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NO. COA12-286  
NORTH CAROLINA COURT OF APPEALS

Filed: 2 October 2012

JESSICA RUIZ,  
Plaintiff,

v.

Franklin County  
No. 11 CVS 307

FRANKLIN COUNTY ANIMAL CONTROL,  
and GRAHAM STALLINGS,  
Defendants.

Appeal by defendants from order entered 15 December 2011 by Judge Donald W. Stephens in Franklin County Superior Court. Heard in the Court of Appeals 30 August 2012.

*A. Scott Hamilton for plaintiff appellee.*

*Womble Carlyle Sandridge & Rice, LLP, by Robert T. Numbers, II, Julie B. Bradburn, and Kristen Y. Riggs, for defendant appellants.*

McCULLOUGH, Judge.

Franklin County Animal Control and Graham Stallings, Director of Franklin County Animal Control, in his official capacity (collectively, "defendants"), appeal from an order of the trial court denying a motion seeking the entry of summary judgment in favor of defendants as to Jessica Ruiz

("plaintiff")'s claim for negligence. On appeal, defendants argue the trial court erred by declining to enter summary judgment in their favor on the basis of governmental immunity. We reverse and remand for entry of judgment in favor of defendants.

### I. Background

On 21 March 2011, plaintiff filed a complaint against defendants, alleging that the negligence of Stallings and certain Animal Control Officers employed by Franklin County Animal Control resulted in plaintiff's dog being improperly impounded and euthanized. Plaintiff's complaint did not specify whether plaintiff intended to sue Stallings in both his individual and official capacities. Plaintiff's complaint sought both compensatory and punitive damages.

On 28 October 2011, defendants filed a motion for summary judgment, asserting, *inter alia*, that summary judgment should be entered in their favor based on the doctrine of governmental immunity. On 15 December 2011, the trial court entered an order granting in part and denying in part defendants' motion for summary judgment. The trial court dismissed with prejudice any claim against Stallings in his individual capacity, as well as plaintiff's claim for punitive damages. However, the trial

court denied defendants' motion for summary judgment as to plaintiff's remaining negligence claim against defendants. On 28 December 2011, defendants filed a timely written notice of appeal from the trial court's order. Plaintiff did not likewise file an appeal from the trial court's order.

## II. Appealability and Standard of Review

Defendants argue, and plaintiff concedes, that this Court may immediately review the merits of their appeal from the trial court's interlocutory order denying summary judgment on the basis of governmental immunity. See *Estate of Earley v. Haywood Cnty. Dep't of Soc. Servs.*, 204 N.C. App. 338, 339, 694 S.E.2d 405, 407 (2010) (noting that the denial of a motion for summary judgment is interlocutory and ordinarily is not immediately appealable). We agree. This Court has consistently allowed immediate review of "orders denying dispositive motions grounded on the defense of governmental immunity[,] as they affect a substantial right. *Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283, *aff'd*, 344 N.C. 729, 477 S.E.2d 171 (1996); see also *Owen v. Haywood Cnty.*, 205 N.C. App. 456, 458, 697 S.E.2d 357, 358-59 (denial of motion for summary judgment on grounds of governmental immunity immediately appealable as

affecting a substantial right), *disc. review denied*, 364 N.C. 615, 705 S.E.2d 361 (2010).

The standard of review for a trial court's ruling on a motion for summary judgment is *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). "Under a *de novo* standard of review, this Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Reese v. Mecklenburg Cnty.*, 200 N.C. App. 491, 497, 685 S.E.2d 34, 38 (2009). "'Summary judgment is appropriate whenever the movant establishes a complete defense to the [plaintiff's] claim.'" *Earley*, 204 N.C. App. at 340, 694 S.E.2d at 407 (alteration in original) (quoting *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 26, 348 S.E.2d 524, 528 (1986)).

### III. Application of Governmental Immunity in this Case

Defendants' first argument on appeal is that the trial court erred in failing to grant summary judgment in their favor based on governmental immunity because plaintiff failed to allege defendants' waiver of governmental immunity in her complaint. We agree.

Defendants are correct that this Court has expressly held that "[w]here a complaint fails to allege that immunity has been

waived, the complaint fails to state a cause of action." *In re Kitchin v. Halifax Cty.*, 192 N.C. App. 559, 567, 665 S.E.2d 760, 765 (2008) (holding trial court did not err by granting summary judgment in favor of defendants where plaintiffs' complaint failed to allege a waiver of governmental immunity). "In order to overcome a defense of governmental immunity, the complaint must specifically allege a waiver of governmental immunity. Absent such an allegation, the complaint fails to state a cause of action." *Paquette v. County of Durham*, 155 N.C. App. 415, 418, 573 S.E.2d 715, 717 (2002) (citation omitted). "This Court has consistently disallowed claims based on tort against governmental entities when the complaint failed to allege a waiver of immunity." *Id.* "It is well-established law that with no allegation of waiver in a plaintiff's complaint, the plaintiff is absolutely barred from suing the state and its public officials in their official capacities in an action for negligence." *Vest v. Easley*, 145 N.C. App. 70, 74, 549 S.E.2d 568, 573 (2001).

Here, plaintiff's complaint states that defendant Stallings, as Director of Animal Control, "is employed by the County of Franklin and was so employed on the days in question." Further, it appears from the record there is no dispute among

the parties that Franklin County Animal Control is an entity operated by the County. Likewise, it appears from the record there is no dispute among the parties that animal control activities are governmental functions. "Governmental functions are those which are discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State." *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461 (2000) (internal quotation marks and citations omitted).

The well-settled law in this State is that "[g]overnmental immunity shields municipalities and the officers or employees thereof sued in their official capacities from suits based on torts committed while performing a governmental function." *Earley*, 204 N.C. App. at 340, 694 S.E.2d at 407 (quoting *Kephart v. Pendergraph*, 131 N.C. App. 559, 563, 507 S.E.2d 915, 918 (1998)); see also *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) ("Under the doctrine of governmental immunity, a county is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity."). Thus, governmental immunity applied to defendants in this case, as plaintiff appears to recognize, and plaintiff

has failed to allege in her complaint that defendants waived that immunity. Thus, her action was subject to dismissal.

Even if plaintiff had alleged in her complaint that defendants had waived governmental immunity by the purchase of liability insurance, a review of the record and this Court's prior case law reveals that her contention that defendants waived their immunity defense is without merit.

It is well-established that a county can waive governmental immunity through the purchase of liability insurance or participation in a local government risk pool; however, the purchase of such liability insurance waives the county's governmental immunity only "to the extent of insurance coverage." N.C. Gen. Stat. § 153A-435(a) (2011); *see Dickens v. Thorne*, 110 N.C. App. 39, 43, 429 S.E.2d 176, 179 (1993) ("[A] municipality may waive its governmental immunity for civil liability in tort for negligent or intentional damage by purchasing liability insurance, but only to the extent of the insurance coverage."). "'A governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy.'" *Lunsford v. Renn*, 207 N.C. App. 298, 308, 700 S.E.2d 94, 100 (2010) (quoting *Patrick v. Wake Cty. Dep't of Human Servs.*, 188 N.C.

App. 592, 596, 655 S.E.2d 920, 923 (2008)), *disc. review denied*, 365 N.C. 193, 707 S.E.2d 244 (2011).

Defendants acknowledge the activities of Franklin County Animal Control and its officers are covered under an insurance policy included in the record. The liability insurance policy contains the following provision:

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 because of a Wrongful Act occurring while a Covered Person is acting within the course and scope of the Covered Person's duties to perform Law Enforcement and Animal Control Activities which results in Personal Injury, Bodily Injury, or Property Damage.

In particular, this provision covers "Animal Control Officer[s]," who are defined as

any Participant [here, Franklin County] or those employed by a Participant, regardless of department assigned, who is designated as dog warden, animal control officer, animal control official or other designation that may be used and whose responsibility includes enforcing city, county, and state laws governing the care and keeping of animals, including the impoundment, care and disposal of domestic and wild animals as appropriate.

Nonetheless, the insurance policy further provides, in a section denoted "Exclusions," that coverage is not provided for "any 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[.]” Additionally, the policy contains a specific provision, denoted “Immunity,” that sets forth the intentions of the parties not to waive entitlement to governmental immunity:

The parties to this Contract intend for no coverage to exist under Section VI (Law Enforcement Liability Coverage) as to any claim for which the Covered Person is protected by sovereign immunity and/or governmental immunity under North Carolina law. It is the express intention of the parties to this Contract that none of the coverage set out herein be construed as waiving in any respect the entitlement of the Covered Person to sovereign immunity and/or governmental immunity.

As defendant properly contends, this Court has previously considered these identical provisions in a county insurance policy, holding that such provisions clearly indicate that the county did not waive governmental immunity from the plaintiff's particular claim through the purchase of the insurance policy. See *Earley*, 204 N.C. App. at 341-43, 694 S.E.2d at 408-09. In *Earley*, this Court acknowledged “the arguably circular nature” of the logic behind the holding: “[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.” *Id.* at 343, 694 S.E.2d at 409. Nonetheless, here,

as in *Earley*, “[t]he 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.” *Id.* Because this Court, in *Earley*, upheld the application of governmental immunity when the county’s liability insurance policy contained an express exclusion identical to the one at issue in the present case, we are bound by such precedent. In *the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”). Moreover, in addition to *Earley*, this Court has repeatedly upheld summary judgment in favor of a municipality on the basis of governmental immunity where the subject insurance policy contains such exclusionary provisions. See, e.g., *Lunsford*, 207 N.C. App. at 308-10, 700 S.E.2d at 100-01; *Patrick*, 188 N.C. App. at 595-97, 655 S.E.2d at 923-24.

Here, as we stated previously, there is no dispute in the record that Franklin County Animal Control and Stallings, in his

official capacity as an Animal Control Officer, were performing a governmental function in impounding and euthanizing plaintiff's dog, thereby entitling them to governmental immunity from plaintiff's negligence action. Plaintiff failed to allege in her complaint that defendants waived governmental immunity, subjecting her action to dismissal. In addition, here, as in *Earley*, the language of both the applicable statute and the exclusion clause in the insurance contract is clear. *Earley*, 204 N.C. App. at 343, 694 S.E.2d at 409-10. There remains no genuine issue of material fact concerning whether defendants have waived governmental immunity as to plaintiff's negligence action.

The affirmative defense of governmental immunity is a complete bar to liability. *Clayton v. Branson*, 170 N.C. App. 438, 449, 613 S.E.2d 259, 268 (2005). Accordingly, we must reverse the trial court's denial of summary judgment and remand for the entry of summary judgment as to plaintiff's remaining negligence claim in favor of defendants Franklin County Animal Control and Graham Stallings, in his official capacity.

Vacated and remanded for entry of judgment for defendants.

Judges HUNTER, JR., and ERVIN concur.

Report per Rule 30(e).

