NO. COA14-191

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

SAMMY R. PRUETT,

Plaintiff,

v. Rutherford County
No. 13 CVS 81

JOEL D. BINGHAM and
JEAN'S BUS SERVICE, INC.,

Defendants and
Third-Party Plaintiffs,

v.

GREGORY ALAN WIGGINS, MATTHEW
BRACKETT and MOUNTAIN HOME FIRE &
RESCUE DEPARTMENT, INC.,

Third-Party Defendants.

Appeal by third-party plaintiffs from order entered 8 October 2013 by Judge Hugh B. Lewis in Rutherford County Superior Court. Heard in the Court of Appeals 12 August 2014.

Davis and Hamrick, L.L.P., by H. Lee Davis, Jr., and Katherine M. Barber-Jones, for defendant and third-party plaintiff-appellants.

Meghann K. Burke and Michael E. Casterline for third-party defendant-appellees Matthew Brackett and Mountain Home Fire & Rescue Department, Inc.

BRYANT, Judge.

Because incorporated fire departments contracted to provide fire prevention, emergency medical, rescue, and ambulance services are granted governmental immunity, we affirm the trial court's dismissal of claims as to Mountain Home Fire & Rescue Department, Inc., and Brackett based on governmental immunity and public official immunity. Where plaintiffs had adequate notice of defendants' affirmative defenses but failed to timely amend their complaint accordingly, plaintiffs' oral motion to amend their complaint was properly denied.

On 28 January 2013, plaintiff Sammy R. Pruett brought suit against defendants Joel D. Bingham and Jean's Bus Service, Inc. The allegations in the complaint assert that on 8 February at 7:00 a.m., Pruett was driving a pickup truck in Hendersonville along I-26 West approaching the U.S. Highway 25 intersection. At the same time, defendant Joel Bingham was driving a commercial bus owned by defendant Jean's Bus Service, also traveling west on I-26 approaching the U.S. Highway 25 intersection. Plaintiff alleged that Bingham's commercial bus rear-ended Gregory Wiggins' 2009 GMC pickup truck. Wiggins' truck was then propelled forward and into the back of a 2006 Ford pickup driven by Edward Burnett. Bingham's bus and Wiggins' truck travelled into the right lane of I-26 where they

then collided with plaintiff Pruett's vehicle. Pruett sought a recovery against Bingham and Jean's Bus Service (Bingham and Jean) for damages as a result of the collision.

Bingham and Jean answered Pruett's complaint and filed a third-party complaint against Gregory Wiggins, Matthew Brackett, and Mountain Home Fire & Rescue Department, Inc., as third-party defendants. Bingham and Jean alleged that at the time of the collision, third-party defendant Brackett was operating a vehicle owned or leased by Mountain Home Fire & Rescue Department. Just prior to the collision, Brackett entered onto I-26 and moved his vehicle into the far left lane. Brackett then stopped his vehicle in the left hand lane in order to make a left turn onto a section of the median. The vehicles traveling in the left hand lane behind Brackett attempted to stop suddenly, resulting in several collisions.

Brackett and Mountain Home Fire & Rescue Department responded that Brackett was driving a fire department vehicle owned by Mountain Home Fire & Rescue Department in the course and scope of his employment and was responding to an emergency call when he positioned the vehicle in the "emergency use" median. Brackett and Mountain Home Fire & Rescue Department made a motion to dismiss contending that the claims were barred

by governmental or sovereign immunity and by "public officer / official immunity."

On 26 August 2013, third-party defendants Brackett and Mountain Home Fire & Rescue Department ("defendants") moved for summary judgment. Hearings were held on 26 May and 30 September 2013, during which counsel for defendants indicated that Brackett was responding to an emergency call indicating a motorist was suffering chest pains. By order entered 17 October, the trial court granted defendants' motion to dismiss with prejudice. Bingham and Jean appeal.

On appeal, Bingham and Jean raise the following issues: whether the trial court erred in (I) granting defendants' motion to dismiss; and (II) failing to allow Bingham and Jean's oral motion to amend the third-party complaint.[1]

I

Bingham and Jean first argue the trial court erred in granting defendants' motion to dismiss. Specifically, Bingham and Jean claim the trial court erred in granting defendants' motion to dismiss because: (1) defendants are not governmental

[1] We note that Bingham and Jean's appeal is properly before us where the trial court entered a final judgment as to some but not all of the parties and pursuant to Rule 54(b) certified there was no reason for delay.

entities and, thus, not entitled to such immunity; (2) even if defendants were subject to governmental immunity, such immunity was waived by defendants' liability insurance; and (3) defendants failed to timely produce documents concerning their immunity defense. We disagree.

> [Summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). "We review an order allowing summary judgment *de novo*." *Moore v. Nationwide Mut. Ins. Co.*, 191 N.C. App. 106, 108, 664 S.E.2d 326, 328 (2008) (citation omitted).

Bingham and Jean contend that because of the negligent act alleged in the third-party complaint, defendants are not entitled to immunity.

"In North Carolina the law on governmental immunity is clear. In the absence of some statute that subjects them to liability, the state and its governmental subsidiaries are immune from tort liability when discharging a duty imposed for the public benefit." *McIver v. Smith*, 134 N.C. App. 583, 585, 518 S.E.2d 522, 524 (1999) (citations omitted). "One cannot

recover for personal injury against a government entity for negligent acts of agents or servants while they are engaged in government functions." *Id.* at 585, 518 S.E.2d at 524 (citations omitted). "Historically, government functions are those activities performed by the government which are not ordinarily performed by private corporations." *Id.* at 586, 578 S.E.2d at 525 (citation omitted). "The test to determine if an activity is governmental in nature is whether the act is for the common good of all without the element of pecuniary profit." *Id.* at 587, 518 S.E.2d at 525 (citation and quotations omitted). "Activities which can be performed *only* by a government agency are shielded from liability, while activities that can be performed by either private persons or government agencies may be shielded, depending on the nature of the activity." *Id.* at 587, 518 S.E.2d at 526 (citation omitted).

"[T]he organization and operation of a fire department is a governmental function." *Willis v. Town of Beaufort*, 143 N.C. App. 106, 109, 544 S.E.2d 600, 603 (2001) (quoting *Ins. Co. v. Johnson, Com'r. of Revenue*, 257 N.C. 367, 370, 126 S.E.2d 92, 94 (1962)) (considering the affirmative immunity defense of a town fire department).

Within Chapter 153A of our General Statutes ("Counties"), our legislature has established that "[a] county may establish, organize, equip, support, and maintain a fire department . . . [or] may contract for fire-fighting or prevention services with . . . incorporated volunteer fire departments . . . ." N.C. Gen. Stat. § 153A-233 (2013) ("Fire-fighting and prevention services"). The county board of commissioners may define service districts for the purpose of fire protection. *See id.* § 153A-301(a)(2). "If a service district is established . . . for fire protection purposes . . . the board of county commissioners may, by resolution, permit the service district to provide emergency medical, rescue, and/or ambulance services . . . ." *Id.* § 153A-309(a).

In *Luhmann v. Hoenig*, 358 N.C. 529, 597 S.E.2d 763 (2004), our Supreme Court addressed the question of whether the defendant, Cape Carteret Volunteer Fire and Rescue Department, was immune from suit for injuries the plaintiff sustained while the defendant's fire fighters were fighting a brush fire. The plaintiff brought a claim for negligence. A trial court found the defendant liable and awarded the plaintiff damages. On appeal, a divided panel of this Court reversed the trial court's judgment on the basis that General Statutes, section 58-82-5

limited the liability of rural fire departments.[2] In pertinent part, the dissent argued that the defendant was entitled to immunity conferred under section 69-25.8 "which provides sovereign immunity for fire protection districts." *Id.* at 531, 597 S.E.2d at 764 (citation omitted). The plaintiff appealed to our Supreme Court, which looked to the relationship between the County and the defendant fire department. The Court observed that pursuant to Chapter 69, a county's board of commissioners was authorized to provide fire protection services for a district by contracting with an incorporated nonprofit volunteer fire department and that the board was authorized to fund its fire protection services by a tax levy. *Id.* at 533, 597 S.E.2d at 765 (citing N.C. Gen. Stat. §§ 69-25.4(a), 69-25.5(1) (2003)). The Carteret County Board of Commissioners had contracted the defendant fire department to provide fire protection services within the Cape Carteret Fire and Rescue

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[2] "A rural fire department or a fireman who belongs to the department shall not be liable for damages to persons or property alleged to have been sustained and alleged to have occurred by reason of an act or omission, either of the rural fire department or of the fireman at the scene of a reported fire, when that act or omission relates to the suppression of the reported fire or to the direction of traffic or enforcement of traffic laws or ordinances at the scene of or in connection with a fire, accident, or other hazard by the department or the fireman . . . ." *Id.* at 531—32, 597 S.E.2d at 764—65 (quoting N.C. Gen. Stat. § 58-82-5(b) (2003)).

Service District in exchange for compensation generated by the levy of an ad valorem tax on property within the district. *Id.* Our Supreme Court held that the defendant constituted a fire protection district within the meaning of General Statutes, Chapter 69. *Id.* And, "[a]s such, the fire department [was] entitled to the same immunities as a county or municipal fire department under N.C.G.S. § 69-25.8." *Id.*

Pursuant to General Statutes, Chapter 69 ("Fire Protection"), Article 3A ("Rural Fire Protection Districts"), section 25.8 ("Authority, rights, privileges and immunities of counties, etc., performing services under Article"),

> [a]ny county, municipal corporation or fire protection district performing any of the services authorized by this Article shall be subject to the same authority and immunities as a county would enjoy in the operation of a county fire department within the county[.]
>
> . . .
>
> Members of any county, municipal or fire protection district fire department shall have all of the immunities, privileges and rights . . . when performing any of the functions authorized by this Article, as members of a county fire department would have in performing their duties in and for a county . . . .

Id. § 69-25.8.[3,4]

The record before us reflects that Henderson County established the Mountain Home Fire Protection District in 1965. On 22 May 2002, Henderson County contracted Mountain Home Fire & Rescue Department to provide fire protection services in the district. Per the contract, "'Fire Protection' shall specifically include the provision of such emergency medical, rescue and ambulance services that the [Mountain Home Fire & Rescue Department, Inc., a North Carolina nonprofit corporation,] is licensed and trained to provide in order to protect the persons within the District from injury or death." Based on this agreement, defendant Mountain Home Fire & Rescue

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[3] N.C. Gen. Stat. § 69-25.4 (Tax to be levied and used for furnishing fire protection). "For purposes of this Article, the term 'fire protection' and the levy of a tax for that purpose may include the levy, appropriation, and expenditure of funds for furnishing emergency medical, rescue and ambulance services to protect persons within the district from injury or death[.]" N.C. Gen. Stat. § 69-25.4(b) (2013).

[4] N.C. Gen. Stat. § 58-82-5 (entitled "Liability limited" within Article 82—"Authority and Liability of Fireman," of Chapter 58—"Insurance"). "Any member of a volunteer fire department or rescue squad who receives no compensation for his services as a fire fighter or emergency medical care provider, who renders first aid or emergency health care treatment at the scene of a fire to a person who is unconscious, ill, or injured as a result of the fire shall not be liable in civil damages for any acts or omissions relating to such services rendered, unless such acts or omissions amount to gross negligence, wanton conduct or intentional wrongdoing." N.C. Gen. Stat. § 58-82-5(c) (2013).

Department—a nonprofit corporation—constitutes a fire protection district within the meaning of Chapter 69. *See Luhmann*, 358 N.C. at 533, 597 S.E.2d at 765.

Bingham and Jean contend that while *Luhmann* supports the proposition that section 69-25.8 confers immunity on a fire department and its agents for conduct occurring during the course of fighting a fire, Chapter 69 does not provide immunity for a fire department and its agents when providing emergency medical and rescue services outside of the context of fighting fires. *Compare Geiger v. Guilford Coll. Cmty. Volunteer Firemen's Ass'n, Inc.*, 668 F. Supp. 492 (M.D.N.C. 1987) (holding the defendant fire department was immune from liability for injury caused in the course of providing a rescue service not in conjunction with fighting a fire as the rescue service was within the scope of activities fire departments engaged in as recognized by General Statutes, Chapter 69 ("Fire prevention")).

Bingham and Jean direct our attention to section 69-25.4, also within Article 3A ("Rural Fire Protection Districts") of Chapter 69 ("Fire Protection"), which states that a county's Board of Commissioners may levy a tax for "the levy, appropriation, and expenditure of funds for furnishing emergency medical, rescue and ambulance services to protect persons within

the district from injury or death[.] . . . *In providing these services the fire district shall be subject to G.S. 153A-250* [('Ambulance services')]." N.C. Gen. Stat. § 69-25.4(b) (2013) (emphasis added).

While General Statutes, section 153A-250 does not specifically confer immunity, this Court has held that a county-operated ambulance service providing for the health and care of the citizenry was performing a historically governmental function. *See McIver*, 134 N.C. App. at 588, 518 S.E.2d at 526. Thus, the ambulance service was engaged in "a governmental activity shielded from liability by governmental immunity." *Id.*

Here, Henderson County has the authority to contract for fire prevention and emergency medical, rescue, and ambulance services. *See* N.C.G.S. §§ 153A-233, 153A-309(a). Henderson County contracted with defendant Mountain Home Fire & Rescue Department to provide fire protection services, including "such emergency medical, rescue and ambulance services that the [Mountain Home Fire & Rescue Department, Inc., a North Carolina nonprofit corporation,] is licensed and trained to provide in order to protect the persons within the District from injury or death." In accordance with *Luhmann*, Mountain Home Fire & Rescue Department "[is] entitled to the same immunities as a county or

municipal fire department under N.C.G.S. § 69-25.8." *Luhmann*, 358 N.C. at 533, 597 S.E.2d at 765.

It is undisputed that Mountain Home Fire & Rescue Department is entitled to governmental immunity for conduct performed in the course of fighting a fire. *See id.* Also, this Court has held that a county-operated ambulance service was entitled to governmental immunity for providing a historically governmental function to citizens. *See McIver*, 134 N.C. App. at 588, 518 S.E.2d at 526. To hold that Mountain Home Fire & Rescue Department is not entitled to governmental immunity while providing emergency medical services to the extent supported by its license and training when Henderson County contracted with defendant for such services would be inconsistent with our common law and unsupportable. For these reasons, we overrule Bingham and Jean's argument that defendant Mountain Home Fire & Rescue Department and its agents are not entitled to immunity.

Bingham and Jean further contend the trial court erred in granting defendants' motion for summary judgment because even if defendants were entitled to sovereign immunity, defendants waived their immunity through purchasing liability insurance. However, Bingham and Jean have failed to raise this argument before the trial court. "If a plaintiff [fails] to allege a

waiver of immunity by the purchase of insurance, the plaintiff has failed to state a claim against the governmental unit." *Reid v. Town of Madison*, 137 N.C. App. 168, 170, 527 S.E.2d 87, 89 (2000) (citation omitted).

Additionally, Bingham and Jean argue that defendants failed to adequately plead or produce documents related to defendants' claim of immunity. Bingham and Jean's argument is without merit, for defendants clearly stated in their answer and motion to dismiss that defendants, as a fire and rescue department, were entitled to governmental or sovereign immunity.[5] As such, there was sufficient information in defendants' answer to give Bingham and Jean adequate notice of defendants' affirmative defense. Bingham and Jean's arguments are, therefore, overruled.

II

[5] It appears the entire premise on which the dissent is based concerns an acknowledgment that, even though defendants did plead the affirmative defense of governmental immunity, they "did not reveal any specific reason for governmental immunity" and that "the legal basis for [the] claim of governmental immunity was not disclosed until five days before the hearing on the motion to dismiss." The majority, however, notes that this pleading was sufficient to put plaintiffs on notice of the defense of governmental immunity and the trial court's denial of plaintiff's motion to amend the pleadings, raised almost three months after the immunity was asserted, was not an abuse of discretion by the trial court.

Bingham and Jean also contend the trial court erred in failing to allow their oral motion to amend the third-party complaint. We disagree.

When reviewing the denial of a motion to amend, the standard of review is whether the trial court's denial amounted to a manifest abuse of discretion. *Calloway v. Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (citations omitted). A trial court's denial of a motion to amend a complaint can only be reversed upon proof by "a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted).

Bingham and Jean argue that the trial court erred by not permitting their oral motion to amend their complaint. Specifically, Bingham and Jean assert that because they did not have adequate or proper notice of the basis of the alleged immunity for defendants, who were not a government entity or a public official, they should have been allowed to amend their complaint. Plaintiffs cite *Gunter v. Anders*, 114 N.C. App. 61, 441 S.E.2d 167 (1994), in support of their argument.

In *Gunter*, the plaintiffs sued the Surry County Board of Education. After the trial court granted the Board of Education's motion to dismiss and denied the plaintiffs' motion

to amend, the plaintiffs appealed. *Id.* at 64, 441 S.E.2d at 169. This Court held that the order dismissing the action was proper because the plaintiffs had adequate notice during the filing of their original complaint that the Board of Education had liability insurance, and that the plaintiffs could have amended their complaint but failed to do so in a timely fashion. *Id.* at 65, 441 S.E.2d at 170.

We agree that *Gunter* is applicable to the instant case, as Bingham and Jean had the opportunity to amend their complaint but failed to do so. Despite the contention that they received defendants' insurance policy only a month prior to the hearing and were made aware of the legal basis for asserting governmental immunity only days before the hearing, Bingham and Jean still had adequate notice to respond to the motion to dismiss. As stated previously, Mountain Home Fire & Rescue Department answered the third-party complaint by moving to dismiss the action as to them based on the affirmative defenses of governmental/sovereign immunity and public officer/official immunity, and these defenses were repeated throughout the answer. *See supra* note 5. As such, Bingham and Jean had adequate notice of defendants' affirmative defenses such that an issue of waiver by purchase of insurance could have been timely

raised as a matter of due course. Moreover, Mountain Home Fire & Rescue Department's contract with the county was a matter of public record and could therefore have been obtained even prior to the filing of Bingham and Jean's third-party complaint. Therefore, the trial court's denial of the oral motion to amend was not an abuse of discretion. Accordingly, Bingham and Jean's argument is overruled.

Affirmed.

Chief Judge McGEE concurs.

Judge STROUD dissents.

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NORTH CAROLINA COURT OF APPEALS

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JOEL D. BINGHAM and JEAN'S BUS SERVICE, INC.,
Defendants and
Third-Party Plaintiffs,

v.

GREGORY ALAN WIGGINS, MATTHEW BRACKETT and MOUNTAIN HOME FIRE & RESCUE DEPARTMENT, INC.
Third-Party Defendants.

STROUD, Judge, dissenting.

In their third-party complaint, defendants, Joel D. Bingham and Jean's Bus Service, Inc. ("third-party plaintiffs"), sued Mountain Home Fire and Rescue Department, Inc., ("MHFR") and Matthew Brackett, collectively ("third-party defendants"), and identified MHFR as "a non-profit corporation duly organized in the laws of the State of North Carolina with its principal place of business in Henderson County, North Carolina."[6] MHFR admitted this allegation in third-party defendants' "Motion to Dismiss,

[6] Third-party plaintiffs also sued Gregory Alan Wiggins, but Wiggins is not a party to this appeal.

Motion for Change of Venue, and Answer to Third-Party Complaint" filed on or about 5 June 2013. Third-party defendants' motion to dismiss was based upon North Carolina Rule of Civil Procedure 12(b)(6) and stated that third-party plaintiffs' action failed "to state a claim upon which relief can be granted on the grounds that [third-party plaintiffs'] claims are barred by governmental or sovereign immunity and by public officer/official immunity." *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2013). But MHFR failed to provide any factual or legal basis for this claim of immunity. Mountain Home is not an incorporated municipality, and MHFR at this point was identified only as a "non-profit corporation" and not as having any sort of association with a governmental entity that could confer some form of immunity. Third-party defendants' answer also alleges that third-party defendant, Matthew Brackett, drove MHFR's "fire department vehicle" in the course and scope of his employment, on an "emergency call."

On 20 June 2013, MHFR served its responses to interrogatories and requests for production from third-party plaintiffs. These responses made no mention of any basis for immunity but did identify the liability insurance policy for MHFR. A copy of the insurance policy was provided in a

supplement to the discovery responses on or about 11 July 2013. On 26 August 2013, third-party defendants moved for summary judgment on the basis that the pleadings and discovery raised no genuine issue of material fact. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c) (2013). On the same day, they filed a notice of hearing upon their motion to dismiss and motion for summary judgment, which was set for 30 September 2013.

On 23 September 2013, third-party plaintiff Bingham filed an affidavit describing how the accident occurred. He claimed that the MHFR vehicle gave "no observable signal" and no warning before slowing down from about 65 miles per hour "suddenly and abruptly[,]" causing three vehicles and his bus to slam on their brakes, resulting in the collision. North Carolina law requires that an emergency vehicle that is on an emergency call to use its lights and audible signal to alert other drivers that it is on an emergency call:

> The driver of a vehicle upon the highway shall yield the right-of-way to police and fire department vehicles and public and private ambulances . . . when the operators of said vehicles are giving a warning signal by appropriate light and by bell, siren or exhaust whistle audible under normal conditions from a distance not less than 1,000 feet. When appropriate warning signals are being given, as provided in this subsection, an emergency vehicle may proceed through an intersection or other place when

> the emergency vehicle is facing a stop sign, a yield sign, or a traffic light which is emitting a flashing strobe signal or a beam of steady or flashing red light.

N.C. Gen. Stat. § 20-156(b) (2009). Bingham's affidavit raises the question whether the MHFR vehicle was actually on an "emergency call" at the time of the accident, since he claimed that the vehicle did not give any signal or warning of an intention to stop suddenly and cut through the median. An ambulance with flashing lights and sirens is clearly on an emergency call, whereas an ambulance driving down the road with lights and sirens off is just another vehicle. *See id.*

On 30 September 2013, the trial court heard third-party defendants' motions. Just five days before this, on 25 September 2013, third-party defendants served on third-party plaintiffs, as an attachment to a memorandum in support of their motion to dismiss and motion for summary judgment, MHFR's "Contract for Fire Protection" dated 22 May 2002, which third-party defendants claim establishes their right to governmental immunity based upon MHFR's provision of emergency medical and fire services for Henderson County. Our record does not include any affidavits other than Bingham's and no documentary evidence other than the responses to third-party plaintiffs' discovery requests, MHFR's liability insurance policy, and the Contract

for Fire Protection. Third-party plaintiffs objected to the trial court's consideration of the Contract.

At the hearing, the trial court told counsel that he wanted to take the motions one by one, so as not to "blur" the issues. Third-party defendants' motion to dismiss, which was a motion under Rule 12(b)(6) contained in its answer, was the first and only motion addressed, since the trial court found it to be dispositive. Third-party defendants' counsel argued that governmental immunity applied based upon the Contract and counsel's oral description of the facts surrounding the accident, most of which do not appear to be contained in our record on appeal. Counsel concluded by noting that third-party plaintiffs' complaint "does not specifically plead that [MHFR has] waived [its] governmental immunity by purchase of insurance. And for that reason, [third-party defendants are] entitled to be dismissed from this case on those grounds."

But, when the third-party complaint was filed, there was no reason for the complaint to specifically plead governmental immunity, since no governmental entity was named as a party. In addition, third-party plaintiffs' counsel objected to consideration of the Contract because it was not properly before the court, as it had not been previously produced in discovery

and was not attached to any affidavit that had been filed with the court. *See Rankin v. Food Lion*, 210 N.C. App. 213, 218-19, 706 S.E.2d 310, 314-15 (2011) (holding that, under North Carolina Rule of Civil Procedure 56(e), the trial court could not consider unauthenticated documents at a summary judgment hearing). From the transcript, it appears that third-party defendants' counsel simply handed up the Contract during the hearing, and the trial court accepted it without comment despite third-party plaintiffs' objection. Third-party plaintiffs' counsel also noted that there was no witness testimony presented regarding the contract. **[Tr. 9]** Third-party plaintiffs' counsel asked that if the court were to consider the Contract, that it also allow his oral motion to amend the complaint to allege waiver of governmental immunity by purchase of liability insurance. The liability insurance policy was already in the record before the court, as it had previously been provided in discovery, long before the Contract had been provided to third-party plaintiffs.

Basing its ruling entirely upon the Contract and third-party plaintiffs' failure to "specifically plead that the Third-Party Defendant, Mountain Home Fire & Rescue Department, Inc., waived its right of 'governmental immunity' by purchasing

liability insurance[,]" the trial court dismissed the complaint as to third-party defendants "pursuant to Rule 12(b)(6)." The trial court did not reach the motion for summary judgment, since the trial court held that dismissal based upon governmental immunity was proper.

Despite the trial court's admirable attempt not to "blur" the issues raised by the various motions, the parties' arguments and even the trial court's order did in fact blur the issues to the point that bringing them into focus is the first challenge in this case. I must determine the legal basis for third-party defendants' motion to dismiss and the basis upon which the trial court ruled, since that will control the standard of review and what information the trial court should have considered. In ruling upon a Rule 12(b)(6) motion, the trial court may consider only the pleadings and cannot make any findings of fact. *See Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 33, 681 S.E.2d 465, 469 (2009). In ruling upon a motion for summary judgment, the trial court may consider discovery responses, affidavits, and other information, but all must be viewed in the light most favorable to the non-moving parties, here the third-party plaintiffs. *See In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008); N.C. Gen. Stat. § 1A-1, Rule 56(c).

And, in any event, a motion to dismiss based on governmental immunity normally is not based upon Rule 12(b)(6); it is based upon Rule 12(b)(1) or (2). *M Series Rebuild v. Town of Mount Pleasant*, ___ N.C. App. ___, ___, 730 S.E.2d 254, 257, *disc. rev. denied*, 366 N.C. 413, 735 S.E.2d 190 (2012).

The correct standard of review should guide appellate review of the issues. This Court is not reviewing an order for summary judgment, as the majority opinion has done, because the trial court's order very specifically addressed only the motion to dismiss based upon governmental immunity.[7] It is true that in some cases, a hearing upon a motion to dismiss may be converted into a summary judgment hearing, where the trial court has considered documents outside the pleadings, but that did not happen in this case.

> When a trial court converts a party's 12(b)(6) motion to dismiss into one for summary judgment under Rule 56, all parties shall be given a reasonable opportunity to present all material made pertinent to such

[7] Third-party defendants contend that we must review the order as a motion to dismiss based upon Rule 12(b)(6) and argue that the complaint on its face fails to plead waiver of governmental immunity. But third-party plaintiffs did not sue a governmental entity and thus were not on notice that they must plead waiver of governmental immunity. Third-party defendants also argue that the trial court's consideration of the Contract, which was not included in the pleadings, was proper. But on a Rule 12(b)(6) motion, we consider only the pleadings. *Guyton*, 199 N.C. App. at 33, 681 S.E.2d at 469.

> a motion by Rule 56. This is because Rule 12(b) clearly contemplates the case where a party is "surprised" by the treatment of a Rule 12(b)(6) motion as one for summary judgment; it affords such a party a reasonable opportunity to oppose the motion with her own materials made pertinent to such a motion.

Timber Integrated Investments, LLC v. Welch, ___ N.C. App. ___, ___, 737 S.E.2d 809, 815 (2013) (citations and quotation marks omitted).

Here, the trial court was explicit that it was considering only the motion to dismiss, and the order says the same. Also, it would be improper for the trial court to make findings of fact in a summary judgment order, especially since some of the findings here did not reflect the evidence in the light most favorable to the non-moving party, which would be appropriate for a summary judgment ruling. *See Jones*, 362 N.C. at 573, 669 S.E.2d at 576.

The trial court was actually addressing a motion to dismiss based upon governmental immunity.

> 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. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) permits a party to move for dismissal based on lack of jurisdiction over the subject matter, and Rule 12(b)(2) permits dismissal

> based on lack of jurisdiction over the person.
>
> Our review of a motion to dismiss under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure is *de novo*. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court. The standard of review of the trial court's decision to grant a motion to dismiss under Rule 12(b)(2) is whether the record contains evidence that would support the court's determination that the exercise of jurisdiction over defendants would be inappropriate.

M Series Rebuild, ___ N.C. App. at ___, 730 S.E.2d at 257 (citations, quotation marks, and footnote omitted).

Here, third-party defendants' motion to dismiss referred to Rule 12(b)(6), which is "[f]ailure to state a claim upon which relief can be granted," although this motion would properly fall under subsections (1) or (2) of Rule 12(b). *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6); *M Series Rebuild*, ___ N.C. App. at ___, 730 S.E.2d at 257. The trial court also specifically announced when rendering judgment in open court that the dismissal was based on Rule 12(b)(6)and mentioned this rule in its order. But since we treat motions as to their substance, and this motion was clearly based upon a claim of governmental immunity, I would treat it as a motion under Rule 12(b)(1) or (2), despite its lack of any factual allegations to demonstrate why the private

entities claiming immunity would be entitled to it. *See Lee v. Jenkins*, 57 N.C. App. 522, 524, 291 S.E.2d 797, 798 (1982) (treating a motion as to its substance, rather than form). Unfortunately, it is unclear whether we should review the trial court's order under Rule 12(b)(1) or (2), and the standards of review are different for these two subsections. *See M Series Rebuild*, ___ N.C. App. at ___, 730 S.E.2d at 257. But either way, under *de novo* review as applicable to 12(b)(1) or under review of the record evidence to support the trial court's ruling as applicable to 12(b)(2), I would come to the same conclusion and would reverse.

First, there was no need for third-party plaintiffs to specifically plead waiver of governmental immunity in their third-party complaint against third-party defendants because they did not sue a governmental entity that would have immunity. In addition, a defendant should plead the affirmative defense of governmental immunity with some specificity. *See Bullard v. Wake County*, ___ N.C. App. ___, ___, 729 S.E.2d 686, 689, *disc. rev. denied*, 366 N.C. 409, 735 S.E.2d 184 (2012). Even after third-party defendants' answer, the pleadings did not reveal any specific reason for governmental immunity. At that point, the pleadings revealed only that a vehicle owned and operated by a

"non-profit corporation" that claimed to be on "emergency call" was involved in the automobile accident. There was no mention of provision of emergency services for any governmental entity or any other factual or legal basis for governmental immunity.

The trial court can rule only upon the pleadings or evidence which have been properly submitted to the court and which may legally be considered for the purposes of the motion before the court. Here, the motion at issue was third-party defendants' motion to dismiss and not a motion for summary judgment. The legal basis, if any, for MHFR's claim of governmental immunity was not disclosed until five days before the hearing on the motion to dismiss, when third-party defendants' counsel emailed a copy of the Contract to third-party plaintiffs' counsel. The only "evidence" relevant to the trial court's ruling was this Contract, and it was not properly before the trial court. *See Rankin*, 210 N.C. App. at 218-19, 706 S.E.2d at 314-15. Third-party defendants seem to recognize this problem in their appellate brief and argue that the trial court could take judicial notice of the Contract under North Carolina Rule of Evidence 201, because it is "a publicly available record." Rule 201 actually provides, in relevant part, as follows:

> (b) Kinds of facts. — A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> . . . .
>
> (e) Opportunity to be heard. — In a trial court, a party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

N.C. Gen. Stat. § 8C-1, Rule 201 (2013).

Even assuming that this Contract was "not subject to reasonable dispute" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"—a proposition I would question—it is clear that the trial court did not take judicial notice of the Contract and that plaintiff had no "opportunity to be heard as to the propriety of taking judicial notice." *See id.* § 8C-1, Rule 201(b), (e). In fact, judicial notice was never mentioned, and third-party plaintiffs objected to the trial court's consideration of the Contract, which had just been provided by email only five days prior to the hearing. In addition, the

Contract itself was entered in 2002 and was effective for one year, subject to automatic annual renewals. It also included provisions for cancellation by either party on eight months' written notice. Even if the Contract were properly before the trial court, there is no evidence to indicate that the Contract was still effective on the date of the accident which is the basis of the claims raised. In addition, third-party plaintiffs asked to amend the complaint to allege the waiver of immunity by purchase of liability insurance, and if the trial court were going to consider documents outside the pleadings, despite the fact that the transcript indicates that the court was considering only the motion to dismiss under Rule 12(b)(6), the liability insurance policy could properly be considered by the court as part of the responses to discovery. *See id.* § 1A-1, Rule 56(c). I cannot discern why the trial court would consider one document outside the pleadings but not the other.

In its order, the trial court made findings of fact, which would seem to support review of the order as an order under Rule 12(b)(2). The standard of review for a Rule 12(b)(2) order is "whether the record contains evidence that would support the court's determination that the exercise of jurisdiction over defendants would be inappropriate." *M Series Rebuild*, ___ N.C.

App. at ___, 730 S.E.2d at 257. The findings are as follows:

> 1. That on February 8, 2010 the Third-Party Defendants, Matthew Brackett and Mountain Home Fire & Rescue Department, Inc., were responding to a medical emergency when the motor vehicle accident at issue in this case occurred;
>
> 2. That the Third-Party Defendant, Matthew Brackett, was operating the Mountain Home Fire & Rescue Department emergency vehicle within the course and scope of his employment with said department and in his official capacity;
>
> 3. That there exists a contract between the Third-Party Defendant, Mountain Home Fire & Rescue Department, Inc., and Henderson County under which Mountain Home Fire & Rescue Department, Inc. operates and said contract contains provisions detailing the fire protection services to be provided by Mountain Home Fire & Rescue Department, Inc.;
>
> 4. That Paragraph 3 of the above-referenced contract states; "'Fire Protection' shall specifically include the provision of such emergency medical, rescue and ambulance services that the Fire Department is licensed and trained to provide in order to protect the persons within the District from injury or death.";
>
> 5. That at the time of the motor vehicle accident at issue in this lawsuit the Third-Party Defendants, Matthew Brackett and Mountain Home Fire & Rescue Department, Inc., were engaged in a recognized and legitimate governmental function;
>
> 6. That the Third-Party Plaintiff[s] did not specifically plead that the Third-Party

> Defendant, Mountain Home Fire & Rescue Department, Inc., waived its right of "governmental immunity" by purchasing liability insurance[.]

Finding 1 purports to resolve a factual dispute in favor of third-party defendants. Bingham's affidavit seems to indicate that MHFR was not responding to an "emergency call" since the vehicle did not have its lights and siren on at the time. But even if this is correct, Findings 3, 4, and 5 are based upon the Contract, which was not properly before the court as noted above. *See Rankin*, 210 N.C. App. at 218-19, 706 S.E.2d at 314-15. Also, even if the Contract could be considered by the trial court, there was still no evidence that the Contract was in effect on the date of the incident, other than third-party defendants' counsel's representations in his argument to the trial court. "[I]t is axiomatic that the arguments of counsel are not evidence." *State v. Roache*, 358 N.C. 243, 289, 595 S.E.2d 381, 411 (2004). Finding 6 is based upon an assumption that third-party plaintiffs should have known before receiving the Contract that MHFR, a "non-profit corporation," would have governmental immunity.

But it is undisputed that Mountain Home is not an incorporated municipality possessing governmental immunity. Third-party plaintiffs thus had no way to discern, from the

pleadings alone, that MHFR, a "non-profit corporation," had any sort of relationship with a governmental entity that could confer governmental immunity. To require that third-party plaintiffs affirmatively allege that MHFR, a non-governmental entity, had waived its governmental immunity by the purchase of liability insurance even before MHFR had provided any factual or legal basis for this defense defies logic.

Under these unusual circumstances, I would also find that the trial court's implicit denial of third-party plaintiffs' motion to amend was an abuse of discretion. Contrary to third-party defendants' assertion, we have jurisdiction to review a trial court's implicit denial of a party's motion. *See Zagaroli v. Pollock*, 94 N.C. App. 46, 52, 379 S.E.2d 653, 656-57 (reviewing the trial court's denial of the defendants' motion to set aside the verdict implicit in its judgment against the defendants), *disc. rev. denied*, 325 N.C. 437, 384 S.E.2d 548 (1989). By granting third-party defendants' motion to dismiss, the trial court implicitly denied third-party plaintiffs' oral motion to amend.

> Our standard of review for motions to amend pleadings requires a showing that the trial court abused its discretion. Denying a motion to amend without any justifying reason appearing for the denial is an abuse of discretion. However, proper reasons for

> denying a motion to amend include undue delay by the moving party and unfair prejudice to the nonmoving party. Other reasons that would justify a denial are bad faith, futility of amendment, and repeated failure to cure defects by previous amendments. When the trial court states no reason for its ruling on a motion to amend, this Court may examine any apparent reasons for the ruling.

Williams v. Owens, 211 N.C. App. 393, 394, 712 S.E.2d 359, 360 (2011). None of these reasons apply here. Third-party defendants disclosed the basis for their defense of governmental immunity only five days before the hearing, so third-party plaintiffs did not cause undue delay or unfairly prejudice third-party defendants by moving to amend. Amending their pleadings to add the allegation that MHFR had purchased liability insurance would not have been futile, as it would have immediately cured the defect in their pleadings. Because amendments to pleadings are to be freely allowed and we are to decide cases on substantive grounds instead of technicalities, I would reverse the trial court's order. *See Chicora Country Club, Inc. v. Town of Ervin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997) ("Our courts have consistently held that a motion to amend a pleading should be freely allowed by the trial court."), *disc. rev. denied*, 347 N.C. 670, 500 S.E.2d 84 (1998); *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 199, 657 S.E.2d 361, 366

(2008) ("An appellate court has a strong preference for deciding cases on their merits."). Accordingly, I dissent from the majority opinion and would reverse the trial court's order of dismissal.