NO. COA06-571

NORTH CAROLINA COURT OF APPEALS

Filed: 1 May 2007

NATHAN MICHAEL RICHARD ROYAL, a minor, by and through his guardian ad litem Scott Hancox; MICHAEL ROYAL; and TINA ROYAL,
Plaintiffs-Appellants,

v.

Lenoir County
No. 05 CVS 502

THURMAN PATE, individually and in his capacity as a Kinston/Lenoir County Recreation Commission employee; JIMMY SMITH, individually and in his capacity as a school board employee; CITY OF KINSTON; COUNTY OF LENOIR; KINSTON/LENOIR COUNTY RECREATION COMMISSION; LENOIR COUNTY BOARD OF EDUCATION; and AMATEUR ATHLETIC UNION OF THE UNITED STATES, INC.,
Defendants-Appellees.

Appeal by Plaintiffs from order entered 21 November 2005 by Judge Paul L. Jones in Superior Court, Lenoir County. Heard in the Court of Appeals 10 January 2007.

Beaver Holt Sternlicht & Courie, P.A., by H. Gerald Beaver, for Plaintiffs-Appellants.

Tharrington Smith, L.L.P., by Deborah R. Stagner and Carolyn A. Waller, for Defendants-Appellees Lenoir County Board of Education and Jimmy Smith, in his official capacity.

McGEE, Judge.

Nathan Michael Richard Royal (minor Plaintiff) was injured at a baseball tournament (the tournament) held at South Lenoir High School (the facilities) on 28 April 2002. Minor Plaintiff, through his guardian ad litem, and through his parents Michael Royal and Tina Royal (collectively Plaintiffs), filed suit against Kinston/Lenoir County Recreation Commission (the Recreation Commission); Thurman Pate (Pate), an employee of the Recreation Commission, individually and in his official capacity; the Lenoir County Board of Education (the Board); Jimmy Smith (Smith), an employee of the Board, individually and in his official capacity; Lenoir County; City of Kinston; and the Amateur Athletic Union of the United States, Inc. (AAU). Plaintiffs asserted negligence claims against each Defendant. Plaintiffs settled with AAU.

Plaintiffs alleged in their complaint that Pate organized the tournament in which the minor Plaintiff was injured. Pate obtained Smith's oral agreement to use the facilities of South Lenoir High School to hold the tournament. Plaintiffs alleged that the oral agreement was in contravention of the Board's policy for Community Use of School Facilities (policy KG).

According to Plaintiffs' complaint, the minor Plaintiff and his father, Michael Royal, who coached the minor Plaintiff's baseball team, arrived at the facilities on 28 April 2002 in order to warm up and practice before tournament play began. Smith told Michael Royal that the boys' baseball field and batting cages were not available, and he directed them to the girls' softball batting cage. After taking his turn at the batting cage, the minor

Plaintiff exited the batting cage. While he was standing outside the batting cage, a baseball came through the netting of the batting cage and struck the minor Plaintiff on his face, near his right eye.

Subsequent examination of the batting cage revealed that degraded, rotted strands of the netting had left "larger than normal holes" in the netting of the batting cage. Further examination showed that some, but not all, of the rotted strands had been tied together. Examination also indicated the netting was not properly secured along the bottom perimeter of the batting cage and, in places, was held down with cinder blocks. As a result of being hit by the baseball, the minor Plaintiff suffered a fracture of the right eye socket floor, tears and holes in his eyeball, a partially torn and detached retina, ruptured blood vessels, and damage to his optic nerve. The minor Plaintiff lost virtually all sight in his right eye.

The Board and Smith, in his official capacity, moved to dismiss the action for lack of subject matter jurisdiction pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), and for failure to state a claim upon which relief can be granted under N.C.G.S. § 1A-1, Rule 12(b)(6). The Board and Smith contended they were each protected by complete statutory immunity pursuant to N.C. Gen. Stat. § 115C-524(b), and by governmental immunity pursuant to N.C. Gen. Stat. § 115C-42. They filed a notice on 10 October 2005 concerning their motion to dismiss. They stated that the motion should also be considered under N.C.G.S. § 1A-1, Rule 12(b)(2),

lack of personal jurisdiction, because "North Carolina courts treat governmental immunity as a matter of both subject matter and personal jurisdiction[.]" In support of their motion to dismiss, the Board and Smith, in his official capacity, offered numerous affidavits, including that of John W. Frossard (Frossard), superintendent for the public schools of Lenoir County. In his affidavit, Frossard stated that the Recreation Commission and the Board entered into a Facilities Use Agreement in March 2000, and that the agreement was adopted by the Board at that time. R.57. A copy of the agreement and the minutes of the Board's 7 March 2000 meeting were attached. Frossard also stated that policy KG was in effect in April 2002.

In an order filed 21 November 2005, the trial court dismissed all claims against the Board and Smith, in his official capacity. The trial court found that the Board had adopted policy LDAI-E, a Facilities Use Agreement. The trial court also found the Board and the Recreation Commission had entered into an agreement pursuant to policy LDAI-E. The trial court concluded that Plaintiffs had not shown that the trial court had personal or subject matter jurisdiction over the Board and Smith, in his official capacity. The trial court also concluded that Plaintiffs had not stated a claim upon which relief could be granted. Plaintiffs appeal.

Plaintiffs argue the trial court erred by concluding that N.C. Gen. Stat. § 115C-524(b) provided the Board and Smith, in his official capacity, with complete immunity from liability for the minor Plaintiff's injuries. N.C. Gen. Stat. § 115C-524(b) (2005)

provides, in part,

> local boards of education may adopt rules and regulations under which they may enter into agreements permitting non-school groups to use school real and personal property, except for school buses, for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. No liability shall attach to any board of education, individually or collectively, for personal injury suffered by reason of the use of such school property pursuant to such agreements.

When personal injuries are sustained during the use of school property, a school board can attain immunity pursuant to N.C.G.S. § 115C-524(b) "if the use of the school property is 'for other than school purposes' and 'pursuant to' an 'agreement' with a 'non-school group' entered into consistent with 'rules and regulations' adopted by the local board of education." *Seipp v. Wake County Bd. of Educ.*, 132 N.C. App. 119, 121, 510 S.E.2d 193, 194 (1999) (quoting N.C.G.S. § 115C-524(b)).

In *Seipp*, the plaintiff sued the Wake County Board of Education for personal injuries she sustained at an event held at an elementary school and sponsored by the Parent-Teacher Association (PTA). The Wake County Board of Education "encouraged the use of [s]chool facilities by the community and implemented rules and regulations . . . for their use." *Id.* at 120, 510 S.E.2d at 194. The rules required that several steps be taken before a group could use school facilities, including that the group submit a written Facility Use Application to the school's principal for approval. *Id.* The PTA did not complete a Facility Use Application, or comply with several other requirements included in

the rules. *Id.* We held that the Wake County Board of Education was "not entitled to the immunity granted under section 115C-524(b) because the agreement with the PTA was not entered pursuant to the [r]ules adopted by the [Wake County Board of Education]." *Id.* at 121, 510 S.E.2d at 195. Accordingly, our Court affirmed the trial court's denial of the Wake County Board of Education's motion for summary judgment. *Id.* at 122, 510 S.E.2d at 195.

Plaintiffs argue that *Seipp* governs the outcome of the present case and requires that we reverse the trial court's order. The Board and Smith, in his official capacity, argue that *Seipp* is inapplicable to the present case, because the agreement between the Recreation Commission and the Board was consistent with the Board's rules and regulations. We agree with the position of the Board and Smith.

There are multiple documents relevant to this analysis. Plaintiffs argue the Board's rules and regulations were provided in policy KG. Policy KG requires, *inter alia*, that in order to use school property, an application must be made in writing and in triplicate, to the principal thirty days before the desired use. Plaintiffs further argue that policy LDAI-E was the agreement for use of the school property for the tournament, and that policy LDAI-E did not comply with policy KG. Accordingly, the Board and Smith, in his official capacity, were not entitled to statutory immunity pursuant to N.C. Gen. Stat. § 115C-524(b) because use of the facilities for the tournament was not pursuant to an agreement consistent with the Board's rules and regulations.

The Board and Smith, in his official capacity, argue that the rules and regulations adopted by the Board were contained in policy LDAI-E, and the agreement between the Recreation Commission and the Board was embodied in the document dated 7 March 2000. They state that the Board adopted the agreement as its policy at its March meeting and entered into an agreement with the Recreation Commission at the same time, thereby satisfying the requirements of N.C.G.S. § 115C-524(b). Therefore, according to Defendants, the Board and Smith, in his official capacity, were protected by statutory immunity pursuant to N.C.G.S. § 115C-524(b).

We find the position advanced by the Board and Smith, in his official capacity, persuasive and affirm the trial court's order dismissing the Board and Smith. Although policy KG sets forth requirements dictating non-school use of school property, we see no reason why the Board was precluded from adopting a specific policy with respect to a specific non-school user, here, the Recreation Commission, in policy LDAI-E. We acknowledge that the "descriptor term" for policy LDAI-E includes the term "agreement" but note that the minutes from the Board's March meeting stated that the agreement made between the Board and the Recreation Commission was approved, and that the "agreement modifie[d] policy LDAI-E." Thus, the minutes suggest that the Board considered policy LDAI-E to be its policy, or rules and regulations, with respect to the Recreation Commission, and the agreement entered at the 7 March 2000 meeting to be the agreement required by the statute.

Plaintiffs also argue that Frossard's affidavit is not

competent evidence to support the trial court's findings. We note that Plaintiffs did not object to the admission of this affidavit at the hearing. Therefore, Plaintiffs failed to preserve this argument for our review. N.C.R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion[.]"). For the above reasons, we hold that the trial court was correct to conclude that the Board and Smith, in his official capacity, were entitled to statutory immunity pursuant to N.C.G.S. § 115C-524(b). Because we have concluded that the Board and Smith, in his official capacity, were entitled to statutory immunity, we need not address Plaintiffs' arguments regarding waiver of immunity pursuant to N.C.G.S. § 115C-42. *Seipp*, 132 N.C. App. at 121, 510 S.E.2d at 194 (noting that "[t]he purchase of liability insurance does not, however, constitute a waiver of immunity to the extent personal injuries are sustained" where the requirements of N.C.G.S. § 115C-524(b) are met).

Plaintiffs also argue that the trial court erred by concluding that it could, in its discretion, determine whether the matter of personal jurisdiction was properly before it. Plaintiffs argue that because the Board and Smith, in his official capacity, did not assert lack of personal jurisdiction in their first submission to the trial court, they waived the defense pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(h)(1). In response, the Board and Smith argue that the defense of lack of personal jurisdiction was properly before the trial court because their motion to dismiss

clearly stated that it was based upon sovereign immunity, and sovereign immunity is treated by North Carolina courts as both a lack of subject matter jurisdiction and a lack of personal jurisdiction.

Whether the sovereign immunity defense is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina. This Court has noted that "[o]ur courts have held that the defense of sovereign immunity is a Rule 12(b)(1) defense[,] [but] have also held that the defense of sovereign immunity is a matter of personal jurisdiction that would fall under Rule 12(b)(2)." *Battle Ridge Cos. v. N.C. Dep't of Transp.*, 161 N.C. App. 156, 157, 587 S.E.2d 426, 427 (2003), *disc. review denied*, 358 N.C. 233, 594 S.E.2d 191 (2004) (internal citations omitted). The motion to dismiss and amended motion to dismiss filed by the Board and Smith, in his official capacity, clearly assert immunity as the basis for the motions, and we conclude that the motions were sufficient to bring the defense of lack of personal jurisdiction before the trial court.

Lastly, Plaintiffs argue that the trial court was required to treat the allegations in their pleadings as true since the Board and Smith, in his official capacity, moved to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Plaintiffs argue that since they properly alleged waiver of sovereign immunity and lack of sovereign immunity in their complaint, the trial court erred by granting the motion to dismiss. We note that the Rules of Civil Procedure provide that where a Rule 12(b)(6) motion is made and

> matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(b). When considering a motion for summary judgment, the trial court considers "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any[.]" N.C. Gen. Stat. §1A-1, Rule 56(c). Accordingly, the trial court did not err by considering other materials by the parties and this assignment of error is overruled.

Affirmed.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).