

HANDLING GOVERNMENTAL TORT LIABILITY CASES

By: Thomas R. Greer
Bailey & Greer, PLLC
6256 Poplar Avenue
Memphis, TN 38119
tgreer@baileygreer.com
www.baileygreer.com

I. Pre-suit Investigation and Case Work-Up

A. *Open Records Act:*

One of the biggest advantages for a plaintiff's lawyer handling a GTLA case is his or her ability to utilize the open records act to obtain access to discovery material *before* a lawsuit is filed. T.C.A. § 10-7-503 states that:

The custodian of a public record or the custodian's designee shall promptly make available for inspection any public record not specifically exempt from disclosure. In the event it is not practicable for the record to be promptly available for inspection, the custodian shall, within seven (7) business days:

- (i) Make the information available to the requestor;
- (ii) Deny the request in writing or by completing a records request response form developed by the office of open records counsel. The response shall include the basis for the denial; or
- (iii) Furnish the requestor a completed records request response form developed by the office of open records counsel stating the time reasonably necessary to produce the record or information.

B. *Spoliation Letter:*

Although not unique to GTLA cases, you should always begin your representation with a letter providing notice that you are counsel for the plaintiff with instructions to the governmental entity that it should keep and maintain all evidence related to the claim.

*For a sample letter combining the open records request and spoliation letter, see **Appendix A.***

II. Filing

A. *Where to file:*

Generally cases must be filed in Circuit Court. For counties with 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. T.C.A. § 29-20-305.

B. *When to file:*

The action must be commenced within twelve (12) months after the cause of action arises. T.C.A. § 29-20-305.

III. Procedural Issues

A. *Saving Statute Following a Non-Suit Does Not Apply:*

In Rael v. Montgomery County, 769 S.W.2d 211 (Tenn. Ct. App. 1988), the court held that the governmental entity was entitled to sovereign immunity except as the Tennessee Legislature was permitted to waive. The court determined that in light of the applicability of sovereign immunity, time was of the essence and any time limitations were to be strictly construed. The court determined that the provisions of Tenn. Code Ann. § 28-1-105 were not applicable because general statutes granting a court the right to alter time limitations did not operate against time limitations set forth in statutes waiving sovereign immunity.

B. *Adding Governmental Entities Under T.C.A. § 20-1-119*

An amendment to T.C.A. § 20-1-119 in 2003 overruled previous case law that prohibited a party from adding a governmental entity as a party following an allegation of comparative fault if it was beyond the one year statute of limitations. Section T.C.A. § 20-1-119(g) states: “Notwithstanding any law to the contrary, this section applies to suits involving governmental entities.”

C. *Pre-Suit Notice and Tolling in Medical Negligence Cases:*

Cunningham v. Williamson County Hosp. Dist., 2011 Tenn. App. LEXIS 645 (Tenn. Ct. App. Nov. 30, 2011) (“the plaintiffs’ compliance with the pre-suit notification provision in T.C.A. § 29-26-121(a) extended the statute of limitations by 120 days, and that this action was timely filed within the 120-day extension.”)

D. *Statute of Limitations and T.R.C.P. 6.01*

“A complaint is timely filed under the GTLA’s twelve month statute of limitations if it is filed pursuant to the computation of time set forth in T.R.C.P. 6.01. Since the one year anniversary of the accrual of the cause of action occurred on a Sunday, and the following Monday was a legal holiday, the complaint was timely when filed on the following Tuesday.” Sanders v. Traver, 109 S.W.3d 282 (Tenn. 2003).

IV. Liability and Limitations

A. *Elements for Holding Government Liable:*

1) The employee's act or omission was negligent and the proximate cause of the plaintiff's injury; 2) The employee acted within the scope of their employment; and 3) None of the exceptions listed in § 29-20-205 apply. T.C.A. § 29-20-310(a).

B. *If the Government is Liable, the Employee is Immune:*

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. T.C.A. § 29-20-310(b); Hill v. City of Germantown, 31 S.W.3d 234 (Tenn. 2000).

C. *Limitations on Liability:*

Three hundred thousand dollars (\$300,000) for bodily injury or death of any one (1) person in any one (1) accident, occurrence or act. Seven hundred thousand dollars (\$700,000) for bodily injury or death of all persons in any one (1) accident. T.C.A. § 29-20-403.

D. *Limitation of Liability Against Employee:*

If the employee is a proper defendant and was acting in the course and scope of the employee's employment for which the government is immune, the amount of damages may not exceed the amounts established for governmental entities in § 29-20-403, except for conduct that is willful, malicious, criminal, or performed for personal gain. T.C.A. § 29-20-310(c).

E. *Punitive Damages Not Allowed:*

Punitive damages are not recoverable from the governmental entity or its employees. Johnson v. Smith, 621 S.W. 2d 570, 572 (Tenn. 1981).

F. *No Tennessee Constitutional Claims:*

There is no private right of action for damages based solely on the Tennessee Constitution. Bowden Bldg. Corp. v. Tennessee Real Estate Com'n, 15 S.W.3d 434, 446 (Tenn. Ct. App. 1999).

V. Immunities

A. *Public Duty Doctrine:*

The public duty doctrine, although not expressly listed in the statute as an exception to the waiver of immunity, shields a public employee from suits for injuries that are caused by the public employee's breach of a duty owed to the public at large.

Example: A drunk driver seriously injures the plaintiff and kills the plaintiff's wife. The drunk driver had been stopped previously by an officer but was released. The Tennessee Supreme Court held the public duty doctrine barred the suit because the officer owed a duty, not to the plaintiff and his wife, but to the public at large, in stopping and releasing the drunk driver. Ezell v. Cockrell, 902 S.W.2d 394 (Tenn. 1995).

B. *Special Duty Exception to the Public Duty Doctrine:*

The special duty exception to the public duty doctrine operates to negate the public duty doctrine defense and allows the plaintiff to proceed with his or her GTLA action. The elements of the special duty exception are:

1. A public official affirmatively undertakes to protect the plaintiff and the plaintiff relies upon the undertaking;
2. A statute specifically provides for a cause of action against an official or municipality for injuries resulting to a particular class of individuals, of which the plaintiff is a member, from failure to enforce certain laws; or
3. A plaintiff alleges a cause of action involving intent, malice, or reckless misconduct.

Matthews v. Pickett County, 996 S.W.2d 162 (Tenn. 1999).

C. *Exceptions to Removal of Immunity:*

Immunity from suit of governmental entities is not removed (i.e. the government is immune from suit) for injury caused by negligent acts or omissions of any employee if it arises out of:

1. The exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused;
2. False imprisonment pursuant to a mittimus from a court, false arrest, malicious prosecution, intentional trespass, abuse of process, libel, slander, deceit, interference with contract rights, infliction of mental anguish, invasion of right of privacy, or civil rights;
3. The issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order or similar authorization;
4. A failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property;
5. The institution or prosecution of any judicial or administrative proceeding, even if malicious or without probable cause;
6. Misrepresentation by an employee whether or not such is negligent or intentional;
7. Or results from riots, unlawful assemblies, public demonstrations, mob violence and civil disturbances; Or in connection with the assessment, levy or collection of taxes; or Computer failure occurring before January 1, 2005 due to an unforeseeable failure of computer software to accurately or properly recognize, calculate, etc. dates and times. (Year 2000 computer calculation errors)

Civil Rights Exception Dilemma*

In Johnson v. City of Memphis, 617 F.3d 864 (6th 2010), the Sixth Circuit Court of Appeals court found that “[a]ll of Plaintiff’s claims against the City as an employer are in essence claims for violation of Johnson’s constitutional rights.’ The district court found that the claim fell under the ‘civil rights’ exception, and that the City is therefore immune under the TGTLA. This is consistent with the results reached by the majority of district courts addressing this question. Plaintiff’s claim regarding the dispatcher’s negligence arises out of the same circumstances giving rise to her civil rights claim under § 1983. It therefore falls within the exception listed in § 29-20-205, and the City retains its immunity.” (internal citations omitted).

Defendants use Johnson to argue that plaintiffs should not be able to advance alternative theories of liability based on negligence, which would fall under the TGTLA, and civil rights, which would fall under 42 U.S.C. § 1983. The holding in Johnson and similar district court opinions effectively require a plaintiff to choose, on the front end, whether to pursue a negligence claim or a civil rights claim. Many attorneys are now filing two separate actions, one in state court alleging solely negligent conduct, and one in federal court alleging civil rights violations.

Johnson is a federal court opinion interpreting Tennessee law. There is no Tennessee appellate decision on point.

D. *Discretionary Function Exception*

Careful analysis of the basis of the claim must be undertaken to determine whether the conduct of the official was discretionary. In Bowers v. City of Chattanooga, 826 47 S.W.2d 427, 431 (Tenn.1992), the Supreme Court announced what is now known as the “planning operational test” to determine whether a particular act is discretionary and therefore immune from liability. The Bowers court noted:

A consideration of the decision-making process, as well as the factors influencing a particular decision, will often reveal whether that decision is to be viewed as planning or operational. If a particular course of conduct is determined after consideration or debate by an individual or group charged with the formulation of plans or policies, it strongly suggests the result is a planning decision. These decisions often result

from assessing priorities; allocating resources; developing policies; or establishing plans, specifications, or schedules.

On the other hand, a decision resulting from a determination based on preexisting laws, regulations, policies, or standards, usually indicates that its maker is performing an operational act. Similarly operational are those ad hoc decisions made by an individual or group not charged with the development of plans or policies. These operational acts, which often implement prior planning decisions, are not "discretionary functions" within the meaning of the Tennessee Governmental Tort Liability Act. In other words, "the discretionary function exception [will] not apply to a claim that government employees failed to comply with regulations or policies designed to guide their actions in a particular situation." (Citation omitted).

A Closer Look at the Discretionary Function Exception

The most frequently litigated waiver of immunity is the discretionary function provision of the GTLA under T.C.A. § 29-20-205. However, litigants and courts often neglect to first determine whether immunity from suit has been expressly waived by another provision of the GTLA. If a case involves a claim specifically provided for under the GTLA (e.g. auto accident, T.C.A. 29-20-202), then the claim should be brought under that specific provision, because the discretionary function immunity does not apply.

For example, in Swafford v. City of Chattanooga, 743 S.W.2d 174 (Tenn. App. 1987), the plaintiff prevailed at trial on a defective, unsafe, and dangerous condition claim pursuant to T.C.A. § 29-20-203(a). On appeal, the city argued that the entire claim was barred by the discretionary function exception found at § 29-20-205. The court of appeals correctly ruled that the claim was not barred, because T.C.A. § 29-20-203(a) removes governmental immunity for "an injury caused by a defective, unsafe, or dangerous condition" and *does not provide for an exception for discretionary functions*.

VII. Specific Causes of Action

A. *Motor Vehicle Accidents:*

Liability from suit is removed for injuries resulting from the negligent operation by an employee of a motor vehicle or other equipment while in the course and scope of employment. T.C.A. § 29-20-202.

B. *Streets and Highways:*

Immunity from suit of a governmental entity is removed for any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity. Constructive or actual notice is required. T.C.A. § 29-20-203.

C. *Dangerous Structures:*

Immunity from suit of a governmental entity is removed for any injury caused by the dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement owned and controlled by such governmental entity. *Constructive or actual notice is required.* T.C.A. § 29-20-204; see also Hawkes v. City of Westmoreland, 960 S.W.2d 10 (Tenn. 1997)(holding that a governmental entity will have constructive notice of a fact if the fact “could have been discovered by reasonable diligence and the governmental entity had a duty to exercise reasonable diligence to inquire into the matter”)

D. *Intentional Torts Not Listed as Exceptions*

For those torts not specifically enumerated in the intentional tort exception, a cause of action under the GTLA may still exist if the intentional tort was proximately caused by the negligent act or omission of a governmental employee. The seminal case on point is Limbaugh v. Coffee Medical Center, 59 S.W.3d 73 (Tenn. 2001). In Limbaugh, the underlying tort that caused injury was an assault and battery, which is not specifically enumerated in the intentional tort exception. The Court found there was sufficient evidence to conclude that the assault and battery was a foreseeable consequence of the defendant’s negligence (i.e. failure to take reasonable precautions to protect its residents from the risk of abuse by an employee).

In a concurring opinion, Justice Janice Holder stated that she “would hold that a governmental entity may be held liable for its own negligent employment practices regardless of the nature of the underlying acts of the employee.” *Id.* at 88. In other words, Justice Holder would allow a cause of action against a governmental entity—even if the underlying act of the employee was specifically listed in the intentional tort exceptions—so long as the claim asserted that the negligent employment practices caused or contributed to the intentional conduct.

E. *Government Healthcare Providers as Defendants*

T.C.A. § 29-20-310(b) states that “no claim for medical malpractice 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 carried by the governmental entity, whichever is greater and the governmental entity is also made a party defendant.” The term “health care practitioner” means physicians and nurses.

VIII. Trial and Post Judgment Relief

A. Bench Trial for Government:

The circuit courts shall have exclusive original jurisdiction over any action brought under this chapter and shall hear and decide such suits without the intervention of a jury. T.C.A. § 29-20-307.

Exception to Bench Trial: When there are multiple defendants including governmental entities and private parties, the case shall be heard by a jury upon the demand of any party. T.C.A. § 29-20-313.

B. Post Judgment Interest:

Post judgment interest is allowed only up the statutory limit for damages. Erwin v. Rose, 980 S.W.2d 203 (Tenn. Ct. App. 1998).

C. Discretionary Costs:

Although no Tennessee Supreme Court case directly addresses the issue, it has stated that for a statute to effectively waive a sovereign's immunity, it must be explicit in doing so. The court of appeals has addressed the issue in several unpublished opinions and has ruled that Rule 54.04(2) does not waive a sovereign's immunity from discretionary costs. See Tennessee Small Sch. Sys. v. McWherter, 1993 Tenn. App. LEXIS 512 (Tenn. Ct. App. Aug. 4, 1993).

Appendix A

City of Memphis
125 N. Main St. Room 700
Memphis, TN 38103

RE: **Open Records Request**
 Date of Crash:
 Reference No:
 My Client:

Dear

Please be advised that my firm has been retained by [client] to investigate any and all potential causes of actions which [he/she/they] may have stemming from an accident that occurred on [DOI], near [accident location].

This letter also serves to put you on notice to maintain the integrity of all evidence, documents, reports, records, etc. pertaining to this incident and not to dispose, alter, modify, destroy or perform destructive testing on any evidence, documents, reports, records, etc. pertaining to this incident prior to providing my office an opportunity to inspect this evidence. This request covers anything which in any way pertains to this incident and includes, but is not limited to, **the 2009 Dodge Charger which is owned by the City of Memphis and bears license plate number ABC123**, the electronic control module for the MPD vehicle, all accident reports, incident reports, supplemental accident reports, supplemental incident reports, witness statements, diagrams, videotapes, audio tapes, photographs, dispatcher tapes and logs, videos from patrol cars, activity reports, pursuit reports, field notes, daily activity logs, daily rosters, daily work schedules, policies, procedures, ambulance records or reports, towing records, medical records, toxicology reports, memoranda, correspondence, insurance claim forms or documents, accident reconstruction reports, worker's compensation claim forms or

documents, test results, officer's medical records or reports, repair bills, or any other evidence, records, documents or things pertaining to this incident.

If any evidence or other things pertaining in any way to this incident, including, but not limited to, the MPD vehicle in question, has or have already been tested, inspected, altered, modified, destroyed, lost or changed in any manner, I am requesting that you identify with particularity the evidence or things that has or have been tested, inspected, modified, altered, destroyed, lost or changed in any manner and the name, address and telephone number of the person, persons, entity or entities who tested, altered, inspected, modified, destroyed, lost or changed in any manner any evidence or thing pertaining to this incident.

Pursuant to T.C.A. § 10-7-501, et seq., and in particular T.C.A. § 10-7-503, please be advised that I would like to inspect and photocopy any and all records and photographs pertaining to this incident. If payment is required prior to the production of these documents and things, please contact my office immediately so that I can make arrangements for prepayment of such charges.

If you will not produce these documents voluntarily, please set forth your reasons in writing for the denial.

I thank you in advance for your anticipated professional courtesies and attention to this matter.

Best regards,

Thomas R. Greer