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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-334

Filed: 3 March 2020

Orange County, No. 18 CVS 1029

ESTATE OF FREDERICK JEROME SEYMOUR, by TONYA B. SEYMOUR,  
Administratrix of the Estate of Frederick Jerome Seymour, Plaintiff,

v.

ORANGE COUNTY BOARD OF EDUCATION, Eric Jeffries, in his individual capacity; Randy Jeffries, in his individual capacity; and Wesley Holder, in his individual capacity, Defendants.

Appeal by Defendant Orange County Board of Education from order entered 31 January 2019 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 30 October 2019.

*Glenn, Mills, Fisher & Mahoney, P.A., by William S. Mills and Carlos Mahoney, for plaintiff-appellee.*

*Tharrington Smith L.L.P., by Kristopher B. Gardner and Colin Shive, for defendant-appellant.*

MURPHY, Judge.

School boards waive immunity from tort claims by purchasing liability insurance, but “only to the extent that said board of education is indemnified by insurance for such negligence or tort.” N.C.G.S. § 115C-42 (2019). To decide whether a school board purchased insurance that waived immunity for a particular claim, we

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compare the language of the policy with the Plaintiff's pleadings to determine whether the events alleged are covered—and immunity is waived—or excluded such that the board is entitled to immunity. Here, the Defendant, Orange County Board of Education, is entitled to immunity from the Plaintiff's negligence suit because its insurance policy excludes coverage for claims arising out of or in connection with sports practices and the events alleged arose out of and in connection with a school football practice.

**BACKGROUND**

Frederick Jerome Seymour ("Fred") was a student and member of the football team at Gravelly Hill Middle School in Orange County at the time of his tragic and untimely death at the age of thirteen. During the first football practice of the season, on 22 August 2016, Fred suffered an asthma attack and collapsed on the field. Three days later, Fred died from respiratory failure following an asthma attack.

This suit was brought by Tonya Seymour ("Plaintiff"), Fred's mother and the administratrix of his estate, who filed an *Amended Complaint* in Orange County Superior Court asserting a single claim of negligence against the Orange County Board of Education ("the Board") and three individual defendants ("the Defendants"). As to the Defendants, the *Amended Complaint* reasoned the Defendants' "negligence is imputed to [the] Board pursuant to the doctrine of *respondeat superior*."

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Plaintiff's complaint alleged the Defendants "negligently failed to provide assistance to Fred when he started exhibiting signs and symptoms of breathing difficulty." These symptoms, which arose "[d]uring football practice[.]" included Fred's "frequent and repeated use of his Albuterol inhaler." Fred had an "Emergency Action Plan" in place that "required the Defendants . . . to have Fred use his inhaler, remove Fred from the trigger activity and to take such other action as required by the action plan and to protect [Fred's] health and safety . . . ." Plaintiff alleged "Fred's death was directly and proximately caused by the negligence of [the] Defendants."

The Board timely moved to dismiss Plaintiff's complaint pursuant to Rules 12(b)(1), (2), and (6) of Civil Procedure based on "all applicable governmental immunities." The trial court denied the Board's motion to dismiss in a signed Order on 31 January 2019, and the Board filed notice of appeal on 12 February 2019. The parties agree this appeal warrants our immediate review because the trial court's interlocutory order affects the Board's substantial right to sovereign immunity. *See, e.g., Smith v. Phillips*, 117 N.C. App. 378, 380, 451 S.E.2d 309, 311 (1994) ("[W]hen [a] motion is made on the grounds of sovereign and qualified immunity, . . . a denial is immediately appealable, because to force a defendant to proceed with a trial from which he should be immune would vitiate the doctrine of sovereign immunity.").

**ANALYSIS**

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The ultimate question in this appeal is whether the trial court erred in denying Defendants' Motion to Dismiss. We review a trial court's denial of a motion to dismiss on the basis of sovereign immunity de novo. *White v. Trew*, 366 N.C. 360, 362-63, 736 S.E.2d 166, 168 (2013). To resolve this appeal, we must decide whether the Defendants waived their right to sovereign immunity by purchasing liability insurance for the act of negligence alleged in Plaintiff's complaint.

Our General Statutes have a specific provision for the waiver of sovereign immunity by a school board:

Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but *such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.*

N.C.G.S. § 115C-42 (2019) (emphasis added). The parties agree that, to the extent the insurance policy at issue explicitly indemnifies it from liability, the Board has waived its governmental immunity by purchasing reinsurance coverage. The Board argues it is not indemnified—and therefore has not waived immunity—for five specific reasons, each of which would independently bar Plaintiff's claim. If the Board

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is correct regarding even one of those exclusions it is not indemnified and is therefore entitled to immunity from Plaintiff's suit.

The purported exclusions to indemnification within the Board's reinsurance agreement are found in:

1. Art. IV, Sec. F(9)(m) ["The Athletics Clause"]
2. Art. IV, Sec. F(9)(i) ["The Professional Services/First Aid Clause"]
3. Art. IV, Sec. F(9)(o) ["The Contaminants Clause"]
4. Art. IV, Sec. F(9)(r) ["The School Policies Clause"]
5. Art. IV, Sec. F(9)(l) ["The Loss of Consortium Clause"]

In order to hold that the trial court erred, we need only conclude one of the exclusions applies.

In order to determine whether such circumstances are covered by the provisions of [a] liability insurance [policy], the policy provisions must be analyzed, then compared with the events as alleged. This is widely known as the "comparison test": the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded. Any doubt as to coverage is to be resolved in favor of the insured.

*Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 693, 340 S.E.2d 374, 378 (1986); *see also Herring ex rel Marshall v. Winston-Salem/Forsyth Cnty. Bd. Of Educ.*, 137 N.C. App. 680, 686, 529 S.E.2d 458, 463 (2000) (applying the comparison test in a case against a board of education). Plaintiff's *Amended Complaint* alleges, inter alia:

Defendants Jeffries and Holder were negligent in that they:

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- a. Failed to timely provide assistance to Fred when he exhibited symptoms of breathing difficulty during football practice.
- b. Failed to timely call 911 and request medical assistance as required by the Emergency Action Plan, and
- c. Otherwise failed to exercise reasonable care with regard to Fred's health and safety.

Defendants Jeffries' and Holder's negligent acts and omissions, as described above, were committed within the course and scope of their duties as agents and employees of [the] Board, and [their] negligence is imputed to [the] Board pursuant to the doctrine of *respondeat superior*.

Fred's death was directly and proximately caused by the negligence of Defendants.

In comparing those allegations to the Board's reinsurance agreement, we conclude the Board is immune from Plaintiff's suit.

The Board's reinsurance agreement excludes coverage for—and therefore does not waive immunity in regard to—“[a]ny claim made by an athletics participant (or made by the parent(s) or guardian(s) of an athletics participant for the participant's medical expenses) arising out of or in connection with, in whole or in part, athletics, including but not limited to . . . practices . . . .” We compare this clause to Plaintiff's claim that the Defendants “[f]ailed to timely provide assistance to Fred when he exhibited symptoms of breathing difficulty during football practice.”

The Athletics Clause explicitly excludes coverage for claims “arising out of . . . athletics” and claims made “in connection with, in whole *or in part*, athletics.” On its

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face, Plaintiff's complaint describes an injury that both arose out of and was connected at least in part with athletics. Again, Plaintiff's complaint states it was "[d]uring football practice" when "Fred exhibited symptoms of shortness of breath and difficulty with breathing[.]" and that the Defendants "[f]ailed to timely provide assistance to Fred when he exhibited symptoms of breathing difficulty *during football practice.*" Fred suffered difficulty breathing during his participation in football practice, and the coaches running that practice allegedly failed to provide timely assistance. Were it not for the football practice, Fred would not have suffered breathing difficulty and the Defendants would not have been in a position where they had a duty to assist him. Plaintiff's pleadings do not attempt to argue or allege otherwise. In order to interpret the Athletics Clause as inapplicable to Plaintiff's claim, we would need to read both "arising out of" and "in connection with . . . in part" out of the policy altogether.

Plaintiff argues the Athletics Clause is intended to protect the Board from suits arising out of sports injuries and not injuries caused by any negligent act that happens to occur at an athletic event. We agree that the Board is not immune from suit over every conceivable injury that happens to occur at or around an athletic event. For example, if a student-athlete is injured near a football field due to something unrelated to an ongoing practice, the Athletics Clause would not apply because the student's injury was not connected to the athletic event. That is to say,

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the same injury could have occurred whether there was a practice happening on the field or not. That is not true for the injury complained of here. The fact that Fred was participating in football practice when his breathing difficulty arose is crucial to Plaintiff's claim and leads us to conclude the complained-of injury arose out of an athletic event.

Comparing the plain language of the Athletics Clause with Plaintiff's complaint, we conclude the Board's policy excluded coverage for the complained-of injury and the Board is therefore immune from Plaintiff's suit. Having reached this conclusion, any analysis of the other four clauses would be surplusage.

**CONCLUSION**

The Board is immune from Plaintiff's negligence suit because its insurance policy excludes coverage for claims arising out of or in connection with athletics practices and the events alleged arose out of and in connection with a school football practice.

REVERSED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).