IN THE COURT OF APPEALS

SAMUEL D. LOWERY, JR.,	)	BRADLEY CIRCUIT
	)	C.A. NO. 03A01-9605-CV-00177
	)	
Plaintiff-Appellant	)	
	)	
	)	
	)	
	)	
	)	
vs.	)	HON. EARLE G. MURPHY
	)	JUDGE
	)	
	)	
	)	
	)	
	)	
ARLENE FAIRES, individually and	)	
as a representative of an	)	
association of persons	)	
purportedly acting under the	)	
name of Pets are Lovable	)	REVERSED AND REMANDED
Society, a/k/a PALS, DON BIRD,	)	
individually and as Deputy	)	
Sheriff of Bradley County,	)	
	)	
Defendants-Appellees	)	

JAMES F. LOGAN, JR., Logan, Thompson, Miller, Bilbo, Thompson & Fisher, P.C., Cleveland, for Appellant.

ELAINE B. WINER and KEN E. JARRARD, Rice, Kreitzer & Winer, P.C., Chattanooga, for Appellee, Arlene Faires, et al.

ASHLEY L. OWNBY, Cleveland, for Appellee, Pets are Lovable Society a/k/a PALS.

O P I N I O N

McMurray, J.

In this case, the trial court dismissed the complaint on motion for summary judgment. A motion to amend the complaint was pending at the time the motion for summary judgment was granted. The trial court refused to consider the motion to amend. This appeal resulted.[1] We reverse the judgment of the trial court and vacate the order granting the summary judgment.

This case stems from the impoundment of more than 400 head of cattle in Bradley County by the Bradley County Sheriff's Department and the Pets are Loveable Society (PALS) of Bradley County. The plaintiff, Samuel D. Lowery, Jr., was a cattle farmer in Bradley County. In September and October of 1993, he was forced to move some of his cattle from farms in Georgia to a Bradley County farm where he had other cattle. Shortly after moving the cattle to Tennessee, the Bradley County Sheriff's Department began receiving complaints about the cattle running at large, destroying property, causing traffic accidents and dying without being buried.

[1]We are cognizant of the court's order requiring an accounting of funds held by the court. Therefore, the order from which this appeal is taken may not be final and appealable as of right. In our discretion, however, we will treat the appeal as an interlocutory appeal and address the issues necessary to dispose of the appeal.

Plaintiff filed suit in Chancery Court alleging that the defendants removed approximately 425 head of cattle without proper authority. The case was transferred to the Bradley County Circuit Court in accordance with T.C.A. § 29-20-307.[2] Defendants filed a motion for summary judgment based upon governmental immunity. Plaintiff filed a motion to amend his complaint after the motion for summary judgment was filed. The trial court denied plaintiff's motion to amend.

Plaintiff submits two issues for our consideration:

1. Did the trial court err in overruling plaintiff's motion to amend his complaint?

2. Did the trial court err in granting defendants' motions for summary judgment?

In denying the motion to amend, the trial court stated in the order the following:

> This matter came on for hearing on the 17th day of July, 1995, upon motions of all the defendants for summary judgment and upon motion of plaintiff for an order allowing him to amend his complaint to state additional and alternative grounds for recovery. On July 17, this court denied the motion to amend, **holding that such motion could not be entertained while a motion for summary judgment was pending**. The motion for summary

[2]T.C.A. 29-20-307 provides that the circuit courts shall have exclusive jurisdiction over any action brought under the Tennessee Governmental Tort Liability Act.

> judgment on behalf of all defendants heard on July 17, was taken under advisement. (Emphasis added).

Rule 15.01, Tennessee Rules of Civil Procedure provides that a motion to amend a complaint may be granted after an answer has been filed with the written consent of the adverse party or by leave of court. Leave to amend shall be freely given by the court when justice so requires.

Our Supreme Court has specifically held that a motion to amend should be considered before granting a motion for summary judgment. Henderson v. Bush Brothers & Co., 868 S.W.2d 236 (Tenn. 1993). The Court said:

* * * *

> ... we are of the opinion that the trial court erred in granting summary judgment before consideration of the motion to amend, and we therefore vacate the summary judgment ... . Henderson, supra, page 237.

* * * *

> ... it is our opinion the trial court must give the proponent of a motion to amend a full chance to be heard on the motion, must consider the motion in light of the amendment policy embodied in T.R.C.P. 15.01, that amendments must be freely allowed; and in the event the motion to amend is denied, the trial court must give a reasoned explanation for his action. Henderson, supra, page 238.

In the instant case, the trial court denied plaintiff's motion to amend on the grounds that the motion could not be entertained while a motion for summary judgment was pending. This decision is clearly in conflict with the Supreme Court's decision in Henderson.

Appellees argue that it was within the trial court's discretion to deny the motion, and cite several factors that a court must consider in determining whether to grant a motion to amend. We agree that in the ordinary case, the standard of review is whether the trial court abused its discretion in denying a motion to amend. This court in Welch v. Thuan, 882 S.W.2d 792 (Tenn. App. 1994) noted that "[t]he rule [Rule 15.01, T.R.A.P.] provides that permission to amend may be liberally granted, but the decision is in the sound discretion of the trial court, and will not be reversed unless abuse of discretion has been shown." (Citing Wilson v. Ricciardi, 778 S.W.2d 450, 453 (Tenn. App. 1989)). Here, however, the trial court did not exercise its discretion nor consider relevant factors in determining whether to grant or deny the motion. The trial court's decision was based on the mistaken belief that the court could not entertain a motion to amend while a motion for summary judgment was pending. Some of the relevant factors to consider are undue delay in filing; lack of notice to the opposing party; bad faith by the moving party; repeated failure to cure deficiencies by previous amendments; undue prejudice to the

opposing party; and futility of the amendment. Welch, supra, and Merriman v. Smith, 599 S.W.2d 548 (Tenn. App. 1979).

We make no determination concerning the merits of either the motion to amend or the motion for summary judgment except to vacate the present order. We believe that the trial judge should consider the motion to amend, and if, in the court's determination the motion is not well taken, a reasoned explanation for the denial should be given in accordance with Henderson. After action on the motion to amend, the trial court may then consider the motion for summary judgment.

In light of our resolution of appellant's first issue, the second issue is pretermitted. We vacate the trial court's order granting summary judgment in favor of the defendants. Costs of this appeal are assessed to the appellees and this case is remanded to the trial court for further proceedings consistent with this opinion.

_____
Don T. McMurray, J.

CONCUR:

_____
Houston M. Goddard, Presiding Judge

_____
Charles D. Susano, Jr., Judge

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vs.	)	HON. EARLE G. MURPHY
	)	JUDGE
ARLENE FAIRES, individually and as a representative of an association of persons purportedly acting under the name of Pets are Lovable Society, a/k/a PALS, DON BIRD, individually and as Deputy Sheriff of Bradley County	)	REVERSED AND REMANDED
Defendants-Appellees	)	

ORDER

This appeal came on to be heard upon the record from the Circuit Court of Bradley County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was reversible error in the trial court.

We vacate the trial court's order granting summary judgment in favor of the defendants. Costs of this appeal are assessed to the

appellees and this case is remanded to the trial court for further proceedings consistent with this opinion.

PER CURIAM