IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-740

Filed: 17 July 2018

Wake County, No. 15 CVS 007473

AISHA D. FLOOD, Administrator of the Estate of Maurice A. Harden, Plaintiff,

v.

JONATHAN HENRY CREWS, Individually, and JONATHAN HENRY CREWS, in his capacity as a member of Raleigh Police Department, and CITY OF RALEIGH, Defendants.

Appeal by plaintiff from order entered 26 January 2017 by Judge William R. Pittman in Wake County Superior Court. Heard in the Court of Appeals 21 March 2018.

*George Ligon, Jr. and Mohammed Shyllon for plaintiff-appellant.*

*City of Raleigh Attorney Thomas A. McCormick, by Deputy City Attorney Dorothy K. Leapley and Associate City Attorney Andrew J. Seymour, for defendant-appellees.*

ELMORE, Judge.

Plaintiff Aisha D. Flood, administrator of the estate of Maurice D. Harden, brought this wrongful death action against defendants Jonathan Henry Crews, individually and in his official capacity as an officer of the Raleigh Police Department

("RPD"), and the City of Raleigh ("City"). Plaintiff alleged tort claims arising out of a traffic accident in which Officer Crews's patrol car collided head-on with Harden's motorized scooter. The undisputed evidence showed Officer Crews was speeding in the westbound lane of a two-lane road in silent pursuit of a speeding driver when Harden's motorized scooter, driving in the opposite direction in the eastbound lane, without activating a turn signal abruptly turned left into Officer Crews's driving lane. The vehicles collided head-on, killing Harden and his passenger, Trindell Thomas. The trial court granted defendants' motion for summary judgment, dismissing plaintiff's claims with prejudice.

On appeal, plaintiff contends the trial court erred because (1) the forecasted evidence presented genuine issues of material fact as to whether Officers Crews's conduct in operating his patrol car while pursuing the speeding driver amounted to "gross negligence, willful and wanton conduct, and malice"; (2) public official and governmental immunity did not bar her claims because Officer Crews's conduct amounted to malice, and because defendants waived their defense of sovereign immunity; and (3) her negligent training/supervision claim against the City was inappropriate for summary judgment because the City conceded it trained and expected its officers to conduct pursuits just as Officer Crews did in this case.

Even when viewed in the light most favorable to plaintiff, because the forecasted evidence failed to raise a genuine issue of material fact that Officer Crews's

actions amounted to gross negligence or malice, or that defendants waived their sovereign immunity defense, defendants were entitled to summary judgment as a matter of law. Accordingly, we affirm the trial court's order.

## *I. Background*

Around 3:05 a.m. on 5 June 2013, Officer Crews was monitoring traffic on Skycrest Drive, a two-lane road with a posted speed limit of 35 m.p.h., while parked in his patrol car. A westbound car sped passed him, registering 70 m.p.h. on his rear radar. Officer Crews quickly drove his patrol car onto the roadway, turned on its headlights, and began driving westward on Skycrest Drive to pursue the speeding driver. Officer Crews had not yet activated his patrol car's blue lights or siren, and as he approached a hill, he accelerated to maintain visibility and ascertain which way the speeding car was headed as it traveled through an intersection.

As Officer Crews's patrol car crested the hill, driving approximately 76 m.p.h. to catch up to the speeding driver, he observed two sets of headlights approaching from the opposite direction in the eastbound lane. The first set belonged to a motorized scooter being driven by Harden that RPD Officer D.L. Riley had previously clocked driving above the speed limit; the second belonged to Officer Riley's patrol car following closely behind in silent pursuit of the scooter. About three seconds later, just before Officer Crews's westbound patrol car would have passed the eastbound scooter, the scooter, without activating its turn signal, abruptly turned left into

Officer Crews's driving lane. The vehicles collided head-on, killing Harden and his passenger. Blood tests taken after the accident revealed that Harden's blood alcohol concentration was 0.16, twice the legal limit.

On 24 June 2015, and amended on 10 December 2015, plaintiff filed a wrongful death action against defendants, alleging the following claims for relief: (1) negligence, gross negligence, and wanton negligence against Officer Crews, individually and in his official capacity, based in relevant part on Officer Crews's conduct in failing to activate his blue lights and siren while pursuing the speeding driver and cresting the hill on Skycrest Drive at approximately 76 m.p.h.; (2) imputed liability for Officer Crews's conduct against the City under a theory of *respondeat superior*; (3) negligence, gross negligence, recklessness, and willful and wanton conduct against the City under a theory of negligent training/supervision of RPD officers; and (4) punitive damages against Officer Crews in his individual and official capacities. Plaintiff also alleged defendants waived any sovereign immunity defense by purchasing liability insurance and participating in a local government risk pool.

Most relevant for purposes of this appeal, on 1 August 2016 defendants moved for summary judgment, requesting the trial court to dismiss plaintiff's claims with prejudice. Defendants alleged (1) Officer Crews complied with the law at the time of the accident, including N.C. Gen. Stat. § 20-145; (2) Officer Crews's conduct was not actionable under North Carolina law; (3) Harden's death was not proximately caused

by the City; (4) the public-duty doctrine barred plaintiff's claims; (5) governmental immunity barred plaintiff's claims against the City and Officer Crews in his official capacity; (6) public official immunity barred plaintiff's claims against Officer Crews individually; (7) plaintiff's claims against Officer Crews individually were barred by the expiration of the applicable statute of limitations; (8) Harden's gross contributory negligence barred plaintiff's wrongful death action; and (9) no ground existed to support plaintiff's punitive damages claim.

To support their summary judgment motion, defendants attached several affidavits from RPD officers and other officials who indicated, in relevant part, that Officer Crews's decision not to activate his blue light and siren when initiating his pursuit of the speeding driver was consistent with RPD training and policy. Defendants also attached other relevant documents, including a traffic collision reconstruction report, the RPD's policies regarding its officers' operation of patrol cars, a 1999 resolution adopted by the Raleigh City Council permitting the City to waive its governmental immunity under certain circumstances for claims up to $1,000,000.00, and an excess liability policy issued to the City providing an aggregate of $10,000,000.00 in coverage that would only trigger after the City exhausted its $1,000,000.00 self-retained limit.

After a hearing, the trial court entered an order on 26 January 2017 that, *inter alia*, granted defendants' motion for summary judgment and dismissed plaintiff's action with prejudice. Plaintiff appeals.

### *II. Alleged Errors*

On appeal, plaintiff asserts the trial court improperly granted defendants' summary judgment because (1) the forecasted evidence established genuine issues of material fact as to whether Officer Crews's conduct in pursuing the speeding car constituted gross negligence, willful and wanton conduct, and malice; (2) public official or governmental immunity does not bar her claims because Officer Crews's conduct amounted to malice, and defendants waived their sovereign immunity defense; and (3) her negligent supervision/training claim against the City was improperly dismissed with prejudice because the City conceded it trained and expected Officer Crews to commit the allegedly malicious act.

### *III. Review Standard*

We review *de novo* a trial court's summary judgment ruling. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment "is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.' " *Id.* (quoting *Forbis v. Neal*, 361 N.C. 519, 523–24, 649 S.E.2d 382, 385 (2007)). "All facts asserted by the [nonmoving] party are taken as true . . . and their inferences must be viewed in the

light most favorable to that party[.]" *Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (internal citations omitted). A defendant is entitled to judgment as a matter of law "whenever the movant establishes 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) (quoting *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 26, 348 S.E.2d 524, 528 (1986)).

## *IV. Analysis*

### A. Gross Negligence

Plaintiff first asserts the forecasted evidence established genuine issues of material fact as to whether Officer Crews's conduct in pursing the speeding car amounted to gross negligence in relevant part by operating his vehicle in violation of N.C. Gen. Stat. § 20-145. We disagree.

N.C. Gen. Stat. § 20-145 (2015) provides that speed limits do not apply to police patrol cars "when operated with due regard for safety . . . by a law enforcement officer in the chase or apprehension of violators of the law . . . ." But the statute does not protect officers "from the consequence of a reckless disregard of the safety of others." *Id.* Thus, the standard arising from this statute is gross negligence. *See Young v. Woodall*, 343 N.C. 459, 463, 471 S.E.2d 357, 360 (1996) ("In order to have recovered against Officer Woodall [under N.C. Gen. Stat. § 20-145], the plaintiff would have to have proved Officer Woodall was grossly negligent.").

"Gross negligence has been defined as 'wanton conduct done with conscious or reckless disregard for the rights and safety of others.' " *Norris v. Zambito*, 135 N.C. App. 288, 294, 520 S.E.2d 113, 117 (1999) (quoting *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988)). "North Carolina's standard of gross negligence, with regard to police pursuits, is very high and is rarely met." *Eckard v. Smith*, 166 N.C. App. 312, 323, 603 S.E.2d 134, 142 (2004), *aff'd per curiam*, 360 N.C. 51, 619 S.E.2d 503 (2005).

In *Norris*, this Court set forth the following factors to consider when assessing whether the evidence raised a genuine issue of material fact about whether an officer's pursuit amounted to gross negligence: "(1) the reason for the pursuit, (2) the probability of injury to the public due to the officer's decision to begin and maintain pursuit, and (3) the officer's conduct during the pursuit." *Greene v. City of Greenville*, 225 N.C. App. 24, 27, 736 S.E.2d 833, 836 (2013) (citing *Norris*, 135 N.C. App. at 294–95, 520 S.E.2d at 117).

*1. Prong One*

*Norris*' first prong asks "the reason for the pursuit." *Id.* (citing *Norris*, 135 N.C. App. at 294, 520 S.E.2d at 117). Plaintiff argues that "Crews was not pursuing a felon, but someone who was committing a minor traffic offense." Plaintiff's argument is misplaced. Relevant considerations under the first prong "include whether the officer 'was attempting to apprehend someone suspected of violating the law' and

whether the suspect could be apprehended by means other than high speed chase." *Id.* (quoting *Norris*, 135 N.C. App. at 294, 520 S.E.2d at 117).

Here, Officer Crews was attempting to apprehend a driver that his radar equipment established was driving well above the posted speed limit, justifying the pursuit. Further, because the driver was unknown to Officer Crews, the only way to apprehend him was via a high speed chase, and because speeding while driving presents a danger to the public, Officer Crews's pursuit was the only method by which that danger could be abated. *See Norris*, 135 N.C. App. at 294, 520 S.E.2d at 117 (explaining another relevant consideration is "whether the fleeing suspect presented a danger to the public that could only be abated by immediate pursuit" (citation omitted)). Officer Crews's pursuit was aptly justified under the first prong.

*2. Prong Two*

*Norris*' second prong asks "the probability of injury to the public due to the officer's decision to begin and maintain pursuit[.]" *Greene*, 225 N.C. App. at 27, 736 S.E.2d at 836 (citing *Norris*, 135 N.C. App. at 294–95, 520 S.E.2d at 117). Plaintiff argues Officer Crews's conduct of cresting the hill on Skycrest Road at 76 m.p.h. was grossly negligent because (1) "Skycrest Road was a narrow, two-lane road"; (2) "the hill near the intersection of Skycrest Road and Hill St[reet] prevented driver visibility to . . . anyone beyond the hill"; and (3) the area surrounding Skycrest Road was densely populated, with hundreds of residences within the vicinity.

Relevant considerations under the second prong include "the (1) time and location of the pursuit, (2) the population of the area, (3) the terrain for the chase, (4) traffic conditions, (5) the speed limit, (6) weather conditions, and (7) the length and duration of the pursuit." *Id*. (citing *Norris,* 135 N.C. App. at 294–95, 520 S.E.2d at 117). In *Norris*, we determined the "apparent probability of injury to the public" was minimal when an officer engaged in a high speed chase because "the road was clear and dry, the pursuit occurred in the early morning hours, traffic in the area was very light, and the length and duration of the pursuit were both short." *Id.* at 295, 520 S.E.2d at 118.

Here, Officer Crews's pursuit occurred (1) around 3:00 a.m. in the middle of the week; (2) on a two-lane road within city limits; (3) in a suburban area within close proximity to several residences; (4) on a road with one hill providing low driver-visibility from the opposite direction; (5) with no other traffic other than the westbound speeding car, the eastbound scooter, and Officer Riley's eastbound patrol car tailing the scooter; (6) the speed limit dropped to 25 m.p.h. at the crest of the hill but was posted 35 m.p.h. everywhere else; (7) the road and weather conditions were clear; and (8) the pursuit lasted about twenty seconds and spanned only 0.3 miles. This evidence, like the evidence in *Norris*, is insufficient to create a genuine issue of material fact about gross negligence.

*3. Prong Three*

*Norris*' third prong requires a consideration of "the officer's conduct during the pursuit." *Greene*, 225 N.C. App. at 27, 736 S.E.2d at 836 (citing *Norris*, 135 N.C. App. at 295, 520 S.E.2d at 117). Plaintiff argues Officer Crews violated RPD regulation 1106-05 during the pursuit because he admitted in his deposition that he "only considered 'the time and day and the house on Hill Street,' " when he should have also considered the "speed limit, intersections and traffic conditions, road conditions, and the use of warning and signal lights"; "he was required to terminate his pursuit since there was a clear and unreasonable hazard" that "outweighed the necessity for immediate apprehension"; and he "failed to contact Officer D.L. Riley whom he was working with to monitor the thru traffic on Skycrest Drive."

> Under the third prong we look to [the officer's] conduct during the pursuit. Relevant factors include: (1) whether an officer made use of the lights or siren, (2) whether the pursuit resulted in a collision, (3) whether an officer maintained control of the cruiser, (4) whether an officer followed department policies for pursuits, and (5) the speed of the pursuit.

*Id*. (citing *Norris*, 135 N.C. App. at 295, 520 S.E.2d at 117). In *Greene*, we concluded an officer silently pursuing a driver "followed common procedure and exercised his discretion by waiting to activate the siren and lights," and that although the officer "reached a maximum speed of approximately 30 m.p.h. over the speed limit" and violated "policy by failing to notify the police communications center of the pursuit," these circumstances raised no genuine issue of material fact as to whether the officer

acted with gross negligence. *Id.* at 28, 736 S.E.2d at 836; *see also id.* ("[E]xceeding the speed limit is . . . insufficient to establish gross negligence." (citing *Parish v. Hill*, 350 N.C. 231, 245, 513 S.E.2d 547, 555 (1999)).

Here, Officer Crews (1) turned on his patrol car's headlights, and followed common procedure and departmental policies by initiating a silent response in pursuit of a speeding driver; (2) collided with the scooter but, as both Officer Crew's and Officer Riley's dash camera videos show, the scooter unexpectedly and abruptly turned into Officer Crews's driving lane so quickly that Officer Crews could not have avoided the collision; (3) kept his vehicle under control, as the evidence showed he activated his brakes 0.4 seconds after the collision; and (4) reached a speed of 76 m.p.h. when it crested the hill, exceeding the posted speed limit by approximately 41 miles per hour. Plaintiff fails to identify any evidence that raised a genuine issue of material fact regarding whether Officer Crews violated any RPD regulation. But even if he had, such a violation under these facts would not amount to gross negligence. *Id.* (concluding that while the officer "violated policy by failing to notify the police communications center of the pursuit, this failure [did] not constitute gross negligence" (citing *Parish*, 350 N.C. at 245, 513 S.E.2d at 555)).

Accordingly, even when viewed in the light most favorable to plaintiff, the forecasted evidence raised no genuine issue of material fact regarding whether Officer

Crews's conduct in pursuing the speeding car amounted to "reckless indifference toward the safety of others" as required to establish gross negligence.

**B. Sovereign Immunity**

Plaintiff next contends public official or governmental immunity did not bar her claims because Officer Crews's actions amounted to malice, and because defendants waived their sovereign immunity defense. We disagree.

*1. Malice*

Plaintiff asserts that because Officer Crews's actions amounted to malice, the doctrine of sovereign immunity did not bar her claims against him individually, officially, or the City under a theory of vicarious liability.

> Public official immunity precludes suits against public officials in their individual capacities and protects them from liability "*[a]s long as a public officer* lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and *acts without malice* or corruption[.]"

*Fullwood v. Barnes*, ___ N.C. App. ___, ___, 792 S.E.2d 545, 550 (2016) (emphasis added) (quoting *Smith v. State*, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976)). Additionally, "suits against public officials are barred by the doctrine of governmental immunity where the official is performing a governmental function, such as providing police services." *Parker v. Hyatt*, 196 N.C. App. 489, 493, 675 S.E.2d 109, 111 (2009) (citation omitted).

"[A] public official is immune from suit unless the challenged action was (1) outside the scope of official authority, (2) *done with malice*, or (3) corrupt." *Wilcox v. City of Asheville*, 222 N.C. App. 285, 288, 730 S.E.2d 226, 230 (2012) (emphasis added) (citing *Smith*, 289 N.C. at 331, 222 S.E.2d at 430). "[A] malicious act is an act (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Id.* at 289, 730 S.E.2d at 230 (citing *In re Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d 888, 890 (1984)).

Plaintiff relies on *Wilcox* to support her assertion that the forecasted evidence raised a genuine issue of material fact that Officer Crews's conduct was so wanton and reckless as to amount to a "constructive intent to injure" sufficient to establish malice. *Wilcox* is readily distinguishable. There, we concluded the forecasted evidence raised a genuine issue of fact as to a constructive intent to injure sufficient to warrant a finding of malice when an officer "fired six bullets into a slow-moving vehicle, knowing it was occupied by a passenger, and he did so despite having been called off the pursuit and despite the absence of a clear public threat." *Id.* at 294, 730 S.E.2d at 234. Here, the only evidence plaintiff highlights to support her assertion that Officer Crews's conduct was so wanton and reckless as to justify a finding of constructive intent to injure were his actions of "not engaging his siren or blue light and driving over the crest of the hill at 76 mph when his visibility was obstructed."

Even when viewing this evidence in the light most favorable to plaintiff, it is insufficient to raise a genuine issue of material fact as to the existence of malice.

*2. Waiver*

Plaintiff next argues defendants waived their sovereign immunity defense because the City purchased liability insurance and adopted a resolution waiving immunity for claims up to $1,000,000.00. We disagree.

> A town or municipality may waive sovereign immunity through the purchase of liability insurance. However, "[i]mmunity is waived only to the extent that the [municipality] is indemnified by the insurance contract from liability for acts alleged." "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) (citations omitted), *disc. rev. denied*, 365 N.C. 193, 707 S.E.2d 244 (2011).

Here, plaintiff's amended complaint alleged defendants waived their immunity by purchasing liability insurance. In response, defendants denied the allegation and attached to their summary judgment motion a special excess liability policy issued to the City by Starr Indemnity & Liability Company that provided coverage of up to $10,000,000.00 aggregate after the City had exhausted its self-retained limit of $1,000,000.00, and a 1999 resolution adopted by the Raleigh City Council permitting the City to waive, under limited circumstances, its immunity for claims up to the $1,000,000.00 self-retained limit ("resolution").

The Starr Indemnity policy provides in relevant part that it will pay to the City "those *sums in excess of the retained limit that the insured becomes legally obligated to pay* as damages by reason of liability imposed by law because of bodily injury, property damage or personal and advertising injury . . . ." (Emphasis added.) It also provides that the City's "retained limit" is $1,000,000.00, and reiterates in the "Limits of Insurance" section that Starr Indemnity

> will pay any sums covered under this Policy *only after your retained limit has been exhausted* by payments for judgments, settlements or defense costs for claims and suits subject to Paragraph B. above. *We will then pay damages in excess of your retained limit up to our Limits of Insurance.*

(Emphasis added.) The policy also includes a "North Carolina – Governmental Immunity Endorsement," which provides as follows:

> This policy is not intended by the Named Insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 115C-42, Sec. 153A-435, or Sec[.] 160A-485, as applicable, or any amendments thereof.
>
> Accordingly, subject to the Policy and the Limits of Insurances shown on the Declarations, the Policy provides coverage only for occurrences [or] wrongful acts . . . for which the defense of governmental immunity is clearly not applicable or for which . . . a court of competent jurisdiction determines the defense of governmental immunity not to be applicable.

In *Arrington v. Martinez*, we rejected an argument similar to the one plaintiff advances here and explained the resolution as follows:

> [T]he Raleigh City Council adopted a resolution waiving governmental immunity to a limited extent, established a self-funded reserve ("SFR") for claims up to $1 million, and obtained insurance for claims above this amount, up to $11 million ("the resolution").
>
> . . . .
>
> The resolution above provided for waiver of immunity as to claims covered by the SFR up to $1,000,000.00. The City had no insurance to cover claims under $1,000,000.00 or in excess of $11,000,000.00.

215 N.C. App. 252, 259–60, 716 S.E.2d 410, 415–16 (2011). We interpreted this resolution as requiring a plaintiff to "agree to accept only the specific damages which the City has agreed to pay, and to waive recovery of any additional damages from any other party, in order to receive the benefit of the waiver." *Id.* at 261, 716 S.E.2d at 416. We concluded a plaintiff could not "skip over" the $1,000,000.00 "self-insured by the City by the SFR, and recover only upon the policies which provide excess coverage for damages in excess of" the SFR. *Id.* at 264, 716 S.E.2d at 418. Thus, because the evidence showed the plaintiff did not execute a release as required by the resolution and thus the City's SFR had not been exhausted as required to trigger its excess liability policy, we held "there [was] no question that the plaintiff has not triggered the waiver of immunity as defined by the City's resolution." *Id.*

Here, as in *Arrington*, defendants presented evidence showing that plaintiff refused the City's settlement offer and refused to sign a release of all claims as required to trigger its waiver of governmental immunity under the resolution. Thus,

the City's self-retained limit had not been exhausted as required to trigger its excess liability policy. Therefore, the evidence here similarly raised "no issue of material fact as to plaintiff's failure to trigger the City's waiver of immunity." *Id.* at 265, 716 S.E.2d at 419. Accordingly, the trial court properly granted summary judgment in defendants' favor because plaintiff's claims were barred by immunity.

**C. Negligent Training/Supervision Claim**

In light of our foregoing conclusions, we overrule plaintiff's remaining argument that the trial court erred by granting summary judgment in the City's favor as to its negligent training/supervision claim, since that derivative claim cannot survive independently. *See Prior v. Pruett*, 143 N.C. App. 612, 622, 550 S.E.2d 166, 172–73 (2001) ("Without a underlying negligence charge against the deputies, a claim of negligence against the Sheriff and County cannot be supported.").

## *V. Conclusion*

Even when viewed in the light most favorable to plaintiff, the forecasted evidence presented no genuine issues of material fact that Officer Crews's conduct in pursuing the speeding driver was grossly negligent or malicious, or that defendants waived their immunity defense by the City's purchasing excess liability insurance or adopting the 1999 resolution. The trial court therefore properly concluded defendants were entitled to judgment as a matter of law. Accordingly, we affirm its order.

AFFIRMED.

Judges INMAN and BERGER concur.

Report per Rule 30(e).