

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

DAVID F. EVANS, et al.,

Plaintiffs,

v.

CITY OF DURHAM, N.C., et al.,

Defendants.

Civil Action No. 1:07-CV-739

RULE 56(f) AFFIDAVIT OF CHARLES DAVANT IV

CITY OF WASHINGTON)

DISTRICT OF COLUMBIA)

CHARLES DAVANT IV, being duly sworn, deposes and says:

1. I am a member of the North Carolina and District of Columbia bars, a member of the bar of this Court, and an associate in the law firm of Williams & Connolly LLP. Since October 2007, I have served as counsel for Plaintiffs David F. Evans and Collin Finnerty in the above-captioned action. I submit this affidavit in opposition to the City of Durham’s Motion for Partial Summary Judgment (“the Motion”).

2. The Motion contends that the City has not waived its governmental immunity for Plaintiffs’ state-law claims in the above-captioned action, either expressly or through insurance coverage.

3. Discovery has yet to begin in the above-captioned action. As a result, Plaintiffs have not yet had the opportunity to discover evidence concerning the City’s insurance coverage or waiver of governmental immunity through subpoenas, document requests, interrogatories, requests for admission, or depositions. The parties have not yet

conferred pursuant to Federal Rule of Civil Procedure 26(f), nor have they exchanged the initial disclosures required by Federal Rule of Civil Procedure 26(a)(1).

4. On or about September 23, 2008, the *Durham Herald-Sun* newspaper reported that the City had paid \$729,350 for legal fees and expenses in the above-captioned action and two other lawsuits, and that the City was “in line to get \$229,350 of that back from the American International Group, the company that owns the insurer the city was using when the lacrosse case began in spring of 2006.” Ex. A.¹ The *Herald-Sun* also reported that the City Defendants have generated more than \$1.2 million in legal bills in this and two other cases, and that “AIG will pay for the city’s defense until the bill hits Durham’s \$5 million coverage limit.” *Id.* The *Herald-Sun* attributed this information to Durham Assistant City Attorney Kim Grantham. *See id.* The *Raleigh News & Observer*, the *Associated Press*, and *WFMY News 2* likewise have reported that the City has insurance coverage for Plaintiffs’ claims, and that the City’s insurer will reimburse the City’s defense costs up to \$5 million. *See* Exs. B–D. There is no indication in any of these reports that the City distinguished between state and federal claims in describing the City’s insurance coverage.

5. The City was a defendant in *Linda Jones v. City of Durham*, No. 02-CVS-02620 in the Superior Court in and for Durham County, North Carolina. The court record in the *Jones v. City of Durham* case includes an e-mail message from the City’s then-Risk Manager, Laura Henderson, to Patrick Baker, one of the City Defendants in this case, stating the following with regard to the City’s self-insured retention:

A situation in which there are high economic damages at the time the claim is made pushes us into the range in which [the plaintiff’s attorney] could argue that he’s entitled to a trial

¹ Some of the exhibits to this affidavit are excerpts of voluminous documents.

based on the presumption that, if a jury found for Plaintiff, then some portion of the claim would be covered by insurance and thus immunity would not apply to that portion. . . . This will be the first case in which we will need to carefully review the wording in my time-honored affidavit and revise to fit the situation. The affidavit now gives an unqualified statement that the City's insurance does not apply to the loss

Ex. E. The court record in *Jones v. City of Durham* also contains an affidavit of the City's Finance Director Kenneth C. Pennoyer in which he avers:

To the best of my knowledge, information and belief, the portion, if any, of Plaintiff's claims that she was injured as a result of Officer Joe Kelly's allegedly negligent or grossly negligent operation of his patrol car which exceeds Three Hundred Fifty Thousand Dollars (\$350,000) may be covered by the Excess Policy. However, the City has not purchased insurance that would cover any portion of Plaintiff's claims below the Three Hundred Fifty Thousand Dollars (\$350,000) SIR [self-insured retention].

Ex. F at 3. The court record in *Jones v. City of Durham* also contains an excerpt from the deposition of Patrick Baker, one of the City Defendants in this matter, that includes the following exchange:

- Q. Presently, there's an excess insurance policy, I believe.
A. That's right.
Q. And that kicks in at 350,000 dollars (\$350,000), depending on what attorney's fees and expenses are billed to the self-insured's attention.
A. That's my understanding, yes.

Ex. G at 20–21. The City's North Carolina Court of Appeals brief in *Jones v. City of Durham* stated that the City's then excess insurance policy contained a self-insured retention of \$350,000. Ex. K at 12. It also stated:

The City has waived governmental immunity only for that portion of a claim which is covered by the excess policy. When faced with a partial waiver [of governmental immunity] such as the partial waiver in the case *sub judice*,

this Court has held that . . . summary judgment with respect to that portion of the [state-law] claim which would not be covered by insurance is appropriate.

Id. 12–13.

6. Even within the City’s self-insured retention, it appears that the City has expressly waived its governmental immunity for some of the damages claimed by Plaintiffs in this action. According to public records, on December 20, 2004 the City Council of Durham enacted a “Resolution to Adopt A Policy To Waive Governmental Immunity in Limited Circumstances,” and a “Resolution to Establish A Funded Reserve To Pay Claims Where Governmental Immunity Has Been Waived.” *See* Exs. H & I. The City’s 2007 financial statements also disclose \$656,092 of net assets in a “Risk Retention Fund.” *See* Ex. J at 141. The notes to the financial statements state:

Risk Retention Fund – This fund is established to provide a source of funds for payment of the City’s uninsured legal liabilities, including risks such as workers’ compensation, automobiles, general operations and professional activities. Claim settlements, actuarial expenses, legal fees, administrative expenses and other professional services required for claim disposition are paid from this fund.

Id. at 49.

7. In light of the above, and based on the plain language of the policies attached to the City’s Motion, Plaintiffs’ counsel expect that discovery would result in additional evidence that Plaintiffs’ state-law claims are covered by insurance and/or that the City has otherwise waived its governmental immunity with respect to such claims. Plaintiffs’ counsel expect that discovery will reveal that, prior to the filing of the instant motion, the City and its insurer understood the City’s policies to provide coverage for all of Plaintiffs’ claims, not simply those alleged under federal law; that the City and its

insurer understood that the City's retained limits could be expended on costs of defending all of Plaintiffs' claims, not simply those alleged under federal law; and that the City Defendants sought and received reimbursement from the City's insurer for legal fees expended in connection with defending all of Plaintiffs' claims, including those brought under North Carolina law. Plaintiffs' counsel expect that discovery will reveal that City officials have made other admissions concerning the City's insurance coverage for Plaintiffs' state-law claims. Plaintiffs' counsel also expect that discovery will confirm that the City has independently waived immunity by retaining money in a reserve fund that would satisfy some of Plaintiffs' damages.

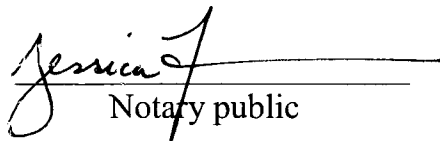
8. Any of these facts, which are in the possession, custody, or control of persons or entities other than Plaintiffs, should preclude the granting of the Motion.

9. For these reasons, Plaintiffs cannot present facts essential to justify their opposition to the Motion.



Charles Davant IV

Sworn to before me this
24th day of November 2008.



Notary public

JESSICA FISCHER
NOTARY PUBLIC DISTRICT OF COLUMBIA
My Commission Expires June 30, 2013