NO. COA12-501
NORTH CAROLINA COURT OF APPEALS

Filed: 4 December 2012

BENJAMIN T. TATE,
Plaintiff,

v. Mecklenburg County
No. 10 CVS 16753

CLIFFORD K. CALLOWAY, MD; AND
CHRISTIAN MADSEN, MD,
Defendants.

Appeal by plaintiff from Order and Judgment entered 3 October 2011 by Judge Hugh Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 September 2012.

Watts-Robinson, P.A., by Lena Watts-Robinson, for plaintiff appellant.

Shumaker, Loop & Kendrick, LLP, by Scott M. Stevenson, Stacy Stevenson, and Christian Staples, for defendant appellees.

McCULLOUGH, Judge.

Benjamin T. Tate ("plaintiff") appeals the trial court's order granting summary judgment in favor of Clifford K. Calloway, MD ("Dr. Calloway"), and Christian Madsen, MD ("Dr.

Madsen") (together "defendants"). For the following reasons, we affirm.

I. Background

Plaintiff was a commercial truck driver employed by Pepsi Bottling Group ("Pepsi") from 2004 to 2010. By law, a commercial truck driver is required to undergo periodic medical examinations in order to receive certification from the Department of Transportation ("DOT") and maintain his commercial driver's license. Defendants are doctors at Pro-Med Minor Emergency Centers that administer the exams and issue certifications for DOT.

On 5 March 2007, plaintiff went to defendants to have an exam. Dr. Madsen conducted the exam and denied certification based on plaintiff's diabetes and psychological issues. Thereafter, plaintiff submitted additional explanatory documentation from his primary care physician and his psychiatrist and plaintiff was granted a one-year certification by Dr. Calloway.

On 6 August 2007, plaintiff returned to see defendants for another exam. Dr. Madsen conducted the exam and again denied certification. Plaintiff again responded by submitting

documentation from his personal doctors and Dr. Calloway issued plaintiff a one-year certification on 21 August 2007. However, on 27 August 2007, Dr. Calloway wrote a letter to Pepsi revoking the certification on the grounds that the issuance of the certification was based on misleading information provided by plaintiff.

Although plaintiff could no longer serve as a truck driver for Pepsi following the revocation of his DOT certification, plaintiff was not fired. Instead, plaintiff was given the opportunity to apply for alternative positions with Pepsi. Plaintiff refused to do so and resigned from his position at Pepsi on 25 June 2010.

Plaintiff filed his original complaint in this matter on 6 August 2010. The original complaint listed only "Minor Emergency Center, P.A. d/b/a Pro-Med Minor Emergency Centers" ("Pro-Med") as a defendant in the caption. However, the claims for relief in the complaint referred to Dr. Calloway and Dr. Madsen as defendants.

Plaintiff filed an amended complaint on 15 November 2010. This amended complaint included Dr. Calloway and Dr. Madsen in the caption with Pro-Med. The remainder of the complaint was essentially the same as the original complaint, with the

addition of two paragraphs identifying Dr. Calloway and Dr. Madsen, inserted as new paragraphs 5 and 6.

Pro-Med filed a motion for summary judgment that was granted by the trial court on 13 June 2011, leaving only the claims against defendants.

Defendants subsequently filed a motion for summary judgment on 18 July 2011, followed by an amended motion for summary judgment on 13 September 2011. The trial court granted defendants' motion for summary judgment on the grounds that the statute of limitations had expired with respect to both claims. The Order and Judgment was filed 3 October 2011. Defendant appeals.

II. Analysis

Plaintiff raises the following issues on appeal: Whether the trial court erred in granting summary judgment (1) based on the application of an arbitrary statute of limitations; (2) by determining that the complaint was filed against defendants when the amended complaint was filed; or (3) based on the affidavits submitted by defendants.

"Upon motion, summary judgment is appropriately entered where 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" *Pembee Mfg. Corp. v. Cape Fear Const. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)).

> Ordinarily, the question of whether a cause of action is barred by the statute of limitations is a mixed question of law and fact. However, when the bar is properly pleaded and the facts are admitted or are not in conflict, the question of whether the action is barred becomes one of law, and summary judgment is appropriate.

Id. (citations omitted).

A. Amended Complaint

The determination of when a case is filed is critical when addressing a statute of limitations question. Therefore, we begin our analysis with plaintiff's second issue on appeal concerning the date of filing of the action against defendants.

In its order granting summary judgment, the trial court did not specifically conclude that defendants were not included as parties in the original complaint filed 6 August 2010. However, it is apparent from the trial court's finding that "[plaintiff] filed an 'Amended Complaint' against Defendants . . . on November 15, 2010[]"nd subsequent conclusion that "[p]laintiff's 'Amended Complaint' was filed outside of the applicable three

(3) year statute of limitations[,]" that the trial court ran the statute of limitations from the filing of the amended complaint. Plaintiff now contends that it was error for the trial court to conclude that the statute of limitations had expired based on the amended complaint filed on 15 November 2010. Instead, plaintiff argues that the original complaint, filed on 6 August 2010 is the proper complaint from which the applicable statute of limitations should run.

Plaintiff concedes that defendants were not listed in the caption of the original complaint, yet plaintiff argues that the determination of who is a defendant in the case hinges upon more than the caption. In support of his argument, plaintiff cites *White v. Cochran*, __ N.C. App. __, 716 S.E.2d 420 (2011).

The plaintiff in *White v. Cochran*, a detention officer at the Swain County Jail, filed suit against Curtis Cochran, the Swain County Sheriff, alleging violations of the Retaliatory Employment Discrimination Act. However, the right-to-sue letter issued by the N.C. Department of Labor listed the "Swain County Sheriff's Department" as the respondent. In determining that the complaint was sufficient to bring suit against the Sheriff's Department, the Court held that where a government official could be sued in his official capacity and/or individual

capacity, "'[t]he crucial question . . . is the nature of the relief sought . . .'" and therefore "'"it is appropriate to consider the . . . allegations contained in the pleading to determine the capacity in which defendant is being sued."'" *White*, __ N.C. App. at __, 716 S.E.2d at 425 (quoting *Mullis v. Sechrest*, 347 N.C. 548, 552-53, 495 S.E.2d 721, 723-24 (1998) (quoting *Meyer v. Walls*, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997)). Thus, plaintiff argues that the caption of a case is not controlling.

After reviewing *White v. Cochran*, we find the instant case distinguishable. First, defendants are not government officials and therefore can only be sued in their individual capacity. Second, this is not a case where an individual was incorrectly named in the caption. In this case, plaintiff amended the complaint to add defendants while Pro-Med, the sole defendant listed in the caption of the original complaint, remained a defendant in the case.

Furthermore, the fact that defendants were mentioned in plaintiff's claims for relief in the original complaint does not save the complaint where defendants were not on notice of the suit allegedly pending against them. The North Carolina Rules of Civil Procedure require that summonses be issued to

defendants within five days of the filing of a complaint. N.C. Gen. Stat. § 1A-1, Rule 4(a) (2011). In this case, summonses were not issued to defendants until after the amended complaint was filed on 15 November 2010. "It is well settled that the 'summons, not the complaint, constitutes the exercise of the power of the State to bring the defendant before the court.'" *Stinchcomb v. Presbyterian Medical Care Corp.*, __ N.C. App. __, __, 710 S.E.2d 320, 324-25 (2011) (quoting *Childress v. Forsyth Cnty. Hosp. Auth., Inc.*, 70 N.C. App. 281, 285, 319 S.E.2d 329, 332 (1984)). Thus, "'[w]here a complaint has been filed and a proper summons does not issue within the five days allowed under the rule, the action is deemed never to have commenced.'" *Stinchcomb*, __ N.C. App. at __, 710 S.E.2d at 324 (quoting *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157, 323 S.E.2d 458, 461 (1984)).

Where defendants were not named as parties to the suit until the amended complaint was filed and where defendants were not on notice of the suit until after summonses were issued following the filing of the amended complaint, the trial court did not err in concluding that the action commenced against defendants on 15 November 2010 when plaintiff filed his amended complaint.

B. Statute of Limitations

Having determined that plaintiff's action commenced against defendants when the amended complaint was filed on 15 November 2010, we now proceed to address plaintiff's contention that the trial court erred in granting defendant's motion for summary judgment based on the application of an arbitrary statute of limitations.

As an initial note, "[w]hen the statute of limitations is properly pleaded and the facts of the case are not disputed[,] resolution of the question becomes a matter of law and summary judgment may be appropriate." *Williams v. Blue Cross Blue Shield of North Carolina*, 357 N.C. 170, 178, 581 S.E.2d 415, 422 (2003) (internal quotation marks and citation omitted) (alteration in original).

In this case, plaintiff's complaint includes two distinct claims for relief: one claim for malicious and wrongful interference with contract, and one claim for negligent infliction of emotional distress. We address plaintiff's arguments as they apply to each claim for relief separately.

Malicious & Wrongful Interference With Contract

It is settled, and plaintiff does not dispute, that a claim for malicious and wrongful interference with contract is governed by the three-year statute of limitations set forth in N.C. Gen. Stat. § 1-52(5). *See Johnson v. Graye*, 251 N.C. 448, 452, 111 S.E.2d 595, 598 (1959). Here, plaintiff's contention is that the statute of limitations did not begin to run until his discovery of the interference with his contractual rights. Plaintiff is mistaken.

"Ordinarily, the period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged accrues. The cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed." *Wilson v. Development Co.*, 276 N.C. 198, 214, 171 S.E.2d 873, 884 (1970). Yet, plaintiff cites our decision in *Soderland v. Kuch* for the general proposition that the legislature expressly provided a discovery statute in N.C. Gen. Stat. § 1-52 to protect plaintiffs in cases of latent injuries. *Soderland v. Kuch*, 143 N.C. App. 361, 370, 546 S.E.2d 632, 638 (2001). While it is true that N.C. Gen. Stat. § 1-52(16) contains a discovery provision, the discovery provision is applicable only to cases where there is "personal injury or physical damage to the claimant's

property[.]" N.C. Gen. Stat. § 1-52(16) (2011). Here, no such damage results from malicious and wrongful interference with contract and we have declined to extend the discovery provision of N.C. Gen. Stat. § 1-52(16) to claims for pecuniary loss. *See White v. Consolidated Planning, Inc.*, 166 N.C. App. 283, 308, 603 S.E.2d 147, 164 (2004) ("By its terms, [N.C. Gen. Stat. § 1-52(16)] applies only to claims for 'personal injury or physical damage to claimant's property.' This language is unambiguous and cannot be read as drawing within its scope pecuniary loss unrelated to personal injury or physical property damage.").

Plaintiff additionally argues that the last act of interference by defendants occurred 30 July 2010 when Dr. Calloway filed a declaration in plaintiff's separate action against Pepsi. For purposes of plaintiff's malicious and wrongful interference with contract claim, the 30 July 2010 declaration cannot be considered. Plaintiff resigned from his position at Pepsi on 25 June 2010. Therefore, there was no longer a contractual relationship to be interfered with on 30 July 2010.

As a result, the trial court did not err in granting summary judgment concerning plaintiff's malicious and wrongful interference with contract claim where the three-year statute of

limitations running from 27 August 2007, the last act of interference, expired before the amended complaint was filed 15 November 2010.

Negligent Infliction of Emotional Distress

Plaintiff's contentions regarding the statute of limitations applicable to his claim for negligent infliction of emotional distress are similar to his contentions regarding his interference with contract claim.

As was the case with plaintiff's claim for malicious and wrongful inference with contract, plaintiff does not dispute that a three-year statute of limitations is applicable to his negligent infliction of emotional distress claim. *See Russell v. Adams*, 125 N.C. App. 637, 640, 482 S.E.2d 30, 33 (1997) ("Causes of action for emotional distress, both intentional and negligent, are governed by the three-year statute of limitation provisions of N.C. Gen. Stat. § 1-52(5)[].") . Yet, plaintiff argues that the discovery provision of N.C. Gen. Stat. § 1-52(16) is applicable for the same reasons previously argued.

In *Soderlund*, we declined to apply the discovery statute of N.C. Gen. Stat. § 1-52(16) to the plaintiff's claims for intentional and negligent infliction of emotional distress because the plaintiff was aware of the injury and the effects

were not latent. *Soderlund*, 143 N.C. App. at 370-71, 546 S.E.2d at 638-39. Instead, we held that "the three-year period of time for emotional distress claims accrues when the 'conduct of the defendant causes extreme emotional distress.'" *Id.* at 371, 546 S.E.2d at 639 (quoting *Bryant v. Thalhimer Brothers, Inc.*, 113 N.C. App. 1, 12, 437 S.E.2d 519, 525 (1993)).

However, in deciding *Soderland*, we distinguished the case of *Russell v. Adams*, where the cause of the plaintiff's alleged emotional distress was not discovered by the plaintiff until more than two years after the acts causing the injury occurred. 125 N.C. App. 637, 641, 482 S.E.2d 30, 33 (1997). In *Russell*, we stated that emotional distress "claims do not accrue until the plaintiff 'becomes aware or should reasonably have become aware of the existence of the injury.'" *Id.* (quoting *Pembee Mfg. Corp.*, 313 N.C. at 493, 329 S.E.2d at 354; N.C. Gen. Stat. § 1-52(16)).

In the present case, although plaintiff may not have been aware of the letter from Dr. Calloway to Pepsi, the revocation of plaintiff's DOT certification after it was initially awarded and the ensuing change in plaintiff's employment status with Pepsi put plaintiff on notice so that he "should reasonably have become aware of the existence of the injury."

Furthermore, plaintiff has not specified a date as to when he began suffering emotional distress. "Once a defendant has properly pleaded the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action." *Pembee Mfg. Corp.*, 313 N.C. at 491, 329 S.E.2d at 353. In response to an interrogatory concerning the nature and timing of plaintiff's severe emotional distress, plaintiff stated that "[u]pon learning, *actual date unknown*, that the Defendants had provided confidential information to Plaintiff's employer, Plaintiff suffered severe depression, many sleepless nights, excessive stress, and great embarrassment." (Emphasis added.) Where plaintiff failed to give a date on which to begin the accrual of the statute of limitations, there is no forecast of evidence sufficient to show the action was brought within three years.

Thus, the trial court did not err in granting summary judgment concerning plaintiff's claim for negligent infliction of emotional distress based on the statute of limitations.

C. Affidavits

Plaintiff's final contention is that defendants' affidavits are not based on personal knowledge and therefore cannot

lawfully be the basis for the trial court's grant of summary judgment.

N.C. Gen. Stat. § 1A-1, Rule 56(e) requires that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2011).

> Although a Rule 56 affidavit need not state specifically it is based on "personal knowledge," its content and context must show its material parts are founded on the affiant's personal knowledge, . . . Our courts have held affirmations based on "personal[] aware[ness]," "information and belief," . . . and what the affiant "think[s]," do not comply with the "personal knowledge" requirement of Rule 56(e).

Hylton v. Koontz, 138 N.C. App. 629, 634, 532 S.E.2d 252, 256 (2000) (citations omitted).

In this case, the affidavits of Dr. Calloway and of Dr. Madsen both include a statement that "the facts in this Affidavit are based upon my own personal knowledge." However, the paragraph in each affidavit asserting defendants' last involvement in plaintiff's case is made "[u]pon information and belief." Generally, such statements made "upon information and belief" are not to be considered in ruling on a motion for

summary judgment. However, plaintiff failed to preserve this issue for appeal when he failed to object to the trial court's consideration of the affidavits. *See* N.C.R. App. P. 10(a)(1) (2012) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion[.]"). We, therefore, cannot find that the trial court erred in considering the affidavits in granting summary judgment.

III. Motions to Dismiss and Motion for Sanctions

In addition to deciding the merits of the appeal, this Court received motions to dismiss the appeal and a motion for sanctions. Specifically, defendants filed a second motion to dismiss the appeal or, alternatively, sanction plaintiff on 2 July 2012 on the grounds that plaintiff failed to include an Index to the Record on Appeal as required by N.C.R. App. P. 9(a)(1). Plaintiff responded to defendants' motion and moved for sanctions against defendants on 11 July 2012. These motions were referred to this panel and are hereby denied.

Even so, we note that defendants' counsel is correct in asserting that plaintiff's counsel failed to include an Index to the Record on Appeal as required by N.C.R. App. P. 9(a)(1). This undoubtedly caused defendant's counsel to expend additional

time in attending to this matter, as it did this Court. However, this violation is not so significant as to warrant sanctions. Based upon this admonition, plaintiff's counsel should be certain to file an Index to the Record on Appeal in accordance with the Rules of Appellate Procedure in the future.

IV. Conclusion

For the reasons discussed above, the trial court did not err in granting summary judgment in favor of defendants. Accordingly, we affirm the Order and Judgment of the trial court.

Affirmed.

Judges HUNTER, JR. (Robert N.) and ERVIN concur.

Report per Rule 30(e).