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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-865

No. COA22-344

Filed 20 December 2022

Wilson County, No. 20 CVS 794

PEDRO M. MARTINEZ, Plaintiff,

v.

CITY OF WILSON, Defendant.

Appeal by Defendant from order entered 1 October 2021 by Judge William D. Wolfe in Wilson County Superior Court. Heard in the Court of Appeals 18 October 2022.

*Law Offices of James Scott Farrin, by Rosa A. Boatwright, for Plaintiff-Appellee.*

*Lewis, Brisbois, Bisgaard & Smith, LLP, by Seth M. Friedman, and Cauley Pridgen, P.A., by James P. Cauley, III, and Emily C. Cauley, for Defendant-Appellant.*

INMAN, Judge.

¶ 1

The City of Wilson (the “City”) appeals from an order of the trial court denying the City’s motion for summary judgment on the issue of governmental immunity. The City’s sole contention on appeal is that the trial court improperly concluded the City waived its governmental immunity by purchase of an insurance policy subject to a

self-insured retention. After careful review of the record, we reverse the trial court's order.

## I. FACTUAL & PROCEDURAL HISTORY

¶ 2 The record tends to show the following:

¶ 3 Plaintiff-Appellee Pedro M. Martinez filed suit against the City on 19 March 2020, alleging negligence and seeking damages for injuries he sustained during the construction of a municipal dog park. Mr. Martinez was on the construction site placing rebar in holes for cement reinforcement on 17 July 2019 while City employees operated a digger truck to move a steel pole. The pole fell from the truck and landed on Mr. Martinez's left foot.

¶ 4 At the time of Mr. Martinez's injury, the City was covered by a commercial general liability insurance policy with Travelers Indemnity Company ("Travelers"). The policy included a \$500,000 self-insured retention—the amount the City must pay before there is any potential coverage under the Travelers policy. The policy also included an immunity endorsement entitled "Preservation of Governmental Immunity – North Carolina," which provided:

### PROVISIONS

1. The following is added to each Section that provides liability coverage:

This insurance applies to the tort liability of any insured only to the extent that such tort liability is not subject to

any defense of governmental immunity under North Carolina law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

2. The following is added to the **CONDITIONS** section:

**Preservation of Governmental Immunity**

Your purchase of this policy is not a waiver, under North Carolina General Statute Section 160A-485 or North Carolina General Statute Section 153A-435 or any amendments to those sections, of any governmental immunity that would be available to any insured had you not purchased this policy.

¶ 5 Mr. Martinez originally filed suit in Cumberland County, but the case was transferred to Wilson County with the consent of the parties. The City raised its defense of governmental immunity under N.C. Gen. Stat. §§ 160A-350, *et seq.*, -485 (2021) in its answer to Mr. Martinez’s complaint.

¶ 6 The City filed a motion for summary judgment, alleging it was immune from suit under the doctrine of governmental immunity. The City argued that building the dog park was a governmental function authorized by N.C. Gen. Stat. § 160A-351 (2021), so it was entitled to governmental immunity up to \$500,000 under its self-insured retention as well as any amount in excess of \$500,000 because the policy’s immunity endorsement applied.

¶ 7 At a hearing on the City’s motion, Mr. Martinez conceded that building the dog

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park was a proper governmental function<sup>1</sup> and that the City is entitled to governmental immunity for its self-insured retention up to \$500,000. The only remaining issue was whether the City had waived its immunity by purchasing insurance for any liability in excess of \$500,000. The trial court commented during the hearing, “I don’t attribute a whole lot of significance to the paragraph in the policy saying that the city hasn’t waived [immunity] by purchasing [insurance], I think the act of purchasing it constitutes [waiver.]” The trial court ultimately denied the City’s motion for summary judgment because “[the City] purchased liability insurance, and by doing so [it] waived its governmental immunity[.]” The City appeals.

## II. ANALYSIS

### A. Standard of Review

¶ 8 “[I]t is well-established that the denial of a motion for summary judgment grounded on governmental immunity affects a substantial right and is immediately appealable.” *Butterfield v. Gray*, 279 N.C. App. 549, 2021-NCCOA-523, ¶ 8 (citation and quotation marks omitted). We review an order denying summary judgment *de novo*. *Id.* ¶ 11. “Summary judgment is appropriate whenever the movant establishes

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<sup>1</sup> Because the parties do not contest whether building a dog park is a “governmental function,” we do not address the question in our opinion. See § 160A-351 (“[T]he creation, establishment, and operation of parks and recreation programs is a proper governmental function[.]”); *Hickman v. Fuqua*, 108 N.C. App. 80, 85, 422 S.E.2d 449, 452 (1992) (holding, in the absence of liability insurance, a city was immune from liability for torts arising out of its sponsorship and operation of a free tennis clinic).

a complete defense to the plaintiff's claim." *Estate of Earley v. Haywood Cnty. Dep't of Soc. Servs.*, 204 N.C. App. 338, 340, 694 S.E.2d 405, 407 (2010) (citation and quotation marks omitted) (cleaned up).

**B. Insurance Policy's Immunity Endorsement & Governmental Immunity**

¶ 9 The City contends the immunity endorsement in its insurance policy precludes waiver of its municipal governmental immunity because it is indistinguishable from policy language this Court has held precluded waiver in other cases. We agree and reverse the trial court's order.

¶ 10 Purchase of liability insurance pursuant to N.C. Gen. Stat. § 153A-435(a) (2021) may waive governmental immunity to the extent of the municipality's insurance coverage. *Patrick v. Wake Cnty. Dep't of Human Servs.*, 188 N.C. App. 592, 595-96, 655 S.E.2d 920, 923 (2008). That statute provides:

A county may contract to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or of any of its officers, agents, or employees when acting within the scope of their authority and the course of their employment. . . .

§ 153A-435(a). However, "[a] governmental entity does not waive sovereign immunity if the action brought against them is excluded from coverage under their insurance policy." *Patrick*, 188 N.C. App. at 596, 655 S.E.2d at 923 (citation omitted).

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¶ 11 In *Patrick*, we held a county did not waive its immunity when the policy provided:

This policy is *not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A-435*. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, *this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable* or for which, after the defenses is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

188 N.C. App. at 596-97, 655 S.E.2d at 923-24 (emphasis in original) (emphasis added).

¶ 12 More recently in *Butterfield*, this Court summarized other instances in which we have held the purchase of insurance did not waive governmental immunity:

In *Owen v. Haywood Cnty.*, 205 N.C. App. 456, 697 S.E.2d 357 (2010), we held that immunity had not been waived where the policy excluded from coverage “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.” *Id.* at 460, 697 S.E.2d at 359. Similarly, in *Estate of Earley v. Haywood Cnty. Dep’t of Soc. Servs.*, 204 N.C. App. 338, 694 S.E.2d 405 (2010), we held that immunity was not waived where the policy contained an exclusion substantively identical to that in *Owen* and the policy further specified that the parties

intend for no coverage to exist . . . as to any claim for which the Covered Person is protected by sovereign immunity and/or

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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.

*Id.* at 342, 694 S.E.2d at 409. We reached the same conclusion in *Bullard v. Wake Cnty.*, 221 N.C. App. 522, 729 S.E.2d 686 (2012), where the insurance policy similarly provided that it was

not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A-435. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defense is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

*Id.* at 527, 729 S.E.2d at 690.

*Butterfield*, ¶¶ 23-24.

¶ 13           The policy at issue in this case expressly and unambiguously provides the City’s purchase of insurance is *not* a waiver of governmental immunity under our General Statutes and “applies to the tort liability of an[] insured only to the extent that such tort liability is not subject to any defense of governmental immunity.” This language is “substantively identical” to the policy language we have previously held

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does not waive governmental immunity. See *Butterfield*, ¶¶ 24, 29; *Owen*, 205 N.C. App. at 460, 697 S.E.2d at 359; *Earley*, 204 N.C. App. at 342, 694 S.E.2d at 409; *Bullard*, 221 N.C. App. at 527, 729 S.E.2d at 690; *Patrick*, 188 N.C. App. at 596, 655 S.E.2d at 923. And, as Mr. Martinez conceded below, the City’s self-insured \$500,000 retention preserves governmental immunity for damages below that amount. See *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 322-23, 420 S.E.2d 432, 434-35 (1992) (holding a city had not waived immunity by forming and operating a corporation to cover claims against it for one-million dollars and below); *Hinson v. City of Greensboro*, 232 N.C. App. 204, 212-13, 753 S.E.2d 822, 828 (2014) (holding a city had not waived immunity by its purchase of a five-million-dollar excess liability policy with a three-million-dollar self-retention based on non-waiver language in the policy).

¶ 14 Mr. Martinez and the trial court rely on this Court’s earlier decision, *Wilhelm v. City of Fayetteville*, 121 N.C. App. 87, 464 S.E.2d 299 (1995), in which we held the trial court erred in granting summary judgment to the City of Fayetteville based on its claim for *partial* governmental immunity for damages up to \$250,000 after a city police officer drove through a flashing red light intersection, collided with the plaintiff, and the plaintiff suffered injuries alleged to cost \$10,000. *Id.* at 88, 64 S.E.2d at 300. The trial court granted Fayetteville’s motion “based on plaintiff’s failure to provide a forecast of evidence tending to demonstrate that his damages would be in



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an amount greater than the level of defendant's immunity." *Id.* We vacated and remanded the trial court's entry of summary judgment because it had prematurely shifted the burden to the plaintiff to forecast total damages and partial immunity would not bar the plaintiff's claim. *Id.* at 90, 64 S.E.2d at 301.

¶ 15 Unlike in *Wilhelm*, the City has argued governmental immunity as a complete defense and bar to Mr. Martinez's claim for negligence because: (1) its self-insured retention preserves governmental immunity for damages below \$500,000; and (2) the policy's immunity endorsement establishes governmental immunity for damages above \$500,000. Neither the City's claim for governmental immunity nor the trial court's denial of summary judgment in this case depend upon the amount of Mr. Martinez's damages to be determined by a jury. By contrast, in *Wilhelm*, this Court reasoned:

At best, the evidence of self-insurance up to an award of \$250,000.00 serves only to mitigate the amount of damages defendant may incur. That amount is a question of material fact for the jury, and it cannot be said that plaintiff would fail to obtain an award greater than \$250,000.00 as a matter of law.

*Id.* Further, the immunity endorsement language in the City's insurance policy in this case was entirely absent from this Court's analysis in *Wilhelm*. For these reasons, *Wilhelm* is inapposite, and more recent caselaw is controlling.

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¶ 16 Consistent with our precedent, we hold that governmental immunity provides a complete defense, the City did not waive that defense, and the trial court erred in denying the City's motion for summary judgment.

¶ 17 Mr. Martinez propounds, for the first time on appeal, several novel arguments concerning waiver of immunity through contract, due process violations, and the maintenance of a funded reserve. We cannot consider these issues that were not raised below and are not included in the record on appeal. *See* N.C. R. App. P. 9(a), (b)(5), 10(a)(1),(c), 28(c) (2022).

**III. CONCLUSION**

¶ 18 For the foregoing reasons, we hold the trial court erred in determining the City waived its governmental immunity and in denying the City's motion for summary judgment, and we reverse the trial court's order.

REVERSED.

Judges DIETZ and GRIFFIN concur.

Report per Rule 30(e).