

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

RYAN McFADYEN, *et al.*,
Plaintiffs,

v.

DUKE UNIVERSITY, *et al.*,
Defendants.

Civil Action No. 1:07-cv-953

RULE 56(f) AFFIDAVIT OF ROBERT C.EKSTRAND

ROBERT C. EKSTRAND, being duly sworn, deposes and says:

1. I am a member of the North Carolina Bar and a member of the bar of this Court. I am a partner in the law firm of Ekstrand & Ekstrand, LLP, and since December 2007, I have served as counsel for Plaintiffs Ryan McFadyen, Matthew Wilson and Breck Archer in the above-captioned action. I submit this affidavit in opposition to the City of Durham's Motion for Partial Summary Judgment.

2. The City claims it has not waived governmental immunity for state-law claims in this action by any of the means authorized in N.C.G.S. §160A-153(a). The accompanying Brief and exhibits to this Affidavit reveal that discovery is required to resolve the myriad doubts posed by the City's claim, in the face of publicly available document that appear to contradict the City.

3. Out of respect for this Court's established local practice, I have not sought to compel a Rule 26(f) Conference and I do not do so here. 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 any means.

4. Plaintiffs do have access to some public information that indicates that the City has waived coverage, but without discovery Plaintiffs have not been able to authenticate the records or to determine if this is the full extent of the coverage.

5. For example, an Assistant City Attorney Kim Grantham spoke to both the *Durham Herald Sun* and the *News and Observer* and indicated that City Defendants have accumulated more than 1.2 million dollars in legal fees. The city having already paid out \$739,350 mean that it was "in line to get back \$229,350" from American International Group. (Exhibits 1, 2)¹

¹ The exhibits mentioned in this affidavit are publicly available documents Plaintiffs found on their own without the benefit of discovery. They are mentioned herein using the same numbering systems as found in the motion. A complete list of the exhibits is as follows

- 1) Lacrosse Suit so far Cost City \$729,350 *Durham Herald-Sun*, Ray Gronberg Sept. 23, 2008
- 2) Legal Bills from Lacrosse Case top \$1M, *Raleigh News&Observer*, Anne Blythe, Sept. 23, 2008
- 3) Excerpts from Durham City Council Minutes of June 20, 2005 re Authorization to enter the NCLM's "Inter-local Risk Financing Fund for General Liability Claims"
- 4) Interlocal Agreement for a Group Self-Insurance Pool For Property and Liability Risk Sharing
- 5) Certified copy of Durham City Council Minutes December 20, 2004
- 6) Certified Copy of Resolution to Adopt a Policy to Waive Governmental Immunity in Limited Circumstances
- 7) Certified Copy of Resolution to Establish a Fund Reserve to Pay Claims where Governmental Immunity has been Waived
- 8) Resolution Establishing FY 2004-2005 Financial Plan for the Funded Reserve for Immunity Waiver Fund
- 9) May 22, 2008 Memo from Patrick Baker re NCLM Contract
- 10) Duke-Durham Police Jurisdiction Allocation Agreement (Exhibit 3 to the amended Complaint)
- 11) Redacted Financial Statement, City of Durham 2007

6. In a recent case, although under a different policy, the City acknowledges that defense costs were a part of the Self-insured Retention Policy of the City. See generally *Jones v. City of Durham* Record on Appeal. The record in this case includes an email received by a Defendant in this case, Patrick Baker, that acknowledges that defenses costs count against the retention (Exhibit 12) in other places charts indicate that the city paid defenses costs and that was immune after the insurance policy ran out (Exhibits 13, 14). Additionally depositions filed with the record on appeal by Defendant Baker (Exhibit 15), and Laura Henderson, the former risk manager for the City (Exhibit 16) back up the fact that the City understands Defense costs to count against the self-insured retention endorsement (Exhibit 17). The Plaintiffs believe that with access to discovery more such information will come to light.

7. Additionally City Resolutions appear to indicate that the City has waived immunity. On December 20, 2004 the Durham City Council enacted “A Resolution to Adopt a Policy to Waive Governmental Immunity in Limited Circumstances,” (Exhibit 6) and a “Resolution to Establish a Funded Reserve Where Governmental Immunity has been Waived” (Exhibit 7). Durham’s financial statement also indicaticates that \$656,092 were in a “Risk Retention

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- 12) Email exchange between then City Attorney Defendant Patrick Baker and City Risk Manager Laura Henderson from *Jones* Record on Appeal p. 300-301
 - 13) Redacted immunity Chart from *Jones* record on appeal
 - 14) Finical impact chart from *Jones* Record on appeal
 - 15) Deposition of Patrick Baker from the *Jones* Record on Appeal
 - 16) Deposition of Laura Henderson from *Jones* Record on Appeal
 - 17) Self-Insured Retention Endorsement at Issue in *Jones*
 - 18) February 15, 2006 Press release Mayor William Bell becomes Member of Board of NCLM


Fund” established to cover the “the City’s uninsured legal liabilities” (Exhibit 19). Without the benefit of Discovery Plaintiffs’ counsel is unable to know if there is more out there that further expands the liability documents.

8. Plaintiffs’ have discovered that the City of Durham appeared to join a municipal risk pool scheme run by the North Carolina League of Municipalities (NCLM)(Exhibit 4). The Mayor for the City of Durham is a member or the Board of the NCLM (see Exhibit 18) which indicates that Durham is an active member of the group. On May 22, 2008 the City Manager, Defendant Patrick Baker, sent out a Memo stating that the NCLM serves as the City’s Third Party Administrator for liability claims adjustment (Exhibit 9). Even so, Plaintiffs have not been able to ascertain if the City signed the agreement and entered into the policy and will not be able to do so without further discovery.

9. Plaintiffs’ counsel expects, based on what he has been able to uncover on its own, without discovery, that discovery will result in additional evidence that the City is not immune to Plaintiffs state-law claims. As in the case of *Jones*, Discovery will prove that the City and its insurers understood the policies to cover all of the Plaintiffs claims, that the defense costs counted toward the retained limit and that therefore the City would be reimbursed for legal fees.

10. Plaintiffs counsel therefore request discovery to look into issues raised in the publicly available exhibits he has discovered and attached to this affidavit as exhibits as they believe there to be more information in the possession of the Defendants they will not have access to without legal fees.

11. Because Plaintiff has not had access to discovery these facts are not in their control, and they cannot present essential facts to justify opposition to the Motion.



Robert C. Ekstrand

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



Notary Public

