IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 10, 2008 Session

CLIFTON K. CRUTCHER, ET AL. v. MAURY COUNTY BOARD OF EDUCATION

Appeal from the Circuit Court for Maury County
No. 10143 Robert L. Holloway, Judge

No. M2007-00244-COA-R3-CV - Filed July 9, 2008

Plaintiff appeals the trial court's determination that under the Tenn. Code Ann. § 29-20-404(a) of the Tennessee Governmental Tort Liability Act, the limitation of liability in Tenn. Code Ann. § 29-20-403 applies even if there is insurance policy coverage with a greater limitation of liability since the policy did not contain an express waiver of the limitation of liability. The defendant County also appeals several determinations by the trial court regarding the admissibility of expert proof, allocation of fault, allowing proof of negligent entrustment and damages for loss of consortium. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Ann Buntin Steiner, Nashville, Tennessee, for the appellants, Clifton K. Crutcher and Katherine J. Crutcher.

Steven D. Parman, Nashville, Tennessee, for the appellee, Maury County Board of Education.

OPINION

This lawsuit arose from an automobile accident that occurred in November of 2001 between Hazel Stigger driving a Maury County school bus and Clifton Crutcher driving a pickup truck. As the result of settlements and dismissals that are not the subject of this appeal, the only claim remaining at the time of trial was a claim by Mr. and Mrs. Crutcher against the Maury County Board of Education ("Board") under the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. §

29-20-101 *et seq*. ("GTLA").[1] According to the Crutchers, the Board is liable under the GTLA for its employee's negligence and for its own negligence under the theory that the Board negligently entrusted the school bus to Ms. Stigger. The Crutchers sought to recover for Mr. Crutcher's significant personal injury and Mrs. Crutcher's loss of consortium.

Prior to trial, the trial court granted the Board's motion for partial summary judgment finding that the Crutchers' recovery against the Board is limited to $130,000 per claimant under the GTLA.

After a trial on the merits, the trial court found that the bus driver, Ms. Stigger, was 100% at fault for causing the accident. While the trial court found that the Board negligently entrusted the bus to Ms. Stigger, the Board was not held liable on that basis since the trial court also found that the Board's negligence was not the proximate cause of the accident. The trial court awarded Mr. Crutcher damages of $1.5 million and Mrs. Crutcher $150,000 but, consistent with the prior summary judgment order, the trial court limited the recovery of each to $130,000.

The Crutchers appeal the amount of their recovery. Specifically, they challenge the trial court's decision in its partial summary judgment order that limited the amount of their recovery to $130,000 each. According to the Crutchers, their recovery should not be limited since the Board carried insurance in excess of the statutory $130,000 limit. The Board, on the other hand, argues on appeal that the trial court erred in finding the Board liable under the GTLA since the trial court erred in admitting the Crutcher's expert witness, erred in allowing admission of evidence pertaining to negligent entrustment, and erred in its allocation of fault. Even if the Board is liable, the Board alternatively argues that Mrs. Crutcher's award for loss of consortium is excessive.

I. LIMITATION OF RECOVERY UNDER GTLA

In order to address the Crutchers' challenge to the trial court's finding that their recovery is limited by the GTLA, we must closely examine and interpret two of its provisions, namely Tenn. Code Ann. § 29-30-311 and Tenn. Code Ann. § 29-20-404(a). Construction of a statute is a question of law which appellate courts review *de novo*, without a presumption of correctness of the trial court's findings. *Barge v. Sadler*, 70 S.W.3d 683, 686 (Tenn. 2002); *Hill v. City of Germantown*, 31 S.W.3d 234, 237 (Tenn. 2000); *Gleaves v. Checker Cab Transit Corp., Inc.*, 15 S.W.3d 799, 802 (Tenn. 2000); *Exxonmobil Oil Corp. v. Metropolitan Government of Nashville and Davidson County*, 246 S.W.3d 31, 35 (Tenn. Ct. App. 2005).

The primary rule of statutory construction is "to ascertain and give effect to the intention and purpose of the legislature." *LensCrafters, Inc. v. Sundquist*, 33 S.W.3d 772, 777 (Tenn. 2000); *Carson Creek Vacation Resorts, Inc. v. Department of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993); *Exxonmobil*, 246 S.W.3d at 35; *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002). To determine legislative intent, one must look to the natural and ordinary meaning of the language used

[1] Technically, Maury County was a defendant in this case until it was dismissed without objection by the trial court after the trial on April 10, 2007, and the judgment was amended so that the judgment was solely against the Maury County Board of Education.

in the statute itself. We must examine any provision within the context of the entire statute and in light of its over-arching purpose and the goals it serves. *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000); *Cohen v. Cohen*, 937 S.W.2d 823, 828 (Tenn. 1996); *Exxonmobil*, 246 S.W.3d at 35; *T.R. Mills Contractors, Inc. v. WRH Enterprises,* LLC, 93 S.W.3d 861, 867 (Tenn. Ct. App. 2002). The statute should be read "without any forced or subtle construction which would extend or limit its meaning." *National Gas Distributors, Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991). As our Supreme Court has said, "[w]e must seek a reasonable construction in light of the purposes, objectives, and spirit of the statute based on good sound reasoning." *Scott v. Ashland Healthcare Center, Inc.*, 49 S.W.3d 281, 286 (Tenn. 2001) (citing *State v. Turner*, 913 S.W.2d 158, 160 (Tenn. 1995)).

Courts are also instructed to "give effect to every word, phrase, clause and sentence of the act in order to carry out the legislative intent." *Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn. 1975); *In re Estate of Dobbins*, 987 S.W.2d 30, 34 (Tenn. Ct. App. 1998). Courts must presume that the General Assembly selected these words deliberately, *Tenn. Manufactured Housing Ass'n. v. Metropolitan Gov't.*, 798 S.W.2d 254, 257 (Tenn. Ct. App. 1990), and that the use of these words conveys some intent and carries meaning and purpose. *Tennessee Growers, Inc. v. King,* 682 S.W.2d 203, 205 (Tenn. 1984); *Clark v. Crow,* 37 S.W.3d 919, 922 (Tenn. Ct. App. 2000).

When construing statutes that are part of a statutory scheme, we are also directed to look to the context of the particular provision. While discussing the interpretation of provisions in the GTLA, our Supreme Court made the following observation:

> When statutory provisions are, as in this case, enacted as part of a larger Act, 'we examine the entire Act with a view to arrive at the true intention of each section and the effect to be given, if possible, to the entire Act and every section thereof. Where different sections are apparently in conflict we must harmonize them, if practicable, and lean in favor of a construction which will render every word operative.'

Hill, 31 S.W.3d at 238 (quoting *Bible & Godwin Constr. Co. v. Faener Corp.*, 504 S.W.2d 370, 371 (Tenn. 1974)).

Under the GTLA, governmental entities[2] are immune from suit for injuries that occur due to discharge of their functions. Tenn. Code Ann. 29-20-201; *Hill*, 31 S.W.3d at 236; (citing *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 14 (Tenn. 1997)). There are, however, several statutory exceptions to this immunity. *Hill*, 31 S.W.3d at 236-37.

There is no dispute between the parties that the GTLA removed the immunity of governmental entities for injuries resulting from the negligent operation of motor vehicles by employees acting within the scope of their employment. Tenn. Code Ann. § 29-20-202. Consequently, the Board is not immune and may be liable for Mr. Crutcher's injuries resulting from Ms. Stiggers' negligent operation of the bus. The question presented to us on appeal is whether and

[2]Governmental entities are defined to mean political subdivisions of the state. Tenn. Code Ann. § 29-20-102.

to what extent the Crutchers' damages are capped by the GTLA. To make that determination we must examine Tenn. Code Ann. §§ 29-20-311 and 29-20-404(a).

Both statutes at issue were originally enacted in 1973. Tennessee Code Annotated § 29-20-311 has had no substantive amendment in the intervening thirty-five years and provides as follows:[3]

> No judgment or award rendered against a governmental entity may exceed the minimum amounts of insurance coverage for death, bodily injury and property damage liability specified in § 29-20-403, unless such governmental entity has secured insurance coverage in excess of such minimum requirements, in which event the judgment or award may not exceed the applicable limits provided in the insurance policy.

Tennessee Code Annotated § 29-20-403,[4] referenced in the quoted statute, authorizes governmental entitles to purchase insurance to cover liability arising from immunity waived by the GTLA. At the time of the accident, the minimum amount was $130,000 per claimant. Consequently, together with Tenn. Code Ann. § 29-20-311, the liability limits in Tenn. Code Ann. § 29-20-403 establish, in effect, the statutory cap on governmental entity liability under the GTLA. *Hill*, 31 S.W.3d at 237.

Tennessee Code Annotated § 29-20-404, on the other hand, has been amended since its enactment. As originally enacted in 1973, Tenn. Code Ann. § 29-20-404 provided as follows:

> SECTION 25. Liability Insurance - Provision for Waiver of Sovereign Immunity Defense and for Payments by Insurer. Every contract or policy of insurance

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[3] Tenn. Code Ann. § 29-20-311 was amended in 1976 to correct what appears to be a clerical mistake in an internal citation. *See* 1976 Pub. Acts, c. 656, § 1.

[4] Tenn. Code Ann. § 29-20-403 provides in pertinent part as follows:

> (a) Any governmental entity may purchase insurance to cover its liability under this chapter.
> (b) Every policy or contract of insurance purchased by a governmental entity as authorized by this chapter shall provide:
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> . . .
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> (2)(A) Minimum limits of not less than one hundred thirty thousand dollars ($130,000) for bodily injury or death of any one (1) person in any one (1) accident, occurrence or act and not less than three hundred fifty thousand dollars ($350,000) for bodily injury or death of all persons in any one (1) accident, occurrence or act, and in cases arising out of the ownership, maintenance and use of automobiles to a limit of not less than fifty thousand dollars ($50,000) for injury to or destruction of property of others in any one (1) accident, occurrence or act. The provisions of this subdivision (b)(2)(A) apply to any action arising on or after July 1, 1987, but before July 1, 2002; and
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> (B) Minimum limits of not less than fifty thousand dollars ($50,000), except as provided otherwise in this section, for injury to or destruction of property of others in any one (1) accident.
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> . . .
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> (c) Any governmental entity electing to self-insure its liability shall have the same limits of liability as if insurance had been purchased.

> purchased under the terms of this act shall include a provision or endorsement by which the insurer agrees not to assert the defense of sovereign immunity and to pay all sums for which it would otherwise be liable under its contract or policy of insurance. (1973 Pub. Acts, c. 345, § 25).

Thereafter, in 1985, Tenn. Code Ann. § 29-20-404 was amended to provide its current provisions:

> (a) A governmental entity or the insurer of such governmental entity shall not be held liable for any claim arising under state law for which the governmental entity has immunity under the provisions of this chapter unless the governmental entity has expressly waived such immunity. **A governmental entity or the insurer of such governmental entity shall not be held liable for any judgment in excess of the limits of liability set forth in § 29-20-403, unless the governmental entity has expressly waived such limits.** The waiver of such immunity or such limits of liability by a governmental entity shall only be valid if such waiver is expressly contained in the provisions or endorsement of a policy or contract of insurance authorized by this chapter to cover its liability under this chapter.
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> (b) The provisions of this chapter shall not be construed to prohibit or limit a governmental entity from purchasing a policy or contract of insurance in such amounts of coverage as it deems proper for liabilities which may arise under federal law. If a governmental entity has such policy or contract of insurance for liabilities which may arise under federal law, such policy or contract of insurance shall not be construed or deemed a waiver of any immunity provided in this chapter or of the limits of liability set forth in § 29-20-403, for any claims arising under state law.

As originally enacted, Tenn. Code Ann. § 29-20-404 required that any insurance under the GTLA must contain a provision that, in effect, provided that sovereign immunity was no deterrent and that the matter would proceed as if against a private party. In 1985, however, the legislature revised Tenn. Code Ann. § 29-20-404(a) which accomplished three separate purposes. First, a governmental entity and its insurer cannot be held liable for any *claim* for which it has immunity "unless the governmental entity has expressly waived such immunity." Second, a governmental entity and its insurer cannot be held liable for any judgment in *excess of the limits of liability*, *i.e.*, its statutory cap in Tenn. Code Ann. § 29-20-403 "unless the governmental entity has expressly waived such limits." Third, the statute specifies the "only" valid way a governmental entity can "expressly" waive its immunity as to claims or waive its limits of liability is that "such waiver is expressly contained in the provisions or endorsement of a policy or contract of insurance authorized by the chapter."

Tennessee Code Annotated §§ 29-20-311 and 29-20-404 are co-extensive and applicable. Tennessee Code Annotated § 29-20-404 authorizes local governments to waive their immunity and limits of liability beyond that specifically waived by the GTLA by purchasing additional insurance. In order to do so, however, the legislature required that the waiver be "express" in the policy. Tennessee Code Annotated § 29-20-404 places requirements on how a governmental entity may

elect to waive the statutory limitations. This requirement that the waiver be "expressly contained" in the policy must be read in conjunction with another part of the GTLA that requires "When immunity is removed by this chapter any claim for damages must be brought in *strict compliance* with the terms of this chapter." Tenn. Code Ann. § 29-20-201(c).

Consequently, we agree with the trial court that in order to recover for any amount in excess of the limits in Tenn. Code Ann. § 29-20-403, the waiver of limits of liability must be "expressly contained" in the insurance policy as required by Tenn. Code Ann. § 29-20-404(a). This conclusion has been reached in three other court of appeals' decisions. *See Coburn v. City of Dyersburg*, 774 S.W.2d 610, 611 (Tenn. Ct. App. 1989); *Goff v. Howell*, 01A01-9401-CV-00024, 1994 WL 317542, at *3-4 (Tenn. Ct. App. July 6, 1994) ("As we read [Tenn. Code Ann. § 29-20-404(a)] that waiver requires two things: an express waiver of the liability limits by the county *and* the inclusion of that waiver in an insurance policy covering the increased exposure. One of the two is not sufficient"); *Cline v. City of Chattanooga*, CA No. 976, 1991 WL 25941, at *3 (Tenn. Ct. App. March 4, 1991) (perm. app. denied August 5, 1991) ("absent an express provision in the liability policy as required by [Tenn. Code Ann. § 29-20-404(a)], the limits of Tenn. Code Ann. § 29-20-403 must be applied"). We also note that permission to appeal to the Tennessee Supreme Court was denied in *Coburn* and *Cline*.

Plaintiffs make several arguments in support of their position which we do not find persuasive. First, it is argued that as a specific enactment, Tenn. Code Ann. § 29-20-311 should prevail over the general Tenn. Code Ann. § 29-20-404. Plaintiffs apparently believe that since Tenn. Code Ann. § 20-29-311 applies to death, personal injury and property damage that that is somehow limiting. However, as we have discussed, Tenn. Code Ann. § 29-20-311 is not limited but has a general application. Second, plaintiffs argue that since Tenn. Code Ann. § 29-20-202 removes immunity relating to motor traffic accidents then liability is not capped. They argue that in order to cap liability after immunity has been removed, the statute must provide that immunity has been removed up to this amount, *i.e.* $130,000. As discussed earlier, GTLA removes immunity and then caps the amount recoverable. Third, plaintiffs argue that Tenn. Code Ann. § 29-20-404(a) applies only when immunity is not removed. The terms nor effect of the statute is limited as such. Also, such a limitation would ignore the second sentence in the statute applying to limitations of liability. Finally, plaintiffs argue that allowing Tenn. Code Ann. § 29-20-404(a) to limit their recovery has the effect of rendering Tenn. Code Ann. § 29-20-311 useless and inoperative. As discussed earlier, we find both statutes to be applicable.

The argument put forth by plaintiffs that gives us the most pause is the effect produced by Tenn. Code Ann. § 29-20-404(a), namely that although a governmental entity's insurance coverage includes damages resulting from such a horrific accident as occurred in this case, unless there is an express waiver of the limits of liability in the policy then the governmental entity and carrier are not responsible for the amount of the increased coverage. Nevertheless, Tenn. Code Ann. § 29-20-404(a) is quite clear and in two places employs the requirement that a governmental entity must "expressly" waive the limits of liability in Tenn. Code Ann. § 29-20-403. Clearly, the mere existence of the policy alone is insufficient. Normally, immunity is waived and limitations of liability are established by the legislature in statutes. Since the legislature authorized governmental entities in Tenn. Code Ann. § 29-20-404(a) to waive immunity for claims *and* waive the statutory

limit of liability, the legislature may have wanted to be clear that any such action by a governmental entity must be express. In any event, the legislature clearly created this requirement and we must abide by it.

Plaintiffs do not argue that the trial court misinterpreted the insurance policy at issue, so there is no dispute that the policy contains no express waiver of limitations of liability as required by Tenn. Code Ann. § 29-20-404(a). Consequently, the trial court's order on partial summary judgment limiting plaintiffs' recovery is affirmed.[5]

II. GROUNDS RAISED BY BOARD

The Board has also appealed and asserts that the trial court erred in admitting the testimony of plaintiff's expert, allowing proof of negligent entrustment, and in its allocation of fault. It is important to note that both drivers testified about the cause of the accident and the trial court found Mr. Crutcher to be a "very credible witness," while Ms. Stigger "lost credibility" with the court. Mr. Crutcher testified that he approached the curve where the accident happened at 20 miles per hour and that the bus driven by Ms. Stigger came around the curve on his side of the road. There is ample testimony by unrelated witnesses that supports Mr. Crutcher's account.

The Board alleges that admission of the plaintiffs' expert was in error. We find that whether such an admission was in error is not dispositive. The plaintiff's expert, Mr. McClanahan, testified that the bus was in Mr. Crutcher's lane at impact. This, however, was already proved by Mr. Crutcher's credible testimony and other witnesses. The trial court commented on the weight given to Mr. McClanahan's testimony:

> The testimony of three independent eye witnesses, plus the testimony of Mr. Crutcher, substantially outweighs the impeached testimony of Ms. Stigger. Although Mr. Hutchinson [the County's expert] is highly qualified as an accident reconstructionist, he did not become involved in the case until two and one-half years after the accident. The information available to him, primarily photographs taken at the scene years earlier, and the accident scene as it existed when he was hired, limit the weight of his opinions so that the Court places no more weight on his opinions than the opinions of Mr. McClanahan who was qualified to testify about the physics involved in the accident.

The rules of evidence that govern admissibility of expert proof are Tenn. R. Evid. 702 and 703. Questions governing admissibility of expert proof are left to the trial court's discretion. *McDaniel v. CSX Transportation*, 955 S.W.2d 257, 263 (Tenn. 1997); *Johnson v. John Hancock Funds*, 217 S.W.3d 414, 425-26 (Tenn. Ct. App. 2006). Under Tenn. R. App. P. 36(b), a judgment is not to be reversed unless "error involving a substantial right more probably than not affected the judgment."

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[5] In their brief on appeal, the Crutchers request a judgment against Ms. Stigger for all amounts in excess of $130,000 if they are unsuccessful in the appeal of damages. Ms. Stigger had been earlier dismissed under Tenn. Code Ann. § 29-20-310(b) which prohibits suit against an employee where the governmental entity's immunity has been waived. There is no question that immunity has been waived in this case so Ms. Stigger may not be held liable.

The trial court expressly relied on the witnesses' account and, in effect, gave little weight to the testimony of the experts presented by both sides. Consequently, we cannot find that the admission of the expert's testimony in this bench trial affected the judgment. We find no reversible error in this evidentiary ruling.

Second, the Board argues that plaintiffs should not have been able to introduce evidence pertaining to the Board's negligent entrustment of the bus to Ms. Stigger. While the trial court heard testimony of complaints about Ms. Stiggers' driving, which might support the conclusion that Ms. Stigger was a poor driver, the trial court's order is clear that it relied on evidence about this particular accident in finding and allocating fault. Consequently, since the trial court's order was clear on this issue and no liability was placed on the Board as a result, we find the under Tenn. R. App. P. 36(b), quoted above, that the admission of such evidence, even if erroneous, does not constitute reversible error.

Third, the Board argues the trial court erred in its allocation of fault. This case presented a classic "he said, she said" wherein the trial court clearly found one credible witness and the other not credible. As mentioned previously, there was ample evidence to support Mr. Crutcher's version of the accident. We do not find the trial court erred in its allocation of fault.

Finally, the Board argues that Mrs. Crutcher's loss of consortium damages were excessive. When reviewing nonjury verdicts, unless the evidence preponderates against the trial court's findings, we are required to affirm the trial court's decision unless there is an error of law. Tenn. R. App. P. 13(d); *Thurmon v. Sellers*, 62 S.W.3d 145, 163 (Tenn. Ct. App. 2001). Based upon the record before us, there was ample evidence presented to the trial court from which it could assess the damages awarded.

The trial court's findings on the merits of this dispute were thoughtful, lengthy and clear. The trial court is affirmed and the costs of this appeal are assessed against the Maury County Board of Education, for which execution may issue if necessary.

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PATRICIA J. COTTRELL, P.J., M.S.