IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
February 16, 2016 Session

JENNIFER L. AL-ATHARI, ET AL. v. LUIS A. GAMBOA, ET AL.

Appeal from the Circuit Court for Davidson County
No. 10C2024 Thomas W. Brothers, Judge

No. M2015-00278-COA-R3-CV – Filed August 5, 2016

In the second appeal of this case, Plaintiffs seek reversal of orders awarding damages to Defendants for Plaintiffs' prosecution of a frivolous appeal and denying motions for relief from orders which served as the basis of the first appeal. Finding no error, we affirm the judgments. We have also concluded that this appeal is frivolous and remand for the trial court to determine the amount of damages which Defendants are entitled to pursuant to Tenn. Code Ann. § 27-1-122.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and ANDY D. BENNETT, J., joined.

Jennifer L. Al-Athari and Haider G. Al-Athari, Antioch, Tennessee, Pro Se.

Steven D. Parman, Nashville, Tennessee, for the appellee, Morgan Southern, Inc.

MEMORANDUM OPINION[1]

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[1] Tenn. R. Ct. App. 10 states:

> This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

I. FACTUAL AND PROCEDURAL HISTORY

On June 2, 2010, Haider Al-Athari and Jennifer Al-Athari ("Plaintiffs" or "Mr. and Ms. Al-Athari") filed suit against Luis Gamboa and Morgan Southern Inc. ("Defendants" or "Morgan Southern") to recover for injuries allegedly sustained by Jennifer Al-Athari when the car she was driving was involved in an accident with a truck being driven by Luis Gamboa and owned by Morgan Southern; Haider Al-Athari claimed damages from loss of consortium. On January 14, 2013, the trial court granted four motions *in limine* filed by Defendants and on January 18, entered an order dismissing the case without prejudice for failure to prosecute. Mr. and Mrs. Al-Athari appealed, and we affirmed the judgment of the trial court on the motions *in limine* and the dismissal of the complaint on December 30, 2013; we also held the appeal was frivolous and remanded the case to determine the amount of damages owed to Morgan Southern pursuant to Tenn. Code Ann. § 27-1-122.

The trial court entered an order on April 16, 2014, awarding Morgan Southern judgment in the amount of $5,346.89. No appeal was taken from the judgment. On December 22, 2014, Plaintiffs filed a "Motion to Correct Errors," asking that the court "suspend the operation of the final judgment, reconsider the liability agreement with plaintiffs and Geico, and correct errors and mistakes"; on December 30 they filed a "Motion to Enforce the Liability Agreement Order." The trial court held a hearing on January 16, 2015, and denied both motions. Plaintiffs appeal.[2]

In this appeal, Plaintiffs raise ten issues for review, seven of which specifically relate to the dismissal of their complaint and the grant of Morgan Southern's motions *in limine*; these issues were resolved in the first appeal and are, therefore, *res judicata*. The issues we resolve are whether the trial court was impartial; whether the award of damages for the first appeal was appropriate; and whether the denial of their "Motion to Correct Errors" pursuant to Tenn. R. Civ. P. 60 and "Motion to Correct the Liability Agreement Order" was proper. Defendants ask this court to award damages for a frivolous appeal.

[2] Plaintiffs are non-lawyers who have represented themselves on the first appeal, on the proceedings on remand, and on this appeal. Their brief does not comply with Tenn. R. App. P. 27 and the arguments in their brief are muddled and difficult to comprehend. As we resolve this appeal, we are "mindful of the boundary between fairness to a *pro se* litigant and unfairness to the *pro se* litigant's adversary" and, accordingly, afford Plaintiffs leeway in considering their arguments. *MBNA Am. Bank, N.A. v. Baker*, No. M2004-02239-COA-R3-CV, 2007 WL 3443600, at *3 (Tenn. Ct. App. Nov. 15, 2007).

II. ANALYSIS

A. Motion to Correct Errors

Plaintiffs filed the Motion to Correct Errors on December 22, 2014, citing Tenn. R. Civ. P. 60.02, and stating that Defendants "deceived the court and fraudulently filed motions in limine(s) in 2012 to dismiss the case." Plaintiffs asked the trial court to "correct the mistakes, fraud, deception and other misconduct by the defendants" and "to suspend the operation of the final judgment, reconsider the liability agreement with plaintiffs and Geico, and correct errors and mistakes." Plaintiffs did not specify the ground upon which relief was sought in the motion.

Tenn. R. Civ. P. 60.02 provides:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. *The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. . . .*

(emphasis added). Rule 60 of the Tennessee Rules of Civil Procedure allows the trial court to relieve a party from a final judgment "upon such terms as are just" for a limited number of reasons. A motion for relief under Rule 60.02 addresses itself to the sound discretion of the trial court, and the scope of review on appeal is whether the trial court abused that discretion. *Toney v. Mueller Co.*, 810 S.W.2d 145, 147 (Tenn. 1991)(citing *Travis v. City of Murfreesboro,* 686 S.W.2d 68, 70 (Tenn. 1985).

The motion sought relief from the orders granting the motions *in limine* and dismissing the complaint entered on January 13 and 18, 2013, respectively; these were the subject of the first appeal.[3] A motion seeking relief under Tenn. R. Civ. P. 60.02(1) or (2)

[3] After their brief in chief was filed, Plaintiffs filed a document styled "Notes To Be Attached To Plaintiffs' Brief" in which they state, "The reward order after the first appeal were [sic] filed on April 14, 2014. Plaintiffs' motion under rule 60.02 was filed On Dec/22/2014." From this statement, it appears that Plaintiffs

must be filed within one year of the date of entry of the order. To the extent Plaintiffs' motion is construed to seek relief under those grounds, therefore, the motion is untimely. The motion does not assert that the judgment granting the motions *in limine* and dismissing the complaint were void, as specified in Rule 60.02(3) and (4); consequently, those grounds are not available for relief. With respect to Rule 60.02(5), giving the motion a most generous reading, the motion does not allege any ground, other than mistake, inadvertence, misrepresentation or misconduct by Defendants, as those terms are used with respect to grounds (1) and (2), in support of the requested relief. Accordingly, we affirm the denial of the motion to correct errors.

B. Motion to Correct the Liability Agreement

The pertinent portion of this motion reads as follows:

> Pursuant to TCA 47-50-112 (a & c), TCA 47-50-103, TCA 47-50-104, and TCA 29-5-302 Plaintiffs Jennifer L. Al-Athari and Haider G. Al-Athari are respectfully filing this motion to enforce the liability agreement order. The agreement was signed and filed in this case by all parties. Morgan Southern and Liberty Mutual provided liability insurance in this accident by the agreement order to dismiss Geico.
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> On Jan/14/2013 This Honorable Court enforced the order of June/18/2012 because plaintiffs' attorney signed the order to take the depositions by Dec/01/2012. Plaintiffs failed to meet the deadlines in this order due to counsel withdrawal. The order was enforced This Honorable Court, and the case was dismissed on Jan/14/2013.

Mr. and Mrs. Al-Athari make repeated reference to a "liability agreement" they signed with Defendants and Geico. We have found no such liability agreement in the record. In their brief, Defendants state that the term is an apparent reference to the "Agreed Order of Dismissal as to Unnamed Defendant GEICO General Insurance Company Only," entered on November 10, 2010. In the absence of any other explanation, and in light of Plaintiffs' statement that the liability agreement "dismiss[ed] Geico," we assume the same. The order is an agreed order signed by the parties[4] allowing GEICO to be dismissed from the case on the basis that "Defendants have applicable liability insurance limits which are equal to or greater than the uninsured motorist coverage limits of GEICO"; the order is not an admission of liability by any party to the case. Accordingly, any issue asking this court to enforce or

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believe that the one year limit for seeking relief under Tenn. Rule Civ. P. 60.02(1) and (2) began on April 14, 2014.

[4] Plaintiffs' then-counsel signed the order on their behalf.

reconsider the liability agreement or reverse the dismissal of the complaint on the basis of this order is without merit.

C. Impartiality of the Trial Judge

Plaintiffs contend that they were subjected to unfair treatment by the trial judge. Specifically, they argue that the trial judge ignored the law, granted frivolous motions, denied lawful motions, and improperly granted costs and attorney's fees because, as *pro se* litigants, they are exempt from the "loser pay statute." However, at no point in their brief do Mr. and Mrs. Al-Athari cite to evidence, as required by Tenn. R. App. P. 27, of any alleged unfair treatment they were subjected to or any evidence that the denial or grant of any motions was improper on the part of the trial court. Without more than the unsupported statements set forth in their brief, this contention is without merit.

D. Frivolous Appeal

Mr. and Mrs. Al-Athari contend that this Court improperly granted Morgan Southern damages for a frivolous appeal as set forth in Tenn. Code Ann. § 27-1-122. The Al-Atharis base their contention on the grounds that *pro se* litigants are exempt from the "loser pay statute" and cite to Tenn. Code Ann. § 20-12-119(c)(5)(d). However, the exemption does not apply to Plaintiffs. Section (5)(d) applies to pro se litigants who are exempt from paying costs where a trial court grants a motion to dismiss pursuant to Tenn. R. Civ. P. 12.02(6), not for the filing of a frivolous appeal as set forth in Tenn. Code Ann. § 27-1-122.

Mr. and Mrs. Al-Athari also assert a number of additional reasons why this court should not have awarded damages under Tenn. Code Ann. § 27-1-122. This was a matter addressed in the first appeal, as to which no rehearing or further appeal was sought; we decline to revisit that ruling.

As in the first appeal, Morgan Southern asks this court to award damages for a frivolous appeal, pursuant to Tenn. Code Ann. § 27-1-122. In their brief, Morgan Southern states as follows:

> [T]he [Al-Atharis] have presented no citations to the record, raised no discernable legal issues, and cited no supporting, relevant legal authority that would support a claim that their Rule 60 motion should have been granted. Moreover, this appeal is a second attempt to appeal the dismissal *without prejudice* of a case in which they did not comply with the scheduling order, had no competent medical proof, and literally stated that they did not wish to proceed.

We agree that such an award is appropriate on the record presented. A frivolous appeal is one that is devoid of merit or has no reasonable chance of success. *Wakefield v. Longmire*, 54 S.W.3d 300, 304 (Tenn. Ct. App. 2001). In this case, Plaintiffs have appealed the denial of two orders which sought relief as to matters that were or could have been sought in the first appeal, and which had no merit.

III. CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed; we remand this case for the court to determine the amount of damages which Morgan Southern is entitled to, pursuant to Tenn. Code Ann. § 27-1-122, for the frivolous appeal.

RICHARD H. DINKINS, JUDGE