

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED

October 29, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

CHERYL KELLEY)	ROANE COUNTY
)	03A01-9704-CV-00122
Plaintiff - Appellee)	
)	
v.)	HON. RUSSELL E. SIMMONS, JR.,
)	JUDGE
)	
THE CITY OF ROCKWOOD,)	
TENNESSEE)	
)	
Defendant - Appellant)	AFFIRMED AND REMANDED

ROBERT H. WATSON, JR., OF KNOXVILLE FOR APPELLANT

JOHN D. AGEE OF KINGSTON FOR APPELLEE

O P I N I O N

Goddard, P. J.

This appeal is from the Circuit Court of Roane County and concerns liability under the Tennessee Governmental Tort Liability Act, T.C.A. Title 29, Chapter 20. The Plaintiff, Cheryl Kelley, filed the present lawsuit on behalf of her deceased child, Joshua Kelley, who was a passenger on a motorcycle driven by another child, Douglas King, which collided with a Norfolk Southern train in the City of Rockwood, Tennessee.

The City of Rockwood filed a Rule 56 motion for summary judgment based on sovereign immunity. The Trial Court denied the motion and the case was scheduled for trial. Prior to the trial the Plaintiff settled all matters with Norfolk Southern Railway Company.

The following issues are presented by the Defendant for appeal:

I. Whether or not the Trial Court committed error in failing to dismiss the City of Rockwood as a defendant in the above lawsuit upon sovereign immunity pursuant to the Tennessee Governmental Tort Liability Act, Tenn. Code. Ann. §29-20-205, in that the actions or inactions of the City were discretionary.

II. Whether or not the evidence supported the Trial Court's finding of constructive notice to the City of Rockwood in this case and met the requirement that Black Hollow Road was in a defective, unsafe or dangerous condition as required by Tenn. Code. Ann. §29-20-203.

III. Whether or not the Trial Courts finding of no negligence on the part of the passenger, Joshua Kelley, was error.

The Trial Judge entered a Memorandum Opinion on January 8, 1997. He awarded Cheryl Kelley \$750,000 and, based on comparative fault, attributed 90 percent of the fault to Douglas King, ten percent of the fault to the City of Rockwood, and no fault to Joshua Kelley. Both parties appeal.

Joshua Kelley at the time of the accident was 13-years old. Joshua lived with his mother in Rockwood, about one-half

mile from the home of William and Mazelle King. Joshua played with the Kings' son, Douglas, who was also 13-years old at the time of the accident. Douglas King lived with his parents on Black Hollow Road and had lived there for approximately six years prior to the accident. The Kings' home was within a mile of the accident scene and Douglas had ridden over the railroad crossing many times as a passenger in an automobile. Douglas King had been operating motorcycle-type vehicles for many years but had been instructed by his parents to never drive on the road.

The accident occurred on May 22, 1994, at a railroad crossing on Black Hollow Road within the city limits of Rockwood. The motorcycle was traveling easterly and ran into the left side of a northbound train killing Douglas King instantly. Joshua Kelley died a short time later at the University of Tennessee Medical Center.

The City of Rockwood owned and maintained the right-of-way on the south side of Black Hollow Road. The City generally trimmed the foliage on Black Hollow Road twice a year, once in the Fall and once in the Spring, although no money was specifically appropriated to do the task. On the day of the accident the foliage had not been trimmed since the previous Fall. The view of a train approaching from the south when traveling easterly on Black Hollow Road was obstructed by the untrimmed foliage. The tree limbs and bushes also partially obscured the view of a railroad crossbuck sign located near the

crossing on the south side of Black Hollow Road. This crossbuck was the only sign on Black Hollow Road warning of a railroad crossing.

Prior to the accident the City of Rockwood had received no complaints regarding foliage obstructing the view of trains or signage at the railroad crossing on Black Hollow Road. There had never been a reported accident at the scene prior to the one in question. The City had received complaints prior to the accident from drivers regarding untrimmed foliage a mile or so up Black Hollow Road from the accident scene. The drivers complained that the foliage on the side of the road was overgrown and scraping their cars. City vehicles had been in the area prior to the accident but no one had mentioned a problem of foliage obscuring the view of trains or signage to any city official responsible for maintenance of the right-of-way on Black Hollow Road.

Additionally, the Plaintiff submits the following issues on appeal:

I. Whether the Trial Court erred in apportioning only ten percent (10%) fault to the City of Rockwood.

The City of Rockwood first submits that the Trial Court erred in failing to dismiss the City as a defendant based upon sovereign immunity pursuant to the Tennessee Governmental Tort Liability Act, T.C.A. 29-20-205, in that the actions or inactions of the City were discretionary. The Trial Court did not base its

decision on whether the act of trimming or not trimming foliage was a discretionary function but did deny the City of Rockwood's motion for summary judgment which was based on that very issue. For this reason we address whether the City of Rockwood's failure to trim the foliage on Black Hollow Road was a discretionary action or inaction.

Governmental entities are immune from liability for discretionary acts under T.C.A. 29-20-205. In order to determine whether an action or inaction by a governmental entity is considered discretionary the Tennessee Supreme Court adopted the "planning-operational test." Bowers v. City of Chattanooga, 826 S.W2d 427 (Tenn.1992). The Bowers Court described the difference between planning and operational as follows:

A consideration of the decision-making process, as well as the factors influencing a particular decision, will often reveal whether that decision is to be viewed as planning or operational. If a particular course of conduct is determined after consideration or debate by an individual or group charged with the formulation of plans or policies, it strongly suggests the result is a planning decision. These decisions often result from assessing priorities; allocating resources; developing policies; or establishing plans, specifications, or schedules. . . .

On the other hand, a decision resulting from a determination based on preexisting laws, regulations, policies, or standards, usually indicates that its maker is performing an operational act. Similarly operational are those ad hoc decisions made by an individual or group not charged with the development of plans or policies. These operational acts, which often implement prior planning decisions, are not "discretionary functions" within the meaning of the Tennessee Governmental Tort Liability Act. . . .

Another factor bearing on whether an act should be considered planning or operational is whether the decision is the type properly reviewable by the courts. The discretionary function exception “recognizes that courts are ill-equipped to investigate and balance the numerous factors that go into an executive or legislative decision” and therefore allows the government to operate without undue interference by the courts. See Mainscott v. State, 642 P.2d 1355, 1356 (Alaska 1982). Put succinctly:

[T]he judiciary confines itself ... to adjudication of facts based on discernible objective standards of law. In the context of tort actions ... these objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not [reasonableness] but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political, or economic decisions. Peavler, 528 N.E. 2d at 44-45 (quoting Blessing v. United States, 447 F. Supp. 1160, 1170 (E. D. Penn. 1978)).

Bowers, at 430-431.

Applying the “planning-operational test” to the facts of this case we find that the City of Rockwood’s failure to trim the foliage on Black Hollow Road was an operational decision and not discretionary. As discussed in Bowers, an operational decision is one based on preexisting laws, regulations, policies, or standards. Although the City of Rockwood had no written procedure regarding the trimming of foliage on Black Hollow Road the evidence at trial showed a clear policy or standard to maintain the right-of-way. At Trial, Mr. Carl Mee, Superintendent of Roads for Rockwood, was asked:

Question: Insofar as the Black Hollow Road crossing is concerned, you told us that it was your *custom* to cut back the foliage two times annually, is that correct? (Emphasis added.)

Answer: Yes, sir.

The decision each Fall and Spring to trim the foliage on Black Hollow Road was not determined after “consideration or debate” but was simply a custom or in the words of the Bowers Court, a “policy or standard.”

The City of Rockwood argues that the issue of discretion in this case has been dealt with in two recent Tennessee Supreme Court decisions. Kirby v. Macon County, 892 S.W2d 403 (Tenn. 1994); Helton v. Knox County, 922 S.W2d 877 (Tenn. 1996). Both cases involved a city’s decision to install guardrails and the decision was held to be a clearly discretionary act for which governmental immunity applied. We find those cases do not apply to the facts of this case. In Helton and Kirby the decision to install the guardrails was not based on any standing custom or policy but rather was determined after consideration and debate of various political, economic, and social issues. The City of Rockwood had no decision to make regarding whether to trim the foliage because the decision had already been made and the custom or policy was in existence.

However, the City of Rockwood was correct in stating that the courts have dealt with this issue before. The same issue with similar facts was addressed by two cases cited in the Kirby opinion. Swafford v. City of Chattanooga, 743 S.W2d 174 (Tenn. App. 1987); Morrow v. Town of Madisonville, 737 S.W2d 547

(Tenn. App. 1987). In Swafford, a city had made a decision to paint lines on a road but the person responsible had simply not done it. The court held the failure to paint the lines was an operational omission and therefore the city was not immune. Similarly in Morrow, a city had made the initial decision to protect traffic by placing lids on water meters. The city's failure to follow its own policy was held to be an operational omission. In the case before us, the City of Rockwood had already made the initial decision to trim the foliage on Black Hollow Road and it failed to follow its own policy; this failure was not a discretionary act.

Finally, our finding that the City of Rockwood's failure to trim the foliage was an operational omission is supported by the type of question it involves. The issue before us is based more upon negligence than social wisdom, more upon due care than political practicability, and more upon reasonableness than economic expediency. Governmental entities are immune from injuries resulting from social, political, or economic decisions, but the failure to maintain the right-of-way on Black Hollow Road involved no such decision. Therefore, the City of Rockwood was not immune under T. C. A. 29-20-205.

The City of Rockwood next claims that the Trial Court erred in holding that the evidence supported a finding of constructive notice to the City and met the requirement that Black Hollow Road was in a defective, unsafe or dangerous

condition as required by T. C. A. 29-20-203. It is not necessary that we address this issue since a governmental entity's immunity need not be removed under both T. C. A. 29-20-205 and T. C. A. 29-20-203 in order to lose its protection, and we have already found the City of Rockwood was not immune under T. C. A. 29-20-205. However, since the Trial Court's decision was based on the removal of immunity under T. C. A. 29-20-203 we will address the question.

The Trial Court held that Black Hollow Road was defective, unsafe or dangerous because on the date of the accident the foliage on the City of Rockwood's right-of-way obstructed the railroad warning signs, and that the foliage obscured a driver's view of a train approaching from the south. The law in Tennessee is clear that a defective, unsafe or dangerous condition exists if a governmental entity allows foliage to obstruct the view of a traffic sign that was placed there by local officials. Fretwell v. Chaffin, 652 S.W2d 755 (Tenn.1983). However, there must be direct proof in the record that the governmental entity owned and controlled the traffic sign in question. Harris v. Williamson County, 835 S.W2d 588 (Tenn. App. 1992).

The City of Rockwood cannot be responsible for the obstruction of a sign which they did not own and control. The only proof in the record as to who owned, controlled or erected the railroad crossing sign, pointed to the railroad. No direct

proof appears anywhere in the record to contradict this assertion. Therefore, the City of Rockwood's immunity was not removed based on the crossbuck sign being obscured by foliage.

However, the Trial Court also held that Black Hollow Road was defective, unsafe or dangerous because the untrimmed foliage obstructed a traveler's view of an oncoming train. This specific issue has not been addressed by Tennessee courts, although our Supreme Court has provided a list of characteristics to consider in determining whether a particular site is defective, unsafe or dangerous for purposes of governmental immunity under T. C. A. 29-20-203:

The decision of whether a condition of a highway actually is a dangerous and hazardous one to an ordinary prudent driver is a factual one, and the court should consider the physical aspects of the roadway, the frequency of accidents at that place in the highway and the testimony of expert witnesses in arriving at this factual determination.

Sweeney v. State, 768 S.W2d 253, 255 (Tenn.1989).

The courts should also consider the road's location, the volume of traffic, and the type of traffic it accommodates. Sweeney v. State.

Our review of cases tried without a jury is **de novo** upon the record with a presumption of correctness as mandated by Rule 13(d) of the Tennessee Rules of Appellate Procedure. This Rule requires us to uphold the factual findings of the trial court unless the evidence preponderates against them Campanali

v. Campanali, 695 S.W2d 193 (Tenn. App. 1985). It is with this standard in mind that we undertake our review of the Trial Court's decision on this issue.

Testimony and exhibits in the record evidence Black Hollow Road as a rural, lightly traveled road. Also, no one had any knowledge of an accident ever occurring in the area of the railroad crossing. Pictures and video taken of the site several days after the accident gave a good indication of the area's physical aspects. The road is narrow and the foliage was very thick and overgrown. The foliage definitely obscured an easterly traveler's view of a northbound train. The closest testimony to that of an expert was the testimony of Judge Howard Butler who was the Rockwood city recorder. He testified that it was part of his responsibility as city recorder to keep the brush back from the side of the road. He further testified that if he had seen the foliage on Black Hollow Road the way it was on the date of the accident he would have had someone trim it back. Looking at these facts, which Sweeney identifies as the standard, we find the evidence does not preponderate against the Trial Court's holding that Black Hollow Road was defective, unsafe or dangerous.

The City of Rockwood argues that even if the road was dangerous they did not have constructive notice of the fact.

"Constructive notice" is "information or knowledge of a fact imputed by law to a person (although he may not

actually have it), because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it.”

Kirby, at 409 quoting Black’s Law Dictionary, 1062 (6th ed. 1990).

The City of Rockwood had received complaints about overgrown foliage scratching cars as they drove down Black Hollow Road and city officials had been past the accident site many times just prior to the wreck. At the very least, the City of Rockwood had constructive notice that it was time again to trim the foliage on Black Hollow Road. Therefore, the City of Rockwood was not immune under T. C. A. 29-20-203.

Finally, the City of Rockwood claims that the Trial Court erred in finding no negligence on the part of the passenger Joshua Kelley. Although the law in Tennessee is clear that a minor is subject to an adult standard of care when operating a motor vehicle on the public roads, it is equally clear that this standard has not been extended to a minor guest passenger. Brown v. Smith, 604 S.W2d 56 (Tenn. App. 1980). In Brown, a 12-year-old passenger was injured while riding on a motorcycle being driven by a 15-year old. The Court found the passenger was not held to an adult standard of care but the degree of care ordinarily exercised by a person of like age, discretion, knowledge and experience. Applying the appropriate standard used by the Brown Court to the facts of this case we find no error in the Trial Court’s holding that no negligence be apportioned to Joshua Kelley.

We now turn to the issue raised by Cheryl Kelley. She contends that the Trial Court erred in apportioning only ten percent fault to the City of Rockwood.

Although we find that the City of Rockwood was not immune under either T.C.A. 29-20-205 or T.C.A. 29-20-203, this does not necessitate a finding of fault on the part of the City. In O'Guin v. Corbin, a case very similar to the case at hand, the trial court found that Dickson County was not immune but, nonetheless, a prudent driver could have avoided the accident. 777 S.W2d 697 (Tenn. App. 1989). The trial court found that Dickson County's negligence was not the proximate cause of the accident but, rather, that it was caused by the plaintiff's failure to stop at the intersection. This Court upheld the trial court's decision.

Although the City of Rockwood was negligent in failing to maintain its right-of-way, the greater cause of the wreck was the act of Douglas King. A careful and prudent driver could have noticed the railroad crossing and taken proper precaution regardless of the foliage that obscured the view of the train. Therefore, we find no error in the Trial Court's apportioning of fault.

For the reasons stated above, the judgment of the Trial Court is affirmed and the cause remanded for collection of the judgment and costs below. Costs of appeal are adjudged one-half

against the City of Rockwood and one-half against M. Kelley and her surety.

Houston M Goddard, P. J.

CONCUR:

Don T. McMirray, J.

(Separate Concurring Opinion)
Charles D. Susano, Jr., J.