IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

FILED

December 17, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

THELMA AILOR, EARL AILOR and PAM AILOR	)	UNION COUNTY
	)	03A01-9605-CV-00158
Plaintiffs-Appellees/ Cross-Appellants	)	
	)	HON. CONRAD E. TROUTMAN, JR. JUDGE
v.	)	
CITY OF MAYNARDVILLE	)	
Defendant-Appellant/ Cross-Appellee	)	AFFIRMED AND REMANDED

JON G. ROACH OF KNOXVILLE FOR CITY OF MAYNARDVILLE

LINDA J. HAMILTON MOWLES OF KNOXVILLE FOR THELMA AILOR, EARL AILOR and PAM AILOR

OPINION

Goddard, P.J.

This is an appeal from a judgment entered by the Union County Circuit Court in a case arising from the failure of the Defendant to repair the damage to the Plaintiffs' home caused by the blockage of a sewer line. Plaintiffs Thelma, Earl, and Pam Ailor filed suit against Defendant City of Maynardville on

September 29, 1992, for breach of implied contract or contract by estoppel and for negligence under the Governmental Tort Liability Act.

A bifurcated trial was held March 7, 8, and 9, 1995. The parties argued the contract issue before a jury and argued the negligence issue under the Governmental Tort Liability Act before the Trial Judge. The jury returned a verdict as to the contracts issue in favor of the Plaintiffs for $40,653.10. On June 9, 1995, the Defendant filed a motion for a directed verdict, or, in the alternative, for vacating the judgment and granting a new trial. On March 4, 1996, the Court overruled the Defendant's motion, dismissed the Plaintiffs' negligence claim, and upheld the jury's award of $40,653.10.

The Defendant appeals the denial of its motion. In the event this Court reverses the jury verdict, the Plaintiffs cross-appeal the Court's dismissal of their negligence claim.

On February 2, 1992, a sewage back-up in one of the Defendant's sewer lines caused raw sewage to flood the Plaintiffs' home for almost three hours. Von Richardson, the Defendant's City Manager at the time, went to the Plaintiffs' home the day after the incident to speak with Mr. Ailor. Mr. Richardson testified that he came to the Plaintiffs' home as a representative of the Defendant, observed the damage caused by the sewage, and told Mr. Ailor to fix the house at the expense of

the Defendant. Mr. Richardson did not give the Plaintiffs any limitation on the amount needed to repair the home. While no formal action was taken at the City Council meeting, according to Mr. Richardson the Commissioners did discuss the damage to the Plaintiffs' home and agreed that the Defendant should pay for it.

Mr. Ailor contacted three of the five City Commissioners to discuss and confirm that he would be compensated for any repairs needed to restore the home. Mr. Ailor testified that he did not contact the other two Commissioners because of his belief that they were incapacitated due to poor health. Although the parties disagree as to whether the Commissioners explicitly agreed to pay for the damages to the Plaintiffs' home, the Commissioners did acknowledge telling the Plaintiffs that they would be willing to work with them on fixing the problem.

Based on the conversations with Mr. Richardson and the Commissioners, the Plaintiffs spent over $37,000 on repairing their home. In April of 1992, the Commissioners instructed the City Attorney to get an itemized list of damages from the Plaintiffs. Mr. Ailor told the City Attorney that he had obtained counsel to handle the incident. The Plaintiffs' counsel sent two letters in June and July 1992 to the City Manager who, at that time, was Russell Gillenwater. These letters outlined the Plaintiffs' claim for damages, including a list of expenses, and asked the City Manager to inform the Plaintiffs' counsel about what action would be taken by the Defendant to remedy this

claim. City Manager Gillenwater never gave the letters to the City Attorney, and the Defendant never paid the Plaintiffs for their repairs.

The Defendant presents the following issues, which we re-state:

> I. Whether the Trial Court erred in denying the Defendant's motion for directed verdict or, alternatively, for a new trial on the Plaintiffs' claim for breach of contract because the Plaintiffs failed to establish a contractual relationship.
>
> II. Whether the Trial Court erred in failing to grant a mistrial due to repeated references by the Plaintiffs' counsel and witnesses to the existence of liability insurance.

In the event this Court reverses the jury's verdict, the Plaintiffs present the following issue, which we also re-state:

> I. Whether the Trial Court erred in dismissing the Plaintiffs' claim under the Governmental Tort Liability Act.

The standard of review for a jury verdict approved by the Trial Court is the material evidence standard as set forth in Rule 13(d) of the Tennessee Rules of Appellate Procedure. This Court will set aside the jury's verdict only if no material evidence exists to support it. We find that material evidence in the record supports the jury verdict and that the Trial Court did not abuse its discretion in not granting a mistrial due to

testimony regarding liability insurance. Because we affirm the jury verdict, this Court does not reach the issues raised by the Plaintiffs.

The Plaintiffs argue that the Defendant is estopped from denying the existence of a contract because the City Manager and several City Commissioners told the Plaintiffs that the Defendant would pay for the repairs knowing that the Plaintiff would rely on these representations. The Defendant argues that, while the Defendant had the power to contract with the Plaintiffs, no contract existed because the action of Mr. Richardson as City Manager was not a valid exercise of the Defendant's power to contract. The Defendant further argues that estoppel should not apply because the Plaintiff is responsible for ascertaining any limitations of the Defendant's power to contract. Since the contract was not entered into during a session duly assembled, the Defendant contends the contract was ultra vires. Finally, the Defendant asserts that equitable estoppel should not apply because the Plaintiff suffered no harm by making the repairs and because the Defendant gained no benefit.

Generally, persons contracting with the officers of a municipal corporation do so at their own risk and are deemed on notice of the powers that the corporation has to enter into such contracts. City of Lebanon v. Baird, 756 S.W.2d 236 (Tenn. 1988). Indeed, the doctrine of equitable estoppel generally does

not apply to the acts of public officials except under "very exceptional circumstances." Bledsoe County v. McReynolds, 703 S.W.2d 123 (Tenn. 1985). However, as an exception to the general rule, where an innocent third party has been induced by and reasonably relied on the unauthorized acts of an agent of a municipality, the municipality may not intentionally rely on the fact that the acts were unauthorized to avoid its obligations. Whether equitable estoppel or implied contract should apply is determined on a case by case basis and depends on the facts and equities of the particular case. City of Lebanon v. Baird, supra.

For the doctrines of equitable estoppel or implied contract to apply to a municipality, the contract must have been ultra vires due to the fact that it was not entered into in the appropriate manner. Additionally, the contract must have been executed. Tennessee law recognizes two distinct forms of ultra vires municipal acts. The first, which occurs where a municipality lacked the power to perform the action, is void and not subject to equitable estoppel. The second, which occurs where the municipality had the power to perform the action but did not follow the proper procedure in doing so, may be subject to equitable estoppel. Baird, supra. In the present case, the Defendant acknowledges that it had the power to contract with the Plaintiffs. However, the Defendant asserts that the contract was ultra vires because it was entered into outside of a session of the City Commission duly assembled. Therefore, the Defendant's

actions fall into the second category of ultra vires acts. Additionally, the contract was executed because the Plaintiffs repaired their home before becoming aware that the Defendant would not repay the repair costs. Because the contract fits in the second ultra vires category and because it was executed, the issue of equitable estoppel or implied contract applies.

The Tennessee Supreme Court in McReynolds found that "in those Tennessee cases where estoppel was applied, or could have been applied, the public body took affirmative action that clearly induced a private party to act to his or her detriment, as distinguished from silence, non-action or acquiescence." McReynolds, supra. In this case, the City Manager took an affirmative act of inducement by going to the Plaintiffs' home and telling the Plaintiffs to make any necessary repairs at the Defendant's expense. The Plaintiffs reasonably relied on the City Manager's actions, and sought the true state of affairs by contacting the available City Commissioners. After receiving the support of the Commissioners, the Plaintiffs repaired their home at considerable personal expense. Therefore, although deemed on notice of the Defendant's procedure for contracting, the Plaintiffs reasonably relied on the Defendant's affirmative inducements to their detriment.

Finally, as to estoppel, the Defendant argues that even if its actions induced the Plaintiffs to make the repairs, the Defendant received no benefit. While it is arguable that the

Defendant benefited by temporarily inducing the Plaintiffs to forgo their cause of action, the Plaintiffs may assert equitable estoppel on grounds other than showing that the Defendant benefited from the Plaintiffs' actions. Our Supreme Court has held that equitable estoppel is also appropriate where one party induces another to perform a detrimental act. City of Lebanon v. Baird, supra. In the present case, the Plaintiffs incurred substantial obligations, through loans and the sale of cattle for a loss, to finance the repairs to their home based on the representations made by City Manager Richardson that the Defendant would repay these costs. Thus, the Defendant's actions induced the detrimental acts of the Plaintiffs. Based on the equities of this case and because the Defendant's inducements resulted in the Plaintiffs acting to their detriment, we find material evidence to support the jury's verdict and, therefore, we affirm.

The Defendant also asserts that a mistrial is required because testimony at trial concerning liability insurance was so prejudicial that its effect could not be erased from the mind of the jury. The Defendant relies on Marshall v. North Branch Transfer Co., 166 Tenn. 96, 59 S.W.2d 520 (1933), for this proposition. However, Marshall involved specific statements by members of the jury during deliberation that due to the presence of insurance a verdict should be rendered for the plaintiff. Marshall, supra. The Marshall Court also held that the trial court should be reversed on the basis that the uncontradicted

statements of four jury members showed that they were induced to change their verdict because of discussions concerning insurance.

The Defendant in this case offers no such proof of "misconduct, affirmatively shown to have affected the result of the trial." Marshall, supra. To support this claim, the Defendant refers to two instances at trial where insurance was mentioned. Neither instance relied upon by the Defendant involved the use or reference by the Plaintiffs' counsel of the word "insurance." Both references were made by Mr. Von Richardson, the former City Manager. The first reference occurred during the direct examination of Mr. Richardson by the Plaintiffs' counsel. In response to the Plaintiffs' counsel's inquiry about what actions were taken after visiting the Plaintiffs' residence, Mr. Richardson stated:

> I went back to the office, talked to Mrs. Gillenwater about the situation for a minute or two, and then called the -- asked her for the number for the insurance company.

The Defendant objected to the reference.

The second reference relied upon by the Defendant occurred during defense counsel's re-cross examination of Mr. Richardson. In response to defense counsel's inquiry about whether Mr. Richardson obtained authority from the City Commission to repair the Plaintiffs' home, Mr. Richardson stated: "No, sir, I got it from the insurance company. They told me to fix it." After two bench conferences, the Trial Court indicated

it would consider declaring a mistrial if insurance came up again.

The Plaintiffs argue that there were other references to insurance at trial to which the Defendant did not object, notably a reference by defense counsel. During his cross-examination of Mr. Ailor, defense counsel stated, "Now, you know that there was a claims representative that came by your house to investigate the matter. . . . And did he give you any estimates of what it was going to cost to fix your property?" At this point, the Plaintiffs' counsel objected.

This Court has held that where an attorney "willfully and voluntarily refers to liability insurance for the purpose of influencing a jury, a mistrial should be granted." West End Recreation, Inc. v. Hodge, 776 S.W.2d 101 (Tenn.App.1989), cert. denied (1989). However, this question is left to the discretion of the trial court. West End, supra. In this case, the Defendant has not offered proof of an affirmative appearance that the testimony affected the result of the trial, or that the Plaintiffs' counsel willfully and voluntarily referred to insurance in order to influence the jury. See Colwell v. Jones, 48 Tenn.App. 353, 346 S.W.2d 450 (1960). We therefore find that the Trial Court did not abuse its discretion in not granting a mistrial on the basis of the mention of liability insurance at trial.

For the foregoing reasons, the judgment of the Trial Court is affirmed and the cause remanded for collection of costs below. Costs of appeal are adjudged to the Defendant, City of Maynardville.

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Houston M. Goddard, P.J.

CONCUR:

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Herschel P. Franks, J.

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Don T. McMurray, J.