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# INSIGHTS

BY

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## OVERVIEW:

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- TENNESSEE'S ANTI-SLAPP ACT
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# NAVIGATING THE GTLA

*by Erik C. Lybeck*

Tort lawsuits can be beautiful in their simplicity. Usually, they come down to a familiar question—whether one person's carelessness caused another person's injuries. Sometimes, though, those simple tort cases get complicated. One way that happens? When the careless person is the government. Bringing or defending a lawsuit involving the government can seem like a daunting task, and it involves many traps for the unwary. This primer on suits against the government—and specifically on suits against local governments under the Governmental Tort Liability Act ("GTLA"), Tenn. Code Ann. § 29-20-201, *et seq.*—is intended to help lawyers meet these issues with confidence.

So, let's say you've been asked to handle a personal injury case involving the government. As a threshold matter, you have to figure out whether the GTLA applies to your case at all. As its name suggests, the Governmental Tort Liability Act applies to all tort claims against "governmental entities." Tenn. Code Ann. § 29-20-103(b). But what is a governmental entity? Well, pretty much everything you think of as local government, from the big (cities and counties) to the small (school districts, utility districts, even volunteer fire departments). Tenn. Code Ann. § 29-20-102(2). Note the adjective, though—*local* government. You cannot use the GTLA to bring claims against the State or Federal governments. (Those claims are for a different article.) Also note the noun—local *government*. The GTLA generally does not apply to claims against private companies that are providing public services, such as regulated gas, electric, or telephone utilities. (You get to sue them in a good old-fashioned negligence case).

Next, you need to figure out whether there is a claim under the GTLA. The default rule when you are suing a governmental entity is sovereign immunity. Tenn. Code Ann. § 29-20-201(a). In other words, most of the time, there is no claim at all. But there's a catch—governmental entities have immunity . . . "[e]xcept as may be otherwise provided in" the GTLA. There are three general ways around the default rule of sovereign immunity.

The first way is the easiest. Section 202 removes immunity "for injuries resulting from the negligent operation by any employee of a motor vehicle or other equipment while in the scope of employment." Tenn. Code Ann. § 29-20-202(a). There are no extra hoops to jump through here; if a car driven by a government employee on the clock hits someone, there's probably a claim under the GTLA.

The second way can be thought of as the "premises liability" exception (although it is slightly broader than that in practice). Under Sections 203 and 204, immunity is removed for the dangerous condition of any street (Tenn. Code Ann. § 29-20-203(a)) or building or other "improvement" (Tenn. Code Ann. § 29-20-204(a)) owned or controlled by the government. This is where you need to look for injuries caused by (for example) a broken stop light, an uneven sidewalk, or a puddle in a government building. Here, though, there *is* an extra hoop to jump through; under either of these sections, immunity is only removed when the governmental entity had actual or constructive notice of the problem. Tenn. Code Ann. § 29-20-203(b) & -204(b). As a result, lawsuits under these sections typically come to what the government knew and when it knew it.

The third way should be the easiest way to remove immunity, but is anything but. Under Tenn. Code Ann. § 29-20-205, immunity is removed for "any injury proximately caused by a negligent act or omission of *any* employee within the scope of his employment." That sounds broad. In practice, though, this exception is extremely limited. First are the limitations set on it by the General Assembly. Section 205 itself contains ten enumerated cases in which immunity still applies notwithstanding employee negligence, including injuries resulting from (i) "discretionary functions" (a much litigated and amorphous concept), (ii) inadequate inspections, (iii) almost anything occurring in connection with an arrest, investigation, or lawsuit, and (iv), COVID-19. And that still leaves the limitations set by the Tennessee Supreme Court. In *Ezell v. Cockrell*, 902 S.W.2d 394 (Tenn. 1995), the Court

decreed that the common law "public duty doctrine" survived the enactment of the GTLA. The upshot of this ruling is a near total bar on claims under Section 205 unless your case fits into one of the three narrow circumstances known as the "special duty exceptions"— (1) reliance on an affirmative undertaking to protect the plaintiff, (2) claims explicitly allowed by statute, or (3) intentional, malicious, or reckless misconduct. Finding a case that fits into one of these circumstances is rare. The last work around, then, is not nearly as expansive as it appears.

Let's assume, though, that there *is* a claim under the GTLA. Next, you have to deal with the procedural quirks. Start with the question of venue; where can suit be filed? Claims under the GTLA must be brought in the Circuit Court of the county (i) where the governmental entity is located or (ii) where the injury occurred (almost always the same place). Tenn. Code Ann. § 29-20-308(a). Failure to file in the correct court can be devastating. The savings statute does not apply to claims under the GTLA, so a dismissal without prejudice on jurisdictional grounds can effectively operate as a dismissal with prejudice when it happens after the one year statute of limitations has run. *See, e.g., Lynn v. City of Jackson*, 63 S.W.3d 332, 337 (Tenn. 2001). (One solution? Ask that the case be transferred to the proper venue instead of dismissed without prejudice). And note well — if you want a jury, you'll need to find a non-governmental co-defendant. Lawsuits solely involving GTLA claims are limited to bench trials by statute. Tenn. Code Ann. § 29-20-307. When filing the complaint, make sure you cross your t's and dot your i's; the claim "must be brought in strict compliance with the terms of this chapter," Tenn. Code Ann. § 29-20-201(c). In other words, don't forget to explain how and why immunity is removed in your complaint. See also Tenn. R. Civ. P. 8.05(1). Once the complaint has been filed, the governmental entity gets sixty days to respond, so don't get an itchy trigger finger on that motion for default judgment just because a month passed without an answer. Tenn. Code Ann. § 29-20-304(a). Finally—and perhaps most important as a practical matter—any recovery is capped at $300,000 per injury or death of any one person, and $700,000 total per accident (no matter how many people are injured). Tenn. Code Ann. § 29-20-311, -403(b)(4).

The GTLA, while complicated, is not impossible to understand. Hopefully, with the help of this article, you can jump through its hoops with confidence and get back to that beautifully simple question we all love to litigate—did one person's carelessness cause another person's injury?

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# TENNESSEE'S ANTI-SLAPP ACT

*by William "Jay" J. Harbison II*

Retaliatory lawsuits that attack the exercise of free speech and public criticism are known as "strategic lawsuits against public participation" or "SLAPP" lawsuits. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 Pace Envtl. L. Rev. 3, 8-9 (1989). These lawsuits are filed to "send a clear message" to critics: the "price for speaking out" is "a multi-million-dollar lawsuit." *Id.* at 6.

In 2019, the Tennessee Legislature recognized the growing problem of SLAPP lawsuits attacking the exercise of free speech rights by consumers, reviewers, and the news media. These lawsuits are not designed to be won—instead, they are designed to chill critical commentary by imposing massive litigation costs on the speaker (even when they ultimately fail on the merits).

In response to this problem, Tennessee has recently joined the majority of states and enacted laws designed to protect free speech by punishing and deterring SLAPP lawsuits. Like other states, Tennessee now has a mechanism for courts to dismiss speech-chilling lawsuits at the threshold—and before costly discovery. This mechanism requires the plaintiff to identify *at the outset* facts establishing a prima facie case for recovery, rather than resting on a complaint's conclusory allegations and using discovery to fish for factual support. And it permits the defendant to provide a basic factual defense, so the court can evaluate whether further proceedings are genuinely likely to result in liability. Thus, unless the plaintiff in this threshold proceeding can show it already possesses facts sufficient to support each element of its claims, Tennessee's Anti-SLAPP Act requires: (1) dismissal with prejudice; and (2) an award of attorney's fees and costs to the defendant.

California was one of the first states to combat these cases by enacting an "Anti-SLAPP" statute, which addresses "lawsuits brought primarily to chill the valid exercise of the constitutional right[] of freedom of speech." Cal. Civ. Proc. Code § 425.16(a). The California statute authorizes parties sued for exercising free speech rights to move for early dismissal, without incurring costly and time-consuming discovery. *Id.*; *see Varian Med. Sys., Inc. v. Delfino*, 106 P.3d 958, 967 (Cal. 2005).

The California statute "has been a primary model or influence on similar laws subsequently enacted in other states." *Serafine v. Blunt*, 466 S.W.3d 352, 386 (Tex. App. 2015). "Many States have enacted anti-SLAPP statutes to give more breathing space for free speech about contentious public issues." *Abbas v. Foreign Policy Grp.*, LLC, 783 F.3d 1328, 1332 (D.C. Cir. 2015). Like California's, these statutes aim to secure added protection for the robust "exchange of idea[s]" and "citizen participation" envisioned by the First Amendment, whether in the form of "petitioning the government, writing a traditional news article, or commenting on the quality of a business." *Cheniere Energy, Inc. v. Lotfi*, 449 S.W.3d 210, 218 (Tex. App. 2014) (Jennings, J., concurring) (quotation omitted). In particular, "[n]ewspapers and publishers, who regularly face libel litigation, were intended to be one of the 'prime beneficiaries'" of Anti-SLAPP statutes. *Sonoma Media Invs., LLC v. Superior Court*, 34 Cal. App. 5th 24, 34 (2019) (quotation omitted).

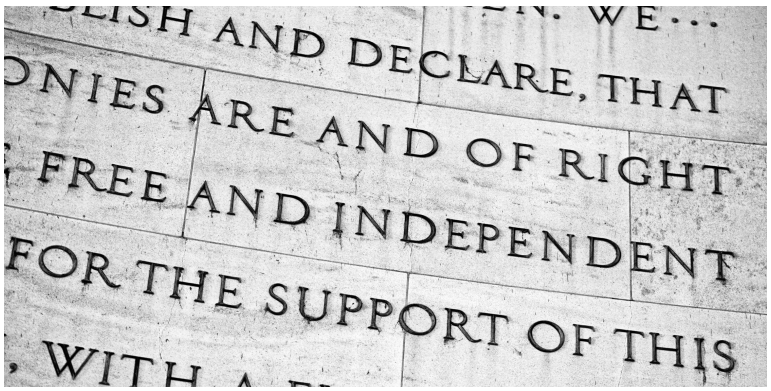
Before 2019, Tennessee had a narrow version of an Anti-SLAPP law, which only addressed lawsuits seeking to hold the defendant liable for communicating with a government agency. In 2019, however, a bipartisan group of Tennessee legislators introduced a bill providing much broader protecting, expanding the law to follow other states in protecting speech critical of corporations and other matters of public concern. *See* S.B. 1097, 111th Sess. (Tenn. 2019). The legislation passed with virtually unanimous support in both chambers, was signed into law by the Governor, and became effective in July 2019. Tenn. Code Ann. §§ 20-17-101 *et seq.* (2019); *see also* Tennessee General Assembly, SB1097.

Just like similar laws adopted elsewhere, Tennessee's Anti-SLAPP Act seeks "to encourage and safeguard the constitutional rights of persons to . . . speak freely . . . to the fullest extent permitted by law." Tenn. Code Ann. § 20-17-102. As its Senate sponsor explained, the law addresses "a problem in Tennessee" of "frivolous or nuisance lawsuits against individuals who are expressing their First Amendment rights." Tenn. Sen. Floor Proceedings, SB1097, at 1:32:10–33:40 (Mar. 18, 2019) ("Sen. Floor Proceedings"). In response to that problem, the Tennessee Legislature enacted the Anti-SLAPP Act to punish and deter retaliatory lawsuits that seek "to punish media outlets for doing the investigative work that we expect of them." Todd Hambidge et al., *Speak Up: Tennessee's New Anti-Slapp Statute Provides Extra Protections to Constitutional Rights*, 55 Tenn. Bar J. 14, 15 (Sept. 2019). The law "allow[s] a judge to look at the suit before the very expensive discovery portion of the suit comes up, and decide whether the suit has merit." Sen. Floor Proceedings 1:32:10–33:40. Early dismissal is critical because "[t]he cost of defending such lawsuits can be prohibitive," even for "substantial media organizations, which must weigh the expenditure of defense costs against the substantial costs of developing, producing, and distributing new content." Hambidge at 15. The Anti-SLAPP Act thus ensures that media organizations and others "have a right not to be dragged through the courts because [they] exercised [their] constitutional rights." *Varian*, 106 P.3d at 967.

Tennessee's Anti-SLAPP Act achieves that objective through an expedited procedure for dismissing lawsuits filed to inhibit the valid exercise of "constitutional rights of persons to . . . speak freely." Tenn. Code Ann. § 20-17-102. Courts considering an Anti-SLAPP petition apply a three-step analysis:

First, the petitioning party must make "a prima facie case that a legal action is based on, relates to, or is in response to that party's exercise of the right to free speech." Tenn. Code Ann. § 20-17-105(a). "Exercise of the right of free speech" means any "communication made in connection with a matter of public concern," including "issue[s] related to" a "public figure," "the government," "community well-being," or "[a]ny other matter" of public concern. Tenn. Code Ann. § 20-17-103(3), (6).

Second, if the petitioning party meets this threshold burden of showing that the action relates to its exercise of free speech, the burden shifts to the responding party to "establish[] a prima facie case for each essential element of




the claim in the legal action." Tenn. Code Ann. § 20-17-105(b). Tennessee courts have had limited opportunity to construe the new statute, but courts in states with comparable laws recognize that to carry this burden, the responding party must provide enough trial-admissible evidence to prove each element of every claim. *See Wilson v. Parker, Covert & Chidester*, 50 P.3d 733, 739 (Cal. 2002) (requiring responding party to "state and substantiate a legally sufficient claim" and to "support[]" each claim with a "sufficient prima facie showing of facts"); *HMS Capital, Inc. v. Lawyers Title Co.*, 118 Cal. App. 4th 204, 212 (2004) ("In opposing an anti-SLAPP motion, the plaintiff cannot rely on the allegations of the complaint, but must produce evidence that would be admissible at trial."). A responding party's failure to carry this burden requires dismissal with prejudice.Tenn. Code Ann. § 20-17-105.

Third, even if the responding party provides evidence sufficient to establish a prima facie case, the court still must dismiss the action if the petitioning party "establishes a valid defense to the [responding party's] claims." Tenn. Code Ann. § 20-17-105(c). That includes constitutional defenses, such as the defense that the First Amendment and Tennessee Constitution protect the challenged speech. *See De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 855 (2018) (anti-SLAPP statute "contemplates consideration of the substantive merits of the plaintiff's complaint, as well as all available defenses to it, including, but not limited to, constitutional defenses").

Finally, if a case is dismissed under the Anti-SLAPP Act, the court "shall" award the petitioning party its costs and reasonable attorneys' fees. Tenn. Code Ann. § 20-17-107(a)(1). The mandatory fee-shifting provision is essential to the statute's fundamental deterrence objective, ensuring that the law "discourages similar future litigation," Hambidge at 16, "by imposing the litigation costs on the party seeking to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Ketchum v. Moses*, 17 P.3d 735, 741 (Cal. 2001).

# ATTORNEY SPOTLIGHT

**We took the opportunity to sit down with Neal & Harwell trial attorney, Mozianio "Trey" S. Reliford III, to learn more about his personal and professional experiences as a diverse attorney.**

Trey Reliford is a trial attorney at Neal & Harwell, PLC. His practice focuses on complex litigation. Before joining Neal & Harwell, Trey clerked for Chief Justice Jeffrey S. Bivins of the Tennessee Supreme Court and worked as an associate at Paul, Weiss, Rifkind, Warton & Garrison LLP in New York. Trey earned his JD from Stanford Law School.
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1. **Can you tell us about your background and how you made the decision to become a lawyer?** Well, my mother always said I had the "gift of gab" and I could argue non-stop . . . so I guess not much has changed. But more seriously, I made the decision to become a lawyer because I want(ed) to help people. When someone comes to a lawyer, they are often dealing with one of the most serious and consequential problems in their lives. I love helping people and strategizing to find resolutions to problems. The tactics, the stakes, the adrenaline of practicing and advocating is something I love. I am happy with the choice I made; I was meant to do this.

2. **How have you seen the legal industry shift in recent years with respect to diversity and inclusion?** I think the legal industry is still finding its footing honestly. When I graduated from Stanford Law in 2015, and was being recruited by Paul, Weiss and other firms, the big talking points were the numbers of diverse attorneys at a particular firm. Now, the conversation has appropriately shifted to the number of diverse attorneys in meaningful positions of power. I think that is spot on. What matters is how much trust and opportunity is given to diverse attorneys within organizations. Will the organization give them the ball and say, "go make plays" or will they keep them on the bench and trot them out for optics only? Speaking for myself at Neal & Harwell, I've been given the ball.

3. **Juneteenth is now recognized as a federal holiday. What does Juneteenth mean to you?** Juneteenth is a celebration of perseverance and triumph. As a black man descended from slaves, it's a day to reflect on the strength of my ancestors and their journey to freedom and the realization of greater equality in America – which, candidly – is not yet complete. Juneteenth more broadly should be a day of pride for each and every American, regardless of their race, religion, or creed. It's a day when the ideals America was founded upon were made more real. I am very happy that it is now recognized as a federal holiday – that's progress. And I'm very excited about the past and present traditions that have developed and are continuing to develop around the holiday.

4. **What areas of practice do you enjoy most and why?** I truly enjoy white collar and regulatory defense work, securities litigation, entertainment law litigation, and crisis management. Each practice area typically involves complex issues with many moving pieces and requires multi-faceted strategies. In addition, these matters are usually high-profile/high-stakes, and that gets the blood pumping. There is nothing like delivering for a client when the pressure is highest, and to do so, you must keep your cool, strategize, and execute. I love it!

5. **What is one thing about you that most people don't know?** I taught English in Japan for 2 years as a Japanese Exchange Teaching ("JET") Programme Assistant Language Teacher. I lived in Togane, Chiba, Japan, and while there, I taught myself conversational Japanese and did mixed martial arts at a local gym called, "Grow." I fought in two amateur bouts – lost both – hence why I fight with words now, haha. But really, I loved my time in Japan. I made some of my most fulfilling friendships in Japan, and call Japan my second home. I try to get back whenever I can.

6. **Best advice you received from a role model/mentor?** Take your career into your own hands and be proactive. My father told me that if I wanted to be successful, it was up to me to outwork and outperform my peers every time, regardless of previous successes. He was right.

# NH NEWS

## Callie K. Hinson, Mozianio "Trey" S. Reiford III, Nathan C. Sanders, and Marie T. Scott Named 2020 Attorneys for Justice by Tennessee Supreme Court

Neal & Harwell attorneys **Callie K. Hinson, Mozianio "Trey" S. Reliford III, Nathan C. Sanders,** and **Marie T. Scott** are recognized as 2020 Attorneys for Justice by the Tennessee Supreme Court. Each of these attorneys dedicated over 50 hours of pro bono work in 2019.

Neal & Harwell attorneys understand the importance of access to justice for all. Providing pro bono legal assistance to under-served individuals and non-profit organizations is a duty for the bar in general that helps to strengthen our community.


## Chambers USA 2021 Recognizes Neal & Harwell Attorneys and Litigation Practice

Neal & Harwell, PLC has been recognized for its General Commercial Litigation – Tennessee practice in the Chambers USA 2021 Guide of recommended lawyers and law firms. A source describes Neal & Harwell as "the go-to, preeminent firm for government investigations."

In addition, four members of Neal & Harwell are included in the Chambers USA 2021 Guide. **Aubrey B. Harwell, Jr.**, founding member, is cited for his General Commercial Litigation practice and "is considered an expert in commercial litigation. He has several decades' experience representing clients in a host of securities and product liability litigation as well." **James R. Kelley** is recognized in Bankruptcy/Restructuring and "draws on wider experience in commercial disputes and tax issues." **William T. Ramsey**, recognized for General Commercial Litigation and White-Collar Crime and Government Investigations, is noted for being "particularly experienced in representing artists and entertainers." He is described by his peers as "very smart and effective. Not only can he do the intellectual review but he can move the case through to trial." **James F. Sanders**, listed in General Commercial Litigation and White-Collar Crime and Government Investigations, is "well known for his significant expertise in white-collar crime litigation. He also has considerable experience handling high-stakes environmental and toxic tort proceedings."

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## ATTORNEYS AT LAW

**In February 1971, James F. Neal and Aubrey B. Harwell, Jr. announced the formation of Neal, Karzon & Harwell, predecessor to Neal & Harwell.**
**Neal & Harwell is proud to celebrate 50 years of serving our clients and community.**