

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. 13-34
NORTH CAROLINA COURT OF APPEALS

Filed: 1 October 2013

TYKI S. IRVING,

Plaintiff,

v.

Mecklenburg County
No. 12 CVS 6149

CHARLOTTE-MECKLENBURG BOARD OF
EDUCATION,

and

RANDALL FLOYD LONG,
In his Official Capacity,

Defendants.

Appeal by plaintiff from order filed 20 August 2012 by
Judge F. Lane Williamson in Mecklenburg County Superior Court.
Heard in the Court of Appeals 13 August 2013.

*Osborne Law Firm, P.C., by Curtis C. Osborne, for
plaintiff-appellant.*

*Parker, Poe, Adams & Bernstein L.L.P., by Benjamin
Sullivan, for defendant-appellees.*

STEELMAN, Judge.

Where the purchase of insurance for damages in excess of
\$1,000,000 did not constitute a waiver of governmental immunity,
the trial court correctly dismissed plaintiff's complaint.

I. Factual and Procedural Background

Tyki S. Irving (plaintiff) filed this action in Mecklenburg County Superior Court against the Charlotte-Mecklenburg Board of Education (Board of Education) and Randall Floyd Long (Long) (collectively defendants). Plaintiff sought to recover damages for personal injuries arising out of an automobile accident. On 5 October 2007, plaintiff was stopped at a traffic light when Long, who was driving a Board of Education school activity bus, drove into the rear of her vehicle. Plaintiff alleged that Long was an employee of the Board of Education and was acting within the course and scope of his employment at the time of the collision. She asserted that her injuries were proximately caused by Long's negligence and that the Board of Education was liable under the doctrine of respondeat superior. Plaintiff sued Long "in his official capacity." The complaint alleged that the "Board of Education has purchased liability insurance that provides coverage for the types of claims brought by Plaintiff[;]" that the "Board of Education participates in a risk pool to cover the payment of compensation for negligence claims and judgments for negligence[;]" and that the "Board of Education has thereby waived any claim(s) of immunity to Plaintiff's claims."

On 2 May 2012, defendants filed a motion to dismiss plaintiff's complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure asserting that plaintiff's claims were barred by the doctrine of governmental immunity under N.C. Gen. Stat. § 115C-42. In support of their motion, defendants filed the affidavit of Daniel J. Pliszka, the Risk Manager for the City of Charlotte, who administers insurance and self-insured retention programs for the Board of Education. A copy of the applicable policy of insurance was attached to his affidavit. On 20 August 2012, the trial court granted defendants' motion pursuant to Rule 12(b)(1) and Rule 12(b)(2) of the North Carolina Rules of Civil Procedure based upon sovereign immunity.¹

Plaintiff appeals.

¹ The trial court's order uses the term "sovereign immunity" as does plaintiff in her brief. Because the Board of Education is a county agency, "the immunity it possesses is more precisely identified as governmental immunity, while sovereign immunity applies to the State and its agencies." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 335 n.3, 678 S.E.2d 351, 353 n.3 (2009). In our analysis in the instant case, this distinction is not material. *See id.*

II. Waiver of Immunity

In plaintiff's only argument on appeal, she contends that the trial court erred in dismissing the case on the sole ground of sovereign immunity. We disagree.

A. Standard of Review

"A motion to dismiss based on sovereign immunity is a jurisdictional issue; whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina." *M Series Rebuild, LLC v. Town of Mount Pleasant, N.C.*, ___ N.C. App. ___, ___, 730 S.E.2d 254, 257, *disc. rev. denied*, 336 N.C. 413, 735 S.E.2d 190 (2012). In cases where waiver is at issue, "it is irrelevant whether immunity implicates personal or subject matter jurisdiction. Because it is a jurisdictional matter, a plaintiff's complaint must affirmatively demonstrate the basis for the waiver of immunity when suing a governmental entity which has immunity." *Arrington v. Martinez*, ___ N.C. App. ___, ___, 716 S.E.2d 410, 417 (2011).

"We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings." *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007). Similarly, Rule 12(b)(2) does not

impose a restriction upon the trial court in considering matters outside the pleadings and our courts have declined to extend such a restriction. See *Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 102, 545 S.E.2d 243, 247 (2001). We therefore will consider defendants' supporting affidavit and apply the above standard of review to the parties' substantive arguments to determine if plaintiff's complaint "'affirmatively demonstrate[d] the basis for the waiver of immunity[.]'" *M Series Rebuild*, ___ N.C. App. at ___, 730 S.E.2d at 257 (quoting *Arrington*, ___ N.C. App. at ___, 716 S.E.2d at 417)).

B. Analysis

"As a governmental agency, a county or city board of education is not liable in a tort or negligence action except to the extent that it has waived its governmental or sovereign immunity pursuant to statutory authority." *Herring v. Winston-Salem/Forsyth Cnty. Bd. of Educ.*, 137 N.C. App. 680, 685, 529 S.E.2d 458, 462 (2000). A school board may waive its immunity pursuant to N.C. Gen. Stat. § 115C-42 through the purchase of liability insurance. However, immunity is "waived only to the extent that said board of education is indemnified by insurance for such negligence or tort." N.C. Gen. Stat. § 115C-42 (2011). "The statute makes clear that unless the negligence or tort is

covered by the insurance policy, sovereign immunity has not been waived by the Board or its agents." *Beatty v. Charlotte-Mecklenburg Bd. of Educ.*, 99 N.C. App. 753, 755, 394 S.E.2d 242, 244 (1990).

In support of their motion to dismiss, defendants submitted an affidavit that contained the provisions of the applicable policy of insurance. The policy specifically stated that "[t]his Policy is not intended by the insured to waive its governmental immunity as allowed by North Carolina Statutes Sec. NCGS 115C-42." The policy contained a Self-Insured Retention Amount of \$1,000,000, which provided that when "the insured's legal obligation to pay damages . . . has been determined, and the amount of such damages is less than or equal to \$1,000,000 . . . then we shall have no obligation to pay or indemnify the insured for any amount under this Policy."

We have previously held that the purchase of this type of policy did not constitute a waiver of a school board's governmental immunity. *Magana v. Charlotte-Mecklenburg Bd. of Educ.*, 183 N.C. App. 146, 149, 645 S.E.2d 91, 93 (2007). In *Magana*, because the school board had not purchased liability insurance for any amount below the \$1,000,000 coverage limit, it had not waived its immunity for any damages under \$1,000,000.

Id. We concluded that even though the plaintiffs sought damages in excess of \$1,000,000, because the school board "ha[d] statutory immunity from liability for tort claims, it cannot be required to pay any part of the \$1,000,000 self-insured amount and, therefore, the excess policy . . . provide[d] no indemnification." *Id.* at 149, 645 S.E.2d at 93.

We recognize that this holding permits the Board of Education to create the illusion of having insurance where no coverage in fact exists. We also recognize that this type of insurance policy provides no coverage to persons injured by the agents of the Board of Education. Nonetheless, we are bound by this Court's prior decision in *Magana. In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989).

Under the holding in *Magana*, the Board of Education did not waive its immunity with respect to the claims asserted by plaintiff. Plaintiff has not affirmatively demonstrated any basis for finding waiver of immunity. Under existing precedent, the trial court correctly dismissed plaintiff's complaint.

Plaintiff also contends that the Board of Education was required by statute to carry automobile liability insurance on school activity buses and therefore, immunity should have been waived. Plaintiff cites both the North Carolina Vehicle

Financial Responsibility Act, N.C. Gen. Stat. §§ 20-309 to 20-318, and a federal regulation, 49 C.F.R. § 387.9. Upon review of these statutes and regulations, we do not find any statutory authority requiring that the Board of Education carry automobile liability insurance on school activity buses or that the Board of Education waived governmental immunity. See N.C. Gen. Stat. § 20-318 (2011) ("The [North Carolina Vehicle Financial Responsibility Act] does not apply to any motor vehicle owned by the State of North Carolina or by a political subdivision of the State, nor to any motor vehicle owned by the federal government."); *Presnell v. Pell*, 298 N.C. 715, 724, 260 S.E.2d 611, 616 (1979) (stating that an employee of the Surry County Board of Education was "employed by a political subdivision of the state"); 49 C.F.R. § 387.27 (2012) ("This subpart applies to for-hire motor carriers transporting passengers in interstate or foreign commerce.").

The order of the trial court is affirmed.

AFFIRMED

Judges McGEE and ERVIN concur.

Report per Rule 30(e).