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NO. COA01-449

NORTH CAROLINA COURT OF APPEALS

Filed: 19 March 2002

JENNIFER A. BABCOCK, a Minor,
by and through her Guardian
Ad Litem, OWEN W. COOK; ANN
M. BABCOCK; and KEVIN W.
BABCOCK,
Plaintiffs-Appellees

v.

Cumberland County
No. 00 CVS 107

CUMBERLAND COUNTY, NORTH
CAROLINA; CUMBERLAND COUNTY
DEPARTMENT OF SOCIAL SERVICES;
and E.C. MODLIN, in his
official capacity as Director
of the Cumberland County
Department of Social Services,
Defendants-Appellants

Appeal by defendants from judgment entered 15 December 2000 by
Judge Knox V. Jenkins, Jr., in Cumberland County Superior Court.
Heard in the Court of Appeals 30 January 2002.

*Law Offices of Wade E. Byrd, by Wade E. Byrd, for plaintiffs-
appellees.*

*Cumberland County Attorney's Office, by Douglas E. Candors,
for defendants-appellants.*

WALKER, Judge.

Ann and Kevin Babcock (the Babcocks) are the parents of
Jennifer A. Babcock (Jennifer). On 5 January 2000, plaintiffs
filed a complaint seeking damages as a result of injury to Jennifer

after the Cumberland County Department of Social Services (DSS) was alleged to have negligently placed Jennifer in the therapeutic foster care home of Althoria Clayton and her husband. DSS removed Jennifer from the care of the Babcocks and placed her in therapeutic foster care in early December 1996.

Plaintiffs allege that Jennifer was seriously injured on 7 January 1997, while in the care of the Claytons, as a result of abuse by Ms. Clayton. Plaintiffs further allege that defendants breached their duty to Jennifer as follows:

- A. Negligently conducting an inadequate investigation of Althoria Clayton and her household, as well as allegations of abuse to other children in her foster care, prior to placing Jennifer in the Clayton's foster care;
- B. Negligently selecting Althoria Clayton and her family as suitable foster parents for Jennifer;
- C. Negligently placing Jennifer in the foster care of Althoria Clayton and her family;
- D. Negligently supervising Jennifer's care while she was in the foster care of Althoria Clayton;
- E. Negligently failing to follow placement criteria in the selection of Althoria Clayton as a foster parent for Jennifer;
- F. Negligently training Althoria Clayton as a foster parent for Jennifer;
- G. Negligently training and supervising agents and employees of Defendants on how to investigate and determine the suitability and safety of prospective foster homes;
- H. Negligently assessing, ignoring, and increasing the risk of harm posed to Jennifer by placement in the Althoria Clayton foster family;

I. Negligently failing to protect Jennifer from physical injury by Althoria Clayton, her family members, or others; and

J. Other ways and means it is expected that further investigation and discovery will reveal.

DSS has insurance coverage which covers specific conduct and individuals in the performance of their statutory duties. Under a policy written by American International Specialty Lines Insurance Company, DSS has both a Commercial General Liability Policy (American General Policy) and a Professional Liability Policy (American Professional Policy). Under a policy written by Lexington Insurance Company, DSS has both a General Liability Policy (Lexington General Policy) and a Professional Liability Policy (Lexington Professional Policy). The policies have an effective date retroactive to 1 January 1997.

DSS filed a motion to dismiss claiming governmental immunity. The trial court converted the motion to a summary judgment motion, which was denied on the basis that DSS waived immunity through the purchase of liability insurance. The denial of a motion for summary judgment is generally not immediately appealable because it is interlocutory; however, "if immunity is raised as a grounds for the summary judgment motion, a substantial right is affected and the denial is immediately appealable." *Hickman v. Fuqua*, 108 N.C. App. 80, 82, 422 S.E.2d 449, 450 (1992), *disc. rev. denied*, 333 N.C. 462, 427 S.E.2d 621 (1993).

The doctrine of governmental immunity bars actions against counties and its public officials sued in their official capacity

"for the performance of a governmental, rather than a proprietary, function." *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493, *disc. rev. denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). Governmental functions are those which are "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State." *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461, *disc. rev. denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). However, "[p]urchase of insurance ... waives the county's governmental immunity, to the extent of insurance coverage, for any act or omission occurring in the exercise of a governmental function." N.C. Gen. Stat. § 153A-435 (1999).

Here, there are four policies which could provide coverage thereby waiving immunity. To determine whether immunity is waived through the purchase of liability insurance, "the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded. Any doubt as to coverage is to be resolved in favor of the insured." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 693, 340 S.E.2d 374, 378, *rehearing denied*, 316 N.C. 386, 346 S.E.2d 134 (1986).

DSS contends there is no coverage because the negligent acts alleged occurred at the time Jennifer was placed in the therapeutic foster care of the Claytons, which was in early December of 1996, while the insurance policies are not effective until 1 January 1997. However, plaintiffs' complaint alleges negligent acts occurring before and after the coverage period began. Plaintiffs'

allegations of negligent acts in paragraphs A, E, F, and G of the complaint occurred prior to the placement of Jennifer in foster care in early December of 1996. The negligent acts alleged in paragraphs B, C, and H occurred at the time of the placement of Jennifer in early December of 1996. The negligent acts alleged in paragraphs D and I occurred after Jennifer was placed through the time of the injury on 7 January 1997.

We first consider whether DSS waived immunity through the purchase of the American General Policy which provides coverage as follows:

We'll pay amounts you are legally required to pay to compensate others for loss because of covered bodily injury, property damage or fire damage that:

- during the policy period, is sustained by someone other than your patient; and
- is caused by an occurrence.

In construing the plain language of the policy in favor of finding coverage, the policy provides coverage if the bodily injury meets a two-prong test. First, the bodily injury must be sustained by someone other than a patient during the policy period. Here, the complaint alleges that Jennifer was injured on 7 January 1997. Since the coverage period began 1 January 1997, this prong is met. Secondly, the bodily injury must be caused by an occurrence. Here, the complaint alleges that Jennifer was injured as a result of negligent acts by DSS. In its brief, DSS concedes that "[a] breach of duty by a public official is an 'occurrence' for the purpose of general insurance definitions." Thus, the allegations in the

complaint meet the second prong. As DSS does not argue that any exclusions apply, there is sufficient forecast of evidence alleged in the complaint such that DSS waives immunity through the purchase of the American General Policy.

We next consider the Lexington General Policy which provides coverage as follows:

We will pay those sums that you become legally obligated to pay as damages because of bodily injury or property damage to which this Coverage Part applies....

This Coverage Part applies to bodily injury and property damage only if:

1. The bodily injury or property damage is caused by an occurrence that takes place in the coverage territory; and
2. The bodily injury or property damage occurs during the policy period.

Similar to the American General Policy, the Lexington General Policy only limits coverage to an occurrence which takes place in the coverage territory and an injury during the policy period. There is no contention by DSS that the occurrences here have taken place outside the coverage territory. Thus, there is sufficient forecast of evidence alleged in the complaint such that DSS waives immunity under the Lexington General Policy.

The analysis changes under the two professional policies. The American Professional Policy provides coverage as follows:

We will pay amounts you are legally required to pay to compensate others for loss resulting from your wrongful act or that of another for whom you are legally responsible. The wrongful act must be solely in your providing or failure to provide professional services in the conduct of your profession..., and must

take place on or after the retroactive date and before the end of the policy period....

. . .
10. wrongful act means any actual or alleged negligent act, error, or omission in the performance of professional services.

Under this policy, a "wrongful act" must have occurred after 1 January 1997, the retroactive date. Thus, the allegations of negligent acts which occurred before the placement of Jennifer and at the time of her placement in therapeutic foster care would not be covered. However, there are allegations of negligent acts occurring after 1 January 1997. Thus, to the extent the complaint alleges negligence after 1 January 1997, which resulted in injuries to Jennifer, DSS waives immunity through the purchase of the American Professional Policy.

For the Lexington Professional Policy to provide coverage, "[t]he medical incident must take place on or after the retroactive date and before the end of the policy period." The policy defines "medical incident" as "any act, error or omission in the providing of or failure to provide professional services." Thus, the negligent actions alleged to have occurred before 1 January 1997 would not be covered. However, to the extent the complaint alleges negligence after 1 January 1997, DSS waives immunity through the purchase of the Lexington Professional Policy.

We hold that plaintiffs have made sufficient allegations such that DSS, through the purchase of the four liability insurance policies, has waived immunity to the extent of the coverage. We do not address the amount of actual coverage afforded by each policy.

Thus, the order of the trial court denying the summary judgment motion of the defendant is

Affirmed.

Judges McGEE and BIGGS concur.

Report per Rule 30(e).