IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-44

No. COA21-261

Filed 18 January 2022

Durham County, No. 20CVS3058

TONISHA MCGIRT, Administratrix for the Estate of Jean Carolyn McGirt, Plaintiff,

v.

DURHAM COUNTY GOVERNMENT; MICHAEL D. ANDREWS, former Durham County Sheriff, in his individual and official capacities; CLARENCE F. BIRKHEAD, Durham County Sheriff, in his official capacity; DURHAM COUNTY SHERIFF'S OFFICE; CYNTHIA KORNEGAY, Interim Jail Director, Durham County Detention Facility, in her individual and official capacities; SHELECIA JOHNSON, Detention Officer, Durham County Detention Facility, in her individual capacity; CITY OF DURHAM; THOMAS D. DOUGLASS, JR., City of Durham Police Officer, in his individual and official capacities; TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, as Surety, Defendants.

Appeal by Defendants Clarence F. Birkhead, Cynthia Kornegay, Shelecia Johnson, and Travelers Casualty and Surety Company of America from an order entered 9 December 2020 by Judge Michael J. O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 21 September 2021.

Office of the Durham County Attorney, by Senior Assistant County Attorney Larissa S. Williamson, for Defendant-Appellants Birkhead, Kornegay, Johnson, and Travelers.

Brandon S. Atwater for Plaintiff-Appellee.

JACKSON, Judge.

¶ 1 Defendant-Appellants (collectively "Defendants") Durham County Sheriff Clarence F. Birkhead ("Defendant Birkhead"), Interim Jail Director Cynthia Kornegay ("Defendant Kornegay"), Detention Officer Shelecia Johnson ("Defendant Johnson"), and Travelers Casualty and Surety Company of America ("Defendant Travelers") appeal from an order denying Defendants' motions to dismiss Plaintiff's complaint. After careful review, we affirm the trial court's denial of Defendants' motions to dismiss Claims (7), (8), (14), and (15), and we dismiss Defendants' appeal of the trial court's denial of their motion to dismiss Claim (16) as interlocutory. Governmental immunity has been waived for Claims (8) and (14) only to the extent of the Sheriff's bond.

I. Factual and Procedural Background

¶ 2 This case arises out of events surrounding the death of Jean Carolyn McGirt ("Decedent"). Plaintiff, Tonisha McGirt, ("Plaintiff") is Decedent's daughter and the administratrix of Decedent's estate. Because we are reviewing the denial of Defendant's motion to dismiss, our recitation of the relevant factual background is based upon the allegations contained in Plaintiff's complaint. *Good Hope Hosp., Inc. v. N.C. Dep't of Health and Hum. Servs.*, 174 N.C. App. 266, 267, 620 S.E.2d 873, 876 (2005).

¶ 3 On 24 August 2018, Decedent was arrested by City of Durham police officers on substance abuse charges. Plaintiff alleges the charges were "padded" after

Decedent had refused to serve as an informant. The arrest was led by Defendant Officer Thomas D. Douglass ("Defendant Douglass") and carried out by several police officers dressed in tactical gear. Decedent was arrested at the home of her brother, G. Taylor ("Mr. Taylor"). Plaintiff alleges that excessive force was used during the arrest, specifically that Defendant Douglass threw Decedent to the floor and placed his knee on her neck. Officers also arrested Mr. Taylor and took both Decedent and Mr. Taylor to police headquarters for questioning. Mr. Taylor informed police while at headquarters that Decedent needed medical attention.

¶ 4 After questioning, Decedent and Mr. Taylor were transported to the Durham County Detention Facility (the "Facility") and placed in the custody of the Durham County Sheriff. Mr. Taylor advised Facility officials that Decedent had substance abuse issues, suffered from high blood pressure, shortness of breath, and chest pains. Mr. Taylor advised that he was concerned about Decedent's condition because of asserted excessive force used during the arrest. Decedent was placed in the Facility's medical unit, which was staffed by contracted medical personnel and Facility staff, including Defendant Johnson.

¶ 5 At some point within the next 24 hours, Decedent was found unresponsive in her cell by medical personnel or Facility staff. Emergency Medical Services were called, but resuscitation efforts were ceased due to "presumed extended downtime as [Decedent] was cold to the touch." Plaintiff alleges that at the time Decedent was

discovered unresponsive in her cell, multiple hours had elapsed since medical personnel had checked on Decedent and documented her status.

¶ 6 On or about 31 August 2018, the Division of Health Service Regulation, Construction Section, ("DHSR") of the North Carolina Department of Health and Human Services conducted a compliance investigation and found the Facility was not in compliance with Subchapter 14J of Title 10A of the North Carolina Administrative Code, which covers jails and local confinement facilities. Specifically, DHSR found that Facility staff failed to document it had conducted supervised rounds of Decedent. Defendant Johnson was the detention officer on duty in the medical unit at the time of Decedent's death. Plaintiff alleges that Defendant Johnson failed to complete her documented rounds and that any documentation of such rounds was not completed contemporaneously with the rounds.

¶ 7 Plaintiff also alleges that former Durham County Sheriff Michael D. Andrews ("Defendant Andrews"), Defendant Kornegay, and Defendant Johnson did not maintain any records documenting specific observations of Decedent while she was in the medical unit. Plaintiff lastly alleges that Decedent's medical records from the Facility reveal that medical personnel failed to properly screen, monitor, and diagnose Decedent for substance abuse and the health conditions Mr. Taylor had advised Defendants that Decedent had.

¶ 8 Plaintiff filed this action on 24 August 2020 against (1) Durham County; (2)

Defendant Andrews in his individual and official capacities; (3) Defendant Birkhead in his official capacity; (4) the Durham County Sheriff's Office; (5) Defendant Kornegay in her individual and official capacities; (6) Defendant Johnson in her individual capacity; (6) the City of Durham; (7) Defendant Douglass in his individual and official capacities; and (8) Defendant Travelers, as Surety. In her complaint, Plaintiff raised 16 causes of action.

¶ 9 On 29 September 2020, Defendants filed motions to dismiss all claims pursuant to N.C. R. Civ. P. 12(b)(1), (2), and (6) and N.C. Gen. Stat. § 1-75.3 on the grounds that (1) the Court lacked subject matter and personal jurisdiction over Defendants due to sovereign, governmental, public official, qualified, and Eleventh Amendment immunities, and (2) Plaintiff failed to state a claim upon which relief can be granted.

¶ 10 The matter was heard before the Honorable Michael J. O'Foghludha on 9 November 2020. On 9 December 2020, the Court issued an Order granting in part and denying in part Defendants' motions to dismiss. The Court denied the motions to dismiss for the following claims,[1] which are the only causes of action before us on appeal:

> Claim (7): Defendants Johnson (in her individual capacity) and Kornegay (in her individual and official capacities)

[1] The claims have been written here to reflect the specific part of each claim that is on appeal and do not reflect every defendant named in these claims in Plaintiff's complaint.

> acted with Deliberate Indifference to Medical Needs in Violation of the 8th and 14th Amendments of the United States Constitution
>
> Claim (8): Defendant Kornegay (in her official capacity) is Liable for Wrongful Death[2]
>
> Claim (14): Defendant Kornegay (in her official capacity) is Liable for Injury to Prisoner in Violation of N.C. Gen. Stat. § 162-55
>
> Claim (15): Defendant Travelers is Liable on Sheriff's Official Bond under N.C. Gen. Stat. § 58-76-1, et seq.
>
> Claim (16): For Temporary and Permanent Injunctive Relief against Defendant Birkhead (in his official capacity)

Defendants timely filed a notice of appeal on 31 December 2020 alleging the claims are barred for lack of jurisdiction.

II. Interlocutory Review

¶ 11 As an initial matter, we must address the scope of this Court's jurisdiction over Defendants' interlocutory appeal. Defendants assert that they are entitled to an interlocutory appeal because the trial court's order affects Defendants' substantial right of immunity. We agree and affirm the trial court's denial of Defendants' motions to dismiss Claims (7), (8), (14), and (15).

¶ 12 "Typically, the denial of a motion to dismiss is not immediately appealable to

[2] The order granted Defendant Kornegay and Defendant Johnson's motions to dismiss the wrongful death and injury to prisoner claims asserted against them in their individual capacities. Plaintiff did not appeal these dismissals.

this Court because it is interlocutory in nature." *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007). However, an "appeal lies of right directly to the Court of Appeals . . . [f]rom any interlocutory order or judgment of a superior court . . . in a civil action or proceeding that . . . [a]ffects a substantial right." N.C. Gen. Stat. § 7A-27(b)(3)(a) (2019). *See also id.* § 1-277(a). "Our Supreme Court has defined a substantial right as a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a person is entitled to have preserved and protected by law: a material right." *Royal Oak Concerned Citizens Ass'n v. Brunswick Cnty.*, 233 N.C. App. 145, 148, 756 S.E.2d 833, 835 (2014) (internal marks and citation omitted).

¶ 13 "[I]n cases in which a party asserts sovereign, governmental, or qualified immunity, denial of a motion to dismiss affects a substantial right and is immediately appealable." *Allen v. Stone*, 161 N.C. App. 519, 522, 588 S.E.2d 495, 497 (2003). *See also Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding that a district court's denial of a claim of qualified immunity is immediately appealable); *Derwort v. Polk Cnty.*, 129 N.C. App. 789, 790, 501 S.E.2d 379, 380 (1997) ("Appeals which present defenses of governmental or sovereign immunity have been held by this Court to be immediately appealable."); *Smith v. Phillips*, 117 N.C. App. 378, 380, 451 S.E.2d 309, 311 (1994) ("[W]hen the motion is made on the grounds of sovereign and qualified immunity, such a denial is immediately appealable, because to force a defendant to

proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity.")

¶ 14 Defendants moved to dismiss the claims pursuant to Rules 12(b)(1), (2), and (6) based upon their assertion of several immunities, including sovereign, qualified, governmental, and public official immunity. While the denial of a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction based on sovereign immunity is not immediately appealable, the denial of a 12(b)(2) motion to dismiss for lack of personal jurisdiction based on sovereign immunity and the denial of a 12(b)(6) motion to dismiss for failure to state a claim based on sovereign immunity are immediately appealable. *See Can Am S., LLC v. State*, 234 N.C. App. 119, 122-24, 759 S.E.2d 304, 307-08 (2014). Therefore, we proceed with this interlocutory review of the denial of the motions to dismiss under Rules 12(b)(2) and (6) only. *See id.*

III. Analysis

A. Standard of Review

¶ 15 "The standard of review for an appeal from a denial of a Rule 12(b)(6) motion is well settled." *Leonard v. Bell*, 254 N.C. App. 694, 697, 803 S.E. 2d 445, 448 (2017).

> The motion to dismiss under N.C. R. Civ. P. 12(b)(6) tests the legal sufficiency of the complaint. In ruling on the motion the allegations of the complaint must be viewed as admitted, and on that basis the court must determine as a matter of law whether the allegations state a claim for which relief may be granted.

Stanback v. Stanback, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979) (internal

citations omitted). "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). North Carolina is a notice-pleading state, meaning "[a] complaint is adequate . . . if it gives a defendant sufficient notice of the nature and basis of the plaintiff's claim and allows the defendant to answer and prepare for trial." *Burgess v. Busby*, 142 N.C. App. 393, 399, 544 S.E.2d 4,7, *disc. rev. improvidently allowed*, 354 N.C. 351, 553 S.E.2d 679 (2001). At the early stages of litigation, we are permitted to view the evidence and facts presented by the plaintiff "indulgently." *Moore v. Evans*, 124 N.C. App. 35, 51, 476 S.E.2d 415, 426 (1996) (internal citation omitted).

¶ 16 "When this Court reviews the denial of a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, we must review the record to determine whether there is evidence to support the trial court's determination that exercising its jurisdiction would be appropriate." *Leonard*, 254 N.C. App. at 698, 803 S.E.2d at 448 (internal quotation and citation omitted).

B. Constitutional Claim against Defendants Kornegay and Johnson

¶ 17 Plaintiff brought this action pursuant to 42 U.S.C. §§ 1983 and 1988 and the constitutional claim—Claim (7)—against Defendant Kornegay in her official and individual capacities and Defendant Johnson in her individual capacity under the

Eighth and Fourteenth Amendments of the United States Constitution, alleging deliberate indifference to medical needs. Defendants argue that Plaintiff failed to allege sufficient facts to support the claim and raise the defense of qualified immunity.

1. Defendant Kornegay – Official Capacity

¶ 18 Defendants argue first that Plaintiff has failed to allege any facts that would support an official capacity claim against Defendant Kornegay.

¶ 19 We first note that Defendants incorrectly assert that Plaintiff is not entitled to monetary relief as a matter of law for the § 1983 official capacity claim against Defendant Kornegay. "[W]hen an action is brought under section 1983 in state court against the State, its agencies, and/or its officials' actions in their official capacities, neither a State nor its officials acting in their official capacity are 'persons' under section 1983 when the remedy sought is monetary damages." *Corum v. Univ. of N.C.*, 330 N.C. 761, 771, 413 S.E.2d 276, 282-83 (1992) (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989)).

¶ 20 "The text of section 1983 permits actions only against a 'person.'" *Id.* at 771, 413 S.E.2d at 282. This Court has previously held that the office of the North Carolina sheriff is in fact a "person" within the meaning of § 1983. In *Boyd v. Robeson County*, 169 N.C. App. 460, 621 S.E.2d 1 (2005), this Court applied the United States Supreme Court's Eleventh Amendment immunity analysis to the question of

"whether a North Carolina sheriff is an 'arm of the State' that had 'traditionally enjoyed Eleventh Amendment immunity.'" *Id.* at 473, 621 S.E.2d at 9 (quoting *Howlett v. Rose*, 496 U.S. 356, 365 (1990)). Because the Eleventh Amendment prevents the State and arms of the State from being sued under § 1983 in state or federal court, it must be considered in determining whether an entity is a "person" under § 1983. *Id.*; *Howlett*, 496 U.S. at 365.

> In *Regents*, *Hess*, and *Auer*, the Supreme Court has thus most recently focused on three factors in its Eleventh Amendment analysis: (1) how provisions of state law characterize the defendant, (2) whether the State is potentially liable for any money judgment against the defendant, and (3) whether the defendant is subject to the State's direction or control.

Boyd, 169 N.C. App. at 474, 621 S.E.2d at 10. Analyzing State law, this Court determined that a sheriff is a local, county officer rather than an arm of the State, *id.* at 475-77, 621 S.E.2d at 10-11, and therefore held that "a North Carolina sheriff is a 'person' for purposes of § 1983." *Id.* at 474, 621 S.E.2d at 10. Accordingly, Defendant Kornegay, as an employee of the Durham County Sheriff, is a "person" under § 1983 and can be sued for monetary relief in her official capacity for a constitutional violation.

¶ 21 Additionally, Defendants incorrectly assert that the Sheriff and his jailers, Defendant Kornegay among them, are protected from § 1983 claims by qualified immunity for actions taken in their official capacities. Suits against government

officials in their official capacity "generally represent only another way of pleading an action against an entity of which an officer is an agent[.]" *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, n. 55 (1978). Therefore, "the only immunities available to the [defendant official] in an official-capacity action are those that the governmental entity possesses." *Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997) (quoting *Hafer v. Melo*, 502 U.S. 21, 25 (1991)).

¶ 22 In *Kentucky v. Graham*, 473 U.S. 159 (1985), the United States Supreme Court differentiated between the defenses available to officials sued in their individual capacity and to officials sued in their official capacity in a § 1983 action.

> When it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses such as objectively reasonable reliance on existing law. *See Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity); *Pierson v. Ray*, 386 U.S. 547 (1967) (same); *Harlow v. Fitzergerald*, 457 U.S. 800 (1982) (qualified immunity); *Wood v. Strickland*, 420 U.S. 308 (1975) (same). **In an official-capacity action, these defenses are unavailable.** *Owen v. City of Independence*, 445 U.S. 622 (1980); *see also Brandon v. Holt*, 469 U.S. 464 (1985). The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.

Graham, 473 U.S. at 166-67 (emphasis added). Accordingly, when sued in their official capacity in a § 1983 action, a North Carolina sheriff and his employees are not entitled to qualified immunity. *Id.*

¶ 23 A municipality and other local government units, such as a county, are persons within the meaning of § 1983. *Monell*, 436 U.S. at 690. "Although a municipal government is a creation of the State, it does not have the immunity granted to the State and its agencies." *Moore*, 345 N.C. at 365, 481 S.E.2d at 20. However, to hold a municipality liable under § 1983 for monetary, declaratory, or injunctive relief, "[t]he action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690.

¶ 24 The official policy must be the "moving force of the constitutional violation." *Id.* at 694. "[A] municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* at 691.

¶ 25 Here, Plaintiff has alleged sufficient facts to state Claim (7) against Defendant Kornegay in her official capacity. Plaintiff alleges that the Facility was not in compliance with the North Carolina Administrative Code subchapter regulating jails and that the North Carolina Department of Health and Human Services had found that detention officials failed to document supervised rounds of Decedent as required by law.

¶ 26 Further, Plaintiff alleges that Defendant Kornegay did not maintain any records indicating any specific observations of Decedent while she was on the medical

unit. Defendant Kornegay, as Interim Jail Director, is responsible for the supervision of the Facility's medical unit and therefore the unit's adherence to official policies. If Plaintiff's allegations are true, this lack of adherence to official policies may have constituted the driving force of the constitutional violation.

2. Defendant Kornegay – Individual Capacity

¶ 27 Defendants argue secondly that Plaintiff has failed to allege any facts that would support an individual capacity claim against Defendant Kornegay. Defendants also raise the defense of qualified immunity to the individual capacity claim and contend Plaintiff has not alleged any facts to overcome qualified immunity.

¶ 28 "[P]ublic officials who perform discretionary functions are entitled to qualified immunity from suit against them personally in their individual capacity under 42 U.S.C. § 1983." *Moore*, 124 N.C. App. at 48, 476 S.E.2d at 424. However, qualified immunity will not protect public officials from personal liability if "their conduct [violates] clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

> For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Hope v. Pelzer, 536 U.S. 730, 739 (2002) (internal quotation and citation omitted). "The threshold inquiry a court must undertake in a qualified immunity analysis is whether the plaintiff's allegations, if true, establish a constitutional violation." *Id.* at 736. The subsequent point of inquiry is whether the law was clearly established such that the defendant would have "fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Id.* at 741.

¶ 29 The United States Supreme Court has previously held that

> deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.

Estelle v. Gamble, 429 U.S. 97, 104 (1976) (internal marks and citation omitted). In applying the Supreme Court's holding in *Estelle*, this Court in *Boyd*, held "that a reasonable officer . . . would have had fair warning that ignoring an inmate's requests for medical care to address severe pain, vomiting, and nausea—over two full days—would, under these circumstances, violate clearly established constitutional law." 169 N.C. App. at 482, 621 S.E.2d at 15.

¶ 30 Here, Plaintiff has alleged sufficient facts to state Claim (7) against Defendant Kornegay in her individual capacity and to overcome the defense of qualified

immunity. Plaintiff alleges that Decedent's brother alerted detention officials of her health problems, specifically her issues with substance abuse, high blood pressure, shortness of breath, and chest pains, and told them he was concerned about Decedent's condition due to the forceful nature of her arrest.

¶ 31 Plaintiff alleges, despite this notice, Decedent did not receive an adequate health assessment or any meaningful health assessment or care throughout her period of detention at the Facility. Plaintiff alleges that Defendant Kornegay, as Interim Jail Director, ignored and failed to respond to obvious signs of medical distress and failed to implement required policies of jail administration, such as conducting and documenting regular observations of inmates confined in the medical unit. Taking these allegations as true, as we must at this stage, such actions could constitute a deliberate indifference to serious medical needs in violation of the Eighth Amendment. Like this court's holding in *Boyd*, if Defendant Kornegay ignored requests for medical care or obvious signs of medical distress, then such conduct violates a clearly established right of which Defendant Kornegay had fair warning.

3. Defendant Johnson

¶ 32 Defendants argue that Plaintiff has failed to allege any facts that would support an individual capacity claim against Defendant Johnson or overcome the defense of qualified immunity.

¶ 33 Here, Plaintiff has alleged sufficient facts to state Claim (7) against Defendant

Johnson in her individual capacity to overcome the defense of qualified immunity. Defendant Johnson was the detention officer on duty in the Facility's medical unit at the time of Decedent's death. Plaintiff alleges that Defendant Johnson failed to complete and contemporaneously document her required rounds and observations of Decedent. Plaintiff alleges there was no recordation of any specific observations of Decedent while she was confined in the medical unit. By the time Emergency Medical Services responded to Decedent's cell on the medical unit, she had turned blue and was cold to the touch. Plaintiff alleges that Defendant Johnson failed to respond to obvious signs of medical distress and failed to follow policies and practices required by law. Again, as in this Court's holding in *Boyd*, if Defendant Johnson ignored obvious signs of medical distress, or failed to observe Decedent as required, thereby delaying medical treatment, then such conduct violates a clearly established right of Decedent of which Defendant Johnson had fair and prior warning.

C. State Tort Claims against Defendant Kornegay in her Official Capacity

¶ 34 Defendants argue that Plaintiff has failed to plead sufficient facts to support Claims (8) and (14)—the wrongful death and injury to prisoner claims—against Defendant Kornegay in her official capacity. Defendants also raise the defense of governmental immunity and contend that the trial court failed to find that governmental immunity is waived only to the extent of the Sheriff's bond for these claims.

¶ 35 As an initial matter, Plaintiff has alleged sufficient facts to state Claims (8) and (14) against Defendant Kornegay in her official capacity. Defendant Kornegay, as Interim Jail Director, was responsible for the security and supervision of the Facility's medical unit. Decedent was processed into the Facility on 24 August 2018 and placed on the Facility's medical unit after her brother had alerted Facility officials of her health problems. When Decedent was discovered unresponsive, blue, and cold to the touch in her cell, multiple hours had elapsed since medical staff had checked on Decedent and documented her status. Sharing in the responsibility for administering medical services at the Facility, Defendant Kornegay, among others, did not maintain any records indicating any specific observations of Decedent while she was confined in the medical unit. These facts are sufficient to assert a claim of wrongful death under N.C. Gen. Stat. § 28A-18-2 and an injury to prisoner claim under N.C. Gen. Stat. § 162-55. We affirm the trial court's denial of Defendants' motion to dismiss these claims.

¶ 36 Defendants contend that Defendant Kornegay's liability for these claims is limited due to governmental immunity. "Under the doctrine of governmental immunity, a municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function." *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993). "Because a suit against a public official in his official capacity operates as a suit against the governmental

entity itself, an official sued in this capacity may raise the defense of governmental immunity." *Butterfield v. Gray*, 2021-NCCOA-523, ¶ 13. "Sheriffs and deputy sheriffs are considered public officials for purposes" of governmental immunity, *Phillips v. Gray*, 163 N.C. App. 52, 56-57, 592 S.E.2d 229, 232 (2004), and the operation of a county jail is considered a governmental function, *Butterfield*, 2021-NCCOA-523, ¶ 15.

¶ 37 A county may waive governmental immunity, however, by purchasing liability insurance. N.C. Gen. Stat. § 153A-435(a) (2019). County sheriffs specifically waive governmental immunity *via* the statutorily-mandated purchase of a sheriff's bond or by their county's purchase of liability insurance. *Id.* § 162-8; *Smith*, 117 N.C. App. at 384, 451 S.E.2d at 314. Immunity is waived for the sheriff and their surety when they are both named parties in an action and only to the extent of the coverage provided, namely the amount of the bond. *Id.* § 58-76-5; *White v. Cochran*, 229 N.C. App. 183, 190, 748 S.E.2d 334, 339 (2013).

¶ 38 Here, Plaintiff has alleged Defendant Kornegay, as an employee of the Durham County Sheriff and the Facility's Interim Jail Director, has waived governmental immunity by virtue of Defendant Birkhead purchasing a Sheriff's bond from Defendant Travelers. Defendants have conceded that Defendant Birkhead obtained a bond from Defendant Travelers for $25,000 as is required by N.C. Gen. Stat. § 162-8. Plaintiff properly joined Defendant Travelers as a party to this action under N.C.

Gen. Stat. § 58-76-5. In its Order, the trial court did not specifically limit Defendant Kornegay's liability to the extent of the coverage provided. We therefore clarify that Defendant Kornegay and Defendant Travelers as surety have waived governmental immunity for claims up to $25,000 and Plaintiff, if successful in her claim, is limited to recovery of that amount from these Defendants.

D. Injunctive Relief Claim Against Defendant Birkhead

¶ 39 Defendants appeal the trial court's denial of their motion to dismiss Claim (16) in which Plaintiff seeks temporary and permanent injunctive relief against Defendant Birkhead in his official capacity. Specifically, Plaintiff seeks injunctive relief related to her § 1983 claims involving the failure of Defendant Birkhead to provide adequate healthcare to inmates.

¶ 40 An order denying a motion to dismiss is interlocutory in nature and thus typically not immediately appealable. *Reid*, 187 N.C. App. at 263, 652 S.E.2d at 719. However, when the denial of a motion to dismiss affects a substantial right, such as the availability of an immunity defense, that order becomes immediately appealable. N.C. Gen. Stat. § 7A-27(b)(3)(a); *Allen*, 161 N.C. App. at 522, 588 S.E.2d at 497.

¶ 41 A municipality and other local government units, such as a county, are persons within the meaning of § 1983. *Monell*, 436 U.S. at 690. A North Carolina sheriff is a local official and also a person for purposes of § 1983. *Boyd*, 169 N.C. App. at 474, 621 S.E.2d at 10. "Although a municipal government is a creation of the State, it does

not have the immunity granted to the State and its agencies." *Moore*, 345 N.C. at 365, 481 S.E.2d at 20. Accordingly, when sued in their official capacity in a § 1983 action for injunctive relief, a North Carolina sheriff is not entitled to qualified immunity.

¶ 42 Here, Plaintiff is seeking temporary and permanent injunctive relief against Defendant Birkhead in his official capacity. The defenses of sovereign and qualified immunity are not available to Defendant Birkhead—as a local official being sued in his official capacity under § 1983—regarding this claim for injunctive relief. The trial court's denial of the motion to dismiss therefore does not affect a substantial right of Defendant Birkhead. Accordingly, we dismiss Defendants' appeal of the trial court's denial of their motion to dismiss Claim (16) as interlocutory and without prejudice.

IV. Conclusion

¶ 43 For the reasons stated above, we hold that Plaintiff alleged facts sufficient to state Claim (7) and to overcome the defense of qualified immunity where applicable. Accordingly, we affirm the trial court's denial of Defendants' motions to dismiss Claims (7), (8), (14), and (15). We clarify that Defendant Kornegay has waived governmental immunity for Claims (8) and (14) only to the extent of the Sheriff's bond. Finally, we dismiss Defendants' appeal of the trial court's denial of their motion to dismiss Claim (16) as interlocutory and without prejudice and remand.

AFFIRMED IN PART, DISMISSED IN PART, AND REMANDED.

Judges TYSON and GORE concur.

Report per Rule 30(e).