

FILED

**IN THE CLAIMS COMMISSION OF THE STATE OF TENNESSEE
EASTERN GRAND DIVISION**

JAN 15 2010

Tennessee Claims Commission
CLERK'S OFFICE

WENDY BURCHFIEL, individually, and }
KRISTIN BURCHFIEL, a minor, through }
next friend WENDY BURCHFIEL, }

Claimants, }

v. }

STATE OF TENNESSEE, }

Defendant. }

Claims Commission No. 20091242
Regular Docket

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ORDER GRANTING STATE'S MOTION TO DISMISS

THIS MATTER IS BEFORE the undersigned on the Defendant's Motion to Dismiss and the Record as a whole.

Motions pending before the Tennessee Claims Commission ("the Commission") are to be decided without oral argument pursuant to Tennessee Claims Commission Rule 0310-1-1-.01(5)(a) unless otherwise ordered. There has been no order for oral argument in this matter. Further, there has been no motion by either party for oral argument. Therefore, the State's Motion is properly before the Commission and will be heard on the Record.

This claim was originally received by the Division of Claims Administration ("the Division") on April 23, 2009, and was transferred by the Division to the Commission on August 4, 2009.

The State has filed a Motion to Dismiss pursuant to Tennessee Rules of Civil Procedure 12.02(6) on the grounds that the Claimant has failed to state a claim against the State and secondly, that the claim filed is barred by the applicable statute of limitations.

The Claimant has not responded to the State's Motion which was filed in the Commission on

September 16, 2009.

The Tennessee Rules of Civil Procedure, Rule 12.02(6) provides as follows:

12.02. How Presented. – Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in writing:

(6) failure to state a claim upon which relief can be granted,....

In applying this Rule, the following standard was adopted in Tennessee, in *Cook v.*

Spinnaker's of Rivergate, Inc., 878 S.W.2d 934 (Tenn. 1994):

A Rule 12.02(6) motion to dismiss for failure to state a claim upon which relief can be granted tests only the sufficiency of the complaint, not the strength of a plaintiff's proof as does, for example, a motion for a directed verdict. *Merriman v. Smith*, 599 S.W.2d 548, 560 (Tenn. Ct. App. 1979). The failure to state a claim upon which relief can be granted is determined by an examination of the complaint alone. *Wolcotts Fin. Serv., Inc. v. McReynolds*, 807 S.W.2d 708, 710 (Tenn. Ct. App. 1990). The basis for the motion is that the allegations contained in the complaint, considered alone and taken as true, are insufficient to state a claim as a matter of law. *Cornpropst v. Sloan*, 528 S.W.2d 188, 190 (Tenn.1975); *Shelby County v. King*, 620 S.W.2d 493, 494 (Tenn.1981); *Shipley v. Knoxville Journal Corp.*, 670 S.W.2d 222, 223 (Tenn.Ct.App.1984). The motion admits the truth of all relevant and material averments contained in the complaint but asserts that such facts do not constitute a cause of action. *League Cent. Credit Union v. Mottern*, 660 S.W.2d 787, 789 (Tenn.Ct.App.1983). In scrutinizing the complaint in the face of a Rule 12.02(6) motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact therein as true. *Fuerst v. Methodist Hospital South*, 566 S.W.2d 847, 848-49 (Tenn.1978); *Holloway v. Putnam County*, 534 S.W.2d 292, 296 (Tenn.1976). The motion should be denied unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *Fuerst*, 566 S.W.2d at 848.

It is abundantly clear that this case must be dismissed.

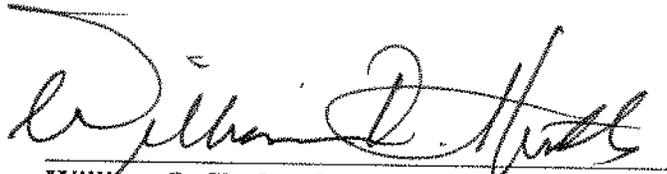
The Claimant bases her allegations of negligence on the actions of a City of Sevierville police officer. The Commission, in negligence cases, has jurisdiction over acts or omissions committed by

state employees. (See Tenn. Code Ann. §§ 9-8-307(a)(1) and 8-42-101(3).) The officer was not an employee of the State.

Secondly, the automobile accident which forms the basis of Ms. Burchfiel's claims occurred on April 23, 2008, yet this claim was received by the Division on May 6, 2009, nearly two weeks past the expiration of the statute of limitations which applies here and which is set out in Tennessee Code Annotated, section 28-3-104.

Therefore, for these two reasons, this claim must be and is, respectfully DISMISSED.

ENTERED this the 13th day of January, 2010.



William O. Shults, Commissioner

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CERTIFICATE OF SERVICE

I certify that a true and exact copy of the foregoing document has been forwarded to:

Andrew Farmer, Esq.
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Lionel R. Joiner, Esq.
Assistant Attorney General
P.O. Box 20207
Nashville, TN 37202-0207

this the 15 day of January, 2010.



Marsha Richeson, Administrative Clerk