NO. COA08-1196

NORTH CAROLINA COURT OF APPEALS

Filed: 18 August 2009

LINDSAY MARIE RAEF,
Plaintiff-Appellee

v.

Union County
No. 06 CVS 1169

UNION COUNTY PUBLIC SCHOOLS BOARD OF EDUCATION, DAPHNEY HENDERSON and DAPHNEY W. TORRES,
Defendant-Appellants

Appeal by defendant from order entered 6 June 2008 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 11 March 2009.

Ragan & Ragan, PLLC, by Jerry N. Ragan and Norman A. Smith, for plaintiff-appellee.

Cranfill Sumner & Hartzog, LLP, by Ryan D. Bolick, for defendant-appellant.

CALABRIA, Judge.

Daphney W. Torres ("Torres"), formerly known as Daphney Henderson, appeals from the trial court's order denying her motion for summary judgment[1]. We reverse and remand.

On or about 27 May 1996, Lindsay Marie Raef ("plaintiff"), an eleven-year-old student at Shiloh Elementary School in Union County, North Carolina, stayed after school at the request of Torres, her physical education teacher. Torres asked for

[1] Union County Public Schools Board of Education is not a party to this appeal.

assistance in preparing for a field day exercise the following day. While Torres was moving a volleyball pole and base, the metal base disengaged and crushed part of plaintiff's right foot. As a result, plaintiff sustained injuries, including the partial amputation of three toes.

On 26 May 2006, plaintiff filed a complaint in Union County Superior Court against the Union County Public Schools Board of Education ("the School Board") and Torres (collectively "defendants"), alleging negligence and requesting monetary compensation in excess of $10,000. Defendants filed a Motion for Summary Judgment, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, claiming immunity from suit under the doctrine of governmental immunity.

Defendants submitted three affidavits indicating the School Board had not waived its right to governmental immunity by purchasing liability insurance to cover plaintiff's claims. The first affidavit was submitted by Edwin Dunlap, Jr., Treasurer of the North Carolina School Boards Trust, a risk management program designed to guide local school boards in appropriating budgetary funds to pay for claims or civil judgments made against its employees. The affidavit stated that the School Board participated in the trust at the time of the accident and that the trust was not insurance. The second and third affidavits were submitted by Daniel R. Karpinski, Chief Financial Officer for the Union County Public Schools Board of Education. The second affidavit confirmed that defendant School Board was a member of the North Carolina

School Board Trust at the time of the incident. The third affidavit stated defendant School Board "purchased no insurance policy which would be applicable to or provide coverage for Plaintiff's claims."

On 6 June 2008, the trial court granted summary judgment for the School Board, but denied the motion as to Torres. This order also set a hearing date for plaintiff's motion to amend her complaint, a motion which was not included in the record on appeal. On 17 June 2008, Torres filed a motion to stay the trial court proceedings pending appeal. On 27 June 2008, the trial court stayed the proceedings until the resolution of Torres' appeal. Torres now appeals the denial of summary judgment.

We first note that an order denying summary judgment is an interlocutory order and generally not immediately appealable. *See Hallman v. Charlotte-Mecklenburg Bd. Of Educ.*, 124 N.C. App. 435, 437, 477 S.E.2d 179, 180 (1996). However, an interlocutory order that denies summary judgment on the basis of governmental immunity affects a substantial right and is immediately appealable. *See Craig v. New Hanover Cty. Bd. of Educ.*, __ N.C. __, __, __ S.E.2d __, __ (2009); *Childs v. Johnson*, 155 N.C. App. 381, 384-85, 573 S.E.2d 662, 665 (2002).

Summary judgment is proper when "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) (2007). A

moving party may show this by: "(1) proving that an essential element of the plaintiff's case is nonexistent; or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim; or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim." *James v. Clark*, 118 N.C. App. 178, 181, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). "A trial court's ruling on a motion for summary judgment is reviewed *de novo*." *Leverette v. Labor Works, Int'l, LLC*, 180 N.C. App. 102, 108, 636 S.E.2d 258, 263 (2006), *disc. review denied*, 361 N.C. 694, 652 S.E.2d 646 (2007).

Torres argues that plaintiff filed the action against her in her official capacity, and therefore she is protected from suit by the doctrine of governmental immunity and entitled to summary judgment. The doctrine of governmental immunity "bars action against, *inter alios*, the state, its counties, and its public officials sued in their official capacity." *Tabor v. Cty. of Orange*, 156 N.C. App. 88, 90, 575 S.E.2d 540, 542 (2003) (quoting *Messick v. Catawba Cty.*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493 (1993)). It is appropriate to grant summary judgment when a defendant appropriately asserts the affirmative defense of governmental immunity. *See Mullis v. Sechrest*, 347 N.C. 548, 551, 495 S.E.2d 721, 722-23 (1998).

The threshold issue in this case is whether plaintiff seeks recovery against Torres in her official capacity, her individual capacity, or both. *See id.* at 552, 495 S.E.2d at 723; *Meyer v.*

Walls, 347 N.C. 97, 110, 489 S.E.2d 880, 887 (1997). When a plaintiff seeks to recover from a defendant in her official capacity, governmental immunity protects the defendant from suit if the affirmative defense has not been waived through the purchase of liability insurance. *See Tabor*, 156 N.C. App. at 90, 575 S.E.2d at 542 (citing *Messick v. Catawba Cty.*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493 (1993)). However, when a plaintiff seeks recovery directly from a defendant in her individual capacity, the defendant is not protected by the doctrine of governmental immunity or the immunity of her employer. *See Meyer*, 347 N.C. at 112, 489 S.E.2d at 888.

Our Supreme Court has stated that "where the complaint does not clearly specify whether the defendants are being sued in their individual or official capacities, 'the 'course of proceedings' . . . typically will indicate the nature of the liability sought to be imposed.'" *Mullis*, 347 N.C. *at* 551-52, 495 S.E.2d at 723 (quoting *Kentucky v. Graham*, 473 U.S. 159, 87 L. Ed. 2d 114 (1985)). This Court has further held that "in the absence of a clear statement of defendant's capacity, a plaintiff is deemed to have sued a defendant in his official capacity." *Reid v. Town of Madison*, 137 N.C. App. 168, 172, 527 S.E.2d 87, 90 (2000).

> The crucial question for determining whether a defendant is sued in an individual or official capacity is the nature of the relief sought, not the nature of the act or omission alleged. If the plaintiff seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant is named in an official capacity. If money damages are sought, the court must ascertain whether the complaint indicates that the damages are sought from the government or from the pocket of the individual defendant. If the former, it is

> an official-capacity claim; if the latter, it is an individual-capacity claim; and if both, then the claims proceed in both capacities.

Isenhour v. Hutto, 350 N.C. 601, 608-09, 517 S.E.2d 121, 126-27 (1999) (citations omitted).

Plaintiff argues that because the complaint asserted joint and several liability against the defendants, it indicates "the lawsuit is being pursued in Defendant Torres' individual capacity." This conclusion does not necessarily follow from an assertion of joint and several liability. In *Oakwood Acceptance Corp. v. Massengill*, this Court held a complaint against a county and the county's tax collector was an action against the defendant tax collector in his official capacity despite the mention of joint and several liability. 162 N.C. App. 199, 211, 590 S.E.2d 412, 421 (2004); *see also White v. Crisp*, 138 N.C. App. 516, 530 S.E.2d 87 (2000) (affirming summary judgment for individual defendant despite plaintiff seeking damages "jointly and severally" because the remainder of the record showed that recovery was sought in his official capacity and he was therefore entitled to governmental immunity). The mere mention of joint and several liability is insufficient, by itself, to turn what would otherwise be an action against Torres in her official capacity into an action against her in her individual capacity. Further analysis is necessary.

Mullis v. Sechrest provides a guide for our analysis in this case. 347 N.C. 548, 495 S.E.2d 721 (1998). In *Mullis,* the plaintiff injured his hand while working in the school's woodshop under the supervision of the defendant. *Id.* at 549-50, 495 S.E.2d

at 722. The initial and amended complaints were silent on the defendant teacher's capacity, but the plaintiff requested monetary damages. *Id.* at 552-53, 495 S.E.2d at 723-24. As a result, the Court examined the course of proceedings to determine the intent of the plaintiff. *Id.* The *Mullis* Court held plaintiffs sought recovery from defendant in his official capacity based upon the following factors: (1) the caption did not specify defendant's individual or official capacity; (2) the complaint alleged defendant was acting as an agent of the government entity; (3) plaintiffs only set forth one claim of relief; and (4) plaintiffs amended their complaint to allege waiver of governmental immunity, but the amendment did not specify the claim was brought against the defendant in his individual capacity. *Id.* at 553-54, 495 S.E.2d at 724. The teacher was held to be entitled to governmental immunity to the same extent as the school board. *Id.* at 555, 495 S.E.2d at 725.

In the instant case, the complaint was silent as to whether plaintiff sought to recover from Torres in her official capacity, individual capacity, or both. Neither the caption, the allegations within the complaint, nor the prayer for relief specified in which capacity plaintiff sought recovery from Torres. Accordingly, "we treat the complaint against [Torres] as a suit against her in her official capacity." *Warren v. Guilford Cty.*, 129 N.C. App. 836, 839, 500 S.E.2d 470, 472 (1998).

"[A] suit in an official capacity is another way of pleading an action against the governmental entity." *Reid v. Town of*

Madison, 137 N.C. App. 168, 172, 527 S.E.2d 87, 90 (2000) (internal quotations and citations omitted). Once it has been determined that plaintiff sought recovery from Torres in her official capacity, the fact she was acting as an agent of her employer (as conceded by plaintiff in her complaint) and the fact her employer was protected by governmental immunity are sufficient to prove she was protected by governmental immunity. *See id.*

Plaintiff argues that she filed a motion to amend her complaint to add the words "in her individual capacity" in reference to Torres at some point before the hearing on the motion for summary judgment. However, that motion does not appear anywhere in the record. Without its inclusion in the record, we cannot consider the motion to amend. *See* N.C.R. App. P. 9 (2007); *State v. Hickman*, 2 N.C. App. 627, 630, 163 S.E.2d 632, 633-34 (1968) ("[T]he appellate court is bound by the contents of the record on appeal . . . [because] [t]he record imports verity."). The record before us indicates plaintiff intended to bring her claim against Torres in her official capacity. The trial court erred in denying defendant Torres' motion to dismiss on the grounds of governmental immunity.

Reversed and remanded.

Judges HUNTER, Robert C. and HUNTER, JR., Robert N. concur.

Report per Rule 30(e).