IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 19, 2023 Session

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JACOB THOMAS COOK ET AL. V.
JEFFERSON COUNTY, TENNESSEE ET AL.

Appeal from the Circuit Court for Jefferson County
No. 24210-I James L. Gass, Judge

No. E2022-01537-COA-R3-CV

This case involves an accident between a motor vehicle and a school bus that occurred on Highway 11E on a foggy December morning in Jefferson County, Tennessee. The automobile was traveling eastbound on Highway 11E when it struck the bus, which was stopped across the two eastbound lanes of Highway 11E positioned to make a left turn onto the westbound lanes. The driver of the car, Jacob Cook, sustained serious injuries as a result of the impact. Mr. Cook, together with his grandfather, Rickey Macari, who owned the vehicle, brought an action in tort seeking damages against Jefferson County, the Jefferson County Board of Education, and the driver of the school bus, Harold Moody. In their complaint, Mr. Cook and Mr. Macari alleged that Mr. Moody's negligence in stopping the school bus across the eastbound lanes was the proximate cause of Mr. Cook's injuries. The defendants filed a counterclaim alleging that Mr. Cook's negligence, and not Mr. Moody's, was the proximate cause of the accident because Mr. Cook had been speeding when the accident occurred. During a bench trial, the defendants' expert witness, an accident reconstructionist, opined that Mr. Cook had been speeding at the time of the accident but that Mr. Cook's car would have collided with the stopped school bus even had he been following the speed limit. At the conclusion of the bench trial, the trial court found that Mr. Cook was indeed speeding at the time of the accident, but that Mr. Moody should not have attempted to turn left across the eastbound lanes given the traffic and weather conditions. Accordingly, the trial court determined that Mr. Moody's actions were the proximate cause of Mr. Cook's injuries and allocated 80% of the fault for the accident to Mr. Moody, with 20% of the fault assigned to Mr. Cook. The defendants timely appealed. Discerning no reversible error, we affirm the trial court's judgment with one modification: we direct the trial court to dismiss Jefferson County as a defendant because the Jefferson County Board of Education, as the owner of the school bus, is undisputedly the proper defendant in this action.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as Modified; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and KRISTI M. DAVIS, JJ., joined.

Arthur F. Knight, III, Knoxville, Tennessee, for the appellants, Jefferson County, Tennessee, and Jefferson County Board of Education.

Randal E. Martin and Gary Brewer, Morristown, Tennessee, and Mikel A. Towe, Knoxville, Tennessee, for the appellees, Jacob Thomas Cook and Rickey J. Macari.

OPINION

I. Factual and Procedural Background

Although the parties contest which driver's actions were the proximate cause of the accident, the underlying facts are largely undisputed. The accident occurred on or around 7:45 a.m. on December 15, 2014, in Jefferson County, Tennessee. Mr. Cook was driving Mr. Macari's 2005 Nissan Altima ("the Nissan") in the inside lane of Highway 11E traveling eastbound toward Jefferson County High School. Mr. Moody, who was driving an empty school bus after transporting students to Jefferson County Middle School, was attempting to make a left turn from the school entrance by crossing the two eastbound lanes of Highway 11E onto the westbound lanes. The weather was foggy. Mr. Moody testified at trial that before driving the bus into the eastbound lanes of Highway 11E, he looked both ways and did not see any oncoming traffic. Mr. Moody then drove the bus across both eastbound lanes of Highway 11E in preparation for turning left onto the westbound lanes. Mr. Moody recounted that as he was "going through the median," he "saw a pickup come out from behind a car into [his] lane" and stopped the bus to allow the truck to pass. Consequently, the stopped bus was blocking the interior of the two eastbound lanes of Highway 11E as Mr. Cook approached, driving the Nissan in the interior eastbound lane. Mr. Cook struck the stationary bus, totaling both the Nissan and the school bus. Mr. Cook suffered severe injuries to his right femur and tibia, requiring surgery and physical therapy.

On January 22, 2015, Mr. Cook and Mr. Macari (collectively, "Plaintiffs") filed a complaint in the Jefferson County Circuit Court ("trial court"), naming as defendants Jefferson County, Tennessee ("the County"); the Jefferson County Board of Education ("the Board"); and Mr. Moody (collectively, "Defendants") (the County and the Board, as the two remaining defendants in this appeal, shall be hereinafter collectively referred to as the "County Defendants"). Although Plaintiffs did not directly refer to the Tennessee Governmental Tort Liability Act, codified at Tennessee Code Annotated §§ 29-20-101, *et seq.* ("GTLA"), in their complaint, the trial court treated Plaintiffs' claims as arising under the GTLA because, as stated in Plaintiffs' complaint, the County is "a governmental

entity" and the Board is a "political subdivision" of the County. *See* Tenn. Code Ann. § 29-20-102(3). Plaintiffs requested $450,000.00 in relief for Mr. Cook's personal injuries and damages sustained from the accident and $7,500.00 for property damage to the Nissan.

On March 12, 2015, Defendants filed an answer asserting that Plaintiffs' claims were barred by the doctrine of modified comparative fault because, according to Defendants, Mr. Cook was the sole negligent actor in the accident and the sole proximate cause of any injuries or damages sustained. In their answer, Defendants acknowledged that the Board owned the school bus, the Board was an entity capable of being sued pursuant to the GTLA, and the Board's governmental immunity had been removed in this case by operation of Tennessee Code Annotated § 29-20-202 (2012) of the GTLA.[1] Defendants posited that because the Board, not the County, owned the school bus, the County was not an appropriate Defendant and should be dismissed from the action. Defendants further asserted that Mr. Moody was not a proper Defendant pursuant to Tennessee Code Annotated § 29-20-310(b) (Supp. 2022).[2] On December 9, 2015, the trial court entered an agreed order dismissing all claims against Mr. Moody, without prejudice, pursuant to Tennessee Code Annotated § 29-20-310(b).

Defendants also filed a counter-complaint against Plaintiffs, which is not included in the record on appeal, seeking $30,000.00 for damage to the school bus as a result of the accident. On August 2, 2019, the Board filed a "Motion to Amend Ad Damnum," pursuant to Tennessee Rule of Civil Procedure 15, requesting permission to amend the relief sought in their counter complaint from $30,000.00 to $55,554.00 due to a typographical error. On August 19, 2019, the trial court entered an agreed order granting the motion to amend *ad damnum*.

The trial court conducted a bench trial on October 3, 2022. Plaintiffs presented testimony from Mr. Cook; Director of Transportation for the Board, Sherry Dotson; and Mr. Macari. County Defendants presented testimony from Mr. Moody and their expert witness, Todd Hutchison, who was tendered and accepted as an expert in accident reconstruction with no objection from Plaintiffs. Mr. Hutchison's full report and several photographs of the Nissan, the school bus, and the scene of the accident were also entered as exhibits at trial. During the trial, Mr. Hutchison opined that Mr. Cook had been traveling 40.8 to 45 miles per hour "at the point of impact" with the bus, and calculated that Mr. Cook had been traveling "46-53 miles per hour at the start of the skidding" which began

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[1] Under the GTLA, sovereign immunity of governmental entities is removed for injuries resulting from an employee's negligent operation of a motor vehicle while in the scope of employment. *See* Tenn. Code Ann. § 29-20-202 (2012).

[2] Tennessee Code Annotated § 29-20-310(b) provides that "[n]o claim may be brought against an employee or judgment entered against an employee for damages for which the immunity of the governmental entity is removed by this chapter unless the claim is one for health care liability brought against a health care practitioner."

once Mr. Cook saw the school bus blocking his path. With this calculation, Mr. Hutchison further opined that Mr. Cook had been traveling at approximately 15 to 20 miles per hour over the 25 mile-per-hour speed limit in the school zone before he saw the bus and reacted by engaging his brakes. Mr. Hutchison noted that even had Mr. Cook been traveling within the speed limit, conditions of the road and visibility were such that Mr. Cook would not have been able to avoid hitting the school bus stretched across the eastbound lanes.

Upon the close of proof, the trial court announced a recess to take the matter under advisement. On October 5, 2022, the trial court reconvened to deliver its ruling from the bench, and the decision was subsequently incorporated into a final judgment entered on October 17, 2022. The trial court found that Mr. Moody was 80% at fault for the accident and Mr. Cook was 20% at fault. The trial court concluded that this fault allocation barred County Defendants from any recovery upon their counter-complaint for damage to the school bus. The trial court then awarded what it deemed to be 80% of Plaintiffs' total damages, or $208,000.00, against both the Board and the County. County Defendants timely appealed.

II. Issues Presented

County Defendants have raised four issues on appeal, which we have restated and reordered as follows:

1. Whether the trial court erred in failing to consider the unrebutted testimony of accident reconstructionist Todd Hutchison.

2. Whether the trial court erred in allocating 80% of the fault for the accident to the driver of the school bus, Mr. Moody.

3. Whether the trial court erred in failing to find Plaintiffs liable for the property damage to the school bus.

4. Whether the trial court erred in including Jefferson County as a party defendant.

III. Standard of Review

Our review of the trial court's judgment following a non-jury trial is *de novo* upon the record with a presumption of correctness as to the trial court's findings of fact unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 204 (Tenn. 2012). This standard of review is the same for allocation of fault in bench trials. *Lindgren v. City of Johnson City*, 88 S.W.3d 581, 584 (Tenn. Ct. App. 2002) (citing *Cross v. City of Memphis*, 20 S.W.3d 642 (Tenn. 2000)). "In order for the evidence to preponderate against the trial court's finding of fact, the evidence must support another finding of fact with greater convincing effect." *Wood*

v. Starko, 197 S.W.3d 255, 257 (Tenn. Ct. App. 2006) (citing *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 296 (Tenn. Ct. App. 2001)). We review the trial court's conclusions of law *de novo* with no presumption of correctness. *Hughes v. Metro. Gov't of Nashville & Davidson Cnty.*, 340 S.W.3d 352, 360 (Tenn. 2011). Regarding our review of a trial court's determinations of witness credibility, our Supreme Court has explained:

> Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary.

Wells v. Tenn. Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999).

IV. Comparative Fault

A. Testimony of Accident Reconstructionist Todd Hutchison

County Defendants contend that the trial court erred in failing to consider the "unrebutted testimony" of County Defendants' expert, accident reconstructionist Todd Hutchison. In support of their argument, County Defendants state that Mr. Hutchison was "not deposed"; that Plaintiffs "submitted nothing to contradict Mr. Hutchison's conclusions"; and that Plaintiffs "did not question either Mr. Hutchison's qualifications, methodology, or offer any facts that would . . . discount [Mr. Hutchison's opinions]." Additionally, County Defendants advance the position that the trial court "adopted a view diametrically opposed" to Mr. Hutchison's testimony despite accepting him as an expert in the field of accident reconstruction and despite the lack of any testimony or evidence from Plaintiffs to rebut Mr. Hutchison's opinions. County Defendants also contend that in ruling contrary to Mr. Hutchison's findings, the trial court "disregarded the weight of the evidence." County Defendants urge that the trial court "must have some valid evidentiary basis for coming to a contrary conclusion" to testimony proffered by an expert and that "[a] trial court may reject expert testimony only if it finds it is inconsistent with the lay testimony." County Defendants offer no authority, nor have we found any authority, to support these assertions. Plaintiffs counter that the trial court was not required to simply adopt, without question or analysis, Mr. Hutchison's conclusions even in the absence of contradicting testimony from another expert. We agree with Plaintiffs.

Both parties rely on *Cocke Cnty. Bd. of Highway Comm'rs v. Newport Utils. Bd.*, in which our Supreme Court explained:

> Expert opinions are not ordinarily conclusive in the sense that they must be accepted as true on the subject of their testimony, but are generally regarded as purely advisory in character; the jury may place whatever weight they choose upon such testimony and may reject it, if they find that it is inconsistent with the facts in the case or otherwise unreasonable.

690 S.W.2d 231, 235 (Tenn. 1985) (quoting 31A AM. JUR. 2D, EXPERT AND OPINION EVIDENCE § 138 (1967))[3] (other citations omitted). Furthermore, County Defendants expressly acknowledge as much in their brief on appeal, quoting this Court's opinion in *Thurmon v. Sellers* for the proposition that "expert testimony is not conclusive, even if uncontradicted, but is merely purely advisory in character, and the trier of fact may place whatever weight it chooses on such testimony." 62 S.W.3d 145, 162 (Tenn. Ct. App. 2001); *see also Crutcher v. Maury Cnty. Bd. of Educ.*, No. M2007-00244-COA-R3-CV, 2008 WL 2695660, at *6 (Tenn. Ct. App. July 9, 2008) (noting that the trial court "expressly relied" on the eyewitness accounts of lay witnesses, affording more weight to their testimony than to the testimony of the experts presented by both sides). Thus, contrary to County Defendants' assertions, the trial court was not bound to accept Mr. Hutchison's testimony as true simply because he was tendered as an expert and his opinions were not contradicted. Mr. Hutchison's opinions remained "advisory in character," *see Cocke Cnty.*, 690 S.W.2d at 235, and the trial court properly exercised its discretion to place whatever weight it chose concerning Mr. Hutchison's testimony and report.

Moreover, upon review of Mr. Hutchison's testimony at trial and the trial court's final judgment, we determine that the trial court did not, as County Defendants propound, reach conclusions "diametrically opposed" to the testimony of Mr. Hutchison. It is true that Mr. Hutchison opined in his written report:

> [I]t is my opinion that the accident [between Nissan and school bus] was caused by [Mr. Cook] traveling too fast for the roadway and lighting conditions and in excess of the posted 25 mph speed limit in a school zone.

If this conclusion from Mr. Hutchison's written report had been the only opinion from Mr. Hutchison presented during trial, County Defendants might possess a stronger argument that the trial court's allocation of greater fault to Mr. Moody was "diametrically opposed" to Mr. Hutchison's opinion. But such was not the case. At trial, Mr. Hutchison ultimately opined that Mr. Cook would have collided with the school bus even had he been following the speed limit of 25 miles per hour.

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[3] This content can be found in the current version of American Jurisprudence at 31A AM. JUR. 2D EXPERT AND OPINION EVIDENCE § 88 (2023).

After Mr. Hutchison was questioned at length about his analytical process, his investigation of the accident site, and the information he relied on in reaching his conclusions and completing his report, Mr. Hutchison opined that Mr. Cook had been operating the Nissan at a speed of 40.8 to 45 miles per hour, or roughly 15 to 20 miles per hour above the speed limit, when the Nissan collided with the bus. However, on cross-examination, counsel for Plaintiffs questioned Mr. Hutchison as to what likely would have happened had Mr. Cook been driving the speed limit, specifically 25 miles per hour. After initially responding that at 25 miles per hour, Mr. Cook "would not have hit the bus," Mr. Hutchison later qualified this statement to explain that based on all of the factors he considered, there still "may have been an impact," but at a much lower rate of speed. Near the completion of Mr. Hutchison's testimony, the trial court questioned him as follows:

Trial Court:	So, from the point [Mr. Cook] first saw this bus, where the skid marks begin, or back it up some feet for his travel time to react . . .
Mr. Hutchison:	Yes.
Trial Court:	Even in the light most favorable to the plaintiff, being 25 miles an hour . . .
Mr. Hutchison:	Yes.
Trial Court:	[N]ot a higher speed, he still couldn't have stopped, and he would have still hit the bus?
Mr. Hutchison:	Well, at, using a .4[4] at 25 miles an hour, he would leave 52 feet of skidding. Okay? 52 feet. So, if he's skidding at 52 feet, and he's going 25 miles an hour, if he had hit the bus at the very end, he would have probably been going two or three miles per hour.
Trial Court:	But he still would have hit the bus. The bus was there, and he couldn't have avoided it?

[4] During his testimony at trial, Mr. Hutchison explained that he had assigned a "friction factor" of ".4" to the road on the day of the accident. This number, which Mr. Hutchison also called a "drag factor," is based on weather conditions and the material of the road, among other factors. Essentially, Mr. Hutchison explained that the lower the friction factor, the less "drag" the road surface would have on a vehicle skidding along that surface. Conversely, the higher the "friction factor," the faster a vehicle would be able to come to a complete stop after the driver had applied the brakes. Here, Mr. Hutchison opined that the asphalt road during the accident in question had a "friction factor" of ".4," after taking "into account that there may have been some moisture on the ground to allow [the road] to slip a little bit more than if it was just a completely dry surface."

Mr. Hutchison: If it's the .4 factor . . .

Trial Court: Okay.

Mr. Hutchison: . . . he would have hit the bus. Or anything else that stopped there in the roadway.

Trial Court: Okay. But the damage might not have been as great is what you're saying?

Mr. Hutchison: Yeah. It wouldn't have been as great.

Upon the conclusion of trial, the trial court directly addressed both Mr. Hutchison's testimony at trial and his written report in its final judgment:

> The impact and car passing times are reflected in the report of [Mr. Hutchison], at page 2 of Exhibit 15. The [trial court] further observes that even 2.5 seconds, under the expert's assumptions, would not have allowed time to react to avoid the accident. Mr. Hutchison testified, based on his assumptions, Mr. Cook was traveling over the speed limit, yet he still admitted that under the same assumptions [Mr. Hutchison] made, if travel was at the speed limit of 25 miles an hour by Mr. Cook, he would have struck the stopped bus.

Thus, the trial court clearly considered and weighed Mr. Hutchison's report, as well as his testimony during trial, when adjudicating liability and allocating fault between the parties. In fact, the trial court predicated its conclusion—that Mr. Cook would have struck the bus regardless of whether he was driving within the speed limit—on Mr. Hutchison's own calculations. The trial court's conclusions were therefore not diametrically opposed but were instead consistent with Mr. Hutchison's opinions.

In their appellate brief, County Defendants assert that had Mr. Cook been following the speed limit, it is "doubtful that Mr. Cook would have received any injury and the property damage to the vehicles would have been minimal." However, the nature and amount of damage to person or property are not material to this issue. We find no error in the trial court's consideration of Mr. Hutchison's testimony.

B. Fault Allocation

County Defendants argue that the trial court "erred in allocating fault against [County Defendants] in this action" because "[Plaintiffs] were at least 50% or more at fault in the accident . . . and therefore [Plaintiffs] are barred from recovery." County Defendants

urge that "Mr. Cook and his negligence was the sole proximate cause of the accident." Plaintiffs respond that County Defendants' postulate is deficient because they do not point out any alleged error in the trial court's ruling, rather they simply "recite[] supposed facts from the case that are not included in [County Defendants'] Statement of Facts and are not cited to the Record."

In negligence actions such as the case at bar, courts in Tennessee apportion fault by using the "common law system of modified comparative fault." *Crotty v. Flora*, ___ S.W.3d___, ___, No. M2021-01193-SC-R11-CV, 2023 WL 6342049, at *5 (Tenn. Sept. 29, 2023) (citing *McIntyre v. Balentine*, 833 S.W.2d 52, 55-56 (Tenn. 1992)). "[C]omparative fault is an affirmative defense in which an alleged tortfeasor asserts 'that a portion of the fault for the plaintiff's damages should be allocated to another tortfeasor.'" *Ellington v. Jackson Bowling & Family Fun Ctr., L.L.C.*, No. W2012-00272-COA-R3-CV, 2013 WL 614502, at *10 (Tenn. Ct. App. Feb. 19, 2013) (quoting *Banks v. Elks Club Pride of Tenn. 1102*, 301 S.W.3d 214, 220 (Tenn. 2010)). Our Supreme Court adopted the system of modified comparative fault in *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992), with the intention, among other things, of replacing the prior doctrine of contributory negligence with a set of principles that would more fairly allocate liability among defendants and enable plaintiffs to recover fully for their injuries. *See Grandstaff v. Hawks*, 36 S.W.3d 482, 490 (Tenn. Ct. App. 2000). Under the modified system, a plaintiff may only recover damages if the "plaintiff's negligence remains less than the defendant's negligence." *McIntyre*, 833 S.W.2d at 57. In such a case, the "plaintiff's damages are to be reduced in proportion to the percentage of the total negligence attributable to the plaintiff." *Id.*

In support of their position that Mr. Cook was "at least 50% . . . at fault" for the accident, County Defendants aver that the accident occurred in a school zone and that "it was foggy, visibility was limited, it was cold, and the road was slippery." County Defendants assert that Mr. Cook was "undisputedly in the fast lane" when his vehicle struck the bus. According to County Defendants, Mr. Cook was "clearly exceeding the speed limit," had admitted during testimony that he "should have been going slower than 25 miles an hour," and had acknowledged that the "tires were bald" on the Nissan at the time of the accident. By contrast, County Defendants state that Mr. Moody was an "experienced over the road driver," who had spent "35 years driving over the road tractor trailers" before becoming a school bus driver. County Defendants further aver that "Mr. Moody took great pains to be safe in loading and unloading kids while a school bus driver[.]" County Defendants emphasize that "when it was Mr. Moody's turn to cross over the median and into westbound traffic, he looked both ways, specifically left, right, and then left again. At no point did [Mr. Moody] see the Cook vehicle." Moreover, County Defendants assert that after Mr. Moody began to move his bus across eastbound traffic, a pickup truck that was "clearly exceeding the speed limit and driving recklessly in a school zone" veered around an SUV in the westbound lanes, forcing Mr. Moody to stop the bus before proceeding westbound. County Defendants therefore posit that the totality of these facts establishes

that Mr. Cook's actions, and not those of Mr. Moody, were the proximate cause of the accident and that for these reasons Mr. Cook should receive no award for his injuries.

We agree with Plaintiffs that County Defendants' arguments and citations to the record here are deficient. County Defendants recite several facts for the first time in this argument section without proper reference to the record. For example, in explaining that Mr. Moody's bus was forced to stop across eastbound traffic by reason of an approaching pickup truck in the westbound lanes, County Defendants argue that the pickup truck driver was "exceeding the speed limit" and "driving recklessly." However, they do not provide proper record citations for these assertions, nor are these facts included in County Defendants' statement of facts section. County Defendants also point to Mr. Moody's several years as an "experienced over the road" driver, while including that Mr. Moody "took great pains to be safe in loading and unloading kids" from the bus and that "all of Mr. Moody's lights were on his bus . . . ." Again, County Defendants have neither supplied respective citations to the record nor have they explained why these facts are relevant to their argument as to fault allocation.

In relying upon facts without proper citations to the record in their appellate brief, County Defendants have failed to comply with the requirements of Tennessee Rule of Appellate Procedure 27, which provides, in relevant part:

> (a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings[:]
>
> (6) A statement of facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record;
>
> (7) An argument . . . setting forth:
>
> (A) the contentions of the appellant with respect to the issues represented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on[.]

(Emphasis added.) "[Tennessee c]ourts have routinely held that a failure to make appropriate references to the record and to cite relevant authority in the argument section of [an appellate] brief as required by [Tennessee Rule of Appellate Procedure] 27(a)(7) constitutes a waiver of the issue." *See Bean v. Bean*, 40 S.W.3d 52, 55 (Tenn. Ct. App. 2000) (citations omitted).

However, in the instant action, we note that County Defendants have largely complied throughout their brief with the requirements of Tennessee Rule of Appellate

Procedure 27 and we further note that the facts for which they fail to provide citations to the record are not dispositive. We therefore determine that this is an appropriate case in which to exercise our discretion to waive strict adherence to the briefing requirements so that we may fully review this issue on the merits. *See* Tenn. R. App. P. 2; *Chiozza v. Chiozza*, 315 S.W.3d 482, 487–89 (Tenn. Ct. App. 2009) ("[T]here are times when this Court, in the discretion afforded it under Tenn. R. App. P. 2, may waive the briefing requirements to adjudicate the issues on their merits.").

Even had County Defendants presented all of these facts with proper reference to the record, the evidence does not preponderate against the trial court's conclusion that Mr. Moody was 80% at fault for the accident. The trial court's final judgment includes eight pages of findings of fact and conclusions of law, in which the trial court considered the exhibits and testimony of all witnesses, including County Defendants' own expert, Mr. Hutchison. After reciting its findings, the trial court ultimately concluded that while Mr. Cook bore a portion of the fault, "[t]he bus blocking the road was the proximate cause of the accident." In determining fault allocation, the trial court specifically found the following facts regarding Mr. Moody's actions, none of which are disputed by County Defendants:

> At the time of Mr. Moody's deposition, the bus driver could not recall how far he could see oncoming traffic before pulling across the highway. At trial, Mr. Moody said he could see to the school zone sign. Mr. Moody stated once in the median, he saw a pickup truck pull into an open Westbound lane, which caused him to stop. This action of entering the roadway to cross over was contrary to his department policy of not pulling across traffic unless you are clear both ways by 400 feet. This policy was stated by [Board] Supervisor of Transportation, Sherry Dotson. Ms. Dotson also testified that bus drivers are taught to never stop in an intersection. Her testimony was supported by CDL regulations for drivers, contained in Exhibit 7, Commercial Driver's License Manual. Given [his] assertion [that] the highway was safe to cross with the fog, and lack of line of sight of other Westbound vehicles, the Court finds a credibility issue with the bus driver's position and testimony.

The trial court further found that not only did Mr. Moody's operation of the bus on the morning of the accident violate Board policy and commercial driver regulations, it also violated Tennessee law and the "rules of the road":

> The Court specifically applies the rules of the road to this factual situation. Mr. Cook had the right of way. The school bus blocked the road and right of way in violation of Tennessee Code Annotated § 55-8-130 ["Through

> highways; right of way"] and 55-8-158 ["Stopping or parking on roadways"].[5]

Regarding County Defendants' argument that Mr. Cook's actions were the "sole proximate cause" of the accident because he was speeding, the trial court found:

> Mr. Hutchison testified, based on his assumptions, Mr. Cook was traveling over the speed limit, yet he still admitted that under the same assumptions he made, if travel was at the speed limit of 25 miles an hour by Mr. Cook, [Mr. Cook] would have struck the stopped bus.

As this Court has previously explained, "[a] trial court has considerable latitude in allocating fault between or among culpable parties, and the appellate court reviews same with a presumption of correctness." *Lindgren*, 88 S.W.3d at 585. Upon thorough review of the record, we determine that the evidence does not preponderate against the trial court's allocation of 80% fault to Mr. Moody and 20% fault to Mr. Cook.

County Defendants also invoke the doctrines of "sudden emergency" and "last clear chance" to contend that the trial court's allocation of fault constituted error. Specifically, County Defendants propound that Mr. Moody was confronted with a "sudden emergency as a result of the actions of the pickup truck and therefore under established Tennessee law is not held to the same level of care as Mr. Cook." County Defendants further urge that Mr. Moody had no choice but to stop in the middle of the eastbound lane to avoid the approaching pickup truck. In reliance upon the "doctrine of last clear chance," County Defendants argue that Mr. Cook had the last chance to avoid the accident because the school bus was already stopped across the eastbound lanes when Mr. Cook came upon it in the Nissan.

We note, and County Defendants acknowledge in their appellate brief, that these two doctrines have been subsumed into Tennessee's system of comparative fault. *See McCall v. Wilder*, 913 S.W.2d 150, 157 (Tenn. 1995) ("The [sudden emergency] doctrine no longer constitutes a defense as a matter of law but, if at issue, must be considered as a factor in the total comparative fault analysis."); *McIntyre*, 833 S.W.2d at 57 ("[T]he new rule [of comparative fault] makes the doctrine[] of . . . last clear chance obsolete."). As such, the application of these doctrines to the facts here does not create any cognizable position separate from the issues presented concerning the trial court's comparative fault analysis. Furthermore, the trial court expressly considered and rejected Mr. Moody's testimony at trial that he had no choice but to stop the bus in the middle of eastbound traffic because a pickup truck blocked his way traveling westbound. The trial court found that Mr. Moody's "action of entering the roadway to cross over was contrary to his department

[5] Plaintiffs alleged in their complaint that both of these motor vehicle statutes, Tennessee Code Annotated §§ 55-8-130 (2020) and 55-8-158 (2020), had been violated.

policy of not pulling across traffic unless you are clear both ways by 400 feet." On Mr. Moody's options, the trial court further stated:

> The Court also finds the testimony of [Board] Transportation Director Sherry Dotson], that the bus driver could have done one of three things instead of crossing the highway in the fog. The Court finds two of those to have been an option. Those options were to stop and not cross the highway in the fog. The fact that others were in line behind the bus to leave is no justification to abandon safety. The other option was to turn right and later cross over where safe. Neither of the safer options was exercised by [Mr. Moody].

Relative to Mr. Cook's actions, as the driver who purportedly had the "last clear chance" to avoid the accident, the trial court determined:

> Mr. Cook had no other option but to slow down as best he could before impact after suddenly seeing the bus blocking the road in the fog. Given the fog, had Mr. Cook driven at a lesser speed, his injury may have been less. However, it was not the proximate cause of the accident. The bus blocking the road was the proximate cause of the accident.

The trial court considered, *inter alia*, the drivers' respective duties according to the "rules of the road" in rendering its fault allocations. We find that the evidence presented by County Defendants does not preponderate against the trial court's ruling. Accordingly, we discern Defendants' arguments related to the "doctrine of sudden emergency" and the "doctrine of last clear chance" to be unpersuasive as they pertain to the trial court's allocation of fault between the parties.

We further note that County Defendants argue the "sudden emergency" and "last clear chance" doctrines for the first time on appeal. Therefore, to the extent County Defendants intend this Court to consider these doctrines anew or separately from the trial court's comparative fault analysis, County Defendants have waived same. *See Dye v. Witco Corp.*, 216 S.W.3d 317, 321 (Tenn. 2007) ("We have held that 'issues raised for the first time on appeal are waived.'" (quoting *Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996))).

C. Modified Comparative Fault

Inasmuch as we find no error in the trial court's determination that Mr. Moody was 80% at fault and Mr. Cook was 20% at fault for the accident, County Defendants' third issue on appeal is unavailing. County Defendants posit that the trial court erred "in failing to find Plaintiffs liable for the property damage to the bus" based upon County Defendants' counterclaim for this damage against Plaintiffs. As reviewed above, under Tennessee's modified comparative fault system, a plaintiff may recover from a defendant on a claim of

negligence *only if* "the plaintiff's negligence remains less than the defendant's negligence." *McIntyre*, 833 S.W.2d at 57. Here, Mr. Moody's negligence was found to be greater than Mr. Cook's negligence. Ergo, County Defendants are barred from recovery for damages to the bus pursuant to the doctrine of modified comparative fault because Mr. Cook's 20% fault allocation was outweighed by Mr. Moody's 80% fault allocation. Accordingly, we find no error in the trial court's determination on this issue.

V. Inclusion of the County as a Party Defendant

County Defendants contend that the County should not have been named as a defendant in this action because the "bus at issue is owned and operated by the [Board]" and the Board operates separately from the County. In support, County Defendants aver that the trial court dismissed the County by an agreed order purportedly entered on July 16, 2016. During the pendency of this appeal, County Defendants filed a motion to supplement the record, requesting that they be allowed to add an agreed order entered by the trial court on July 16, 2016, dismissing the County as a party. Plaintiffs did not oppose the motion to supplement, and this Court entered an order granting the motion on May 23, 2023. However, the trial court subsequently filed a communication with this Court stating that no such order could be found in the record.

Although the agreed order dismissing the County is not in the record certified by the trial court, Plaintiffs concede that the Board is the proper party in this case and do not object to the dismissal of the County from this action. It is also undisputed that the Board is an entity capable of being sued pursuant to Tennessee Code Annotated § 29-20-102(3). Therefore, it appearing that no dispute exists between the parties respecting this issue and that the Board, as the owner and operator of the school bus involved in the accident, is the proper Defendant, *see* Tenn. Code Ann. § 29-20-102(3), we conclude that the County should have been dismissed by the trial court prior to the final judgment. Therefore, the case shall be remanded with instructions to the trial court to amend its October 10, 2022 final judgment to dismiss Jefferson County as a party defendant.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's final judgment awarding damages to Plaintiffs from the Jefferson County Board of Education with the modification that Jefferson County should be dismissed as a defendant. We remand this case, pursuant to applicable law, for modification and enforcement of the final judgment, as well as collection of costs assessed below. Costs on appeal are assessed to the appellant, the Jefferson County Board of Education.

s/Thomas R. Frierson, II
THOMAS R. FRIERSON, II, JUDGE