

IN THE COURT OF APPEALS

FILED

March 21, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

MATTHEW CHRISTIAN LOCKABY b/n/f)	KNOX CIRCUIT
and mother, MARY ELIZABETH)	C. A. NO. 03A01-9609-CV-00297
LOCKABY,)	
)	
Plaintiff - Appellant)	
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)	
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)	
vs.)	HON. DALE C. WORKMAN
)	JUDGE
)	
)	
)	
)	
CITY OF KNOXVILLE and JAMES T.)	VACATED AND REMANDED
HUSKEY,)	
)	
Defendant - Appellee)	

HARRY WERSEMA, JR., Knoxville, for Appellant.

SHARON E. BOYCE, Knoxville, for Appellee, City of Knoxville.¹

O P I N I O N

Murray, J.

¹A voluntary nonsuit was taken as to the defendant, James T. Huskey. The City of Knoxville is the only remaining defendant and appellee.

The sole issue presented by the parties for our review is whether the twelve month limitation period contained Section 29-20-305(b) of The Governmental Tort Liability Act (T.C.A. § 29-20-101, et seq.), is tolled by the filing of a claim with the Tennessee Claims Commission. The trial court correctly responded in the negative and dismissed the plaintiff's complaint on motion of the defendant. Nevertheless, however, for reasons hereinafter stated, we vacate the judgment of the court and remand the case to the trial court for further action.

On December 31, 1990, William S. Mley, father of Matthew Christian Lockaby, a minor, was killed in a traffic accident on Western Avenue in Knoxville. Plaintiff contends that water draining from nearby private property formed ice on the road, which contributed to the accident. In 1991, plaintiff filed a complaint against the State of Tennessee with the Claims Commission based on notice, excessive posted speeds, lack of warnings and the condition of the road — a state highway. In 1994, the State, as an affirmative defense, asserted that the City of Knoxville provided for the improvement and maintenance of Western Avenue at the accident scene, pursuant to T.C.A. §§ 54-2-201 and 54-2-204. Plaintiff then filed this suit against the City and the adjacent property owner. The City was granted a motion to dismiss based upon the time limitations of The Governmental Tort Liability Act and exemption from T.C.A. § 20-1-119. This appeal followed.

Plaintiff contends that the statute of limitations set forth in the Governmental Tort Liability Act, T.C.A. § 29-20-305(b), which was passed in 1973, is superseded by T.C.A. § 9-8-402(b), passed in 1984, which states: "The filing of the notice (with the Claims Commission) tolls all statutes of limitation as to other persons potentially liable to the claimant due to the occurrence from which the claim before the commission arises." Plaintiff contends that this creates an irreconcilable conflict between the two statutes, and, consequently, the prior act is rendered inoperative. See Chattanooga Hamilton County Hospital Authority v. City of Chattanooga, 580 S.W2d 322, 327 (Tenn. 1979).

T.C.A. § 29-20-305(b) limits the time within which an action can be brought against a governmental agency. It provides: "Said action must be commenced within twelve (12) months after the cause of action arises." T.C.A. § 29-20-201 provides that when immunity is removed pursuant to the provisions of the Governmental Tort Liability Act, "any claim for damages must be brought in strict compliance with [the statute]." This Court has previously held that the statute of limitations in the act must be strictly construed:

Historically governmental entities have been immune from suit for injury resulting from their activities based on the concept of sovereign immunity. However [the Governmental Tort Liability Act] now allows suit to be brought against governmental entities within certain

limitations. One such limitation is set forth in T. C. A. § 29-20-305(b) which provides that: "the action must be commenced within twelve (12) months after the cause of action arises."

Williams v. Memphis Light, Gas & Water Div., 773 S.W2d 522, 523 (Tenn. Ct. App. 1988).

The issue in Williams was whether the one-year statute of limitations in the Act could be extended by the Tennessee savings statute, T. C. A. § 28-1-105, which allows an action to be recommenced within one year of the time the original action is nonsuited. The plaintiff in that case argued that the statute of limitation contained in the Act was like any other general statute of limitations and could thus be extended by the savings statute. This Court disagreed, and held that the savings statute did not apply to the provisions of the Governmental Tort Liability Act, saying:

Where a statute creates a new liability or extends a new right to bring suit and that statute provides a time period within which to bring the action, that period 'operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all.' 'Time has been made the essence of the right and that right is lost if the time is disregarded.' As thus defined, the right of action is conditional. The limitation inheres in the right itself. Automobile Sales Co. v. Johnson, 174 Tenn. 38, 122 S.W2d 453, 457-58 (1938). . . . Since the Act created a new liability, it must be strictly construed. See id., 122 S.W2d at 543. In so doing, we find the twelve-month limitation period of T. C. A. 29-20-305(b) for bringing an action is a condition precedent which must be met before a suit may be brought against the governmental entity.

Williams at 523 (emphasis ours).

This Court has also held that T.C.A. § 28-1-115, which provides for a one-year extension of time to file a new complaint if the original complaint is dismissed by a judgment or decree not dispositive of the right of action, does not apply to suits filed pursuant to the Governmental Tort Liability Act. Nance v. City of Knoxville, 883 S.W2d 629 (Tenn. Ct. App. 1994).

Most significantly, however, is our decision holding that T.C.A. § 20-1-119, which addresses joinder of defendants in comparative fault actions through amendment of the complaint, cannot be invoked to extend the 12-month limitation period of T.C.A. § 29-20-305(b). See Goodman v. Suh, 1995 WL 507778 (Tenn. App.), an unreported decision of this Court filed at Knoxville, Aug. 29, 1995. As in this case, the plaintiffs in Goodman learned of the potential liability against a governmental entity after having filed suit against another party, and after the one year statute of limitations in the Governmental Tort Liability Act had run. The plaintiffs relied on T.C.A. § 29-1-119. We rejected the argument, holding that the Governmental Tort Liability Act could not be circumvented by that section. We adhere to that decision and the reasoning of the cases cited herein to hold that T.C.A. § 29-20-305(b) is not tolled by T.C.A. § 9-8-402(b). We reject plaintiff's contention that T.C.A. § 9-8-402(b) must impliedly

repeal T. C. A. § 29-20-305(b) because it is a more recent statute. We note that the statute that the plaintiffs relied on in Goodman was also more recent than the Governmental Tort Liability Act.

Thus, for the reasons set forth above, the decision of the trial court as to the issue before us as presented by the parties is eminently correct. We do not find this issue to be dispositive of this appeal however.

Rule 13(b), Tennessee Rules of Appellate Procedure provides as follows:

(b) Consideration of Issues Not Presented for Review. Review generally will extend only to those issues presented for review. The appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review, and **may in its discretion consider other issues in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process.** (Emphasis supplied).

In view of the minority of the plaintiff, we choose to exercise our discretion and consider an issue not raised by the parties but which is clearly controlling under the circumstances of the case.

The Governmental Tort Liability Act, Section 29-20-104(b) provides as follows:

Notwithstanding any other provision of law to the contrary, the provisions of §§ 28-1-106 - 28-1-108 shall apply in causes of action arising pursuant to this chapter.

T. C. A. § 28-1-106 provides as follows:

28-1-106. Persons under disability on accrual of right. If the person entitled to commence an action is, at the time the cause of action accrued, either within the age of eighteen (18) years, or of unsound mind, such person, or his representatives and privies, as the case may be, may commence the action, after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three (3) years, and in that case within three (3) years from the removal of such disability. (Emphasis added).

We believe that a dismissal of this action in the face of the clear provisions of T. C. A. §§ 29-20-104(b) and 28-1-106 would result in prejudice to the judicial process and a deprivation of the minor plaintiff from his day in court.

We find that the plaintiff's cause of action is not barred by the twelve month period of limitations set out in the Governmental Tort Liability Act. Accordingly, we vacate the judgment of the trial court and remand the case for such other and further action

as may be required. In our discretion, we tax the costs to the appellant.

Don T. Murray, J.

CONCUR:

Houston M. Goddard, Presiding Judge

Herschel P. Franks, Judge

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CITY OF KNOXVILLE and JAMES T.)	VACATED AND REMANDED
HUSKEY,))
))
Defendant - Appellee))

JUDGMENT

This appeal came on to be heard upon the record from the Circuit Court of Knox County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that the judgment of the trial court should be vacated.

Accordingly, we vacate the judgment of the trial court and remand the case for such other and further action as may be required. In our discretion, we tax the costs to the appellant.

PER CURIAM

