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NO. COA08-710

NORTH CAROLINA COURT OF APPEALS

Filed: 20 January 2009

BOBBY DAVIS BRASWELL,

Plaintiff,

v.

Wayne County
No. 04 CVS 1363

ST. PAUL MERCURY INSURANCE
COMPANY and FIDELITY and
GUARANTY INSURANCE COMPANY

Defendants.

Court of Appeals

Appeal by Plaintiff from order entered 5 December 2007 by Judge Jay D. Hookenbury in Wayne County Superior Court. Heard in the Court of Appeals 1 December 2008.

Slip Opinion

Haithcock, Barfield, Hulse & Kinsey, PLLC, by Glenn A. Barfield, for Plaintiff-Appellant.

Wilson & Coffey, L.L.P., by G. Gray Wilson, and Steptoe & Johnson LLP, by Paul Janaskie, pro hac vice, for Defendant-Appellee Fidelity and Guaranty Insurance Company.

STEPHENS, Judge.

The facts of this case are more fully set out in *Braswell v. St. Paul Mercury Ins. Co.*, 181 N.C. App. 605, 640 S.E.2d 449, 2007 WL 328770 (unpublished), *disc. review denied*, 361 N.C. 567, 650 S.E.2d 598 (2007). Briefly, Plaintiff Bobby Davis Braswell ("Braswell") was a Wayne County deputy sheriff when he sexually assaulted several female prisoners. After Braswell pled guilty to

multiple charges arising out of the assaults, two of the inmates filed a civil suit against Braswell and others in federal court. All of the claims settled before trial except claims brought by one of the inmates against Braswell in his individual capacity. The federal court entered judgment against Braswell on those claims for a sum in excess of five million dollars. See *id.*

At the times of the sexual assaults, the Wayne County Sheriff's Department was insured first by Defendant Fidelity and Guaranty Insurance Company ("FGIC") and then by Defendant St. Paul Mercury Insurance Company ("St. Paul"). Neither Defendant provided Braswell with a defense in the federal action. After the federal court entered its judgment, Braswell sued Defendants in Wayne County Superior Court on claims that Defendants breached the terms of their insurance policies and that Defendants' acts constituted unfair and deceptive acts or practices. On 24 October 2005, the trial court granted summary judgment in favor of FGIC on all of Braswell's claims. The trial court denied St. Paul's motion for summary judgment and, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56(c), granted summary judgment in favor of Braswell "on the issue of whether [St. Paul] had and breached a duty to defend" Braswell in the federal action. The trial court certified its "ruling regarding St. Paul" for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b).

On appeal, this Court reversed the trial court's ruling and instructed the trial court to enter judgment in favor of St. Paul on all of Braswell's claims. *Braswell*, 181 N.C. App. 605, 640

S.E.2d 449, 2007 WL 328770. We held that, even assuming St. Paul's insurance policy provided coverage for the sexual assaults, the policy's "exclusion applie[d] to bar coverage in this matter." *Id.* at *4. We also held that, "[u]nder the rationale of [*Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 340 S.E.2d 374, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986)], St. Paul did not have a duty to defend Braswell in the federal court action." *Id.* On remand, the trial court entered summary judgment in favor of St. Paul on all of Braswell's claims. Braswell subsequently appealed the trial court's order granting summary judgment in favor of FGIC.

In this appeal, Braswell argues that FGIC breached its duty to defend him in the federal action. Braswell contends that FGIC had a duty to defend because the complaint filed against him by the inmates alleged that the sexual assaults occurred "while [Braswell] was conducting investigations, interviewing witnesses, interviewing suspects or criminal defendants, and patrolling the county." Braswell, however, fails to distinguish our Supreme Court's decision in *Young v. Great Am. Ins. Co. of New York*, 359 N.C. 58, 602 S.E.2d 673 (2004) (*per curiam*), *reh'g denied*, 359 N.C. 286, 610 S.E.2d 718 (2005), which reversed this Court's decision in 162 N.C. App. 87, 590 S.E.2d 4 (2004), for the reasons stated in Judge Hunter's dissent.

The insurance policy at issue in *Young* provided coverage to law enforcement officers who became legally obligated to pay damages arising out of "wrongful acts" occurring "while [the

officers were] performing law enforcement duties[.]” 162 N.C. App. at 89, 590 S.E.2d at 6. Judge Hunter wrote that the officer in that case “was not performing law enforcement duties at the same time as he was sexually assaulting the victims.” *Id.* at 92, 590 S.E.2d at 8. Furthermore, Judge Hunter

also conclude[d] that the intentional sexual assaults were not within the scope of plaintiff’s employment, and thus, the general liability policy also does not provide coverage for plaintiff’s assaults on the three women. See *Medlin v. Bass*, 327 N.C. 587, 594, 398 S.E.2d 460, 464 (1990) (where assault by an employee cannot have been in furtherance of employer’s business, the assault is not within course and scope of employment).

Id. at 93, 590 S.E.2d at 8. As stated above, the Supreme Court adopted Judge Hunter’s reasoning. 359 N.C. 58, 602 S.E.2d 673.

The applicable Insuring Agreement in FGIC’s policy states as follows:

- a. We will pay those sums that the insured becomes legally obligated to pay as damages arising out of any “wrongful act” to which this coverage applies. . . .
- b. This insurance applies to damages arising out of “wrongful acts” only if the “wrongful acts” are committed or allegedly committed:
 - (1) by an insured while acting in the scope of [his or her] duties to the named insured

Braswell was not acting within the scope of his duties to Wayne County when he sexually assaulted female inmates. *Young, supra*. Accordingly, FGIC did not have a duty to defend Braswell in the federal action. *Waste Management*, 315 N.C. at 691, 340 S.E.2d at 377 (“[W]hen the pleadings allege facts indicating that the event

in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend.”).

Because we conclude that FGIC’s policy did not provide coverage for the sexual assaults, we need not address Braswell’s contention that the policy’s exclusions do not apply.

AFFIRMED.

Chief Judge MARTIN and Judge WYNN concur.

Report per Rule 30(e).