

IN THE SUPREME COURT OF MISSOURI

DONALD AMICK)
Appellant,)
) Supreme Court No. SC84677
v.)
) Court of Appeals No. ED80382
PATTONVILLE-BRIDGETON TERRACE)
FIRE PROTECTION DISTRICT) Circuit Court No. 01CC-1115
)
Respondent.)

APPELLANT’S SUBSTITUTE REPLY BRIEF

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II. TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

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III. JURISDICTIONAL STATEMENT

This action is one involving the question of whether Respondent had insurance coverage for the acts complained of by Appellant, thereby waiving Respondent's claim of sovereign immunity under Sec. 537.610(1) of the Missouri Revised Statutes ("R.S.Mo.") and hence involves the construction of a law of this state. Respondent's Application For Transfer was sustained by this Missouri Supreme Court and this cause was ordered transferred from the Missouri Court of Appeals, Eastern District to the Missouri Supreme Court.

IV. STATEMENT OF FACTS

Plaintiff Donald Amick ("Amick") re-adopts the statement of facts filed in his Appellant's Brief in this matter.

V. POINTS RELIED ON

1. THE TRIAL COURT ERRED IN ITS DECISION TO SUSTAIN DEFENDANT FIRE DISTRICT'S MOTION TO DISMISS, BECAUSE THE FIRE DISTRICT WAIVED ITS SOVEREIGN IMMUNITY BY OBTAINING INSURANCE COVERAGE FOR THE ACTS ALLEGED IN AMICK'S FIRST AMENDED PETITION.

PRINCIPAL CASES:

Grace v. Missouri Gaming Comm., 51 S.W.3d 891 (Mo.App.W.D.2001)

Langley v. Curators Of The University, 73 S.W.3d 808 (Mo.App.W.D.2002)

Stephenson V. Raskas Dairy, Inc., 26 S.W.3d 209 (Mo.App.E.D. 2000)

OTHER AUTHORITIES:

Krasney v. Curators of University of Missouri, 765 S.W.2d 664 (Mo.App.1989)

State Ex Rel. Cass Medical Ctr. v. Mason, 796 S.W.2d 621 (Mo.banc 1990)

Section 287.780, R.S.Mo

Section 537.600, R.S.Mo.

Section 537.610, R.S.Mo.

VI. ARGUMENT

A. THE TRIAL COURT ERRED IN ITS DECISION TO SUSTAIN DEFENDANT FIRE DISTRICT'S MOTION TO DISMISS, BECAUSE THE FIRE DISTRICT WAIVED ITS SOVEREIGN IMMUNITY BY OBTAINING INSURANCE COVERAGE FOR THE ACTS ALLEGED IN AMICK'S FIRST AMENDED PETITION.

1. Governmental entities are not in peril.

On page 10 of Respondent's Substitute Brief, Respondent states :

Governmental entities are now faced with the uncertainty of purchasing insurance and risking a waiver of its immunity because precise, specific language of its policy may not withstand judicial scrutiny. Certainly Sec. 537.610.1 was not enacted to place governmental entities in such peril.

There is no peril. There is only peril if one were to accept Respondent's position. Respondent is afraid that the purchase of any liability insurance would cause a waiver of sovereign immunity.

This position has already been rejected by this Court in State Ex Rel. Cass Medical Ctr. v. Mason,

796 S.W.2d 621, 624 (Mo.banc 1990).

There is no peril under Appellant's position. Appellant's position is if there is insurance covering the act, then sovereign immunity has been waived, to the extent of the insurance. This is the position of Sec. 537.610.1 RSMo. Langley v. Curators Of The University, 73 S.W.3d 808, 811 (Mo.App.W.D. 2002). The Western District ruled that, "A public entity does not waive its sovereign immunity by maintaining an insurance policy where that policy includes a provision stating that the policy is not meant to constitute a waiver of sovereign immunity." Langley at page 811. By implication, where the insurance policy does not include a provision stating that the policy is not meant to constitute a waiver of sovereign immunity, then the public entity does waive its sovereign immunity by maintaining the insurance policy.

If there is insurance, then sovereign immunity is waived, and the insurance company must defend/pay the claim. If there is no insurance, then sovereign immunity is not waived. To hold otherwise would make the insurance purely illusory.

In fact, what exactly was the Respondent getting for its money from the insurance company? Sec. 537.600 provides that governmental entities enjoy sovereign immunity except for injuries caused by: (1) negligent acts or omissions by public employees arising out of the operation of motor vehicles, and (2) the condition of a public entity's property. These risks were already insured by the Respondent for \$5,603 under the Commercial General Liability Policy. (L.F. pages 70-1, 71 and 72 & 314, 315, and 316) The Management Liability Policy insured other "wrongful acts" and the Respondent paid \$4,011 for this coverage. (L.F. page 74 and 75 & 318 and 319). Under Respondent's argument, the Respondent received no coverage for \$4,011.00. This insurance would then certainly be illusory.

2. Willful Violation of Statute Exclusion does not apply.

Respondent cites an exclusion from its insurance coverage on page 11 of its Substitute Brief. Respondent quotes the exclusion as one for a “willful violation of any statute.” Let us examine the plain language of the full text of the exclusion:

EXCLUSIONS

This insurance does not apply under either Coverage A or Coverage B to:

... k. Damages, loss or expense arising out of or contributed to by: (1) Any fraudu

The plain language of this exclusion does not apply to Appellant’s cause of action under Section 287.780 of the Missouri Revised Statutes. Missouri Courts have used the dictionary definition of willful. “Willful is defined as ’proceeding from a conscious motion of the will; ...deliberate. Intending the result which actually comes to pass; ...intentional, purposeful; ... done with evil intent, or with bad motive or purpose, or with indifference to the natural consequences, unlawful...” Grace v. Missouri Gaming Comm., 51 S.W.3d 891, 900 (Mo.App.W.D.2001)

There is no element of willfulness in a violation of Section 287.780 RSMo. To prevail in an action for retaliatory discharge under Section 287.780 R.S.Mo., a plaintiff must prove four elements: (1) plaintiff's status as an employee of defendant before the injury; (2) plaintiff's exercise of a right granted by the Act; (3) employer's discharge of or discrimination against the plaintiff; and (4) an exclusive causal relationship between plaintiff's actions and defendant's actions. Stephenson v. Raskas Dairy, Inc., 26 S.W.3d 209 (Mo.App.E.D. 2000). Again, this exclusion is not applicable.

3. Krasney case is misapplied.

Respondent cites the case of Krasney v. Curators of University of Missouri, 765 S.W.2d

664 (Mo.App.1989) on pages 11 and 12 of its Substitute Brief to conclude that:
on MoFAD is without merit.

...neither Se

Appellant agrees that Krasney holds that the Missouri Workers' Compensation laws itself does not provide an express waiver of sovereign immunity. However, Krasney does not hold that Respondent's MoFAD insurance does not cover the allegations contained in the Petition herein. Sec. 537.610 R.S.Mo. provides that it is precisely Respondent's purchase of insurance that effects its wavier of sovereign immunity.

VII. CONCLUSION

Based on the foregoing, the trial court's decision should be reversed as it is not supported by the laws of the state of Missouri. In other words, the Eastern District Appellate decision should be affirmed as it is supported by the laws of the state of Missouri. The insurance coverages obtained by the Fire District effectively waives the sovereign immunity of the Fire District as against Plaintiff Amick. Thus, the Defendant Fire District's Motion To Dismiss should be denied and the cause of action remanded to the trial court for trial.

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CERTIFICATE OF SERVICE

Two copies of the foregoing was hand-delivered on this 15th day of October, 2002 to:

Mr. Daniel J. Bruntrager
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CERTIFICATE OF COMPLIANCE

Comes now Attorney for Appellant, David O. Kreuter, and hereby certifies that the Appellant's Substitute Reply Brief complies with Rule 84.06 of the Missouri Rules of Civil Procedure, in that Appellant's Substitute Reply Brief meets the following requirements:

- 8 1/2 x 11 paper was used weighing not less than nine pounds to the ream
- all lines are typed double spaced using only one side of the paper
- margins are not less than one inch from the edge of the paper
- pages are numbered consecutively after the cover page
- all characters are typed using 13 font, Times New Roman on WordPerfect 8
- has been securely bound to left
- has 1419 words and 203 lines of monospaced type

The undersigned also certifies that the disk containing the Appellant's Substitute Reply Brief of Appellant complies with Rule 84.06 of the Missouri Rules of Civil Procedure in that the disk has been scanned for viruses and is virus-free, the disk is double-sided, high density, IBM-PC compatible, 1.44 MB, 3 1/2-inch size, and an adhesive label is affixed to the disk identifying the caption of the case, the party filing the disk, the disk number and the word processing format used.

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