

MISSOURI COURT OF APPEALS, EASTERN DISTRICT
STATE OF MISSOURI

DONALD AMICK)	
Appellant,)	
)	Appeal No. ED 80382
v.)	
)	
PATTONVILLE-BRIDGETON TERRACE))	
FIRE PROTECTION DISTRICT)	
)	
Respondent.)	

**APPEAL FROM THE CIRCUIT COURT OF
ST. LOUIS COUNTY, STATE OF MISSOURI**

BRIEF OF APPELLANT DONALD AMICK

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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.

IV. STATEMENT OF FACTS

Plaintiff Donald Amick (Amick) filed his First Amended Petition in this matter, a one-count petition alleging violation of Sec. 287.780 R.S.Mo. (LF, pp. 23 -26). Sec. 287.780 R.S.Mo. prohibits any employer from discharging an employee for exercising said employee's rights under the Missouri Workers' Compensation Act.

In response to Amick's First Amended Petition, the Defendant Pattonville-Bridgeton Terrace Fire Protection District (Fire District) filed a Motion To Dismiss (LF, pp. 27 - 28). The Fire District's Motion To Dismiss alleged that, "The Defendant is not covered by insurance for the above mentioned acts and, thus, it is immune from liability and suit for Plaintiff's tort action for retaliatory discharge and violations of Sec. 287.780 of the Revised Statutes of Missouri." (LF, p. 28) In the Fire District's Memorandum Of Law that accompanied its Motion To Dismiss, the Fire District attached copies of its insurance policies and cited two sections to claim that it did not have insurance coverage for the actions alleged in the First Amended Petition. These two sections were:

1. Insuring Agreement.

We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance

applies. We will have the right and duty to defend the insured against any Asuit@ seeking those damages. However, we will have no duty to defend the insured against and Asuit@seeking damages for Apersonal and advertising@injury to which this insurance does not apply...

(Emphasis added by the Fire District) (LF, p. 30),

and

Exclusions of Section I - Coverage B - Personal and Advertising Injury Liability:

This insurance does not apply to:

APersonal and advertising injury@to:

(1) A person arising out of any:

...

(b) Termination of that person's employment;

(LF, p. 31).

Amick responded to the Fire District's Motion To Dismiss by alleging that the Fire District did indeed have coverage for its acts under its Management Liability coverage and its MoFAD coverage - A (LF, p. 276).

Pursuant to the Court's Order of September 25, 2001, the copies of the insurance policies were admitted into evidence to be considered by the Court in its eventual ruling (LF, p. 519).

On October 2, 2001, the Trial Court granted the Fire District's Motion To Dismiss and ruled that A...(A)ny insurance obtained by Defendant did not waive sovereign immunity under Section 537.610, RSMo or any other provision of law.@ (LF, p. 547) Amick filed his Notice Of Appeal on November 7, 2001. (LF, p. 549).

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.

Casey v. Chung, 989 S.W.2d 592 (Mo.App.E.D.1998)

Section 537.610, R.S.Mo.

State ex rel. Ripley County v. Garrett, 18 S.W.3d 504 (Mo.App.S.D.2000)

Balderree v. Beeman, 837 S.W.2d 309 (Mo.App. 1992)

ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 376 (Mo.banc 1993)

State ex rel. Cass Medical Center v. Mason, 796 S.W.2d 621 (Mo.banc 1990)

Section 287.780, 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.

Appellate review of an appeal from the grant of a motion for summary judgment is essentially de

novo. ITT Commercial Finance v. Mid-Am. Marine, 854 S.W.2d 371, 376 (Mo.banc 1993). The record should be reviewed in the light most favorable to the party against whom judgment was entered. Id.

The Missouri Supreme Court has ruled that even when public entities have full sovereign immunity, they may waive that immunity through the purchase of insurance as provided in Sec. 537.610 R.S.Mo. Sec. 537.610(1) provides:

The commissioner of administration, through the purchasing division, and the governing body of each political subdivision of this state, notwithstanding any other provision of law, may purchase liability insurance for tort claims, made against the state or the political subdivision, but the maximum amount of such coverage shall not exceed two million dollars for all claims arising out of a single occurrence and shall not exceed three hundred thousand dollars for any one person in a single accident or occurrence, except for those claims governed by the provisions of the Missouri workers' compensation law, chapter 287, RSMo, and no amount in excess of the above limits shall be awarded or settled upon. *Sovereign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state.* (Emphasis mine)

Thus, it must be determined whether the Fire District purchased insurance or participated in a self-insurance plan that would cover the acts alleged in Amick's First Amended Petition.

Amick's First Amended Petition alleged that the Fire District discharged Amick for exercising his rights under the Missouri Workers=Compensation Act in violation of Sec. 287.780 R.S.Mo. There are three potential coverages that may apply in this instance, Management Liability coverage, Commercial Umbrella coverage, and MoFAD coverage.

i. Management Liability coverage

The Fire District purchased insurance coverage for Management Liability in the amount of \$1,000,000 for each Awrongful act@with an aggregate limit of \$3,000,000 (LF, p. 318). The Management Liability coverage is defined in Form ML1000a(10/97), in addition to other Forms (LF, p. 322). Form ML1000a(10/97) is contained in the Legal File from pages 407 to 419. Under this Management Liability coverage, the policy states that AWe will pay those sums that the insured becomes legally obligated to pay as monetary damages because of a >wrongful act=to which this insurance applies.@ (LF, p. 407) Wrongful Act is defined as A...(A)n actual or alleged act, error or omission by or on behalf of you in the performance of your operations.@ (LF, p. 419) The alleged actions of the Fire District in Amick's First Amended Petition is clearly a AWrongful Act@under the terms of the Fire District's Management Liability coverage.

Next, we must address the meaning of Abecomes legally obligated to pay@. The Fire District has cited the case of State Ex Rel. Ripley County v. Garrett, 18 S.W.3d 504 (Mo.App.S.D.2000) in its Memorandum Of Law In Support Of Defendant's Motion To Dismiss Plaintiff's First Amended Petition (LF, p. 31 and 32) to claim that if sovereign immunity bars the suit, then the insurer Ahas no duty to pay@, and thus there is no liability

insurance coverage.

However, in the state of Missouri, there is another Court that has ruled on the meaning of "becomes legally obligated to pay". This Court weighed in on this matter in Casey v. Chung, 989 S.W.2d 592 (Mo.App.E.D.1998). The Defendant hospital in Casey v. Chung purchased liability insurance coverage and the policy contained the "becomes legally obligated to pay" language. However, this same policy also included an endorsement that stated, "This insurance does not apply to any claim or suit which is barred by the doctrines of sovereign immunity or official immunity..." This Court ruled that, "...the attached endorsement operates to negate the waiver of sovereign immunity that would otherwise result from such purchase." Casey at p. 594.

In the case at bar, the liability insurance coverage of the Fire District does contain the "becomes legally obligated to pay" language, but does not contain an endorsement as did the hospital's policy in Casey v. Chung. Pursuant to the ruling and reasoning of Casey v. Chung, there is no endorsement that would operate to negate the waiver of sovereign immunity that would otherwise result from such purchase. Thus, sovereign immunity has been waived by the Fire District.

Now let us further examine the decision in the case cited by the Fire District, State Ex Rel. Ripley County v. Garrett, 18 S.W.3d 504 (Mo.App.S.D.2000). In this case, the Defendant County of Ripley had purchased liability insurance coverage, and the policy contained the "becomes legally obligated to pay" language. However, this same policy also included an endorsement that stated, "The purpose of this insurance does not include

coverage for any liability or suit for damages which is barred by the doctrines of sovereign or governmental immunity by whatever name...@ The Court in the Southern District of Missouri ruled that there was no waiver of sovereign immunity since the policy contained the phrase: Abecomes legally obligated to pay@. The Southern District itself recognized that its holding could be attacked by arguing that its decision would render the coverage under the policy Aillusory@. The Court continued to state that given the language of the endorsement, the County would not be deemed to have waived its sovereign immunity under Sec. 537.610(1) R.S.Mo. The holding of the Southern District is directly in contradiction of the holding of the Eastern District in Casey v. Chung. However, what is most interesting is the concurring opinion of Judge Kenneth W. Shrum in State Ex Rel. Ripley County v. Garrett. Judge Shrum concurred in the result because of the language of the endorsement, but he disputed the majority's interpretation of Abecomes legally obligated to pay@. Judge Shrum stated:

Unlike the Relator here, the political subdivisions in State ex rel. Cass Medical Center v. Mason, 796 S.W.2d 621 (Mo.banc 1990), and in Balderree v. Beeman, 837 S.W.2d 309 (Mo.App. 1992), had not purchased liability insurance coverage for the very risks for which the respective public bodies were being sued. I view that as a definitive and dispositive distinction. I do not agree that Cass and Balderree support the implicit holding of the majority that Relator would retain immunity from the plaintiff's claims after buying Policy 954 without the Endorsement. By reading the plain language of section 537.610.1, RSMo 1994, I

conclude that, but for the Endorsement, Relator's purchase of insurance protection against claims of the type asserted by plaintiff was a waiver of Relator's immunity from such claims. Any other interpretation renders the coverage illusory under Section 1.B.1.a. of Policy 954.

Judge Shrum agrees with the holding of the Eastern District in Casey v. Chung regarding the legal effect of A becomes legally obligated to pay@.

Thus, it is the case law in the Eastern District of Missouri that the actions of the Fire District are covered under the Management Liability policy of the Fire District. By the case law and Sec. 537.610.1 R.S.Mo., this insurance effects a waiver of the Fire District's sovereign immunity against the Plaintiff, Donald Amick.

ii. Commercial Umbrella coverage

Although the Fire District has commercial umbrella coverage that would cover the acts alleged by Amick (LF, pp. 488 - 513), this coverage has an exclusion for A any obligation for which the insured or any company as its insurer may be held liable under: (a.) Workers=compensation law...@ (LF, p. 494). Thus, this coverage will not work as a waiver of the Fire District's sovereign immunity for Amick.

iii. MoFAD coverage

The Fire District is a member of MoFAD, a self-insurance pool (LF, p. 518). Coverage A is for all claims under the A Workers=Compensation Laws of the State of Missouri@. Since Amick's claim is one under the Workers=Compensation Laws of the State of Missouri, this coverage effectively waives the sovereign immunity of the Fire District as

against Plaintiff, Donald Amick. The policy as produced by the Fire District contains no additional exclusions or endorsements.

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. 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.

VIII. APPENDIX

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CERTIFICATE OF SERVICE

Two copies of the foregoing was hand-delivered on this 7th day of January, 2002 to:
1735 South Big Bend Blvd.
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Mr.
