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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-69

Filed 01 August 2023

Moore County, No. 22 CVS 515

N.C. CITIZENS FOR TRANSPARENT GOVERNMENT, INC. and KEVIN DRUM,
Plaintiffs,

v.

THE VILLAGE OF PINEHURST, JOHN STRICKLAND in his official capacity as
Mayor of the Village of Pinehurst; and JANE HOGEMAN in her official capacity as
a member of the Village of Pinehurst Council, Defendants.

Appeal by Plaintiffs from order entered 29 September 2022 by Judge James M.

Webb in Moore County Superior Court. Heard in the Court of Appeals 7 June 2023.

*First Amendment Clinic at Duke Law School, by C. Amanda Martin and Sarah
Ludington for plaintiffs-appellants.*

*Hartzog Law Group, LLP, by Dan M. Hartzog and Dan M. Hartzog Jr., and
Van Camp, Meacham & Newman, PLLC, by Michael J. Newman for
defendants-appellees.*

MURPHY, Judge.

Plaintiffs N.C. Citizens for Transparent Government, Inc. and Kevin Drum
appeal the dismissal of their claims for relief under the Uniform Declaratory
Judgment Act, N.C.G.S. § 1-253, and for violations of the Open Meetings Law,

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N.C.G.S. §§ 143-318.10. *et seq.*, as barred by the 45-day statute of limitations period in N.C.G.S. § 143-318.16A. We hold that the trial court erred by applying a 45-day limitations period to Plaintiffs' claims for relief under N.C.G.S. § 1-253, for an order declaring that actions taken by the Village Council were in violation of the Open Meetings Law under N.C.G.S. § 143-318.16A, and for injunctive relief under N.C.G.S. § 143-318.16.

BACKGROUND

This appeal arises from a Rule 12(b)(6) dismissal of Plaintiffs' claims arising under the Uniform Declaratory Judgment Act, N.C.G.S. § 1-253, and for violations under the Open Meetings Law, N.C.G.S. §§ 143-318.10. *et seq.* Plaintiff Drum is a former member of the Village of Pinehurst Council and founder of N.C. Citizens for Transparent Government, Inc. Plaintiffs filed their complaint against the Village of Pinehurst, John Strickland in his capacity as mayor of the Village of Pinehurst, and Jane Hogeman in her capacity as a member of the Village of Pinehurst Council on 6 May 2022.

As this is an appeal of a 12(b)(6) dismissal order, we provide this background based upon Plaintiffs' allegations. Plaintiffs' claims arise from actions taken by the Village Council during a number of council meetings occurring from September 2021 until October 2021. The first of these meetings was noticed on 16 September 2021 by a posting that the Village Council planned to hold a "Special Closed Session Meeting"

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sometime before the regularly scheduled meeting on 28 September 2021. The Special Meeting was subsequently held on 20 September 2021, and Plaintiff Drum was in attendance. At that meeting, the Village Council entered into a closed session purportedly pursuant to the personnel exemption under N.C.G.S. § 134.318.11(a)(6) to discuss issues pertaining to a strained relationship between a councilmember and citizens. At the next regularly scheduled Village Council meeting, Plaintiff Drum voted to approve the minutes from the 20 September 2021 Special Meeting.

The second “meeting” in dispute is a series of emails that began on 8 October 2021 between a majority of the members of the Village Council. On this date, Defendant Strickland, Defendant Hogeman, the Village Manager, and the Village Attorney began participating in an email thread to consider possible censures against Plaintiff Drum and another Village Council member. The emails discussed complaints received from local business owners about Plaintiff Drum’s negative treatment of them and continued through the Village Council meeting on 12 October 2021.

During the 12 October 2021 meeting, Defendant Strickland and the Village Attorney explained that there had been consensus by the majority of the Village Council to investigate whether Plaintiff Drum and another councilmember had violated the Village Council’s Code of Ethics. Defendant Hogeman then read a motion for censure that had been discussed and formed in the email thread. Following the

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meeting, more emails regarding the proposed censure of Plaintiff Drum were exchanged between the majority of the Village Council until 26 October 2021. Coincidentally, Plaintiff Drum and another Village Council member discussed the potential that the email thread between the Village Council majority could be in violation of the Open Meetings Law in an email conversation on 13 October 2021. At the regularly scheduled meeting on 26 October 2021, Defendant Strickland read a prepared statement regarding Plaintiff Drum's potential ethics violations.

On 6 May 2022, Plaintiffs brought a complaint for violations of the Open Meetings Law, claiming that: (1) notice for the council meeting conducted on 20 September 2021 was legally insufficient and in violation of N.C.G.S. § 143-318.12; (2) the closed session during the council meeting conducted on 20 September 2021 was a violation of N.C.G.S. § 143-318.11(a)(6); (3) the recorded minutes for the 20 September 2021 closed session are inaccurate and violate N.C.G.S. § 143-318(e); and, (4) emails exchanged between the majority of the Village Council between 20 September 2021 and 26 October 2021 violated the Open Meetings Law for lack of notice, access, and minutes.

Plaintiffs further claim that, under the Uniform Declaratory Judgment Act, the trial court had jurisdiction to declare the rights of parties pursuant to N.C.G.S. § 1-253 and § 1-254 and any other relevant statutes because of the presence of one or more "genuine, subsisting and justiciable disputes or controversies" between

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Plaintiffs and Defendants as to applicable rights under the Open Meetings Law.

Plaintiffs sought the following relief for the alleged violations:

- (1) an order pursuant to [N.C.G.S.] § 143-318.16C setting this matter for an immediate hearing and ordering that subsequent proceedings in this action shall be accorded priority;
- (2) an order pursuant to [N.C.G.S.] §§ 143-318.16A and 1-253 declaring that the [20 September 2021] meeting was in violation of the Open Meetings Law as a result of a false and misleading Notice;
- (3) an order pursuant to [N.C.G.S.] §§ 143-318.16A and 1-253 declaring that the [20 September 2021] meeting was in violation of the Open Meetings Law for conducting in closed session public business that should have been conducted in open session;
- (4) an order pursuant to [N.C.G.S.] §§ 143-318.16A and 1-253 declaring that the [20 September 2021] meeting was in violation of the Open Meetings Law, because there are no full and accurate minutes of the meeting;
- (5) an order pursuant to [N.C.G.S.] §§ 143-318.16A and 1-253 declaring that the [20 September 2021] meeting was in violation of the Open Meetings Law, because there is no general account of the closed session portion of the meeting;
- (6) an order pursuant to [N.C.G.S.] §§ 143-318.16A and 1-253 declaring that the electronic communications that took place between [20 September 2021 and 12 October 2021] constituted the transaction of public business in violation of the Open Meetings Law for lack of notice, access to the public, and minutes;
- (7) an order pursuant to [N.C.G.S.] §§ 143-318.16A and 1-253 declaring that it is a violation of the Open Meetings Law for a majority of the members of the Village of Pinehurst Council to attend to, discuss and transact public business without the notice, public access and minutes required by the Open Meetings Law;

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- (8) an order, pursuant to [N.C.G.S.] § 143-318.16, permanently enjoining the defendants and anyone acting in concert with them from conducting meetings violations of the Open Meetings Law, including through email;
- (9) an order awarding the plaintiffs reasonable attorney fees pursuant to [N.C.G.S.] § 143-318.16B; and,
- (10) such other and further relief as the court may determine to be appropriate and necessary.

In response to Plaintiffs' complaint, Defendants filed an amended motion to dismiss in accordance with Rule 12(b)(6) on 30 August 2022. The trial court granted Defendants' motion on 29 September 2022 for failure to state a claim upon which relief can be granted, finding that all claims set forth in the complaint were barred by the applicable 45-day statute of limitations period in N.C.G.S. § 143-318.16A. Plaintiffs timely filed their appeal on 4 October 2022.

ANALYSIS

Plaintiffs argue on appeal that the trial court erred in dismissing their claims for relief pursuant to the North Carolina Uniform Declaratory Judgments Act, N.C.G.S. §§ 1-253 *et seq.*, and N.C.G.S. § 143-318.16 as time barred by the 45-day statute of limitations period contained in N.C.G.S. § 143-318.16A.¹ The main issue

¹ Plaintiffs also argue on appeal that the trial court erred by not making findings of fact as to when Plaintiffs knew or should have known about the challenged action in its order granting the Motion to Dismiss. Plaintiffs cite the language of N.C.G.S. § 143-318.16A(b), which states "the date of its initial disclosure shall be determined by the court *based on a finding* as to when the plaintiff knew or should have known that the challenged action had been taken" and *Knight v. Higgs*, 189 N.C. App. 696, 704 (2008), where we held that "[t]he trial court's failure to make conclusions of law that demonstrate

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we face is determining what claims are limited by the 45-day statute of limitations period written in Open Meetings Law N.C.G.S. § 143-318.16A. N.C.G.S. § 143-318.16A(b) states:

(b) A suit seeking declaratory relief under this section must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void; provided, however, that any suit for declaratory judgment brought pursuant to this section that seeks to set aside a bond order or bond referendum shall be commenced within the limitation periods prescribed by [N.C.]G.S. 159-59 and [N.C.]G.S. 159-62. If the challenged action is recorded in the minutes of the public body, its initial disclosure shall be deemed to have occurred on the date the minutes are first available for public inspection. If the challenged action is not recorded in the minutes of the public body, the date of its initial disclosure shall be determined by the court based on a finding as to when the plaintiff knew or should have known that the challenged action had been taken.

N.C.G.S. § 143-318.16A(b) (2022). We review a trial court's decision to dismiss an action as time-barred by the statute of limitations de novo. *Boyd v. Sandling*, 210 N.C. App. 455, 458 (2011).

To ascertain whether Plaintiffs' claims are time-barred, the date of accrual must first be assessed. *See Newton v. Barth*, 248 N.C. App. 331, 341 (2016) ("In general a cause or right of action accrues, so as to start the running of the statute of

consideration of the statutory factors for such violations, [N.C.G.S. § 143-318.16A], is reversible error." *Id.*

However, our Supreme Court has long held that, when dismissing a plaintiff's claims on a 12(b)(6) motion, findings of fact are not only not required, but conceptually inapplicable. *White v. White*, 296 N.C. 661, 667 (1979) ("[A] trial court cannot make 'findings of fact' conclusive on appeal on a motion to dismiss for failure to state a claim under Rule 12(b)(6)"). Accordingly, we need not further address this argument.

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limitations, as soon as the right to institute and maintain a suit arises.”) (citations omitted). The relevant date of accrual depends on if the challenged action was recorded in the public minutes. N.C.G.S. § 143-318.16A(b) (2022). If the action was recorded, the 45-day limitations period begins to accrue at the “initial disclosure of the action.” *Id.* If that action is not recorded in the public minutes, “the date of its initial disclosure shall be determined by the court based on a finding as to when the plaintiff knew or should have known that the challenged action had been taken.” *Id.* We have held that initial disclosure occurs when the plaintiff is aware of documents that contain a reference to the challenged action by the public body and when those documents are read at public hearings in which the plaintiff is present. *See Coulter v. City of Newton*, 100 N.C. App. 523, 526 (1990).

Plaintiffs claim that the Village Council violated requirements of the Open Meetings Law during: (1) the 20 September 2021 closed meeting; (2) the 8 October 2021 through 12 October 2021 email thread meetings; (3) the 12 October 2021 Village Council meeting; (4) the 12 October 2021 through 26 October 2021 email thread meetings; (5) and the 26 October 2021 meeting.² As to the 20 September 2021 meeting, Plaintiff Drum was present and participated in the action that Plaintiffs now claim was a violation of the Open Meetings Laws. Therefore, Plaintiffs’ claim

² As no arguments were made on appeal regarding the knowledge of Plaintiff N.C. Citizens for Transparent Government, Inc. as to the challenged actions, Plaintiff N.C. Citizens for Transparent Government, Inc. is charged with the knowledge of Plaintiff Drum for the purposes of this analysis.

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for alleged violations occurring at the 20 September 2021 meeting accrued on 20 September 2021.

The email thread meetings that took place on 8 October 2021 through 12 October 2021 between the majority of the Village Council contained discussion of potential censures against Plaintiff Drum. While these discussions were not recorded in the public minutes, the actions that Plaintiffs contend violated the Open Meetings Law were referenced in a prepared document at the Village Council Meeting on 12 October 2021. Plaintiff Drum was present at this council meeting. Therefore, as we held in *Coulter*, the date of accrual for actions pertaining to the email thread on 8 October 2021 through 12 October 2021 accrued on 12 October 2021.

Similarly, because Plaintiff Drum was present at the meeting on 12 October 2021, Plaintiffs' claims in regard to violations of the Open Meetings Law which occurred at that meeting also began to accrue on that date. Further, the email meeting threads which took place from 12 October 2021 through 26 October 2021 referenced motions against Plaintiff Drum, which were then discussed at the Village Council Meeting on 26 October 2021. Thus, the date of accrual for alleged violations in the 12 October 2021 through 26 October 2021 email threads and at the 26 October 2021 Village Council meeting is 26 October 2021.

Having determined that Plaintiffs' claims accrued on 20 September 2021, 12 October 2021, and 26 October 2021, the claims were properly dismissed by the trial

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court as time-barred if the 45-day statute of limitations period applies to all forms of relief sought in Plaintiffs' complaint. However, when determining what claims the 45-day statute of limitations period in N.C.G.S. § 143-318.16A applies to, we must adhere to well-established principles of statutory construction which dictate that, “[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.” *State v. Langley*, 371 N.C. 389, 395 (2018) (quoting *State v. Hooper*, 358 N.C. 122, 125 (2004)). N.C.G.S. § 143-318.16A, entitled “Additional remedies for violations of Article,” states:

(a) Any person may institute a suit in the superior court requesting the entry of a judgment declaring that any action of a public body was taken, considered, discussed, or deliberated in violation of this Article. Upon such a finding, the court may declare any such action null and void. Any person may seek such a declaratory judgment, and the plaintiff need not allege or prove special damage different from that suffered by the public at large. The public body whose action the suit seeks to set aside shall be made a party. The court may order other persons be made parties if they have or claim any right, title, or interest that would be directly affected by a declaratory judgment voiding the action that the suit seeks to set aside.

(b) *A suit seeking declaratory relief under this section must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void; provided, however, that any suit for declaratory judgment brought pursuant to this section that seeks to set aside a bond order or bond referendum shall be commenced within the limitation periods prescribed by [N.C.]G.S. 159-59 and [N.C.]G.S. 159-62. If the challenged action is recorded in the minutes of the public body, its initial disclosure shall be deemed to have occurred on the date the minutes are first available for public inspection. If the challenged action is not recorded in the minutes of the public body,*

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the date of its initial disclosure shall be determined by the court based on a finding as to when the plaintiff knew or should have known that the challenged action had been taken.

(c) In making the determination whether to declare the challenged action null and void, the court shall consider the following and any other relevant factors:

(1) The extent to which the violation affected the substance of the challenged action;

(2) The extent to which the violation thwarted or impaired access to meetings or proceedings that the public had a right to attend;

(3) The extent to which the violation prevented or impaired public knowledge or understanding of the people's business;

(4) Whether the violation was an isolated occurrence, or was a part of a continuing pattern of violations of this Article by the public body;

(5) The extent to which persons relied upon the validity of the challenged action, and the effect on such persons of declaring the challenged action void;

(6) Whether the violation was committed in bad faith for the purpose of evading or subverting the public policy embodied in this Article.

(d) A declaratory judgment pursuant to this section may be entered as an alternative to, or in combination with, an injunction entered pursuant to [N.C.]G.S. 143-318.16.

(e) The validity of any enacted law or joint resolution or passed simple resolution of either house of the General Assembly is not affected by this Article.

N.C.G.S. § 143-318.16A (2022) (emphasis added).

Here, the relevant language contained in N.C.G.S. § 143-318.16A(b) dictating that “[a] suit seeking declaratory relief under this section must be commenced within

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45 days following the initial disclosure of the action that the suit seeks to have declared null and void” is unambiguous. This section of the statute provides a limitations period followed by only one of three forms of relief available for claims under the Open Meetings Law. By not including mention of injunctive relief within this section, which is delineated from other forms of relief for violations of the Open Meetings Law in N.C.G.S. § 143-318.16, it is clear that the 45-day period is a limit only on claims which seek nullification as a form of relief.³

Defendants argue that a reading of the statute of limitations including only the relief prescribed in N.C.G.S. § 143-318.16A conflicts with the framework we established in *Garlock v. Wake County Bd. of Educ.*, 211 N.C. App. 200, 230 (2011). However, no such conflict exists. In *Garlock*, we held that:

The Open Meetings Law requires a two-step analysis. First, the trial court must consider whether a violation of the Open Meetings Law has occurred; that is, whether the public body has taken reasonable measures to provide for public access to its meetings. If no violation has occurred, the analysis stops at step one. If there was a violation, the court must consider step two, which is identifying the appropriate remedy. The trial court may consider remedies under [N.C.G.S.] § 143–318.16, which governs injunctive relief, and [N.C.G.S.] § 143–318.16A, which provides for “Additional remedies for violations of Article.”

³ N.C.G.S. § 143-318.16 reads in relevant part: “(a) The General Court of Justice has jurisdiction to enter mandatory or prohibitory injunctions to enjoin (i) threatened violations of this Article, (ii) the recurrence of past violations of this Article, or (iii) continuing violations of this Article. Any person may bring an action in the appropriate division of the General Court of Justice seeking such an injunction; and the plaintiff need not allege or prove special damage different from that suffered by the public at large. It is not a defense to such an action that there is an adequate remedy at law. (b) Any injunction entered pursuant to this section shall describe the acts enjoined with reference to the violations of this Article that have been proved in the action.” N.C.G.S. § 143-318.16 (2022).

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Id. Defendants argue that, because step one of the *Garlock* analysis requires the trial court to provide declaratory judgment if a violation of the Open Meetings Law is found, all Open Meetings Law claims are subject to the 45-day statute of limitations because they are essentially derivative of the same claim.

Defendants' argument is without merit. Step one in *Garlock's* two-step analysis requires the trial court to determine whether there is a violation of any law contained within Article 33 generally, and step two provides discretion to the court to apply the appropriate remedy. *Garlock*, 211 N.C. App. at 230. In *Garlock*, we held that "a judicial determination that a public body has violated the Open Meetings Law requires a separate analysis and standard from the determination of the appropriate remedies." *Id.* A plain reading of N.C.G.S. § 143-318.16 and N.C.G.S. § 143-318.16A as being subject to different limitations periods does not inherently conflict with *Garlock*; rather, it time-bars specific remedies under the Open Meetings Law. When interpreting N.C.G.S. § 143-318.16A so as to not conflict with its plain meaning⁴, the 45-day statute of limitations period applies only to the statutorily independent remedy of nullification.

⁴ Compare N.C.G.S. § 143-318.16A(b) (2022) ("[a] suit seeking declaratory relief under this section must be commenced within 45 days following the initial disclosure of the action that the suit seeks to have declared null and void"), with N.C.G.S. § 143-318.16 (2022) ("Any person may bring an action in the appropriate division of the General Court of Justice seeking such an injunction. . .").

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Defendants further argue that our holding in *Coulter v. City of Newton*, 100 N.C. App. at 526 establishes that the 45-day statute of limitations period in N.C.G.S. § 143-318.16A applies to claims under the Open Meetings Law that do not seek nullification as a form of relief. In *Coulter*, we noted that “a careful reading of [the] plaintiffs’ pleadings and brief indicates that the only purpose of this action is to test the legality of the Board’s [] action” *Id.* at 525-526. We then held that the suit was properly dismissed as time-barred when it was filed 60 days after the plaintiff gained knowledge of the action taken by the board. *Id.*

However, the plaintiffs in that case filed a complaint “seeking to have the contract between the City and the [other party] declared void . . .” *Id.* at 524. Further, the plaintiffs there sought merely to “reverse the action of the Board . . .” *Id.* The plaintiffs in *Coulter* did not actually seek declaratory judgment or injunctive relief in their complaint alleging a violation of the Open Meetings Law; rather, those plaintiffs sought to have the Board’s action declared null and void under N.C.G.S. § 143-318.16A. Our characterization of those plaintiffs’ claims as seeking to “test the legality” of the challenged action in *Coulter* was no more than a framework to analyze the relevant issues in that particular case. Accordingly, our holding in *Coulter* does not render all claims for relief under the Open Meetings Law as limited by the 45-day statute of limitations applicable to N.C.G.S. § 143-318.16A. The trial court erred by dismissing Plaintiffs’ claims which sought relief in the form of an order pursuant

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to N.C.G.S. § 143-318.16A declaring that the actions by the Village Council were in violation of the Open Meetings Law, for dismissing Plaintiffs' claim which sought relief pursuant to the Uniform Declaratory Judgments Act N.C.G.S. § 1-253, and for dismissing Plaintiffs' claims for injunctive relief pursuant to N.C.G.S. § 143-318.16 as time-barred.

CONCLUSION

As Plaintiffs did not seek an order rendering actions by the Village Council null and void pursuant to N.C.G.S. § 143-318.16A, and because the plain meaning of N.C.G.S. § 143-318.16A provides that, of the three forms of relief the trial court has discretion to grant for violations of the Open Meetings Law, nullification is the only form which is limited by 45-day period contained in the statute, Plaintiffs' claims that allege violations of the Open Meetings Law in relation to the 20 September 2021 Special Meeting, the 8 October 2021 through 12 October 2021 email thread meetings, the 12 October 2021 Village Council meeting, the 12 October 2021 through 26 October 2021 email thread meetings, and the 26 October 2021 are remanded to the trial court for further proceedings.

REVERSED AND REMANDED.

Judges TYSON and ARROWOOD concur.

Report per Rule 30(e).