IN THE COURT OF APPEALS OF TENNESSEE

FILED

October 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

JOYCE McCLELLAN	:	KNOX CIRCUIT
	:	CA No. 03A01-9604-CV-00119
Plaintiff-Appellant	:	
	:	
	:	
vs.	:	HON. DALE C. WORKMAN
	:	JUDGE
	:	
CITY OF KNOXVILLE	:	
	:	
Defendant-Appellee	:	AFFIRMED AND REMANDED

DANIEL F. McGEHEE, WITH McGEHEE & NEWTON, OF KNOXVILLE, TENNESSEE, FOR APPELLANT

SHARON E. BOYCE, OF KNOXVILLE, TENNESSEE, FOR APPELLEE

O P I N I O N

Sanders, Sp.J.

The Plaintiff has appealed from an order dismissing her complaint for personal injuries, based on Defendant's motion pursuant to Rule 12.02(6), TRCP, for failure to state a claim upon which relief can be granted. We affirm.

The Plaintiff-Appellant, Joyce McClellan, owns and occupies a residence in the City of Knoxville, which adjoins a small city park. A mulberry tree which overhangs a portion of the Plaintiff's property is located in the city park. In the

spring of the year when the mulberries ripen they drop from the tree onto Plaintiff's yard, driveway and automobile. The Plaintiff registered complaints with the City about the mulberries' dropping from the tree onto her property, but no action was taken by the City to remove or trim the tree. In June, 1993, while trimming grass on her property in the vicinity of the mulberry tree, she slipped and fell, injuring her left ankle.

Plaintiff filed suit against the City of Knoxville alleging she fell as a result of slipping on the mulberries which had fallen on her property from the tree. She alleged the City was maintaining a public nuisance in not removing the tree and preventing the mulberries from accumulating on her property; her slipping and falling were the direct and proximate result of the City's negligence; and as a result of her fall her ankle was broken, which required surgery, and caused permanent injuries. She asked for compensatory and punitive damages and demanded a jury.

The City, for answer, denied it was guilty of negligence resulting in Plaintiff's injuries. It averred the City was immune from liability. It averred the City's liability, if any, was determined by the provisions of the Governmental Tort Liability Act, TCA § 29-20-101, et seq. As an affirmative defense, it averred the Plaintiff's own negligence was responsible for her injuries and her negligence was the sole cause of her injuries. The City denied Plaintiff was entitled to either punitive damages or a trial by jury.

The City also filed a motion to dismiss pursuant to Rule 12.02(6), TRCP. It alleged the Plaintiff failed to state a claim upon which relief could be granted under the Governmental Tort Liability Act (GTLA). In its motion, the City relied upon TCA § 29-20-101, et seq., the Governmental Tort Liability Act, and, particularly, § 29-20-201-202-203(a)-204(a) and 205 (TCA 1995 Supp. Vol.5).

The City insisted TCA § 29-20-201(a) provides: "Except as may otherwise be 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." It also insisted the only exceptions to § 29-20-201(a) were those set forth in TCA §§ 29-20-202 through 20-20-205 and, since the injuries about which the Plaintiff complained in her complaint did not fall within the exceptions to § 29-20-201(a), the Plaintiff had failed to state a claim upon which relief could be granted.

The Plaintiff filed a written response to the City's motion in which she argued the complaint stated a claim upon which relief could be granted under GTLA. As pertinent, the response stated: "The Plaintiff would show that immunity from suit of a governmental entity is removed for any injury caused from a defective, unsafe or dangerous condition when the governmental entity has actual notice of such defective, unsafe or dangerous condition as more fully set forth in Tennessee Code Annotated, Section 29-20-203(a) and (b).

"That the City of Knoxville is not immune from suit pursuant to the provisions of Tennessee Code Annotated Section 29-20-203(b) due to the fact that notice had been given by the Plaintiff, Joyce McClellan, for many years prior to her accident. (See the deposition of Joyce McClellan filed herewith as Exhibit A."

The Plaintiff filed her discovery deposition as an exhibit to her response to the City's motion to dismiss. As pertinent, she testified she had owned her home, which was adjacent to the city park, since 1973. A mulberry tree located on city park property overhung her property. When the mulberries on the tree ripened, they would fall off the tree onto her property. She had complained to the City on numerous occasions and asked the City to cut the tree. She wanted the tree cut down "because it's messy, stinks, it's a hazard". On the day of her accident, she was cutting grass on her property with a "sling sickle". Ripe mulberries on the ground caused her to slip and fall, resulting in her broken ankle.

There was no proof offered by the Plaintiff by way of affidavit or otherwise to show the Plaintiff's injuries resulted from any of the exceptions to TCA § 29-20-201(a), which are as follows:

TCA § 29-20-203(a) for injuries "caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity...;"

TCA § 29-20-204(a) for injuries "caused by the dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement owned and controlled by such governmental entity;"

TCA § 29-20-202 9(a) for injuries "...resulting from the negligent operation by any employee of a motor vehicle or other equipment while in the scope of his employment;" and

TCA § 29-20-205 "...for injury proximately caused by a negligent act or omission of any employee within the scope of his employment...." with certain exceptions.

Upon the hearing of the motion, the court sustained the City's motion and dismissed the complaint.

The Plaintiff has appealed, presenting the following issues for review: 1. "The trial court erred in dismissing the complaint on the basis of assumption of the risk by Plaintiff" and 2."If this Honorable Court were to construe the trial court's order that the City of Knoxville was immune from suit, then the trial court erred because it had insufficient facts on which to base an opinion on the issue of immunity." We cannot agree the trial court erred, and affirm.

In considering the Appellant's first issue, we cannot find that the court dismissed the complaint "on the basis of assumption of the risk by the Plaintiff." The order dismissing the complaint fails to state the basis of the court's ruling. The court's order, as pertinent, states the cause came on to be heard "upon defendant's Motion to Dismiss, plaintiff's response, and oral argument, and it appearing to the Court that the Motion should be sustained, it is

"ORDERED that Complaint against the City of Knoxville is hereby dismissed." But, even if her assumption of the risk had been the basis for dismissing the complaint, it would not be

reversible error since the court reached a correct result. Where a trial judge has reached a correct result, it will not be reversed because he may have predicated it on an erroneous reason. **Cherokee Ins. Co. v. U.S. Fire Ins. Co.**, 559 S.W.2d 337 (Tenn.App.1977); **Baker v. Seal**, 694 S.W.2d 948, 953 (Tenn.App.1984).

As for Appellant's second issue that "the trial court erred because it had insufficient facts on which to base an opinion on the issue of immunity", it was not necessary for the court to have extraneous facts to determine that Plaintiff's complaint failed to state a claim upon which relief could be granted under GTLA.

The Appellant fails to set out in her brief how the allegations in her complaint would fall within the purview of either of the exceptions to the immunity granted to all governmental entities under TCA § 29-20-201(a).

From reading Appellant's brief, we find it difficult to follow the reasoning of the Appellant as to why she insists the court was in error in sustaining the City's motion to dismiss. At one point in her brief, Appellant states: "The contention of the Appellant McClellan is that the injury which she sustained was caused by a public nuisance on governmental property which is a 25-foot right of way along the edge of Lark Avenue Park. The City of Knoxville was well aware of the nuisance which existed and had existed for an extended period of time since 1976...." At another place in her brief, Appellant states: "The Plaintiff has been proceeding under the theory that her cause of action is

not an exception to Tennessee Code Annotated Sections 29-20-203(a) and 29-20-205(1) which is [sic] set forth below:

"T.C.A. 29-20-203. Removal of immunity for injury from unsafe streets and highways - Notice required. - (a) Immunity from suit of a governmental entity is removed from any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity. 'Street' or 'highway' includes traffic control device thereon.

"T.C.A. 29-20-205. Removal of immunity for injury caused by negligent act or omission of employees - Exceptions. - Immunity from suit of all governmental entitled 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.

"The Trial Court had no basis or evidence before it on which to make a determination as to whether the Plaintiff's cause of action was an exception. The Court did not, and could not, dismiss the Plaintiff's cause of action on the basis of immunity because there is no evidence on which to render a decision based on immunity. There is [sic] been no determination under Tennessee Code Annotated Section 29-20-203(a) as to whether a 'dangerous condition of any street, alley, sidewalk or highway owned and controlled by such governmental entity' nor under Tennessee Code Annotated Section 29-20-205(1) as to whether the failure of the City to correct the nuisance was discretionary."

We conclude from Appellant's brief that she is saying: (1) The City was maintaining a nuisance which was not governed by GTLA and she is entitled to recover damages on that theory; (2) She was injured on a defective, unsafe or dangerous condition of a street, alley, sidewalk , or highway owned by the City and was entitled to recover pursuant to TCA § 29-20-203(a); and (3) Her "injuries were proximately caused by a negligent act or omission of an employee within the scope of his employment"

pursuant to § 29-20-205 by failing to remove the hazard of the mulberry tree.

We first address the issue of liability of the City under the theory of maintaining a nuisance. Under the common law, municipalities were considered to be acting in a proprietary capacity rather than a governmental capacity in maintaining a nuisance, and were liable in damages. The Tennessee Governmental Tort Liability Act was passed in 1973, which extends immunity to proprietary activities by TCA § 29-20-201. **Crowe v. John W. Horton Mem. Hospital**, 579 S.W.2d 888 (Tenn.App.1979). In the case of **Collier v. Memphis Light, Gas & Water Div.**, 677 S.W.2d 771, 776 (Tenn.App.1983) this court, in addressing the question of immunity by municipal utilities for damages due to injuries caused by nuisance, said:

> We have been squarely presented with the issue of whether plaintiffs have an action independent of the Act for damages due to injuries caused by nuisance.
>
> As previously noted the Act is premised on the establishment of absolute immunity for governmental entities, not only for acts in their governmental capacity, but also for acts in their proprietary capacity. Comprehensive plans are then established to control all actions for damages against governmental entities.
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> In **Haun v. Freeman**, Court of Appeals, Western Section, unreported (filed November 22, 1982), Judge Nearn, in considering actions for damages outside the Act, observed:
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> > ...Therefore, it seems clear to us that it is the legislative intent that, unless excepted in the chapter, all claims for injuries against a governmental entity must be brought under the chapter. We are buttressed in this conclusion by the fact that T.C.A. § 29-20-201 does not use the term "negligence" but uses the term "suit for any injury" which would include even the previously time-honored claim for nuisance injury, which courts have previously recognized as being an exception to the governmental immunity doctrine on the ipse dixit statement that such claims are not based on negligence.

Id. at pages 2 and 3."

As for the Plaintiff's contention she was injured on a defective, unsafe or dangerous condition of a street, alley, sidewalk or highway, there is no allegation in the complaint the Plaintiff was any place except on her own property when she was injured. In her complaint Plaintiff alleges: "Plaintiff was trimming her grass on June 1, 1993, and slipped and fell on the property adjoining the Defendant's right of way, causing her to break her left ankle." In her deposition, she testified she was on her property when she fell. Upon the hearing of the motion to dismiss, Plaintiff's counsel made the following statement to the court: "Your Honor, very briefly, my client was on her property rather than on the City's property at the time of the fall. The mulberry tree was in Marsh Park, which adjoins the property of my client." There is nothing in the complaint which would support a recovery by the Plaintiff under TCA § 29-20-203(a).

Neither is there any allegation in the complaint which states a claim upon which the Plaintiff could recover under TCA § 29-20-205. As pertinent, the statute states immunity from suit is removed "for injuries proximately caused by a negligent act or omission of <u>any employee within the scope of his employment</u>..." with certain exceptions. (Emphasis ours.)

In her complaint, Plaintiff, as pertinent, alleges: "That the Plaintiff has complained of the nuisance of the mulberry upon numerous occasion [sic] over the past ten (10) years, and that the Defendant has never taken any affirmative action to alleviate the hazard public nuisance created by the presence of the mulberry tree" and "As the direct and proximate result of the Defendant's negligence, [Plaintiff] has suffered

severe, painful and permanent injuries of a continuing nature to her left leg and body and [sic] a whole." The complaint, however, fails to allege her injuries were "proximately caused by a negligent act or omission of any employee within the scope of his employment." The court, in the case of **Gentry v. Cookeville General Hosp.**, 734 S.W.2d 337, 339 (Tenn.App.1987), in addressing the omission of this averment in a complaint, said:

> Said Act, T.C.A. § 29-20-201, provides in pertinent part as follows:
>
> * * *
>
> (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**)
>
> 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.

<u>Also see</u> L**ee v. City of Cleveland**, 859 S.,W.2d 347 (Tenn.App.1993).

We find no error in the trial court's sustaining the City's motion and dismissing the complaint. The trial court is affirmed and the cost of this appeal is taxed to the Appellant. The case is remanded to the trial court for any further necessary proceedings.

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Clifford E. Sanders, Sp.J.

CONCUR:

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Herschel P. Franks, J.

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Charles D. Susano, Jr.