to be acquired for "controlled-access facilities," and the exercise by it of such discretionary authority and powers is not subject to judicial review, unless its action here is so clearly unreasonable as to amount to oppressive and manifest abuse

State Highway Comm'n. v. Greensboro City Bd. of Educ., 265 N.C. 35, 48 (1965) (citations omitted). The determination in this case does not involve the DOT's discretionary decisions involving whether and to what extent it condemns school property for a highway, but whether the DOT was negligent by not replacing the BCT that was involved in the fatal accident giving rise to this litigation. The standard of care articulated in *State Highway Commission v. Greensboro* is inapplicable here.

Nonetheless, after reciting this inapplicable standard, the Commission further concluded both that "Plaintiff presented insufficient evidence to show that Defendants' maintenance of the accident area, including the guardrail end treatment

struck in the accident, was unreasonable” and that “the discretionary decisions made and actions taken by Defendants in this case regarding the maintenance of this area, including the guardrail end treatment, were so clearly unreasonable as to amount to oppressive and manifest abuse.”

It is not apparent from the findings and conclusions what standard of care the Commission applied or how it applied that standard. Because we vacate and remand this decision to the Commission for the reasons stated below, upon remand we instruct the Commission that the applicable standard of care in this case is that of “reasonable care.” *Phillips*, 200 N.C. App. at 560.

2. Negligence

Plaintiff next argues that the Commission erred by failing to find and conclude that the DOT was negligent by failing to remove the BCT within thirty years of receiving notice that it failed crash tests due to penetration into vehicles, and that this failure was the proximate cause of the decedents’ death. Because the Commission failed to make sufficient findings of fact, we cannot appropriately review its findings and conclusions.

“This Court has long held that findings of fact must be more than a mere summarization or recitation of the evidence[.]” *Lane v. Am. Nat’l Can Co.*, 181 N.C. App. 527, 531 (2007) (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 59 (1981) (other citations omitted)). “Recitations of the testimony of each witness *do not* constitute *findings* of fact by the trial [tribunal], because they do not reflect a conscious choice

between the conflicting versions of the incident in question which emerged from all the evidence presented.” *Winders v. Edgecombe Cty. Home Health Care*, 187 N.C. App. 668, 673 (2007) (emphasis in original) (quoting *In re Green*, 67 N.C. App. 501, 505 n.1 (1984)); see *Harris v. S. Commer. Glass*, 249 N.C. App. 26, 37 (2016). Although “there is nothing impermissible about describing testimony,” the Commission must ultimately make its own findings based on the evidence and testimony. See *In re C.L.C.*, 171 N.C. App. 438, 446 (2005).

Here, the Commission’s decision and order includes ninety-three findings of fact. Except for a very few findings, or pieces thereof, and one ultimate finding—that Plaintiff had failed to prove the essential elements of negligence—the findings are merely recitations of the evidence. These findings describe and quote the evidence submitted and the testimony of the various witnesses, reciting how the witnesses “testified,” “explained,” “summarized,” “clarified,” “noted,” “continued,” and “concluded,” but contain no actual findings made by the Commission based on the evidence.

As a result, there are insufficient findings of fact for this Court to review to determine if findings of fact supported by competent evidence support the Commission’s conclusions of law. We therefore vacate the Commission’s decision and order and remand the matter to the Commission to make findings of fact supported by the competent evidence and to make conclusions of law supported by those findings of fact.

IV. Conclusion

For the foregoing reasons, we vacate the final decision and order and remand the case to the Commission to do the following: (1) make findings of fact based on the evidence, (2) apply the “reasonable care” standard of care, and (3) make conclusions of law supported by those findings in light of the correct standard of care.

VACATED and REMANDED WITH INSTRUCTIONS.

Panel consisting of: Judges MURPHY, COLLINS, and FLOOD.

Report per Rule 30(e).