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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-10

No. COA19-334-2

Filed: 2 February 2021

Orange County, No. 18 CVS 001029

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 Defendants 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 A. Shive, for
defendants-appellants.*

MURPHY, Judge.

¶ 1 School boards waive immunity from negligence 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 determine whether the events alleged are covered under the policy—and immunity is waived—or excluded such that the board is entitled to immunity. Here, Defendant, Orange County Board of Education, is entitled to immunity from Plaintiff’s wrongful death suit because its insurance policy contains a clause that excludes coverage for claims brought by an athletics participant, or derivatively through the participant’s estate, 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

¶ 2 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.

¶ 3 This wrongful death suit was brought by Tonya Seymour (“Plaintiff”), in her capacity as the administratrix of Fred’s estate. Plaintiff, who is also Fred’s mother, 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 individuals (“Defendants”). As to Defendants, the *Amended Complaint*

reasoned Defendants’ “negligence is imputed to [the] Board pursuant to the doctrine of *respondeat superior*.”

¶ 4

Plaintiff’s complaint alleged 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 [] 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 Defendants.”

¶ 5

The Board timely moved to dismiss the 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 timely 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

¶ 6

The ultimate question in this appeal is whether the trial court erred in denying Defendants’ motion to dismiss. The standard of review for a trial court’s denial of a motion to dismiss on the basis of sovereign immunity is 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 Defendants waived their right to sovereign immunity by purchasing liability insurance for the act of negligence alleged in Plaintiff’s *Amended Complaint*. Specifically, we must determine whether the liability insurance policy excluded coverage for the wrongful death claim asserted by Plaintiff.

¶ 7

“A county or city board of education is a governmental agency, and therefore is not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority.” *Beatty v. Charlotte-Mecklenburg Board of Education*, 99 N.C. App. 753, 755, 394 S.E.2d 242, 244 (1990). 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). The Board is a member of the North Carolina School Boards Trust (“NCSBT”). The NCSBT “provides local boards of education the opportunity to budget funds for the purpose of paying all or part of a covered [c]laim made or a civil judgment entered against the [B]oard” On behalf of the Board, the NCSBT obtained excess insurance coverage through a reinsurance agreement issued by Great American Insurance Company. The Board’s coverage under this policy is subject to exclusions set forth in the agreement. Specifically, the agreement contains an “Athletics Clause,” which applies 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 tryouts, selection, practices, games, meetings, training, equipment, participation, discipline, and travel. This exclusion does not apply to “Claims” arising from activities occurring during a regularly scheduled physical education class or during recess.

¶ 8

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 parties also agree Fred’s death arose out of or in connection with an athletic activity. However, Plaintiff argues the express language of the Athletics Clause does not exclude its claim from liability coverage

and therefore the Board has waived its sovereign immunity. If Plaintiff is correct regarding the interpretation of the Athletics Clause,¹ the Board is indemnified and is therefore not entitled to immunity from Plaintiff's wrongful death suit.

¶ 9

“The meaning of language used in an insurance contract is a question of law for the Court, as is the ‘construction and application of the [insurance] policy provisions to the undisputed facts.’” *Daniel v. City of Morganton*, 125 N.C. App 47, 53, 479 S.E.2d 263, 267 (1997) (internal citations omitted) (quoting *Walsh v. Nat’l Indem. Co.*, 80 N.C. App. 643, 647, 343 S.E.2d 430, 432 (1986). “If the language in an exclusionary clause contained in a[n insurance] policy is ambiguous, the clause is to be strictly construed in favor of coverage.” *Daniel*, 125 N.C. App. at 53, 479 S.E.2d at 267 (internal citations omitted). “[I]f the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein.” *Dawes v. Nash Cty.*, 357 N.C. 442, 449, 584 S.E.2d 760, 764 (2003) (internal quotations omitted).

¹ In its brief, Plaintiff argues other exclusions contained within the agreement do not apply to its wrongful death suit. However, these exclusions were not identified as a basis for rehearing in Plaintiff's *Petition for Rehearing* so we do not address these exclusions. See N.C. R. App. P. 31(c) (2020) (“The rehearing may be granted as to all or fewer than all points suggested in the petition.”).

¶ 10 Here, the Athletics Clause is clear and unambiguous and we must interpret the clause as written and according to its plain meaning. The Athletics Clause requires two elements to be present in order for a claim to fall under the exclusion: (1) the claim is made by an athletics participant, or parent or guardian of the athletics participant for the participant’s medical expenses, and (2) the claim arises out of or in connection with an athletic activity. The parties agree the claim arises out of or in connection with an athletic activity. Therefore, if the claim is not made by the athletics participant, or a parent or guardian to recover medical expenses, the exclusion cannot apply and the Board will have waived its immunity.

¶ 11 Plaintiff argues its claim is not made by the athletics participant or a parent or guardian because “[n]either Fred – the athletics participant – nor his parents have filed a lawsuit against [the Board] for his medical expenses. Rather, the wrongful death lawsuit has been filed by the personal representative of [Fred’s e]state.” We disagree. A claim brought by a personal representative of a decedent’s estate is equivalent to a claim brought by the athletics participant – the decedent, if he were still living – against the Board.

¶ 12 When dealing with exclusionary clauses in insurance policies, we have consistently applied exclusions to the personal representative of the decedent’s estate. We have done so even when the clause and/or policy make no mention of a personal representative, estate, or administrator of the estate. *See Nationwide Mut.*

Ins. Co. v. Integon Indem. Corp., 123 N.C. App 536, 473 S.E.2d 23 (1996); *see also U.S. Fid. and Guar. Co. v. Country Club of Johnston Cty. Inc.*, 119 N.C. App. 365, 458 S.E. 2d 734 (1995) (applying an exclusion in a commercial general liability policy for an entity in the business of selling alcohol to the administrator of the decedent's estate in a wrongful death action); *Estate of Earley v. Haywood Cty. Dep't of Soc. Servs.*, 204 N.C. App. 338, 694 S.E.2d 405 (2010) (applying an exclusion in a liability insurance policy to the decedent's estate's wrongful death claim and holding the defendant's governmental immunity was preserved). In *Nationwide Mut. Ins. Co. v. Integon Indem. Corp.*, a collision occurred when a trailer being towed by the defendants became detached from the truck, crossed the centerline of the road, and struck the plaintiff's car. *Nationwide Mut. Ins. Co.*, 123 N.C. App at 536, 473 S.E.2d at 24. As a result, the plaintiff died and the administrator of her estate brought a wrongful death action against the defendants alleging they were negligent in the manner in which they operated the truck and in the manner in which they loaded and secured its trailer. *Id.* at 536-37, 473 S.E.2d at 24. The homeowners policy at issue there provided personal liability insurance coverage to "an insured for damages because of bodily injury or property damage caused by an occurrence to which [the policy's] coverage applies" *Id.* at 537, 473 S.E.2d at 24. In addition, the homeowners policy provided the following exclusions:

1. Coverage E -- Personal Liability and Coverage F --

Medical Payments to Others do not apply to bodily injury or property damage: . . .

e. arising out of:

(1) the ownership, maintenance, use, loading, or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured; . . .

This exclusion does not apply to:

(1) a trailer not towed by or carried on a motorized land conveyance; . . .

(4) a vehicle or conveyance not subject to motor vehicle registration which is:

(a) used to service an insured's residence;

Id. Similar to the case before us, nowhere in the exclusions did the policy mention wrongful death, a representative of the decedent's estate, or an administrator of the decedent's estate. *Id.* Nonetheless, we held the estate's wrongful death action fell under the exclusions of the defendant's homeowners policy. *Id.* at 539, 473 S.E.2d at 25. Our caselaw demonstrates exclusionary clauses in insurance contracts apply equally to the claimant's personal representative as they would a claimant had he survived.

¶ 13 Our wrongful death statute, N.C.G.S. § 28A-18-2, provides the fiduciary of an estate may only pursue such actions for damages as the decedent could have brought had he lived. N.C.G.S. § 28A-18-2 (2019). Had Fred survived, he could have brought

a negligence action against the Board. Unfortunately, Fred's death renders this option unavailable and the only avenue by which his estate can seek a remedy is through a wrongful death suit. A wrongful death suit can only be brought by the decedent's personal representative, in this case, Fred's mother. *Id.* Even though the Athletics Clause does not specifically mention a representative of a decedent's estate, Fred's mother's claim, in her capacity as administratrix of Fred's estate, is equivalent to a claim brought by Fred himself. Plaintiff's claim is excluded from the Board's liability coverage and the Board has not waived its sovereign immunity. Therefore, Plaintiff's claim is barred from recovery.

CONCLUSION

¶ 14 The Board is immune from Plaintiff's wrongful death suit where the personal representative of the deceased's estate's suit is equivalent to a claim brought by the athletics participant.

REVERSED.

Judges STROUD and ZACHARY concur.

Report per Rule 30(e).