IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA15-208

Filed: 1 December 2015

Durham County, No. 14 CVS 3382

FCCI INSURANCE GROUP, Plaintiff,

v.

CLIFTON HINESLEY, JR. and THE HINESLEY–THOMPSON COMPANY, INC., Defendants.

Appeal by Plaintiff from order entered 29 October 2014 by Judge G. Bryan Collins, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 24 August 2015.

Ragsdale Liggett PLLC, by Mary M. Webb and Amie C. Sivon, for Plaintiff–Appellant.

The Hunt Law Firm, PLLC, by Anita B. Hunt and Ralph A. Hunt, Jr., for Defendants–Appellees.

McGEE, Chief Judge.

FCCI Insurance Group ("Plaintiff") appeals from the trial court's 29 October 2014 order, which concluded that Clifton Hinesley, Jr. ("Mr. Hinesley") and Hinesley–Thompson Company, Inc. ("the company") (collectively "Defendants") were entitled to uninsured motorist coverage under a commercial automobile policy issued by Plaintiff to Defendants "for any damages that may be awarded in [an underlying] tort action"

arising out of a 13 September 2012 motor vehicle collision between Mr. Hinesley's vehicle and a vehicle owned by the City of Durham and operated by a City of Durham employee. We affirm the trial court's order.

In a separate action that is not presently before this Court, Defendants filed a complaint claiming negligence and negligent entrustment by the City of Durham ("Durham"), a named Durham employee ("the Durham employee") in his official and individual capacities, and "unnamed insurance companies." In that action, Defendants alleged that Mr. Hinesley, a Durham resident, was operating a passenger vehicle on 13 September 2012 at approximately 2:20 p.m. The vehicle was registered to the company, a North Carolina corporation. Defendants further alleged that, at the same time, the Durham employee, who was operating a sanitation truck, "improperly attempted to make a right turn" by failing to yield the right-of-way to Mr. Hinesley and struck the vehicle registered to the company, causing $8,000.00 to $9,000.00 in damages to Defendants' vehicle. The personal automobile policy ("the auto policy") issued by Plaintiff to the company in effect at the time of the collision included an uninsured motorists coverage endorsement that expressly provided, in relevant part, as follows:

> "[U]ninsured motor vehicle" *does not include* any vehicle:
>
> a. Owned or operated by a self-insurer under any applicable motor vehicle law, except a self-insurer who is or becomes insolvent and cannot provide the amounts required by that motor vehicle law.

> b. Owned by:
> . . . .
> (3) A state; or
> (4) An agency, *except* vehicles owned by political subdivisions of . . . (3) above.

(Emphases added.)

Plaintiff filed a declaratory judgment action on 22 May 2014 in which it alleged that the auto policy "[did] not afford uninsured motorist coverage for any damages sought by Defendants as a result of the subject motor vehicle accident because the vehicle owned by [Durham] and operated by [the Durham employee] was self-insured." Plaintiff requested the trial court declare that Defendants were not entitled to uninsured motorist coverage under the auto policy for any damages that may be awarded in the underlying tort action; that Plaintiff had no obligation to continue to defend or indemnify the damages incurred in the tort action; and that Plaintiff be permitted to withdraw its defense in the tort action.

The trial court heard Plaintiff's complaint for declaratory judgment and, in an order entered 29 October 2014, determined that, although Plaintiff contended that Durham "was self-insured as contemplated by the uninsured motorist policy," Durham was "not self-insured pursuant to Resolution #9458 (A Resolution To Adopt a Uniform Tort Claims Settlement Policy)." Consequently, the trial court concluded that Plaintiff was "required to provide uninsured motorist coverage to [Defendants] in this case as the 'nature of the uninsured motorist statute is remedial and therefore

should be liberally construed to accomplished the beneficial purpose intended by the General Assembly.'" Plaintiff appeals.

Plaintiff contends the trial court erred by concluding that Durham was not self-insured with respect to Defendants' claims. Specifically, Plaintiff asserts that Durham "maintains insurance and falls within the usual, ordinary, and commonly accepted meaning of 'self-insurer' such that the [auto policy] did not provide uninsured motorist coverage to [Defendants] in this instance." Based on our review of the record before us, we disagree.

"Any city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance." N.C. Gen. Stat. § 160A-485(a) (2013). "Participation in a local government risk pool . . . shall be deemed to be the purchase of insurance for the purposes of this section." *Id.* "Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability." *Id.* Further, if a city "uses a funded reserve instead of purchasing insurance against liability for . . . negligence" or "absolute liability for damage to person or property caused by an act or omission of the city or any of its officers, agents, or employees acting within the scope of their authority and the course of their employment," *id.*, "the city council may adopt a resolution that deems the creation of a funded reserve to be the same as the purchase of insurance under this section." *Id.* "Adoption of such a resolution waives the city's governmental immunity only to the extent

specified in the council's resolution, but in no event greater than funds available in the funded reserve for the payment of claims." *Id.*

The record before us contains a letter from a property and liability adjuster with the North Carolina League of Municipalities' Risk Management Services ("the League of Municipalities' letter") to Defendants' counsel, stating: "We are the claims administrators on assignment for [Durham]." "[U]pon review of [Defendants'] file, a Resolution to Adopt a Uniform Tort Claims Settlement Policy [('the Settlement Resolution')] for [Durham] will be in effect and applied in the handling of this file." "Under the [Settlement] Resolution, [Durham] will consider out of pocket expense relating directly to medical bills incurred as a result of the accident." "[Y]ou have the option of filing an Uninsured Motorist Claim with your client's carrier." "If you elect to pursue a UM claim then [Durham] will not waive its immunity."

The Settlement Resolution referenced in the League of Municipalities' letter was adopted by Durham's City Council pursuant to N.C. Gen. Stat. § 160A-485(a). The Settlement Resolution expressly repealed and replaced two resolutions adopted by Durham's City Council three years prior that (1) waived governmental immunity in limited circumstances and (2) established a funded reserve to pay claims where government immunity had been waived. The Settlement Resolution provided, in part: that the Durham City Council adopted it "to address the settlement of claims against [Durham];" that "[t]he cumulative recovery limit under this policy . . . shall

not exceed the self-insured retention limit under [Durham's] applicable excess liability policy or policies for claims covered by [Durham's] insurance;" and that, where Durham "determine[d] it more likely than not ha[d] a defense of governmental immunity concerning the claim, *and there [wa]s no insurance held by [Durham] that would cover the claim*, the cumulative recovery limit for any one accident or occurrence, whether from one or multiple persons, shall not exceed $350,000." (Emphasis added.)

Thus, while Plaintiff directs this Court's attention to the League of Municipalities' letter as evidence that Durham was a self-insurer, the letter expressly provided that the Settlement Resolution would be "applied in the handling of this file," and the Settlement Resolution was applicable only where "there [wa]s *no insurance held by [Durham]* that would cover the claim." (Emphasis added.) In other words, the only evidence in the record reflective of Durham's status as a self-insurer is the League of Municipalities' letter and the Settlement Resolution, both of which indicate that Durham was *not* insured at the time of, and with respect to, Defendants' claims. *Cf. Williams v. Holsclaw*, 128 N.C. App. 205, 208, 495 S.E.2d 166, 168 ("The record . . . indicates the [c]ity purchased liability insurance for claims between $1,000,000 and $10,000,000, but is wholly uninsured for claims under or above this range. Because [the] plaintiffs seek damages less than $1,000,000, immunity has not been waived and the [c]ity and [the officer], in his official capacity, are entitled to

summary judgment."), *aff'd per curiam*, 349 N.C. 225, 504 S.E.2d 784 (1998). Accordingly, we conclude the trial court did not err when it determined that Durham was not self-insured with respect to Defendants' claims. The remaining issues on appeal and bare assertions for which Plaintiff has failed to provide adequate legal support are deemed abandoned. See N.C.R. App. P. 28(a).

AFFIRMED.

Judges ELMORE and DAVIS concur.

Report per Rule 30(e).