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Torts; Governmental Immunity; Insurance Contract; Endorsement; Interpretation

Meinck v. City of Gastonia ("Meinck II"), ___ N.C. App. ___ (Gaston– COA16-892-2, 1/2/19), *petition for reh'g denied*, ___ N.C. App. ____ (No. COA16-892-2, 2/7/19), *disc. review denied*, ___ N.C. ___ (No. 130PA17-2, 5/9/19)

Upon remand from N.C. Supreme Court, N.C. Court of Appeals holds that, applying canons of contract interpretation in the light most favorable to plaintiff as the non-moving party, trial court erred by entering summary judgment upholding defendant-City's waiver of governmental immunity notwithstanding defendant-City's purchase of liability insurance.

- ***Holding*–** In October 2018, the Supreme Court reviewed the March 2017 Court of Appeals' decision and *inter alia* reversed in part, holding that "the trial court correctly determined that defendant[-City] was engaged in a governmental function[.]" Meinck I, ___ N.C. at ___, 819 S.E.2d 353, 367. (The facts underlying this case are set forth in detail in both opinions. *See also* Meinck I, ___ N.C. App. ___, 798 S.E.2d 417 (2017), *rev'd in part, disc. review improvidently allowed in part, and remanded*, ___ N.C. ___, 819 S.E.2d 353 (2018). *See MLN* November 2018, p. 1.) Otherwise remanding in part, the Court directed the Court of Appeals to determine the precise issue of "whether the trial court correctly ruled that defendant[-City] did not waive governmental immunity by purchasing liability insurance." *Id*. at __, 819 S.E.2d at 367. (In June 2016, the trial court had concluded that defendant-City's liability insurance policy "contained an express non-waiver provision" and that defendant[-City] had not waived governmental immunity. Because the Court of Appeals previously held that defendant-City was engaged in a proprietary function, its initial March 2017 opinion did not further address plaintiff's argument that defendant-City's non-waiver provision in its liability insurance contract did not preserve defendant-City's governmental immunity.) The Supreme Court also determined that discretionary review as to the issue of plaintiff's contributory negligence had been improvidently allowed. *Id*.

Here, in this 2019 decision issued pursuant to remand, the Court of Appeals addresses whether defendant-City waived governmental immunity by purchasing liability insurance. The Court reversed the trial court's ruling and remanded to the trial court for further proceedings given the Court's determination of waiver of immunity.

- ***Key Excerpt*–** "Unlike the clear and explicit contract exclusionary provisions in Hart [v. Brienza, 246 N.C. App. 426, 434, 784 S.E.2d 211, *disc. review denied,* 369 N.C. 69, 793 S.E.2d 223 (2016)], [Estate of] Earley [v. Haywood Cty. Dep't of Soc. Servs., 204 N.C. App. 338, 342, 694 S.E.2d 405, 408-09 (2010)], and Patrick [v. Wake Cty. Dep't of Human Servs., 188 N.C. App. 592, 596, 655 S.E.2d 920, 923 (2008)], the endorsement at issue here is ambiguous. *See id.* Hart, Earley, and Patrick provide prominent examples for how exclusionary clauses have been drafted to be clear and unambiguous. Under the endorsement at issue, it is unclear whether the exclusion for coverage applies to claims for which sovereign or governmental immunity would apply."

  "With the ambiguous language in the endorsement, we 'strictly construe' the insurance policy Defendant[-City] purchased as providing coverage for claims which clearly stated provisions preserving governmental immunity would otherwise bar. *See* Daniel [v. City of Morganton], 125 N.C. App. [47] at 53, 479 S.E.2d [263] at 267 [(1997)] ('If the language in an exclusionary clause contained in a policy is ambiguous, the clause is to be strictly construed in favor of coverage.' (citation and internal quotation marks omitted))."

  "With the purchase of liability insurance coverage, Defendant[-City] has waived governmental immunity up to the amount of its general liability policy limits of $1,000,000. *See* [G.S.] 160A-485(a) ('Immunity shall be waived only to the extent that the city is indemnified by the insurance contract from tort liability.'). The ambiguous exclusionary endorsement, strictly construed in favor of coverage and against the drafter, does not exclude the express coverage the [defendant-]City obtained when it purchased the liability insurance policy. Furthermore, the unambiguous provisions of the [defendant-]City's general liability policy clearly provides coverage for 'bodily injury' up to a limit of $1,000,000."

  "Following our precedents and construing the coverage provisions of the policy liberally and the ambiguous exclusionary provision narrowly, Defendant[-City] has not preserved governmental immunity to the extent of the $1,000,000 coverage limit. *See* Lambe Realty [Inv., Inc. v. Allstate Ins. Co.], 137 N.C. App. [1] at 11, 527 S.E.2d [328] at 335 [(2000)]; Stanback [v. Westchester Fire Ins. Co.], 68 N.C. App. [107] at 114, 314 S.E.2d [775] at 779 [(1984)]."

  "The trial court's grant of summary judgment to Defendant[-City], partly on the basis the City did not waive governmental immunity by purchasing liability insurance through the exclusionary provision, is reversed."

- ***Synopsis*–** Upon remand in part from N.C. Supreme Court. Reversed and remanded. Opinion by Judge Tyson, with Judge Elmore and Judge Dietz concurring. On February 7, 2019, the N.C. Court of Appeals denied defendant-City's petition for rehearing pursuant to N.C. R. App. P. 31. On May 9, 2019, the Supreme Court of North Carolina denied the City's petition for discretionary review.

Nota Bene (N.B.) Other Recent Decisions of Note

Land Use; Permits; Polluting Industries Development Ordinance; Asphalt Plant; Moratorium; Permit Choice Statute Ashe Cnty. v. Ashe Cnty. Planning Bd. & Appalachian Materials, LLC, ___ N.C. App. ___ (No. COA18-253, Ashe– 5/21/19) In a case wherein respondent-appellee Appalachian Materials submitted an application for a permit to operate an asphalt plant (and County accepted and deposited application fee), Court of Appeals holds where subsequently adopted moratorium was no longer in effect, Appalachian Materials' application was required to be reviewed under the Old Ordinance, as requested by Appalachian Materials; the Planning Director bound the County on the issue

of whether certain buildings were each a "commercial building" as defined in the buffer provision under the Old Ordinance, and; the Planning Board had the authority to determine whether the application otherwise complied with the Old Ordinance. Court states *inter alia,* "[W]e conclude that the Planning Director made the determination that they were *not* commercial buildings in his June 2015 Letter and that his determination was binding on the County. Indeed, the record shows that these buildings were shown in the application and that the Planning Director stated in his June 2015 Letter that he had 'verified' that these buildings were not a problem. Further, Appalachian Materials was prejudiced by this determination in that it could have sought a variance [for any buffer issues] had the Planning Director not made the determination." (Emphasis in original.) Accordingly, the trial court's order affirming the Planning Board's decision was affirmed. The Court determined that the Supreme Court of North Carolina's decision in Robins v. Hillsborough, 361 N.C. 193, 199-200, 639 S.E.2d 421, 425 (2007) determinative. The Court observed, "Seven years later, in 2014, the General Assembly essentially codified much of the Supreme Court's reasoning in Robins when it enacted the Permit Choice statute [G.S. 153A-320.1]. Like the rule applied in Robins, there is no language in [G.S.] 153A-340(h), the moratorium statute, which prevents the Permit Choice statute from applying once the moratorium is lifted." (Appeal by Ashe County from November 2017 order affirming the decision of the Planning Board directing issuance of Polluting Industries Development Ordinance permit. Affirmed. Judge Dillon wrote the opinion, joined by Judge Stroud. Judge Berger concurred by separate opinion.))

Procedure; Torts; Multiple Defendants; Interlocutory Order; Substantial Right McFarland v. Pity Cty. Bd. of Educ., ___ N.C. App. ___ (No. COA18-946, Pitt— 5/7/19) (***unpublished***) In plaintiffs' action alleging *inter alia* negligence and state constitutional claims, Court of Appeals dismisses as interlocutory plaintiffs' appeal from superior court's order granting dismissal as to Board: three other named defendants remained in the action in their official and individual capacities. "In the substantial right context, the appellant 'must present more than a bare assertion that the order affects a substantial right; [he] must demonstrate *why* the order affects a substantial right.' Unless the appellant meets that burden, appellate jurisdiction will not lie and this Court must dismiss the appeal. In the instant case, the trial court's order from which Plaintiffs appeal only disposed of Plaintiffs' claims against Defendant Board. Therefore, Plaintiffs' appeal is interlocutory…. Instead [of alleging the existence of a substantial right], Plaintiffs cite [G.S.] 1-277(a) and 7A-27(b) and maintain that it is appropriate to pursue an immediate appeal from the trial court's order because the ruling 'is final and determines the end of the action with regard to the defendant Pitt County Board of Education.' However, section 1-277(a) provides, among other avenues, that an immediate appeal may be taken from an interlocutory order that 'in effect determines the action, *and prevents a judgment from which an appeal might be taken*.' [G.S.] 1-277(a) (2017) (emphasis added); *accord id*. [G.S.] 7A-27(b)(3)(b). First, a determination of the action as to Defendant Board is not the equivalent of a determination of the *entire action*. Moreover, the order does not 'prevent[ ] a judgment from which appeal might be taken' at a later point. *Id.* § 1-277(a). Parties do 'not waive their right to appeal after the final judgment by foregoing an interlocutory appeal.' … *see also* [G.S.] 1-278 ('Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment.'). Therefore, because Plaintiffs fail to carry their burden of presenting appropriate grounds for this Court's acceptance of their interlocutory appeal, we lack jurisdiction to address Plaintiffs' challenges to the trial court's dismissal order." (Citations omitted.) (Appeal by plaintiffs from April 2018 order granting Board's motion to dismiss. Appeal dismissed. Judge Zachary wrote the opinion, joined by Judge Berger and Judge Hampson.))