IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-1155

Filed: 7 August 2018

Pasquotank County, No. 15 CVS 531

LAWRENCE PHIFER, Plaintiff,

v.

PASQUOTANK COUNTY; THE CITY OF ELIZABETH CITY; ELIZABETH CITY CHIEF OF POLICE, EDDIE BUFFALOE, JR., in his official and individual capacities; CITY MANAGER, RICH OLSON, in his official and individual capacities, Defendants.

Appeal by Defendants from Order entered 5 May 2017 by Judge Walter H. Godwin, Jr., in Pasquotank County Superior Court. Heard in the Court of Appeals 19 April 2018.

Law offices of F. Bryan Brice, Jr., by F. Bryan Brice, Jr., and Rand Law Firm, by Slade Rand, for Plaintiff-Appellee.

Teague Campbell Dennis & Gorham, LLP, by Henry W. Gorham, Natalia K. Isenberg, and Melissa P. Woodard, for Defendants-Appellants.

INMAN, Judge.

Pasquotank County ("Defendant" or the "County") appeals from an order denying its motion for summary judgment asserting governmental immunity as an affirmative defense against claims of negligence, premises liability, negligent

infliction of emotional distress, and punitive damages filed by Lawrence Phifer ("Plaintiff").[1] Defendant argues that the trial court erred because there were no genuine issues of material fact and the County was entitled to immunity from suit as a matter of law based on governmental immunity.

After careful review of the record and applicable law, we reverse the trial court's order.

Factual and Procedural History

This case arises from a series of alleged mold exposure injuries sustained by Plaintiff beginning on 29 August 2012 in the Public Safety Building ("PSB") owned by Pasquotank County. The PSB housed several departments of Elizabeth City including: the District Attorney's Office, the Sherriff's Department, the intake and fingerprinting room, and the Central Communications and Emergency Management Services. Plaintiff, an employee of Elizabeth City Police Department, worked regularly in the PSB and utilized the intake and fingerprinting room on a daily basis.

Plaintiff filed this action after he began suffering from symptoms including burning eyes and throat, respiratory difficulty, asthma, epistaxis, chest tightness, coughing, dyspnea on exertion, headaches, weight loss, high blood pressure, and fever

[1] Following the trial court's order, all parties to the suit filed notices of appeal. However, subsequent to the filing of Appellant's Brief, Plaintiff, and the remaining Defendants—the City of Elizabeth City, Elizabeth City Chief of Police, Eddie Buffaloe, Jr., and the City Manager, Rich Olson—filed a joint motion for leave to withdraw and dismiss the appeal. The motion was granted by this Court on 3 January 2018. As a result, the only issue remaining before us is whether the trial court erred in denying the County's motion for summary judgment.

and chills. Plaintiff alleged that his symptoms were caused by mold in the intake and fingerprinting room of the PSB and that the County was aware of the mold prior to his exposure. Plaintiff asserted claims for, among other things, negligence, premises liability, negligent infliction of emotional distress, and punitive damages against the County.

On 3 August 2016, Defendant filed a motion for summary judgment asserting governmental and sovereign immunity. Defendant filed in support of the motion affidavits by Charles Eaton, the Assistant Risk Manager for the North Carolina Association of County Commissioners, and Rodney Bunch, the County Manager for Pasquotank County. The affidavit by Mr. Eaton included a copy of the County's liability insurance policy. The trial court heard the motion on 30 January 2017, and issued its order denying the motion on 5 May 2017. Defendant timely appealed.

Analysis

1. Appellate Jurisdiction

As a general matter, appeals from the denial of a motion for summary judgment are interlocutory and not immediately appealable. *Herndon v. Barrett*, 101 N.C. App. 636, 639, 400 S.E.2d 767, 769 (1991). However, Section 7A-27(b)(3) of the North Carolina General Statutes provides that an appeal from an interlocutory order may be heard if it affects a substantial right. N.C. Gen. Stat. § 7A-27(b)(3) (2017). It is well-settled that "[w]here the appeal from an interlocutory order raises issues of

sovereign immunity, such appeals affect a substantial right sufficient to warrant immediate appellate review." *Satorre v. New Hanover Cty. Bd. of Comm'rs.*, 165 N.C. App. 173, 175, 598 S.E.2d 142, 144 (2004) (citation omitted). Because the County's motion for summary judgment is based on sovereign and governmental immunity, we hold it is immediately appealable.

2. Discussion

Defendant argues that the trial court erred in denying its motion for summary judgment because, based on the undisputed facts, it is immune from suit. We agree.

The standard of review from an order denying a motion for summary judgment is *de novo*. *Bynum v. Wilson Cty.*, 367 N.C. 355, 358, 758 S.E.2d 643, 645 (2014). When applying a *de novo* review, this Court considers the case anew and may substitute its own judgment for that of the lower tribunal. *Id.* at 358, 758 S.E.2d at 645. "When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party." *Dalton v. Camp*, 353 N.C. 647, 651, 548 S.E.2d 704, 707 (2001) (citation omitted). 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) (2017).

It is well-established that county and municipal corporations may invoke the doctrine of governmental immunity as an affirmative defense against "suit for the negligence of its employees in the exercise of governmental functions[,]" so long as the government has not waived its immunity. *Estate of Williams v. Pasquotank Cty. Parks & Recreation Dep't*, 366 N.C. 195, 198, 732 S.E.2d 137, 140 (2012) (internal quotation marks and citations omitted).

Governmental immunity applies only to those acts "committed pursuant to [a] governmental function[]." *Id.* at 199, 732 S.E.2d at 141 (citation omitted). Whether a county is entitled to governmental immunity therefore "turns on whether the alleged tortious conduct of the county or municipality arose from an activity that was governmental or proprietary in nature." *Id.* at 199, 732 S.E.2d at 141.

Governmental functions have long been held to be those activities that are "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). The North Carolina Supreme Court has held that a county's maintenance and supervision of county owned buildings falls within the scope of a governmental function. *Bynum*, 367 N.C. at 360, 758 S.E.2d at 647 (reasoning that "the fact that the legislature has designated these responsibilities as governmental is dispositive").

Here, it is undisputed that the basis for Plaintiff's claims—*i.e.*, the County's failure to properly address, and notify workers about, the mold issue in the PSB—arises from the County's allegedly negligent maintenance of the PSB. A review of the County's liability insurance policy reveals that Plaintiff's claims are not covered by the policy. *See Estate of Earley v. Haywood Cty. Dep't of Soc. Servs.*, 204 N.C. App. 338, 342-43, 694 S.E.2d 405, 409 (2010) (interpreting substantively identical language in an insurance policy as not waiving governmental immunity). Because there were no genuine issues of material fact as to this issue and, under *Bynum*, maintenance of a county owned building by the county falls within the scope of a governmental function, we hold that the trial court erred by denying Defendant's motion for summary judgment.

Plaintiff argues that *Bynum* is inapposite to the present case because Plaintiff worked in the PSB as an employee of the city, and the County had a statutory duty to its own employees and others working on the premises to maintain the property as a workplace free from hazards. In support of this argument, Plaintiff cites N.C. Gen. Stat. § 95-129 (the Occupational Safety and Health Act of North Carolina) and *N.C. Comm'r of Labor v. Weekley Homes, L.P.*, 169 N.C. App. 17, 609 S.E.2d 407 (2005).

The Occupational Safety and Health Act of North Carolina ("OSHA") provides that employers, including state, county, and municipal employers, owe a duty to each employee to maintain "conditions of employment and a place of employment free from

recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees[.]" N.C. Gen. Stat. § 95-129(1) (2017). Our Court, applying this statute in *Weekley Homes*, held that the statute "does not limit an employer's responsibility to comply with occupational health and safety standards to only its own employees." 169 N.C. App. at 26, 609 S.E.2d at 414. In *Weekley Homes*, a compliance officer with the North Carolina Department of Labor issued a citation to a general contractor for a subcontractor's failure to wear fall protection gear while working on a steep pitch roof in violation of OSHA regulations. *Id.* at 18, 609 S.E.2d at 410. The issue in *Weekley Homes* was whether the Department of Labor had the authority to issue a citation holding a general contractor "liable for violations that its subcontractor may create if [the general contractor] could reasonably have been expected to detect the violation by inspecting the job site." *Id.* at 28, 609 S.E.2d at 415.

Plaintiff's reliance on *Weekley Homes* is misguided. Plaintiff did not assert an OSHA claim against the County, and even if he had, his reliance conflates case law interpreting administrative violations with tort liability. As this Court explained in *Pike v. D.A. Fiore Constr. Servs., Inc.*, 201 N.C. App. 406, 411-12, 689 S.E.2d 535, 539 (2009), "*Weekley Homes* has not been recognized to stand for the proposition that a general contractor's violation of OSHA regulations necessarily gives rise to tort

liability[.]" Following *Pike*, and because this case involves no alleged OSHA violation, the decision in *Weekley Homes* is inapposite.

Plaintiff also argues that Defendant is not shielded from liability under governmental immunity because the County's actions went beyond negligence and amounted to active concealment of the existence of mold from the police officers by county employees. Plaintiff's complaint contains no specific allegations of concealment and asserts no claims of negligent or intentional misrepresentation or fraud.

Even assuming *arguendo* that the issue is properly before us, Plaintiff's claims still arise from conduct that falls within the scope of a governmental function—the maintenance of a county building. It is well-established that governmental immunity bars tort claims generally, including claims of misrepresentation or fraud. *See, e.g., Herring v. Winston-Salem/Forsyth Cty. Bd. of Educ.*, 137 N.C. App. 680, 684-85, 529 S.E.2d 458, 462 (2000) (holding "constructive fraud [is] a viable tort claim subject to the doctrine of sovereign immunity"); *see also Providence Volunteer Fire Dep't v. Town of Weddington*, __ N.C. App. __, __, 800 S.E.2d 425, 434 (2017) (holding that governmental immunity precluded the plaintiff from raising a fraud claim). Plaintiff cites no authority to the contrary. Accordingly, we hold Plaintiff's argument is without merit.

Conclusion

For the foregoing reasons, we hold that the trial court erred by denying Defendant's motion for summary judgment. We reverse the trial court's order and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judges ELMORE and MURPHY concur.

Report per Rule 30(e).