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NO. COA09-1567

NORTH CAROLINA COURT OF APPEALS

Filed: 5 October 2010

THE ESTATE OF JEFFREY WHITE, JR.
and THE ESTATE OF JACOB WHITE, by
and through their Administratrix,
MELISSA M. WHITE,
Plaintiff-Appellant,

v.

Stokes County
No. 07 CVS 1002

STOKES COUNTY DEPARTMENT OF
SOCIAL SERVICES; and JAN SPENCER,
in her capacity as Director of
Stokes County Department of
Social Services; and REBECCA MASER,
in her capacity as a Stokes County
Social Worker; and MARSHA MARSHALL,
in her capacity as a Stokes County
Social Worker Supervisor,
Defendants-Appellees.

Appeal by Plaintiff from order entered 27 July 2009 by Judge
Anderson D. Cromer in Superior Court, Stokes County. Heard in the
Court of Appeals 9 June 2010.

Bennett & West, by R. Brandon West, for Plaintiff-Appellant.

*Womble Carlyle Sandrige & Rice, by James R. Morgan, Jr. and
Mary Craven Adams, for Defendants-Appellants.*

McGEE, Judge.

Stokes County Department of Social Services (DSS) received a
Child Protective Services Report for Jeffrey White, Jr. and Jacob
White (the children) on or about 3 May 2006, and thereafter
received non-secure custody of the children. DSS placed the

children with their paternal grandparents pending an adjudication hearing scheduled for 7 September 2006. The children ran away from their grandparents' home on 5 September 2006. Three days later the children were found dead in the nearby Dan River.

Melissa M. White, Administratrix of the children's estates (Plaintiff), commenced this action by filing a complaint on 20 December 2007 in Stokes County Superior Court. Plaintiff alleged that DSS, and its employees Jan Spencer, Rebecca Maser, and Marsha Marshall (collectively Defendants), were negligent in their placement of the children and that this negligence was the proximate cause of the children's deaths. Specifically, Plaintiff alleged that Defendants were negligent in placing the children in the custody of their grandparents, because the grandparents were "in poor health and not in physical condition to properly supervise" the children. Plaintiff also alleged that Defendants were aware that the children had previously run away from adult supervision while in custody and, specifically, had previously run away from their grandparents. Plaintiff filed a motion to amend her complaint on 12 September 2008, which the trial court allowed in an order entered 1 October 2008. The trial court's order "deemed [the amended complaint] filed as of" 1 October 2008. In her amended complaint, Plaintiff alleged that Defendants waived sovereign or governmental immunity by purchasing liability insurance.

Defendants answered, pleading the affirmative defenses of "sovereign immunity, governmental immunity, good-faith immunity,

and public officer's/public official's immunity[.]\" Defendants filed a motion for summary judgment, along with supporting affidavits, on 21 January 2009. Defendants amended their motion for summary judgment on 26 February 2009 and filed additional affidavits. In an order entered 27 July 2009, the trial court granted Defendants' amended motion for summary judgment. Plaintiff appeals.

Standard of Review

We review a trial court's ruling on a motion for summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Summary judgment is proper where "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) (2009).

Sovereign or Governmental Immunity

Our Court has held that the "[s]ervices provided by local Departments of Social Services are governmental functions to which governmental immunity applies." *Whitaker v. Clark*, 109 N.C. App. 379, 381, 427 S.E.2d 142, 143, *disc. review denied*, 333 N.C. 795, 431 S.E.2d 31 (1993). However, a county can waive governmental immunity by purchasing liability insurance or participating in a local government risk pool. N.C. Gen. Stat. § 153A-435(a) (2009). Immunity is waived "to the extent of insurance coverage[.]" *Id.* In seeking summary judgment where waiver of immunity is implicated,

"[i]t is defendants' burden to show that no genuine issue of material fact exists that the policy does *not* cover [defendants'] actions in the instant case." *McCoy v. Coker*, 174 N.C. App. 311, 313-14, 620 S.E.2d 691, 693 (2005) (emphasis in the original).

Along with their motion for summary judgment, Defendants filed the affidavits of Stokes County Manager Bryan Steen and Jan Spencer. Each affiant asserted that, at the time during which the actions occurred giving rise to the complaint in this action, Stokes County was a participant in the North Carolina Association of County Commissioners Risk Management Agency Contract (the Contract). The Contract provided liability insurance coverage for Stokes County. Defendants included a copy of the Contract with their motion for summary judgment.

The Contract provided: "The Pool will pay on behalf of the Covered Person all sums which the Covered Person shall become legally obligated to pay as money damages for a Wrongful Act occurring while a Covered Person is acting within the course and scope of his/her duties[.]" "Covered Person" is defined as:

- a. The Participant [(Stokes County)];
- b. a person who is a lawfully elected or appointed official of the Participant while acting under the jurisdiction of the Participant or within the course and scope of his/her authority or apparent authority, express or implied, but only with respect to his/her liability while acting within the course and scope of his/her authority;
- c. any employees of the Participant while acting within the course and scope of his/her duties for claims brought against him/her in his/her individual capacities[.]

However, the Contract also contains the following language:

Section V (Public Officials Liability Coverage) of this Contract does not apply to. . . [a]ny claim, demand, or cause of action against any Covered Person as to which the Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina law.

The dispositive issue in this case is whether Defendants' participation in the Contract constituted waiver of governmental immunity in light of the above exception. Plaintiff contends that, "[i]f the exclusionary clause in the [Contract] were interpreted as a bar to coverage . . . it would be an interpretation that suggests the County is using taxpayer funds to pay premiums for a policy which would afford them little to no liability coverage at all." Defendants counter that, where the language of the Contract is unambiguous, the Court must apply that language as written and not rewrite the Contract "under the guise of interpreting the policy[,] " to impose liability where none was intended.

Defendants assert that the holding of this Court in *Patrick v. Wake Cty. Dep't of Human Servs.*, 188 N.C. App. 592, 655 S.E.2d 920 (2008), is controlling on these facts. In *Patrick*, the plaintiff brought an action against the Wake County Department of Human Services, alleging negligence related to an investigation of child abuse. *Id.* at 593, 655 S.E.2d at 922. The defendants had purchased insurance which contained the following provision: "This policy is not intended by the insured to waive its governmental immunity. . . . [Rather,] this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental

immunity is clearly not applicable[.]" *Id.* at 596, 655 S.E.2d at 923 (emphasis omitted). Our Court affirmed the trial court's order granting summary judgment in favor of the defendants, reasoning that the "insurance policy unambiguously states, 'this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable[.]'" *Id.* at 597, 655 S.E.2d at 924. We determined that the liability policy did not constitute a waiver of immunity and, therefore, the defense of immunity applied to bar the plaintiff's claims. *Id.*

Our Court recently addressed an almost identical set of circumstances in *Estate of Earley v. Haywood Cty. Dep't of Soc. Servs.*, ___ N.C. App. ___, 694 S.E.2d 405 (2010). In *Earley*, the provisions governing coverage and the exclusions therefrom were identical to those in the case before us. *Id.* at ___, 694 S.E.2d at 408-09. Our Court held in *Earley* that, because the language of the contract was unambiguous, the language of the contract as written must be enforced. *Id.* at ___, 694 S.E.2d at 409. Because "[a] county is immune from liability for injuries caused by negligent social services employees working in the course of their duties absent a waiver of that immunity[,]" *Id.*, quoting *Patrick*, 188 N.C. App. at 597, 655 S.E.2d at 924, we held that the exclusionary clause excluded coverage for the negligence claims asserted by the plaintiff. *Id.* Further, our Court wrote:

We acknowledge the arguably circular nature of the logic employed in *Patrick*. The facts are that the legislature explicitly provided that governmental immunity is waived to the extent of insurance coverage, but the subject insurance contract eliminates any potential

waiver by excluding from coverage claims that would be barred by sovereign immunity. Thus, the language in *Patrick* boils down to: [the d]efendant retains immunity because the policy doesn't cover his actions and the policy doesn't cover his actions because he explicitly retains immunity. Nonetheless in this case, as in *Patrick*, where the language of both the applicable statute and the exclusion clause in the insurance contract are clear, we must decline Plaintiff's invitation to implement "policy" in this matter. Any such policy implementation is best left to the wisdom of our legislature.

Id. at ___, 694 S.E.2d at 409-10; accord *Owen v. Haywood County*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___ (July 20, 2010) (No. COA09-929) ("The exclusionary provision in the instant case is materially indistinguishable from the provisions in *Patrick* and *Estate of Earl[e]y*. We are therefore bound by this Court's prior holdings.").

In the case before us, Defendants were participants in an insurance contract which explicitly excluded from coverage "[a]ny claim, demand, or cause of action against any Covered Person as to which the Covered Person is entitled to sovereign immunity or governmental immunity under North Carolina law." We are bound by the precedent of this Court, and despite the "arguably circular" logic pointed out in *Earley*, *Owen*, and *Patrick*, we must hold that Defendants "retain[] immunity because the policy doesn't cover [their] actions and the policy doesn't cover [their actions] because [they] explicitly retain[] immunity." *Earley*, ___ N.C. App. at ___, 694 S.E.2d at 409. We do not address Plaintiff's argument that this interpretation "suggests the County is using taxpayer funds to pay premiums for a policy which would afford them

little to no liability coverage at all." Such considerations would not constitute a valid basis for refusing to follow *Earley*, *Owen* and *Patrick*. Therefore, Defendants did not waive their governmental immunity by virtue of their participation in the Contract. Because Defendants were protected by governmental immunity, the trial court properly granted summary judgment in favor of Defendants. *McCoy*, 174 N.C. App. at 313-14, 620 S.E.2d at 693.

Affirmed.

Judges STROUD and ERVIN concur.

Report per Rule 30(e).