IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 20, 2023 Session

JOHN H. PACKARD, IV v. JONATHAN R. BENTLEY ET AL.

Appeal from the Circuit Court for Sevier County
No. 19-CV-430-IV O. Duane Slone, Judge

No. E2022-00982-COA-R3-CV

The plaintiff, John H. Packard, IV ("Plaintiff") was struck by a vehicle driven by Jonathan R. Bentley while Plaintiff attempted to walk across a roadway in Gatlinburg, Tennessee. Plaintiff brought a suit arising in negligence against a number of parties, including the City of Gatlinburg ("City"). As to City, Plaintiff alleged that it created an unreasonably dangerous risk of harm to pedestrians attempting to use the crosswalk because it failed to inspect and maintain LED lights it had previously installed on a nearby crosswalk sign. The Circuit Court for Sevier County ("trial court") granted summary judgment in favor of City, finding that City negated an essential element of Plaintiff's claim, that City was entitled to immunity pursuant to the Tennessee Governmental Tort Liability Act ("GTLA"), Tennessee Code Annotated section 29-20-101 *et seq.*, and that City was also immune pursuant to the public duty doctrine. Finding no error, we affirm the judgment of the trial court.

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

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and THOMAS R. FRIERSON, II, J., joined.

Sidney W. Gilreath and Cary L. Bauer, Knoxville, Tennessee, for the appellant, John H. Packard, IV.

Benjamin K. Lauderback, Knoxville, Tennessee, for the appellee, City of Gatlinburg.

OPINION

I. Background

On March 8, 2019, at approximately 6:00 p.m., Plaintiff was struck by a car driven by Mr. Bentley while Plaintiff attempted to cross a roadway in Gatlinburg, Tennessee colloquially known as "the Parkway." The Parkway and the designated crosswalk in which Plaintiff was located at the time of the accident are owned and controlled by the State of Tennessee. However, the sign adjacent to the crosswalk, which is meant to alert drivers on the Parkway to the presence of the crosswalk, is owned and maintained by City.

Years prior to the accident at issue in this case, a similar accident occurred when a pedestrian was struck by a vehicle in the same crosswalk. Following that prior accident, City attached LED lights to the crosswalk sign that were designed to activate if a button on the sign pole was pushed. The lights were inoperable at the time of the accident at issue in this case. Plaintiff knew that the lights were not working and did not attempt to push the button to activate the lights on the day of the accident. Despite the lights being inoperable, the crosswalk sign met and complied with all Tennessee engineering standards for such traffic control devices.

At the time of the accident, Plaintiff owned and lived at a business in the immediate vicinity of the crosswalk. Plaintiff was very familiar with the area of the Parkway and crosswalk at issue and testified that he used this same crosswalk thousands of times prior to the accident. Plaintiff had just closed his store for the day and was walking to his car, which was parked across the Parkway from his store, when the accident occurred. Upon exiting his store, Plaintiff turned to the left and mere feet later was standing on the curb at the crosswalk. As he stood on the sidewalk, he looked to his left and to the right for traffic. Plaintiff had a clear visibility of at least 100 yards to his left and did not see any vehicles approaching from that direction. Plaintiff stepped into the crosswalk and began crossing the Parkway when he saw vehicles approaching from his right, which led Plaintiff to retreat back to the sidewalk. After pausing on the sidewalk, Plaintiff quickly re-entered the crosswalk and stepped directly into the path of Mr. Bentley's vehicle, which was approaching from Plaintiff's left, at which time Mr. Bentley's vehicle struck Plaintiff.

On June 24, 2019, Plaintiff filed a Complaint against Mr. Bentley, the owner of the vehicle, and City in the trial court. Plaintiff separately filed a Complaint against the State of Tennessee in the Claims Commission for the State of Tennessee. Only Plaintiff's claim against City is at issue in this appeal. With regard to his claim against City, Plaintiff averred:

> 3. Defendant City of Gatlinburg is a municipality within the State of Tennessee and . . . is sued pursuant to the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-30-307 *et seq*. . . .

* * *

> 15. At the time of the collision herein, defendant City of Gatlinburg knew that the subject crosswalk, owing to the extreme volume of traffic passing thereby, created an unreasonably dangerous risk of harm to pedestrians attempting to cross. In recognition of said danger, defendant had installed pedestrian-activated warning flashers to alert oncoming motorists to the presence of pedestrians within the crosswalk.
>
> 16. At said time and place, defendant knew that the warning flashers they had installed were not functional, thereby creating an unreasonably dangerous risk of harm to pedestrians attempting to cross. The inability of plaintiff to activate the warning flashers to alert oncoming motorists of his presence within the crosswalk caused or contributed to the collision herein.
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> 17. As a direct and proximate result of defendants' combined negligence and negligence *per se*, plaintiff has suffered, and continues to suffer . . . injuries . . .

On March 7, 2022, City filed a motion for summary judgment arguing that Plaintiff cannot prove that City committed a negligent act, that City is immune from suit pursuant to the GTLA, and that the public duty doctrine bars Plaintiff from recovering against City. Pursuant to Rule 56.03 of the Tennessee Rules of Civil Procedure, City's motion was accompanied by a contemporaneously filed statement of purportedly undisputed material facts with a specific citation to the trial court record to support each fact. Also pursuant to Rule 56.03, on May 18, 2022, Plaintiff filed a response to each of City's facts and included additional purportedly undisputed material facts, some of which were supported by a specific citation to the trial court record. Plaintiff did not file any other documents in opposition to the motion for summary judgment.

On June 21, 2022, following a hearing on City's motion, the trial court granted City's motion and entered summary judgment in City's favor, finding that City was entitled to summary judgment on three independent grounds. First, the trial court held that City successfully negated an essential element of Plaintiff's negligence claim by showing that City did not breach any duty of care it owed to the Plaintiff. Specifically, the trial court found that the duty of care owed by City to the public with regard to the crosswalk was to have signage in place and "it is undisputed that [] the signage the City had in place at all times relevant to this matter complied and met with, at least, the minimum engineering standards for traffic engineering in the State of Tennessee and the Manual on Uniform Traffic Control Devices that has been adopted by the State of Tennessee." Next, the trial court held that City "was immune from suit pursuant to the [GTLA] pursuant to Tenn. Code Ann. § 29-20-205(4) based on the Plaintiff's failure to inspect theory." Specifically, the trial court found that "Plaintiff's argument that the City failed to inspect the lights on

the signage at issue and is therefore liable to the Plaintiff is without merit as the City retains immunity for claims based on a failure to inspect." Finally, the trial court held that "the Public Duty Doctrine applies in this case and provides the City with immunity . . . because the Plaintiff has failed to offer any evidence that the City undertook a 'special duty' related to the Plaintiff." Specifically, the trial court found that "[t]he signage at issue did not exist solely to protect the Plaintiff, no employee of the City acted to specifically protect the Plaintiff nor has the Plaintiff provided any evidence that the City undertook or owed a duty to the Plaintiff versus the public in general." This timely appeal followed.

II. Issues Presented on Appeal

Plaintiff raises the following issues for our review, which we have restated slightly and reordered:

1. Whether the trial court erred by holding that City was immune from suit pursuant to the GTLA pursuant to Tenn. Code Ann. § 29-20-205(4) based on Plaintiff's failure to inspect theory.

2. Whether the trial court erred by holding that the public duty doctrine also provides City with immunity.

3. Whether the trial court erred by granting summary judgment to City where the facts demonstrate that City assumed a duty of care to Plaintiff.

III. Standard of Review

A trial court may grant summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. The propriety of a trial court's summary judgment decision presents a question of law, which we review de novo with no presumption of correctness. *Kershaw v. Levy*, 583 S.W.3d 544, 547 (Tenn. 2019).

"The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008). As our Supreme Court has instructed,

> when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense.

Rye v. Women's Care Ctr. of Memphis, 477 S.W.3d 235, 264 (Tenn. 2015). "[I]f the moving party bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if uncontroverted at trial, would entitle it to a directed verdict." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)).

When a party files and properly supports a motion for summary judgment as provided in Rule 56, "to survive summary judgment, the nonmoving party may not rest upon the mere allegations or denials of its pleading, but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, set forth specific facts . . . showing that there is a genuine issue for trial." *Rye*, 477 S.W.3d at 265 (internal quotation marks and brackets in original omitted). "Whether the nonmoving party is a plaintiff or a defendant – and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense – at the summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'" *TWB Architects*, 578 S.W.3d at 889 (quoting *Rye*, 477 S.W.3d at 265). In reviewing the trial court's summary judgment decision, we accept the evidence presented by the nonmoving party as true; allow all reasonable inferences in its favor; and "resolve any doubts about the existence of a genuine issue of material fact in favor of" Plaintiff, the party opposing summary judgment. *Id.* at 887.

IV. Analysis

A.

Plaintiff did not make any legal argument or raise any legal theory in opposition to City's motion for summary judgment.

"It is well established that the Court of Appeals' 'purpose is to correct errors made by trial courts, not make initial rulings on arguments not presented to the trial court.'" *Searcy v. Axley*, No. W2017-00374-COA-R3-CV, 2017 WL 4743111, at *8 (Tenn. Ct. App. Oct. 19, 2017) (quoting *Est. of Cunningham by & through Cunningham v. Epstein Enters. LLC*, No. W2015-00498-COA-R3-CV, 2016 WL 3662468 (Tenn. Ct. App. June 30, 2016) (Stafford, J., concurring)). Therefore, "[i]t has long been the general rule that questions not raised in the trial court will not be entertained on appeal . . . ." *Id.* (quoting *City of Memphis v. Shelby Cnty., Tenn.*, 469 S.W.3d 531, 560 (Tenn. Ct. App. 2015)). Moreover,

> [s]ummary judgment standards are both well settled ... and difficult for the moving party to meet. Parties on both sides of a summary judgment motion must heed those standards. The non-moving party must fully oppose a

> motion for summary judgment before it is granted rather than [seek to] overturn a summary judgment after only weakly opposing the motion.

Id. (quoting *Est. of Cunningham*, 2016 WL 3662468 (Stafford, J., concurring)). "Accordingly, a party's appeal to 'this Court of a trial court's order granting summary judgment is not an opportunity for the parties to set forth novel arguments not previously raised before the trial court.'" *Id.*

As such, each of Plaintiff's legal theories raised for the first time in his brief filed with this Court are waived. Nevertheless, "Rule 36(a) of the Tennessee Rules of Appellate Procedure confers upon this Court the power to grant any relief the proceeding requires, as long as that relief does not contravene the province of the trier of fact." *Norton v. Everhart*, 895 S.W.2d 317, 322 (Tenn. 1995). In light of the clear policy of this state favoring the adjudication of disputes on their merits, we believe that this is an appropriate case to invoke our authority under Rule 36(a). Accordingly, we hold that Plaintiff has waived any issue he has raised that was not previously presented to the trial court, but we further hold that the summary judgment order is appropriate for our review. *See Blackburn ex rel. Briton B. v. McLean*, No. M2021-00417-COA-R3-CV, 2022 WL 3225397, at *7 (Tenn. Ct. App. Aug. 10, 2022).

B.

Our analysis begins with the GTLA. In Tennessee, except as provided under the GTLA, "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." Tenn. Code Ann. § 29-20-201(a). Therefore, "[b]efore proceeding in an action against a governmental entity, the threshold issue of waiver of governmental immunity must be addressed." *Mitchell v. City of Franklin*, No. M2021-00877-COA-R3-CV, 2022 WL 4841912, at *4 (Tenn. Ct. App. Oct. 4, 2022) (quoting *McMahan v. City of Cleveland*, No. E2018-01719-COA-R3-CV, 2019 WL 5067193, at *3 (Tenn. Ct. App. Oct. 9, 2019)). For purposes of the GTLA, "governmental entity" includes "any political subdivision of the state of Tennessee including, but not limited to, any municipality[.]" *Id.* § 29-20-102(3)(A). It is undisputed that City is such an entity. "When immunity is removed by [the GTLA] any claim for damages must be brought in strict compliance with" Title 29, Chapter 20 of the Tennessee Code Annotated. *Id.* § 29-20-201(c).

Relevant to this case, the GTLA provides:

> Immunity from suit of all governmental entities 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 arises out of:

* * *

(4) A failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property[.]

Id. § 29-20-205(4).

In his brief filed with this Court, Plaintiff contends "that [City] was liable for failing to inspect and maintain its own signage and that if they had done so properly, the City would have known to repair the flashing LED lights at the [] crosswalk and the collision would have been avoided." This comports with the trial court's interpretation of Plaintiff's claim and the focus of a substantial number of the additional purportedly undisputed material facts offered by Plaintiff pursuant to Rule 56.03. Of note, Plaintiff asserted:

8. Melvin Large, Facilities Maintenance Supervisor, had the responsibility to know if the lights were not working.

9. It was Melvin Large's responsibility to fix the lights if they were not working.

* * *

11. Melvin Large was at all times the Facilities Maintenance Supervisor for the City of Gatlinburg.

12. Melvin Large had the responsibility of performing maintenance on the crosswalk sign.

13. Melvin Large was very familiar with the LED light system at the [crosswalk].

14. Melvin Large was employed by the City of Gatlinburg on August 2014 when Ola Moore was injured at the [] crosswalk, and this prompted the installation of the LED light system.

15. Before plaintiff's accident Melvin Large did not know the crosswalk sign lights were not working since no one told him they were not working.

16. Prior to the [accident at issue in this case], on March 8, 2019, Melvin Large relied on Larry Henderson to tell him if lights were not working.

(Citations to record omitted). Accordingly, we consider Plaintiff's claim under section 29-20-205. *See Davis by Davis v. City of Cleveland*, 709 S.W.2d 613, 615 (Tenn. Ct. App. 1986) (concluding that a claim arose under section 29-20-205 and not section 29-20-203 when "[t]he substance of plaintiff's allegations is that the governmental employee who was responsible for setting the timing sequence on this traffic signal negligently set the yellow caution interval" and "that the governmental entities, through their employees, were negligent in failing to inspect and/or re-evaluate the timing sequence on this signal"); *see also Fowler v. City of Memphis*, 514 S.W.3d 732, 741 (Tenn. Ct. App. 2016) (citing *Davis* with approval and applying the same analysis).

In his brief, Plaintiff again makes an argument with regard to this issue that it failed to raise before the trial court. Specifically, Plaintiff argues that the Tennessee Supreme Court held in *Hawks v. City of Westmoreland*, 960 S.W.2d 10 (Tenn. 1997), that section 29-20-205(4) does not grant immunity to a governmental entity for its failure to inspect its own property. This argument relies upon a flawed reading of *Hawks*.

In *Hawks*, homeowners sued the city when a defect in two fire hydrants resulted in the total fire loss of their home. 960 S.W.2d at 11. The local volunteer fire department responded to the fire but was unable to obtain water from the two fire hydrants nearest the home because an underground valve in the feeder pipe for each hydrant was closed. *Id.* at 12. The homeowners brought a claim pursuant to section 29-20-204 of the GTLA, which removes immunity from suit "for any injury caused by the dangerous or defective condition of any . . . public improvement owned and controlled by [a] governmental entity." *Id.* (quoting Tenn. Code Ann. § 29-20-204(a)). However, immunity is only removed pursuant to section 29-20-204 when the governmental entity had constructive and/or actual notice of the dangerous or defective condition. *See* Tenn. Code Ann. § 29-20-204(b). The homeowners offered witness testimony at trial that the city was required by state law to establish and maintain an adequate "flushing program . . . to [e]nsure that the chlorine level in the water supply system is sufficient to kill bacteria and provide fresh water." *Hawks*, 960 S.W.2d at 13. While "[t]he flushing program is not designed or intended to test and [e]nsure that fire hydrants are functioning properly[,]" the individual who maintained the flushing program for the city "testified that the [c]ity should have known that the underground valves next to the hydrants were closed." *Id.* Based upon this testimony, the trial court found that the city had constructive notice of the dangerous or defective condition sufficient to allow the homeowners to bring a claim pursuant to section 29-20-204. *Id.* On appeal, this Court and the Tennessee Supreme Court affirmed the holding of the trial court. *Id.* at 13–14.

Plaintiff now relies on this holding to argue that section 29-20-205(4) "does not grant immunity to a governmental entity for its failure to inspect its own property[.]" *Hawks*, however, was not a case about the application of section 29-20-205(4). Instead, the issue in that case dealt with the proof sufficient to satisfy the notice requirement under section 29-20-204. In this case, notice was not addressed by the trial court during the

summary judgment proceedings, and notice is not at issue in this appeal. As such, this holding in *Hawks* is inapplicable to this case.

Section 29-20-205(4) is clear. Immunity from suit is not removed when a plaintiff's claim is based upon a government employee's failure to make an inspection of *any* property. Tenn. Code Ann. § 29-20-205(4) (emphasis added). This is precisely the claim Plaintiff has asserted against City in this case. Accordingly, the trial court did not err in holding that City is immune from suit in this case pursuant to section 29-20-205(4) and was entitled to judgment as a matter of law.

C.

"If immunity is found under the GTLA, a court need not inquire as to whether the public duty doctrine also provides immunity." *Chase v. City of Memphis*, 971 S.W.2d 380, 385 (Tenn. 1998). "If immunity is [] found under the public duty doctrine, the next inquiry is whether the special duty exception removes the immunity afforded under the public duty doctrine." *Id.* "The special duty exception, however, cannot be used to remove immunity afforded by the GTLA." *Id.*

Because we conclude that City is immune from suit in this case pursuant to the GTLA, that issue is dispositive and Plaintiff's remaining issues are pretermitted. *See O'Dneal v. Baptist Mem'l Hosp.-Tipton*, 556 S.W.3d 759, 774 (Tenn. Ct. App. 2018) (quoting *In re Jamie B.*, No. M2016-01589-COA-R3-PT, 2017 WL 2829855, at *7 (Tenn. Ct. App. June 30, 2017)) ("[W]hen presented with multiple issues on appeal, one of which is dispositive, we have consistently found the remaining issues to be pretermitted.").

V. Conclusion

For the aforementioned reasons, we affirm the judgment of the Circuit Court for Sevier County, and this case is remanded for proceedings consistent with this opinion. Costs of this appeal are taxed to the Appellant, John H. Packard, IV, for which execution may issue if necessary.

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KRISTI M. DAVIS, JUDGE