

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

**FILED**  
September 25, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

WILLIAM HOLLIFIELD, et ux,	)	C/A NO. 03A01-9605-CV-00172
et al.,	)	
	)	HAMLEN LAW
Plaintiffs-Appellees,	)	
v.	)	HON. WILLIAM JENKINS,
	)	JUDGE
	)	
CITY OF MORRISTOWN,	)	AFFIRMED AS MODIFIED
	)	AND
Defendant-Appellant.	)	REMANDED

JAMES M DAVIS, Morristown, for Plaintiffs-Appellees, William Hollifield, et ux.

JOHN C. DUFFY, WATSON, HOLLOW and REEVES, P.L.C., Knoxville, for Defendant-Appellant.

O P I N I O N

Franks. J.

In this wrongful death action against the City of Morristown (?City?) filed pursuant to the Governmental Tort Liability Act, T.C.A. §29-20-101, *et seq.* (?GTLA?) the Trial Judge entered judgment against the City and another defendant, finding the City 25% at fault for the accident. The Court also awarded discretionary costs to the plaintiff, on the authority of Tennessee Rules of Civil Procedure 54.04, which

states:

**54.04. Costs.** - (1) Costs included in the bill of costs prepared by the clerk shall be allowed to the prevailing party unless the court otherwise directs, but costs against the state, its officers, or its agencies shall be imposed only to the extent permitted by law.

(2) Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions or trials, and guardian ad litem fees; travel expenses are not allowable discretionary costs. Subject to Rule 41.04, a party requesting discretionary costs shall file and serve a motion within thirty (30) days after entry of judgment. The trial court retains jurisdiction over a motion for discretionary costs even though a party has filed a notice of appeal.

The City has appealed, insisting that it is not subject to the payment of discretionary costs, relying heavily on an unreported case of this Court, *Tennessee Small School Systems, et al., v. Ned Ray McWhorter, et al.*, Court of Appeals, Middle Section, filed August 4, 1993. Judge Lewis in that case held that T.R.C.P. Rule 54.04(2), only authorizes the trial court to award discretionary costs in general terms, and since the Rule does not specifically authorize discretionary costs to be assessed against the State where immunity has not been removed, the State is not liable for such costs.

We agree with Judge Lewis' decision, but it does not control the case before us. The *McWhorter* case was a declaratory judgment<sup>1</sup> proceeding and the issue of

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<sup>1</sup>In declaratory judgment cases T.C.A. §29-14-111 provides: ...?the court may make such award of costs as may seem equitable and just [Acts 1923 Ch. 9.]?

discretionary costs before the Lewis Court was presented with the full force of sovereign immunity applying to all aspects of that litigation.

As noted, the case before us was brought pursuant to the Governmental Tort Liability Act which waives the State's sovereign immunity, but limits damages recoverable thereunder. The Act does not mention "costs" or "discretionary costs". The Act also provides that where immunity from suit is removed by the Act, the entity is placed in the position of "a private person". T. C. A. §29-20-206.

In the recent case of *Lucius, et al., v. City of Memphis*, \_\_\_ S.W2d \_\_\_, filed July 15, 1996, the Supreme Court held that municipalities are liable for post-judgment interest on judgments rendered under the GTLA. The issue arose because the GTLA allows post-judgment interest if payments were made in installments but does not mention interest for lump sum payments. T. C. A. §29-20-312. The Supreme Court found that despite the lack of a specific provision in the GTLA for post-judgment interest in non-installment payment situations, the Tennessee statute providing generally for interest on "every" judgment would control. The court concluded that because the general interest provisions of the Tennessee Code "do not conflict with specific provisions of GTLA, its structure, purpose, or intent, [they] apply to actions brought under the GTLA." The Court also stated that this decision was "in accord with recent decisions refuting the sweeping notion that the GTLA necessarily excludes the application of all other rules and statutes not specifically made a part of the GTLA even absent

statutory conflict or undermining of the purposes of the  
GTLA ?

We hold that since governmental immunity was waived,  
the provisions for costs contained in T.R.C.P. 54.04(1) and  
(2) apply to actions filed under this Act, which is in keeping  
with the Supreme Court's decision that the general law as to  
interest on judgment applied to judgments under the GTLA.

Alternatively, the City argues that since the co-  
defendant's negligence was found to be 75% ?at fault? for  
plaintiff's injuries, and this defendant only 25%, the Trial  
Court was in error in awarding 100% of the discretionary costs  
against this defendant. Plaintiff counters that the  
discretionary costs were properly assessed against ?the party  
making defense to this litigation?.

It has been held that adjudging cost is within the  
?reasonable? discretion of the Judge. *State v. Flatt, et al.*,  
505 S.W2d 724 (Tenn. 1974); *Runi ons v. Runi ons*, 186 Tenn. 25,  
207 S.W2d 1016 (1948).<sup>2</sup> Applying this standard, on the facts  
of this case we believe the Trial Judge abused his reasonable  
discretion. Both defendants were required to respond in  
damages and to assess all costs to one defendant was an abuse.  
We reject the argument that in every case where comparative  
fault is determined that costs must be precisely based on the  
degree of fault of each defendant. We hold that a reasonable  
assessment of costs is one-half to each defendant.

The judgment of the Trial Court is affirmed, as

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<sup>2</sup>This discretion was carried forward in the rule: ?costs included . . .  
by the Clerk shall be allowed to the prevailing party unless the court  
otherwise directs . . .? (emphasis added).

modified, and the cost of the appeal is assessed one-half to each party.

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Herschel P. Franks, J.

CONCUR:

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Houston M. Goddard, P. J.

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Charles D. Susano, Jr., J.