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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

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**Ex parte Association of County Commissions of Alabama
Liability Self-Insurance Fund, Inc.**

PETITION FOR WRIT OF MANDAMUS

**(In re: Gerald Paulk, as personal representative of the Estate of
Amanda Nicole Foster, deceased, et al.)**

v.

Jackson County et al.)

(Jackson Circuit Court, CV-21-900059)

STEWART, Justice.

The Association of County Commissions of Alabama Liability Self-Insurance Fund, Inc. ("the Fund"), petitions this Court for a writ of mandamus directing the Jackson Circuit Court ("the trial court") to dismiss an action filed against it based on the purported immunity afforded to it as a liability self-insurance fund ("LSIF") under § 11-30-7, Ala. Code 1975. For the following reasons, we grant the petition.

Background

On January 27, 2020, a fire occurred at "Dock B," a covered dock with 36 boat slips located at the Jackson County Park. That fire resulted in fatalities, injuries, and property damage. In May 2021, ten plaintiffs¹ sued Jackson County, the Fund, and numerous other defendants asserting, among other claims, wrongful-death, negligence, and wantonness claims. Jackson County is a member of the Fund, which was created pursuant to the Liability Self-Insurance Funds Act, § 11-30-1 et

¹The plaintiffs are: Gerald Paulk, as personal representative of the Estate of Amanda Nicole Foster, deceased; Yancy Tyler Roper, as administrator of the Estate of Yancy Farrell Roper, deceased; John Sanderson; Alvin Brown; Elford Burns; Harrel Burns; Bryan McGaha; Tim Parker; Wayne Waldrop; and Devin Thomas.

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seq., Ala. Code 1975 ("the Act"). The Act provides for the creation of LSIFs by two or more counties "for the purpose of pooling resources and funds to self-insure such counties and/or their officers and employees acting in the line and scope of their employment" from claims for damages. § 11-30-1(1), Ala. Code 1975.

The plaintiffs alleged that the Fund had undertaken a duty to Jackson County, as its insured, to annually, and as otherwise necessary, "inspect and/or audit the premises of the Park and Dock B to assist in implementing and monitoring a safety program" that was intended to identify, prevent, and warn Jackson County about potential hazards, including fire-safety hazards. The plaintiffs alleged that the Fund had failed to exercise reasonable care in conducting those inspections, that it had failed to recognize the safety concerns with Dock B, and that its failures had resulted in the fatalities, injuries, and property losses suffered by the plaintiffs.

The Fund filed a motion to dismiss the claims against it, asserting that § 11-30-7 provides it immunity from such claims. That statute provides:

"No liability self-insurance fund nor the trustees thereof shall be subject to suit by any third party on account of a claim

against a member county or its officers and employees. It shall incur no liability to any party other than that authorized and contracted for under provisions of [the Act]."

§ 11-30-7. Specifically, the Fund argued that, based on the above language, the plaintiffs were barred from bringing their action against the Fund because, the Fund contended, the plaintiffs were seeking to impose liability on the Fund that it had not "authorized and contracted for." The plaintiffs responded and asserted that the Fund was not entitled to immunity under § 11-30-7 because their claims were directly against the Fund based on its own alleged independent actions and not based on Jackson County's liability.

On November 12, 2021, the trial court entered an order denying the Fund's motion to dismiss. In the order, the trial court determined that the first sentence of § 11-30-7 "authorizes a suit by a third party [against an LSIF] so long as it is not on account of a claim against a member county or its officers." The trial court concluded that, because the plaintiffs had specifically alleged that the Fund itself had committed tortious acts separate and apart from any actions of Jackson County, the first sentence of § 11-30-7 did not provide the Fund immunity. The trial court also rejected the Fund's argument that the second sentence of § 11-

30-7 immunized LSIFs from liability for their own tortious conduct. The trial court reasoned that, because the first sentence of that statute indicates that an LSIF could be liable to a third party if the action is not based on a claim against a member county, the legislature would not negate the first sentence with the inclusion of a second sentence granting such broad immunity. The trial court also opined that the phrase "shall incur no liability" in the second sentence is intended to merely limit the contractual liabilities of the Fund. The Fund filed a petition for a writ of mandamus to this Court.

Standard of Review

To be entitled to a writ of mandamus, a petitioner must demonstrate "1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court." Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993). The sole question before this Court is whether the Fund is immune from the plaintiffs' claims asserted against it. Although the denial of a motion to dismiss is generally not reviewable by a petition for a writ of mandamus, this Court will review the denial of

a motion to dismiss that is premised on the assertion of statutory immunity. See Ex parte Haralson, 853 So. 2d 928, 931 n.2 (Ala. 2003).

Discussion

The Fund argues that it is entitled to a writ of mandamus because, it asserts, § 11-30-7 grants immunity to the Fund and, therefore, the trial court should have dismissed the claims against it. The plaintiffs argue that their claims against the Fund arise from independent torts that they allege were committed by the Fund itself in connection with its inspection of the premises and, therefore, that § 11-30-7 does not apply to bar their claims against the Fund.

The first step in interpreting a statute is to ascertain and effectuate the legislative intent by looking to the plain language of the statute. League of Women Voters v. Renfro, 292 Ala. 128, 290 So. 2d 167 (1974); City of Bessemer v. McClain, 957 So. 2d 1061, 1074 (Ala. 2006). The first sentence of § 11-30-7 states that "[n]o liability self-insurance fund nor the trustees thereof shall be subject to suit by any third party on account of a claim against a member county or its officers and employees."² The

² Section 11-30-1(3), Ala. Code 1975, defines a "claim" to include:

purpose of this provision is to prohibit a claimant from bringing a direct action against an LSIF for the purpose of recovering damages for injury or damage allegedly caused to the claimant by a member county or its officers or employees. The first sentence of § 11-30-7, however, does not bar actions against an LSIF arising from the LSIF's own independent tortious conduct. See, e.g., Howton v. State Farm Mut. Auto. Ins. Co., 507 So. 2d 448, 450 (Ala. 1987) (holding that "the rule prohibiting direct actions" by a claimant against a tortfeasor's insurer does not bar suit against an insurer "where the insurer, acting independently of its insured, ... commits a tort against[] a third-party claimant"). Accordingly, we agree with the plaintiffs that the first sentence of § 11-30-7 does not entitle the Fund to immunity from claims based on its own alleged torts.

"Any claim or suit filed against a member county for money damages which any person or other entity is legally entitled to recover for damages suffered as a result of bodily injury, death or property damage caused by a negligent or wrongful act or omission committed by any employee, officer, or servant of the member county while acting within the line and scope of his or her employment under circumstances where the member county would be liable to the claimant for such damages under the laws of the State of Alabama"

The question remains, however, whether the second sentence of § 11-30-7 grants LSIFs immunity from third-party claims like those asserted by the plaintiffs in this case. That sentence provides that an LSIF "shall incur no liability to any party other than that authorized and contracted for under provisions of [the Act]." § 11-30-7. The plaintiffs contend that this provision merely limits the contractual liability that an LSIF may incur and that it is not intended to grant broad immunity to an LSIF for its own tortious conduct. In reviewing the language of the provision, however, we note that the provision begins with a broad statement of immunity -- "[an LSIF] shall incur no liability to any party" -- to which it then provides a limited exception -- "other than that authorized and contracted for under the provisions of [the Act]." The "authorized and contracted for" language plainly references the power and authority expressly granted to an LSIF by § 11-30-3, Ala. Code 1975. Pursuant to that section, LSIFs are authorized to, among other things,

"enter into contracts with member counties; establish a schedule of benefits payable; establish a schedule of charges to be collected from member counties for benefits provided; enter into contracts with solvent insurance companies authorized to do business in this state; enter into management and consultant contracts; hire attorneys and employees; and, exercise such powers and authority incident to the purposes of [the Act]."

Thus, according to the plain language of § 11-30-7, the liability of an LSIF is limited to the contractual liability that an LSIF may assume pursuant to § 11-30-3, i.e., contractual liability to member counties, solvent insurance companies, parties to management and consulting agreements, and employees and other contractual liability incident to the operation of an LSIF. Tort liability to third parties does not fall within the exception to the grant of immunity to LSIFs in § 11-30-7. Accordingly, we conclude that the plain language of § 11-30-7 bars liability against the Fund for the plaintiffs' claims arising out of the Fund's own alleged tortious conduct.³

In reaching this conclusion, we note that LSIFs are public entities supported by pooled public funds appropriated by member county governments for the purpose of providing the member counties and their employees with affordable liability coverage, and we recognize that the legislature may have determined that immunizing LSIFs from tort liability would serve to protect those public funds and the public purpose served by LSIFs. Indeed, this Court has long recognized the legislature's

³We note that the Fund may indeed be contractually obligated to indemnify Jackson County for the claims asserted against it by the plaintiffs, although we take no position on the merits of such claims.

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ability to extend immunity from tort liability to counties, municipalities, and other governmental entities. See, e.g., Jackson v. City of Florence, 294 Ala. 592, 600, 320 So. 2d 68, 75 (1975); Ex parte Birmingham Airport Auth., 274 So. 3d 964 (Ala. 2018). Furthermore, we are confident in our interpretation of § 11-30-7 in view of the nearly contemporaneously enacted Risk Management Cooperative Act, § 16-8-42.1, Ala. Code 1975. Similar in purpose to the Act, the Risk Management Cooperative Act authorizes boards of education to form risk-management cooperatives for the purpose of pooling resources and funds to provide for "risk management alternatives," § 16-8-42.1(b), and the drafters of that act used language nearly identical to the language in § 11-30-7. Indeed, like § 11-30-7, the Risk Management Cooperative Act limits the liability of a risk-management cooperative to "that authorized and contracted for under provisions of this section," § 16-8-42.1(h), but the legislature added an additional and notable exception. Section 16-8-43(h) provides, in its entirety:

"(h) No risk management cooperative nor the trustees, employees or agents thereof, shall be subject to suit by any third party on account of claim against a member board of education. It shall incur no liability to any party other than that authorized and contracted for under provisions of this section. Provided, however, that this section shall not prohibit

an action for fraud brought directly against said risk management cooperative or its agents."

(Emphasis added.) That the legislature found it necessary to include an express provision authorizing tort liability for fraud against a risk-management cooperative indicates that it viewed the preceding sentence, which is nearly identical to the second sentence of § 11-30-7, as otherwise prohibiting such liability. See Ex parte Johnson, 474 So. 2d 715, 717 (Ala. 1985) ("It is a fundamental principle of statutory construction that statutes covering the same or similar subject matter should be construed in pari materia.").

Nor do we agree with the plaintiffs that the second sentence of § 11-30-7 renders the first sentence of that statute superfluous. To the contrary, as indicated above, the first sentence provides that a claimant may not bring a direct action against an LSIF on account of a claim it has against a member county. This clarifies that Alabama's direct-action statute, § 27-23-1, Ala. Code 1975, which provides a right for a claimant to recover directly against a tortfeasor's insurer under certain circumstances, does not apply to an LSIF. Although an LSIF is not subject to a direct action brought by a third-party claimant, an LSIF may nevertheless be contractually liable to indemnify a member county for a

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claim made against the county by such a claimant, and this type of contractual liability is authorized under the second sentence of § 11-30-7.

Based on the above, we conclude that the Fund has established a clear legal right to an order dismissing the plaintiffs' claims against it.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Bryan, Sellers, Mendheim, and Mitchell, JJ., concur.

Shaw, J., concurs in the result.

Wise, J., recuses herself.