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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-816

Filed: 21 April 2020

N.C. Industrial Commission, I.C. No. TA-26729

VERA WOODARD, Plaintiff

v.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, DIVISION OF
MOTOR VEHICLES, Defendant

Appeal by Plaintiff from Order entered 2 May 2019 by the North Carolina Industrial Commission. Heard in the Court of Appeals 18 February 2020.

Perry & Associates, by Cedric R. Perry, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Alexander G. Walton, for defendant-appellee.

HAMPSON, Judge.

Factual and Procedural Background

Vera Woodard (Plaintiff) appeals from an Order of the Full Commission of the North Carolina Industrial Commission (Commission), dismissing her claims under the North Carolina Tort Claims Act with prejudice. Relevant to this appeal, the Record tends to show the following:

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On 30 January 2018, Plaintiff filed a Tort Claims Affidavit (Affidavit) asserting claims against the North Carolina Department of Transportation, Division of Motor Vehicles (Defendant). In her Affidavit, Plaintiff sought \$2,000.00 “by reason of the negligent conduct of . . . Denise Nowell of the Zebulon License Plate Agency operated by the Zebulon Chamber of Commerce and duly authorized by the North Carolina Dept. of Transportation.” Specifically, Plaintiff alleged her injury occurred in the following manner:

Injury occurred when Denise Nowell (agent for NC Department of Transportation/North Carolina Division of Motor Vehicles) (and agent for the Zebulon License Plate Agency and the Zebulon Chamber of Commerce) placed [Plaintiff] on administrative leave on or about 30 October 2017, called the Zebulon Police to arrest [Plaintiff] on two occasions, and terminated [Plaintiff] from employment on 11 December 2017. . . . Prior to termination, Denise Nowell, agent for the North Carolina agencies named above, defamed [Plaintiff] by calling her a thief and filling out an incident report that accused [Plaintiff] of stealing \$495.00[.]

Plaintiff further alleged her damages “consist of lost wages, medical expenses, and mental/emotional distress that were incurred due to the defamation and negligent infliction of emotion distress by Denise Nowell, agent for the agencies named above.”

On 1 March 2018, Defendant filed a Motion to Dismiss and Motion to Stay Discovery (Motion to Dismiss) pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure. Defendant alleged, *inter alia*, the Commission lacked subject-matter jurisdiction because Plaintiff’s claims for defamation (Defamation Claim) and negligent infliction of emotional distress (NIED) (NIED

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Claim) were premised on intentional acts. Defendant's Motion to Dismiss was heard before a Deputy Commissioner on 20 June 2018, and on 5 July 2018, the Deputy Commissioner entered an order dismissing Plaintiff's Defamation and NIED Claims for lack of subject-matter jurisdiction.

Plaintiff appealed this order to the Full Commission. On 2 May 2019, the Commission entered its Order dismissing Plaintiff's Claims with prejudice. In its Order, the Commission concluded Plaintiff's Defamation Claim should be dismissed because defamation is an intentional tort and the Industrial Commission lacks subject-matter jurisdiction over intentional torts under the North Carolina Tort Claims Act. As for the NIED Claim, the Commission concluded Plaintiff failed to allege the elements of NIED because the alleged conduct was not "negligent conduct" but instead "intentional acts." Plaintiff timely appealed the Commission's Order to this Court.

Issues

The dispositive issues on appeal are whether the Commission erred by (I) dismissing Plaintiff's Defamation Claim for lack of subject-matter jurisdiction and (II) dismissing Plaintiff's NIED Claim for failure to state a claim under Rule 12(b)(6).

Analysis

I. Defamation Claim

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Plaintiff contends the Commission erred by concluding it did not have subject-matter jurisdiction over Plaintiff's Defamation Claim. We disagree. The standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*. See *Lentz v. Phil's Toy Store*, 228 N.C. App. 416, 418, 747 S.E.2d 127, 130 (2013) (citation omitted).

“Under the Tort Claims Act, jurisdiction is vested in the Industrial Commission to hear claims against state departments, institutions and agencies for personal injuries or damages sustained by any person as a result of the *negligence* of a state officer, agent or employee acting within the scope of his employment.” *Frazier v. Murray*, 135 N.C. App. 43, 47, 519 S.E.2d 525, 528 (1999) (emphasis added) (citation omitted). The Commission must decide whether the alleged wrong

arose as a result of the *negligence* of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

N.C. Gen. Stat. § 143-291(a) (2019) (emphasis added). “The Tort Claims Act does not give the Industrial Commission jurisdiction to award damages based on intentional acts.” *Frazier*, 135 N.C. App. at 48, 519 S.E.2d at 528 (citation omitted). “Injuries intentionally inflicted by employees of a state agency are not compensable under the Tort Claims Act. Intentional acts are legally distinguishable from negligent acts.” *Id.* (citation omitted).

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Here, Plaintiff alleges the Commission erred by dismissing her Defamation Claim. Specifically, Plaintiff asserts the tort of defamation is covered under the Tort Claims Act because, according to Plaintiff, defamation is not an intentional tort as “[t]here is no mention that ‘intent’ is an element of defamation.”

However, our Supreme Court recognizes defamation is “an intentional tort.” *White v. Trew*, 366 N.C. 360, 363, 736 S.E.2d 166, 168 (2013) (citation omitted); *see also Dobson v. Harris*, 352 N.C. 77, 87, 530 S.E.2d 829, 837 (2000) (stating in a defamation action, “the [defendant’s] state of mind, motive, or subjective intent is an element of [the] plaintiff’s claim” (citation omitted)). Because defamation is an intentional tort, the Tort Claims Act “does not give the Industrial Commission jurisdiction” to hear Plaintiff’s Defamation Claim. *Frazier*, 135 N.C. App. at 48, 519 S.E.2d at 528 (citation omitted). Therefore, the Commission did not err by dismissing Plaintiff’s Defamation Claim for lack of subject-matter jurisdiction. *See id.* (citation omitted).

II. NIED Claim

Plaintiff also argues she sufficiently alleged negligent acts falling under the Tort Claims Act and thus the Commission erred in dismissing her NIED Claim. We disagree. In her brief to this Court, Plaintiff does not distinguish between the basis for the Commission’s dismissal of her Defamation Claim and the basis for dismissing her NIED Claim. Rather, Plaintiff more generally contends she sufficiently alleged

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claims sounding in negligence (including NIED) and therefore her claims should not have been dismissed. The Commission, however, dismissed Plaintiff's NIED Claim on the basis Plaintiff failed to state a claim for NIED under N.C. R. Civ. P. 12(b)(6).¹

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) (citation omitted). “[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). Therefore, “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.” *Id.* (citation omitted).

“To state a claim for [NIED] under North Carolina law, the plaintiff need only allege that: (1) the defendant *negligently* engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress, and (3) the conduct did in fact cause the plaintiff *severe* emotional distress.” *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 334 N.C. 669, 672, 435 S.E.2d 320, 321-22 (1993) (emphasis added) (alteration, citation, and quotation marks omitted).

¹ The Commission did additionally determine even if it viewed Plaintiff's allegations as asserting a claim for *Intentional* Infliction of Emotional Distress, it would not have jurisdiction over that claim under the Tort Claims Act. Plaintiff does not contest this determination.

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The first element of a NIED claim requires allegations that the “defendant failed to exercise due care in the performance of some legal duty owed to [the] plaintiff under the circumstances[.]” *Guthrie v. Conroy*, 152 N.C. App. 15, 25, 567 S.E.2d 403, 410-11 (2002) (citation and quotation marks omitted). Plaintiff’s Affidavit, however, fails to reference any duty Defendant owed to her, and such a failure is fatal to Plaintiff’s NIED Claim on a motion to dismiss. *See id.* at 25, 567 S.E.2d at 411 (“[P]laintiff alleges no duty that [the defendant] owed plaintiff Absent a breach of duty of care, plaintiff’s suit against [the defendant] for NIED cannot be maintained.” (citation omitted)).

Further, Plaintiff’s NIED Claim is premised on allegations of intentional rather than negligent conduct. In her Affidavit, Plaintiff alleged Nowell “placed [Plaintiff] on administrative leave . . . , called the Zebulon Police to arrest [Plaintiff] on two occasions, and terminated [Plaintiff] from employment[.]” As the Commission noted in its Order, “[n]one of these acts are examples of negligent conduct, and instead are intentional acts.” Our Court has previously recognized, “[a]llegations of intentional conduct, . . . even when construed liberally on a motion to dismiss, cannot satisfy the negligence element of an NIED claim.” *Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, 228 N.C. App. 142, 149, 746 S.E.2d 13, 19 (2013) (citation omitted) (affirming dismissal of a NIED claim where “plaintiff’s NIED claim is premised on allegations of intentional—rather than negligent—conduct”).

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“In addition, in order to plead a valid NIED claim, a plaintiff must allege severe emotional distress, which has been defined as ‘any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.’” *Id.* at 149, 746 S.E.2d at 19-20 (citation omitted). Here, Plaintiff’s Affidavit merely asserts Plaintiff suffered “lost wages, medical expenses, and mental/emotional distress” as a result of Defendant’s alleged negligent conduct. “[W]ithout any factual allegations regarding the type, manner, or degree of severe emotional distress[,]” Plaintiff’s Affidavit fails to state a valid claim for NIED. *Id.* at 149, 746 S.E.2d at 20 (citation omitted); *see also Holleman v. Aiken*, 193 N.C. App. 484, 502, 668 S.E.2d 579, 591 (2008) (affirming dismissal of NIED claims where complaint did “not make any specific factual allegations as to [the plaintiff’s] ‘severe emotional distress’” (citation omitted)).

Because Plaintiff fails to allege any basis for liability under NIED—including any duty owed to Plaintiff, any breach of that duty, foreseeability, or infliction of *severe* emotional distress—Plaintiff’s NIED Claim fails as a matter of law. *See Horne*, 228 N.C. App. at 149, 746 S.E.2d at 19-20 (citations omitted). Therefore, the Commission properly dismissed this Claim under Rule 12(b)(6).

Conclusion

Accordingly, for the foregoing reasons, we affirm the Commission’s Order.

WOODARD V. N.C. DEP'T OF TRANSP.

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AFFIRMED.

Chief Judge McGEE and Judge BRYANT concur.

Report per Rule 30(e).