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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-918

No. COA22-56

Filed 29 December 2022

Wake County, No. 20 CVS 13466

C.G.C., a Minor, by and through her Guardian ad Litem, Sarah Homes; T.W.C., a Minor, by and through his Guardian ad Litem, Sarah Homes; and PATRICK JOSEPH CAMPBELL, Plaintiffs,

v.

REGINA PETTEWAY (in her individual and official capacity); KATIE TREADWAY (in her individual and official capacity); HEATHER KANE (in her individual and official capacity), AUDREY DIFILIPO (in her individual and official capacity), BRITNEY KEENE (in her individual and official capacity); and STEPHANIE PEARSON (in her individual and official capacity), Defendants.

Appeal by Plaintiff from order entered 3 August 2021 by Judge Gale M. Adams in Wake County Superior Court. Heard in the Court of Appeals 10 August 2022.

Kennedy, Kennedy, Kennedy, and Kennedy, L.L.P., by Harold L. Kennedy III and Harvey L. Kennedy, for appellant-father.

Wake County Attorney's Office, by Roger A. Askew, and Waldrep Wall Babcock & Bailey PLLC, by Dennis Bailey, for defendants-appellees.

MURPHY, Judge.

¶ 1

Plaintiff Patrick Joseph Campbell (“Father”) appeals from the dismissal of the claim in his *Amended Complaint*, which he characterizes as a conspiracy by Defendants to deprive him and his children of their constitutional rights in violation

of 42 U.S.C. § 1983. As the trial court correctly held that the claim in the *Amended Complaint* brought on his own behalf was barred by statute of limitations, we affirm that portion of the dismissal. However, we do not reach the merits of the dismissal with respect to the claims of the minor children, as we dismiss the appeal with respect to their claims under Rule 3 of our Rules of Appellate Procedure.

BACKGROUND

¶ 2 On 20 November 2020, Father—acting on his own behalf, as well as purportedly on behalf of his two minor children, Michael and Nadine¹—filed a *Complaint* in Wake County Superior Court. The *Complaint*—as amended 17 December 2020—alleged that Defendants Regina Petteway, Katie Treadway, Heather Kane, Audrey Difilipo, Britney Keene, Stephanie Pearson, and Rene Betancourt committed “violations of 42 U.S.C. [§] 1983 and [the] U.S. and N.C. Constitution[s]” and “willful and wanton acts” that denied him and his minor children their constitutional rights and inflicted “physical and mental pain and suffering[,]” respectively.

¶ 3 On 8 February 2021, Defendants filed a *Motion to Dismiss in Lieu of Answer* arguing, *inter alia*, that Father’s claims were barred by statute of limitations, governmental immunity, and public official immunity, and that Michael and Nadine

¹ Pseudonyms are used for all relevant persons throughout this opinion to protect the identities of the juveniles and for ease of reading.

were not proper parties because they “[did] not appear [] by guardian ad litem or licensed attorney and therefor[e] may not [have maintained] th[e] action[.]”² While the motion was pending, the trial court appointed Michael and Nadine a guardian ad litem in orders entered 12 February 2021. In an order dated 3 August 2021, the trial court allowed Defendants’ motion to dismiss on the basis that the claims were “barred by the applicable statute of limitations[,] . . . governmental immunity, public official immunity and qualified immunity[,]” as well as that Father “is and was not authorized to file this action on behalf of the minor plaintiffs in that he is not an attorney, nor was he otherwise authorized[.]”

¶ 4 Father timely appealed.

ANALYSIS

¶ 5 On appeal, Father argues the trial court erred in allowing Defendants’ motion to dismiss. “We review de novo the grant of a motion to dismiss.” *Lea v. Grier*, 156 N.C. App. 503, 507 (2003).

¶ 6 As a general matter, the threshold at which North Carolina will recognize a complaint as sufficient to withstand a motion to dismiss is low, affording claimants

² Defendants filed an *Amended Motion to Dismiss in Lieu of Answer* on 25 February 2021 and a *Second Amended Motion to Dismiss in Lieu of Answer* on 19 March 2021, both of which contained substantially the same arguments.

the benefits of both an assumption of factual accuracy and a liberal construction of their legal arguments:

A motion to dismiss made pursuant to [Rule 12(b)(6) of our Rules of Civil Procedure] tests the legal sufficiency of the complaint. In order to withstand such a motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim. The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. In general, a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.

Harris v. NNCB Nat. Bank of North Carolina, 85 N.C. App. 669, 670-71 (1987) (citations and emphasis omitted). Despite the charitable lens through which we review claims subject to a motion to dismiss, though, the propriety of a ruling on a motion to dismiss may account for “the disclosure of facts which will necessarily defeat the claim[,]” including whether defenses raised by the opposite party would constitute a valid bar. *Id.* at 671; see *Est. of Barksdale ex rel. Farthing v. Duke Univ. Med. Ctr.*, 175 N.C. App. 102, 104-05 (2005).

Here, in addition to arguing generally that the claims in his *Amended Complaint* were sufficient to show relief could be granted, Father also specifically argues that the claims were not barred by statute of limitations and that Defendants

were not immune, contrary to the ruling of the trial court. Furthermore, Father argues the dismissal of the claim as to his two minor children, whom he listed as co-plaintiffs, was improper because he subsequently obtained counsel to represent all three of them. Upon a de novo review and for the reasons stated below, we hold that the trial court correctly dismissed the action as to Father; however, as it does not appear from the Record that the minor children are actually represented before us, we dismiss the appeal as to Michael and Nadine.

A. Father

¶ 8

Father argues, in relevant part, that his claims at trial are sufficient to survive a motion to dismiss because they are not defeated by any applicable statute of limitations.³ This position is further divided into two sub-arguments: first, that this case is, for statute of limitations purposes, analogous to an action for intentional infliction of emotional distress, preventing the limitations period from having tolled until he received a diagnosis for mental and emotional trauma; and, second, even if the limitations period applicable to intentional infliction of emotional distress does not apply in this case, he has alleged a conspiracy, placing the last act for limitations purposes exactly three years prior to the date he filed his complaint.

³ Father also argues the trial court erred in dismissing the action on immunity grounds. However, as this argument is mooted by the resolution of his statute of limitations argument, we need not address it. *See infra* ¶ 12.

¶ 9

As a threshold matter, we must determine whether Father’s actual claims at trial support his characterization of the claims on appeal. Father argues in his appellate brief that, under our notice pleading rules, the two causes of action he identifies in his principal brief—labeled “violations of 42 U.S.C. [§] 1983 and [the] U.S. and N.C. Constitution[s]” and “willful and wanton acts[,]” respectively—are, in actuality, a single allegation of a “conspiracy to deprive him of his civil rights.” Father further argues that, despite the individually-labeled cause of action “willful and wanton acts” using language reminiscent of a negligence claim,⁴ “Plaintiffs did not sue for negligence[.]”

¶ 10

While it is true that notice pleading creates a highly elastic standard,⁵ Father’s characterization of his claim stretches the rule almost to the point of snapping.

⁴ North Carolina does not recognize “willful and wanton acts” as a discrete cause of action; it does, however, recognize willful and wanton *negligence* as a subspecies of negligence. See *Clayton v. Branson*, 170 N.C. App. 438, 445-46 (2005) (“[O]rdinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act. Wanton and willful negligence rests on the assumption that he knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results.”) (quoting *Wagoner v. North Carolina R. Co.*, 238 N.C. 162, 168 (1953)). We also note that Plaintiffs have identified elements typical of a negligence action—duty, breach, causation, proximate cause, and damages—in the allegations contained in the *Amended Complaint*.

⁵ “Under notice pleading, a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought. Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.” *Wake Cnty. v. Hotels.com, L.P.*, 235 N.C. App. 633, 646 (2014) (citations omitted).

Setting aside the fact that Father clearly lists two distinct causes of action in the *Amended Complaint*—along with an independently listed item of punitive damages—the only location among the more than one hundred and twenty individually enumerated allegations that alludes to a conspiracy is a single line under “willful and wanton acts”—paragraph 118(a)—asserting that Defendants “[c]onspired with [M]other’s attorney and [M]other to create and prolong an extended separation between the minor children”

¶ 11 Assuming, *arguendo*, that we accept the entirety of the *Amended Complaint* as alleging a singular conspiracy to deprive Father of his constitutional rights in violation of 42 U.S.C. § 1983, the trial court did not err in granting Defendants’ motion to dismiss on statute of limitations grounds as to Father. “This Court has applied the three-year limitations period of [N.C.G.S.] § 1-52(5) to a civil conspiracy claim.” *Carlisle v. Keith*, 169 N.C. App. 674, 685 (2005); *see also* N.C.G.S. § 1-52(5) (“Within three years an action . . . for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated”). And, as Father correctly identifies, the statute of limitations for civil conspiracies begins to run upon the last act in furtherance of the conspiracy. *See Carlisle*, 169 N.C. App. at 680, 685 (basing the limitations period of an alleged civil conspiracy on the date of a final transfer of funds). However, the date Father asserts the last act of the conspiracy alleged here took place—20 November 2017—is not the date at which any material

action by a named defendant took place, but the date when Father “received information from Defendants giving notice that the acts giving rise to this action occurred[.]” The final involvement in the alleged conspiracy, as it appears on the face of the *Amended Complaint*, is, at best, “the denial of [Father’s] care, custody and control of the children for over three years from October 2013 to December 2016.” (Emphasis added). This rule renders Father’s original complaint, filed 20 November 2020, outside the limitations period.⁶

¶ 12 In the absence of further authority enabling Father to base his claim for conspiracy to deprive him of his constitutional rights in violation of 42 U.S.C. § 1983 at the date of *discovery* rather than the last act of a Defendant—and Father points us to none—we cannot say the trial court erred in dismissing the case. And, in light

⁶ In the alternative, Father argues the three-year limitations period did not begin to run until he received a diagnosis confirming the psychiatric condition arising from Defendants’ alleged misconduct on 10 September 2020. In support of this argument, he directs us to *Bryant v. Thalheimer Bros.*, a case in which we held that the statute of limitations applicable to a particular intentional infliction of emotional distress claim began to run at the point of psychiatric diagnosis rather than the point of the treatment itself. *See Bryant v. Thalheimer Bros.*, 113 N.C. App. 1, 12-13 (1993). However, *Bryant* was a case decided on its own unique facts, not a mandate that the statute of limitations in *every* case involving mental, emotional, or psychological distress not run until the point of diagnosis. Indeed, we have said elsewhere that “the accrual of emotional distress claims does not necessarily begin at the time of diagnosis, nor is an actual diagnosis always necessary to trigger accrual.” *Soderlund v. Kuch*, 143 N.C. App. 361, 371 (2001) (citation omitted). *Bryant* was not decided on the basis that emotional damage existed in some general sense; rather, it was decided on the basis that “all of the elements of the tort were not present” until the time of diagnosis. *Bryant*, 113 N.C. App. at 13. In other words, its reasoning was exclusively applicable to the tort of intentional infliction of emotional distress, which is not the cause of action before us.

of our holding with respect to the applicable statute of limitations, the remainder of Father’s arguments as to his own claims are moot.

B. Michael and Nadine

¶ 13

Unlike the dismissal of Father’s claims, we decline to reach the merits of the trial court’s dismissal of Michael and Nadine’s claims. Rule 3 of our Rules of Appellate Procedure dictates that “[a]ny party entitled by law to appeal from a judgment or order of a [S]uperior or [D]istrict [C]ourt rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the [C]lerk of [S]uperior [C]ourt and serving copies thereof upon all other parties within the time prescribed” N.C. R. App. P. 3(a) (2022). However, “[t]he notice of appeal required to be filed and served by subsection (a) of this rule *shall specify the party or parties taking the appeal*[.]” N.C. R. App. P. 3(d) (2022) (emphasis added). Our Supreme Court has advised that “[t]he provisions of Rule 3 are jurisdictional, and failure to follow the rule’s prerequisites mandates dismissal of an appeal.” *Bailey v. State*, 353 N.C. 142, 156 (2000). And, where only some of the named parties have properly appealed pursuant to Rule 3, we have dismissed an appeal with respect to only those parties whose appeal is noncompliant. *See Nobel v. Foxmoor Grp., LLC*, 272 N.C. App. 300, 302 n.1, *disc. rev. denied*, 375 N.C. 495 (2020), *aff’d*, 380 N.C. 116, 2022-NCSC-10.

¶ 14 Here, after a thorough examination of the Record, we are not satisfied that Michael and Nadine are, in fact, parties to the appeal. While the *Notice of Appeal* refers once to “Plaintiffs,” the notice of appeal was signed by the “[a]ttorneys for *Plaintiff*.” (Emphasis added.) Both the brief and the reply brief—entitled “Plaintiff-Appellant’s Brief” and “Plaintiff-Appellant’s Reply Brief,” respectively—are signed identically, and both continually waver between referring to “Plaintiffs,” plural, and “Plaintiff,” singular.⁷ The hearing transcript in the Record Supplement likewise contains multiple statements from Father’s counsel referring to him singularly as “[P]laintiff.” Moreover, we see no definitive indication that Father’s attorney has represented Michael or Nadine since the appointment of their guardian ad litem, whom Father’s counsel referred to as having been “appointed to prosecute this case” on the children’s behalf during the hearing. Finally, Father’s most recent filing—a *Memorandum of Additional Authorities* filed 8 August 2022—exclusively uses the singular term “Plaintiff-Appellant.”

¶ 15 On this Record, we have no way of ensuring Michael and Nadine are actually being represented on appeal. We therefore dismiss the appeal with respect to the

⁷ References to “Plaintiffs,” plural, seem to occur more frequently in appellant’s briefs when referring to matters that *had been argued* in the *Amended Complaint*, further confusing the matter of whether the children are co-appellants. At one point, the reply brief uses the identifier “Plaintiff-Appellants.”

minor children. As the trial court’s dismissal of Michael and Nadine’s claims at trial was without prejudice, they remain free to bring their claims in a subsequent action.

CONCLUSION

¶ 16 The trial court correctly dismissed Father’s claims on statute of limitations grounds; and, our having so held, the remainder of the arguments as to his own claims are moot. As we cannot be confident the minor children are represented on appeal, we dismiss the appeal as to their claims pursuant to Rule 3 of our Rules of Appellate Procedure.

NO ERROR IN PART; APPEAL DISMISSED IN PART.

Judges CARPENTER and JACKSON concur.

Report per Rule 30(e).