IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 21, 2021 Session

GEORGE GARY INGRAM v. DR. MICHAEL GALLAGHER, ET AL.

Appeal from the Circuit Court for Hamilton County
No. 18C1272 W. Jeffrey Hollingsworth, Judge

No. E2020-01222-COA-R3-CV

FILED
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Rec'd by

This is a health care liability case. George Gary Ingram ("Ingram") filed a health care liability action in the Circuit Court for Hamilton County ("the Trial Court") against, among others, Dr. Michael Gallagher ("Dr. Gallagher") and Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Health System ("Erlanger") ("Defendants," collectively). Plaintiff later filed an amended complaint naming Dr. Gallagher as the sole defendant. He thus removed the other defendants, including Erlanger, from the lawsuit. Dr. Gallagher then filed an answer asserting, as a defense, that his governmental employer, Erlanger, was not made a party to the action. Consequently, Plaintiff filed a motion to alter or amend the Trial Court's order of dismissal as to Erlanger, which was denied. Plaintiff's claims were dismissed. In *Ingram v. Gallagher*, No. E2020-01222-COA-R3-CV, 2021 WL 3028161 (Tenn. Ct. App. July 19, 2021) ("*Ingram* I"), we reversed the Trial Court, holding that the Trial Court erred in denying Plaintiff's motion to revise the order of dismissal. We pretermitted all other issues. The Tennessee Supreme Court then reversed this Court, holding that Erlanger was removed from the lawsuit when Plaintiff filed his amended complaint and that the order of dismissal had no legal effect so there was no order to amend. Our Supreme Court remanded for us to address the remaining issues. We hold, *inter alia*, that the savings statute is inapplicable as the Governmental Tort Liability Act ("the GTLA") is implicated; that the Trial Court did not err in dismissing Erlanger for lack of pre-suit notice and a certificate of good faith; and that the Trial Court did not err in granting summary judgment to Dr. Gallagher as his governmental employer, Erlanger, was not made a party. We affirm.

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

D. MICHAEL SWINEY, C.J., delivered the opinion of the court, in which CARMA DENNIS MCGEE and KRISTI M. DAVIS, JJ., joined.

W. Neil Thomas, III, Chattanooga, Tennessee, for the appellant, George Gary Ingram.

Arthur P. Brock and Drew H. Reynolds, Chattanooga, Tennessee, for the appellees, Dr. Michael Gallagher and Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Health System.

OPINION

Background

In November 2018, Plaintiff filed a health care liability action in the Trial Court against Dr. Mac Worthington, the Chattanooga Neurosurgery and Spine Group, and Defendants. The lawsuit stemmed from injuries Plaintiff allegedly had received from a July 2017 medical procedure. As this matter has been before us on appeal once before, we quote extensively from *Ingram* I to set out the background:

> A certificate of good faith was filed in compliance with Tennessee Code Annotated § 29-26-122, and the complaint stated that Plaintiff had complied with the notice requirements of Tennessee Code Annotated § 29-26-121. A general affidavit was attached as an exhibit to the complaint, providing that the affiant had personally delivered the sixty-day notice of intent to sue to Dr. Gallagher, Erlanger, and Dr. Worthington. The affidavit included three certified mail receipts dated July 2018.
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> On November 26, 2018, Plaintiff filed a notice of voluntary dismissal without prejudice, pursuant to Tennessee Rule of Civil Procedure 41, seeking dismissal of the following defendants: Chattanooga Neurology and Spine Group, Dr. Mac Worthington, and Chattanooga-Hamilton County Hospital Authority d/b/a Erlanger Health System. Plaintiff concomitantly filed an amended complaint listing Dr. Michael Gallagher as the sole defendant. The Trial Court subsequently entered an order, dismissing without prejudice the remaining three defendants.
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> Dr. Gallagher filed his answer to the complaint on January 10, 2019. Dr. Gallagher included several defenses including a defense that he was an employee of a governmental entity, Erlanger, and that entity had not been included as a party to the action. Plaintiff subsequently filed a motion to amend his complaint on January 31, 2019, accompanied by a brief in support thereof and a copy of the second amended complaint he wished to file, which included several attachments including a copy of the pre-suit notice and a

certificate of good faith. This amended complaint added Erlanger Health System, Inc., as a defendant to the action. Dr. Gallagher subsequently filed a response to the motion to amend the complaint, opposing the amendment. Plaintiff later filed a brief in reply to Dr. Gallagher's response.

On February 27, 2019, Plaintiff filed a motion to alter or amend the order of voluntary dismissal entered by the Trial Court in November 2018, seeking to set aside the dismissal of Erlanger as a defendant to this action. According to Plaintiff's motion, Erlanger "was inadvertently dismissed in light of the affirmative defense assertion by a co-defendant, Dr. Michael Gallagher, that Erlanger is a necessary party to this action." In his brief in support of his motion to alter or amend, Plaintiff cites to Tennessee Rules of Civil Procedure 54 and 60. According to Plaintiff, he sought to "rescind his voluntary dismissal of Erlanger as a defendant" and "reinstate [Erlanger] as an original defendant" in this action. Plaintiff argued that pursuant to Rule 54, the Trial Court's dismissal order was not a final order and therefore could be revised to rescind the voluntary dismissal at any time prior to entry of a final judgment. Plaintiff further argued that Rule 60 provides relief from "an order due to oversight or omission." According to Plaintiff's motion, he was unsure whether Dr. Gallagher was employed by Erlanger because Dr. Gallagher was also listed as being employed by the neurology group. Plaintiff further alleged that he was unsure whether the statute relied on by Dr. Gallagher applied to this matter.

Dr. Gallagher subsequently filed a response opposing the motion to alter or amend. In his response, Dr. Gallagher alleged that (1) the voluntary dismissal filed pursuant to Tennessee Rule of Civil Procedure 41 was "complete and effective," leaving Erlanger in a position as if it had never been sued by Plaintiff; (2) Rule 54 does not apply to the voluntary dismissal of a party; (3) Plaintiff was not entitled to relief pursuant to Rule 60 because Plaintiff's employment with Erlanger was "neither new nor unknown" to Plaintiff prior to the voluntary dismissal; and (4) the action against Erlanger was not subject to reinstatement pursuant to the savings statute following the voluntary dismissal. Dr. Gallagher argued that Plaintiff's attempts to amend his complaint and revise the order of voluntary dismissal were "futile" and would not relate back to the date when the original complaint was filed. Dr. Gallagher, therefore, requested that Plaintiff's motion be denied.

Ingram I, 2021 WL 3028161, at *1-2.

The Trial Court denied Plaintiff's motions. *Id.* at *2. As to Plaintiff's motion to amend his complaint, the Trial Court found that Dr. Gallagher had standing to object to the requested amendment of Plaintiff's complaint; that under the GTLA, the savings statute did not apply to Plaintiff's lawsuit against Erlanger; and that the requested amendment to add Erlanger would not relate back to the filing of the original complaint. *Id.* Regarding Plaintiff's motion to set aside the order of voluntary dismissal, the Trial Court stated that it was difficult to say the dismissal of Erlanger was a "mistake" as Plaintiff knew that it was at least possible that Dr. Gallagher was Erlanger's employee. *Id.* The Trial Court also concluded that the order dismissing Erlanger was final and the case against Erlanger was over. *Id.* The Trial Court observed that if the savings statute applied, the lawsuit could be revived; since the savings statute did not apply, the lawsuit could not be revived. *Id.* Following the Trial Court's denial of Plaintiff's motions, additional procedural history unfolded, which we set out in *Ingram* I as follows:

> While Plaintiff's motions were pending, Plaintiff also filed a second motion to amend his complaint in March 2019, with a brief in support of his motion and a copy of his amended complaint. In his second amended complaint, Plaintiff added Erlanger as a defendant and included an allegation that Dr. Gallagher and Erlanger had a fiduciary duty to disclose to Plaintiff the results of the lumbar puncture performed on him but that those results had been concealed from him. As such, Plaintiff alleged that Dr. Gallagher and Erlanger had concealed from Plaintiff "their deviation from the accepted standard of care." Plaintiff further stated in his amended complaint that he had complied with the notice requirements in Tennessee Code Annotated § 29-26-121(a) and had filed a certificate of good faith with his complaint; however, documentation of the pre-suit notice and the certificate of good faith was not attached to this amended complaint. In his brief in support of his motion to amend, Plaintiff stated that the motion had been filed to allow Plaintiff to pursue a claim that his cause of action and injury had been concealed from him, "thereby tolling the statute of limitations." In May 2019, the Trial Court granted Plaintiff's second motion to amend his complaint. Both Dr. Gallagher and Erlanger thereafter filed their respective answers to the second amended complaint.
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> The defendant, Erlanger, subsequently filed a motion to dismiss and a memorandum in support of its motion, alleging that Plaintiff had failed to state a claim for which relief can be granted, pursuant to Tennessee Rule of Civil Procedure 12.02(6). Erlanger argued that (1) Plaintiff had not provided new pre-suit notice prior to the filing of the second amended complaint, which had added it as a party, (2) Plaintiff had failed to attach to the complaint proof of service regarding the pre-suit notice, and (3) Plaintiff had

not filed a new certificate of good faith with the amended complaint. In its memorandum, Erlanger relied on our Supreme Court's opinion in *Foster v. Chiles*, 467 S.W.3d 911 (Tenn. 2015) for its holding that "Tenn. Code Ann. § 29-26-121(a)(1) requires that plaintiffs provide pre-suit notice to prospective health care defendants each time a complaint is filed."

Plaintiff filed a memorandum in response to the motion to dismiss, in which he argued that Erlanger's motion should be denied. In his response, Plaintiff argued that Erlanger's motion should fail because: "(1) the amendment was sought because of the defense asserted by Erlanger; (2) the amendment is derivative of the actions of Dr. Gallagher; and (3) the addition of Erlanger was to re-assert a claim in an amended pleading in the same case, not a fresh case filed months later." Plaintiff argued that Erlanger should be added as a party "under a derivative claim" based on Dr. Gallagher's affirmative defense that Erlanger is a necessary party and that no prejudice to Erlanger could have resulted. Additionally, Plaintiff alleged that Dr. Gallagher had asserted the defense of comparative fault by arguing that Dr. Gallagher was not liable unless his employer was also a defendant and, thus, Plaintiff was not required to file a certificate of good faith or provide pre-suit notice to Erlanger. Plaintiff further argued that *Foster* was distinguishable from the present case because Erlanger knew of the ongoing litigation, no independent theory of liability was alleged against Erlanger, and Erlanger was added as a defendant to this action as a result of Dr. Gallagher's assertion that it should be made a party. According to Plaintiff, he asserted "no theory of active medical negligence against Erlanger" to trigger the requirement for new pre-suit notice and a new certificate of good faith.

The Trial Court entered an order granting Erlanger's motion to dismiss, determining that Plaintiff's allegations against Erlanger involve vicarious liability, not comparative fault. The Trial Court further found that even if Erlanger fraudulently concealed Dr. Gallagher's negligence to extend the statute of limitations, Plaintiff had not complied with the requirements of Tennessee Code Annotated § 29-26-121 and -122 by filing new pre-suit notice and a new certificate of good faith with the amended complaint which added Erlanger as a party. The Trial Court, therefore, dismissed with prejudice Plaintiff's claims against Erlanger.

In June 2020, Dr. Gallagher filed a motion for summary judgment requesting that the Trial Court dismiss all claims against him as a matter of law following the dismissal with prejudice of Erlanger as a party to the action. In addition to his motion, Dr. Gallagher filed a memorandum of law

in support of his motion, a statement of undisputed material facts, and an affidavit by him. According to Dr. Gallagher, there is no genuine issue of material fact as to his employment with Erlanger and Erlanger was a required party to the action, pursuant to Tennessee Code Annotated § 29-20-310(b). Therefore, Dr. Gallagher argued that all claims against him should be dismissed.

Plaintiff filed a memorandum in opposition to the motion for summary judgment, in which Plaintiff argued that Tennessee Code Annotated § 29-20-310(b) allows the health care practitioner to be "held personally liable, even if his employer is not named as a defendant, if the liability sought to be attached to the individual practitioner exceeds the limits of insurance 'actually carried by the governmental entity' and is in excess of the limits of liability under § 29-20-403." Plaintiff thereafter filed a response to Dr. Gallagher's statement of undisputed facts and a motion for limited discovery regarding "whether Erlanger maintained liability insurance for Dr. Gallagher at the time of the events complained of herein or whether Dr. Gallagher maintained any such insurance." In his response to Dr. Gallagher's undisputed facts, Plaintiff admitted that Dr. Gallagher had been an employee of Erlanger since 2015, that the treatment provided to Plaintiff by Dr. Gallagher had been in the scope of his employment with Erlanger, and that Erlanger is a governmental hospital entity governed by the Governmental Tort Liability Act. Dr. Gallagher filed a reply disagreeing with Plaintiff's statutory interpretation of Tennessee Code Annotated § 29-20-310(b).

In August 2020, the Trial Court granted Dr. Gallagher's motion for summary judgment, upon its determination that Erlanger was a necessary party to the action. The Trial Court found that Erlanger was a governmental entity, that the Governmental Tort Liability Act applied, that Dr. Gallagher was an employee of Erlanger acting in the scope of his employment, and that Erlanger was not and could not be made a party defendant in this matter. The Trial Court, therefore, granted summary judgment in favor of Dr. Gallagher. Plaintiff timely appealed to this Court.

Ingram I, 2021 WL 3028161, at *2-4.

In *Ingram* I, we reversed the Trial Court's refusal to set aside the order of voluntary dismissal, concluding among other things that the Trial Court erred by treating Plaintiff's motion as a Tennessee Rule of Civil Procedure 60 motion instead of a motion to revise pursuant to Rule 54.02. *Id.* at *5. We deemed the other issues raised by Plaintiff

pretermitted as moot. *Id.* Defendants filed an application to appeal to the Tennessee Supreme Court, which granted their appeal and reversed this Court on grounds not argued to the Trial Court or this Court in the first appeal. Our Supreme Court concluded:

> The removal of Erlanger as a defendant at this point in the proceedings becomes determinative of our decision in this case. Because Erlanger was removed from the lawsuit the moment Mr. Ingram filed his amended complaint, Erlanger was no longer a defendant when Mr. Ingram filed his notice of voluntary dismissal nor when the trial court entered its order of voluntary dismissal. As such, both the notice and order of voluntary dismissal were of no legal effect.
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> In light of this procedural background, we need not answer the central question of whether the Tennessee Rule of Civil Procedure 41.01(1) voluntary dismissal of one of multiple defendants in a GTLA case may be set aside and the claim against the dismissed defendant reinstated on the motion of a plaintiff pursuant to Tennessee Rule of Civil Procedure 54.02. Because the trial court's order of voluntary dismissal was of no legal effect due to Mr. Ingram's November 26, 2018 amended complaint, there was no valid order of voluntary dismissal to alter or amend. As a result, the trial court correctly denied Mr. Ingram's motion to alter or amend, albeit for different reasons. The decision of the Court of Appeals is reversed, and we remand to the Court of Appeals to address the issues it deemed pretermitted as moot.

Ingram v. Gallagher, --- S.W.3d ----, No. E2020-01222-SC-R11-CV, 2023 WL 3487083, at *6 (Tenn. May 17, 2023). In accordance with the Tennessee Supreme Court's instructions, we now address those issues from *Ingram* I which we previously deemed pretermitted as moot.

Discussion

Although not stated exactly as such, Plaintiff raises the following issues for our review on appeal: 1) whether the savings statute allows Plaintiff to refile his action against Erlanger within one year; 2) whether new pre-suit notice and a new certificate of good faith is required when a defendant has been removed as a party by the filing of an amended complaint and subsequently reinstated as a party by the filing of another amended complaint; and 3) whether Erlanger is a required party under Tenn. Code Ann. § 29-20-310(b) when only damages in excess of the statutory limit were sought. Defendants raise separate, but somewhat overlapping, issues of whether Plaintiff's proposed amendment related back under Tenn. R. Civ. P. 15.03; whether Plaintiff is entitled to relief under Tenn.

Code Ann. § 20-1-119 pursuant to *Bidwell ex rel. Bidwell v. Strait*, 618 S.W.3d 309 (Tenn. 2021); and whether Plaintiff's action is time-barred based upon his failure to substantially comply with Tenn. Code Ann. § 29-26-121. As they are related, we address Defendants' separate issues in the course of addressing Plaintiff's issues.

This case was resolved in part by means of a motion to dismiss and in part by means of a motion for summary judgment. Regarding our standard of review for motions to dismiss pursuant to Tenn. R. Civ. P. 12.02(6), the Tennessee Supreme Court has instructed:

> A motion to dismiss a complaint for failure to state a claim for which relief may be granted tests the legal sufficiency of the plaintiff's complaint. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 894 (Tenn. 2011); *cf. Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383, 406 (Tenn. 2002). The motion requires the court to review the complaint alone. *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d 695, 700 (Tenn. 2009). Dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when the alleged facts will not entitle the plaintiff to relief, *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011), or when the complaint is totally lacking in clarity and specificity, *Dobbs v. Guenther*, 846 S.W.2d 270, 273 (Tenn. Ct. App. 1992) (citing *Smith v. Lincoln Brass Works, Inc.*, 712 S.W.2d 470, 471 (Tenn. 1986)).
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> A Tenn. R. Civ. P. 12.02(6) motion admits the truth of all the relevant and material factual allegations in the complaint but asserts that no cause of action arises from these facts. *Brown v. Tennessee Title Loans, Inc.*, 328 S.W.3d 850, 854 (Tenn. 2010); *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d at 700. Accordingly, in reviewing a trial court's dismissal of a complaint under Tenn. R. Civ. P. 12.02(6), we must construe the complaint liberally in favor of the plaintiff by taking all factual allegations in the complaint as true, *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d at 894; *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d at 426; Robert Banks, Jr. & June F. Entman, *Tennessee Civil Procedure* § 5-6(g), at 5-111 (3d ed. 2009). We review the trial court's legal conclusions regarding the adequacy of the complaint de novo without a presumption of correctness. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d at 895; *Highwoods Props., Inc. v. City of Memphis*, 297 S.W.3d at 700.

SNPCO, Inc. v. City of Jefferson City, 363 S.W.3d 467, 472 (Tenn. 2012).

Regarding the standard of review for cases disposed of by summary judgment, the Tennessee Supreme Court has instructed:

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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. We review a trial court's ruling on a motion for summary judgment de novo, without a presumption of correctness. *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997); *see also Abshure v. Methodist Healthcare–Memphis Hosp.*, 325 S.W.3d 98, 103 (Tenn. 2010). In doing so, we make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied. *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013) (citing *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 471 (Tenn. 2012)).

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[I]n Tennessee, as in the federal system, 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. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee 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" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.* [*v. Zenith Radio Corp.*], 475 U.S. [574,] 586, 106 S.Ct. 1348 [89 L.Ed.2d 538 (1986)]. The 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. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 250, 264-65 (Tenn. 2015).

In addition, "[g]enerally, a review of a denial to amend pleadings is governed by the abuse of discretion standard of review. Reversal is appropriate where the trial court applies an incorrect legal standard or reaches a decision that causes an injustice to the party complaining." *Vincent v. CNA Ins. Co.*, No. M2001-02213-COA-R9-CV, 2002 WL 31863290, at *2 (Tenn. Ct. App. Dec. 23, 2002), *perm. app. denied May 5, 2003* (citations omitted).

The first issue we address is whether the savings statute allows Plaintiff to refile his action against Erlanger within one year. This issue implicates the savings statute found at Tenn. Code Ann. § 28-1-105.[1] Tennessee courts have held that savings statutes generally do not apply against governmental entities. As for exceptions to that general rule, this Court has stated:

> In sum, the weight of authority from both this Court and the Tennessee Supreme Court indicate that a saving statute will not apply to a claim against a governmental entity unless a statute "clearly and unmistakably" expresses

[1] Plaintiff cites Tenn. Code Ann. § 28-1-115, which states: "Notwithstanding any applicable statute of limitation to the contrary, any party filing an action in a federal court that is subsequently dismissed for lack of jurisdiction shall have one (1) year from the date of such dismissal to timely file such action in an appropriate state court." However, as that statute is not pertinent to this case, we believe Plaintiff intended to cite Tenn. Code Ann. § 28-1-105, which provides in relevant part: "(a) If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding the plaintiff's right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or the plaintiff's representatives and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest."

> the General Assembly's intent to permit the claim against the State. In this case, nothing in section 28-1-115 or [the Public Employee Political Freedom Act] explicitly evinces this intent. Moreover, the General Assembly's choice not to include an internal statute of limitations within PEPFA does not meet the explicit or unmistakable standard necessary to find a waiver of sovereign immunity. As such, the trial court erred in applying the section 28-1-115 saving statute to Mr. Boone's claim. In the absence of a saving statute, there is no dispute that Mr. Boone's claim is time-barred.

Boone v. Town of Collierville, 593 S.W.3d 156, 165 (Tenn. Ct. App. 2019); *See also Nance v. City of Knoxville*, 883 S.W.2d 629, 631 (Tenn. Ct. App. 1994) ("[I]t is well-settled that the general saving statute found in T.C.A. § 28-1-105 has no application to actions brought pursuant to the Governmental Tort Liability Act.") (Citations omitted). Notwithstanding the aforementioned authorities, Plaintiff asserts that the circumstances of this case are such that the general rule does not apply. He cites Tenn. Code Ann. § 29-20-310(b) and its requirement that a governmental entity be named as a defendant if its employee-defendant is sued. Plaintiff argues that "[s]ince a suit would have [been] permitted against Dr. Gallagher but for T.C.A. §129-20-310(b)[sic], it follows that the savings statute should also apply to permit the naming of Erlanger."

In response, Defendants argue that there is ample authority that the savings statute does not apply to actions brought under the GTLA. Indeed, Defendants are correct about the weight of authority supporting their position. While Plaintiff contends that Defendants' proposed construction "would result in an inconsistent application of the savings statute and a repeal of the savings statute as to a doctor by implication," it is in fact consistent with the weight of authority providing that the savings statute generally does not apply to actions brought under the GTLA. That there are possible different consequences for purposes of the savings statute based upon whether a doctor is employed by a governmental entity and whether a plaintiff fails to name that governmental entity as a party defendant is not clear evidence that the General Assembly could not have intended for that distinction to be possible. In the absence of an expression by the General Assembly of its clear intent otherwise, Plaintiff's argument is unavailing. Here, there is no statute that "'clearly and unmistakably' expresses the General Assembly's intent to permit the claim against the State." *Boone*, 593 S.W.3d at 165. We hold that the savings statute found at Tenn. Code Ann. § 28-1-105 does not apply to Plaintiff's claim against Erlanger.

Under the umbrella of this issue, we also address whether Plaintiff's proposed amendment relates back under Tenn. R. Civ. P. 15.03.[2] In his reply brief, Plaintiff contends

[2] Tenn. R. Civ. P. 15.03 provides:

> Whenever the claim or defense asserted in amended pleadings arose out of the conduct,

that this issue is "ancillary" to his argument that the savings statute applies. Plaintiff cites *Floyd v. Rentrop*, 675 S.W.2d 165, 167 (Tenn. 1984), wherein our Supreme Court found that the trial court erred by denying an amendment adding a party defendant who previously had been dismissed as a party upon its holding that Rule 15.03 applied. However, in that case, there was a mistake as to which doctor performed the surgery and the plaintiff had nonsuited its claim against the wrong doctor. *Id.* at 166-67. Subsequently, this Court stated in *Townes v. Sunbeam Oster Co., Inc.*, 50 S.W.3d 446 (Tenn. Ct. App. 2001), as follows:

> The courts should construe Tenn. R. Civ. P. 15.03 liberally to promote the consideration of claims on their merits. *Floyd v. Rentrop*, 675 S.W.2d 165, 168 (Tenn. 1984); *McCracken v. Brentwood United Methodist Church*, 958 S.W.2d 792, 794 (Tenn. Ct. App. 1997). However, Tenn. R. Civ. P. 15.03 should not be used to breathe life into claims that are plainly time-barred. *Turner v. Aldor Co. of Nashville, Inc.*, 827 S.W.2d 318, 321-22 (Tenn. Ct. App. 1991).
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> The purpose of Tenn. R. Civ. P. 15.03 is to enable parties to correct the "mislabeling of a party they intended to sue," *Grantham v. Jackson-Madison County Gen. Hosp. Dist.*, 954 S.W.2d 36, 38 (Tenn. 1997), not to add a new party who was simply overlooked. *Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment*, 821 S.W.2d 938, 941 (Tenn. Ct. App. 1991); *Smith v. Southeastern Props., Ltd.*, 776 S.W.2d 106, 109 (Tenn. Ct. App. 1989). Thus, the rule does not apply when a plaintiff seeks to amend its complaint to add a defendant that it previously nonsuited. *Bennett v. Town & Country Ford, Inc.*, 816 S.W.2d 52, 54 (Tenn. Ct. App. 1991).

Townes, 50 S.W.3d at 450-51. "[T]he purpose behind the Rule is to 'ameliorate the effect of a statute of limitations where the plaintiff has sued the wrong party but where the right party has had adequate notice of the institution of the action.'" *Doyle v. Frost*, 49 S.W.3d 853, 856 (Tenn. 2001) (quoting *Bloomfield Mech. Contracting, Inc. v. Occupational Safety*

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transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party or the naming of the party by or against whom a claim is asserted relates back if the foregoing provision is satisfied and if, within the period provided by law for commencing an action or within 120 days after commencement of the action, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

& Health Rev. Comm'n, 519 F.2d 1257, 1262 (3d Cir. 1975)) (other citation omitted). This Court has elaborated further:

> [A] plaintiff's amendment to the complaint will not relate back against the defendant unless the following requirements are met: (1) the claim in the amendment must arise out of the same conduct, transaction, or occurrence involved in the original complaint; (2) the new defendant brought in by amendment must not be prejudiced in maintaining its defense, and (3) the new defendant must have known or should have known it would have been sued had it not been for the misnomer or other similar mistake.

Jones v. Montclair Hotels Tenn., LLC, No. M2006-01767-COA-R3-CV, 2007 WL 4322009, at *4 (Tenn. Ct. App. Dec. 5, 2007), *perm. app. denied May 5, 2008* (citations omitted).

In Plaintiff's original complaint, he alleged as relevant with respect to Erlanger:

> 9. Upon information and belief at all times relevant herein, Erlanger is and was the owner of the Spine Group, and its employees were either employees of Erlanger acting within the scope of their duties as employees of Erlanger or employees of the Spine Group only while treating [Plaintiff]. Upon information and belief, the Spine Center employees referred to in the preceding sentence were Doctor [Michael] Gallagher and physician assistant Anita Jones.
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> 31. A search of the public records has been unable to disclose the employment and/or agency relationship between the doctors who treated [Plaintiff] and Erlanger, UT and the spine group. As a result, they have all been named. Once that relationship has been developed through discovery, appropriate procedural action will be taken by plaintiff.

Defendants argue persuasively that there was no mistake or misnomer on Plaintiff's part to warrant application of Tenn. R. Civ. P. 15.03. Plaintiff knew about Erlanger when he filed his complaint. Indeed, he named Erlanger as a defendant. He alleged that it was at least possible that Erlanger was Dr. Gallagher's employer. As Defendants' counsel pointed out at oral argument, Plaintiff removed all defendants other than Dr. Gallagher from the lawsuit when he filed his amended complaint. Even if Plaintiff believed that the other named entity rather than Erlanger employed Dr. Gallagher, Plaintiff removed it from the lawsuit too. Whatever Plaintiff's tactical reasons were in removing Erlanger as a

defendant when he filed his amended complaint, the move was not based on a mistake or misnomer. We, therefore, hold that Plaintiff's proposed amendment did not relate back under Tenn. R. Civ. P. 15.03. The Trial Court committed no abuse of discretion or other reversible error in declining to grant Plaintiff's amendment.

Continuing our review of this issue, both parties contend with whether Plaintiff is entitled to relief under the savings provision of Tenn. Code Ann. § 20-1-119 pursuant to *Bidwell ex rel. Bidwell v. Strait*, a decision filed by the Tennessee Supreme Court while this appeal was pending.[3] In *Bidwell*, the plaintiff provided pre-suit notice and sued certain physicians and entities for health care liability. 618 S.W.3d at 314-15. The plaintiff did not provide pre-suit notice to or sue the physician-defendants' employer, Erlanger. *Id.* at 315. The Tennessee Supreme Court concluded that the physician-defendants failed to comply with Tenn. Code Ann. § 29-26-121(a)(5) by their having failed to provide written notice of their employer. *Id.* at 321. The High Court also held that the physician-defendants' answers sufficiently alleged comparative fault so as to allow the plaintiff to add Erlanger pursuant to Tenn. Code Ann. § 20-1-119 without providing pre-suit notice pursuant to Tenn. Code Ann. § 29-26-121(c). *Id.* at 328-29, n.14. However, the *Bidwell* Court ultimately ruled against the plaintiff, stating:

> In the case on appeal, Dr. Strait filed his answer prior to Dr. Colburn on August 28, 2017. The Plaintiff filed two *motions* for leave to amend—the first on November 3, 2017 and the second on November 20, 2017. Both

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[3] Tenn. Code Ann. § 20-1-119 (West August 11, 2009 to June 30, 2023) provides, in relevant part:

> (a) In civil actions where comparative fault is or becomes an issue, if a defendant named in an original complaint initiating a suit filed within the applicable statute of limitations, or named in an amended complaint filed within the applicable statute of limitations, alleges in an answer or amended answer to the original or amended complaint that a person not a party to the suit caused or contributed to the injury or damage for which the plaintiff seeks recovery, and if the plaintiff's cause or causes of action against that person would be barred by any applicable statute of limitations but for the operation of this section, the plaintiff may, within ninety (90) days of the filing of the first answer or first amended answer alleging that person's fault, either:
> (1) Amend the complaint to add the person as a defendant pursuant to Tenn. R. Civ. P. 15 and cause process to be issued for that person; or
> (2) Institute a separate action against that person by filing a summons and complaint. If the plaintiff elects to proceed under this section by filing a separate action, the complaint so filed shall not be considered an original complaint initiating the suit or an amended complaint for purposes of this subsection (a).
>
> ***
>
> (g) Notwithstanding any law to the contrary, this section applies to suits involving governmental entities.

> motions were filed within the ninety-day period provided by section 20-1-119. However, while the record on appeal reflects that the Plaintiff *attached* his second amended complaint to his second motion for leave to amend, he failed to *actually amend* his complaint within ninety days of Dr. Strait's answer. Had the Plaintiff simply filed an amended complaint naming Erlanger as a defendant pursuant to section 20-1-119, as Rule of Civil Procedure 15.01 permits, and caused process to issue to Erlanger within ninety days of Dr. Strait's answer, he would have properly and timely satisfied the statutory requirements of section 20-1-119. However, he did not do so, and his motions to amend "simply fail[ ] to fulfill the unambiguous requirements of the statute." *Ward v. AMI SUB (SFH), Inc.*, 149 S.W.3d 35, 39 (Tenn. Ct. App. 2004).

Bidwell, 618 S.W.3d at 329 (footnotes omitted).

Plaintiff argues that *Bidwell* is on point and, essentially, that he did what was he supposed to do under *Bidwell* to add Erlanger to the lawsuit. For their part, Defendants assert among other things that, unlike in *Bidwell*, Plaintiff named Erlanger in his original complaint and Erlanger was included in his pre-suit notice. Moreover, even if Tenn. Code Ann. § 20-1-119 were triggered by Dr. Gallagher's January 10, 2019 answer, Plaintiff did not file his amended complaint against Erlanger within 90 days of Dr. Gallagher's answer. Dr. Gallagher filed his answer, even assuming it alleged comparative fault, on January 10, 2019. Plaintiff did not file his amended complaint naming Erlanger as a defendant until May 23, 2019, well over 90 days later. Although Plaintiff filed a motion to amend with an amended complaint attached within the 90 day period, *Bidwell* clarifies that a plaintiff has to file an amended complaint and cause process to be issued to the party named in the amended complaint within 90 days in order to comply with Tenn. Code Ann. § 20-1-119. Plaintiff did not do so. Thus, *Bidwell* is unavailing to Plaintiff's case.

We next address whether new pre-suit notice and a new certificate of good faith is required when a defendant has been removed as a party from the lawsuit by the filing of an amended complaint and subsequently reinstated as a party by the filing of another amended complaint. This issue regards Plaintiff's May 23, 2019 amended complaint. Initially, Plaintiff makes a cursory argument that Erlanger waived its argument regarding this issue because it failed to respond to his motion to amend. Defendants note that Erlanger was not even a party at that point. We agree with Defendants on this and decline to find waiver. Regarding whether it is necessary to provide pre-suit notice upon recommencing a health care liability action, the Tennessee Supreme Court has stated:

> We hold that Tenn. Code Ann. § 29-26-121(a)(1) requires that plaintiffs provide pre-suit notice to prospective health care defendants each

> time a complaint is filed. Because the Fosters did not provide Defendants with notice that they intended to recommence their health care liability action, the Fosters failed to comply with § 29-26-121(a)(1).

Foster v. Chiles, 467 S.W.3d 911, 916 (Tenn. 2015); *see also Myers v. AMISUB (SFH), Inc.*, 382 S.W.3d 300, 310 (Tenn. 2012) ("[A]fter Mr. Myers's original action terminated, he could not rely on statements made by experts relative to that action as a substitute for a certificate of good faith filed with his new action because the statute provides that '[i]f the certificate is not filed *with the complaint*, the complaint shall be dismissed.' Tenn. Code Ann. § 29-26-122(a).").

Plaintiff argues that his amended complaint did not constitute a new action. He says that, under the jurisprudence on interlocutory orders, Erlanger was not a new party. Defendants, in turn, say that Plaintiff's May 23, 2019 amended complaint amounted to the commencement of a new action against Erlanger. For support, they cite *Frazier v. E. Tenn. Baptist Hosp.*, 55 S.W.3d 925, 926 (Tenn. 2001) ("We hold that filing a motion to amend and a proposed amended complaint constitute commencement of a new action."). The Tennessee Supreme Court ruled that Erlanger was out of the lawsuit the moment Plaintiff filed his amended complaint naming Dr. Gallagher as the sole defendant. *Ingram*, 2023 WL 3487083, at *6. We disagree with Plaintiff that his filing of an amended complaint naming Erlanger as a party defendant did not constitute a new action. On the contrary, in view of the decisions by our Supreme Court, it was a new action. Plaintiff thus was required to provide new pre-suit notice and a new certificate of good faith. He failed to do so. Plaintiff's claim was properly dismissed on this basis.

On a related point, Defendants argue that Plaintiff's action is time-barred based upon his failure to substantially comply with Tenn. Code Ann. § 29-26-121. They argue further with respect to Plaintiff's allegations below of fraudulent concealment that "[e]ven assuming arguendo that fraudulent concealment can toll the TGTLA statute of limitations, the limitations period would only be tolled until [Plaintiff] discovered or, in the exercise of reasonable diligence, should have discovered the fraudulent concealment." (Citation omitted). In his reply brief, Plaintiff states that this argument by Defendants was not raised below and should not be considered on appeal. Plaintiff states further that the argument does not even go to the basis of the Trial Court's orders. Plaintiff is correct. We decline to address this cumulative argument by Defendants.

The final issue we next address is whether Erlanger is a required party under Tenn. Code Ann. § 29-20-310(b) when only damages in excess of the statutory limit were sought. The statute at issue provides:

> (b) No 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. No claim for health care liability may be brought against a health care practitioner or judgment entered against a health care practitioner for damages for which the governmental entity is liable under this chapter, unless the amount of damages sought or judgment entered exceeds the minimum limits set out in § 29-20-403 or the amount of insurance coverage actually carried by the governmental entity, whichever is greater, and the governmental entity is also made a party defendant to the action. As used in this subsection (b), "health care practitioner" means physicians licensed under title 63, chapter 6, and nurses licensed under title 63, chapter 7.

Tenn. Code Ann. § 29-20-310(b) (West April 23, 2012 to August 16, 2020).

This issue involves the interpretation of a statute. As the Tennessee Supreme Court has instructed regarding issues of statutory interpretation:

> The primary goal of statutory interpretation is to carry out legislative intent without expanding or restricting the intended scope of the statute. *State v. Smith*, 484 S.W.3d 393, 403 (Tenn. 2016) (citations omitted). In determining legislative intent, we first must look to the text of the statute and give the words of the statute "their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose." *Mills v. Fulmarque, Inc.*, 360 S.W.3d 362, 368 (Tenn. 2012) (citations omitted). When a statute's language is clear and unambiguous, we enforce the statute as written; we need not consider other sources of information. *Frazier v. State*, 495 S.W.3d 246, 249 (Tenn. 2016). We apply the plain meaning of a statute's words in normal and accepted usage without a forced interpretation. *Baker v. State*, 417 S.W.3d 428, 433 (Tenn. 2013). We do not alter or amend statutes or substitute our policy judgment for that of the Legislature. *Armbrister v. Armbrister*, 414 S.W.3d 685, 704 (Tenn. 2013).

Coleman v. Olson, 551 S.W.3d 686, 694 (Tenn. 2018).

Plaintiff argues in part as follows on this issue:

> The hospital must be named if the damages do not exceed coverages or limits, the liability is personal, and the entity need not be named. Otherwise, the language of the first clause following the word, "unless", would not make

> sense. The only other interpretation, which would give effect to both clauses, would be that the hospital must be name[d] only if the damages sought exceed the limits of liability, which is nonsensical.

Plaintiff cites *Doe v. Sullivan Cnty., Tenn.*, 956 F.2d 545 (6th Cir. 1992) in support of the proposition that if liability is sought within statutory or insurance limits, the governmental entity must be named, but if the medical provider is asserted to be personally liable because the amount exceeds the governmental or insurance limits, the governmental entity does not need to be named. In *Doe*, the Circuit Judge stated in part:

> Plaintiff relies on Tenn. Code Ann. § 29-20-310(b) (1980), which stated at the time plaintiff's cause of action accrued that no judgment may be entered against an employee for damages when the governmental unit is also liable, "unless the amount of damages sought or judgment entered exceeds the minimum limits set out in § 29-20-404." Plaintiff submits that, under section 29-20-310(b), Gardner and Hawkins would be liable under state law for any amount exceeding the $40,000 limit of Sullivan County's liability. This interpretation finds strong support in *Jenkins v. Loudon County*, 736 S.W.2d 603, 606 n. 5 (Tenn. 1987) which held that, under section 29-20-310(b), "[t]he general rule of personal liability of governmental employees continues for all liability exceeding any limited statutory exposure."

Doe, 956 F.2d at 553 (footnote omitted). Defendants argue among other things in response that the court in *Doe* merely found that a governmental employee may be found personally liable for amounts exceeding the minimum limits, not that the governmental entity need not be named. They argue further that Plaintiff's interpretation ignores the word "and" between the two conditions in Tenn. Code Ann. § 29-20-310(b). Defendants also submitted supplemental authority to this Court in the form of *Braylon W. v. Walker*, No. W2020-00692-COA-R3-CV, 2021 WL 2965355, at *3 (Tenn. Ct. App. July 15, 2021), *no appl. perm. appeal filed* ("[P]ursuant to the GTLA, in order for a plaintiff to properly sue a 'health care practitioner' employed by a governmental entity, he or she must also make the governmental entity a party defendant in the complaint. Tenn. Code Ann. § 29-20-310(b).").

Our unforced reading of Tenn. Code Ann. § 29-20-310(b) leads us to conclude that a health care practitioner employed by a governmental entity is immune "unless" two conjoined conditions are satisfied. The first condition is that "the amount of damages sought or judgment entered exceeds the minimum limits set out in § 29-20-403 or the amount of insurance coverage actually carried by the governmental entity, whichever is greater...." Tenn. Code Ann. § 29-20-310(b). The second condition, linked by the word "and," is that "the governmental entity is also made a party defendant to the action." *Id.*

The word "and" linking the clauses looms large. That is, both conditions must be met. Further, Tenn. Code Ann. § 29-20-310(b) applies to both claims and judgments. To bring a claim or secure a judgment against Dr. Gallagher, who was employed by governmental entity Erlanger, Plaintiff was required to name Erlanger as a party defendant under Tenn. Code Ann. § 29-20-310(b). We affirm the judgment of the Trial Court in its entirety.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, George Gary Ingram, and his surety, if any.

D. MICHAEL SWINEY, CHIEF JUDGE