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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-170

Filed 07 February 2023

N.C. Industrial Commission, I.C. No. TA-28759

WENDY TUGGLE CARPENTER, Plaintiff,

v.

NORTH CAROLINA DEPARTMENT OF HEALTH & HUMAN SERVICES –  
OFFICE OF THE CHIEF MEDICAL EXAMINER, Defendant.

Appeal by Plaintiff from Order entered 9 November 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 September 2022.

*Taylor S. Hastings for plaintiff-appellant.*

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Carl Newman, for defendant-appellee.*

HAMPSON, Judge.

**Factual and Procedural Background**

Wendy Tuggle Carpenter (Plaintiff) appeals from an Order entered by the Full Commission of the North Carolina Industrial Commission (Commission) granting a Motion to Dismiss filed by the North Carolina Department of Health and Human Services Epidemiology Section of the Division of Public Health, the Office of the Chief

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Medical Examiner (Defendant). The Record before us—including the factual allegations made in Plaintiff’s Verified Claim, which we treat as true solely for purposes of this appeal—reflects the following:

On 3 August 2020, Plaintiff initiated this action pursuant to the North Carolina Torts Claims Act, N.C. Gen. Stat. § 143-291, by filing a Verified Claim for Damages in the North Carolina Industrial Commission. In the Verified Claim, Plaintiff alleged the following:

Plaintiff’s brother, George Tuggle (Decedent), passed away in Stoneville, North Carolina on or about 17 June 2015. The Rockingham County Medical Examiner issued a Preliminary Death Certificate on 24 June 2015, listing the manner of death as “pending,” relying solely on the investigation of the Rockingham County Sheriff’s Office (RCSO). On 28 August 2015, Defendant issued a Supplemental Death Certificate, listing the cause of Decedent’s death as “undetermined,” as Defendant identified the competing matters of death to be either suicide or accident. Following the Supplemental Death Certificate, Plaintiff continued to contact Defendant and RCSO, requesting they conduct further investigations into Decedent’s death.

On 27 October 2015, Plaintiff filed a Petition for a Contested Case Hearing in the Office of Administrative Hearings seeking to change the manner of death listed on Decedent’s Supplemental Death Certificate. Plaintiff’s Petition was heard before an Administrative Law Judge, who found Defendant’s refusal to amend the death certificate was contrary to the greater weight of the evidence and ordered the cause

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of death on Decedent's Death Certificate be amended from "undetermined" to "accident." Defendant amended Decedent's Death Certificate on 8 August 2017. Defendant sent Plaintiff the amended Death Certificate on 12 August 2017.

Plaintiff alleged Defendant's acts and omissions constituted negligence and caused her to suffer severe emotional distress that manifested after Plaintiff "learned of the manner of death certification and continued for many months" until the amendment of Decedent's Death Certificate on 8 August 2017. Specifically, Plaintiff alleged:

[Plaintiff] suffered severe emotional distress, in that [Plaintiff] experienced anxiety about having to explain to her family the conclusions [Defendant was] opining without doing an investigation. . . . Furthermore, due to [Defendant's] manner of death determination, and subsequent refusals to amend it, even after [the Administrative Law Judge's] order, [Plaintiff] felt as if she was unraveling, had difficulty sleeping, lost weight rapidly, experienced a racing heart, and found it difficult to eat. [Plaintiff] sought treatment from her family health physician, Dr. Shupe, who urged her to see a mental health counselor for an evaluation. . . . [Plaintiff's] mental health conditions manifested themselves after [Plaintiff] learned of the manner of death certification and continued for many months until [Plaintiff] ultimately obtained an amendment of her brother's death certificate through the contested case litigation.

On 2 October 2020, Defendant filed a Motion to Dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, which among other things, asserted Plaintiff's claim was barred by the statute of limitations. On 20 April 2021, the Deputy Commissioner entered an Order granting Defendant's Motion to Dismiss. In this Order, the Deputy Commissioner noted

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Plaintiff alleged she suffered emotional harm on 28 August 2015 when the Supplemental Death Certificate was issued. The Deputy Commissioner then determined: “The statute of limitations began to run on plaintiff’s claim on 28 August 2015, and plaintiff failed to file her claim within the three-year time limit as this claim was filed on 3 August 2020.” Plaintiff appealed this decision to the Commission on 3 May 2021 pursuant to N.C. Gen. Stat. § 143-292.

The Commission heard Defendant’s appeal from the Deputy Commissioner’s decision on the Motion to Dismiss on 9 September 2021. On 9 November 2021, the Commission entered its Order. In its Order, the Commission concluded:

Plaintiff’s [Verified Claim], on its face, discloses that Plaintiff’s action is barred by the Tort Claims Act’s statute of limitations. As Plaintiff’s [Verified Claim] was filed on August 3, 2020, Plaintiff’s cause of action must have accrued no earlier than August 3, 2017, to fall within the three year statute of limitations. N.C. Gen. Stat. § 143-299 (2020). As Plaintiff has pled an action for NIED, her cause of action accrued when she experienced the onset of “severe emotional distress.” . . . According to the [Verified Claim], Plaintiff’s mental health conditions, such as her diagnosed PTSD, manifested themselves after she learned of the manner of death noted in the August 28, 2015 Supplemental Report of Death and continued for “many months” until receipt of the amended death certificate on August 12, 2017[.]

The Commission determined Plaintiff’s claim was filed after the expiration of the statute of limitations. As such, the Commission ordered Plaintiff’s claim dismissed with prejudice, pursuant to Rule 12(b)(6) as it was filed outside of the statute of limitations. Plaintiff timely filed written Notice of Appeal from the Commission’s Order on 2 December 2021.

**Issue**

The dispositive issue on appeal is whether the Commission erred in dismissing Plaintiff's Verified Claim pursuant to Rule 12(b)(6) on the basis it was filed outside the statute of limitations contained in N.C. Gen. Stat. § 143-299 (2021).

**Analysis**

Plaintiff contends the Commission erred in dismissing Plaintiff's Verified Claim pursuant to Rule 12(b)(6) as barred by the Tort Claims Act's three-year statute of limitations. On appeal, Plaintiff asserts she alleged separate claims for negligence and negligent infliction of emotional distress. In particular, Plaintiff argues her claims included allegations showing both that Defendant owed her a continuing duty to investigate her brother's death and engaged in a cumulative series of acts and omissions in breach of that alleged duty continuing until the death certificate was amended and that the cumulative impact of this alleged breach of duty resulted in emotional distress and other damages. As such, Plaintiff reasons the continuing wrong doctrine tolled the running of the limitation period on Plaintiff's claim until 8 August 2017, when Defendant amended Decedent's manner of death.

This Court reviews a decision of the Commission issued pursuant to the North Carolina Tort Claims Act 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.

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Stat. § 143-293 (2021). The North Carolina Rules of Civil Procedure, thus, apply to tort claims before the Commission. N.C. Gen. Stat. § 1A-1, Rule 1 (2021).

Rule 12(b)(6) of the North Carolina Rules of Civil Procedure permits a defendant to make a motion to dismiss a complaint for failure to state a claim upon which relief can be granted. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2021). A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of a complaint. *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970). “[A] motion to dismiss is properly granted when it appears that the law does not recognize the plaintiff’s cause of action or provide a remedy for the alleged [cause of action].” *Brown v. Friday Services, Inc.*, 119 N.C. App. 753, 755, 460 S.E.2d 356, 358 (1995). In reviewing a Motion to Dismiss under Rule 12(b)(6), we are to treat the well-pleaded allegations as true and in the light most favorable to the pleader. *Donovan v. Fiumara*, 114 N.C. App. 524, 526, 442 S.E.2d 572, 574 (1994). A complaint “must be liberally construed, and the court should not dismiss the complaint unless it appears beyond a doubt that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief.” *Block v. Cnty. of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000). This Court reviews the Commission’s dismissal under Rule 12(b)(6) de novo. *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003).

“The statute of limitations may be raised as a defense by a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the plaintiff’s action.” *Laster v. Francis*, 199 N.C. App. 572, 576, 681 S.E.2d 858, 861

(2009) (citation omitted). “[O]nce a defendant raises the affirmative defense of the statute of limitations, the burden shifts to the plaintiffs to show their action was filed within the prescribed period.” *Id.* (citing *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996)). The Tort Claims Act prescribes a three-year statute of limitations for negligence claims. N.C. Gen. Stat. § 142-299 (2021). “[T]he statute of limitations begins to run once a cause of action accrues.” *McCutchen v. McCutchen*, 360 N.C. 280, 283, 624 S.E.2d 620, 623 (2006) (citation omitted). “ ‘A cause of action based on negligence accrues when the wrong giving rise to bring suit is committed, even though the damages at that time be nominal and the injuries cannot be discovered until a later date.’ ” *Birtha v. Stonemor, N.C., LLC*, 220 N.C. App. 286, 292, 727 S.E.2d 1, 7 (2012) (quoting *Harrold v. Dowd*, 149 N.C. App. 777, 781, 561 S.E.2d 914, 918 (2002)).

However, the continuing wrong doctrine is an exception to this general rule. *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003). “Under the continuing wrong doctrine, the statute of limitations does not start running ‘until the violative act ceases.’ ” *Marzec v. Nye*, 203 N.C. App. 88, 94, 690 S.E.2d 537, 542 (2010) (quoting *Babb v. Graham*, 190 N.C. App. 463, 481, 660 S.E.2d 626, 637 (2008)). In order for the continuing wrong doctrine to toll the statute of limitations, the plaintiff must allege “[a] continuing violation” by the defendant that “is occasioned by continual unlawful acts, not by continual ill effects from an original violation.” *Id.* (alteration in original) (citations and quotation marks

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omitted). “ ‘Courts view continuing violations as falling into two narrow categories. One category arises when there has been a long-standing policy of discrimination. . . . In the second continuing violation category, there is a continually recurring violation.’ ” *Birtha*, 220 N.C. App. at 292, 727 S.E.2d at 7 (alteration in original) (quoting *Faulkenbury v. Tchrs.’ & State Emps.’ Ret. Sys.*, 108 N.C. App. 357, 368, 424 S.E.2d 420, 425 (1993)).

In the case *sub judice*, the first category is not applicable as Plaintiff does not allege discrimination. As to the second category, Plaintiff contends Defendant “engaged in a cumulative series of acts and omissions that violated its duty to investigate the manner of [Decedent’s] death[.]”<sup>1</sup> In support of this argument, Plaintiff points to two instances where this Court applied the continuing wrong doctrine: *Babb v. Graham*, 190 N.C. App. 463, 660 S.E.2d 626 (2008), and *Marzec v. Nye*, 203 N.C. App. 88, 690 S.E.2d 537 (2010).

In *Babb*, this Court applied the continuing wrong doctrine to toll the statute of limitations where the trustee continuously refused to make distributions to trust beneficiaries. 190 N.C. App. at 481, 660 S.E.2d at 637. The plaintiffs alleged—and the defendant conceded—the defendant, acting as trustee, refused to make

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<sup>1</sup> On appeal, Plaintiff contends, citing N.C. Gen. Stat. § 130A-385, “Defendant was statutorily required to ‘make inquiries regarding the cause and manner of death,’ and classify [Decedent’s] manner of death on the appropriate form(s) after an investigation.” Further, Plaintiff contends Defendant owed Plaintiff this duty as Decedent’s next-of-kin. We express no opinion as to whether Defendant owed Plaintiff any legal duty or whether there was, in fact, a breach of any such duty as those issues are not dispositive to our determination in this case.



distributions to the trust beneficiaries. *Id.* at 475, 660 S.E.2d at 634. In applying the doctrine, this Court noted the trustee's "wrongful conduct, the refusal to make distributions, continued until he was removed as trustee[.]" *Id.* at 481, 660 S.E.2d at 637. Thus, this Court concluded the continuous refusal to make distributions constituted continual unlawful acts, warranting the application of the continuing wrong doctrine.

In *Marzec*, the plaintiff alleged in relevant part, the defendant breached his fiduciary duty to plaintiff by failing to pay the plaintiff's monthly salary and failing to produce corporate records upon request. *Marzec*, 203 N.C. App. at 93-94, 690 S.E.2d at 542. This Court applied the continuing wrong doctrine to the defendant's ongoing failure to make salary payments but did not apply the doctrine to the defendant's alleged failure to produce corporate records. *Id.* at 95, 690 S.E.2d at 543. In doing so, the Court noted that while the failure to pay the plaintiff's salary was a repeated and continuing wrong, the plaintiff "has not demonstrated how the ongoing failure to respond to [the plaintiff's] request [for corporate records] constituted continual unlawful acts as opposed to continual ill effects from the original failure to produce the records." *Id.* (citing *Williams*, 357 N.C. at 179, 581 S.E.2d at 423).

Indeed, this Court applied the continuing wrong doctrine in *Marzec* based on the breach of a fiduciary duty to pay the plaintiff's salary; however, this Court also rejected the application of the doctrine to a claim based on the defendant's refusal to provide corporate records to the plaintiff. *Id.* Similarly, here, Plaintiff has not

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demonstrated how Defendant’s alleged failure to investigate amounts to “continual unlawful acts.” Rather, like the Defendant’s alleged ongoing failure to produce records in *Marzec* stemmed from the original failure to produce records, in the present case, Defendant’s alleged failure to investigate stems from the purported, original violation—when Decedent’s Death Certificate listed the manner of death as “undetermined.” Thus, because Plaintiff alleges discrete wrongful conduct, not a continuing violation occasioned by “continual unlawful acts,” the Commission correctly concluded the continuing wrong doctrine does not apply to this case.

Plaintiff also contends, in the alternative, her Verified Claim does not disclose on its face the action is time-barred because the harm at issue did not accrue until 8 August 2017. However, Plaintiff’s Verified Claim filed 3 August 2020 alleges her severe emotional distress manifested after Plaintiff “learned of the manner of death certification and *continued for many months*” until the manner of death was amended on 8 August 2017. The Record reflects, and Plaintiff acknowledges in her Verified Claim, the Supplemental Death Certificate was issued on 28 August 2015. As such, the alleged harm to Plaintiff occurred—and the cause of action accrued—on or about 28 August 2015, when the Supplemental Death Certificate was issued, listing the manner of death as “undetermined,” and when Plaintiff learned of the manner of death certification. *See id.* at 94, 690 S.E.2d at 542 (“For the continuing wrong doctrine to apply, the plaintiff must show ‘a continuing violation’ by the defendant

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that ‘is occasioned by continual unlawful acts, not by continual ill effects from an original violation.’”(quoting *Babb*, 190 N.C. App. at 481, 660 S.E.2d at 637)).

Thus, because Plaintiff has failed to demonstrate how Defendant’s alleged failure to investigate constitutes continual unlawful acts as opposed to continual ill effects of the original, purported violation, we decline to apply the continuing wrong doctrine. Therefore, Plaintiff’s Verified Claim reflects on its face the three-year statute of limitations had expired, barring Plaintiff’s Verified Claim. Consequently, we conclude the Commission did not err in dismissing Plaintiff’s Verified Claim pursuant to Rule 12(b)(6) and N.C. Gen. Stat. § 143-299.

**Conclusion**

Accordingly, for the foregoing reasons, we affirm the Commission’s Order granting Defendant’s Motion to Dismiss.

AFFIRMED.

Judges WOOD and GRIFFIN concur.

Report per Rule 30(e).