IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
January 18, 2023 Session

JOHN JAHEN v. AER EXPRESS, INC. ET AL.

Appeal from the Chancery Court for Hamilton County
No. 12-0445 Pamela A. Fleenor, Chancellor

No. E2022-00344-COA-R3-CV

An injured truck driver brought suit against his alleged employer seeking to recover worker's compensation benefits. The alleged employer did not appear at trial, and the trial court entered judgment in favor of the plaintiff. Eight months later, the alleged employer moved the trial court to set aside the judgment pursuant to Tennessee Rule of Civil Procedure 60.02, on the grounds that it did not receive notice of the trial date. The trial court denied the motion, finding that the alleged employer failed to notify the court and the plaintiff of its change of address and that plaintiff would be severely prejudiced if the court set aside the judgment. Discerning no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which JOHN W. MCCLARTY and THOMAS R. FRIERSON, II, JJ., joined.

Buddy B. Pressley, Jr., and Terrance L. Jones, Chattanooga, Tennessee, for the appellant, AER Express, Inc.

Ronald J. Berke, Chattanooga, Tennessee, for the appellee, April Jahen, Administratrix *ad litem* for the Estate of John Jahen.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

In June 2012, John Jahen ("Plaintiff") sued AER Express, Inc. ("AER") and Kiko Transport, Inc. ("Kiko") (together, "Defendants") in the Hamilton County Chancery Court

(the "trial court"), seeking benefits available to him under Tennessee's worker's compensation law.[1] Plaintiff alleged that in December 2011, he was injured in an accident arising out of and in the course of his employment with Defendants as a truck driver and that Defendants had not provided him with the benefits to which he was statutorily entitled.

AER promptly moved for a partial summary judgment seeking to be dismissed from the lawsuit, asserting that Plaintiff had ceased working for AER "in the spring of 2011" and that, therefore, Plaintiff had no worker's compensation claim against it. The motion included the affidavit of AER's president, Mirsad Mujkanovic, who stated that Plaintiff quit working for AER in the spring of 2011 and did not return to work for AER in any capacity thereafter. At a later date, Defendants submitted the affidavit of Kiko's president, Ruzmira Mujkanovic, who admitted that Plaintiff was working for Kiko on the date of the accident. Plaintiff responded by asking the court to deny the motion or, in the alternative, to continue the hearing until after Defendants provided overdue responses to discovery requests from Plaintiff, especially to requests related to Plaintiff's allegation that AER and Kiko are essentially the same company. This response attached the affidavit of Plaintiff, who stated that in December 2011, he was paid for driving a truck for AER.

On November 14, 2012, the trial court entered an order denying AER's motion for a partial summary judgment, concluding that "because the parties dispute the characterization of AER and Kiko as interchangeable sister corporations, and a determination of this issue requires a fact intensive inquiry, summary judgment as to this issue must be denied pursuant to T.C.A. § 20-16-101."[2] The record reflects no further action by the parties for more than four years.

In April 2017, AER filed an answer to the complaint. Concurrently, its attorney filed a motion to withdraw as counsel of record and to allow AER sixty days to obtain new

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[1] In the complaint, Plaintiff alleged that AER and Kiko "are operated interchangeably, with the same address, equipment[,] and employees." Kiko is not a party to this appeal.

[2] Section 20-16-101 provides:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
>
> (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
>
> (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

Tenn. Code Ann. § 20-16-101 (2021).

counsel.[3] In January 2018, the trial court entered an order substituting counsel of record for both AER and Kiko. The certificate of service reflects that the order was served via certified mail to Mr. Mujkanovic, as president of AER, and to Ms. Mujkanovic, as president of Kiko, at 1028 South Seminole Drive, East Ridge, Tennessee 37412.[4] In August 2018, Defendants' new counsel also filed a motion to withdraw as counsel of record for both entities, which was also mailed to the South Seminole Drive address. The trial court later entered an order allowing counsel to withdraw and giving Defendants thirty days to retain new counsel; the order was sent via certified mail to the South Seminole Drive address. Another year and a half transpired without further action until March 2020, when Plaintiff filed a list of witnesses and exhibits for trial. The list was served upon Defendants by mail sent to the South Seminole Drive address.

The trial was held on October 29, 2020. Defendants did not appear, but the trial court heard Plaintiff's proof. On November 10, 2020, the trial court entered judgment in favor of Plaintiff, awarding him $580 per week beginning on December 30, 2011, and continuing until he "reaches the Social Security retirement age"; reimbursement from Defendants for past medical bills related to his work injuries; and future medical bills related to his work injuries, which would be covered by Defendants.

On July 28, 2021,[5] Defendants moved to set aside the judgment under Rule 60.02 of the Tennessee Rules of Civil Procedure, asserting that they did not receive notice of the trial date. They stated that "[s]ometime in late 2018, the Defendants moved and no longer lived at the South Seminole address" and that they "no longer after 2019 received any mail forwarding." Appellee opposed the motion, arguing that Plaintiff had mailed a total of sixteen case-related documents to the South Seminole Drive address, which were never returned as undeliverable for any reason; that Defendants had a duty to provide a new address if they moved; and that Defendants did not provide Plaintiff, his attorney, the Clerk and Master, or the trial court with notice that they were no longer located at the address they had used throughout the proceedings in their case. Moreover, Appellee asserted that she would be prejudiced as John Jahen had passed away and would be unable to testify.

At the hearing of the motion on January 22, 2022, Ms. Mujkanovic testified that she is an officer of AER; that AER did not receive notice of the October 2020 trial date; and that she did not learn about the judgment against AER until July 2021 when she retained new counsel. Her testimony was equivocal as to the date AER moved from the South

[3] Counsel for Kiko had previously filed a motion to withdraw on March 31, 2017.

[4] This was the corporate address both AER and Kiko filed with the Tennessee Secretary of State until it was changed on June 17, 2019.

[5] John Jahen passed away on July 14, 2021, as evidenced by a copy of his death certificate contained in the record. Upon motion of the appellee, this Court substituted April Jahen, administratrix *ad litem* of the Estate of John Jahen ("Appellee"), as a party to this appeal.

Seminole Drive address, ranging from April, September, or October of 2018 to sometime in 2017. Ms. Mujkanovic acknowledged that mail was being forwarded to her new address for up to one year after the move and that she did not notify the trial court or Plaintiff's attorney of the change of address. She further stated that she did not check on the case from 2016 until July 2021.

The trial court denied Defendants' motion to set aside the judgment, ruling from the bench. A written order was filed on February 21, 2022, incorporating the court's oral ruling explaining its reasoning. The trial court found that under Tennessee law, "a change of address is insufficient to excuse the defendant's failure to attend trial"; that Defendants did not establish a meritorious defense to their failure to appear for trial; and that the amount of prejudice which may result from setting aside the judgment is clear since Plaintiff is deceased. AER timely appealed.

ISSUES PRESENTED

AER asks this Court to review whether the trial court erred in denying its motion to set aside the judgment in favor of Jahen. Appellee, for her part, raises as a threshold issue whether this Court can consider the appeal when it "does not meet the requirements of Tennessee Court of Appeals Rules and/or the Tennessee Rules of Appellate Procedure."

STANDARD OF REVIEW

Our Supreme Court has set forth the standard of review applicable to an order denying a motion to set aside a judgment:

> Tennessee law is clear that the disposition of motions under Rule 60.02 is best left to the discretion of the trial judge. *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993); *Banks v. Dement Constr. Co.*, 817 S.W.2d 16, 18 (Tenn. 1991); *McCracken v. Brentwood United Methodist Church*, 958 S.W.2d 792, 795 (Tenn. Ct. App. 1997). The standard of review on appeal is whether the trial court abused its discretion in granting or denying relief. This deferential standard "reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives," and thus "envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal." *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).
>
> A trial court abuses its discretion when it causes an injustice by applying an incorrect legal standard, reaching an illogical decision, or by resolving the case "on a clearly erroneous assessment of the evidence." *Id.* The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Eldridge v. Eldridge*, 42

> S.W.3d 82, 85 (Tenn. 2001). Indeed, when reviewing a discretionary decision by the trial court, the "appellate courts should begin with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision." *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999); *see also Keisling v. Keisling*, 196 S.W.3d 703, 726 (Tenn. Ct. App. 2005).

Henderson v. SAIA, Inc., 318 S.W.3d 328, 335 (Tenn. 2010).

ANALYSIS

Compliance with Appellate Rules

As a threshold issue, we examine whether AER waived its issue presented on appeal because its appellate brief fails to comply with the Rules of this Court and the Tennessee Rules of Appellate Procedure. Specifically, Appellee asserts that (1) AER's framing of the issue is too broad to comply with Rule 27(a)(4)[6] of the Tennessee Rule of Appellate Procedure; and (2) AER did not make proper references to the record in the statement of facts and argument sections of its brief, as required by Rules 27(a)(6) and 27(a)(7)(A) of the Tennessee Rules of Appellate Procedure, respectively.[7]

Having reviewed AER's brief, we agree with Appellee that the brief falls short of meeting the requirements of Rule 27, which hinders our review of issues presented. AER's counsel should take note that such deficiencies often preclude altogether this Court's consideration of otherwise meritorious issues. However, considering the straightforward factual scenario presented as the basis for AER's argument, we have determined that the brief is not so deficient as to warrant waiver of the sole issue presented for review. *See Total Garage Store, LLC v. Moody*, No. M2019-01342-COA-R3-CV, 2020 WL 6892012, at *6 (Tenn. Ct. App. Nov. 24, 2020) (acknowledging that a brief was "not a model for record citation" but concluding that it was "not so deficient throughout as to justify the heavy penalty of dismissal"); *Boesch v. Holeman*, 621 S.W.3d 60, 70 (Tenn. Ct. App. 2020) (recognizing that a brief contained no statement of the facts but concluding that it was not so deficient as to require waiver of all issues and deciding to consider the issues presented).

[6] This rule requires an appellant's brief to contain "[a] statement of the issues presented for review." Tenn. R. App. P. 27(a)(4). Appellee essentially argues that issues that are too general or broad in scope do not comply with Rule 27(a)(4).

[7] Rule 27(a)(6) requires an appellant's brief to contain "[a] statement of facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record." Tenn. R. App. P. 27(a)(6). Rule 27(a)(7)(A) requires that the argument section of the brief state "the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on[.]" Tenn. R. App. P. 27(a)(7)(A).

Accordingly, we exercise our discretion and turn to examine AER's challenge to the trial court's denial of its motion to set aside the judgment in favor of Jahen. *See Diggs v. Lasalle Nat. Bank Ass'n*, 387 S.W.3d 559, 563-64 (Tenn. Ct. App. 2012) ("Although there are profound deficiencies in Mr. Diggs' brief, we discern that there is only one dispositive issue in this case: whether the trial court erred in dismissing Mr. Diggs' complaints without prejudice based on his failure to plead fraud with particularity. Accordingly, under our authority under Rule 2 of the Tennessee Rules of Appellate Procedure, we proceed to consider the substance of this appeal.").

Denial of Rule 60.02 Motion

About seven and a half months after the trial court entered a judgment in favor of Jahen, AER resurfaced and moved the trial court to set aside the judgment pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. Rule 60.02 provides, in part:

> 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.

Tenn. R. Civ. P. 60.02. Although AER did not reference a specific subsection of Rule 60.02, we have determined that the motion's language makes clear that subsection (1) (mistake, inadvertence, surprise or excusable neglect) was the only ground for relief raised. In the motion—as well as on its brief before this Court—AER's sole argument is that it did not appear at trial on October 29, 2020, because it did not receive notice of the trial date. Specifically, AER asserts that it moved its corporate office from the South Seminole Drive address "Sometime in Late 2018" and no longer received mail forwarded from that address after 2019. This circumstance by itself, AER contends, is sufficient for this Court to conclude that the trial court abused its discretion by denying AER's Rule 60.02 motion to set aside the judgment. We disagree.

Our Supreme Court has established the test a trial court must employ in determining whether relief is appropriate under Rule 60.02(1):

> [W]hen a party seeks relief from a default judgment due to "excusable neglect," whether pursuant to Rule 54.02 (for interlocutory judgments), Rule 59.04 (for final judgments within thirty days of entry), or Rule 60.02 (for final judgments more than thirty days after entry), a reviewing court

> must first determine whether the conduct precipitating the default was willful. If the court finds that the defaulting party has acted willfully, the judgment cannot be set aside on "excusable neglect" grounds, and the court need not consider the other factors. If the conduct was not willful, however, then the court must consider whether the defaulting party has a meritorious defense and whether the non-defaulting party would be prejudiced by the granting of relief. The court may also consider any other factor that it deems relevant.

Discover Bank v. Morgan, 363 S.W.3d 479, 493-94 (Tenn. 2012). In other words, a trial court first determines (1) whether the conduct resulting in the default was willful; if not, then the court must examine (2) whether the defendant has a meritorious defense; and (3) whether the non-defaulting party would be prejudiced if relief were granted. *See Henry v. Goins*, 104 S.W.3d 475, 481 (Tenn. 2003) (citing *Tenn. Dep't of Human Servs. v. Barbee*, 689 S.W.2d 863, 866 (Tenn. 1985)); *Reynolds v. Battles*, 108 S.W.3d 249, 251 (Tenn. Ct. App. 2003) (citing *Barbee*, 689 S.W.2d at 866). The party seeking the relief available under Rule 60.02 bears the burden of proof. *Henry*, 104 S.W.3d at 482 (citing *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 624 (Tenn. 2000); *Banks v. Dement Constr. Co.*, 817 S.W.2d 16, 18 (Tenn. 1991)).

The trial court discussed in detail its findings underpinning the denial of AER's motion to set aside the judgment in favor of Jahen. At the outset, the trial court identified this Court's opinion in *Reynolds v. Battles* as the authority providing the three criteria governing whether a Rule 60.02(1) motion to set aside should be granted. The trial court then applied each criterion to the facts.

First, as to willful default, the court listed five court filings that had been mailed without issue to Defendants at the South Seminole Drive address prior to the October 29, 2020 trial: a motion to withdraw filed by AER's first counsel of record, mailed in April 2017; an agreed order allowing substitution of counsel, mailed in January 2018; a motion to withdraw filed by AER's second counsel of record, mailed in August 2018; an order allowing withdrawal of AER's second counsel of record, mailed in September 2018; and the order setting the trial date, mailed in July 2020. Addressing squarely Ms. Mujkanovic's testimony about leaving the South Seminole Drive address in "late 2018," the trial court stated: "The Court does not find the witness credible because she testified that [the South Seminole Drive address] was only her personal residence, but the Secretary of State filing shows it as the business address [of AER] as well." Citing to this Court's opinions in *Reynolds v. Battles* and in *Schrader v. Schrader*, the trial court then explained that under Tennessee law, "a change of address is insufficient to excuse the defendant's failure to attend trial. *See Reynolds*, 108 S.W.3d at 251 ("If a litigant proceeding *pro se* relocates during the course of litigation, he is encumbered with the responsibility of notifying the clerk of the court of his new address. Without such notification, it is virtually impossible for the clerk to assure that subsequent notices will be received."); *Schrader v. Schrader*,

No. E2005-02641-COA-R3CV, 2007 WL 27118, at *6 (Tenn. Ct. App. Jan. 4, 2007) ("Husband, who initiated this lawsuit, had an affirmative obligation to keep the trial court and, when he had one, his attorney informed of his current whereabouts. Husband is the author of his own misfortune and cannot be heard to complain that the trial court erred when it proceeded in his absence."). The trial court concluded that it was AER's responsibility "to advise the Court of the new address or to get a new attorney,[8] neither of which was done." Accordingly, the court determined that the first criterion—whether the conduct causing the default was willful—did not favor setting aside the judgment. In light of the foregoing, the trial court also determined that AER did not meet the second criterion—a meritorious defense. As to the third and last criterion, the court concluded that

> the amount of prejudice which may result to the nondefaulting party, it's clear that the plaintiff has since passed away. He is not going to be able to come to the stand and put on any kind of testimony to contradict what the defendants are now finally saying -- now they finally come into court, now they emerge and assert a defense which they didn't for over a thousand days. And there's no one on the other side; the plaintiff is not alive to state his side. So the prejudice to the plaintiff is the most there could ever be in any case.

Having carefully reviewed the record before us, we find no basis for overturning the trial court's decision. The trial court applied the correct legal framework for determining whether relief under Rule 60.02(1) was warranted and reached the logical conclusion that AER did not meet its burden to set aside the judgment, as supported by the evidence presented by the parties. Put plainly, AER is, as the husband in *Schrader*, "the author of [its] own misfortune and cannot be heard to complain that the trial court erred when it proceeded in [its] absence." *Schrader*, 2007 WL 27118, at *6. Moreover, Plaintiff's passing after judgment was entered creates insurmountable prejudice against Appellee and weighs heavily against setting aside the judgment. The trial court did not abuse its discretion in denying AER's motion.

CONCLUSION

We affirm the ruling of the Hamilton County Chancery Court denying AER's motion to set aside the judgment entered on November 10, 2020. Costs of this appeal are taxed to the appellant, AER Express, Inc., for which execution may issue if necessary.

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KRISTI M. DAVIS, JUDGE

[8] The trial court's order mailed to Defendants in September 2018 stated: "[Defendants] shall each have thirty (30) days from the entry of this Order within which to retain new counsel. After this thirty (30) day period, the case will proceed to a resolution whether or not the defendants have retained new counsel."