IN THE COURT OF APPEALS OF TENNESSEE

REBECCA MOSES, ET AL.	:	HAMILTON CIRCUIT
	:	03A01-9505-CV-00153
Plaintiffs-Appellants	:	
	:	
	:	
vs.	:	HON. SAMUEL H. PAYNE
	:	JUDGE
	:	
	:	
ERLANGER MEDICAL CENTER	:	
	:	
Defendant-Appellee	:	AFFIRMED AND REMANDED

DAIL R. CANTRELL, WITH CANTRELL, PRATT & VARSALONA, OF CLINTON, TENNESSEE, FOR APPELLANTS

ROBERT J. BOEHM and MARK A. RAMSEY, WITH SPEARS, MOORE, REBMAN & WILLIAMS, OF CHATTANOOGA, TENNESSEE, FOR APPELLEE

O P I N I O N

Sanders, Sr.J.

The Plaintiffs have appealed from a summary judgment dismissing their respective complaints alleging the Defendants tortious acts constituted outrageous conduct.

This appeal is from the action of the trial court in dismissing three separate suits which had been consolidated for trial and are consolidated on this appeal. The Plaintiffs-Appellants, Rebecca Moses and husband, Luke Moses, Brenda Stinnett and husband, Howard Lee Stinnett, and Margaret Tuggle and Linda Slack filed three separate complaints against Defendant-Appellee Erlanger Medical Center alleging the Defendant was guilty of tortious acts constituting outrageous conduct resulting in damages to each of them from mental anguish. It should be noted the Plaintiffs, Margaret Tuggle, Linda Slack and Brenda Stinnett are sisters of Plaintiff Rebecca Moses. It should also be noted the Defendant is a governmental hospital authority created pursuant to Chapter 297 of the Private Acts of Tennessee of 1976 as amended by chapter 125 of the Private Acts of Tennessee of 1977, by chapter 80 of the Private Acts of 1985 and Chapter 99 of the Acts of 1985. See **Johnson v. Chattanooga-Hamilton County Hospital Authority**, 749 S.W.2d 36, 37 (Tenn. 1988).

The three complaints, as filed, are virtually the same as to their allegations against the Defendant. We quote, as pertinent, from one of the complaints which mirrors the other two complaints:

> "3. That this Complaint arises out of an action that occurred in the City of Chattanooga, Hamilton County, Tennessee.
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> "4. That on or about June 17, 1992, Mrs. Rebecca Moses delivered a stillborn son in the maternity ward of the Erlanger Medical Center. Dr. Paul E. Snyder was the attending physician and Mrs. Moses was in her twenty-seventh week of pregnancy.
>
> "5. That on or about June 17, 1992, an agent employee of the Erlanger Medical Center named Gloria, informed the plaintiffs that they could save the transportation cost back to Anderson County, Tennessee, where the family cemetery is located, if they would transport the stillborn infant themselves. This employee of the Erlanger Medical Center instructed the plaintiffs to go to the Health Department and

get a transit report, and that after this was done the body would be placed in the morgue.

"6. The agent employee of Erlanger Medical Center instructed the plaintiffs that when they were ready to transport the body back to Anderson County, hospital security would go to the morgue and place the stillborn infant in the automobile of the plaintiff's sisters.

"7. The agent employee of the Erlanger Medical Center informed the plaintiffs the stillborn infant would be placed in a box like container, suitable for transportation, and that the hospital would prepare the body for transit.

"8. That on or about the morning of June 18, 1992, when the sisters of the plaintiff were ready to transport the infant back to the burial grounds in Anderson County, Tennessee, an employee of the hospital instructed the sisters of the plaintiff to be at the hospital at 9:00 a.m., and to let Gloria know when they were ready to leave.

"9. When the sister of the plaintiff arrived at the hospital the agent employee of the hospital named Gloria was nowhere to be found. The sisters of the plaintiff were instructed by another agent employee of the Erlanger Medical Center that a transit report from the Health Department was not necessary, however, the sisters of the plaintiff insisted that one be filled out and signed.

"10. The sisters of the plaintiff were instructed to go to the nurses station where the morgue was contacted and informed that they were on their way to receive the stillborn infant.

"11. The plaintiff's sisters were instructed to drive around to the Emergency Room entrance at the side of the hospital.

"12. When the plaintiff's sisters arrived at the Emergency Room entrance, another agent employee of Erlanger Medical Center, a security guard, had the plaintiff's sisters pull their car over to the side. Ms. Linda Slack, one of the plaintiff's sisters, and Mrs. Brenda Stinnett, another of the plaintiff's sisters, were instructed by the security guard to follow him into the building next to the Emergency Room.

"13. The security guard opened one door and instructed Mrs. Slack and Mrs. Stinnett to follow him into the building.

"14. Mrs. Slack proceeded through the building, and was directed to a little bassinet, resembling the ones in the hospital nursery, where there was a bundle wrapped in a receiving blanket with a note taped to the blanket.

"15. The agent employee of the hospital, who had escorted the plaintiff's sisters to the body, instructed them to pick up the corpse, which was not packaged in any sort of container, but was lying open in the bassinet with nothing more than a receiving blanket to cover the flesh.

"16. The agent employee of the hospital instructed the plaintiff's sisters, that either her [sic] or Mrs. Stinnett would have to sign for the corpse. Mrs. Stinnett then took the stillborn child, which was still wrapped in a receiving blanket, back through the morgue, past the Emergency Room entrance, to their waiting vehicle.

"17. On the two hour and fifteen minute drive to Anderson County, the stillborn infant began to emit a horrible odor, which filled the automobile.

* * *

"20. The plaintiffs aver that the actions of the defendant's agent, amounted to the intentional infliction of emotional distress.

"21. The plaintiffs aver that the actions of the defendant's agents amounted to outrageous conduct.

` "22. Due to intentional infliction of emotional distress on the part of the defendant, through its employees and agents, and the outrageous conduct on behalf of the defendant, through its employees and agents, the plaintiffs have suffered permanent and severe emotional injuries and damages."

The Plaintiffs asked for compensatory and punitive damages.

The Defendant, for answer, said that although the Defendant was referred to in the pleadings as "Erlanger Medical Center", it was, in fact, "Chattanooga-Hamilton County Hospital Authority" which owned and operated a hospital known as Erlanger Medical Center and lawsuits brought against it are governed and controlled by the Tennessee Governmental Tort Liability Act, TCA § 29-20-101, et seq. It denied it agreed to assist the Plaintiffs in any way with transporting the corpse from Chattanooga to Anderson County. It denied it agreed to prepare the body for shipment or to place it in a box or container. It denied in general all allegations in the complaint except that Mrs. Moses gave birth to a stillborn baby in the hospital. It denied any of its employees had any authority to make any agreement on behalf of the hospital with reference to the preparation of the body for transportation or assistance in the transportation of the body. The Defendant plead immunity from liability under the Tennessee Governmental Tort Liability Act and specifically immunity under TCA § 29-20-205 of the Act.

After discovery depositions were taken, the Defendant filed a motion to dismiss each of the complaints based on the pleadings pursuant to Rule 12, TRCP, or for summary judgment pursuant to Rule 56, TRCP. In support of its motions, it relied upon the complaints, the depositions of the Plaintiffs, answers of Plaintiffs to interrogatories and a letter written by Plaintiff Brenda Stinnett to the director of the Defendant Hospital.

The Plaintiffs, for response to the motion, relied upon the same documents as the Defendant except the provisions of the Tennessee Governmental Tort Liability Act.

In the interim, Plaintiff Howard Lee Stinnett, husband of Plaintiff Brenda Stinnett, entered a nonsuit.

Upon the hearing of the motion to dismiss/or summary judgment, the court granted the motion for summary judgment and dismissed the complaints.

Defendants have appealed, saying the court was in error. We cannot agree, and affirm for the reasons hereinafter stated.

In the order sustaining the motion for summary judgment, the court did not state the basis for his determination of the case. In our review of the record, we find there were three reasons why the court would have been justified in sustaining the motion for summary judgment.

We first consider the insistence of the Defendant that since the Plaintiffs' only claim for damages results from mental anguish inflicted upon them as a result of the

Defendant's acts, it is immune from suit pursuant to TCA § 29-20-205(2). TCA § 29-20-205, as pertinent here, provides:

> **Removal of immunity for injury caused by negligent act or omission of employees - exceptions.**
> Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment except if the injury:
> (1) Arises out of the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
> (2) Arises out of false imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights; .... (Emphasis ours.)

The application of this exclusion was addressed by this court in the case of **Lockhart v. Jackson-Madison County General Hospital**, 793 S.W.2d 943 (Tenn.App.1990). In **Lockhart**, the parents brought suit against the county hospital seeking damages resulting from their child's abduction from the hospital. They averred that upon learning of the disappearance of the child they became upset, resulting in emotional and mental damage and trauma to them, resulting in permanent physical damage to them. The chancellor dismissed the complaint and the parents appealed. In affirming the chancellor, this court said:

> [W]e find it significant that the legislature, knowing...specifically made provisions in the act that governmental immunity would not be removed for any injury arising out of "infliction of mental anguish." The language of the statute is clear and unambiguous that the legislature did not remove governmental immunity for any injury which arises out of mental anguish. We believe the plain language of the statute justifies no other construction of the legislature's intent.

The second reason the court was justified in granting summary judgment is that the complaints as filed do not allege the acts or omissions of the employees of the hospital responsible for their injuries were within the scope of his or her employment. The complaints refer to "an agent employee of Erlanger Medical Center named Gloria" and "another agent employee of Erlanger Medical Center, a security guard". The hospital, in its answer, denied any of its employees had authority to make an agreement on its behalf with reference to preparing the body for transportation or assisting in the transportation of the body.

This issue was addressed in the case of **Gentry v. Cookevill General Hospital**, 734 S.W.2d 337 (Tenn.App.1987). In **Gentry**, suit was brought against the hospital and attending physicians for injuries to a minor on the occasion of her birth. One of the reasons for the court's granting summary judgment was "the physicians were not agents of the city and the complaint failed to state any cause of action against the city other than the negligence of the physicians". In affirming the trial court, this court said, as pertinent, at 339:

> Said Act, T.C.A. § 29-20-201, provides in pertinent part as follows:
>
> > General rule of immunity from suit - Exception. - (a) Except as may be otherwise provided in this chapter, all governmental entities shall be immune from suit for any injury which may result from the activities of such governmental entities wherein such governmental entities are engaged in the exercise and discharge of any of their functions, governmental or proprietary.
> >
> > ***
> >
> > (c) When immunity is removed by this chapter any claim for damages must be brought in strict compliance with the terms of this chapter.
>
> T.C.A. § 29-20-205 provides in pertinent part:
>
> > ... Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of <u>any employee within the scope of his employment....</u> (Emphasis in **Gentry**.)
>
> [1] A complaint against a governmental entity for tort must overtly allege that the tort was committed by an employee or employees of the governmental entity within the scope of his or their employment. A complaint which does not so state does not state a claim for which relief can be granted because the action is not alleged to be within the class of cases excepted by the statute from governmental immunity.
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> [2] The complaint, as amended by the dismissal of the individual defendants, does not state a claim for which relief can be granted against the City.

<u>Also</u> <u>see</u> **Lockhart v. Jackson-Madison County General Hospital**, 793 S.W.2d 943, 946 (Tenn.App.1990).

The third reason the trial court was warranted in sustaining the Defendant's motion was the Plaintiffs failed to state a cause of action in their complaints for outrageous conduct. The landmark case in this jurisdiction addressing an action for outrageous conduct is **Medlin v. Allied Investment Company**, 398 S.W.2d 270 (Tenn.1966). The court, speaking through Chief Justice Burnett, quoted with approval as follows, at 274:

> <u>Extreme and Outrageous Conduct</u>.

> The cases thus far decided have found liability only where the defendant's conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct is characterized by "malice", or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly untolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous."

The court then stated:

> From the foregoing portion of the Restatement, we find the two factors which must concur in order to outweigh the policy against allowing an action for the infliction of mental disturbance: (a) the conduct complained of must have been outrageous, not tolerated in civilized society, and (b) as a result of the outrageous conduct, there must be serious mental injury;....

In finding the plaintiffs' declaration was insufficient to state a cause of action for outrageous conduct, the court said at 275:

> The declaration of the plaintiffs is insufficient because the plaintiffs have not alleged a course of conduct on the part of the defendant which could be classed as outrageous. It is not enough in an action of this kind to allege a legal conclusion; the actionable conduct should be set out in the declaration.

It will be observed from the allegations of the Plaintiffs' complaints quoted above that "plaintiffs have not alleged a course of conduct on the part of the defendant which could be classed as outrageous." The Plaintiffs have alleged a legal conclusion. The actionable conduct of the Defendant has not been set out.

In the case of **Swallows v. Western Electric Company, Inc., and Pinkerton's, Inc.**, 543 S.W.2d 581 (Tenn.1976) the plaintiff filed an action, as pertinent, charging the defendants were guilty of "outrageous conduct". The defendants filed a motion to dismiss, contesting the sufficiency of the complaint. The trial court dismissed the complaint. On appeal, the supreme court affirmed. In doing so, the court, speaking through Chief Justice Cooper, said, at 582, 583:

> Liability for the tort of "outrageous conduct" exists only where (1) the conduct of the defendants has been so outrageous in character, and so extreme in degree, as to be beyond the pale of decency, and to be regarded as atrocious and utterly intolerable in a civilized society, and (2) the conduct results in serious mental injury. (Citations omitted.)
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> * * *
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> The Tennessee Rules of Civil Procedure, while simplifying and liberalizing pleading, do not relieve the plaintiff in a tort action of the burden of averring facts sufficient to show the existence of a duty owed by the defendant, a breach of the duty, and damages resulting therefrom. The complaint in this action is replete with conclusions couched in the language of **Medlin**, supra, but does not undertake to describe the substance and severity of the conduct of appellee's employees which allegedly amounted to harassment, nor the substance and severity of the conduct of Pinkerton in its investigations, nor the actions of Western Electric in attempting to discipline appellant. And, as was pointed out in **Medlin** "it is not enough in an action of this kind to allege a legal conclusion; the actionable conduct should be set out in the [complaint]," supra 398 S.W.2d at page 275. This is so because the court has the burden of determining, in the first instance, whether appellees' conduct may reasonably be regarded as so extreme and outrageous as to permit recovery or whether the conduct is such as to be classed as "mere insults, indignities, threats, annoyances, petty oppression, or other trivialities," for which appellees would not be liable. See comments to § 46 of the Restatement of Torts, Second.

The decree of the chancellor is affirmed. The cost of this appeal is taxed to the Appellants and the case is remanded to the trial court for the collection of cost.

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Clifford E. Sanders, Sr.J.

CONCUR:

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Houston M. Goddard, P.J.

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Herschel P. Franks, J.