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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-538

No. COA20-519

Filed 5 October 2021

Cumberland County, No. 19 CVS 0152

SERENA CAPPS, Plaintiff,

v.

THE CUMBERLAND COUNTY BOARD OF EDUCATION, Defendant.

Appeal by Defendant from order entered 12 March 2020 by Judge Mary Ann Tally in the Cumberland County Superior Court. Heard in the Court of Appeals 23 March 2021.

Marshall B. Pitts, Jr., P.C., by Marshall B. Pitts, Jr., for plaintiff-appellee.

Ragsdale Liggett PLLC, by Mary M. Webb, Amie C. Sivon, and Edward E. Coleman III, for defendant-appellant.

MURPHY, Judge.

¶ 1 Government entities have immunity from negligence and tort claims, unless the government entity waives this immunity by the purchase of liability insurance. However, waiver will only apply to the extent of the liability insurance coverage. When a government entity's liability insurance policy contains a self-insured retention that must be paid by the government entity before insurance coverage is

triggered, the government entity has not waived immunity. Here, Defendant, a county board of education, did not waive its governmental immunity by purchasing a liability insurance policy that included a $100,000.00 self-insured retention that must be paid by the county board of education before triggering insurance coverage.

BACKGROUND

¶ 2 On 17 September 2014, Plaintiff Serena Capps was attacked by another student at Gray's Creek Middle School. As a result of the attack, Capps alleged she suffered a concussion and head injury, a black eye, bruising, throat swelling, swollen gums and other dental problems, facial numbness, eye problems, painful headaches, nausea and vomiting, and frequent nightmares and flashbacks.

¶ 3 Once Capps reached the age of majority in January 2019, she filed a *Complaint* against Defendant Cumberland County Board of Education ("the Board") with six causes of action: (1) negligence; (2) negligent training and supervision; (3) negligent infliction of emotional distress; (4) agency; (5) violation of the right to privilege of education under Article 1, § 15 of the North Carolina Constitution; and (6) deprivation of liberty interest and privilege under Article 1, § 19 of the North Carolina Constitution. The *Complaint* generally alleged Gray's Creek Middle School personnel were aware of Capps' assailant making prior threats against her, but failed to take the appropriate measures to protect her safety. The *Complaint* also alleged that at all relevant times the Board had "purchased and maintained liability insurance, and

thereby waives its privilege of governmental immunity."

¶ 4 In its Answer filed on 11 March 2019, the Board pled the defense of governmental immunity as a bar to Capps' negligence claims and moved to dismiss the claims pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction, Rule 12(b)(2) for lack of personal jurisdiction, and 12(b)(6) for failure to state a claim upon which relief can be granted. The Board acknowledged the purchase of liability insurance, but maintained the liability insurance did not constitute a waiver of governmental immunity. On 5 February 2020, the Board moved for summary judgment pursuant to Rule 56 on all claims "on the grounds that there are no genuine issues of material fact and that [the Board] is entitled to judgment as a matter of law" based on governmental immunity.[1] In support of its motion, the Board filed an affidavit of Laura Young, the risk manager for the Board. Incorporated by reference into her affidavit, Young provided a copy of the Board's liability insurance policy that was effective at the time of the incident, from 1 July 2014 through 1 July 2015. The Board's liability insurance policy included a $100,000.00 self-insured retention "which appl[ied] to a covered loss for each OCCURRENCE or CLAIM under . . .

[1] In addition to governmental immunity, the Board argued the summary judgment motion should be granted on other grounds. However, this interlocutory appeal is limited to the issue of governmental immunity.

GENERAL LIABILITY . . . [and] SCHOOL BOARD MISCELLANOUS LIABILITY."[2]

¶ 5 A hearing on the motion for summary judgment and motions to dismiss occurred on 9 March 2020. At the start of the hearing, Capps voluntarily dismissed her claim for negligent training and supervision, as well as the constitutional claims of right to privilege of education and deprivation of liberty interest and privilege. The Board argued the remaining claims of negligence, negligent infliction of emotional distress, and agency were barred by governmental immunity, which was not waived by the Board's purchase of liability insurance.

¶ 6 After hearing arguments from both parties, on 12 March 2020 the trial court "determine[d] that the Rule 12 motions were converted to [s]ummary [j]udgment motions by law."[3] All motions made by the Board were denied. On 2 April 2020, the

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[2] We note the policy also contained a $200,000.00 corridor retention endorsement that would activate after the self-insured retention was paid. However, this does not affect our analysis because the self-insured retention must be paid first, regardless of the corridor retention endorsement.

[3] We note "[t]he defense of [] immunity is both a North Carolina Rules of Civil Procedure Rule 12(b)(1) and Rule 12(b)(2) defense. Consideration of the affidavits and insurance contracts is proper, without converting the motion to dismiss to one for summary judgment, under motions filed pursuant to Rules 12(b)(1) and (b)(2) . . . ." *Hinson v. City of Greensboro*, 232 N.C. App. 204, 212 n.4, 753 S.E.2d 822, 828 n.4 (marks and citation omitted), *petition for disc. rev. withdrawn*, 367 N.C. 516, 761 S.E.2d 648 (2014). However, "[a] motion to dismiss pursuant to Rule 12(b)(6) is converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the [trial] court." *Watson Ins. Agency, Inc. v. Price Mech., Inc.*, 106 N.C. App. 629, 633, 417 S.E.2d 811, 813 (1992) (marks omitted).

Here, the Board made a motion to dismiss based on governmental immunity pursuant to Rules 12(b)(1), (b)(2), and (b)(6). While it was error for the trial court to convert the 12(b)(1)

Board filed notice of appeal from the trial court's order denying its motions to dismiss and motion for summary judgment.

¶ 7 On appeal, the Board argues it "is entitled to governmental immunity because the [liability insurance] policy requires a self-insured retention [to] be paid by the Board before there is coverage," similar to the requirements of the policies in *Ballard v. Shelley*, 257 N.C. App. 561, 811 S.E.2d 603 (2018), *Arrington v. Martinez*, 215 N.C. App. 252, 716 S.E.2d 410 (2011), *Bullard v. Wake Cty.*, 221 N.C. App. 522, 729 S.E.2d 686, *disc. rev. denied*, 366 N.C. 409, 735 S.E.2d 184 (2012), *Magana,* 183 N.C. App. 146, 645 S.E.2d 91, and *Hinson*, 232 N.C. App. 204, 753 S.E.2d 822.

ANALYSIS[4]

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and (b)(2) motions to one for summary judgment, it was not error to convert the 12(b)(6) motion to one for summary judgment. This error does not impact our analysis, as the issue of governmental immunity may be brought under either a motion to dismiss or a motion for summary judgment. *See Battle Ridge Cos. v. N.C. Dep't of Transp.*, 161 N.C. App. 156, 157, 587 S.E.2d 426, 427 (2003) (ruling on immunity pursuant to a motion to dismiss), *disc. rev. denied*, 358 N.C. 233, 594 S.E.2d 191 (2004); *Magana v. Charlotte-Mecklenburg Bd. of Educ.*, 183 N.C. App. 146, 147, 645 S.E.2d 91, 92 (ruling on immunity pursuant to a motion for summary judgment).

The Board made a separate motion for summary judgment, which the trial court denied. As a result, our review is of the trial court's denial of the summary judgment motion, which we reverse, rendering the trial court's actions on the 12(b) motions moot.

[4] As a preliminary matter, we note "[d]enial of a summary judgment motion is interlocutory and ordinarily cannot be immediately appealed." *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009). "However, a defendant's appeal from denial of summary judgment on grounds of [governmental] immunity is immediately appealable, as it represents a substantial right. Accordingly, [the Board's] appeal is properly before us." *Arrington*, 215 N.C. App. at 256, 716 S.E.2d at 413 (citation omitted).

¶ 8 The ultimate issue presented by this appeal is whether the trial court erred in denying the Board's motion for summary judgment when it concluded that the Board waived governmental immunity by reason of the Board's purchase of a liability insurance policy providing coverage for damages in excess of the Board's self-insured retention of $100,000.00.

¶ 9 "Summary judgment is appropriate '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.'" *Craig*, 363 N.C. at 337, 678 S.E.2d at 353 (quoting N.C.G.S. § 1A-1, Rule 56(c) (2007)). "[W]hen considering a summary judgment motion, all inferences of fact must be drawn against the movant and in favor of the party opposing the motion. . . . We review a trial court's order granting or denying summary judgment *de novo*." *Id.* at 337, 678 S.E.2d at 353-54 (marks and citation omitted).

¶ 10 "Counties and other municipalities, as governmental agencies, enjoy the protections of governmental immunity. This sovereign[5] immunity applies unless the

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[5] As the Board is a county agency, "the immunity it possesses is more precisely identified as governmental immunity, while sovereign immunity applies to the State and its agencies." *Craig*, 363 N.C. at 335 n.3, 678 S.E.2d at 353 n.3. However, here, the distinction between sovereign immunity and governmental immunity is not material and the terms are used interchangeably. *Id.*

county consents to suit or waives its right to sovereign immunity." *Ballard*, 257 N.C. App. at 564, 811 S.E.2d at 606 (marks and citation omitted). "[A] county board of education is a governmental agency, and is therefore not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority." *Magana*, 183 N.C. App. at 148, 645 S.E.2d at 92.

¶ 11 N.C.G.S. § 115C-42 provides that any local board of education may "waive its governmental immunity from liability for damage by reason of death or injury . . . caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment." N.C.G.S. § 115C-42 (2019). "Our courts have strictly construed N.C.G.S. § 115C-42 against waiver. The terms of the statute itself make it clear that immunity is waived only to the extent of the coverage obtained under an insurance policy." *Magana*, 183 N.C. App. at 149, 645 S.E.2d at 92 (citation omitted); *see also* N.C.G.S. § 115C-42 (2019) ("Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.").

¶ 12 In analyzing other similar waiver statutes, we have clarified "immunity is waived only to the extent that the county is indemnified by the insurance contract from liability for the acts alleged. If the liability policy, by its plain terms, does not provide coverage for the alleged acts, then the policy does not waive governmental

immunity." *Ballard,* 257 N.C. App. at 565, 811 S.E.2d at 606 (marks and citation omitted); *see also Arrington*, 215 N.C. App. at 264-65, 716 S.E.2d at 418-19; *Bullard*, 221 N.C. App. at 525-33, 729 S.E.2d at 688-93; *Magana*, 183 N.C. App. at 147-49, 645 S.E.2d at 92-93; *Hinson*, 232 N.C. App. at 210-13, 753 S.E.2d at 827-29.

¶ 13 In *Ballard*, the county defendant's liability insurance policy stated:

> [The insurance company] agree[s] to indemnify the [county] for ultimate net loss in excess of the retained limit which *the [county] becomes legally obligated to pay* because of bodily injury, personal injury, advertising injury, or property damage which occurs during this policy period and to which this insurance applies. [The insurance company's] indemnification obligation *shall not arise until the [county] itself has paid in full the entire amount of its retained limit.*

Ballard, 257 N.C. App. at 565-66, 811 S.E.2d at 606. We held:

> [T]his language demonstrates that the excess policy does not waive its immunity with respect to the common law tort claims at issue []. The policy language states that the insurer's obligation to pay is not triggered until a judgment is entered against the county or the county agrees to pay the claim, with the insurer's approval.

Id. at 566, 811 S.E.2d at 606-07. Because the county did not pay the entire amount of the retained limit, it had not waived immunity. *Id*.

¶ 14 In *Arrington*, the city defendant tendered a check in an amount to the plaintiff in conjunction with a release and settlement agreement, but the plaintiff declined to

execute the release or accept the check. *Arrington,* 215 N.C. App. at 265, 716 S.E.2d at 419. The city defendant's liability insurance policy stated:

> Subject to the applicable Limit(s) of Insurance of this Coverage Part, we agree to indemnify the [city] for ultimate net loss in excess of the retained limit which the [city] becomes legally obligated to pay because of bodily injury, personal injury, advertising injury, or property damage which occurs during this policy period and to which this insurance applies. Our indemnification obligation *shall not arise until the [city] itself has paid in full the entire amount of its retained limit.*

Id. at 264, 716 S.E.2d at 418 (emphasis added). We held "[t]here [was] [] no genuine issue of material fact as to [the] plaintiff's failure to trigger the [c]ity's waiver of immunity, and the trial court erred in denying the [c]ity's motion for summary judgment as to governmental immunity." *Id.* at 265, 716 S.E.2d at 419.

¶ 15 In *Bullard*, the county defendant's liability insurance policy provided a retained limit of $500,000.00. *Bullard*, 221 N.C. App. at 529, 729 S.E.2d at 697. In citing to the liability insurance policy language, we observed:

> [T]he duty of the insurance company "to pay any sums that the [c]ounty becomes legally obligated to pay arises *only after there has been a complete expenditure of the [c]ounty's retained limit by means of payments for judgments, settlements, or defense costs*. . . . The insurance company will then be liable only for that portion of damages in excess of the [c]ounty's retained limit up to the policy's Limits of Insurance."

Id. at 529, 729 S.E.2d at 690-91 (emphasis in original). We held:

> [B]ecause the [c]ounty is entitled to sovereign immunity as to the [plaintiffs'] negligence claims for the first $500,000.00 of their damages and because defense costs are excluded from the amount included within the retained limit, there will be no "complete expenditure" of the retained limit through payments for judgments. . . . [W]e conclude that the [c]ounty has not . . . waived sovereign immunity as to the [plaintiffs'] claims.

Id. at 532, 729 S.E.2d at 692-93.

¶ 16 In *Magana*, the county school board defendant's liability insurance policy provided a self-insured retention amount of $1,000,000.00. *Magana*, 183 N.C. App. at 148, 645 S.E.2d at 92. In citing to the liability insurance policy language, we observed:

> [W]hen the insured's legal obligation to pay damages to which this insurance applies has been determined, and: (1) the amount of such damages is greater than $1,000,000[.00], and (2) *the insured has paid $1,000,000[.00] to the claimant, then and only then will the insured be entitled to make claim for indemnity under this [p]olicy.*

Id. (emphasis added). We held:

> Even though [the] plaintiffs seek damages in excess of $1,000,000[.00], the policy provides that it will not indemnify the [county school board] unless the [county school board] has first paid $1,000,000[.00] to the claimant. Since the [county school board] has statutory immunity from liability for tort claims, it cannot be required to pay any part of the $1,000,000[.00] self-insured amount and, therefore, the [liability insurance] policy will provide no indemnification.

Id. at 149, 645 S.E.2d at 93.

¶ 17 In *Hinson*, we found the provisions in the city defendant's liability insurance policy were "substantially similar to those [provisions] found in *Magana*[.]" *Hinson*, 232 N.C. App. at 212, 753 S.E.2d at 828. The liability insurance policy provided that "the retained limit ($3,000,000.00) must be paid by the [city]. Thus, under the terms of the policy, the [city] is responsible for paying $3,000,000.00 before there is any potential coverage under the [] [i]nsurance policy." *Id*. at 212, 753 S.E.2d at 828. We held "[b]ased on the terms of [the city's] liability insurance policy, . . . [the city] has not waived its immunity as to [the] plaintiff's" claims. *Id*. at 213, 753 S.E.2d at 828.

¶ 18 The settled rule, established by *Ballard*, *Arrington*, *Bullard*, *Magana*, and *Hinson*, is that the purchase of a liability insurance policy will not waive governmental immunity when insurance coverage is triggered only upon the government entity's payment of the entire self-insured retention or retained limit. In each of those cases, the language of the liability insurance policy required that the self-insured retention or the retained limit must have been *paid out* by the government entity as a prerequisite to insurance coverage. But, because government entities have immunity from negligence claims up to the self-insured amount or retained limit, they will not have a legal obligation to pay the self-insured amount or retained limit, and therefore will not have waived their immunity through the purchase of an excess liability insurance policy.

¶ 19 Here, the Board argues the language in its liability insurance policy is substantially similar to the language in the liability insurance policies in the above-quoted cases because "the [p]olicy at issue requires the self-insured retention [to] be paid before the [p]olicy indemnifies the Board." In support of its argument, the Board points to the General Policy Conditions and the section of the policy where "self insured retention" is defined. Those sections state, in pertinent part:

> [The insurance company's] duty under the policy shall be to indemnify [the Board] for ULTIMATE NET LOSS in excess of the applicable SELF INSURED RETENTION, maintenance deductible, or any other applicable deductible or deduction; and not more than the EXCESS LIMIT OF INSURANCE. [The insurance company's] duty to indemnify ends when the applicable EXCESS LIMIT OF INSURANCE is exhausted by the payment of the ULTIMATE NET LOSS.
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> . . . .
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> SELF INSURED RETENTION means that United States Dollar amount specified in the SCHEDULE OF SELF INSURED RETENTIONS which [the Board] is obligated to pay because of loss or damage covered under any Section of this policy, before this policy indemnifies [the Board] for the same loss.

¶ 20 When read together, this language requires the Board to pay out the self-insured retention before insurance coverage is triggered. When the definition of self-insured retention is added to the General Policy Conditions in place of the term, the language of the Board's liability insurance policy reads:

> [The insurance company's] duty under the policy shall be

> to indemnify [the Board] for ULTIMATE NET LOSS in excess of the applicable [United States Dollar amount specified in the SCHEDULE OF SELF INSURED RETENTIONS *which [the Board] is obligated to pay because of loss or damage covered under any Section of this policy*, before this policy indemnifies [the Board] for the same loss.]

(Emphasis added). According to this language, liability insurance coverage for Capps' claims is contingent upon the Board's payment of the $100,000.00 self-insured retention.

¶ 21 We recognize the language in the liability insurance policy here is not identical to the language in the triggering provisions in the above-quoted cases. However, the phrase "which [the Board] is obligated to pay because of loss or damage covered under any Section of this policy, before this policy indemnifies [the Board]" is the functional equivalent of what we have determined to be a triggering mechanism. Like in *Hinson*, we hold the policy provisions here are "substantially similar to those [provisions] found in" the above-quoted cases. *Hinson*, 232 N.C. App. at 212, 753 S.E.2d at 828.

> [T]he policy provides that it will not indemnify the Board unless the Board has first paid [the self-insured retention]. Since the Board has statutory immunity from liability for tort claims, it cannot be required to pay any part of the [self-insured retention] and, therefore, the [liability insurance] policy will provide no indemnification. . . . [T]he Board has not waived its immunity as to the claims asserted by [Capps].

Magana, 183 N.C. App. at 149, 645 S.E.2d at 93. The trial court erred in concluding otherwise and we reverse its order denying the Board's motion for summary judgment.

CONCLUSION

¶ 22 Applying the settled rule from *Ballard*, *Arrington*, *Bullard*, *Magana*, and *Hinson*, and in accordance with the plain terms of the Board's liability insurance policy, we are bound to conclude the Board did not waive its governmental immunity as to Capps' claims. The trial court erred in denying the Board's motion for summary judgment based on governmental immunity.

REVERSED.

Judges DIETZ and GORE concur.

Report per Rule 30(e).