

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA21-15-2

Filed 3 December 2024

Cumberland County, No. 19CVS3596

ESTATE OF GREGORY GRAHAM, Plaintiff,

v.

ASHTON LAMBERT, Individually & Official Capacity, FAYETTEVILLE POLICE DEPARTMENT and CITY OF FAYETTEVILLE, Defendants.

On remand by order of the North Carolina Supreme Court on 22 March 2024 in *Estate of Graham v. Lambert*, 385 N.C. 644 (2024), reversing and remanding this Court's decision filed 15 March 2022 for reconsideration of waiver of governmental immunity under the proper motion for summary judgment standard. Originally appealed by defendants from order entered 16 July 2020 by Judge Mary Ann Tally in Superior Court, Cumberland County. Cumberland County, No. 19CVS3596.

Cranfill Sumner & Hartzog, LLP, by Steven A. Bader and James C. Thornton, for defendants-appellants.

Law Offices of Antonio F. Gerald, by Kevin Vidunas, for plaintiff-appellee.

GORE, Judge.

This case was remanded to our Court by order of the North Carolina Supreme Court for reconsideration on the issue of waiver of governmental immunity pursuant

to N.C.G.S. § 160A-485 in light of its opinion, *Estate of Graham v. Lambert*, 385 N.C. 644. The issue of waiver of governmental immunity was improperly decided under a Rule 12(b)(6) standard of review instead of the proper motion for summary judgment standard. On remand our Supreme Court requests that this Court

ask whether—viewing the evidence in the light most favorable to the Estate and considering the City’s offer of proof that no liability insurance exists—the Estate has offered sufficient evidence to raise a genuine factual dispute as to the City’s waiver of immunity, including whether the terms of any existing insurance policy cover this incident.

Lambert, 385 N.C. at 657. Accordingly, we limit our review to whether the Estate “offered sufficient evidence to raise a genuine factual dispute as to the [City of Fayetteville’s] (“City”) waiver of immunity.” *Id.*

Plaintiff, Estate of Gregory Graham, filed a lawsuit against Ashton Lambert, individually and in his official capacity, and the City bringing claims for negligence, gross negligence, and wrongful death.¹ Plaintiff alleged the City waived its governmental immunity under section 160A-485 by its purchase of liability insurance. Defendants filed a Rule 12(b)(6) motion to dismiss the lawsuit asserting a governmental immunity defense. The trial court did not enter an order on the Rule 12(b)(6) motion. Months later, defendants filed a motion for summary judgment and

¹ On remand, we do not discuss the details surrounding the accident, such background is available within the *Lambert* opinion, but instead, we reexamine the trial court’s determination to deny defendants’ motion for summary judgment despite the City’s immunity defense. *See id.* at 645–48.

reasserted in part their governmental immunity defenses. The trial court denied the motion for summary judgment, concluding there were genuine issues of material fact.

We review summary judgment orders de novo. . . .

Summary judgment is proper only if (1) there is no genuine issue as to any material fact, and (2) any party is entitled to a judgment as a matter of law. The movant's papers are carefully scrutinized while the other party's are indulgently regarded. Put differently, a court must credit all facts asserted by the adverse party and draw any inferences in its favor.

Still, summary judgment is strong medicine and should be used with caution. Courts must tread gingerly at summary judgment, reserving it for cases where only questions of law are involved and a fatal weakness in the claim of a party is exposed. In that vein, summary judgment is proper if an affirmative defense bars an essential element of the opposing party's claim.

That principle applies to immunity. As this Court has explained, immunity is more than a mere affirmative defense to liability—it shields a defendant entirely from having to answer for its conduct in a civil suit for damages. Thus, a defendant entitled to immunity may seek summary judgment on a plaintiff's claims.

Lambert, 385 N.C. at 650–51 (cleaned up). With this standard in mind, we consider the plaintiff's evidence produced at summary judgment and whether it raised a genuine issue of material fact against the City's proffered evidence for governmental immunity.

In its motion for summary judgment, the City proffered an affidavit by the City Manager, Douglas J. Hewett. The City also attached its limited insurance policy that contains a provision essentially stating any amount of liability not covered by the insurance policy is still protected by governmental immunity and waiver does not

ESTATE OF GRAHAM V. LAMBERT

Opinion of the Court

apply. The affidavit also attests that the City has no coverage “until the City has paid the full amount of its \$350,000 Retained Limit.” Hewett also attested there was no liability insurance in place at the time of the incident to cover this matter.

Plaintiff alleged claims of negligence against the City to the extent allowed under section 160A-485. Plaintiff stated, in its reply to defendants’ answer, the “immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability. No formal action other than the purchase of liability insurance shall be required to waive tort immunity.” Plaintiff provided no further evidence or argument in the record to overcome defendants’ offer of proof that the insurance policy did not cover plaintiff’s claims. Accordingly, viewing the evidence in the light most favorable to plaintiff, we determine there was no genuine issue of material fact as to the City’s governmental immunity. Because plaintiff did not demonstrate the existence of a genuine issue of material fact regarding the City’s governmental immunity defense, the trial court erred by denying the motion for summary judgment as to the claims against the City that are shielded by governmental immunity.

VACATED AND REMANDED.

Judges TYSON and STADING concur.

Report per Rule 30(e).