NO. COA04-206

NORTH CAROLINA COURT OF APPEALS

Filed: 7 December 2004

MARCUS J. DEPALMA,
ARLENE M. DEPALMA, and
PHILIP N. DEPALMA,
Plaintiffs,

v.

Wake County
No. 03 CVS 7487

ROMAN CATHOLIC DIOCESE
OF RALEIGH, CARDINAL GIBBONS
HIGH SCHOOL, BROTHER MICHEL
BETTIGOLE, TROY DAVIS, DAVID
MILLS, DEAN MONROE, and
WAYNE STEWART,
Defendants.

Appeal by plaintiffs from order entered 7 October 2003 by Judge Henry W. Hight, Jr., in Wake County Superior Court. Heard in the Court of Appeals 21 October 2004.

Marcus J. DePalma, Arlene M. DePalma, and Philip N. DePalma, pro se.

Poyner & Spruill, by J. Nicholas Ellis, for defendant-appellees.

LEVINSON, Judge.

Plaintiffs appeal from an order granting defendants' motion to dismiss their complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) (2003), for failure to state a claim for relief and as barred by the applicable statute of limitations. We affirm.

In October 1999, plaintiff Marcus DePalma was enrolled as a student at defendant Cardinal Gibbons High School ("the school"), in Raleigh, North Carolina, and played on the school's football team. On 15 October 1999 Marcus injured his knee and ankle while playing in a school football game. On 31 May 2003 plaintiffs filed suit against the Diocese, the school, and several individual school personnel. On 15 July 2003 defendants moved to dismiss plaintiffs' complaint under N.C.G.S. § 1A-1, Rule 12(b)(6), as barred by the applicable statute of limitations, and also for failure to comply with the Rules of Civil Procedure. On 7 October 2003 the trial court granted defendants' motion and ordered plaintiffs' complaint dismissed with prejudice. From this order, plaintiffs appeal.

Standard of Review

A motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) (2003), challenges the legal sufficiency of a plaintiff's pleadings:

> A Rule 12(b)(6) motion will be granted '(1) when the face of the complaint reveals that no law supports plaintiff's claim; (2) when the face of the complaint reveals that some fact essential to plaintiff's claim is missing; or (3) when some fact disclosed in the complaint defeats plaintiff's claim.' We treat all factual allegations of the pleading as true but not conclusions of law.

Sterner v. Penn, 159 N.C. App. 626, 628, 583 S.E.2d 670, 672 (2003) (quoting *Walker v. Sloan*, 137 N.C. App. 387, 392, 529 S.E.2d 236, 241 (2000)) (other citations omitted). On appeal, our standard of review "'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.'" *Bowman v. Alan Vester Ford Lincoln Mercury*, 151 N.C. App. 603, 606, 566 S.E.2d 818, 821 (2002) (quoting *Holloman v. Harrelson*, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353, *disc. review denied*, 355 N.C. 748, 565 S.E.2d 665 (2002)).

If, in its ruling on a Rule 12(b)(6) motion, the trial court considers evidence outside the pleadings, the motion is converted to one for summary judgment. *See Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 292, 378 S.E.2d 21, 24 (1989) ("court considered matters outside the pleadings and thus treated the motions to dismiss as motions for summary judgment"). However, "where, as here, the matters outside the pleading considered by the trial court consist only of briefs and arguments of counsel, the trial court need not 'convert the Rule 12 motion into one for summary judgment under Rule 56[.]'" *Governor's Club Inc. v. Governors Club Ltd. P'ship*, 152 N.C. App. 240, 246, 567 S.E.2d 781, 785 (2002), *aff'd*, 357 N.C. 46, 577 S.E.2d 620 (2003) (quoting *Privette v. University of North Carolina*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989)).

In the instant case, the court's order states in pertinent part that "[a]fter reviewing the pleadings and hearing argument from counsel and the DePalmas, the Court finds that the motion should be granted." We conclude that the trial court did not consider evidence outside the pleadings; therefore, this Court will confine its review to the pleadings.

The dispositive issue in this case is whether plaintiffs' claim is barred by the applicable statute of limitations. "A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Id.* (citations omitted).

Plaintiffs' *pro se* complaint was captioned "Tort - Negligent Supervision." The body of the complaint alleges that defendants were negligent in failing to inform Marcus of the seriousness of his October 1999 knee injury, failing to properly treat his knee injury, failing to properly supervise Marcus, and failing to properly hire, train, and supervise certain school personnel. Plaintiffs also asserted an individual claim against defendant David Mills, in his capacity as athletic trainer, for "breach [of] his duty as a paramedical professional." Plaintiffs sought compensatory and punitive damages from defendants "jointly and/or severally for their negligent acts and omissions herein set forth[.]" We conclude that plaintiffs' complaint asserts claims against defendants for negligence.

"Claims based on negligence are governed by [N.C.G.S.] § 1-52(5)," *White v. Consol. Planning, Inc.*, __ N.C. App. __, __, 603

S.E.2d 147, 147 (2004), which provides that a claim must be brought within three years on an action for "any other injury to the person or rights of another, not arising on contract and not hereafter enumerated." Thus, the general statute of limitations for negligence claims is three years. *See Johnson v. Raleigh*, 98 N.C. App. 147, 148, 389 S.E.2d 849, 850 (1990) ("statute of limitations for personal injury allegedly due to negligence is three years").

In the instant case, plaintiffs' complaint asserts claims for negligence arising "[o]n or about October 15, 1999 and for a time thereabout[.]" The complaint generally asserts that defendants were negligent in their response to Marcus's knee injury, including their treatment of Marcus's 15 October 1999 knee injury, their subsequent supervision of Marcus, and their failure to inform Marcus of the seriousness of the 15 October 1999 injury. Plaintiffs' claim against Mills individually also arises from the 15 October 1999 knee injury and Mills' alleged failure to "attend to the needs of an injured student athlete" and "intercede and protect the Plaintiff from a known or potential harm[.]" Finally, plaintiffs' complaint expressly asserts that defendants' negligence occurred "[d]uring the time period between October, 1999 through December 2000[.]" Thus, the factual allegations of plaintiffs' complaint uniformly assert that defendants' negligence arose on 15 October 1999 and continued for some period of time thereafter. We conclude that the complaint clearly establishes that plaintiffs' alleged cause of action accrued on 15 October 1999. Consequently,

because plaintiffs' complaint was not filed until 31 May 2003, it was barred by the applicable three-year statute of limitations.

Plaintiffs, however, argue on appeal that "the events which lead up to the injury complained of did not occur until August 2000 through November 2000"; that "the facts of the injury were never revealed by the Defendants"; and that the "date of discovery of this deception was November 17 2000 and should be the controlling date for the court to determine the issue of the Statute of Limitations." We reject plaintiffs' argument for several reasons.

First, plaintiffs' arguments are based in part on documents outside the complaint. Plaintiffs' brief cites an affidavit executed by plaintiff Arlene DePalma and a medical record kept by a Dr. Szura as proof of a "pattern of deceit" and of the date of its discovery. However, neither the affidavit nor the medical record referenced in plaintiffs' brief were part of the complaint. Therefore, these are not considered in our review of the trial court's order. As discussed above, the factual allegations in the complaint unequivocally assert that defendants' negligence began on the date of Marcus's 15 October 1999 injury, and the complaint fails to allege any negligent actions by the defendants between August and November 2000.

For the same reason, we do not consider certain of plaintiffs' assertions, made for the first time on appeal and not contained in their complaint. These include allegations that defendants violated certain specifically identified provisions of the General Statutes or of the North Carolina Administrative Code; that a Dr.

Szura performed a test on 15 October 1999 diagnosing Marcus's knee condition; that the defendants intentionally concealed this "diagnosis" from plaintiffs; and that defendants conspired to prevent plaintiffs from learning the extent of Marcus's knee injury. None of these assertions are contained in plaintiffs' complaint, which is based on allegations of negligence, contains only a generalized conclusory allegation that defendants' actions were "contrary to State Law and/or Administrative Regulation," and which does not mention Dr. Szura.

Secondly, we reject plaintiffs' argument that their complaint states a basis to extend the statute of limitations. Plaintiffs argue on appeal that they did not learn of defendants' negligence until November 2000. On this basis, plaintiffs contend that the statute of limitations was tolled until their belated "discovery" of the extent of Marcus's injuries. It is true that an exception to the three year statute of limitations is found in N.C.G.S. § 1-52(16), which provides in relevant part that in an action for personal injury "[u]nless otherwise provided by statute, . . . the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs[.]" However, the statute "serves to delay the accrual of a cause of action in the case of latent damages until the plaintiff is aware he has suffered damage, not until he is aware of the full extent of the damages suffered." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 69 N.C. App. 505, 509, 317 S.E.2d

41, 43 (1984), *aff'd,* 313 N.C. 488, 329 S.E.2d 350 (1985). Accordingly, "as soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action is complete and the limitation period begins to run. It does not matter that further damage could occur; such further damage is only aggravation of the original injury." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. at 493, 329 S.E.2d at 354 (1985) (citing *Matthieu v. Gas Co.*, 269 N.C. 212, 152 S.E. 2d 336 (1967)).

"In applying the discovery rule, it must be determined when [plaintiff] knew or should have known the cause of action accrued. Under common law, 'when the right of the party is once violated, even in ever so small a degree, the injury . . . at once springs into existence and the cause of action is complete.'" *McCarver v. Blythe*, 147 N.C. App. 496, 499, 555 S.E.2d 680, 683 (2001) (quoting *Mast v. Sapp*, 140 N.C. 533, 540, 53 S.E. 350, 352 (1906). Thus, "where plaintiffs clearly know more than three years prior to bringing suit about damages, yet take no legal action . . . the fact that further damage is caused does not bring about a new cause of action." *Robertson v. City of High Point*, 129 N.C. App. 88, 91, 497 S.E.2d 300, 302 (1998) (citing *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985)).

In the instant case, the complaint asserts that defendants were negligent in their treatment of and response to Marcus's October 1999 injury. By its own terms, plaintiffs' complaint alleges that defendants' negligence began on 15 October 1999. It is undisputed that on 15 October 1999 plaintiffs knew Marcus had

been injured. Thus, "plaintiff's injuries were apparent to plaintiff and his [condition] could have been generally recognized and diagnosed by a medical professional . . . plaintiff's injuries and [condition] were not latent; thus, § 1-52(16) is inapplicable to the facts of this case." *Soderlund v. Kuch*, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 (2001). Moreover, defendants' "supervision" of Marcus in relation to his football injury also arose on 15 October 1999. Finally, the allegations of plaintiffs' complaint do not support their arguments on appeal that plaintiffs (1) were unaware of defendants' negligence or of the nature of Marcus's injury until November 2000, (2) were prevented by defendants from determining the extent of Marcus's injury, or (3) could not reasonably have learned of defendants' negligence or the extent of Marcus's injury at some time within three years of his 15 October 1999 injury. We conclude that plaintiffs' complaint fails to include any allegations that would toll the applicable statute of limitations.

We also reject plaintiffs' argument that the "continuing supervision" of Marcus by defendants between 15 October 1999 and December 2000 is the equivalent, for purposes of the statute of limitations, of a medical "continuing course of treatment." Plaintiffs cite no authority to support this proposition, and we find none. Moreover, "[o]ur Supreme Court has adopted the 'continuing course of treatment doctrine' with regard to malpractice by hospitals and other health care providers." *Delta Envtl. Consultants, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160,

169, 510 S.E.2d 690, 696 (1999) (citing *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 472 S.E.2d 778 (1996)). This Court has not extended the doctrine to situations outside of the medical malpractice arena. *See Delta, id.* at 170, 510 S.E.2d at 697 ("in light of the holding in *Horton*, which narrowly defines the 'continuing course of treatment doctrine,' we elect not to expand the doctrine's breadth"). Plaintiffs herein argue vehemently that they have **not** filed a medical malpractice claim, making the "continuing course of treatment" exception inapplicable.

For the reasons discussed above, we conclude that plaintiffs' claim was barred by the statute of limitations, and was properly dismissed by the trial court. Having reached this conclusion, we have no need to address the parties' arguments regarding the special requirements for filing a medical malpractice claim. The trial court's order is

Affirmed.

Judges TYSON and BRYANT concur.

Report per Rule 30(e).