

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE

September 7, 2022 Session

FILED

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Clerk of the  
Appellate Courts

**ESTATE OF JAMES SMITH ET AL. V. HIGHLAND COVE APARTMENTS,  
LLC ET AL.**

**Appeal from the Circuit Court for Davidson County  
No. 18C1774 Kelvin D. Jones III, Judge**

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**No. M2021-01215-COA-R3-CV**

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This is a negligence and wrongful death action brought by the decedent's estate and the surviving spouse against the apartment complex owner and management company where the accident occurred. The decedent died from profound injuries he sustained when he fell while attempting to remove tree branches that blocked the only path his disabled stepson used for ingress and egress to his apartment. The complaint asserted claims for negligence based on premise liability, negligence per se, and wrongful death. Upon the motion of the defendants, the trial court summarily dismissed all claims based on the finding that the defendants did not owe the decedent a duty of care because the accident was not foreseeable. The court also dismissed the surviving spouse's independent claim for loss of consortium. Plaintiffs appealed. We find sufficient facts exist from which a trier of fact could reach a different conclusion than that found by the trial judge on the issues of foreseeability and duty. Accordingly, we reverse the decision to dismiss the wrongful death claim. We nevertheless affirm the dismissal of the spouse's independent claim for loss of consortium because it does not represent a claim for damages separate from the wrongful death action. Rather, "a claim for consortium . . . embodies one component of the decedent's pecuniary value of life." *Kline v. Eyrich*, 69 S.W.3d 197, 207 (Tenn. 2002). Accordingly, the case is remanded to the trial court for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Reversed, in part, Affirmed, in part, and Remanded**

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which KRISTI M. DAVIS and JEFFREY USMAN, JJ., joined.

Peter T. Skeie and Neil M. McIntire, Nashville, Tennessee, for the appellants, Trina Smith and the Estate of James Smith.

Steven W. Keyt, Chattanooga, Tennessee, for the appellees, Highland Cove Apartments, LLC and Broad Management Group, LLC.

## OPINION

### FACTS AND PROCEDURAL HISTORY

The decedent, James Smith (“Mr. Smith”), was the husband of Trina Smith and the stepfather of John Prysock, III, who suffers from rheumatoid arthritis and is restricted to a motorized wheelchair. At the time of the accident, Mr. Prysock resided in Building H of the Highland Cove Apartments in Nashville, Tennessee, which is three stories tall and is built into the side of a hill. Highland Cove Apartments is owned by Highland Cove Apartments, LLC, and managed by Broad Management Group, LLC (“Defendants”).

Because of the terrain, Mr. Prysock’s apartment was accessible only by a poorly maintained, unimproved path located behind the apartment building.<sup>1</sup> Because Mr. Prysock was unable to use the stairs, he was required to use the unmaintained pathway on the side of the building. It is undisputed that the apartment complex and its management company knew that Mr. Prysock was restricted to a motorized wheelchair and that the path in question was his only means of ingress and egress to and from his apartment.

On or around August 6, 2017, the apartment maintenance staff trimmed several trees near the path Mr. Prysock used. Instead of removing them, however, the maintenance staff stacked the branches in a manner that blocked the path. Because the branches restricted Mr. Prysock’s ability to access both the street and his apartment, he called the apartment office to report the obstruction, but his calls went unanswered.

The apartment complex does not dispute that it failed to answer or return any of Mr. Prysock’s calls, but it maintains that it did not know the nature of the calls because he did not leave any voicemails. Because of the branches, Mr. Prysock was unable to utilize the pathway without assistance. In order for him to maneuver his motorized wheelchair along the path, another person needed to pull the branches away from the path until Mr. Prysock was able to pass. For this reason, Mr. Prysock required the help of others for ingress and egress to and from his apartment.

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<sup>1</sup> Mr. Prysock’s apartment building was built into a hill and had three levels. The apartments on the top level, the third floor, were accessible by stairs up from the front of the building. The apartments on the middle level, the second floor, which were street level, were directly accessible from the front of the building. The apartments on the bottom level, the first floor where Mr. Prysock lived, had two points of access, assuming you were ambulatory. They were accessible by taking the stairs down to the first floor. Alternatively, they were accessible via a common, unimproved path that ran along the back of Mr. Prysock’s building to a lower parking lot. Thus, Mr. Prysock’s only access to and from his apartment was along the unimproved common path along the back of the building.

The incident in question occurred on August 19, 2017, thirteen days after Defendants caused Mr. Prysock's only path of ingress and egress to be blocked. That morning, Mr. Smith came to Mr. Prysock's apartment to assist him along the path so Mr. Prysock could get to the bus on the street. After Mr. Prysock proceeded to the street to catch the bus, Mr. Smith decided to permanently remove the branches so his stepson could come and go without the assistance of others. While it is unclear how Mr. Smith fell, during the course of removing the branches from the path, Mr. Smith "slipped or tripped backwards on the roots and small rocks in and around the area he was clearing." After the fall, Mr. Smith was "entirely numb" and unable to move. Mr. Prysock had already driven away on the bus when Mr. Smith fell. For this reason, Mr. Smith lay on the ground for approximately an hour and a half before a neighbor noticed him and called an ambulance.<sup>2</sup>

The ambulance transported Mr. Smith to Vanderbilt University Medical Center, where he required emergency spinal surgery. At this point, it was not known whether he would be able to walk again. Mr. Smith was later transferred to a different facility to continue his recovery. In October 2017, however, he was transported back to Vanderbilt due to a "deteriorating medical condition." Mr. Smith was subsequently transferred to various Nashville area medical facilities until passing away at Alive Hospice on June 23, 2018.

In July 2018, Mr. Smith's estate and Mrs. Smith in her personal capacity (collectively, "Plaintiffs") filed a complaint against Defendants<sup>3</sup> alleging negligence and negligence per se for the wrongful death of Mr. Smith and loss of consortium for Mrs. Smith. More specifically, Plaintiffs alleged that Defendants breached their duty of care by: (1) failing to maintain safe and accessible paths for tenants, residents, and guests; (2) breaching their common law duty to maintain a safe and accessible path for John Prysock to use when coming and going from his apartment; and (3) breaching their statutory duty, pursuant to Tennessee Code Annotated § 66-28-304(a)(3), to maintain the public areas and paths—more specifically the path Mr. Prysock used to access his apartment—in a clean and safe condition.

After discovery, Defendants moved for summary judgment on all claims arguing that, while it may have been foreseeable that Mr. Prysock might be injured by the branches while using his wheelchair, they did not owe any duty to Mr. Smith because it was not foreseeable that anyone would try to move the trimmed tree limbs for Mr. Prysock and fall while doing so. In response, Plaintiffs argued that summary judgment was inappropriate because (1) whether Defendants owed a duty was a question of fact for the jury, (2) it was foreseeable that someone would need to clear Mr. Prysock's path to and from his

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<sup>2</sup> These facts come from statements Mr. Smith made during his hospitalization.

<sup>3</sup> The original complaint also included Lion Easton, LLC and Lion Real Estate Group as defendants. In July 2019, Plaintiffs voluntarily nonsuited both Lion Real Estate Group and Lion Easton, LLC.

apartment, and (3) it was foreseeable that someone might injure themselves while attempting to move the branches.

The trial court granted Defendants' motion and dismissed all claims, stating:

As an initial matter, this case is styled as Trina Smith as the Representative of the Estate of James Smith and Trina Smith in her personal capacity. Plaintiffs brought suit for the wrongful death of James Smith and loss of consortium for Trina Smith. Ms. Smith's loss of consortium claim is not an independent cause of action, but part of the wrongful death claim for James Smith. All wrongful death claims are brought pursuant to Tennessee Code Annotated Section 20-5-113. Tenn. Code Ann. Section 20-5-113 creates one cause of action for wrongful death. Loss of consortium is a factor to be considered in the determination of the pecuniary value of life of the deceased, but is not a separate cause of action. Therefore, Trina Smith's separate loss of consortium claim is dismissed with prejudice.

In the case at hand, Plaintiff[s] argue[] that it is reasonably foreseeable that Mr. Smith could be injured when Mr. Smith took it upon himself to move the branches out of the path of John Prysock. The reasonably foreseeable injury from a stack of tree branches is from the stack of branches themselves, not in trying to move the branches. This Court concludes that it is not reasonably foreseeable that a stack of branches would cause injury. Defendants do owe a duty to John Prysock to ensure the ingress and egress was passable for John Prysock in his wheelchair.

(footnotes omitted) (citations omitted).

Plaintiffs later filed a motion to alter or amend the judgment, which the trial court denied. This appeal followed.

#### ISSUES

Appellants raise four issues for our consideration, stated as follows:

- I. Whether the trial court erred in holding, as a matter of law, that it was unforeseeable that someone would try to clear the branches blocking John Prysock's only path to and from his apartment?
- II. Whether remand of Plaintiffs' claims for negligence per se is necessary because Defendants did not raise this issue in their motion

for summary judgment, and the trial court did not address or even mention this issue in its order granting summary judgment.

- III. Whether the trial court erred in dismissing Mrs. Smith's common law cause of action for loss of consortium?
- IV. Whether the trial court erred in dismissing Trina Smith as a plaintiff in regard to wrongful death damages authorized by Tenn. Code Ann. § 20-5-113?

#### STANDARD OF REVIEW

This court reviews a trial court's decision on a motion for summary judgment de novo without a presumption of correctness. *See Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Accordingly, this court must "make a fresh determination of whether the requirements of [Tennessee Rule of Civil Procedure 56] have been satisfied." *Id.* In so doing, we accept the evidence presented by the nonmoving party as true, consider the evidence "in the light most favorable to the nonmoving party," and "draw all reasonable inferences in that party's favor." *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002).

Summary judgment should be granted 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. "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 explained in *Rye v. Women's Care Center of Memphis, M PLLC*:

[W]hen 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.

477 S.W.3d at 264. However, "if 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) (Brennan, J., dissenting)).

To survive when a party files a properly supported motion for summary judgment pursuant to Rule 56, the nonmoving party "may not rest upon the mere allegations or

denials of the [nonmoving] party's pleading" but must respond and set forth specific facts by affidavits—or one of the other means provided in Tennessee Rule of Civil Procedure 56—establishing that there is a genuine issue for trial. *Rye*, 477 S.W.3d at 265 (alteration in original) (quoting Tenn. R. Civ. P. 56.06). "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.'"<sup>4</sup> *TWB Architects, Inc.*, 578 S.W.3d at 889 (alteration in original) (quoting *Rye*, 477 S.W.3d at 265).

Whether a defendant owed the plaintiff a duty of care is a question of law which we review de novo. *West v. E. Tennessee Pioneer Oil Co.*, 172 S.W.3d 545, 550 (Tenn. 2005).

## ANALYSIS

### I. THE PREMISES LIABILITY CLAIM

Plaintiffs argue that the trial court erred when it granted Defendants' Motion for Summary Judgment because it was foreseeable that Mr. Prysock would require the assistance of others to clear his only path of ingress and egress and that such a person may be injured in doing so. In their brief, Plaintiffs contend, "[w]hen Defendants failed to cure the hazard that they created it became entirely foreseeable that someone would take it upon himself to move the branches so that Prysock could get to and from his apartment without assistance. The possibility that whomever moved the branches for Prysock could be injured in the process implicates the doctrine of comparative fault." We agree.

As Plaintiffs correctly state in their appellate brief:

At its core, this is a "danger invites rescue" case. As Tennessee courts have recognized, "The act (of rescue), whether impulsive or deliberate, is the child of the occasion." The trial court implicitly recognized this fact when it observed, "Defendants [owed] a duty to John Prysock to ensure the ingress and egress was passable for [him] in his wheelchair." Unfortunately, the trial court then missed the point of its own observation when it held that the "reasonably foreseeable injury from a stack of tree branches is from the stack of branches themselves, not in trying to move the branches." The point that the trial court missed is that Defendants breached their duty to Prysock when they stacked their branches in his path. Then, by failing to cure the hazard that they had created, they also created an "occasion" where it was

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<sup>4</sup> As the Supreme Court explained in *TWB Architects, Inc. v. Braxton, LLC*, "[t]his is the standard Tennessee courts must apply when ruling on summary judgment motions regardless of which party bears the burden of proof at trial." 578 S.W.3d at 889.

foreseeable that someone would try to clear Prysock's path for them. James Smith did just that. Smith deliberately tried to cure the danger to Prysock that Defendants first created and then ignored. And he is no longer alive for his effort.

(Citations omitted).

In order to maintain a claim for premises liability, a plaintiff must present prima facie evidence of the customary elements of negligence. *See Jones v. Exxon Corp.*, 940 S.W.2d 69, 71 (Tenn. Ct. App. 1996). These elements are “(1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal cause.” *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993).

An owner or occupier of land has the duty to exercise reasonable care with regard to invitees on the premises, which includes the duty to remove or warn against “any dangerous condition on the premises of which the property owner is actually aware or should be aware through the exercise of reasonable diligence.” *Hixson v. Am. Towers, LLC*, 593 S.W.3d 699, 716 (Tenn. Ct. App. 2019) (citation omitted). Thus, a plaintiff seeking to hold an owner or operator of property liable in a premises liability action must prove that a “dangerous or defective condition” existed on the owner's premises. *Nee v. Big Creek Partners*, 106 S.W.3d 650, 653 (Tenn. Ct. App. 2002). “If no dangerous or defective condition exists, an owner or occupier cannot be held liable for failing to take action in order to remedy the supposed condition.” *Id.* at 654. Furthermore, a plaintiff must also prove that “(1) the condition was caused or created by the owner, operator, or his agent, or 2) if the condition was created by someone other than the owner, operator, or his agent, that the owner or operator had actual or constructive notice that the condition existed prior to the accident.” *Blair v. W. Town Mall*, 130 S.W.3d 761, 764 (Tenn. 2004). Moreover, as this court has stated, “The key to premises liability is foreseeability.” *Rogers ex rel. Wright v. Autozone Stores, Inc.*, No. M2011-02606-COA-R3-CV, 2012 WL 3594342, at \*6 (Tenn. Ct. App. Aug. 21, 2012). Thus, for a plaintiff to prevail on a premises liability claim, he must prove that his injury “was a reasonably foreseeable probability and that some action within the defendant's power more probably than not would have prevented the injury.” *Id.* (quoting *Dobson v. State*, 23 S.W.3d 324, 330 (Tenn. Ct. App. 1999)).

Here, it is undisputed that Defendants owned and operated the Highland Cove Apartments. It is further undisputed that Mr. Prysock, who is a tenant of Highland Cove Apartments, suffers from severe rheumatoid arthritis, is restricted to a motorized wheelchair, and resides in Building H—which is three stories tall, is built into the side of a hill, and has no elevator. It is also undisputed that Mr. Prysock does not reside on the

ground floor, and thus the only means of ingress and egress to and from his apartment is along an unimproved path on a hill near Building H.<sup>5</sup>

It is also undisputed that on or around August 6, 2017, the apartment maintenance staff trimmed several trees near the path but, instead of removing them, left a substantial pile of branches on the path, which blocked Mr. Prysock's only means of ingress or egress. It is also undisputed that Mr. Smith's injury occurred thirteen days after the path was blocked, during which time Defendants took no action to remove the obstruction. Thus, but for the efforts of friends and relatives who helped him to navigate the obstructed path, Mr. Prysock would have been confined to his apartment for thirteen days.

In the interim, however, on each and every occasion Mr. Prysock needed to travel along the path, a friend or relative came to his aid upon his request and pulled the branches from the path while Mr. Prysock passed. Unfortunately, this rescue effort had to be repeated every time Mr. Prysock left his apartment and every time he returned.

On the day in question, August 19, 2017, thirteen days after the hazard to Mr. Prysock's safety and the safety of those who aided him was created by Defendants, Mr. Prysock requested the assistance of his stepfather, Mr. Smith. As he had done on previous occasions, Mr. Smith pulled the branches back for Mr. Prysock to pass. The only difference on this occasion is that Mr. Smith had had enough and decided to remove the branches from the path. While he was attempting to remove the branches, he fell and sustained profound injuries that ultimately caused his death.

Defendants contend this tragic event was unforeseeable and that the trial court correctly granted summary judgment because they could not reasonably foresee that Mr. Smith would attempt to move the pile of branches or injure himself in the process. Defendants contend that the trial court correctly granted summary judgment because the tree branches were an open and obvious hazard and, thus, did not constitute a dangerous condition. Significantly, in *Coln v. City of Savannah*, our Supreme Court limited the open and obvious doctrine stating, "attempting to analyze the duty issue simply by labeling some conditions 'open and obvious,' without consideration of any surrounding circumstances, promotes arbitrary and inconsistent results." 966 S.W.2d 34, 42 (Tenn. 1998). As the Court explained in *Coln*, while the open and obvious nature of a condition might be relevant to determining the comparative fault of a plaintiff, it is not in and of itself determinative of a defendant's duty in a premises liability case. *See id.* at 41-42. Thus, while the open and obvious nature of the tree branches may be relevant to the comparative negligence of the Decedent, this fact, standing alone, does not establish as a matter of law that Defendants owed no duty to Mr. Smith.

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<sup>5</sup> Knowing that the unimproved path, which became muddy and impassable for him to traverse alone after a substantial rain, was Mr. Prysock's only means of ingress and egress, Defendants promised to improve the path but never did.



Defendants next argue that the trial court correctly granted summary judgment because Defendants did not have sufficient notice of any dangerous condition on the premises. We find this contention disingenuous because it is undisputed that Defendants and their agents created the condition. *See Blair*, 130 S.W.3d at 764 (providing that proof of notice is required “if the condition was created by someone *other than the owner, operator, or his agent*” (emphasis added)). In fact, Defendants concede that the apartment’s maintenance staff cut down the branches, placed them in the only path Mr. Prysock could use for ingress and egress, and left the debris for a period of thirteen days.

Defendants also contend that the trial court correctly granted summary judgment because they could not reasonably foresee that Mr. Smith would attempt to move the pile of branches and injure himself in the process.<sup>6</sup> We disagree because the obstructed path was Mr. Prysock’s only means of ingress and egress, and it was foreseeable that others would have to come to his aid to clear a path for him to come and go. Otherwise, Mr. Prysock would have been confined to his apartment for thirteen days. Whether it was foreseeable that someone would be injured is less certain, but that question of foreseeability is a question for the jury to decide because, in our opinion, reasonable minds could differ as to the foreseeability of whether someone might be injured while clearing a path for Mr. Prysock to come and go. As we have stated before, the issue of foreseeability should be decided on summary judgment only “if the evidence is uncontroverted and *if the facts and the inferences reasonably drawn from them permit reasonable persons to reach only one conclusion.*” *Montgomery ex rel. Montgomery v. Kali Oresi*, 303 S.W.3d 281, 289 (Tenn. Ct. App. 2009) (emphasis added) (citing *McCall v. Wilder*, 913 S.W.2d 150, 157 (Tenn. 1995); *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995); *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 89 (Tenn. 2000)).

Here, Defendants concede that they were aware Mr. Prysock was restricted to a motorized wheelchair and that his only means of ingress and egress was the path that Defendants’ groundcrew blocked and allowed to remain blocked for thirteen days. Based on these undisputed facts, we have determined that there is sufficient evidence for a trier of fact to reach a different conclusion than the trial court and find that Mr. Smith’s injuries were reasonably foreseeable. *See McCall*, 913 S.W.2d at 153 (explaining that a party is entitled to summary judgment “[i]f the facts and conclusions permit a reasonable person to reach only one conclusion”). For these reasons, Defendants were not entitled to summary judgment on the issue of duty. Accordingly, we reverse the trial court’s grant of summary judgment based on the issue of duty.

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<sup>6</sup> Defendants also contend that it is unforeseeable for someone to walk backwards when moving branches, but they fail to provide any reasoned explanation for why walking backwards when moving branches is unforeseeable.

## II. THE ESTATE'S NEGLIGENCE PER SE CLAIM

Plaintiffs argue on appeal that the trial court did not effectively grant summary judgment as to the claim for negligence per se because neither Defendants' Motion for Summary Judgment nor the trial court's final order granting Defendants' Motion for Summary Judgment expressly mentioned Plaintiffs' negligence per se claim.

A trial court may, in rare cases, grant summary judgment on an issue sua sponte, so long as the opposing party "had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried." *Franklin Real Est. Grp., Inc. v. Spero Dei Church*, No. M2019-01691-COA-R3-CV, 2021 WL 274747, at \*4 (Tenn. Ct. App. Jan. 27, 2021) (quoting *Patton v. Est. of Upchurch*, 242 S.W.3d 781, 791 (Tenn. Ct. App. 2007)). Here, Plaintiffs based their negligence per se claim on the Uniform Residential Landlord and Tenant Act ("URLTA"), Tennessee Code Annotated § 66-28-101 through -522. Specifically, Plaintiffs assert that Defendants violated § 66-28-304(a)(3), which requires landlords to "[k]eep all common areas of the premises in a clean and safe condition."

This court has previously held that Tennessee's URLTA was not intended to modify the common law regarding the elements of premises liability. *See Richardson v. H & J Props., LLC*, No. W2019-02082-COA-R3-CV, 2020 WL 6158463, at \*4 (Tenn. Ct. App. Oct. 21, 2020). "Instead, the URLTA was meant to promote the four clearly-stated purposes listed in section 66-28-103(b) and to provide remedies that are not otherwise permitted at common law." *Id.* at \*4 (citation omitted). Accordingly, this court has routinely applied common law premises liability principles to determine whether the owner of premises is liable under the URLTA. *See, e.g., Holloway v. Grp. Properties LLC*, No. W2016-02417-COA-R3-CV, 2017 WL 3641713, at \*3-4 (Tenn. Ct. App. Aug. 24, 2017) ("The *prima facie* case for negligence, under either the URLTA or the common law, is ostensibly the same."); *Miller ex rel. Miller v. Hill*, No. E2002-02018-COA-R3-CV, 2003 WL 252625, at \*4-5 (Tenn. Ct. App. Jan. 31, 2003) (construing URLTA "with reference to the well-established meaning given . . . in the cases addressing a landlord's common law duty").

Thus, because the elements of premises liability are the same under both the common law and the URLTA, we find that Plaintiffs were afforded a full and fair opportunity to oppose the dismissal of its negligence per se claim when they argued in opposition to summary judgment regarding the common law premises liability claim. On the same basis, however, we reverse the trial court's grant of summary judgment on this issue for the reasons stated in the section above.

## III. MRS. SMITH'S INDEPENDENT CLAIM FOR LOSS OF CONSORTIUM

Plaintiffs argue that the trial court erred by dismissing Mrs. Smith's loss of consortium claim. More specifically, Mrs. Smith argues that she has an independent,

vested, common law cause of action for loss of consortium in relation to the 308-day period from the date of the accident, August 19, 2017, until the date of Mr. Smith's death, June 23, 2018. We disagree.

In *Kline v. Eyrich*, the Tennessee Supreme Court noted that the wrongful-death statutes do not create more than one cause of action:

[T]he statutes permitting an action for the wrongful death of another create “no right of action exist[ing] independently of that which the deceased would have had, had [he or she] survived.” Although the living beneficiaries of the action may seek a limited recovery for their own losses in addition to those of the decedent, the right of action itself remains one that is “single, entire[,] and indivisible.” In point of fact, therefore, “[t]here can be but one cause of action for the wrongful death of another.”

69 S.W.3d at 206–07 (citations omitted). For this reason, this court has held that a wife's “action for loss of consortium is derivative in that it . . . owes its existence to [her husband's] claim for personal injuries.” *Clark v. Shoaf*, 209 S.W.3d 59, 61 (Tenn. Ct. App. 2006) (citing *Hunley v. Silver Furniture Mfg. Co.*, 38 S.W.3d 555, 557 (Tenn. 2001)). Thus, we disagree with Plaintiffs that Mrs. Smith could maintain an independent, common law loss of consortium claim, and we affirm the trial court on this issue.

Nevertheless, we recognize that a spouse may receive loss of consortium damages in cases brought under Tennessee Code Annotated § 20-5-110. *See Jordan v. Baptist Three Rivers Hosp.*, 984 S.W.2d 593, 601 (Tenn. 1999) (“We hold that consortium-type damages may be considered when calculating the pecuniary value of a deceased's life. This holding does not create a new cause of action but merely refines the term ‘pecuniary value.’”). In particular, the party suing may recover “damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.” Tenn. Code Ann. § 20-5-113 (emphasis added).

Thus, Mrs. Smith is not precluded from seeking damages for loss of consortium as a derivative claim to the wrongful death claim in relation to the 308-day day period from the date of the accident, on August 19, 2017, until Mr. Smith's death on June 23, 2018, as well as those that are a consequence of his death. If entitled to damages, Mrs. Smith—being a party “for whose use and benefit the right of action survives”—will have a right to recover for “damages resulting to [her] from the death consequent upon the injuries received.” *Id.* However, “a claim for loss of consortium does not, in any way, represent a claim for damages separate from the wrongful death action itself. Rather, a claim for consortium merely embodies one component of the decedent's pecuniary value of life.” *Kline*, 69 S.W.3d at 207–08 (citing *Hancock v. Chattanooga–Hamilton Cnty. Hosp. Auth.*, 54 S.W.3d 234, 237 (Tenn. 2001); *Hill v. City of Germantown*, 31 S.W.3d 234, 239 (Tenn. 2000); *Jordan*, 984 S.W.2d at 601)).

#### IV. WHO IS THE PROPER PLAINTIFF?

Finally, Plaintiffs argue that the trial court erred by dismissing Mrs. Smith as a plaintiff seeking damages under Tennessee's Wrongful Death Statute. In its final order, the trial court stated,

As an initial matter, this case is styled as Trina Smith as the Representative of the Estate of James Smith and Trina Smith in her personal capacity. Plaintiffs brought suit for the wrongful death of James Smith and loss of consortium for Trina Smith. Ms. Smith's loss of consortium claim is not an independent cause of action, but part of the wrongful death claim for James Smith. All wrongful death claims are brought pursuant to Tennessee Code Annotated Section 20-5-113. Tenn. Code Ann. Section 20-5-113 creates one cause of action for wrongful death. Loss of consortium is a factor to be considered in the determination of the pecuniary value of life of the deceased, but is not a separate cause of action. Therefore, Trina Smith's separate loss of consortium claim is dismissed with prejudice.

The purpose of the wrongful death statutes "is to provide 'for the continued existence and passing of the right of action of the deceased, and not for any new, independent cause of action in [survivors].'" *Beard v. Branson*, 528 S.W.3d 487, 499 (Tenn. 2017) (alteration in original) (citations omitted). For this same reason, in *Ki v. State*, the Supreme Court rejected the assertion that Tennessee Code Annotated § 20-5-113 created two separate rights to damages and permitted two claimants to exist in a wrongful death action. 78 S.W.3d 876, 880 (Tenn. 2002). In doing so, the court clarified that "beneficiaries do not have an individual claim or cause of action for the wrongful death of the decedent." *Id.* Instead, a wrongful death action may be instituted by "the personal representative of the deceased or by the surviving spouse in the surviving spouse's own name, or, if there is no surviving spouse, by the children of the deceased or by the next of kin." Tenn. Code Ann. § 20-5-107(a).

For this reason, and as we noted earlier, the right of action in a wrongful death case remains one that is "single, entire[,] and indivisible." *Kline*, 69 S.W.3d at 207 (alteration in original) (citations omitted). Stated another way, "[t]here can be but one cause of action for the wrongful death of another." *Id.* (quoting *Matthews v. Mitchell*, 705 S.W.2d 657, 660 (Tenn. Ct. App. 1985)). And regardless of who prosecutes the claim, "[p]roceeds of a wrongful death action are distributed according to the laws of intestate succession." *Id.* at 202 n.3 (citing *Foster v. Jeffers*, 813 S.W.2d 449, 452 (Tenn. Ct. App. 1991)); *see also Rickman v. Rickman*, No. M2013-00251-COA-R3-CV, 2013 WL 5656214, at \*7 (Tenn. Ct. App. Oct. 15, 2013) ("Tennessee courts have determined that the proceeds from a wrongful death action should pass as if through intestate succession."). Thus, "any

proceeds of the action go to the statutory beneficiaries, not to the decedent's estate." *Beard*, 528 S.W.3d at 499 (citations omitted).

Thus, as the trial court correctly stated, Tennessee's wrongful death statutes create one cause of action. Because multiple actions may not be brought to resolve a single wrongful death claim, the statutes carefully prescribe the priority of those who may assert the action on behalf of the decedent and any other beneficiaries. Pursuant to the statute, the surviving spouse has "the prior and superior right above all others." *Kline*, 69 S.W.3d at 207 (quoting *Foster*, 813 S.W.2d at 451). Once the surviving spouse has asserted his or her right or priority, the statutes give the surviving spouse complete "control over the right of action until he or she waives that right." *Id.* (quoting *Est. of Baker ex rel. Baker v. Maples*, 995 S.W.2d 114, 115 (Tenn. Ct. App. 1999)).

In this case, then, the claim for wrongful death may be brought by either Mrs. Smith as the surviving spouse *or* by Mrs. Smith in her capacity as the personal representative of the Estate. *See* Tenn. Code Ann. § 20-5-106(a) (stating that action passes to the surviving spouse or the decedent's personal representative for the benefit of the surviving spouse). Accordingly, on remand, the trial court shall afford Mrs. Smith the option to take control over the singular claim or to allow the Estate to pursue the claim.<sup>7</sup> Regardless of the named plaintiff, however, the claim is being prosecuted on behalf of the statutory beneficiaries. *See id.*; *see also Kline*, 69 S.W.3d at 202 n.3; *Foster*, 813 S.W.2d at 452; *Rickman*, 2013 WL 5656214, at \*7 ("Tennessee courts have determined that the proceeds from a wrongful death action should pass as if through intestate succession.").

#### IN CONCLUSION

The judgment of the trial court is reversed, in part, and affirmed, in part, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against the Appellees, Highland Cove Apartments, LLC, and Broad Management Group, LLC.

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FRANK G. CLEMENT JR., P.J., M.S.

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<sup>7</sup> "Once the surviving spouse has asserted his or her right or priority, the statutes give to the surviving spouse complete 'control over the right of action until he or she waives that right.'" *Beard*, 528 S.W.3d at 499 (quoting *Kline*, 69 S.W.3d at 207).