IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JESSIE W. JONES and wife,
MELISSA A. JONES,

Plaintiffs-Appellants,

Vs.

C.A. No. 02a01-9704-CV-00090
Tipton Law No. 4368

TIPTON COUNTY, TENNESSEE,

Defendant-Appellee.

FROM THE TIPTON COUNTY CIRCUIT COURT
THE HONORABLE JOSEPH H. WALKER, JUDGE

W. Timothy Hayes, Jr.; The Hardison Law Firm
of Memphis, for Appellee

Raleigh E. Sanford, Jr. of Rosemark
For Appellants

AFFIRMED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

DISSENTS by Separate Opinion:

HOLLY KIRBY LILLARD, JUDGE

This case involves a suit filed pursuant to the Tennessee Governmental Tort Liability Act (TGTLA). Plaintiffs Jessie and Melissa Jones appeal the order of the trial court granting summary judgment to defendant Tipton County, Tennessee.

Plaintiff Jessie Jones was injured when he lost control of his pickup and ran off the road and into a tree. Plaintiffs filed a suit for damages under the TGTLA, with Jessie Jones seeking compensation for his injuries and Melissa Jones seeking compensation for loss of her husband's services, companionship, and society. Plaintiffs' complaint alleges in pertinent part as follows:

> 4. That on or about September 15, 1994, plaintiff Jessie W. Jones was the owner and operator of a 1969 Chevrolet Pickup proceeding south on Lucado Road near the intersection with Tracy Road in Tipton County, Tennessee at approximately 7:30 p.m. Plaintiff driver was exercising due care and caution for the safety of himself and others properly upon the aforementioned roadway and ran over a large pothole or sinkhole in the road negligently allowed to remain by the defendant, causing plaintiff's vehicle to run off the road and violently collide with a tree causing serious and permanent personal injuries to be hereafter set out in more particularity.
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> 5. That the defendant is charged with the duty of maintaining the streets and thoroughfares of the County of Tipton and that the defendant had actual knowledge of the defective, unsafe or dangerous condition on Lucado Road and/or that the condition of the road had been there for such a length of time as to place the defendant upon constructive notice of the defective condition.
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> 6. That the actions of the defendant were the proximate cause of this accident and that the county was guilty of common law negligence which was the proximate cause of the injuries to the plaintiffs in the following particulars:
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> A. That the defendant failed to properly maintain and repair the street owned and controlled by the county.
> B. That the defendant failed to properly notify the plaintiff that a dangerous condition existed in the street owned and controlled by the county.
> C. That the defendant was guilty of negligence in violating state statutes of the State of Tennessee and ordinances of the County of Tipton.
> D. That the defendant violated the forgoing common laws of negligence which were the direct and proximate cause of the injuries and damages to the plaintiffs.

The defendant filed a motion to dismiss along with the affidavit of David "Rip" Smith, the Assistant Director of Public Works for Tipton County.[1] The affidavit states:

> As part of my investigation into this lawsuit, I have reviewed the files of Tipton County and have determined that the Tipton County Public Works Department had no notice of any problems or dangerous conditions on Lucado Road near Tracy Road prior

[1]Because extraneous matters were presented to and considered by the trial court, the motion was treated as one for summary judgment. Tenn.R.Civ.P. 12.02.

> to September 15, 1994. . . . The only record of any complaint concerning this area is dated September 28, 1994 and the problem was fixed the very same day.

Tipton County argued in its supporting memorandum that the exception which provides for removal of governmental immunity for injuries from unsafe streets and highways was not applicable because there was no showing that the county had actual or constructive notice of the allegedly dangerous condition of the road. *See* T.C.A. § 29-20-203 (Supp. 1996). In response to defendant's motion to dismiss, Mr. Jones filed an affidavit in which he stated in part:

> I was proceeding south on Lucado Road in Tipton County at approximately dusk. I went over a hill at a spot where the road curves to left. The road is extremely narrow at this point with no lane markings on the right side of the lane. There were no signs warning of hill or curves at this spot. It is my belief that I hit a pothole extending into right hand side lane which caused me to lose control of vehicle. It is my belief that the road was unreasonably dangerous in that there was inadequate signage [sic] and road markings and the road was unsafe due to the fact that there was a dangerous drop-off to the shoulder of the road and there were no guardrails at the overpass where my vehicle left the road.

In addition, the plaintiffs submitted the affidavit of an individual who lives near the accident site. Mr. Ray Armstrong stated in part:

> I am familiar with the location of the accident. At the location of the accident, Lucado goes over a hill at a spot where the road curves to the left. The road is extremely narrow at this point with no lane markings on the right side of the lane. There are no signs warning of hill or curves at this spot. There is also a drop-off to the shoulder of the road at this spot and there are no guardrails at the overpass where the vehicle involved in the accident left the road. . . . There have been other accidents at this same location. In particular, there was a previous accident where a woman suffered very serious injuries.

The trial court granted defendant summary judgment and plaintiffs have appealed. One issue is presented for review: Whether the trial court erred in granting summary judgment to defendant based upon a finding that the defendant had no actual or constructive notice of any dangerous or defective condition of the roadway.

A trial court should grant a motion for summary judgment only if the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Tenn.R.Civ.P. 56.03; ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993); ***Dunn v. Hackett***, 833 S.W.2d 78, 80 (Tenn. App. 1992). The party moving for

summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***Byrd***, 847 S.W.2d at 210. When a motion for summary judgment is made, the court must consider the motion in the same manner as a motion for directed verdict made at the close of the plaintiff's proof; that is, "the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence." ***Id***. at 210-11. In ***Byrd***, the Tennessee Supreme Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. [citations omitted]. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth ***specific facts*** showing that there is a genuine issue of material fact for trial.

Id. at 211. (emphasis in original). Where a genuine dispute exists as to any material fact or as to the conclusions to be drawn from those facts, a court must deny a motion for summary judgment. ***Byrd***, 847 S.W.2d at 211 (citing ***Dunn***, 833 S.W.2d at 80).

The general provisions of the Tennessee Governmental Tort Liability Act, T.C.A. § 29-20-101 et seq., immunize governmental entities from suits for injury resulting from activities engaged in while exercising governmental or proprietary functions. However, the Act provides for removal of immunity if injury is "caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity." T.C.A. § 29-20-203(a) (Supp. 1996). This exception "shall not apply unless constructive and/or actual notice to the governmental entity of such condition be alleged and proved." T.C.A. § 29-20-203(b) (Supp. 1996).

Defendant admits it owns and controls the road in question. Therefore, if we assume for purposes of review that the road is defective, unsafe or dangerous, summary judgment can be granted only if the plaintiffs have failed to create an issue of fact as to whether the defendant had actual or constructive knowledge of the alleged defects in the roadway.[2] We agree with the trial judge that the affidavits submitted by the plaintiffs are insufficient to demonstrate that Tipton

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[2] In reliance on the recent Tennessee Supreme Court case of ***Helton v. Knox County***, 922 S.W.2d 877 (Tenn. 1996), plaintiffs argue that summary judgment was improper because whether a road is defective, unsafe or dangerous is a question of fact. Even though there may be *that* question of fact for trial, the plaintiffs cannot survive a summary judgment motion without establishing an issue of fact with regard to the essential element of notice.

County had either actual or constructive knowledge of the existence of the pothole on Lucado Road. Mr. Armstrong's affidavit mentions prior accidents in that area but does not even mention the existence of a pothole. The mere occurrence of prior accidents, without more, is insufficient to impute notice to Tipton County of a dangerous condition. The prior accidents could have resulted from myriad reasons unrelated to any defect in the road.

Similarly, the affidavit of plaintiff Jessie Jones is insufficient to create a question of actual or constructive notice with regard to the pothole that allegedly caused the accident. Mr. Jones stated:

> Defendant should have had either actual or constructive knowledge of the pothole in question due to the fact that other accidents had occurred as a result of this pothole and/or due to the fact that the pothole was so obvious and had been there so long that Defendant should be charged with constructive knowledge of its presence.

Simple statements such as defendant "should have known," or that the pothole "had been there so long," are not sufficient *specific facts* to overcome a motion for summary judgment.

It should be noted, however, that both of the affidavits discuss the lack of road signs, lane markings, and guardrails which could create a question of fact as to whether the road was negligently designed or constructed. Plaintiffs point to the case of ***Glover v. Hardeman County***, 713 S.W.2d 73 (Tenn. App. 1986) decided by this Court for the proposition that if a road is defectively constructed the defendant would be charged with notice from the time of the original defective construction. While that is a correct statement of the law it is inapplicable to this case because the plaintiffs' complaint alleges only negligent maintenance of Lucado road, and not that it was negligently designed or constructed. The complaint is quite specific in stating that plaintiffs "ran over a large pothole or sinkhole in the road negligently allowed to remain by the defendant *causing* plaintiff's vehicle to run off the road and collide with a tree." (emphasis supplied).

While it is true that in considering a motion to dismiss, the court must construe the complaint liberally in favor of the plaintiff, it is also true that an adverse party is entitled to sufficient notice to inform him of allegations he is called to answer. ***Jasper Engine & Transmission Exch. v. Mills***, 911 S.W.2d 719, 720 (Tenn. App. 1995). Similarly, a court has no duty to create a claim the pleader does not spell out in his complaint. ***Brown v. City of***

Manchester, 722 S.W.2d 394 (Tenn. App. 1986). Plaintiffs' complaint is insufficient to state a cause of action for negligent construction of Lucado Road, therefore, plaintiffs' must show that Tipton County had either actual or constructive knowledge of the pothole in question. This the plaintiffs have not done. The order of the trial court granting summary judgment and dismissing the complaint is affirmed. Costs of appeal are assessed against appellants.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

ALAN E. HIGHERS, JUDGE

HOLLY KIRBY LILLARD, JUDGE