NO. COA11-17 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

LINDA JUDGE **[IC FILE NO: TA-18699]** **JENNIFER RAY** **[IC FILE NO: TA-18568]** **EILEEN B. LAYAOU and** **ROGER D. LAYAOU** **[IC FILE NO: TA-18694]** **Plaintiffs,** **v.** **NORTH CAROLINA DEPARTMENT OF TRANSPORTATION,** **Defendant.**	**From Industrial Commission** **[Wake County]** **IC FILE NOS: TA-18699, TA-18568, and TA-18694**

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BRIEF OF AMICUS CURIAE
NORTH CAROLINA ADVOCATES FOR JUSTICE

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INTEREST OF THE AMICUS

North Carolina Advocates for Justice ("NCAJ") respectfully submits this brief as amicus curiae. NCAJ is a nonprofit, nonpartisan, voluntary bar association whose members regularly represent plaintiffs in civil actions. NCAJ frequently participates as amicus curiae before North Carolina's appellate courts in cases of importance to NCAJ members, the bar, and the public.

SUMMARY OF ARGUMENT

A fundamental principle of statutory construction is that legislative acts should be construed to effect the intent of the legislature. Subsequent legislative amendments are a useful tool that may illuminate and clarify the legislature's original intent. In this case, plaintiffs' claims were dismissed by the full Industrial Commission when, for the first time, the public duty doctrine was used to shield the North Carolina Department of Transportation ("DOT") from a negligence claim. The Industrial Commission rejected the most plausible and straightforward reading of the Tort Claims Act ("Act"), ignored the General Assembly's recent amendment, and instead expanded the scope of the public duty doctrine past its historic bounds.

The 2008 amendment, codified at N.C.G.S. § 143-299.1A and titled "Limit use of public duty doctrine as an affirmative

defense," reaffirms the legislative intent behind the original Act. The doctrine's growth – originally adopted by the Supreme Court only twenty years ago and specifically excluding public highways – was a judicial misadventure that has since been corrected by the General Assembly.

ARGUMENT

I. THE TORT CLAIMS ACT WAIVES SOVEREIGN IMMUNITY.

A. Balancing the interests of injured plaintiffs and taxpayers, the Tort Clams Act waives sovereign immunity but places strict limits on recovery.

Sovereign immunity is an ancient feature of the Anglo-American legal system. Under this judicially-created doctrine, the State – like the English monarchs before – is immune from suit unless it expressly consents to be sued. Great American Ins. Co. v. Gold, Commr. of Ins., 254 N.C. 168, 118 S.E.2d 792 (1961). The General Assembly waived North Carolina's immunity when it enacted the Tort Claims Act in 1951. The Act struck a careful balance: citizens could now sue the State for negligence, but were only permitted to recover a limited amount of damages. See N.C.G.S. § 143-299.2 (placing a strict cap on total recovery from the State).

B. The plain language of the Tort Claims Act mandates a waiver of sovereign immunity.

The threshold question before the Court is one of statutory construction. The relevant statutory language is codified as North Carolina General Statute § 143-291(a).

> The Industrial Commission shall determine whether or not each individual claim arose as a result of the negligence of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina.

(emphasis added).

The first step of statutory interpretation is to read the statute's plain language and give the language its intended effect. Wal-mart Stores East, Inc. v. Hinton, ___ N.C. App. ___, 676 S.E.2d 234, 242 (2009). The best evidence of that intent is the language of the statute itself, the spirit of the act, and what the act seeks to accomplish. Coastal Ready-Mix Concrete Co. v. Board of Commr's, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980).

Under the Act's plain language, the State must be treated as a private person would be: amenable to suit and unshielded by its status as a sovereign. This Court has recognized that the statute "constitutes such a specific waiver of [sovereign]

immunity" against DOT. Midgett v. N.C. Dep't of Transp., 152 N.C. App. 666, 568 S.E.2d 643 (2002).

C. DOT's construction produces an absurd result: it twists a statute waiving sovereign immunity into a shield against liability.

Appellee-DOT advanced to the Industrial Commission an argument that private citizens do not have public duties and thus when the State has undertaken a uniquely sovereign activity (like the maintenance of public roads) it is immune from tort claims under the public duty doctrine. This construction is patently inconsistent with the purpose and legislative intent of the Tort Claims Act and allows a narrow exception to swallow the legislature's rule that "the State of North Carolina, if a private person, would be liable to the claimant." N.C.G.S. §143-291(a). DOT simply seeks sovereign immunity cloaked in another name.

Additionally, DOT's reading ignores the fact that a private person can design, engineer, build, and maintain a private road, and can be held liable for its negligence in doing so. See Tharp, Swain County HOA wins $2.4 million verdict in defective roads dispute, 23 North Carolina Lawyer's Weekly A1 (Feb. 28, 2011) (the referenced case is Alarka Creek Properties Homeowners Association, Inc. v. Cane Creek Development Corporation, 08 CVS 36, (Swain County Superior Court, Feb. 17, 2011)). The Industrial Commission's dismissal of plaintiffs' claims fails to

treat DOT as "if [it were] a private person," liable for its negligence in maintenance just as a private development company would be.

II. THE INDUSTRIAL COMMISSION ERRED WHEN IT FAILED TO CONSIDER THE IMPLICATIONS OF THE 2008 AMENDMENT.

The Act was amended in 2008 to limit the scope of the public duty doctrine. Session Laws enacting the 2008 amendment only give it prospective effect, and plaintiffs' claim originated in 2002. However, the 2008 amendment remains useful as an instructive tool for interpreting the prior statute. "Later statutory amendments provide useful evidence of the legislative intent guiding the prior version of the statute." Wells v. Consolidated Judicial Retirement System of North Carolina, 354 N.C. 313, 320, 553 S.E.2d 877, 880 (2001). Chief Deputy Commissioner Gheen, in his Order denying defendant's original motion to dismiss, correctly recognized the amendment's interpretive effect. J.A. at 460-61, ¶¶ 15, 16, 17.

By amendment in 2008, the General Assembly clarified its original intent underlying the Tort Claims Act of 1951. Such clarifying amendments relate back to the legislative purpose of the original act, restating the original purpose to prevent an overly narrow reading. Cates v. Hunt Constr. Co, 267 N.C. 560, 564, 148 S.E.2d 604, 607-08 (1966), Cooke v. Outland, 265 N.C.

601, 144 S.E.2d 835, 840 (1965) (using subsequent amendment to show General Assembly's prior intent).

Plaintiffs' situation is much like the injured workmen's compensation plaintiff in Cates. Cates v. Hunt Constr. Co, 267 N.C. at 560, 148 S.E.2d at 604. The Industrial Commission refused to award Cates any compensation for the loss of his kidney in a work-related injury, reasoning that a lost internal organ did not result in outward disfigurement and thus was not compensable. Id. at 560-64, 148 S.E.2d at 604-07 After Cates' injury, and only applying prospectively, the General Assembly amended the worker's compensation laws to provide compensation for the loss of an internal organ. Id. at 564, 148 S.E.2d at 607. The North Carolina Supreme Court wisely reasoned that although the amendment only applied prospectively, in effect "the Legislature merely restated what its purpose and intent were from the beginning, and that the courts, by their narrow and strict construction, attached to the original Act a meaning the General Assembly never intended." Id. at 564, 148 S.E.2d at 607-08.

The parallels between Cates and this case are clear. As in Cates, the amendment at § 143-299.1A serves to clarify the original intent behind the Tort Claims Act; under the Act, a person injured by DOT's negligence has the right to pursue a claim for damages against the State. Considering the language

and intent of the Act, reinforced by the 2008 amendment, the inescapable conclusion is that the Industrial Commission improperly expanded the public duty doctrine's scope, which had never precluded claims against DOT.

III. THE AMENDMENT TO "LIMIT USE OF PUBLIC DUTY DOCTRINE" REAFFIRMS THE GENERAL ASSEMBLY'S ORIGINAL INTENT TO WAIVE SOVEREIGN IMMUNITY.

The General Assembly had only one reason to title its amendment "Limit use of public duty doctrine as an affirmative defense": its displeasure at the judiciary's expansion of the public duty doctrine as an affirmative defense. See N.C.G.S. § 143-299.1A. The new amendment provides strict boundaries on the doctrine and prevents further expansion.

The first subsection outlines the two narrow instances where the doctrine now applies:

> [T]he public duty doctrine is an affirmative defense on the part of the [State agency] against which a claim is asserted **if and only if** the injury of the claimant is the result of . . . [t]he alleged negligent failure to protect the claimant from the action of others or from an act of God by a law enforcement officer . . . [or] the alleged negligent failure of an officer, employee, involuntary servant or agent of the State to perform a health or safety inspection required by statute.

N.C.G.S. §§ 143-299.1A(a)(1)–(2) (emphasis added).

The second subsection further narrows the scope of the doctrine. Notwithstanding the first subsection, the public duty doctrine **cannot** be raised:

> (1) Where there is a special relationship between the claimant and the officer, employee, involuntary servant or agent of the State.
>
> (2) When the State, through its officers, employees, involuntary servants or agents, has created a special duty owed to the claimant and the claimant's reliance on that duty is causally related to the injury suffered by the claimant.
>
> (3) Where the alleged failure to perform a health or safety inspection required by statute was the result of gross negligence.

N.C.G.S. § 143-299.1A(b)(1)–(3). Reading the two subsections together, the public duty doctrine as an affirmative defense applies **only** when a plaintiff alleges a failure of police protection (and no special relationship or special duty between the officer and the plaintiff exists) **or** when the plaintiff alleges the State failed to perform a statutory health or safety inspection (but not when the failure was the result of gross negligence).

IV. NORTH CAROLINA'S PUBLIC DUTY DOCTRINE SPECIFICALLY EXCLUDES DOT'S ROAD MAINTENANCE FUNCTIONS.

The genesis of today's public duty doctrine was first recognized by the North Carolina Court of Appeals, and soon after by the Supreme Court, in a pair of cases concerning a

municipality's liability for failure to provide police protection. See Coleman v. Cooper, 89 N.C. App. 188, 366 S.E.2d 2 (1988), Braswell v. Braswell, 330 N.C. 363, 410 S.E.2d 897, (1991).

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.

Braswell v. Braswell, 330 N.C. at 370, 410 S.E.2d at 901, (citing Coleman v. Cooper, 89 N.C. App. at 193, 366 S.E.2d at 6).

In both Coleman and Braswell, estate administrator-plaintiffs sued government-defendants on a theory that a perceived lack of police protection had resulted in the death of their family member. In both opinions, North Carolina's appellate courts reasoned that

> The amount of [police] protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources . . . should be allocated and without predictable limits.

Coleman, 89 N.C. App. at 193, 366 S.E.2d at 6; Braswell, 330 N.C. at 371, 410 S.E.2d at 901-02. In Coleman, this Court contrasted the duty of police protection with other State activities not subject to the public duty doctrine: "This is **quite different** from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, **or even highways are provided.**" Coleman, 89 N.C. App. at 193, 366 S.E.2d at 6 (emphasis added); accord, Riss v. City of New York, 240 N.E.2d 860, 860-61 (1968) cf. Stone v. Dep't of Labor, 347 N.C. 473, 495 S.E.2d 711, 720 (1998) (Orr, J. dissent (citing this language from Coleman and Riss)). Indeed, one reason highways are "quite different" is that DOT has a statutory duty "to provide for the necessary planning, construction, maintenance, and operation of an integrated statewide transportation system for the economical and safe transportation of people and goods[.]" N.C.G.S. §143B-346, see also Reid v. Roberts, 112 N.C. App. 222, 227, 435 S.E.2d 116, 120-21 (1993) (recognizing "the duty owing to the public to maintain highways falls upon the DOT."). Accordingly, our appellate courts have never applied the public duty doctrine to shield DOT from its acts of negligent road maintenance.

CONCLUSION

For the reasons stated herein and for the reasons stated in plaintiffs' brief, this Court should reverse the Industrial Commission's Order dismissing plaintiffs' claims.

NORTH CAROLINA ADVOCATES FOR JUSTICE

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served a copy of the foregoing **BRIEF OF AMICUS CURIAE NORTH CAROLINA ADVOCATES FOR JUSTICE** in the above-entitled action upon all other parties to this cause by U.S. Mail, postage paid, addressed to the parties as follows:

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