

IN THE FIFTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

SHAUNDELLE BROOKS, as next-of-kin to)	
the deceased, AKILAH DASILVA,)	
)	
Plaintiff,)	
)	No. 19C980
v.)	
)	
METROPOLITAN GOVERNMENT OF)	
NASHVILLE AND DAVIDSON COUNTY,)	
TENNESSEE,)	
)	
Defendant.)	

ORDER

This cause came to be heard on July 26, 2019 upon the Metropolitan Government of Nashville and Davidson County's ("Metropolitan Government") motion to dismiss. Upon consideration of the Metropolitan Government's Motion to Dismiss and Memorandum of Law in Support, Plaintiff's Response in Opposition, the Metropolitan Government's Reply, the Complaint, the arguments of counsel, and the applicable law, the Court hereby finds as follows:¹

1. The Metropolitan Government asserts that Plaintiff's cause of action falls under the Tennessee Health Care Liability Act ("HCLA") at Tenn. Code Ann. § 29-26-101. Specifically, the Metropolitan government asserts that the 911 call takers that dispatch first responders, including emergency medical personnel and ambulance services, are providing health care services under the HCLA. Plaintiff does not dispute that she did failed to comply with the requirements of the HCLA. Instead, Plaintiff maintains that her suit does not involve the provision of medical services, but concerns the timely dispatch of first responders to the scene of a mass shooting. Respectfully, at this stage in the litigation, this Court finds that there are not sufficient facts present to make the leap that a 911 call-taker, employed by the Metropolitan

¹ A true and accurate transcript of the Court's ruling in this matter is attached hereto as Exhibit 1 and is incorporated herein by reference in full.

Government's Emergency Communications Center, is providing health care services for a health care provider under Tenn. Code Ann. § 29-26-101 by fielding calls for emergency assistance and working to dispatch first responders thereto. The Metropolitan Government's motion to dismiss on these grounds is denied at this time.

2. The Metropolitan Government asserts that it is immune for the actions of 911 call-takers and dispatchers under Tenn. Code Ann. § 7-86-320(d). The Metropolitan Government also asserted that it was immune from suit for any claim arising out of the maintenance of the address database referenced in the Complaint. Plaintiff affirmed at the hearing of this matter that she was not asserting any negligence claim as to the maintenance of the address database, thereby rendering the Metropolitan Government's motion as to such claims moot. As to the Metropolitan Government's assertion of immunity under Tenn. Code Ann. § 7-86-320(d) for all of Plaintiff's claims, this Court will accept supplemental briefing by the parties as addressed later in this order. This Court hereby reserves ruling on this issue at this time.

3. The Metropolitan Government asserts that it is immune from Plaintiff's claims for negligence under Tenn. Code Ann. § 29-20-108(b) in the absence of claims that the Metropolitan Government failed to train its 911 call-takers and dispatchers. Because this Court has been called upon to construe Tenn. Code Ann. § 29-20-108(b), it does so under the guidance provided by Tennessee legal precedent. *In re Estate of Tanner*, 295 S.W.3d 610, 613-14 (Tenn. 2009) provides that statutory construction is a matter of law. Because this Court is tasked with construing this statute, its primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. In construing legislative enactments, this Court presumes that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General Assembly is not violated by so doing. When a

statute is clear, this court applies the plain meaning of the statute without complicating the task.

The Court's obligation is simply to enforce the written language. It is only when a statute is

9.12.34. ambiguous that this Court will make reference to the broader statutory scheme, the history of the legislation, or other sources. Further, the language of a statute cannot be considered in a vacuum but should be construed, if practicable, so that its component parts are consistent and reasonable. An interpretation of the statute that would render one statute repugnant to another should be avoided. Further, this Court relies upon the useful rule that statutes related to the same subject or sharing a common purpose must be construed together in order to advance their common purpose or intent, as discussed in *LensCrafters, Inc. v. Sundquist*, 33 S.W.3d 772, 773 (Tenn. 2000) and *Wilson v. Johnson Cty.*, 879 S.W.2d 807, 808 (Tenn. 1994)

Tennessee Code Ann. § 29-20-108(a), provides that emergency communications district boards established in Section 7-86-105, and the members of such board 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 or its members. When looking to subdivision (b), the provision references the immunity provided in subdivision (a). This Court, reading subdivision (a) and (b) together so the sections will not be repugnant to each other, finds that such immunity in subdivision (b) includes the exception to immunity as set out in (a). In turn, this Court finds that the gross negligence exception applies to subdivision (b) because such immunity in (b) refers to the immunity expressed in subdivision (a). Plaintiff asserts claims of gross negligence in this case. In turn, this Court finds that Tenn. Code Ann. § 29-20-108(b) does not preclude the Plaintiff's claims against the Metropolitan Government. The Court declines at this time to determine whether Plaintiff may assert a general negligence claim

under Tenn. Code Ann. § 29-20-108(b). Accordingly, the Metropolitan Government's motion to dismiss based upon Tenn. Code Ann. § 29-20-108 is denied.

4. The Metropolitan Government asserts that it is immune from gross negligence and recklessness under the Tennessee Governmental Tort Liability Act, as codified at Tenn. Code Ann. § 29-20-101 *et seq.* This Court has requested additional briefing on this issue, to be filed as addressed below. The Court hereby reserves ruling on this aspect of the Metropolitan Government's motion pending review of any supplemental briefs.

5. The Metropolitan Government asserts that the Plaintiff has not alleged sufficient facts in the Complaint to state a claim for gross negligence or recklessness. In considering the Metropolitan Government's Motion to Dismiss, *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011) provides that the Court must construe the Plaintiff's Complaint liberally, presuming all factual allegations to be true and giving the Plaintiff the benefit of all reasonable inferences. Applying this standard, this Court finds that the Plaintiff's Complaint contains numerous allegations of gross negligence and reckless conduct. Accordingly, this Court finds that the Metropolitan Government's Motion to Dismiss the Plaintiff's Complaint on the basis that the Plaintiff failed to assert sufficient facts upon which a factfinder could find gross negligence or reckless conduct by 911 operators is not well taken and is therefore denied.

6. The Metropolitan Government asserts that it does not owe Plaintiff a duty of care in this matter because its duty is one owed to the public at large under the public duty doctrine. Tennessee courts recognize the public duty doctrine and the special duty exceptions thereto. *Fleming v. City of Memphis*, No. W201800984COAR3CV, 2019 WL 1040389, at *3 (Tenn. Ct. App. Mar. 5, 2019), and *Ezell v. Cockrell*, 902 S.W.2d 394, 402 (Tenn. 1995). Because the

Plaintiff has alleged a cause of action involving reckless misconduct, this Court finds that the Metropolitan Government's motion to dismiss the Complaint on the basis of the public duty doctrine is not well taken and is therefore denied.

7. The Metropolitan Government requested this Court's permission to file additional authority concerning the independence of the Emergency Communications District Board of Nashville and Davidson County. This Court agrees that such authority would be helpful to its determination. This Court also requests that the parties submit any supplemental authority they find appropriate concerning issues No.s 2 & 4 above. To this end, the Metropolitan Government shall submit additional briefing regarding its defenses on or before August 2, 2019. Likewise, the Plaintiff shall be permitted until August 9, 2019 to respond to the Metropolitan Government's additional briefing.

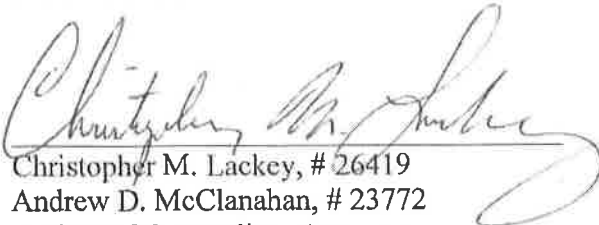
IT IS SO ORDERED, ADJUDGED, and DECREED.



Judge Joseph P. Binkley, Jr.

APPROVED FOR ENTRY:

DEPARTMENT OF LAW OF THE
METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY
JON COOPER, #23571
DIRECTOR OF LAW



Christopher M. Lackey, # 26419

Andrew D. McClanahan, # 23772

Assistant Metropolitan Attorneys

Metropolitan Courthouse, Suite 108

P.O. Box 196300

Nashville, Tennessee 37219-6300

Attorneys for the Metropolitan Government of Nashville and Davidson County

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed, by U.S. Mail, postage pre-paid, addressed to:

Daniel A. Horwitz
1803 Broadway, Suite 531
Nashville, TN 37203

On this the 6th day of August, 2019.



Christopher M. Lackey

CERTIFICATE OF SERVICE**CASE NO. 19C980**

I hereby certify that I have mailed a copy of the foregoing Order to the parties/counsel listed below, this the 16th day of August, 2019.

RICHARD R. ROOKER, CLERKBy: , D.C.

cc:

Daniel A. Horwitz, Esq.
1803 Broadway, Suite 531
Nashville, TN 37203

Christopher M. Lackey, Esq.
Andrew D. McClanahan, Esq.
Assistant Metropolitan Attorneys
108 Metro Courthouse
P.O. Box 196300
Nashville, TN 37219-6300

1 IN THE FIFTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
2 AT NASHVILLE

3 SHAUNDELLE BROOKS,

4 Plaintiff,

5 vs.

Case No. 19C980

6 METROPOLITAN GOVERNMENT OF
7 NASHVILLE AND DAVIDSON COUNTY,
8 TENNESSEE,

9 Defendant.

10
11
12
13
14 BE IT REMEMBERED that the above-captioned cause
15 came on for hearing, on this, the 26th day of July,
16 2019 before Judge Joe P. Binkley, Jr., when and where the
17 following proceedings were had, to wit:

18
19
20
21
22 Elite Reporting Services
23 www.elitereportingservices.com
24 Sarah N. Linder, LCR
25 Post Office Box 292382
 Nashville, Tennessee 37229
 (615) 595-0073

EXHIBIT

1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

A P P E A R A N C E S

For the Plaintiff:

MR. DANIEL A. HORWITZ
Attorney at Law
Law Office of Daniel A. Horwitz
1803 Broadway, Suite 531
Nashville, TN 37203
(615)739-2888
Daniel.a.horwitz@gmail.com

For the Defendant:

MR. CHRISTOPHER M. LACKEY
Attorney at Law
The Department of Law of the Metropolitan
Government of Nashville and Davidson County
P.O. Box 196300
Nashville, TN 37219
(615)862-6376
Chris.lackey@nashville.gov

* * *

P R O C E E D I N G S

(WHEREUPON, additional matters were heard by the Court; after which, the Court's ruling was excerpted as follows:)

THE COURT: Okay. All right. Well, we've got Defendant's arguments 1, 2 -- let's see -- 3, 4, and that's it. 1, 2, 3, and 4 to -- to rule on.

So as it applies to argument number 1, that this is a health care liability case and that it calls for pre-suit notice and -- 4, 7 -- pre-suit notice and certificate of good faith, which has to -- had to be filed before suit is filed, because they were not filed pre-suit, the case can be dismissed.

So I find that basis for the motion to dismiss is respectfully denied for the following reasons: First of all, T- -- Tennessee Code Annotated Section 29-26-101(a)(1) defines health care liability action. And it says it means any civil action including claims against the State, or a political subdivision thereof, alleging that a health care provider or providers have caused an injury related to the provision of or failure to provide

1 health care services to a person regardless of the 16:35:54
2 theory liability in which the action's based. 16:35:58
3 (Indicating.) Good, it stopped. 16:36:04
4 And health care provider means -- and 16:36:07
5 that's number (A)(2). In big A, parenthesis, 16:36:10
6 according to -- 16:36:10
7 (Indicating.) 16:36:10
8 Under A, the (A)(2) -- okay. So (A)(2), 16:36:14
9 health care provider means; and then in big A in 16:37:14
10 parenthesis under that states the following: A 16:37:16
11 health care practitioner licensed, authorized, 16:37:20
12 certified, registered, or regulated under any chapter 16:37:23
13 of Title 63 or Title 68, including, but not limited 16:37:26
14 to, several different types of folks including 16:37:33
15 medical resident physicians, interns, fellows 16:37:38
16 participating in a training program of one of the 16:37:42
17 accredited medical schools or of one such medical 16:37:47
18 school's affiliated teaching hospitals in Tennessee. 16:37:51
19 So just looking at Title 68, Title 68 has 16:37:53
20 436 statutes that include references to emergency -- 16:38:01
21 the word emergency and medical, those words. And I 16:38:09
22 -- that's in Mr. Lackey 's point, that because the 16:38:15
23 Health Care Liability Act as amended in 29-26-101, 16:38:22
24 references Title 63 and 68, and because -- I didn't 16:38:26
25 look at 63 -- because 68, Title 68, has 436 statutes 16:38:32

1 that include references to emergency and medical, 16:38:39
2 that's -- that's his point. 16:38:41

3 But what we're -- what I'm being asked to 16:38:44
4 do is to make the leap from a 911 call-taker employed 16:38:51
5 by the emergency -- Metro emergency communication 16:39:03
6 center to the ambulance that's called to provide 16:39:07
7 health care services that it all is health care 16:39:12
8 services related. So I -- I don't -- I don't believe 16:39:17
9 I can make that leap. It's a great argument. You 16:40:08
10 could be right. I could be wrong, but that's my 16:40:16
11 ruling. 16:40:20

12 So -- and we have no case law one way or 16:40:22
13 the other so that's why I say not -- not an easy 16:40:28
14 problem to solve. But my job is to do the best I can 16:40:32
15 to solve it and that's -- that's my solution to the 16:40:37
16 Health Care Liability Act argument; that the Health 16:40:40
17 Care Liability Act applies to this situation and I 16:40:45
18 say -- I say it does not. 16:40:47

19 And one other thing I wanted to say too, 16:40:49
20 that the -- when the Health Care Liability Act was 16:40:51
21 amended in 2015, it -- it did include political -- 16:40:53
22 State or any political subdivision thereof. Of 16:41:01
23 course, the Metropolitan Government is a political 16:41:05
24 subdivision of the State of Tennessee. So 16:41:07
25 heretofore, or prior to that amendment, the State and 16:41:14

1 -- or political subdivision of the State were immune 16:41:19
2 even if they were operating a hospital. So I believe 16:41:23
3 the Legislature intended to include the State or 16:41:26
4 political subdivision thereof if they're operating a 16:41:32
5 health care facility. Again, I could be wrong about 16:41:37
6 that but I believe that's -- that's what all that 16:41:39
7 means. 16:41:42

8 So those are the reasons for the denying 16:41:44
9 reason number 1, to dismiss the claim based on the 16:41:49
10 fact that it's a -- it's a true -- it's a health care 16:41:55
11 liability claim and pre-suit notice and certificate 16:41:58
12 of good faith were required. I find that is not the 16:42:02
13 case. 16:42:05

14 Okay. Now, there -- there are certain 16:42:06
15 rules of statutory construction that I am required to 16:42:14
16 follow and I'm gonna cite those. And I'm -- and I'm 16:42:17
17 citing them because I'm following them. I'm 16:42:25
18 following what the case law says I'm to do about 16:42:28
19 statutory construction. And this is the case of the 16:42:32
20 Estate of Martha M. Tanner, Supreme Court of our 16:42:34
21 state, 295 S.W.3d 610, 2009 opinion. And this is at 16:42:39
22 page 613 and 614. 16:42:48

23 And here's what the case says: The 16:42:51
24 issues presented by this appeal involve the 16:42:55
25 interpretation of State statutes. Statutory 16:42:59

1 construction is a question of law that is reviewable 16:43:02
2 on a de novo basis without any presumption of 16:43:04
3 correctness. When dealing with statutory 16:43:09
4 interpretation, well-defined precepts apply. Our 16:43:12
5 primary objective is to carry out legislative intent 16:43:15
6 without broadening or restricting the statute beyond 16:43:19
7 its intended scope. In construing legislative 16:43:22
8 enactments, we presume that every word in a statute 16:43:26
9 has meaning and purpose and should be given full 16:43:28
10 effect if the obvious intention of the General 16:43:30
11 Assembly is not violated by so doing. When a statute 16:43:33
12 is clear, we apply the plain meaning without 16:43:37
13 complicating the task. Our obligation is simply to 16:43:41
14 enforce the written language. 16:43:46

15 It is only when a statute is unambiguous 16:43:48
16 that we make a reference to the broader statutory 16:43:52
17 scheme, comma, the history of the legislation or 16:43:53
18 other sources. Further, the language of a statute 16:43:58
19 cannot be considered in a vacuum but should be 16:44:01
20 construed, if practicable, so that its component 16:44:05
21 parts are consistent and reasonable. An 16:44:10
22 interpretation of the statute that would render one 16:44:13
23 statute of that repugnant to another should be 16:44:14
24 avoided. 16:44:19

25 And then here is another case that's not 16:44:22

1 reported but it cites reported cases, Silverman 16:44:25
2 versus Krsna, Incorporated, 2002 Westlaw 1015855. 16:44:30
3 And this is at star 3 of the opinion and it -- 16:44:44
4 this -- the proposition that I'm about to cite in 16:44:48
5 this unreported case is supported by reported cases. 16:44:51
6 So it -- in star 3 of the Silverman opinion states 16:44:59
7 the following: One useful rule is the statutes 16:45:05
8 related to the same subject or sharing a common 16:45:07
9 purpose must be construed together, parenthesis, in 16:45:10
10 pari materia, closed parenthesis, in order to advance 16:45:18
11 their common purpose or intent. And then cited -- 16:45:22
12 the reported case that they've cited is LensCrafters, 16:45:24
13 Inc., versus Sundquist, 33 S.W.3d 772, Tennessee 16:45:28
14 Supreme Court in 2000; and Wilson versus Johnson 16:45:35
15 County, 879 S.W. 2d 807, Tennessee 1994. Okay. So 16:45:39
16 I'm applying those principles in doing the statutory 16:45:56
17 interpretation. 16:46:02
18 Okay. Let's see. Here we go. So I -- I 16:46:25
19 believe I'm able to make a decision on the portion of 16:46:39
20 the motion to dismiss that states that Metro's immune 16:46:43
21 under TCA Section 29-20-108. 16:46:48
22 Now, did I -- I previously say I took 16:46:52
23 that under advisement or not? 16:46:54
24 MR. LACKEY: Yes, Your Honor. I think 16:46:56
25 you were taking arguments 2 and 3 under advisement 16:46:58

1 because of the emergency communications district 16:47:02
2 aspect of -- 16:47:05

3 THE COURT: Yes. 16:47:05

4 MR. LACKEY: -- both of those. 16:47:06

5 THE COURT: Yes. Well, I think I can 16:47:07
6 decide -- well, I think I can decide this one under 16:47:10
7 29-20-108 argument, but I would like to take under 16:47:15
8 advisement and have some additional information on 16:47:19
9 number -- the number 2 reason to dismiss for failure 16:47:22
10 to state a claim, and that is that Metro is immune 16:47:26
11 under TCA Section 7-86-320(d); and the fourth reason 16:47:29
12 for deciding the motion to dismiss for failure to 16:47:37
13 state a claim is that Metro's immune under TCA 16:47:40
14 Section 29-20-201. And then Mr. Lackey pointed this 16:47:43
15 out earlier, that a lot of these do interrelate. But 16:47:51
16 anyway, I think I need some help on those two and -- 16:47:55
17 and would welcome the help on those two. And we've 16:47:59
18 already decided about a briefing schedule. 16:48:02

19 So looking at TCA Section 29-20-108(a), 16:48:09
20 it does say emergency communications district boards 16:48:14
21 established in Section 7-86-105, and the members of 16:48:18
22 such board shall be immune from any claim, complaint, 16:48:25
23 or suit of any nature which relates to or arises from 16:48:30
24 the conduct of the affairs of the board except in 16:48:33
25 cases of gross negligence by such board or its 16:48:35

1 members. Now -- then we go to (b) and -- and it goes 16:48:38
2 back to the reference of immunity that is stated in 16:48:48
3 (a). And (b) says such immunity -- and it's got to 16:48:54
4 be the same immunity they're talking about in (a). 16:48:58

5 And back to the statutory construction, 16:49:02
6 you've got to read it altogether so the sections will 16:49:05
7 not be repugnant to each other or opposing each 16:49:08
8 other. So I'm trying to make sense out of it and 16:49:13
9 what the Legislature says or what some case law says 16:49:15
10 I can do with legislative enactments, try to get the 16:49:17
11 meaning the Legislature intended. 16:49:21

12 So (b) says: Such immunity -- well, let 16:49:23
13 me back up. (a) gives an exception in cases of gross 16:49:27
14 negligence by such board or its members. So it talks 16:49:32
15 about gross negligence of the boards or members of 16:49:35
16 the emergency communication district boards. 16:49:37

17 And then such immunity, which I believe 16:49:39
18 includes the exception that's set out in (a), such 16:49:43
19 immunity shall also extend to employees of the 16:49:48
20 emergency communications district, and county and 16:49:51
21 municipal governments for the acts or omissions of 16:49:54
22 employees that manage, supervise, or perform 911 16:49:56
23 emergency communications service as communicators or 16:50:00
24 dispatchers. 16:50:05

25 So reading those together, I believe I 16:50:06

1 should interpret gross negligence as an exception to 16:50:09
2 such immunity because such immunity in (b) refers to 16:50:16
3 the immunity talked about in (a). And the immunity 16:50:20
4 talked about in (a) has an exception to gross 16:50:23
5 negligence. Gross negligence has been -- has been 16:50:26
6 pled in this case. And so if there's a gross 16:50:28
7 negligence exception to (a), I believe in reading 16:50:33
8 them together a gross negligence exception should 16:50:36
9 also apply to (b). So for that reason, reason number 16:50:39
10 3, for moving to dismiss for failure to state a claim 16:50:51
11 is respectfully denied. 16:50:57

12 Now, still need to have some information 16:50:59
13 on TCA 7-86-320(d). And that also includes 16:51:02
14 discussion about emergency communications districts 16:51:10
15 and public and -- which is (d)(1). And then (d)(2) 16:51:14
16 talks about public safety answering point. You know, 16:51:18
17 I can use some help on that. And -- and the 16:51:22
18 29-20-201, it -- I need help on that. So I would 16:51:33
19 appreciate some additional briefing on both of those 16:51:40
20 and any statutes or ordinances. Things that I can 16:51:43
21 take judicial notice of that I may need to look at 16:51:50
22 it, I'm happy to. 16:51:52

23 MR. LACKEY: Two points, Your Honor. 16:51:53

24 THE COURT: Yes, sir. 16:51:53

25 MR. LACKEY: With respect to 16:51:56

1 29-20-108(a), the plaintiff had -- had articulated in 16:51:57
2 their filing and in their -- in their response to the 16:52:02
3 Metropolitan Government's motion that they were 16:52:03
4 articulating a negligence claim. Does Your Honor 16:52:05
5 have a holding with respect to that under 16:52:08
6 29-20-108(a)? 16:52:13

7 And number two -- 16:52:13

8 THE COURT: Well, wait, wait. We'll do 16:52:14
9 one at a time. 16:52:16

10 MR. LACKEY: Sure. 16:52:18

11 THE COURT: Let's see. I am -- this is a 16:52:19
12 motion to dismiss for failure to state a claim. I 16:52:22
13 think I -- maybe I read the -- I read this earlier in 16:52:25
14 the other case. But the Webb versus Nashville 16:52:28
15 Area -- Area Habitat for Humanity, 346 S.W.3d 422, 16:52:32
16 Tennessee Supreme Court 2011, at page 426: A Rule 16:52:39
17 12.02(6) motion challenges only the legal sufficiency 16:52:43
18 of the complaint, not the strength of the plaintiff's 16:52:47
19 proof or evidence. The resolution of the 12.02(6) 16:52:51
20 motion to dismiss is determined by the examination of 16:52:54
21 the pleadings alone. A defendant who files a motion 16:52:56
22 to dismiss admits the truth of all the relevant and 16:53:00
23 material allegations contained in the complaint but 16:53:03
24 asserts that the allegations fail to establish a 16:53:05
25 cause of action. 16:53:05

1 In considering a motion to dismiss, the 16:53:09
2 courts must construe the complaint liberally, 16:53:10
3 presuming all factual allegations to be true, and 16:53:13
4 giving the plaintiff the benefit of all reasonable 16:53:16
5 inferences. The trial court should grant a motion to 16:53:19
6 dismiss only when it appears that the plaintiff can 16:53:22
7 prove no set of facts in support of the claim that 16:53:24
8 would entitle the plaintiff to relief. 16:53:25

9 So back to your question, Mr. Lackey. 16:53:28
10 Interpreting the complaint liberally, I think the 16:53:31
11 complaint states enough factual allegations to 16:53:38
12 support that proposition. 16:53:44

13 MR. LACKEY: I'm sorry, Your Honor, 16:53:47
14 it's -- it's me, I'm sure. I'm still confused -- 16:53:49

15 THE COURT: No, it's not you. 16:53:51

16 MR. LACKEY: Are -- are you -- 16:53:51

17 THE COURT: I guarantee you that. 16:53:53

18 MR. LACKEY: Are you ruling that they 16:53:54
19 have asserted the sufficient amount to assert a 16:53:57
20 negligence claim so (b) doesn't apply? 16:53:59

21 THE COURT: No, I'm not gonna make a 16:54:02
22 ruling on that. 16:54:02

23 MR. LACKEY: Okay. 16:54:02

24 THE COURT: I'm not gonna make one. I'm 16:54:04
25 not gonna get trapped. I'm just going to say it's -- 16:54:05

1 and you're not -- you're just doing your job so -- 16:54:07
2 but whenever people ask me to clarify, they're really 16:54:10
3 wanting me to change my mind and -- but to say 16:54:14
4 something else. 16:54:18

5 MR. LACKEY: Your Honor, I'm just trying 16:54:18
6 to make sure we have a clean record, that's all. 16:54:19

7 THE COURT: Well, I'm trying to make a 16:54:22
8 clean record too and I'm doing it my way. 16:54:24

9 MR. LACKEY: Certainly. The other point 16:54:26
10 I was gonna ask, under the Health Care Liability Act, 16:54:29
11 I just wanted to make sure I understood your ruling. 16:54:31
12 Are you saying that a governmental entity can only be 16:54:33
13 a health care provider in the context of a 16:54:37
14 governmental hospital? That's what I understood you 16:54:40
15 to say when you had ruled. I wanted to make sure I 16:54:42
16 was correct about that. 16:54:44

17 THE COURT: Not necessarily. I'm not 16:54:44
18 necessarily saying that. I'm just saying I think 16:54:46
19 that's the -- that's why the statute got amended to 16:54:49
20 include State or municipalities but -- 16:54:52

21 MR. LACKEY: So your -- 16:54:56

22 THE COURT: -- that's not -- that's not 16:54:57
23 necessarily the only context but -- 16:54:59

24 MR. LACKEY: So your ruling -- I guess 16:55:02
25 I'm -- and your ruling is just -- with respect to at 16:55:02

1 the Rule 12 stage, there's not sufficient evidence to 16:55:04
2 establish a Health Care Liability Act; whether or not 16:55:09
3 this case falls under the Health Care Liability Act? 16:55:10

4 THE COURT: That's correct. 16:55:13

5 MR. LACKEY: Okay. Thank you. 16:55:14

6 THE COURT: Yes. Now, Mr. Horwitz, you 16:55:15
7 need to amend it? 16:55:18

8 MR. HORWITZ: Well, so I'm just gonna ask 16:55:19
9 counsel if this would fix the problem. I anticipate 16:55:21
10 that there will be personnel involved in this. I can 16:55:24
11 just add a bunch of John Doe defendants. I just 16:55:27
12 don't want to name someone before I can take 16:55:32
13 discovery. 16:55:35

14 THE COURT: Well -- well, I'm -- I'm -- I 16:55:36
15 mean, amendments are very freely granted. And I'm 16:55:37
16 saying if you think that you need to amend any 16:55:42
17 portion of your complaint for whatever reason, I'm 16:55:44
18 gonna let you do that because I -- it may be 16:55:47
19 that's -- that may be what you might want to do to 16:55:51
20 answer some of these issues. But if you don't, it's 16:55:55
21 your prerogative, I'm just saying, because amendments 16:55:58
22 are freely granted. 16:56:01

23 And even though you haven't really truly 16:56:03
24 asked for it, I -- I always under 12.02(6) motion to 16:56:08
25 dismiss for failure to state a claim will allow an 16:56:13

1 amendment to -- if -- you know, if the plaintiff 16:56:16
2 desires to do so; particularly the first go-round. 16:56:21
3 Now, amendments are not freely granted as you move 16:56:26
4 down the road and amend and then fail to -- fail to 16:56:29
5 state a cause of action even after amendments. But 16:56:32
6 this is the first go-round on the motion to dismiss 16:56:35
7 for failure to state a claim so I'm gonna stick to my 16:56:38
8 normal practice, which is to allow amendments, and -- 16:56:41
9 if the pleader desires -- plaintiff desires to do 16:56:47
10 that. 16:56:50

11 Okay. So I think, Mr. Horwitz, you're -- 16:56:53
12 you're the prevailing party on the ones that I've 16:57:00
13 ruled on. If you and Mr. Lackey can get together on 16:57:03
14 a -- on an order, that'd be great and probably attach 16:57:08
15 a copy of the transcript would help because there's a 16:57:12
16 lot of discussion about reasons, and I think I needed 16:57:16
17 to do that. 16:57:19

18 MR. LACKEY: Your Honor, I was gonna 16:57:21
19 try -- and when I'm saying trying to make it easy, 16:57:22
20 I'm really -- I want to work with Mr. Horwitz here. 16:57:25
21 If Mr. Horwitz is gonna file an amended answer 16:57:27
22 anyways, I'm happy to just brief the ECD issue. We 16:57:30
23 can just hold these under advisement pending an 16:57:34
24 amended complaint and then I'll just assert them in a 16:57:38
25 new motion. That might be the easiest way of 16:57:41

1 handling that but I'll leave that up to you. 16:57:45

2 MR. HORWITZ: I'd have to look up -- I 16:57:48

3 mean, my hope was that we would resolve the issue of 16:57:50

4 adding personnel, but it sounds like we might not be 16:57:51

5 able to so maybe we should talk. 16:57:56

6 THE COURT: You all can talk about it and 16:57:57

7 decide what you need to do. If you want to expand 16:58:00

8 the briefing schedule to allow the amendment to occur 16:58:02

9 first, then that's -- then that's fine. That'll be 16:58:08

10 fine. I'm not -- I'm not gonna stand in the way of 16:58:10

11 that. It will be perfectly fine with me. 16:58:16

12 MR. HORWITZ: Thank you, Your Honor. 16:58:19

13 MR. LACKEY: Thank you, Your Honor. 16:58:20

14 THE COURT: All right. Thank y'all for 16:58:23

15 your patience. 16:58:25

16 (WHEREUPON, the foregoing proceedings

17 were concluded at 4:58 p.m.)

18

19

20

21

22

23

24

25

1
2
3 **REPORTER'S CERTIFICATE**

4 STATE OF TENNESSEE

5 COUNTY OF DAVIDSON

6 I, SARAH N. LINDER, Licensed Court Reporter,
7 with offices in Nashville, Tennessee, hereby certify
8 that I reported the foregoing Judge's ruling in the
9 matter of BROOKS vs. METROPOLITAN GOVERNMENT OF
10 NASHVILLE AND DAVIDSON COUNTY, TENNESSEE by machine
11 shorthand to the best of my skills and abilities, and
12 thereafter the same was reduced to typewritten form
13 by me.

14 I further certify that I am not related to
15 any of the parties named herein, nor their counsel,
16 and have no interest, financial or otherwise, in the
17 outcome of the proceedings.

18 I further certify that in order for this
19 document to be considered a true and correct copy, it
20 must bear my original signature and that any
21 unauthorized reproduction in whole or in part and/or
22 transfer of this document is not authorized, will not
23 be considered authentic, and will be in violation of
24 Tennessee Code Annotated 39-14-104, Theft of
25 Services.

SARAH N. LINDER, LCR
Elite Reporting Services
Licensed Court Reporter (TN)
Notary Public State of Tennessee

My Notary Commission Expires: 3/3/2020
LCR #153 - Expires: 6/30/2020