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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-667

Filed 19 March 2025

Cabarrus County, No. 20CVS2064

KAYLA B. SHERRILL and ANITA K. EMERSON, Plaintiffs,

v.

DAWN S. SIMPSON, in her individual capacity, and MARK KINCAID, in his individual capacity, Defendants.

Appeal by plaintiffs from order entered 22 November 2022 by Judge Daniel Kuehnert in Superior Court, Cabarrus County. Heard in the Court of Appeals 9 January 2024.

*The Olsinski Law Firm, by Kimberly Olsinski, for plaintiffs-appellants.*

*Cranfill Sumner LLP, by Steven A. Bader and Patrick H. Flanagan, for defendants-appellees.*

STROUD, Judge.

Plaintiffs, Kayla Sherrill and Anita Emerson, appeal from an order granting summary judgment for Defendants, Mark Kincaid and Dawn Simpson. Defendant Kincaid and Defendant Simpson are employees of the City of Concord's Parks and

Recreation Department. Plaintiffs<sup>1</sup> claims arose from Plaintiff Sherrill's injuries sustained when she fell from a swing set that collapsed at Les Myers Park, a park operated by the City of Concord's Department of Parks and Recreation. Plaintiffs argue Defendants Kincaid and Simpson had a duty to repair and maintain the condition of the swing set and that their failure to fulfill this duty was the proximate cause of the collapse. Defendant Kincaid contends Plaintiffs' claims were properly dismissed because he is a public official, who is entitled to public official immunity. Defendant Simpson contends she did not owe any duty to Plaintiffs as her job duties did not include maintenance or repair of the playgrounds.

Defendants Kincaid and Simpson also contend that summary judgment was proper because even taken in the light most favorable to Plaintiffs, the evidence does not show any alleged negligence was a proximate cause of Plaintiff Sherrill's injuries. We affirm the trial court's order granting summary judgment for Defendants Kincaid and Simpson. Plaintiffs have not demonstrated evidence or genuine issues exist tending to show Defendants Kincaid and Simpson's failure to paint the swing set was a proximate cause of the collapse.

## **I. Factual and Procedural Background**

On 21 July 2020, Plaintiffs filed a complaint alleging negligence against

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<sup>1</sup> Plaintiff Emerson is the mother of Plaintiff Sherrill. Plaintiff Sherrill was age 23 at the time of her injury and was a competent adult when the complaint was filed. The legal basis for Plaintiff Emerson's claim is unclear but this is not relevant for purposes of this opinion.

Defendant Donald Starnes<sup>2</sup> and Defendant Simpson in their individual capacities as public employees. Plaintiffs alleged that on 3 December 2017, Plaintiff Sherrill was on a swing set at Les Myers<sup>3</sup> Park, which is owned and operated by the City of Concord (the “City”), when the swing set collapsed. Plaintiff Sherrill fell and fractured both her ankles, sustaining serious and permanent injuries. Plaintiffs alleged Defendant Starnes and Defendant Simpson “breached their duty to Plaintiff [Sherrill] and were negligent in one or more of the following ways:”

- a. By failing to request the repairs to the swing-set that were documented in the Playground Guardian Inspection report be done;
- b. By failing to complete the repairs to the swing-set, if repairs were requested;
- c. By failing to follow-up and verify that repairs were completed;
- d. By failing to remove the swing-set until the repairs were completed;
- e. By failing to warn the public that the swing-set was in a dangerous condition and should not be used; and,
- f. In such further ways as may be shown by the evidence.

On 12 November 2020, Plaintiffs filed an amended complaint adding Defendant Kincaid to the suit. The parties conducted discovery and Defendants filed

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<sup>2</sup> Defendant Donald Starnes is not a party to this appeal because Plaintiffs subsequently dismissed their claims against him.

<sup>3</sup> The spelling of Les Myers Park is inconsistent throughout the filings and the briefs on appeal; we refer to the park as Les Myers Park throughout this opinion.

a motion for summary judgment on 19 September 2022. By order entered 5 October 2022, Plaintiffs voluntarily dismissed all claims against Defendant Starnes. On 14 October 2022, Defendants filed an amended motion for summary judgment which omitted Defendant Starnes. Defendant Kincaid and Defendant Simpson (“Defendants”) remained listed as the defendants. At the 7 November 2022 hearing on Defendants’ motion for summary judgment, both Plaintiffs and Defendants filed affidavits, excerpts from depositions, and responses to discovery requests for the trial court’s consideration. For purposes of review of the summary judgment order, the facts summarized here are based upon Plaintiffs’ amended complaint and the depositions and exhibits presented at the summary judgment hearing, with Plaintiffs’ assertions taken as true. *See Dobson v. Harris*, 352 N.C. 77, 83, 530 S.E.2d 829, 835 (2000) (“All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party[.]” (citations omitted)).

It is undisputed that in February 2017, Defendant Kincaid was employed as deputy director of the City’s Parks and Recreation Department (the “Department”). Defendant Kincaid supported the Department’s director, Bob Dowless (the “Director”), and was “tasked with doing anything that [the Director] asked [him] to do within the bounds of” the Department, including assisting the Director in preparing an annual budget for the Department. Additionally, after the City Council approved the budget, Defendant Kincaid assisted the Director in managing the budget. As part of his job, Defendant Kincaid would receive requests for expenditures

from six supervisors and seek the Director's approval. Defendant Kincaid also met with the accounting technician and other employees of the Department to review and track the budget as the year progressed. Defendant Kincaid was Defendant Simpson's direct supervisor.

Defendant Simpson was employed by the Department as an athletic coordinator ordinarily responsible for "youth sports, adult sports, a seasonal swimming pool, a fishing lake, road races, golf, and tennis." She was not generally involved with maintenance of the playgrounds; her involvement with the playgrounds was limited to assisting Defendant Kincaid in contacting Playground Guardian, a company that does playground inspections, to arrange inspections. She arranged for Playground Guardian to do the inspections of all the City's playgrounds in February 2017 and gave Defendant Kincaid the Report after she received it. Defendant Simpson did not have any discussion with Defendant Kincaid about the Report after it was done; however, she did order a part for another piece of playground equipment noted in the Report after he asked her to do so.

Plaintiffs allege the City had not regularly had its playground equipment inspected in the years before 2017; however, it is undisputed in February 2017, about nine months before Plaintiff Sherrill's injury, the City retained and paid Playground Guardian to inspect the playground equipment at all the City's playgrounds. The Report prepared by Playground Guardian included photographs of the various items of playground equipment and noted any issues of concern and recommended action.

Each item identified in the Report was assigned a priority rating using a five-tier priority system. The priority key in the Report described the levels of rating as follows:

High

1. Permanent disability, loss of life or body part

*Condition should be corrected immediately.*

2. Serious injury resulting in temporary disability

*Condition should be corrected as soon as possible.*

3. Minor (Non-Disabling) injury

*Condition should be corrected when time permits.*

- 4 . Potential for injury very minimal

*Condition should be corrected if worsens.*

5. Existing condition is compliant . . .

Low

On or about 28 February 2017, an employee of Playground Guardian inspected the playground equipment at all the City's parks, including Les Myers Park. Playground Guardian recommended that inspections in the future be done at least annually. The Report identified several priority 2, 3 and 4 issues. The swing set where Plaintiff Sherrill was injured was identified as the "Arch Swings"; the report classified this issue as priority 4. Graffiti on play equipment was also assigned a priority 4 in the Report. The "defective part" of the Arch Swings was identified as "top[]rail" and the problem identified was "corrosion." The photograph in the Report

shows only the horizontal top rail of the swing set, not the sides. The recommended action was “paint.” The “comments” section says “N/A.”

After receiving the Report, Defendant Kincaid and the Director had a “general” discussion about addressing higher priority items first; Defendant Kincaid did not believe he and the Director had “specifically talked about the painting needs at Les Myers Park or any of the other parks.” Defendant Kincaid stated the Director’s “instructions were address the higher safety issues first[,]” and that he specifically “recall[ed] that [the Director] instructed [Defendant Kincaid] to address the higher priority items.” Defendant Kincaid noted the decisions on which items to repair had to be made as “the year goes on and the budget is managed over the course of the year.” The Department prioritized the higher priority issues identified by Playground Guardian for repair and planned to address painting the swing set as the fiscal year progressed. The Director ordered the repair of some of the higher priority items, including replacement of some equipment identified as priority 2 or 3, but did not direct any repairs for the Arch Swings.

On 3 December 2017, Plaintiff Sherrill was on the Arch Swings when the portion of the top rail that connected to the supporting side legs broke. The evidence is undisputed that the swing set broke at the “weldment between the supporting arch and the top[]rail.” The top rail portion identified as the area with “corrosion” in the Report did not break. She landed on the ground with both feet and sustained “severe and painful permanent injuries to her person, including but not limited to, dislocation

and three fractures to her left ankle, two fractures to her right ankle, and scarring.”

Plaintiffs presented excerpts from depositions of Scott Burton, their expert witness, as to “the duties of . . . [D]efendants regarding playground safety, the standards of the industry, the failures of . . . [D]efendants regarding playground safety, the manufacture, use, maintenance and condition of the swing set and other playground equipment in [the City] parks, and inspections and repairs of playground equipment.” Mr. Burton had earned an associate of arts degree, but demonstrated no formal education as a structural or metallurgical engineer. Mr. Burton was a playground equipment manufacturer and had more than thirty years of experience as a certified playground safety inspector. Plaintiffs identified him in discovery responses as a “recreational safety consultant.”<sup>4</sup> After reviewing the Report and photographs taken by Playground Guardian, Mr. Burton highlighted the corrosion on the top rail of the Arch Swings noted in the Report. Mr. Burton opined the failure of the swing set was caused by “[s]evere rust and corrosion” on the top rail. Mr. Burton did not ever examine the swing set personally—either before or after Plaintiff

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<sup>4</sup> The brief excerpts from Mr. Burton’s depositions provided to this Court do not include much information regarding his relevant education and qualifications. Our record does not include Mr. Burton’s curriculum vitae. Plaintiffs’ responses to interrogatories identify Mr. Burton and state “see the attached C.V.” in the answer to the question regarding his “education and qualifications” as an expert witness. The curriculum vitae and the photographs of the swing set after it collapsed were “attached” to the interrogatory responses with a link to a Dropbox file, but this Court does not have access to the link. However, Defendants do not argue on appeal that Mr. Burton is not qualified as an expert to state an opinion on the duties of Defendants regarding playground safety or the cause of the swing set collapse, so we must assume for purposes of this opinion that he would in fact be qualified to testify as an expert under North Carolina Rule of Evidence 702. See N.C. Gen. Stat. § 8C-1, Rule 702 (2023).



Sherrill’s fall—and he acknowledged that the photograph of the swing set taken by Playground Guardian did not show the portion of the swing set that broke and caused Plaintiff Sherrill to fall. However, he testified that once Defendants knew about corrosion on one part of the swing set, they had a duty to take action as to the entire unit because “[i]f you’re told that, you know, one of your tires has a nail in it, I would want to go and check the other tires to make sure that they don’t have a nail in it either.”

Mr. Burton also opined once Defendants knew about the corrosion on the swing set, they had a duty to remove the swing set, replace the swing set, or “take[ the swing set] back to their shop and worked (sic) on it and possibly corrected the problem[.]” He also testified based on the Report, Defendants should have gotten “a structural engineer to take a look at some of this stuff,” to determine the extent of the rust and corrosion to find out if it was “90 percent through or ten percent.” He acknowledged that if it was only ten percent, “you could wait and put that on your list to do” but if it was 50% or 90%, it should be done sooner.

By order entered 22 November 2022, the trial court granted Defendants’ motion for summary judgment. Plaintiffs filed notice of appeal on 12 January 2023 and an amended notice of appeal the following day.<sup>5</sup>

## **II. Analysis**

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<sup>5</sup> The amended notice of appeal made a correction to the case caption.

On appeal, Plaintiffs argue that the trial court erred in granting summary judgment because: (1) Defendant Kincaid does not have public official immunity because he is a public employee, not a public official; (2) Defendant Simpson owed a duty of care to Plaintiff Sherrill; however, in the alternative, Defendant Simpson assumed and therefore owed a duty to Plaintiff Sherrill regarding the inspection, repairs, and monitoring of the swing set; and, (3) Plaintiffs produced sufficient evidence to support all the elements of common law negligence.

**A. Standard of Review**

At the trial court, summary judgment is proper 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) (2023).

The standard of review for a motion for summary judgment is well established:

Our standard of review of an appeal from summary judgment is de novo; such 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 a judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial.

*In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576-77 (2008) (citations and quotation marks omitted).

## **B. Public Official Immunity**

Defendants contend that the trial court's order should be affirmed as to Defendant Kincaid because as the Department's deputy director, he "is a public official" so he "has public official immunity from [Plaintiff] Sherill's negligence suit." Plaintiffs argue Defendant Kincaid is not a public official because his position was not created by statute, he does not exercise a portion of the sovereign power, and he performs ministerial duties and "does not exercise discretion in performing his job." (Capitalization altered.) We agree with Plaintiffs.

Our Supreme Court set out the distinctions between a public official and a public employee as follows:

Our courts have recognized several basic distinctions between a public official and a public employee, including: (1) a public office is a position created by the constitution or statutes; (2) a public official exercises a portion of the sovereign power; and (3) a public official exercises discretion, while public employees perform ministerial duties. Discretionary acts are those requiring personal deliberation, decision and judgment. Ministerial duties, on the other hand, are absolute and involve merely the execution of a specific duty arising from fixed and designated facts.

*Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 127 (1999) (citation, quotation marks, and brackets omitted). Our courts have also noted that all three of these requirements must be met to establish public official immunity. *See McCullers v. Lewis*, 265 N.C. App. 216, 222, 828 S.E.2d 524, 532 (2019) ("Courts applying this framework have recently held that a defendant seeking to establish public official

immunity must demonstrate that all three of the *Isenhour* factors are present.” (citation omitted)); *see also Leonard v. Bell*, 254 N.C. App. 694, 705, 803 S.E.2d 445, 453 (2017) (“Because we hold that [the] defendants’ positions are not created by statute, we need not address the remaining elements to reach the conclusion that [the] defendants are not public officials entitled to immunity.”).

Defendants contend that Defendant Kincaid’s office was created by statute based upon North Carolina General Statute Section 160A-350, *et seq.* The statute provides that “the creation, establishment, and operation of parks and recreation programs is a proper governmental function, and that it is the policy of North Carolina to forever encourage, foster, and provide these facilities and programs for all its citizens.” N.C. Gen. Stat. § 160A-351 (2023). From there, the statute gives each county and city in North Carolina the authority to establish a parks and recreation department. *See* N.C. Gen. Stat. § 160A-353 (2023).

Plaintiffs argue Defendant Kincaid’s claim of immunity as a public official fails on just this first element, as the office of deputy director of the Department is not an office created by statute. Defendant Kincaid’s argument relies on the statutory authority of the City to establish the Department; however, as discussed below, this sort of general authority is not sufficient to demonstrate that the position of deputy director was created by statute and this argument has been rejected in prior cases.

In *Baznik v. FCA US, LLC*, 280 N.C. App. 139, 867 S.E.2d 334 (2021), the plaintiff sued a division traffic engineer, a sign supervisor, and an engineer employed

by the North Carolina Department of Transportation (“NCDOT”) in their individual capacities for negligent design of an intersection. *Id.* at 140-41, 867 S.E.2d at 335. The defendants contended their positions were created pursuant to North Carolina General Statute Sections 143B-345, 143B-346, and 136-18. *Id.* at 142, 867 S.E.2d at 337. This Court discussed each of the three statutes: North Carolina General Statute Section 143B-345 established “NCDOT as a department within North Carolina[,]” *id.* at 143, 867 S.E.2d at 337; North Carolina General Statute Section 143B-346 “functions to provide a brief one paragraph overview of the function and purpose of NCDOT[,]” *id.*; and North Carolina General Statute Section 136-18 “functions to define and list the powers allotted to NCDOT as a department[,]” *id.* This Court noted that although the three statutes “grant statutory responsibility to NCDOT, these statutes do not in turn delegate such statutory authority to employees of NCDOT” and, thus, rejected the defendants’ claims of public official immunity. *Id.* at 143, 867 S.E.2d at 337. Similarly, in *Isenhour*, the plaintiff—administratrix of the estate of her deceased son—sued the defendant driver and the defendant crossing guard after her son was struck by a car in a cross walk and died. 350 N.C. at 602, 517 S.E.2d at 123. The Supreme Court rejected the defendant crossing guard’s claim of public immunity, stating: “Unlike the specific grant of statutory authority given municipalities to employ police officers, [the] defendants have not directed our attention to, and our research has not disclosed, any statute specifically authorizing municipalities to employ school crossing guards *per se.*” *Id.* at 611, 517 S.E.2d at 128.

Defendants do not address *Baznik* or *Isenhour* in their brief, but rely only upon the general assertion regarding the statutory authority for the City to create the Department. But it is well established that the mere fact that a department of a governmental entity is authorized by statute does not mean that even lower-level positions in that entity are “public officials” entitled to public official immunity. *See Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127; *see also Baznik*, 280 N.C. App. at 143, 867 S.E.2d at 337. Defendants have failed to demonstrate Defendant Kincaid, as deputy director of the Department, holds “a position created by the constitution or statutes”; as a result, Defendant Kincaid is not entitled to public official immunity. *See Isenhour*, 350 N.C. at 610, 517 S.E.2d at 127.

### **C. Negligence**

Plaintiffs contend that Defendant Simpson “shared responsibility” with Defendant Kincaid “for taking reasonable and necessary action based on the safety risks discovered by the playground inspection they had arranged.” **[Pl Br 5]** Defendants contend Defendant Simpson had no such duty. We need not separately address Defendant Simpson’s duty because our analysis of negligence generally is dispositive as to both Defendant Simpson and Defendant Kincaid. Here, the dispositive issue is whether Plaintiffs produced sufficient evidence to show Defendants had a legal duty to maintain and repair the swing set and that their failure to fulfill this duty was the proximate cause of the collapse.

This Court has recognized that “summary judgment is rarely an appropriate

remedy in cases of negligence or contributory negligence[;] [h]owever, summary judgment is appropriate in a cause of action for negligence where the forecast of evidence fails to show negligence on [the] defendant's part[.]” *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (citation and quotation marks omitted). After careful review, we hold that the trial court properly granted summary judgment for Defendants, as Plaintiffs failed to produce sufficient evidence supporting a *prima facie* case of negligence.

To survive a motion for summary judgment in a negligence action, a plaintiff must

establish a *prima facie* case by showing: (1) that [the] defendant failed to exercise proper care in the performance of a duty owed [the] plaintiff; (2) the negligent breach of that duty was a proximate cause of [the] plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that [the] plaintiff's injury was probable under the circumstances.

*Bolick v. Bon Worth, Inc.*, 150 N.C. App. 428, 430, 562 S.E.2d 602, 603 (2002) (citation and quotation marks omitted). If a plaintiff fails to establish evidence as to one of the elements of negligence and no genuine issues of material fact remain, then a trial court properly grants summary judgment. *See Biggers v. Bald Head Island*, 200 N.C. App. 83, 86, 682 S.E.2d 423, 425 (2009).

Plaintiffs brought this claim against Defendant Kincaid and Defendant Simpson individually. She did not assert any claim against the City, the City Council, or the Director of the Department likely because governmental immunity bars any

claims against them. *See Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952) (“It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto.”).

Plaintiffs allege because Defendants are employed by the City, and repairs to the City’s parks would be within the course and scope of their employment, they have a legal duty *personally* to maintain and repair the City’s playgrounds. They allege Defendants each had a duty to protect the community from dangers on the playground, especially when they had prior knowledge of the corrosion identified in the Report. Plaintiffs argue that Defendants breached this duty by their failure to request repairs, monitor the corrosion, warn the community of the danger, or remove the swing set from use. Furthermore, Plaintiffs contend it was foreseeable that a corroded swing set would eventually collapse, and Defendants’ inaction regarding the condition of the swing set following the Report was the proximate cause of Plaintiff Sherill’s injuries.

Plaintiffs’ arguments as to Defendants’ duties are somewhat contradictory. Plaintiffs contend Defendants each had a legal duty—in their individual capacities—to maintain and repair the City’s playgrounds, while simultaneously arguing that Defendant Kincaid had no public official immunity because he was “an assistant to the [D]irector . . . and he had very little discretion or decision-making powers.” Defendant Simpson’s duties were even more limited, as her only involvement with



the playgrounds was essentially administrative; upon Defendant Kincaid's request, she ordered the Playground Guardian inspection and provided the Report to Defendant Kincaid. It is undisputed the Report did not identify the Arch Swings as a high priority item needing immediate action. It is undisputed neither the Director nor any other supervising official directed Defendant Kincaid or Defendant Simpson to take any action to repair or even to paint the Arch Swings. It is undisputed that funding from the budget would have to be available to pay for repair, painting, or replacement of the Arch Swings, but no City funds had been made available for this purpose. However, even if we assume the existence of some duty by Defendants to take independent action to paint or repair the Arch Swings even without receiving authorization or funding to do so from the Director, Plaintiffs have failed to show that Defendants' failure to take action was a proximate cause of the swing set collapse.

In *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E.2d 559 (1984), our Supreme Court defined proximate cause as

a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

*Id.* at 233, 311 S.E.2d at 565 (citation omitted). To establish proximate cause, a plaintiff must first prove foreseeability. *See id.* ("Foreseeability is thus a requisite of proximate cause, which is, in turn, a requisite for actionable negligence." (citations

omitted)). That is, “in the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.” *Williamson v. Liptzin*, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) (citation and quotation marks omitted). “However, the law does not require that the defendant foresee events which are *merely possible* but only those which are reasonably foreseeable.” *Id.* at 11, 539 S.E.2d at 319 (emphasis in original) (citation and quotation marks omitted). Aside from foreseeability, there are other factors taken into consideration when determining causation:

[W]hether the cause is, in the usual judgment of mankind, likely to produce the result; whether the relationship between cause and effect is too attenuated; whether there is a direct connection without intervening causes; whether the cause was a substantial factor in bringing about the result; and whether there was a natural and continuous sequence between the cause and the result.

*Wyatt v. Gilmore*, 57 N.C. App. 57, 59, 290 S.E.2d 790, 791 (1982) (citation omitted). Ultimately, “[p]roof of the [injury] alone is not sufficient to establish liability, for if nothing more appears, the presumption is that the [injury] was the result of accident or some providential cause.” *Phelps v. City of Winston-Salem*, 272 N.C. 24, 31, 157 S.E.2d 719, 724 (1967).

Here, the record contains no facts that would support a conclusion that Plaintiff Sherrill’s injuries were reasonably foreseeable, much less that Defendants’ failure to paint the top rail of the Arch Swings was the proximate cause of her

injuries. Plaintiffs' entire argument as to proximate cause is that "Mr. Burton's opinion that the cause of the swing set collapse that injured [Plaintiff Sherill] was severe rust and corrosion is more than sufficient to establish proximate cause." Essentially, Plaintiffs contend that if there is an area of corrosion on a swing set which has been inspected by a professional playground inspector who has determined that the "[p]otential for injury [is] very minimal" and the "[c]ondition should be corrected if worsens" and the corroded area is not painted, it is reasonably foreseeable that *another* part of the swing set will collapse within the next year. In support, Plaintiffs rely on the deposition testimony of Mr. Burton as to his expert opinion as a certified playground safety inspector. Specifically, when he stated, "[t]hey have this condition of rust and corrosion that only gets worse, but they are expected to keep an eye on it and do what? Wait until it breaks? That just doesn't make sense to me at all."

Plaintiffs do not argue that Defendants were negligent by having Playground Guardian do the playground inspection or that the Report was deficient in some manner and Defendants should have realized this. Despite the Report's recommendation to "paint" the corroded area and to repeat inspection in a year, if we were to accept Plaintiffs' argument, it would mean that Defendants were required to take immediate action as to every item of concern identified by the Report, even an area of corrosion or graffiti identified as a level 4 priority. In addition, despite the undisputed evidence that the Director did not instruct Defendants to take immediate

action, Defendants would be required to take immediate action even if the Department's budget would not cover this expense. Since the only lower level of priority possible was level 5, this would mean that Defendants would be required to take immediate action on every piece of playground equipment identified in the Report of any priority levels from level 1 to 4.

There is also no genuine issue of material fact as to where the Arch Swings failed. Plaintiffs acknowledged the swing set broke at the side connection to the top rail. The Report identified the issue regarding the center of the top rail of the swing set and the recommended action was "paint." The issue was classified as "corrosion" and a priority level four, meaning, "[p]otential for injury [is] very minimal." The photograph in the Report shows only the top rail, while the swing set failed at the connection of the top rail to the side supports; Mr. Burton conceded in his testimony that he never examined the swing set beyond review of photographs. The Report did not indicate any structural concerns for the Arch Swings. Based upon the level 4 priority designation, the corrosion identified was of minimal concern; graffiti on other playground equipment had the same level 4 priority designation. Even if Defendants had immediately taken the recommended action to "paint" the top rail of the swing set, there is no evidence this action would have prevented the failure of the side connection to the top rail.

While it is *possible* Defendants could have foreseen the eventual collapse of the swing set if it was left unattended for some period of time, that is not what the law

requires. Rather, the law imposes on Defendants the duty to foresee events that are *reasonably foreseeable*. See *Liptzin*, 141 N.C. App. at 11, 539 S.E.2d at 319. Assuming Defendants had a legal duty to inspect the playground equipment to discover any safety hazards, Plaintiffs' own evidence demonstrates that Defendants complied with this duty by having Playground Guardian inspect the playground and make recommendations for repairs and Playground Guardian did not recommend re-inspection for another year. Plaintiffs' own evidence also shows Defendants took action to repair higher priority items which were identified as posing a risk of danger to the public. Plaintiffs have not presented any evidence tending to demonstrate it was reasonably foreseeable the Arch Swings would collapse less than a year after the inspection identified level 4 priority corrosion on the top rail. See *Phelps*, 272 N.C. at 30, 157 S.E.2d at 723 ("The law does not charge a person with all the possible consequences of his negligence, nor that which is merely possible. A man's responsibility for his negligence must end somewhere. If the connection between negligence and the injury appears unnatural, unreasonable and improbable in the light of common experience, the negligence, if deemed a cause of the injury at all, is to be considered a remote rather than a proximate cause.").

The record contains no facts that would support a conclusion Plaintiff Sherrill's injuries were reasonably foreseeable. Therefore, Plaintiffs' arguments are insufficient to establish that Defendants' alleged negligence was the proximate cause of Plaintiff Sherrill's injuries. See *Hairston*, 310 N.C. at 233, 311 S.E.2d at 565

(“Foreseeability is thus a requisite of proximate cause, which is, in turn, a requisite for actionable negligence.” (citation omitted)). Accordingly, the trial court properly granted summary judgment in favor of Defendants.

### **III. Conclusion**

For the foregoing reasons, we affirm the trial court’s order granting summary judgment for Defendants. Although Defendant Kincaid is not a public official entitled to public official immunity, summary judgment for Defendants was proper because Plaintiffs failed to establish that Defendants’ negligence was a proximate cause of Plaintiff Sherrill’s injuries. The trial court’s order is affirmed.

AFFIRMED.

Judges TYSON and ZACHARY concur.

Report per Rule 30(e).