

Dorovey  
187

2014 DEC 10 PM 4:33

NORTH CAROLINA  
INDUSTRIAL  
COMMISSION

NORTH CAROLINA INDUSTRIAL COMMISSION  
I.C. FILE NO. TA-24610

CAPE HATTERAS MOTEL, INC., )  
VERNON DAVIS DAWSON, JR., )  
AND CAROL DAWSON, )  
 )  
Plaintiffs, )  
vs. )  
 )  
NORTH CAROLINA )  
DEPARTMENT OF )  
TRANSPORTATION, *et al* )  
 )  
Defendant. )  
 )

MOTIONS TO DISMISS, ANSWER,  
AND DEFENSES

NOW COMES Defendant, North Carolina Department of Transportation, subject to the motions herein, by and through the undersigned counsel, Roy Cooper, Attorney General of North Carolina, and Melody R. Hairston, Special Deputy Attorney General, and responds to Plaintiffs' Affidavit as follows:

MOTION TO DISMISS

Defendant moves to dismiss Plaintiffs' claims against Eugene A. Conti, Jr., Anthony J. Tata, and Jerry Jennings pursuant to rules 12(b)(1), 12(b)(2), 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that the North Carolina Industrial Commission does not have jurisdiction over tort claims filed against individuals. N.C. Gen. Stat. §143-291.

MOTION TO DISMISS

N.C. Gen. Stat. §1-15 requires that any cause of action for tort must be filed within three years from the date the cause of action accrued. Furthermore, N.C. Gen. Stat. §143.299 requires that all claims against any and all State departments, institutions, and agencies shall be forever barred unless filed within three years of the accrual of such claim. The Court has no discretion when considering whether a claim is barred by the statute of limitations. Congleton v. City of Asheboro, 8 N.C. App. 571, 174 S.E.2d 870 (1970), Callahan v. Rodgers, 89 N.C. App. 250, 365 S.E.2d 717 (1988).

Plaintiffs have failed to specify all of the time periods during which the alleged negligence occurred. Instead, Plaintiffs reference dates "stretching back over the past several years." To the extent that Plaintiffs' claim is based upon alleged negligent acts occurring outside of the applicable statute of limitations, Plaintiffs' claim is barred and should be dismissed.

## ANSWER

Defendant, answering the allegations of the numbered paragraphs of Plaintiffs' Affidavit, alleges and says:

1. Defendant is without knowledge or information sufficient to either admit or deny the truth of the allegations contained in paragraph 1 of the Affidavit. Therefore, the allegations of paragraph 1 are denied.
2. Defendant is without knowledge or information sufficient to either admit or deny the truth of the allegations contained in paragraph 2 of the Affidavit. Therefore, the allegations of paragraph 2 are denied.
3. Defendant is without knowledge or information sufficient to either admit or deny the truth of the allegations contained in paragraph 3 of the Affidavit. Therefore, the allegations of paragraph 3 are denied.
4. The allegations of paragraph 4 are admitted.
5. Defendant is without knowledge or information sufficient to either admit or deny the truth of the allegations contained in paragraph 5 of the Affidavit. Therefore, the allegations of paragraph 5 are denied.
6. It is admitted that Secretary Anthony J. Tata was Secretary of NCDOT during some of the time periods referenced in the Affidavit. It is further admitted, upon information and belief, that Secretary Tata was a resident and citizen of North Carolina during some of the time periods referenced in the Affidavit. Except as specifically herein admitted, the allegations of paragraph 6 are denied.
7. It is admitted that Jerry Jennings, P.E. was a Division Engineer for NCDOT for the area that includes Buxton and Hatteras Island during some of the time periods referenced in the Affidavit. It is further admitted, upon information and belief that Mr. Jennings was a resident and citizen of North Carolina during some of the time periods referenced in the Affidavit. Except as specifically herein admitted, the allegations of paragraph 7 are denied.
8. The allegations contained in paragraph 8 call for a legal conclusion and, as such, no response is required. To the extent a response is required, Defendant is without knowledge or information sufficient to either admit or deny the truth of the allegations contained in paragraph 8. Therefore, the allegations of paragraph 8 are denied.
9. The allegations contained in paragraph 9 call for a legal conclusion and, as such, no response is required. To the extent a response is required, it is admitted that

the North Carolina Industrial Commission has jurisdiction over claims of negligence against State departments and agencies pursuant to N.C. Gen. Stat. §143-291, *et seq.* Except as specifically herein admitted, the allegations of paragraph 9 are denied.

10. Defendant is without knowledge or information sufficient to either admit or deny the truth of the allegations contained in paragraph 10 of the Affidavit. Therefore, the allegations of paragraph 10 are denied.
11. Defendant is without knowledge or information sufficient to either admit or deny the truth of the allegations contained in paragraph 11 of the Affidavit. Therefore, the allegations of paragraph 11 are denied.
12. The allegations of paragraph 12 are admitted.
13. It is denied that NCDOT has contracted with or authorized the U.S. Army Corps of Engineers to dredge the area around and under Bonner Bridge and/or Oregon Inlet. It is further denied that NCDOT has authority over the method of dredging used by the U.S. Army Corps of Engineers in this area. Defendant is without knowledge or information sufficient to either admit or deny the truth of the remaining allegations contained in paragraph 13 of the Affidavit. Therefore, the remaining allegations are denied.
14. It is denied that any beach erosion has been the result of any negligence on the part of NCDOT. It is further denied that NCDOT bulldozed sand from the beaches in order to create sand dunes. It is admitted that, following Hurricane Dennis in 1999, NCDOT constructed sand dunes which at the time connected to existing dunes located adjacent to the Cape Hatteras Motel. Defendant is without knowledge or information sufficient to either admit or deny Plaintiffs' allegations regarding dates that Cape Hatteras Motel had to be evacuated due to storm waters and/or sand, and the same are therefore denied. Except as specifically herein admitted, the allegations of paragraph 14 are denied.
15. It is denied that any alleged damage to Cape Hatteras Motel has been the result of any negligence on the part of NCDOT. Upon information and belief, it is admitted that there may have been a construction project 20 or more years ago which may have elevated the pavement on N.C. 12. It is further admitted that N.C. 12 was resurfaced in 2012, which resulted in an additional 1.5 inches of asphalt on the roadway. It is denied that the elevation of N.C. 12 near the Cape Hatteras Motel is inconsistent with the elevation of the highway elsewhere on Hatteras Island. Except as specifically herein admitted, the allegations of paragraph 15 are denied.
16. It is admitted that NCDOT maintains a drainage system in this area that was designed to assist with drainage associated with normal rain events and minor overwash events. Except as specifically herein admitted, the allegations of

paragraph 16 are denied.

17. Defendant hereby incorporates its responses to each and every allegation contained in paragraphs 1 through 17 of the Affidavit.
18. It is admitted that the North Carolina Tort Claims Act is set forth in N.C. Gen. Stat. 143-291, *et. seq.* It is denied that paragraph 18 sets forth the provisions contained within the Tort Claims Act in their entirety. Except as specifically herein admitted, the allegations of paragraph 18 are denied.
19. It is denied that NCDOT and its officers, employees, and agents were negligent as alleged by Plaintiffs. It is further denied that Former Secretary Conti, Secretary Tata, or Mr. Jennings have committed negligent acts. The remaining allegations of paragraph 19 call for legal conclusions and, as such, no response is required. To the extent a response is required, the remaining allegations of paragraph 19 are denied.
20. It is denied that any damages allegedly suffered by Plaintiffs are the result of any negligence on the part of NCDOT, its officers, employees, or agents. Defendant is without knowledge or information sufficient to either admit or deny the remaining allegations contained in paragraph 20 of the Affidavit. Therefore, the remaining allegations of paragraph 20 are denied.
21. The allegations of paragraph 21 are denied.

DEFENDANT DENIES, GENERALLY, EACH AND EVERY ALLEGATION OF PLAINTIFFS' AFFIDAVIT NOT SPECIFICALLY ADMITTED, DENIED OR OTHERWISE QUALIFIED.

**FIRST DEFENSE**  
**CONTRIBUTORY NEGLIGENCE**

Defendant pleads the contributory negligence of Plaintiffs as a bar to their recovery. Even if Defendant was negligent, which Defendant denies, the Plaintiffs are barred from any relief on the grounds that any damages or injuries suffered or incurred by the them were proximately caused by their contributory negligence in that, upon information and belief, they failed to take reasonable efforts to protect their property from sand and/or water damage, and were otherwise negligent as may be proven through discovery and at trial of this matter.

**SECOND DEFENSE**  
**FAILURE TO MITIGATE DAMAGES**

If it is determined that Defendant breached a duty to Plaintiffs, which Defendant denies, Plaintiffs are barred from any relief therefrom on the grounds that, upon information and belief, they have failed to mitigate their alleged damages by taking reasonable efforts to protect their

property from sand and/or water damage. "An injured Plaintiff must exercise reasonable care and diligence to avoid or lessen the consequences of the Defendant's wrong. If he fails to do so, for any part of the loss incident to such failure, no recovery can be had." Snead v. Holloman, 101 N.C. App. 462, 400 S.E. 2d 91 (1991).

**THIRD DEFENSE**  
**ACT OF GOD**

Plaintiffs are barred from any relief on the grounds that any damages or injuries to Plaintiffs were a result of an act of God and of nature, causing storm damage and/or flooding to their property, which is located in close proximity to the ocean.

**FOURTH DEFENSE**  
**INTERVENING AND SUPERSEDING ACTS/NEGLIGENCE**

If it is determined that Defendant was negligent, which is denied, and to the extent Plaintiffs claim that dredging by the U.S. Army Corps of Engineers resulted in their damages, Defendant pleads the intervening and superseding acts and/or negligence of the U.S. Army Corps of Engineers, or any other person and/or entity as a complete bar against any recovery by Plaintiffs in this matter.

**WHEREFORE**, Defendant prays for the following relief:

1. That Plaintiffs recover nothing from Defendant and that Plaintiffs' claim be dismissed with prejudice or denied;
2. That the costs of this action be taxed against Plaintiffs;
3. That Defendant have such other and further relief as the Commission deems just and proper.

This the 10<sup>th</sup> day of December, 2014.

ROY COOPER  
Attorney General

Melody R. Hairston  
Melody R. Hairston  
Special Deputy Attorney General  
N.C. Department of Justice  
P.O. Box 629  
Raleigh, NC 27602  
(919) 716-6820  
NC State Bar # 30623

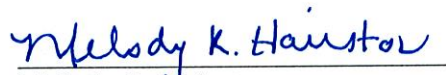
**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing document was this day served upon Plaintiffs by placing the same in the United States mail, postage prepaid, and addressed as follows:

Mr. James L. Conner, II  
Calhoun, Bhella, & Sechrest, LLP  
4819 Emperor Boulevard, Suite 400  
Durham, North Carolina 27703

This the 10<sup>th</sup> day of December, 2014.

ROY COOPER  
Attorney General

  
\_\_\_\_\_  
Melody R. Hairston  
Special Deputy Attorney General