

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 21, 2015 Session

**COFFEE COUNTY BOARD OF EDUCATION v. CITY OF TULLAHOMA,
ET AL.**

**Appeal from the Chancery Court for Coffee County
No. 2014CV179 Vanessa Jackson, Judge**

No. M2014-02269-COA-R3-CV – Filed October 28, 2015

The Coffee County Board of Education filed suit against the City of Manchester and the City of Tullahoma to recover certain tax revenue the Board alleges it was owed pursuant to Tenn. Code Ann. § 57-4-306. The trial court held that the Board of Education lacked capacity to bring the suit and dismissed the petition. The Board of Education appeals asserting that the authority to sue to recover the funds is necessarily implied from the General Assembly’s grant of express powers and duties to the Board. We agree. Pursuant to Tenn. Code Ann. § 49-2-203(b)(5), the General Assembly has granted the Board the power to “[e]mploy legal counsel to advise or represent the board.” We find that this provision vests the Board with the authority to file suit to recover the funds at issue. Therefore, we must reverse the trial court’s dismissal of the lawsuit.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

D. Scott Bennett and Mary C. Decamp, Chattanooga, Tennessee, and Eric Burch, Manchester, Tennessee, for the appellant, Coffee County Board of Education.

Stephen M. Worsham, Michael E. Giffin, and Karen Sedora Price, Tullahoma, Tennessee, for the appellee, City of Tullahoma.

Kristin Ellis Berexa and Mark E. McGrady, for the Amicus Curiae, Tennessee Municipal League Risk Management Pool, Inc.

OPINION

FACTS AND PROCEDURAL HISTORY

On May 30, 2014, the Coffee County Board of Education (“the Board of Education” or “the Board”) filed a complaint against the City of Manchester and the City of Tullahoma (collectively referred to as “Defendants”) alleging that the Defendants received certain tax revenue pursuant to Tenn. Code Ann. § 57-4-301 and failed to remit any portion of that revenue to the county school fund in violation of Tenn. Code Ann. § 57-4-306.¹ The Board of Education asserted that the City of Manchester owed it \$137,340.00 and that the City of Tullahoma owed it \$387,488 in past due tax revenue.

The City of Tullahoma filed an answer on June 27, 2014, denying liability. The City of Manchester filed a motion to dismiss, asserting that the Board of Education lacked capacity or authority to file the action, and, alternatively, that the Board of Education failed to join the Board of Education of the City of Manchester as an indispensable party.

On September 18, 2014, the trial court entered an order granting the City of Manchester’s motion to dismiss, holding that the Board of Education “did not have the capacity to maintain this cause of action.” The court cited “Dillon’s Rule,” a rule of statutory construction that “calls for strict and narrow construction of statutes creating local governmental authority” and reasoned that the statute defining the duties and powers delegated to the Board of Education by the State of Tennessee, Tenn. Code Ann. § 49-2-203, does not expressly grant the Board of Education the power to “prosecute a lawsuit to recover allegedly improperly distributed tax proceeds, nor to prosecute a lawsuit of any kind.” The court went on to state that “the power to bring suit over allegedly improperly distributed tax proceeds is not necessary to, or implied in, or incident to the fifteen powers expressly granted to the [Board of Education] by Tenn. Code Ann. § 49-2-203(b).” Finally, the court held that Tenn. Code Ann. § 49-1-201(c)(15)(A) did not provide authority for the Board of Education to maintain the cause of action against the Defendants. The court dismissed the case in its

¹ Tennessee Code Annotated section 57-4-301(c) is commonly referred to as the “liquor-by-the-drink tax” and provides for the levying of a fifteen percent tax on the sales price of all alcoholic beverages sold for consumption on a premises. The tax is computed on gross sales receipts and is distributed by the commissioner of revenue. *See* Tenn. Code Ann. § 57-4-306(a) (effective August 5, 2013 to June 30, 2014). The tax proceeds are distributed to municipalities that have authorized the sale of liquor by the drink. “[A]ny proceeds expended and distributed to municipalities which do not operate their own school systems separate from the county are required to remit one half (1/2) of their proceeds of the gross receipts liquor-by-the-drink tax to the county school fund[.]” Tenn. Code Ann. § 57-4-306(a)(2)(A) (effective August 5, 2013 to June 30, 2014).

entirety.

The Board of Education filed a motion to alter and amend, which was denied by the trial court on November 3, 2014. In its order denying the motion, the trial court noted that “the attorneys for the Plaintiffs and both Defendants agreed that the Court’s Order entered September 18, 2014, was applicable to and binding upon both the City of Manchester and the City of Tullahoma.” The court amended its September 18, 2014 order to dismiss the Board of Education’s complaint as to both Defendants. The Board of Education appeals the trial court’s dismissal of its claim.²

STANDARD OF REVIEW

Tennessee Rule of Civil Procedure 12.02(6) permits dismissal of a lawsuit for failure to state a claim upon which relief can be granted. A Rule 12.02(6) motion to dismiss challenges the legal sufficiency of the complaint, not the strength of the plaintiff’s proof or evidence. *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011). The motion admits the truth of all averments contained in the complaint but asserts that such facts do not constitute a cause of action. *Id.* In considering a motion to dismiss, courts must liberally construe the complaint, “presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.” *Id.* (quoting *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007)). The scope of review following the grant or denial of a motion to dismiss involves a question of law, which we review de novo, without any presumption of correctness. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 894 (Tenn. 2011). To the extent that this appeal raises issues involving interpretation of statutes, we review those issues de novo without any presumption of correctness. *In re Estate of Tanner*, 295 S.W.3d 610, 613 (Tenn. 2009).

ANALYSIS

The Board of Education asserts that the trial court erred in holding that local boards of education lack the capacity to bring suit. The City of Tullahoma argues the trial court correctly applied “Dillon’s Rule” and properly determined that Tenn. Code Ann. § 49-2-203, the statute conferring powers and duties on the Board of Education, does not authorize the Board of Education to bring this lawsuit.

We begin our analysis by examining the Tennessee Supreme Court case *Southern Constructors, Inc. v. Loudon County Board of Education*, 58 S.W.3d 706 (Tenn. 2001), in

² The Board of Education entered into a settlement agreement with the City of Manchester following the entry of the notice of appeal. Therefore, the City of Manchester is not a party to this appeal.

which our Supreme Court discussed the scope of authority of a county board of education. In *Southern Constructors*, the specific issue concerned whether a county board of education had the authority to arbitrate a dispute arising out of a school construction contract. *S. Constructors, Inc.*, 58 S.W.3d at 708. The Court began its analysis with a discussion of “Dillon’s Rule,”³ a canon of statutory construction, which has been summarized in *Southern Constructors* as follows:

a municipal government may exercise a particular power only when one of the following three conditions is satisfied: (1) the power is granted in the “express words” of the statute, private act, or charter creating the municipal corporation; (2) the power is “necessarily or fairly implied in, or incident to[,] the powers expressly granted”; or (3) the power is one that is neither expressly granted nor fairly implied from the express grants of power, but is otherwise implied as “essential to the declared objects and purposes of the corporation.”

Id. at 710-11 (quoting *Mayor & City Council v. Linck*, 80 Tenn. (12 Lea) 499, 504 (1883)). The Court also emphasized that “[a]ny fair, reasonable doubt concerning the existence of the power is resolved by the courts against the [municipal] corporation and the power is denied.” *Id.* at 711 (quoting *Linck*, 80 Tenn. (12 Lea) at 504)).

When applying Dillon’s Rule, the *Southern Constructors* Court determined that no part of the statute conferring power upon county school boards provided express authority to enter into arbitration agreements. *Id.* at 716. Nevertheless, the Court continued its analysis to determine whether the power to arbitrate is fairly implied from the powers expressly granted by statute. The Court noted, “[i]mplied powers do not exist independently of the grant of express powers[,] and the only function of an implied power is to aid in carrying into effect a power expressly granted.” *Id.* (quoting *City of Flagstaff v. Associated Dairy Prods. Co.*, 255 P.2d 191, 193 (Ariz. 1953)). The Court concluded that “the power to arbitrate is fairly implied from the express power to contract in the first instance.” *Id.* The Court reasoned, “given that the general rule of law is that the power to contract necessarily includes the power to settle disputes arising under that contract, one would reasonably expect the General Assembly to expressly withhold the ability to arbitrate disputes if that avenue of dispute resolution were not available.” *Id.* at 717. Thus, the Court determined that the county school board could engage in arbitration even though the power to arbitrate was not expressly

³ Dillon’s Rule derives its name from Iowa Supreme Court Chief Justice John F. Dillon, who served as a member of the Iowa Supreme Court from 1864 through 1869 before being appointed to the United States Court of Appeals for the Eighth Circuit. Jay P. Syverson, *The Inconsistent State of Municipal Home Rule in Iowa*, 57 *DRAKE L. REV.* 263, 265 n.11 (2008). Justice Dillon first articulated the rule in *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 475 (1868).

provided for by the statutes creating the board. *Id.*; see also *Byrn v. Metro. Bd. of Pub. Educ.*, No. 01-A-019003CV00124, 1991 WL 7806, at *5 (Tenn. Ct. App. Jan. 30, 1991) (“[A]t least insofar as their contracts are concerned, local school boards may sue and be sued in their own right, even in the absence of specific statutory authority.”)

Here, both parties agree that there is no provision of the Tennessee Code that expressly grants a local board of education the authority to file suit to recover liquor-by-the-drink tax revenue. The Board of Education argues, however, that the authority to sue to recover these funds is necessarily implied from the General Assembly’s grant of express powers and duties. In the Board’s view, “[g]iven the sheer magnitude of a school system’s operation, it is inconceivable that the General Assembly would have vested these powers and duties in a local board without empowering it to sue in vindication of them.”

The duties conferred on the Board of Education are found in Tenn. Code Ann. § 49-2-203(a)⁴ and the express powers granted to the Board of Education are enumerated at Tenn.

⁴ The duties of the Board of Education enumerated at Tenn. Code Ann. § 49-2-203(a) are as follows:

(1) Elect, upon the recommendation of the director of schools, teachers who have attained or are eligible for tenure and fix the salaries of and make written contracts with the teachers;

...

(2) Manage and control all public schools established or that may be established under its jurisdiction;

(3) Purchase all supplies, furniture, fixtures and material of every kind through the executive committee;

...

(4) Order warrants drawn on the county trustee on account of the elementary and the high school funds, respectively;

(5) Visit the schools whenever, in the judgment of the board, such visits are necessary;

(6) Except as otherwise provided in this title, dismiss teachers, principals, supervisors and other employees upon sufficient proof of improper conduct, inefficient service or neglect of duty; provided, that no one shall be dismissed without first having been given in writing due notice of the charge or charges and an opportunity for defense;

(7) Suspend, dismiss or alternatively place pupils, when the progress, safety or efficiency of the school makes it necessary or when disruptive, threatening or violent students endanger the safety of other students or school system employees;

(8) Have enumerated the scholastic population of the local school district in May of every odd-numbered year;

(9) Provide proper record books for the director of schools, and should the appropriate local legislative body fail or refuse to provide a suitable office and sufficient equipment for the director of schools, the local board of education may provide the office and equipment out of the elementary and the high school funds in proportion to their gross annual amounts;

(10)(A)(i) Require the director of schools and chair of the local board to prepare a budget on forms furnished by the commissioner, and when the budget has been approved by the local board, to submit it to the appropriate local legislative body;

...

(11) Prepare, or have prepared, a copy of the minutes of each meeting of the board of education, and mail a copy of the minutes no more than thirty (30) days after the board meeting or at the time they are mailed to or otherwise provided to members of the board, if such is earlier, to the president of each local education association. Any subsequent corrections, modifications or changes shall be distributed in the same manner;

(12) Adopt and enforce, in accordance with guidelines prescribed by the state board of education pursuant to § 49-6-3002, minimum standards and policies governing student attendance, subject to availability of funds;

(13) Develop and implement an evaluation plan for all certificated employees in accordance with the guidelines and criteria of the state board of education, and submit the plan to the commissioner for approval;

(14)(A) Notwithstanding any other public or private act to the contrary, employ a director of schools under a written contract of up to four (4) years' duration, which may be renewed. No school board, however, may either terminate, without cause, or enter into a contract with any director of schools during a period extending from forty-five (45) days prior to the general school board election until thirty (30) days following the election. Any vacancy in the office of the director that occurs within this period shall be filled on a temporary basis, not extending beyond sixty (60) days following the general school board election. An option to renew a contract that exists on May 22, 2001, may be exercised within the time period set out in this subdivision (a)(14)(A). Any such person transferred during the term of the person's contract shall not have the person's salary diminished for the remainder of the contract period. The board may dismiss the director for cause as specified in this section or in chapter 5, part 5 of this title, as appropriate. The director of schools may be referred to as the superintendent and references to or duties of the former county superintendents shall be deemed references to or

Code Ann. § 49-2-203(b).⁵ The Board of Education specifically points to Tenn. Code Ann.

duties of the director of schools employed under this section. The school board is the sole authority in appointing a director of schools;

...

(15) Adopt policies on the employment of substitute teachers. The policies shall, at a minimum, address qualifications and training and shall ensure substitute teachers are subject to investigation pursuant to § 49-5-413. The policies shall also prohibit hiring any substitute teacher whose records with the state department of education indicate a license or certificate currently in revoked status; and

(16) Develop and implement an evaluation plan to be used annually for the director of schools. The plan shall include, but shall not be limited to, sections regarding job performance, student achievement, relationships with staff and personnel, relationships with board members, and relationships with the community.

⁵ The powers of the Board of Education listed at Tenn. Code Ann. § 49-2-203(b) are as follows:

(1) Consolidate two (2) or more schools whenever in its judgment the efficiency of the schools would be improved by the consolidation;

(2) Require school children and any employees of the board to submit to a physical examination by a competent physician whenever there is reason to believe that the children or employees have tuberculosis or any other communicable disease, and upon certification from the examining physician that the children or employees have any communicable disease, to exclude them from school or service until the child or children, employer or employers, employee or employees furnish proper certificate or certificates from the examining physician or physicians showing the communicable disease to have been cured;

(3) Establish night schools and part-time schools whenever in the judgment of the board they may be necessary;

(4) Permit school buildings and school property to be used for public, community or recreational purposes under rules, regulations and conditions as prescribed from time to time by the board of education;

...

(5) Employ legal counsel to advise or represent the board;

(6) Make rules providing for the organization of school safety patrols in the public schools under its jurisdiction and for the appointment, with the permission of the parents, of pupils as members of the safety patrols;

(7) Establish minimum attendance requirements or standards as a condition for passing a course or grade; provided, that the requirements or standards are established prior to any school year in which they are to be applicable, are recorded in board minutes and publicized through a newspaper of general circulation prior to implementation and are printed and distributed to students prior to implementation; and provided, further, that the requirements or standards shall not violate § 49-6-3002(b);

(8) Provide written notice to probationary teachers of specific reasons for failure of reelection pursuant to this title; provided, that any teacher so notified shall be given, upon request, a hearing to determine the validity of the reasons given for failure of reelection;

...

(9) Offer and pay a bonus or other monetary incentive to encourage the retirement of any teacher or other employee who is eligible to retire. For purposes of this subdivision (b)(9), “local board of education” means the board of education of any county, municipal or special school system;

(10) Lease or sell buildings and property or the portions of buildings or property it determines are not being used or are not needed at present by the public school system in the manner deemed by the board to be in the best interest of the school system and the community that the system serves. In determining the best interest of the community, the board may seek and consider recommendations from the planning commission serving the community. No member of the local or county board or other school official shall be held liable in damages for any injury to person or property resulting from the use of the school buildings or property. No lease or sale shall be used to avoid any school integration requirement. A local board of education may also dispose of surplus property as provided in §§ 49-6-2006 and 49-6-2007, it being the legislative intent that a local board at its discretion may dispose of surplus property to private owners as well as civic or community groups as provided by this subdivision (b)(10);

(11) Establish and operate before and after school care programs in connection with any schools, before and after the regular school day and while school is not in session. No Tennessee foundation program school funds or any required local matching funds shall be used in connection with the operation of these programs, but the board may charge a fee of any child attending a before and after school care program. In these programs, the board may use teachers on such extended program assignments as may be authorized by § 49-5-5209 and policies established pursuant to § 49-5-5209;

(12) Contract for the management and operation of the alternative schools provided for in § 49-6-3402 with any other agency of local government;

(13) Include in student handbooks, or other information disseminated to parents and guardians, information on contacting child advocacy groups and information on how to contact the state department of education for information on student rights and services;

§ 49-2-203(b)(5), which vests the Board with power to “[e]mploy legal counsel to advise or represent the board.” The Board asserts that this provision necessarily implies that it has the power to pursue litigation to obtain the tax revenues it is owed.

We are persuaded that Tenn. Code Ann. § 49-2-203(b)(5) does provide the Board of Education with authority to sue the City of Tullahoma to recover funds it may be owed pursuant to Tenn. Code Ann. § 57-4-306. The General Assembly provided the Board with the authority to employ legal counsel to “represent” it. Tenn. Code Ann. § 49-2-203(b)(5). The Merriam-Webster Online Dictionary defines “represent” to mean, *inter alia*, “to speak or act for (someone or something) in a court of law.” MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/represent> (last visited Oct. 15, 2015). The statute does not require legal counsel to be solely for the Board’s defense. Thus, the ability of the Board to employ counsel to pursue the tax revenues owed is “fairly implied in” the legislature’s grant of authority to the Board to “[e]mploy legal counsel to advise or represent the board.” Tenn. Code Ann. § 49-2-203(b)(5).

Bolstering this conclusion is our Supreme Court’s statement in *Board of Education of Memphis City Schools v. Shelby County*, 339 S.W.2d 569, 582 (Tenn. 1960): “We conceive it to be the plain duty of any such Board [of Education] to exercise every legal means for the protection and preservation of funds that may belong to the school system which it operates.”⁶ Here, the Board has employed legal counsel to represent it in its effort to protect and preserve funds that may belong to the county school fund. The power to sue for the funds at issue in this case is a power fairly implied from the express power to employ legal

(14) Cooperate with community organizations in offering extended learning opportunities; and

(15) Apply for and receive federal or private grants for educational purposes. Notwithstanding title 5, chapter 9, part 4, except for grants requiring matching funds, in-kind contributions of real property or expenditures beyond the life of the grant, appropriations of federal or private grant funds shall be made upon resolution passed by the local board of education and shall comply with the requirements established by the granting entity. A county board of education or city board of education shall provide a copy of such resolution to the local legislative body as notice of the board’s actions within seven (7) days of the resolution’s passage.

⁶ The City of Tullahoma and the amicus attempt to distinguish *Board of Education of Memphis City Schools v. Shelby County*, 339 S.W.2d 569, 582 (Tenn. 1960), by pointing out that Chapter 30, Acts of 1869, which created the Board of Education of the Memphis City Schools, vested that board with the power to “sue and be sued, plead and be impleaded; answer and be answered unto in all Courts of Record and Courts of inferior jurisdiction.” *Bd. of Educ. of Memphis City Schs.*, 339 S.W.2d at 582. Given the broad language of Tenn. Code Ann. § 42-9-203(b)(5), we believe this is a distinction without a real difference and decline to find the case inapplicable to the issue at hand.

counsel for representation. Therefore, we respectfully disagree with the trial court's holding that the Board of Education "did not have the capacity to maintain this cause of action."

CONCLUSION

For the foregoing reasons, we reverse the chancery court's dismissal of the Board of Education's petition for lack of capacity to sue. Costs of appeal are assessed against the appellee, City of Tullahoma, and execution may issue if necessary.

ANDY D. BENNETT, JUDGE