IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
October 17, 2003 Session

AMY BUTTERWORTH, ET AL. v. JOHN BUTTERWORTH, ET AL.

Direct Appeal from the Circuit Court for Dyer County
No. 02-02 Lee Moore, Judge

No. W2003-00983-COA-R3-CV - Filed December 29, 2003

This lawsuit arises from an accident in which a minor child sustained injuries while assisting his father at father's workplace. The child's mother brought this action as next of kin against the child's father and father's employer. The trial court awarded summary judgment to Defendants based on the doctrine of parental immunity. We reverse and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed; and Remanded

DAVID R. FARMER, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Marvin A. Bienvenu, Jr., and Shannon D. Elsea, Memphis, Tennessee, for the appellant, Amy Butterworth, Individually and as Mother and Next of Kin of Stephen Butterworth, a Minor.

Allan B. Thorp, Memphis, Tennessee, for the appellees, John Butterworth and Chic Transportation, LLC.

OPINION

This appeal concerns the scope and application of the parental immunity doctrine. This Court must determine whether, as a matter of law, a parent is immune from liability for negligence where his minor child sustained injuries while assisting the parent with employment related activities at the parent's place of employment. We hold the parental immunity doctrine will not protect the parent from liability under these circumstances.

On May 5, 2001, Stephen Butterworth (Stephen), then age 17, was injured at John Butterworth's ("Father's") place of employment while assisting Father in servicing a semi-truck owned by Father's employer, Chic Transportation, Inc. ("Chic Transportation"). Stephen was lying under the jacked up semi-truck greasing the fittings while Father was changing the tires. Father did not use jack stands. While the tires were off the truck, the truck fell off the jacks, crushing Stephen's foot. Part of Stephen's foot was amputated as a result of injuries sustained in the accident.

Amy Butterworth ("Mother"), individually and as next of kin of Stephen, filed suit against Father and Chic Transportation (collectively, "Defendants"). In her complaint, Mother alleged Defendants failed to maintain the safety of their equipment and failed to ensure the truck was properly secured. Mother further alleged Defendants knew, or in the exercise of ordinary reasonable care should have known, that a dangerous and defective condition existed, and that they failed to correct this condition. She also alleged Defendants were negligent in allowing Stephen to be under the truck as instructed by Father.

Defendants moved for summary judgment, asserting the claim was barred by the doctrine of parental immunity. The trial court granted their motion, holding Father was immune from suit and that Father's immunity was imputed to Chic Transportation. Mother now appeals to this Court.

Issues Presented

Mother raises the following issues, as we restate them, for our review:

(1) Whether the doctrine of parental immunity bars suit against Father where Stephen sustained injuries while assisting Father at Father's workplace.

(2) Whether parental immunity can be imputed to Chic Transportation.

(3) Whether Chic Transportation negligently permitted a non-employee to enter a work area.

Chic Transportation asserts Mother impermissibly raises issue number three for the first time on appeal.

Standard of Review

A trial court should award summary judgment only when the moving party can demonstrate that there are no disputed issues of material fact, and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993). The moving party must affirmatively negate an essential element of the non-moving party's claim, or conclusively establish an affirmative defense. *McCarley v. West Quality Food Serv.*, 960 S.W.2d 585, 588 (Tenn. 1998).

When a party makes a properly supported motion for summary judgment, the burden shifts to the non-moving party to establish the existence of disputed material facts. *Id.* Mere assertions that the non-moving party has no evidence does not suffice to entitle the moving party to summary judgment. *Id.* In determining whether to award summary judgment, the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Staples v. CBL & Assocs.*, 15 S.W.3d 83, 89 (Tenn. 2000). The court should award summary judgment only when a reasonable person could reach only one conclusion based on the facts and inferences drawn from those facts. *Id.* Summary judgment is not appropriate if there

is any doubt about whether a genuine issue of material fact exists. *McCarley*, 960 S.W.2d at 588. We review an award of summary judgment *de novo*, with no presumption of correctness afforded to the trial court. *Guy v. Mut. of Omaha Ins. Co.*, 79 S.W.3d 528, 534 (Tenn. 2002).

Analysis

In Tennessee, the doctrine of parental immunity once served as an absolute bar against actions for injuries to a minor child caused by a parent's negligence. *Barranco v. Jackson*, 690 S.W.2d 221 (Tenn. 1985)(Brock and Drowota, JJ., dissenting), overruled by *Broadwell v. Holmes*, 871 S.W.2d 471 (Tenn. 1994); *McKelvey v. McKelvey*, 77 S.W. 664 (Tenn. 1903), overruled by *Broadwell v. Holmes*, 871 S.W.2d 471 (Tenn. 1994). In 1994, however, the Tennessee Supreme Court substantially modified the doctrine to reflect the realities of modern life. *Broadwell v. Holmes*, 871 S.W.2d 471 (Tenn. 1994). The *Broadwell* court held that the Tennessee doctrine of parental immunity would henceforth be "limited to conduct that constitutes the exercise of parental authority, the performance of parental supervision, and the provision of parental care and custody." *Id.* at 476-77. The *Broadwell* court accordingly held that the operation of an automobile under the circumstances in that case did not constitute protected conduct under the newly enunciated standard. *Id.* at 477. *Broadwell* specifically overruled *McKelvey*, *Barranco*, and all other cases conflicting with this standard. *Id.*

Thus, in Tennessee, the modern parental immunity doctrine is limited to situations where the question is one involving parental duties and the exercise of parental authority, supervision, or control. The modified doctrine preserves constitutionally protected parental discretion, while promoting the policy of this state that disfavors immunity from liability for negligence. *Fain v. O'Connell*, 909 S.W.2d 790, 794 (Tenn. 1995)(declining to adopt the doctrine of imputed contributory negligence among members of an unincorporated association based on the legal form of the organization rather than the actual degree of fault of the members). Parents, therefore, are not immune from liability for negligence in circumstances outside the context of parental duties.

Under the standard adopted by the Tennessee Supreme Court in *Broadwell*, Father is not immune from liability under the circumstances of this case. The *Broadwell* standard compels a holding that the parental immunity doctrine is not applicable where injuries to a child result from the parent's employment or business related activities. As in other states which recognize a modified parental immunity doctrine, we hold that in Tennessee, a parent is not immune from liability where the alleged negligence is in the performance of employment related activities. *See, e.g., Bonin v. Vannaman*, 929 P.2d 754, 776 (Kan.1996); *Dzenutis v. Dzenutis*, 512 A.2d 130, 136 (Conn. 1986); *Felderhoff v. Felderhoff*, 473 S.W.2d 928, 933 (Tex. 1971); *Trevarton v. Trevarton*, 378 P.2d 640, 642 (Colo 1963); *Signs v. Signs*, 103 N.E.2d 743, 748-49(Ohio 1952); *Borst v. Borst*, 251 P.2d 149, 157 (Wash. 1952); *Worrell v. Worrell*, 4 S.E.2d 343, 350 (Va. 1939).

In this case, Stephen sustained injuries while assisting Father in performing maintenance on a semi-truck at Father's place of employment. Father was not engaged in the exercise of *parental* authority, supervision, or control when Stephen was injured. Rather, Father was engaged in

performance of his employment-related duties. Father's decisions not to use jack stands and to instruct Stephen to work beneath the truck while the tires were off were not matters of parental discretion, but professional determinations. If Father was negligent, that negligence was business related and not a matter of discretion in the performance of parental duties. Therefore, Father is not immune from liability in this case.

We accordingly reverse the trial court's award of summary judgment to Defendants based on the doctrine of parental immunity. Other issues are pretermitted. This cause is remanded for further action consistent with this opinion. Costs of this appeal are taxed to the appellees, John Butterworth and Chic Transportation, Inc.

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DAVID R. FARMER, JUDGE