IN THE COURT OF APPEALS OF TENNESSEE

AT NASHVILLE

January 27, 2015 Session

ALLEN MATHIS, ET AL. v. CITY OF WAYNESBORO

Direct Appeal from the Circuit Court for Wayne County

No. 4194 Robert Lee Holloway, Jr., Judge

No. M2014-00864-COA-R3-CV – Filed March 19, 2015

This appeal arises from the trial court's grant of summary judgment in favor of Defendant, the City of Waynesboro. Plaintiffs filed this lawsuit on May 5, 2006, alleging that acts and/or omissions of the City caused injury to them on May 6, 2003, when a creek near their home flooded and damaged their property. The City moved for summary judgment. The trial court found that the material facts were not in dispute and that Plaintiffs' lawsuit was time-barred by the Tennessee Governmental Tort Liability Act's statute of limitations. Moreover, the trial court found that the City was immune from liability for the claims. Accordingly, the trial court granted summary judgment in favor of the City. After thoroughly reviewing the record on appeal, we affirm the judgment of the trial court.

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

BRANDON O. GIBSON, J., delivered the opinion of the Court, in which ARNOLD B. GOLDIN, J., and KENNY ARMSTRONG, J., joined.

Allen Mathis, *Pro Se*.

John Dean Burleson and Matthew Robert Courtner, Jackson, Tennessee, for the appellee, City of Waynesboro, Tennessee.

MEMORANDUM OPINION[1]

I. BACKGROUND AND PROCEDURAL HISTORY

Allen Mathis and Frances Mathis own a home located near Hurricane Creek in Wayne County, Tennessee. Brian Lee Mathis owns personal property at the home. On May 6, 2003, Hurricane Creek flooded and damaged the Mathises' real and personal property. On May 5, 2006, Allen Mathis, Frances Mathis, and Brian Lee Mathis ("the Mathises") filed a complaint against the City of Waynesboro ("Waynesboro" or the "City") in Wayne County Circuit Court seeking a judgment for damages arising from the flood. Their complaint contained the following allegations:

> 4. James Kelley and James Craig Kelley,[2] owned property immediately to the west of Hurricane Creek and south of U.S. Highway 64. In the years and months preceding May 6, 2003, said James Kelley and James Craig Kelley repeatedly placed fill in an area that abutted or entered into Hurricane Creek thus changing the course of said stream and causing the damages as set out herein. Said fill placed by the defendants was improper in violation of Waynesboro city ordinances and federal guidelines. Further, said James Kelley and James Craig Kelley did not have any appropriate permits and/or permission before placing said fill in the flood plane [sic] of Hurricane Creek.
>
> 5. On or about the 6th day of May, 2003, a rainfall event occurred in Wayne County, Tennessee, at which time the plaintiffs property located at the corner of U.S. Highway 64 and Hurricane Creek Road was flooded. Said property included a house which was inundated with water and suffered severe flood damage as well as destroying most of the plaintiffs' personal property.
>
> 6. As a result of placing fill in said Hurricane Creek by the defendant, Hurricane Creek rose beyond its banks onto the plaintiffs' property in a way it would not have had if James Kelley and James Craig Kelley not

[1]Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

[2]We note that the surname(s) of the individuals named here are spelled two different ways throughout the record; in some instances, it is spelled "Kelley," and in others it is spelled "Kelly." Because they use "Kelly" in their own filings, we are persuaded that "Kelly" is the correct spelling and will use that spelling in this opinion.

placed the fill in said stream and moved the center of stream toward plaintiffs' property.

7. The City of Waynesboro failed to properly inspect said property and enforce its own city ordinances and regulations and knew or should have known that said James Kelly and James Craig Kelley were improperly placing fill in a waterway in the City of Waynesboro.

WHEREFORE, premises considered, plaintiffs pray:

1. For judgment against the defendant in the amount of $150,000.00 and the cost of this cause.

2. This action be consolidated with Wayne County Chancery Case No. 11731 (Attached as Exhibit 1) in the Circuit Court for Wayne County.

The Mathises attached a copy of a complaint filed in Wayne County Chancery Court on October 24, 2005, which contained similar allegations and named the Kellys as defendants.[3]

On September 26, 2006, the City filed a motion titled "Motion to Dismiss, or in the Alternative, Motion for Summary Judgment" and supporting memorandum of law. The City argued that as a governmental entity, claims against it were required to be brought in strict compliance with Tennessee's Governmental Tort Liability Act ("GTLA"). *See* Tenn. Code Ann. § 29-20-101 to -408 (2012). The City argued that the Mathises' claims were time-barred by the GTLA's twelve-month statute of limitations. Tenn. Code Ann. § 29-20-305(b). Additionally, the City argued that it was immune from suit for failure to make an inspection or for making a negligent inspection pursuant to Tenn. Code Ann. § 29-20-205(4). In the supporting memorandum's statement of facts section, the City referred to the Kellys as "certain employees of [the City]."[4]

In response, the Mathises, believing the Kellys to be employees of the City, requested to amend their original complaint by adding the following paragraphs:

[3]On September 26, 2006, the Wayne County Chancery Court entered an Agreed Order directing that the Mathises' proceedings against the Kellys be removed from Chancery Court and consolidated with their Circuit Court proceedings against the City. However, on March 11, 2013, the Circuit Court entered an order dismissing the Mathises' claims against the Kellys with prejudice pursuant to a settlement agreement. Accordingly, the Mathises' claims against the Kellys are not relevant to this appeal.

[4]Both parties now agree that the Kellys were not employed by the City.

> 8. Alternatively, James Kelley and James Craig Kelley were employees of the defendant, and all acts alleged herein were conducted during the course and scope of their employment and constitute a nuisance to the plaintiffs.
>
> 9. The defendant is liable for the plaintiffs' damages by virtue of the doctrine of *respondeat superior* for James Kelley and James Craig Kelley's damage of the plaintiffs' real property as well as for creation of a nuisance.
>
> 10. The plaintiffs did not discover, nor should they reasonably have discovered James Kelley and James Craig Kelley's and/or the defendant's actions caused their injuries until within one year prior to the filing of the original complaint.

The Mathises argued that a ruling to grant the City's motion was not appropriate in light of their amended complaint and asked the trial court to deny the City's motion to allow time for appropriate discovery.

After a hearing on the motions, the trial court granted the Mathises' request to amend their complaint and denied the City's motion on December 13, 2006. In denying the City's motion, the trial court stated that the City's motion "perhaps [was] rendered moot by the plaintiff's amended complaint." In any event, the trial court denied the City's motion, citing the liberal pleading standards of the Tennessee Rules of Civil Procedure. The court found that the Mathises' amended complaint stated a cause of action that invoked the discovery rule to avoid dismissal for non-compliance with the statute of limitations and created genuine issues of disputed material fact.

On March 22, 2007, the City filed an answer to the amended complaint denying the Kellys were employees of the City and asserting a myriad of defenses. An extensive period of discovery followed.

On April 3, 2007, Allen Mathis was deposed in connection with the case. During his deposition, Mathis acknowledged that he attended a meeting in April 2004 involving Waynesboro City Manager Victor Lay, engineers from the engineering and architecture firm Barge Waggoner, and representatives from the Tennessee Department of Transportation and the U.S. Army Corps of Engineers. Mathis spoke about his

knowledge of the City's responsibility to regulate the floodplain surrounding Hurricane Creek around the time of the April 2004 meeting:

> Q. Was there any discussion at that April 15, 2004, meeting of the local government, the City, being responsible for implementing the flood insurance -- or seeing that the flood regulations are followed? Was there any discussion about that?
>
> A. I don't think so.
>
> Q. When did you first learn that the City might have some responsibility of implementing the FEMA regulations regarding the floodplain and the flood zones?
>
> A. It was after that meeting. I had enough common sense to think there should be something. It was after that meeting -- I tried to call Ms. Mitchell in Atlanta. I talked to her and her partner several times.
>
> Q. Now who's Ms. Mitchell?
>
> A. She's the FEMA Regional Director out of Atlanta.
>
> Q. Okay. All right.
>
> A. I talked to all kind of people. Her and -- She had another girl. They would not give me regulations. They'd tell me, "Your city knows all the regulations." They kept trying to get me to refer back to her.
>
> Q. Can I stop you just a second?

A. Yes, sir.

Q. When did you first start talking to Ms. Mitchell and her associate and they started telling you that?

A. I believe right after --

Q. Right after the April 15th, 2004, meeting?

A. Yes, sir.

Q. All right. So -- I interrupted you. I want to come back to that in just a second. But I want to make sure I understand this. So you would call -- Are you saying within a few days you called Ms. Mitchell?

A. Yes, sir.

Q. And she said, "You need to contact the City, that they're the ones who follow these -- administer these regulations"?

A. Knows all about the rules, yes.

In September 2012, the City participated in mediation with Mathis, but failed to settle the case.[5] On November 22, 2013, Mathis was deposed again. Mathis spoke about his knowledge that the Kellys needed a permit to fill in Hurricane Creek around the time of the April 2004 meeting:

[5]There was an extended delay in the trial court proceedings following Allen Mathis's Notice of Appearance. The reason for the delay is not clear from the record.

Q. Okay. I've got down that the meeting in 2004 was on April 15th, 2004. Does that sound correct to you?

A. Yes, sir.

Q. Okay. And at that meeting was there any discussion about -- let's see. I'm trying to get my dates right here. Was there any discussion about the City's failure to have given Mr. Kelley a permit back when he did the fill in '92 or '93 or '98?

A. I asked Mr. Lay directly about in the middle of it did he -- did Mr. Kelley have a permit. He said no.

Q. Okay.

A. Now I didn't know about this no-rise certification until later.

Q. But at least at that point in time, you did know enough --

A. I knew that he was supposed to have had a permit, yes sir.

Q. You knew that Mr. Kelley was supposed to have had a permit and that the City was the entity that should have approved that permit.

A. Yes.

On January 31, 2014, the City filed a motion for summary judgment and a supporting memorandum of law. The City argued that the Mathises' claims were barred by the GTLA's twelve-month statute of limitations. The City acknowledged that the

discovery rule tolled the statute of limitations such that the cause of action did not "arise" until the Mathises knew or reasonably should have known that the City may have caused their injuries. Nevertheless, the City argued that Allen Mathis's deposition testimony established that he knew about the City's alleged wrongful conduct in 2004, more than twelve months prior to filing their complaint on May 5, 2006. Additionally, the City argued that it was entitled to judgment as a matter of law because the GTLA granted it immunity from the Mathises' claims. Finally, the City asserted that it was entitled to judgment on the Mathises' nuisance claim because the claim was based on a theory of respondeat superior, and the Mathises did not dispute that the Kellys were not employees of the City.

The City filed a statement of undisputed facts along with its motion for summary judgment. Citing Allen Mathis's deposition statements, the City contended that the following material facts were not in dispute: that prior to the April 2004 meeting, Mathis spoke to Waynesboro City Manager Victor Lay about the Kellys filling the creek without a permit; that prior to the April 2004 meeting, Mathis knew the Kellys were supposed to have a permit and that the City was supposed to approve it; that shortly after the April 2004 meeting, Mathis learned that the City might have some responsibility to implement FEMA floodplain and floodway regulations; that shortly after the April 2004 meeting, Mathis spoke to a FEMA representative who referred him to the City to obtain the FEMA regulations; that in 2004 Mathis read books that informed him the City had responsibility for regulating the floodplain, and in turn, he spoke to Mr. Lay about it; and that the Kellys were not employed by the City.

On February 10, 2014, the Mathises responded with five handwritten filings, including a motion to dismiss the City's summary judgment motion, replies to the City's memorandum of law and statement of undisputed facts, and several evidentiary motions. The Mathises contended that the trial court should dismiss the City's motion for summary judgment because it was identical to the motion previously dismissed by the court in 2006. The Mathises admitted that in 2004 they knew the City had some responsibility to regulate the floodplain but argued that their claim was not barred by the GTLA's twelve-month statute of limitations because they were not able to find a professional engineer to testify that the flooding was caused by the Kellys' actions. Additionally, they argued that the GTLA did not provide the City with immunity from their claims regardless of the Kellys' status as employees of the City.

On April 7, 2014, the trial court issued an order granting the City's motion for summary judgment and dismissing the Mathises' motions. Initially, the trial court stated that it was not barred from considering the City's second motion for summary judgment.

The court went on to find that based on the undisputed material facts, Allen Mathis knew or should have known by the end of 2004 that the City had or may have had a duty through its permitting powers to control the filling of Hurricane Creek, as well as a duty to inspect any fill placed in the creek within its city limits. The court stated that because the Mathises failed to commence the suit against the City within twelve months of when their cause of action arose, his claims were barred by the GTLA's twelve-month statute of limitations. The trial court also granted summary judgment in favor of the City on the nuisance claim, finding that the City could not be liable for the Kellys' actions under a theory of respondeat superior because the undisputed facts established that the Kellys were not employees of the City. Finally, as an alternative ground for granting summary judgment in favor of the City, the court concluded that the City was immune from liability for Mathises' claims under the GTLA.

On April 28, 2014, Allen Mathis, on behalf of himself, Frances Mathis, and Brian Lee Mathis, filed a Notice of Appeal seeking review of the trial court's final order against the Mathises. Allen Mathis is not an attorney licensed to practice law in the State of Tennessee and, therefore, cannot appear on behalf of anyone else in a Tennessee court. *See* Tenn. Sup. Ct. R. 7 § 1.01 (prohibiting the unauthorized practice of law); *see also Pledged Property II, LLC v. Morris*, No. W2012–01389–COA–R3–CV, 2013 WL 1558318, at *1 (Tenn. Ct. App. April 15, 2013). Because no brief was filed either by or on behalf of Frances Mathis or Brian Lee Mathis, we shall refer to the Appellant as Mr. Mathis going forward.[6]

II. ISSUES

The primary issues Mr. Mathis presents on appeal, are:

1. Whether the trial court erred in considering the City's second motion for summary judgment.

2. Whether the trial court erred in granting summary judgment to the City.

[6]We note that Frances Mathis and Brian Lee Mathis remain Appellants in this matter; they are simply not represented and may be considered as not participating in this appeal.

III. STANDARD OF REVIEW

A trial court's decision to grant summary judgment presents a question of law, and we review it *de novo* with no presumption of correctness. *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008). In doing so, we must make a fresh determination that the requirements of Tennessee Rule of Civil Procedure 56 have been satisfied. *Estate of Brown*, 402 S.W.3d 193, 198 (Tenn. 2013).

Summary judgment is appropriate in virtually any civil case that can be resolved on the basis of legal issues alone. *CAO Holdings, Inc. v. Trost*, 333 S.W.3d 73, 81 (Tenn. 2010). To be entitled to a grant of summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; *Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008). Summary judgment should not be granted when the determinative facts of a case are in dispute. *CAO Holdings, Inc.*, 333 S.W.3d at 82. Summary judgment should be granted, however, where the evidence and the inferences reasonably drawn from the evidence permit reasonable people to reach only one conclusion–that the moving party is entitled to judgment as a matter of law. *Id.*

IV. DISCUSSION

Initially, we address Mr. Mathis's contention that the trial court erred in even considering the City's January 31, 2014 motion for summary judgment. Mr. Mathis argues that the City's motion for summary judgment should have been denied because the trial court denied the City's 2006 motion titled "Motion to Dismiss, or in the Alternative, Motion for Summary Judgment," in which it argued for dismissal of the claims on identical grounds.[7] We disagree.

Rule 56.02 of the Tennessee Rules of Civil Procedure provides that a party against whom a claim is asserted may move for summary judgment in its favor "at any time." Mr. Mathis argues that "at any time" should not be construed to mean more than once; however, he does not cite, nor have we found, any legal authority to support this

[7]On appeal, the City contends that its 2006 "Motion to Dismiss, or in the Alternative, Motion for Summary Judgment" was a motion to dismiss pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure rather than a motion for summary judgment because it only challenged the legal sufficiency of the allegations in Mathis's complaint. Because the distinction is not determinative of the issue before us, we accept Mathis's characterization of the 2006 motion as one for summary judgment.

construction of the phrase. To the contrary, numerous Tennessee courts have held that a party may prevail on a motion for summary judgment even where the trial court denied that party's earlier motion for summary judgment. *Parks v. Mid-Atl. Fin. Co.*, 343 S.W.3d 792, 799 (Tenn. Ct. App. 2011) ("[T]he failure to prevail on one motion for summary judgment does not prevent a litigant from prevailing on a later motion for summary judgment."); *see also, e.g.*, *Slaughter v. Duck River Elec. Membership Corp.*, 102 S.W.3d 612, 615 (Tenn. Ct. App. 2002) (holding that the trial court's denial of the defendant's motion for summary judgment was interlocutory and could be changed or modified at any time prior to becoming final); *Johnson v. EMPE, Inc.*, 837 S.W.2d 62, 68 (Tenn. Ct. App. 1992) (affirming the trial court's grant of defendant's second motion for summary judgment, which was based on a deposition not submitted in support of its earlier motion for summary judgment). To construe the phrase "at any time" in Rule 56.02 as preventing a party from renewing a previously denied motion for summary judgment after additional discovery would be contrary to the directive of Rule 1 of the Tennessee Rules of Civil Procedure that the "rules shall be construed to secure the just, speedy, and inexpensive determination of every action." *Parks*, 343 S.W.3d at 799 (quoting Tenn. R. Civ. P. 1). Thus, the trial court acted well within its discretion in considering the City's 2014 motion for summary judgment.

Having determined that the trial court did not err in considering the City's motion for summary judgment, we turn now to Mr. Mathis's argument that the trial court erred in determining that the City was entitled to judgment as a matter of law. The court found that the City was entitled to summary judgment based on two distinct grounds. First, the court found that the Mathises' claims against the City were barred by the GTLA's twelve-month statute of limitations. Second, the court found that the City was immune from liability under the GTLA for the alleged acts and omissions that are the basis of the claims. For purposes of resolving the issues on appeal, the only facts that are material are those relating directly to the running of the statute of limitations and to the application of the liability exceptions. We have reviewed the record in a light most favorable to the Mathises and find no genuine issues of material fact with regard to the determinative issues. Accordingly, the only question before this Court is whether the City is entitled to a judgment as a matter of law on either of the grounds asserted by the trial court. Because the undisputed facts establish that the Mathises filed this lawsuit outside of the GTLA's twelve-month limitations period, we affirm the trial court's grant of summary judgment in favor of the City.

Tenn. Code Ann. § 29-20-305(b) Statute of Limitations

Historically, governmental entities have been immune from suit based on the concept of sovereign immunity. *Williams v. Memphis Light, Gas and Water Div.*, 773 S.W.2d 522, 523 (Tenn. Ct. App. 1988). With the passage of the GTLA, the General Assembly provided for the waiver of absolute immunity afforded to governmental entities, but only within certain limitations. *Id.* One of those limitations is set forth in Tennessee Code Annotated section 29-20-305(b), which provides that an action against a governmental entity "must be commenced within twelve (12) months after the cause of action arises." Tenn. Code Ann. § 29-20-305(b).

Mr. Mathis advances two arguments that the statute of limitations in Section 29-20-305(b) should not apply. First, Mr. Mathis contends that subsection (a) of Section 29-20-305 limits the applicability of subsection (b) to counties with large populations. A simple reading of the statute reveals that this is not the case. Section 29-20-305 states in full:

> (a) If the claim is denied, a claimant may institute an action in the circuit court against the governmental entity in those circumstances where immunity from suit has been removed as provided for in this chapter; provided, that in counties having a population of more than eight hundred fifty thousand (850,000), according to the 2000 federal census or any subsequent federal census, an action under this section may also be instituted in the general sessions court.
>
> (b) The action must be commenced within twelve (12) months after the cause of action arises.

Nothing in the plain language of Section 29-20-305(a) limits subsection (b) in any way. Rather, subsection (a) directs where a plaintiff must file his/her claim against a governmental entity, and subsection (b) directs when a plaintiff must file the claim. The two subsections operate independently. Thus, this argument is without merit.

Second, Mr. Mathis contends that the three-year statute of limitations for actions for injuries to personal or real property in Tennessee Code Annotated section 28-3-105 should apply. We note that this argument was not raised or argued before the trial court.

Issues raised for the first time on appeal are waived. *Dick Broad. Co. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 670 (Tenn. 2013). Moreover, even if this argument was not waived, it would not prevail. Claims against a governmental entity must be brought in strict compliance with the terms of the GTLA. *Lynn v. City of Jackson*, 63 S.W.3d 332, 337 (Tenn. Code Ann. 2001). The twelve-month statute of limitations in the GTLA requires strict compliance. *Id.* Thus, Mr. Mathis's second argument is also without merit. The trial court correctly determined that the Mathises were required to file their claims in compliance with the twelve-month filing period imposed by Section 29-20-305(a).

Moreover, the trial court correctly determined that the Mathises failed to comply with Section 29-20-305(a) in this case. The Mathises did not file their claims against the City within twelve months of May 6, 2003–the day Hurricane Creek flooded and damaged their property. To cure that defect, the Mathises initially argued that the claims against the City were not barred because the time for filing was tolled by the discovery rule. The discovery rule provides that the statute of limitations begins to run when the plaintiff's injury occurs or when the plaintiff discovers or reasonably should have discovered that he or she has a right of action against the defendant. *Doe v. Coffee Cnty. Bd. of Educ.*, 852 S.W.2d 899, 904 (Tenn. Ct. App. 1992). Under the discovery rule, the cause of action is deemed to be discovered when the plaintiff knows that he or she has been injured and knows who caused the injury. *Id.*

The Mathises clearly knew that they were injured when Hurricane Creek flooded and damaged their real and personal property on May 6, 2003. Additionally, Mr. Mathis admitted that he knew in 2004 that the City had some responsibility for regulating the floodplain. Based on those undisputed facts, we agree with the trial court's determination that 2004 was the latest time that the Mathises' claims could have accrued, that the statute of limitations therefore expired in 2005 at the latest, and that the May 5, 2006 complaint was therefore not timely filed. On appeal, Mr. Mathis argues that he was not able to file the lawsuit earlier because he did not have an expert witness to testify that the Kellys' actions in filling in Hurricane Creek caused the creek to rise beyond its banks in a manner that it otherwise would not have. However, the lack of an expert witness did not bar the Mathises from filing suit in this case, nor did it toll the statute of limitations. The GTLA does not require a plaintiff to consult an expert prior to filing his or her suit. Consequently, the only relevant inquiry is whether the Mathises filed the lawsuit against the City within twelve months of the time that they knew they were injured and that City may have caused the injury. Because the undisputed facts establish that the Mathises did not timely file the complaint, the trial court correctly granted summary judgment in favor of the City.

In light of our holding, discussion of the remaining issues is pretermitted.

V. HOLDING

The judgment of the trial court is affirmed. Costs of this appeal are taxed to the Appellant, Allen Mathis, and his surety, for which execution may issue, if necessary.

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BRANDON O. GIBSON, JUDGE