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NO. COA11-115
NORTH CAROLINA COURT OF APPEALS

Filed: 6 September 2011

LOIS EDMONDSON BYNUM, ADMINSTRATRIX OF THE ESTATE OF JAMES EARL BYNUM and LOIS MARIE BYNUM,
Plaintiff

v.

Wilson County
No. 08 CVS 2433

WILSON COUNTY and SLEEPY HOLLOW DEVELOPMENT COMPANY,
Defendants

Appeal by defendants from order entered 14 October 2010 by Judge Milton F. Fitch, Jr., in Wilson County Superior Court. Heard in the Court of Appeals 7 June 2011.

Thomas & Farris, P.A., by Kurt Schmidt and Albert S. Thomas, Jr.; Narron & Holdford, P.A, by Ben L. Eagles, for Plaintiff-Appellee.

Teague Campbell Dennis & Gorham, L.L.P., by Carrie E. Meigs and Leslie B. Price, for Defendants-Appellants.

ERVIN, Judge.

Defendants Wilson County and Sleepy Hollow Development Company appeal from an order denying their motion for summary judgment. On appeal, Defendants argue that the trial court erred by denying their summary judgment motion. After careful

consideration of Defendants' challenges to the trial court's order in light of the record and the applicable law, we conclude that Defendant's appeal should be dismissed.

I. Factual Background

A. Substantive Facts

In January 2007, Defendant Wilson County moved its main office building to 2201 South Miller Road in Wilson. Wilson County leased the building in question from Defendant Sleepy Hollow Development Company. At the time that it was constructed in the 1960s, the building was required to comply with the 1958 North Carolina Building Code. After Wilson County moved its offices to the building, some additional construction work was performed, including modifications to the electrical system.

On 15 April 2008, Plaintiffs James Earl Bynum and his wife, Lois Marie Bynum, drove to the Wilson County office building, in which the offices of Wilson County's water department were located, for the purpose of paying their water bill. Since Plaintiffs usually paid their water bill in person, they had visited the building on approximately thirteen previous occasions. While Mr. Bynum entered the building to pay the water bill, Mrs. Bynum remained in their car.

After climbing the front exterior steps, Mr. Bynum entered the building and went to the utility department, which was located on the second floor, where he paid the couple's water

bill. After returning to the first floor and exiting the building, Mr. Bynum started down the front exterior stairs in order to return to the car where Mrs. Bynum was waiting. Approximately two-thirds of the way down the stairs, Mr. Bynum fell and sustained serious injuries.

Mr. Bynum had not noticed anything wrong with the stairs on his previous visits to the building, and did not see any sign of problems with the stairs on the date of his fall. According to Mr. Bynum, "the step . . . gave way" and he attempted to grab hold of something as he fell. After his fall, Mrs. Bynum saw Mr. Bynum lying face down on the concrete at the bottom of the stairs, with his feet on the bottom step. Mrs. Bynum described the stairs on which her husband fell as "chipped."

Dale Causey, Wilson County's Water Director, was outside smoking a cigarette at the time of Mr. Bynum's fall. While looking out of the corner of his eye, Mr. Causey saw Mr. Bynum come out of the building and fall while walking down the steps. According to Mr. Causey, Mr. Bynum fell approximately two-thirds of the way down the steps. When Mr. Causey reached Mr. Bynum following his fall, Mr. Bynum was about four feet from the middle of the stairs and had one foot on the bottom step. At that point, Mr. Causey ran into the building, requested that someone call 911, and went to get Assistant County Manager Denise Stinagle.

After coming outside, Ms. Stinagle saw Mr. Bynum lying in a face down position near the middle of the stairs. At an earlier time, some of the steps had been repaired with metal plates. However, the third step, on which Mr. Bynum allegedly fell, did not have such a metal place. A metal plate was used to repair the third step in April 2009.

B. Procedural History

On 9 December 2008, Mr. Bynum filed a complaint in which he alleged that he had been injured as the result of Wilson County's negligence. On 2 January 2009, Wilson County filed an answer in which it denied the material allegations of Mr. Bynum's complaint and asserted a number of affirmative defenses, including a contention that Mr. Bynum's claims were barred by the doctrine of governmental immunity. On 30 July 2009, Plaintiffs filed an amended complaint in which they claimed to have been injured as the result of negligence on the part of Wilson County and Sleepy Hollow.

On 3 June 2010, Defendants sought summary judgment. On 14 October 2010, the trial court entered an order denying Defendants' summary judgment motions.[1] Defendants noted an appeal to this Court from the trial court's order.[2]

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[1] On 25 October 2010, the trial court entered an order certifying the case for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b). However, a trial court is only authorized to make an effective certification pursuant to N.C.

II. Legal Analysis

A. Appealability

As a general proposition, the denial of a motion for summary judgment is interlocutory and not, for that reason, immediately appealable. *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999) (citation omitted). However, a "trial court's denial of [a] motion for summary judgment on the issue of governmental immunity is immediately appealable." *Jones v. Kearns*, 120 N.C. App. 301, 303, 462 S.E.2d 245, 246, *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995) (citation omitted); *Hickman v. Fuqua*, 108 N.C. App 80, 82, 422 S.E.2d 449, 450 (1992) (stating that "case law clearly establishes that if immunity is raised as a grounds for the summary judgment motion,

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Gen. Stat. § 1A-1, Rule 54(b) in the event that it "enter[s] a final judgment as to one or more but fewer than all of the claims or parties" and "there is no just reason for delay and it is so determined in the judgment." "[A] trial judge [cannot] by denominating his decree a 'final judgment' make it immediately appealable under [N.C. Gen. Stat. § 1A-1,] Rule 54(b) if it is not such a judgment." *Tridyn Industries, Inc. v. American Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979) (citation omitted). As a result of the fact that an order denying a request for the entry of summary judgment does not constitute a final judgment as to either a claim or a party, the trial court's attempt to certify the order from which Defendants have attempted to appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) does not suffice to grant this Court jurisdiction over the present appeal.

[2] Mr. Bynum died on 27 January 2011. On 31 March 2011, Plaintiffs filed a motion to substitute Mrs. Bynum, as administratrix of Mr. Bynum's estate, for Mr. Bynum as a party plaintiff. This Court allowed the substitution motion on 15 April 2011.

a substantial right is affected and the denial is immediately appealable."), *disc. review denied*, 333 N.C. 462, 427 S.E.2d 621 (1993); *see also Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283 (1996), *aff'd*, 344 N.C. 729, 477 S.E.2d 171 (1996). As a result, given that Wilson County claims to have been entitled to summary judgment on the grounds of governmental immunity, the trial court's refusal to grant summary judgment on the basis of that defense affects a substantial right and is immediately appealable.[3]

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[3] The fact that Wilson County is entitled to appeal the trial court's denial of its request for summary judgment predicated on governmental immunity grounds does not, however, suffice to bring any other challenge that Wilson County wishes to advance in opposition to the trial court's order before this Court for review. Instead, the only issue that Wilson County is entitled to have this Court consider on the basis of the trial court's rejection of its governmental immunity defense is the extent, if any, to which the trial court erred by rejecting Wilson County's governmental immunity claim. *Corum v. University of North Carolina*, 97 N.C. App. 527, 532, 389 S.E.2d 596, 599 (1990) (holding that the "denial of defendant's summary judgment motion on the grounds of sovereign and qualified immunity is immediately appealable"), *aff'd in part and rev'd in part on other grounds,* 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431, 113 S. Ct. 493 (1992). As a result, since Wilson County has not advanced any additional argument tending to show that the trial court's decisions with respect to non-immunity issues are immediately appealable and since this Court will not search through the record for the purpose of determining whether a particular trial court order affects a substantial right, *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994) (stating that "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order," with "the appellant hav[ing] the burden of showing this Court that the order deprives the appellant of a substantial right which would be jeopardized

We do not, on the other hand, believe that any of Sleepy Hollow's challenges to the trial court's order are properly before this Court. In seeking to persuade us to consider its challenge to the trial court's order on the merits, Sleepy Hollow relies on our decision in *Hartman v. Walkertown Shopping Ctr., Inc.*, 113 N.C. App. 632, 634, 439 S.E.2d 787, 789 (1994), *cert. denied*, 336 N.C. 780, 447 S.E.2d 422 (1994), in which we stated that, "[w]here dismissal of appeal as interlocutory could still result in two different trials on the same issues, creating the possibility of inconsistent verdicts, a substantial right [is] prejudiced" and an immediate appeal lies from an otherwise unappealable interlocutory order. Although Sleepy Hollow argues that, "if [its] appeal was dismissed by the Court, there would be [the] potential for two different trials on the same issues which could create a possibility for inconsistent verdicts," it never explains how it could ultimately be confronted with the inconsistent verdicts about which it is concerned. *Jeffreys*, 115 N.C. App. at 380, 444 S.E.2d at 254. In addition, having concluded that the only issue Wilson County is entitled to raise on appeal from the trial court's order is

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absent a review prior to a final determination on the merits") (citations omitted), we conclude that Wilson County is not entitled to obtain appellate review of the trial court's decision to refrain from granting summary judgment in its favor on the basis of any non-immunity-related argument and dismiss those portions of its appeal that rely on such non-immunity-related issues.

the extent, if any, to which Plaintiffs' claims are barred by the doctrine of governmental immunity and since Sleepy Hollow has not asserted such an immunity defense, we are unable to ascertain how any decision that we might make with respect to Wilson County's governmental immunity defense would subject Sleepy Hollow to a risk of inconsistent verdicts. As a result, we conclude that Sleepy Hollow's appeal has been taken from an unappealable interlocutory order and should be dismissed.

B. Standard of Review

Summary judgment is appropriate "if 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." N.C. Gen. Stat. § 1A-1, Rule 56(c). In reviewing an order granting or denying a motion for summary judgment, our task is "to determine, on the basis of the materials presented to the trial court, whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law." *Coastal Plains Utils., Inc. v. New Hanover Cty.*, 166 N.C. App. 333, 340, 601 S.E.2d 915, 920 (2004) (citation omitted). "All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368

S.E.2d 849, 858 (1988) (citation omitted). Summary judgment is proper when "an essential element of the opposing party's claim does not exist, cannot be proven at trial, or would be barred by an affirmative defense[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (citation omitted). An award of summary judgment is appropriate when the undisputed evidence establishes that a party is entitled to rely on the defense of governmental or sovereign immunity. *McIver v. Smith*, 134 N.C. App. 583, 584, 518 S.E.2d 522, 524 (1999) (citing *Roumillat v. Simplistic Enterprises*, Inc., 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992)), *disc. review improvidently granted*, 351 N.C. 344, 525 S.E.2d 173 (2000). A trial court's decision to grant or deny a motion for summary judgment is subject to *de novo* review on appeal. *Free Spirit Aviation, Inc., v. Rutherford Airport Auth.*, 191 N.C. App. 581, 583, 664 S.E.2d 8, 10 (2008) (citation omitted).

C. Governmental Immunity

"[T]he doctrine of governmental immunity shields a municipality from liability when the municipality performs a governmental function." *Hickman*, 108 N.C. App. at 82-83, 422 S.E.2d at 451. "Governmental immunity does not, however, apply when the municipality engages in a proprietary function." *Id.* A "governmental function" is an activity that is "discretionary, political, legislative, or public in nature and performed for

the public good in behalf of the State rather than for itself." *Britt v. Wilmington,* 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952) (citing *Millar v. Wilson*, 222 N.C. 340, 341, 23 S.E.2d 42, 44 (1942)). A "proprietary function," on the other hand, is one which is "commercial or chiefly for the private advantage of the compact community." *Id.* "Purchase of insurance . . . waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function." N.C. Gen. Stat. § 153A-435(a). However, there is no waiver of governmental immunity if the claim which has been brought against a governmental entity is excluded from coverage under the applicable insurance policy. *Patrick v. Wake County Dep't of Human Servs.,* 188 N.C. App 592, 596, 655 S.E.2d 920, 923 (2008).

Although the parties have engaged in a protracted debate concerning the extent to which any negligence of which Wilson County might have been guilty resulted from the performance of a governmental, as compared to a proprietary, function, we need not decide that question at this time given certain deficiencies that exist in the record before us. Assuming, without in any way deciding, that the injuries that Plaintiffs sustained at the time of Mr. Bynum's fall resulted from negligent conduct on the part of Wilson County stemming from its performance of a governmental function, Wilson County has not shown that it had

not waived governmental immunity through the purchase of insurance, as alleged by Plaintiffs.

At the hearing held before the trial court, Wilson County argues that the applicable insurance policy did not work to waive its right to rely on a defense of governmental immunity because the applicable insurance agreement did not provide coverage relating to Plaintiffs' claims and submitted a copy of the North Carolina Association of County Commissioner's Liability and Property Pool agreement, under which it received coverage for the period from 1 July 2008 to 1 July 2009, in support of that contention. As a result of the fact that Mr. Bynum fell on 15 April 2008, some two and a half months before the policy period associated with this insuring agreement, Wilson County failed to submit any relevant insurance-related evidence to the trial court in support of its claim of governmental immunity despite the apparent agreement between the parties that some sort of insurance coverage existed.

After admitting that "the policy contained in the Record is not the applicable policy," Wilson moved to amend the record on appeal in order to include the insuring agreement applicable to the period from 1 July 2007 to 1 July 2008. In support of its amendment motion, Wilson County argues that we have the discretion to grant its request pursuant to N.C.R. App. P. 9(b)(5)(b) and analogizes this case to *State v. Barts*, 321 N.C.

170, 178-82, 362 S.E.2d 235, 239-42 (1987), in which the Supreme Court allowed the defendant to amend the record on appeal for the purpose of including information that had been presented to the trial court but had been omitted from the record on appeal. The information which Wilson County is seeking to have included in the record on appeal was not, however, ever presented to the trial court during the consideration of Defendants' summary judgment motion and is not, for that reason, part of the record that is subject to our review in this case. As a result of the fact that the amendments to a record on appeal authorized by N.C.R. App. P. 9(b)(5)(b) are limited to "portions of a trial court record or transcript" and the fact that Plaintiffs have refused to consent to the allowance of Defendants' motion or to agree that the language in the policy currently contained in the record is identical to the language found in the correct policy, we have no basis for allowing Wilson County's proposed amendment to the record on appeal and deny its amendment motion for that reason.

In anticipation that we would deny its request to amend the record on appeal, Wilson County requested that the Court either "remand the case to the Trial Court, instruct Defendants[] to file the applicable policy," and "instruct [the trial court] to consider [their] Motion for Summary Judgment in light of this policy" or allow Defendant's "request to withdraw their appeal"

pursuant to N.C.R. App. P. 37(e)(2), which provides that, "[a]fter the record on appeal has been filed, an appellant . . . may move the appellate court in which the appeal is pending, prior to the filing of an opinion, for dismissal of the appeal." In view of the fact that the trial court has not had an opportunity to address the validity of Wilson County's governmental immunity defense on the basis of a correct record coupled with our concern that a simple remand of the type requested by Defendants may unwisely limit the trial court's ability to properly consider all relevant information in determining the validity of Wilson County's governmental immunity defense, we deny Defendants' request that this case be remanded to the trial court with instructions to consider Wilson County's governmental immunity defense on the basis of a record that contains the correct insuring agreement and allow Defendants' alternative request for leave to withdraw the remaining portion of their appeal. Although we acknowledge Plaintiffs' concerns about the potential for additional delay associated with any decision to allow Defendants' withdrawal motion, we believe that any adverse impact upon Plaintiffs that may result from our decision to allow Defendants' withdrawal motion is outweighed by the benefits that will accrue from affording the trial court greater latitude to adopt procedures that will lead to a fair and expeditious resolution of the

issues before the judiciary in this case. As a result, we grant Defendants' alternative motion for leave to withdraw their appeal from the trial court's order to the extent that it has not already been dismissed.

III. Conclusion

Thus, we hold that, with the exception of Wilson County's challenge to the trial court's refusal to grant summary judgment in its favor on governmental immunity grounds, Defendants' appeal should be, and hereby is, dismissed as having been taken from an unappealable interlocutory order. In addition, given the absence of a relevant insurance agreement from the record considered by the trial court and the apparent existence of a relevant insuring agreement that was never tendered for the trial court's consideration, we deny Defendants' request that we allow an amendment to the record on appeal to include what Defendants claim to be the correct insuring agreement. Finally, we deny Defendants' request that this case be remanded to the trial court subject to certain instructions and allow Defendants' alternative motion for leave to withdraw their appeal.

DISMISSED IN PART; WITHDRAWN IN PART.

Judges MCGEE and MCCULLOUGH concur.

Report per Rule 30(e).