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North Carolina Court of Appeals Takes Insurer to Task For Sloppy Drafting.

Last month, the North Carolina Court of Appeals released its decision in *Meinck v. City of Gastonia*, — S.E.2d —, 2019 WL 114054 (N.C. Ct. App. Jan. 2, 2019), holding a policy exclusion to be ambiguous because of poor drafting by the insurer.

The case started in 2013, when plaintiff Joan Meinck fell while walking down the steps of a historic building owned by the City of Gastonia, suffering injuries including a broken hip. While the city owned the property and was responsible for maintaining the exterior of the building, it had leased the property to the private non-profit Gaston County Art Guild, which had subleased the building for use as an art gallery and gift shop.

In 2015, Meink sued the city, alleging specifically that the city was not entitled to governmental immunity because it was engaged in a proprietary (not governmental) function, and alternatively, if the City had governmental immunity, it had been waived by the purchase of liability insurance. Under North Carolina's doctrine of governmental immunity, a county or municipal cooperation is immune from suit for the negligence of its employees in the exercise of governmental functions absent waiver of immunity. *Evans ex rel. Horton v. Hous. Auth.*, 602 S.E.2d 688 (N.C. 2004). However, a city may waive its government immunity in tort by the act of purchasing liability insurance. N.C. Gen. Stat. § 160A-485(a).

The trial court granted summary judgment in favor of the city, finding that the city's use of the building was a governmental function and that therefore the city was entitled to sovereign immunity. The trial court also held that the city had not waived that immunity by purchasing liability insurance because the city's insurance policy contained an "express non-waiver provision."

In a 2017 decision, the Court of Appeals reversed, holding that the city was not engaged in a proprietary, not governmental function in renting the building, and therefore was not entitled to governmental immunity. Based on this holding, the Court did not address any insurance coverage issues. *Meinck*, 798 S.E.2d 417 (N.C. Ct. App. 2017).

However, the Supreme Court granted the City's petition for discretionary review and reversed on the governmental function issue, remanding the case to the Court of Appeals to determine if the City had waived governmental immunity by purchasing liability insurance. *Meinck*, 819 S.E.2d 353 (N.C. 2018).

In an opinion written by Judge Tyson and joined by Judges Elmore and Dietz, the Court of Appeals concluded that the non-waiver provision in the city's insurance policy, issued by Argonaut Insurance Company, was ambiguous and must be construed in favor of coverage, and that therefore, the city had waived its governmental immunity.

The relevant policy endorsement read as follows (emphasis supplied):

12. Sovereign Immunity and Damages Cap

> ***For any amount for which the Insured would not be liable under applicable governmental or sovereign immunity but for the existence of this Policy***; the issuance of this insurance shall not be deemed a waiver of any statutory immunities by or on behalf of any insured, nor of any statutory limits on the monetary amount of liability applicable to any Insured were this Policy not in effect; and as respects to any "claim", we expressly reserve any and all rights to deny liability by reason of such immunity, and to assert the limitations as to the amount of liability as might be provided by law.

The Court of Appeals concluded that the italicized portion of the endorsement was ambiguous. Judge Tyson called the clause "ungrammatical" and wrote that it did "not clearly convey whether governmental immunity is waived under the policy. It is not a complete sentence of clause, and does not convey any clear meaning on its own." Further, Judge Tyson noted that of fourteen provisions in the "North Carolina Common Policy Conditions" endorsement, only this provision did not begin with a complete, grammatical sentence.

The Court of Appeals then set out a hypothetical clause which, in its view, would suffice to preserve the city's governmental immunity, replacing the italicized language in the actual policy with the following: "This policy does not apply to any amount for which the Insured would not be liable under applicable governmental or sovereign immunity but for the existence of this Policy."

The Court of Appeals then reviewed three prior decisions in which it had concluded that policy language preserved governmental immunity: *Hart v. Brienza*, 784 S.E.2d 211, rev. denied, 793 S.E.2d 223 (N.C. 2016), *Estate of Earley v. Haywood Cty. Dep't of Soc. Servs.*, 694 S.E.2d 405 (N.C. Ct. App. 2010), and *Patrick v. Wake Cty. Dep't of Human Servs.*, 655 S.E.2d 920 (N.C. Ct. App. 2008), concluding that in each case "the relevant language was unambiguous . . . and those policies did not cover claims for which sovereign immunity would otherwise be waived by the purchase of insurance." By contrast, the court stated, "[u]nder the endorsement at issue, it is unclear whether the exclusion for coverage applies to claims for which sovereign or governmental immunity would apply." Accordingly, the policy must be "strictly construed" in favor of coverage.

by Joshua Davey

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McGuireWoods LLP