IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE
May 25, 2022 Session Heard at Cookeville[1]

PENNY LAWSON ET AL. v. HAWKINS COUNTY, TENNESSEE ET AL.

Appeal by Permission from the Court of Appeals
Circuit Court for Hawkins County
No. 20-CV-37 Alex E. Pearson, Judge

No. E2020-01529-SC-R11-CV

HOLLY KIRBY, J., concurring.

I concur in the majority's analysis and holding that Tennessee Code Annotated section 29-20-205 removes immunity for Hawkins County only for ordinary negligence, not gross negligence or recklessness. I write separately to highlight an issue not addressed in the majority opinion—whether we should continue to apply the common law public duty doctrine and the related special duty exception in cases where the legislature has addressed the issue of immunity by statute.

We have described the public duty doctrine: "[P]rivate citizens, as such, cannot maintain an action complaining of the wrongful acts of public officials unless such private citizens aver special interest or a special injury not common to the public generally." *Ezell v. Cockrell*, 902 S.W.2d 394, 397 (Tenn. 1995) (quoting *Bennett v. Stutts*, 521 S.W.2d 575, 576 (Tenn. 1975) (Fones, C.J., concurring)). In other words, "the public duty doctrine shield[s] public employees from tort liability for injuries caused by a public employee's breach of a duty owed to the public at large." *Chase v. City of Memphis*, 971 S.W.2d 380, 385 (Tenn. 1998). An exception to the public duty doctrine's shield from liability arises where there is "a 'special relationship' . . . between the plaintiff and the public employee, which gives rise to a 'special duty' that is more particular than the duty owed by the employee to the public at large." *Ezell*, 902 S.W.2d at 401. The special duty exception removes public duty immunity in three situations:

> (1) a public official affirmatively undertakes to protect the plaintiff and the plaintiff relies upon the undertaking;

[1] Oral argument was heard in this case on the campus of Tennessee Tech University in Cookeville, Tennessee, as part of the Tennessee American Legion Boys State S.C.A.L.E.S. (Supreme Court Advancing Legal Education for Students) project.

> (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.

Chase, 971 S.W.2d at 385 (citing *Ezell*, 902 S.W.2d at 402).

The public duty doctrine and the special duty exception both existed at common law, long before Tennessee's adoption of the Governmental Tort Liability Act (GTLA). *Ezell*, 902 S.W.2d at 397, 401. In *Ezell*, the Court held that "the public duty doctrine survived enactment of the Tennessee Governmental Tort Liability Act, and that sound public policy supports" continued application of the public duty doctrine in Tennessee, "as well as the continuing validity of the 'special-duty' of care exception to the doctrine." *Id*. at 404. *Ezell* reasoned that, in the wake of enactment of the GTLA, the public duty doctrine continues to serve "the important purpose of preventing excessive court intervention into the governmental process by protecting the exercise of law enforcement discretion." *Id*. at 400–01.

After holding in *Ezell* that both the public duty doctrine and the special duty exception remain in effect alongside the GTLA, the Court in *Chase* explained how those common law concepts interact with the GTLA:

> The special duty exception to the public duty doctrine is applicable only when immunity has been removed under the GTLA. The special duty exception does not create liability but negates the public duty doctrine, a defense to liability. Accordingly, unless immunity has been removed by the GTLA, a plaintiff cannot recover damages against a government entity even if the special duty exception to the public duty doctrine is applicable.

Chase, 971 S.W.2d at 385.

Meanwhile, the legislature has enacted a host of special statutory provisions and exceptions regarding governmental immunity. Some are consistent with the standards of the public duty doctrine and the special duty exception, others are not. *See, e.g.*, Tenn. Code Ann. § 29-20-201(d) ("Notwithstanding this chapter or any other law to the contrary, a governmental entity that places and properly maintains a clearly visible and adequate flood warning sign or barricade at a flooded road area shall be immune from suit for any injury resulting from a violation of § 55-10-205(c). The immunity from suit shall be removed when the governmental entity's conduct amounts to willful, wanton, or gross negligence."); Tenn. Code Ann. § 29-20-205(10) ("[I]n connection with any loss, damage, injury, or death arising from COVID-19 . . . , unless the claimant proves by clear and

convincing evidence that the loss, damage, injury, or death was proximately caused by an act or omission by the entity or its employees constituting gross negligence."); Tenn. Code Ann. § 29-20-108(a) ("Emergency communications district boards . . . shall be immune from any claim, complaint or suit of any nature which relates to or arises from the conduct of the affairs of the board except in cases of gross negligence by such board . . . .").

Thus, even before our decision here, layering the common law public duty doctrine and the special duty exception on top of the GTLA and other immunity statutes meant that plaintiffs in lawsuits alleging misconduct by employees of governmental entities must navigate a labyrinth of confusing and at times conflicting statutory and common law standards.

Unfortunately, that Rubik's cube effect is not improved by our holding in this appeal, interpreting the GTLA to remove immunity for negligence by an employee of a governmental entity, but not for the employee's gross negligence or recklessness. In the briefs, Lawson's counsel argues that the interpretation of the GTLA we adopt could create a Catch-22 for plaintiffs. Counsel is not incorrect on this point. If the plaintiff's complaint alleges that the governmental entity's employee was reckless in order to qualify for the "reckless misconduct" special duty exception to the public duty doctrine, then dismissal under the GTLA is likely because immunity is not removed for reckless conduct. Conversely, if the complaint alleges that the governmental employee was negligent in order to avoid dismissal under the GTLA, the plaintiff risks dismissal under the public duty doctrine by making his claim ineligible for the special duty exception for reckless misconduct.[2]

As explained in the majority opinion, we are bound to interpret the GTLA according to its text. I agree. However, we are not bound to follow common law precedent, particularly where there have been changes in the law, *Five Star Exp., Inc. v. Davis*, 866 S.W.2d 944, 949 (Tenn. 1993), changing conditions, *Metro. Gov't of Nashville v. Poe*, 383 S.W.2d 265, 277 (Tenn. 1964), or where the precedent proves unworkable, *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 263 (Tenn. 2015) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)). Though adhering to past decisions is the preferred course, "[o]ur oath is to do justice, not to perpetuate error." *Rye*, 477 S.W.3d at 263 (quoting *Montgomery v. Stephan*, 101 N.W.2d 227, 229 (Mich. 1960)).

The question of whether we should continue to apply the public duty doctrine and the special duty exception was not raised as an issue in this appeal, so addressing it here would not be appropriate. Still, our holding may provide impetus to reconsider *Ezell*. The

[2] The majority opinion rightly notes that our holding is with respect to claims against governmental entities and does not affect claims against individual employees. However, this may be cold comfort for plaintiffs, who are unlikely to get appropriate compensation for serious injuries from judgments against individual government employees.

Ezell Court rightly considered the policy reasons that prompted our courts to adopt the public duty doctrine and the special duty exception long before the GTLA and other statutes on governmental immunity. *Ezell*, 902 S.W.2d at 400–01. But even *Ezell* acknowledged that the standards under the public duty doctrine and the special duty exception differed from some statutes on governmental immunity. *Id.* at 402. The *Ezell* Court could not have foreseen the complexities of how those common law concepts would interact with an array of comprehensive, detailed statutes on governmental immunity, some added years later. We can now see how it has all played out.

In a future case, I hope we can look squarely at whether we should continue to adhere to *Ezell*, limit application of the public duty doctrine and the special duty exception, or discontinue application of those common law principles in deference to the statutes governing immunity.

_____

HOLLY KIRBY, JUSTICE