IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 9, 2009 Session

RICK PETERS, ET AL. v. RAY LAMB, M.D., ET AL.

Appeal from the Law Court for Johnson City
No. 25885 Thomas J. Seeley, Jr., Judge

No. E2008-00997-COA-R3-CV - FILED MAY 27, 2009

This is a medical malpractice action by Rick Peters and Rob Watts ("Plaintiffs"), the surviving spouse and child respectively of Elizabeth Peters, deceased, filed against Dr. Ray Lamb and his practice group, McLeod Cancer and Blood Center of East Tennessee (collectively "Defendants"). Mrs. Peters unexpectedly died shortly after Defendants began treating her for her recently-diagnosed anal cancer. Pre-trial, Plaintiffs lodged a proposed motion and order of nonsuit by placing it in the trial judge's "in-box." By the time the judge discovered the document, a motion for summary judgment had been filed by Defendants and was pending. The trial court did not sign the order of nonsuit. Following a summary judgment hearing seven months later, the trial court entered an order denying the motion for nonsuit and granting Defendants summary judgment. Plaintiffs appeal. The sole question Plaintiffs raise is whether the trial court erred in ruling that the lodging of the motion and order for nonsuit was ineffectual to dismiss their action without prejudice. Defendants claim this appeal is frivolous and seek an award of damages pursuant to the provisions of Tenn. Code Ann. § 27-1-122 (2000). We conclude that the appeal is frivolous because the issue Plaintiffs raised had no reasonable chance of success. We affirm the judgment of the trial court and remand for a determination as to the damages due Defendants.

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

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, JR., P.J., and D. MICHAEL SWINEY, J., joined.

Bob McD. Green, Johnson City, Tennessee, for the appellants, Rick Peters and Rob Watts.

Charles T. Herndon IV and Elizabeth M. Hutton, Johnson City, Tennessee, for the appellees, Ray Lamb, M.D., and McLeod Cancer and Blood Center of East Tennessee.

OPINION

I.

Plaintiffs filed their complaint on February 27, 2007.[1] Defendants filed their answer on March 30, 2007.[2] On April 27, 2007, Defendants filed both a concise statement pursuant to Tenn. R. Civ. P. 56, and their motion for summary judgment. On January 7, 2008, the trial court entered an order granting summary judgment to Defendants and dismissing Plaintiffs' complaint. In its order, the trial court stated the following:

> Plaintiffs' attorney placed a combined Motion and Order of Voluntary Non-suit in the undersigned's inbox/outbox in the Law Court Clerk's office for Johnson City on either April 25 or 26, 2007. The combined Motion and Order had an undated, unsigned certificate of service to [Defendants'] attorney.
>
> Defendants filed a Motion for Summary Judgment on April 27, 2007, a copy of which is reflected to have been served upon [Plaintiffs'] counsel by mail on April 25, 2007.
>
> The undersigned's home office at that time was in Unicoi County, Tennessee, which is where most orders and other legal papers were generally mailed by attorneys since this district is comprised of four counties and court is held in five different cities therein.
>
> The undersigned was in Johnson City Law Court Clerk's office sometime after April 27, 2007, and found the combined Motion and Order of Non-suit in my inbox. The Court checked the file and found that [Defendants] had filed a Motion for Summary Judgment on April 27, 2007. The Court upon finding that Motion, did not sign the proposed Motion and Order of Non-suit, which had not been filed or served upon [Defendants], since the Motion for Summary Judgment was pending.
>
> Defendants served interrogatories on [Plaintiffs] on August 10, 2007. No responses were filed by [Plaintiffs].
>
> Nothing more transpired in the case until November 8, 2007, when [Defendants] filed and mailed to [Plaintiffs] a Notice of Hearing for November 26, 2007, on the Motion for Summary Judgment.
>
> Without any further actions, motions or contact with the Court by [Plaintiffs] since April 25 or 26, 2007, the matter came on for hearing on November 26, 2007. The Court granted [Defendants'] Motion for

[1] In addition to Defendants, Plaintiffs named several other defendants, all of whom were duly nonsuited.

[2] Defendants generally denied that their care and treatment of Mrs. Peters proximately caused her death.

> Summary Judgment after denying [Plaintiffs'] Motion for a Non-suit.
>
> The Court's reasoning in denying the voluntary non-suit was [Plaintiffs'] failure to comply with T.R.Civ.P. 41.01 and T.R.Civ.P. 5.01. Rule 41.01 procedurally requires plaintiffs who wish to voluntarily non-suit their action to file a written notice of dismissal before trial and to serve a copy of the notice upon all parties. Rule 5.01 requires a copy of any motion to be served upon the other parties. Plaintiffs failed to comply with these rules and took no action in regard to their Motion and Order on Non-suit for seven months after placing it in the undersigned's inbox and after [Defendants'] Motion for Summary Judgment [was filed]. Plaintiff's failure to follow proper procedure and subsequent inaction for seven months were factors considered by the Court in denying [Plaintiffs'] motion to take a voluntary non-suit. Plaintiffs had failed to respond to [Defendant's] Motion for Summary Judgment and affidavit in support thereof and resulted in the Court's granting the motion.

(Capitalization and underlining in original; paragraph numbering omitted). The trial court denied Plaintiffs' subsequent motion to alter or amend the judgment. Plaintiffs timely appealed.

II.

Taken verbatim from Plaintiffs' brief, the question before us is as follows:

> Did the Trial Court err in ruling that the lodging of a Motion and Order of Dismissal *without prejudice* with the Clerk of the Court did not constitute adequate notice to the Court or to Counsel and was not effective in dismissing the subject case *without prejudice*?

(Emphasis in original). Defendants raise, as an additional issue, whether this appeal is frivolous under the applicable statute.

III.

Discretion denotes the absence of a hard and fast rule. When invoked as a guide for judicial action, it requires that the trial court view the factual circumstances in light of the relevant legal principles and exercise considered discretion before reaching a conclusion. Discretion should not be arbitrarily exercised. The applicable facts and law must be given due consideration. ***Langnes v. Green***, 282 U.S. 531, 541, 51 S. Ct. 243, 247 (1931). "Discretionary decisions are not entirely immune from appellate scrutiny but are subjected to less rigorous appellate scrutiny." ***Overstreet v. Shoney's, Inc.***, 4 S.W.3d. 694, 708 (Tenn. Ct. App. 1999). An appellate court should not reverse for "abuse of discretion" a discretionary judgment of a trial court unless it affirmatively appears that the trial court's decision was against logic or reasoning, and caused an injustice or injury to the party

complaining. ***Douglas v. Estate of Robertson,*** 876 S.W.2d 95, 97 (Tenn. 1994); ***Foster v. Amcon Intern.***, 621 S.W.2d 142, 145 (Tenn. 1981).

IV.

Plaintiffs first contend that they effectively gave notice of their intention to take a voluntary nonsuit by lodging the motion in the trial judge's inbox. Plaintiffs reason, without any supporting authority, that "the lodging of the Motion and Order was the equivalent of notice" and should have supported a voluntary dismissal as of right. In the alternative, Plaintiffs contend that the trial court abused its discretion in failing to permit a voluntary dismissal notwithstanding Defendants' pending motion for summary judgment. In summary, Plaintiffs conclude: "The Motion and Order filed by [Plaintiffs] evidenced a clear intent to take a voluntary dismissal without prejudice as a matter of right, at a time when this should unquestionably have been granted."

Tennessee Rule of Civil Procedure 41.01 governs voluntary dismissals and provides in relevant part as follows:

> *[E]xcept when a motion for summary judgment made by an adverse party is pending*, the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice *by filing a written notice of dismissal* at any time before the trial of a cause *and serving a copy of the notice upon all parties*. . . .

(Emphasis added).

Tenn. R. Civ. P. 5.05 provides that "all papers . . . required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter." Tenn. R. Civ. P. 5.06 provides that filing papers with the court is accomplished "by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event he or she shall note thereon the filing date and forthwith transmit them to the office of the clerk." Tenn. R. Civ. P. 5.06. The information before us does not indicate that Plaintiffs complied with either of these filing methods. The trial court observed that it was not its practice to receive papers deposited by attorneys in its inbox at the Johnson City Law Court because his "home office" was located in Unicoi County.

The issue presented is easily resolved. Plaintiffs, despite their apparent intention to take a voluntary nonsuit against Defendants, failed to comply with the filing and service requirements for doing so. Plaintiffs present no authority to support their position that lodging the motion and order in the manner described was the "equivalent" of filing as required under Rule 41.01, and we find none. The Supreme Court has observed that "[a] paper is said to be filed, when it is delivered to the proper officer, and by him received to be kept on file. . . ." ***Fanning v. Fly***, 42 Tenn. 486, 488 (Tenn. 1865). In an analogous context, we look to the commencement of a civil action under Tenn. R. Civ. P. 3. The rule provides that "all civil actions are commenced by filing a complaint with the clerk of the court." A complaint is "deemed filed when handed to a person in the Clerk's office to receive it. . . ." ***Rush v. Rush***, 97 Tenn. 279, 283, 37 S.W. 13, 14 (1896). Similarly, this court has

held that a notice of appeal is "filed" when it is timely placed in the possession of the clerk of the appropriate court. *See* ***Fry v. Cermola***, No. 03A01-9507-JV-00246, 1996 WL 30903, at *3 (Tenn. Ct. App. Jan. 29, 1996), *no perm. app. filed*. In the present case, Plaintiffs attempt to establish filing when they assert that the motion and order "was lodged with the Clerk of the Court, and placed in [the trial judge's] inbox." This assertion is unsupported by the record. The record simply does not document precisely how the motion and order came to be in the trial judge's inbox. The trial court acknowledged only that it was there when he returned to his office on April 27th.

In fact, not only did Plaintiffs fail to file the motion and order for nonsuit before Defendants filed their motion for summary judgment, but it appears that these documents, in fact, had not even been filed as of the date of oral argument. The motion and order appear in the record only as an exhibit to the trial court's order dismissing the complaint and granting summary judgment to Defendants. The motion and order itself is undated and it bears a certificate of service that is unsigned and undated. In view of these procedural deficiencies, Plaintiffs were not entitled to a voluntary dismissal as a matter of right. Moreover, the trial court expressly considered both "Plaintiffs' failure to follow proper procedure and subsequent inaction for seven months" in exercising its discretion to deny a voluntary nonsuit after the Defendants had sought summary judgment. The evidence does not preponderate against the trial court's findings. We therefore conclude that the trial court did not abuse its discretion in declining to grant Plaintiffs a voluntary nonsuit.

V.

Lastly, Defendants contend that they should be awarded damages for Plaintiffs' filing of a frivolous appeal. *See* Tenn. Code Ann. § 27-1-122 (providing for damages when it appears to the reviewing court that an appeal "was frivolous or taken solely for delay."). Defendants point to Plaintiffs' failure to ever file or serve on Defendants a notice or motion for voluntary nonsuit. Defendants conclude that, in the absence of such a proper filing, there is no chance that this appeal could succeed and its pursuit is nothing more than a delaying tactic.

The Supreme Court has stated that a "frivolous" appeal is "recognizable on its face as devoid of merit." ***Davis v. Gulf Ins. Group***, 546 S.W.2d 583, 586 (Tenn. 1977). "It presents no justiciable questions – neither debatable questions of law nor findings of fact not clearly supported." ***Id***. Considering these criteria, we agree with Defendants that the appeal in the present case had no reasonable chance of success. With nothing to support their argument, Plaintiffs challenged a discretionary ruling of the trial court that was clearly supported by the court's findings of fact and the record supporting those findings. Accordingly, we hold that the appeal was frivolous and that Defendants are entitled to damages. This matter shall be remanded to the trial court for a determination as to the damages due pursuant to the provisions of Tenn. Code Ann. § 27-1-122.

VI.

The judgment of the trial court is affirmed. This cause is remanded, pursuant to applicable law, to the trial court for a determination as to the damages due pursuant to the provisions of Tenn.

Code Ann. § 27-1-122 and for collection of costs assessed below. Costs on appeal are taxed to the appellants, Rick Peters and Rob Watts.

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CHARLES D. SUSANO, JR., JUDGE