

**IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE**

FILED February 28, 2000 Cecil Crowson, Jr. Appellate Court Clerk
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ELIZABETH D. LEBRUN, M.D.,)	No. E1999-01523-
)	C0A-R3-CV
Appellant,)	
)	
v.)	Appeal As Of Right From
)	BLOUNT COUNTY CHANCERY COURT
DALE B. ELMORE, M.D.,)	
APPALACHIAN CENTER FOR)	
WOMEN, P.C., MARYVILLE)	
MEDICAL BUILDING PARTNERSHIP,)	
and LOYCE HOLDEN ELMORE,)	
)	
Appellees.)	TELFORD E. FORGETY, JR.,
)	CHANCELLOR

David A. Burkhalter, Knoxville, Tennessee for the Appellant, Elizabeth D. LeBrun, M.D.

Joe Costner and David R. Duggan, Maryville, Tennessee for Appellees, Dale B. Elmore, M.D., Appalachian Center for Women, P.C., Maryville Medical Building Partnership, and Loyce Holden Elmore..

AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED

SWINEY, J.

OPINION

Plaintiff Elizabeth D. LeBrun, M.D., was terminated from her employment with Defendant Appalachian Center for Women, P.C., an obstetrics and gynecology practice in Maryville, Tennessee. Defendant Dale B. Elmore, M.D., instituted Plaintiff's termination "for cause" under an employment contract between Plaintiff and the professional corporation. Termination for cause served to reduce the amounts due Plaintiff under her employment contract and a separate partnership

agreement in which Plaintiff and Defendant Elmore shared interest in the building that housed the medical practice. Plaintiff brought suit for declaratory judgment on whether her termination was “for cause,” along with claims for damages and other relief relating to her termination. Following a hearing on the bifurcated issue of whether Plaintiff’s termination was “for cause” under her employment contract, the Chancellor entered Judgment against Plaintiff. The Chancellor found, based upon the testimony of witnesses at the hearing, that the termination was for cause as defined in the contract. After a hearing on the remaining issues, the Chancellor awarded Plaintiff a total of \$103,438.00 due under her two agreements with Defendants, dismissed Defendants’ counter-complaint alleging overpayment of salary to Plaintiff during her employment, denied Plaintiff prejudgment interest, and taxed court costs against Plaintiff. For the reasons set forth below, the Trial Court’s ruling that Plaintiff’s employment was terminated for cause is affirmed, the Trial Court’s denial of prejudgment interest is reversed, and the Final Order of the Trial Court is affirmed in part, reversed in part, and remanded.

BACKGROUND

Defendant Elmore (“Elmore”) recruited Plaintiff LeBrun (“Plaintiff”) to join his practice in obstetrics and gynecology in Maryville, Tennessee. Plaintiff began work with Elmore in September 1991. Plaintiff subsequently executed a written employment contract with Appalachian Center for Women, P.C. (“Corporation”) effective January 1, 1994. The contract contained provisions pertaining to termination of employment “for cause” that would decrease Plaintiff’s monetary interest in the corporation upon the occurrence of such termination. Elmore presented a letter of termination to Plaintiff June 16, 1997, invoking termination for cause under the employment contract, and requesting that she vacate the offices in two weeks. Four years earlier, in 1993, Elmore and Plaintiff formed Maryville Medical Building Partnership (“Partnership”), separately from the professional corporation, for the purpose of owning and operating the building that housed their medical practice. The partnership agreement provided a vesting schedule with Plaintiff fully vested with fifty-percent ownership interest in the building after five years. However,

the agreement provided that termination “for cause” from her employment before the five years had passed would result in payment to Plaintiff of only the amount she had paid in to the partnership as of that date. As of the date of her termination, Plaintiff had paid in \$63,000.00 and was forty-percent vested in the partnership. Other financial dealings between Elmore and Plaintiff are detailed in the record, but the Corporation and Partnership form the material basis for the issues on appeal.

Plaintiff resisted the termination, and rejected the \$90,000.52 offered for her interest in the Corporation and Partnership under Defendants’ calculations of the lesser amounts due her under the termination “for cause” aspects of the contracts. Plaintiff filed suit June 30, 1997 for, among other things, declaratory judgment as to the issue of termination for cause, and an injunction forestalling her removal from the practice. An agreement between the parties extended Plaintiff’s departure date to October 16, 1997, Plaintiff’s last day working at the Maryville practice. On December 7, 1998 the Trial Court heard testimony relating to the bifurcated issue of termination for cause. By Judgment filed March 5, 1999, the Chancellor found Plaintiff’s termination was “for cause” under her employment contract, and adopted as findings the transcript of the Chancellor’s opinion delivered from the bench following the December 7 hearing. An accountant was appointed to serve as special master to determine the valuation of various aspects of the Corporation and Partnership interest of Plaintiff, and subsequently submitted a report to the Trial Court.

Following a separate hearing on April 15, 1999, by Final Order filed May 3, 1999, the Trial Court overruled Plaintiff’s motion to reconsider the Judgment on the for-cause termination issue, overruled Defendants’ motion for attorney fees, ruled on findings from the special master in awarding Plaintiff \$63,000.00 for her interest in the partnership and \$40,438.00 for her interest in the Corporation, dismissed Defendants counter-complaint for overpayments made to Plaintiff under the employment agreement, denied Plaintiff’s motion for prejudgment interest, and taxed court costs to Plaintiff. It is from the Judgment on the issue of termination for cause and the Final Order of the Trial Court that Plaintiff has appealed.

DISCUSSION

Although stated as four issues, Plaintiff raises three issues on appeal, alleging error in the Trial Court's Judgment relating to Plaintiff's termination for cause under the employment contract, along with assertions of abuse of discretion by the Chancellor in denying prejudgment interest to Plaintiff, and abuse of discretion in taxing the Trial Court costs solely to Plaintiff. Defendants raise the additional issue of error in the Trial Court's dismissal of Defendants' counter-complaint for overpayment of compensation to Plaintiff during the period of her employment.

Our standard of review of the Chancellor's interpretation of the contract at issue is *de novo*, with no presumption as to the correctness of the findings of the Trial Court. *Eyring v. East Tennessee Baptist Hosp.*, 950 S.W.2d 354, 358 (Tenn. Ct. App. 1997). However, it is not the interpretation of the contract that is central to the issues on appeal, but rather it is the application of the termination clause of the contract under the facts found by the Trial Court that forms the core of Plaintiff's argument on appeal. Plaintiff's argument concerning the actions of the Trial Court in determining that her termination under the contract at issue was for cause is based not upon questions of law, but primarily upon interpretation of the testimony of the witnesses at trial.

One of the most time-honored principles of appellate review is that trial courts are best situated to determine the credibility of the witnesses and to resolve factual disputes hinging on credibility determinations. Accordingly, appellate courts routinely decline to second-guess a trial court's credibility determinations unless there is concrete, clear, and convincing evidence to the contrary.

The most often cited reason for this principle can be traced to the fact that trial judges, unlike appellate judges, have an opportunity to observe the manner and demeanor of the witnesses while they are testifying. There are, however, other reasons for this principle. As the United States Supreme Court has observed:

The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much.

Anderson v. City of Bessemer City, 470 U.S. 564, 574-75, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518 (1985).

The advisory committee note to Fed.R.Civ.P. 52(a), which requires that deference be given to the trial judge's opportunity to judge the credibility of witnesses, lists three important policy concerns behind the rule: (1) upholding the legitimacy of the trial courts to litigants; (2) preventing an avalanche of appeals by discouraging appellate retrial of factual issues, and (3) maintaining the allocation of judicial authority. The policy underpinnings of Fed.R.Civ.P. 52(a) advance the public's interests in stability and judicial economy, and we view them as equally important to Tennessee's citizens and courts.

Mitchell v. Archibald, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Isolated

from the sixteen-page employment agreement that defines the Corporation as “Employer” and Plaintiff as “Employee”, the contract clause addressing termination of employment reads:

13. Termination of Employment.

(a) The Employee and the Employer shall have the right to terminate this Agreement at any time by mutual agreement in writing. The Employee shall have the right to terminate this Agreement as of the last day of any month by giving written notice at least six (6) months prior to the proposed termination. The Employer shall have the right to terminate this Agreement on four (4) months’ written notice upon the majority vote of all the non-terminating shareholders. Upon such termination, neither the Employer nor the Employee shall have any further rights or obligations under the terms of this Agreement except for any rights granted to him in the section entitled “Patient Charts.”

* * * *

(b) In the event the Employee shall willfully violate any of the terms of this contract or, by misconduct or willful inattention to the economic or ethical welfare of the Employer, seriously injure the reputation of the Employer, or if Employee shall lose Employee’s license to practice medicine in the State of Tennessee (separately and collectively, “Cause”), Employee shall be dismissed immediately upon written notification to Employee that the Board of Directors, by majority vote of all members who are then actively practicing for the Employer, other than Employee, has terminated Employee’s employment for cause. If dismissed for cause, Employee shall be entitled only to Employee’s compensation for he month in which dismissal takes place and to those rights provided for in the section entitled “Patient Charts.”

The “Patient Charts” section referenced in the termination clause sets forth the right of the Corporation to retain patient files, records, and charts upon Plaintiff’s termination, with a mechanism for transfer of such documents to Plaintiff upon written request of an affected patient, and an agreement for both parties to provide access to the denominated materials “for billing purposes and for use in any litigation in which such items are relevant.” Plaintiff and Elmore were

the only shareholders in the Corporation at the time of Plaintiff's termination, with Elmore as the only actively practicing member of the board of directors not including Plaintiff. Thus, only Elmore's vote was needed to invoke Plaintiff's termination for cause on the part of the employer under the employment contract.

Based upon our review of the fourteen-page Opinion transcript, the Chancellor found that Plaintiff's termination was "for cause" on alternative grounds. The first ground was actions taken by Plaintiff that violated the contractual obligation not to "engage in any other professional activity which would encroach upon the employee's dedication to employer's business." The Trial Court found that repeated contacts by Plaintiff with Mark Stinnett, an employee of Principal Care, a company that engages principally in the acquisition of medical practices, constituted a violation of her duty to refrain from activity encroaching upon the business of the Corporation. As Stinnett's testimony was by deposition transcript, the Trial Court was in no better position than this Court to judge his credibility as a witness. The findings of the Chancellor pertaining to the testimony of Plaintiff and others relating to this issue, however, is due the deference discussed above. Plaintiff's argument on appeal centers upon interpretation of the testimony at trial, and review of the content of that testimony does not preponderate against the factual findings of the Chancellor and the application of those findings to the termination of Plaintiff's employment "for cause."

Plaintiff argues that although the Trial Court determined that Plaintiff was attempting to market her interest in the Corporation through the contacts with Stinnett, restrictive covenants prevented her from selling her stock in the Corporation without Elmore's agreement. Plaintiff's reliance on this position is misplaced. Review of Stinnett's deposition testimony indicates that, although there were additional reasons for his repeated contacts with Plaintiff, the primary business of his employer, and his main interest in the continuing relationship with Plaintiff, related to the acquisition of the medical practice. The record does not preponderate against the findings of the Trial Court that Plaintiff was attempting to sell her interest in the Corporation, and that these efforts, in and of themselves, constituted activity encroaching upon her dedication to the business of the

Corporation. The Chancellor did not render an opinion as to whether or not the stock transfer restrictions could be enforced against Plaintiff, and such an opinion was not necessary for the Trial Court's determination on this issue. The Judgment of the Trial Court as to this finding is affirmed.

The second ground that Plaintiff's termination was "for cause" under her employment contract is based upon statements attributed to Plaintiff, and directed toward Elmore's professional ability. Plaintiff admitted making comments to patients to the effect that if they were her patients, they would have received different treatment than that provided by Elmore. Plaintiff argues that such statements were made in jest, "with a wink," and that no disparagement of Elmore was intended. The Chancellor specifically addressed this issue in his Opinion, and detailed to some degree how Plaintiff's testimony was balanced against that of the other witnesses at trial, and found that the evidence supported termination for cause.

We agree with the following from 56 C.J.S., Master and Servant, Sec. 42(a):

As a general proposition, any act of the servant which injures or has a tendency to injure his master's business, interests, or reputation will justify the dismissal of the servant. Actual loss is not essential; it is sufficient if, from the circumstances, it appears that the master has been, or is likely to be, damaged by the acts of which complaint is made. . .

Curtis v. Reeves, 736 S.W.2d 108, 112 (Tenn. Ct. App. 1987)(where derogatory remarks were sufficient cause to terminate a contract of employment).

Upon review, the balance of the testimony supports the Chancellor's findings as to the nature and legal effect of Plaintiff's comments about Elmore's medical care of those patients, and provides sufficient alternative grounds for termination "for cause" under the employment contract. The Judgment of the Chancellor as to the issue of termination for cause based upon the remarks by Plaintiff directed toward Elmore's professional conduct is affirmed.

The amounts from the findings of the special master as applied by the Trial Court are not raised as an issue by the parties, and are not reviewed in this Opinion. The Judgment of the Trial Court as to the issue of Plaintiff's termination from her employment with the Corporation being "for cause" is affirmed.

However, we agree with Plaintiff that the Trial Court erred in denying prejudgment

interest, but only as to part of Plaintiff's award in the Judgment below.

Pursuant to Tenn.Code Ann. § 47-14-123, prejudgment interest may be awarded in accordance with the principles of equity. In reaching an equitable decision, a court must keep in mind that the purpose of prejudgment interest is to fully compensate a plaintiff for the loss of the use of funds, not to penalize a defendant. Moreover, if a plaintiff's right to recovery and the amount of such recovery are not disputed on reasonable grounds, an award of prejudgment interest is more likely to be equitable.

The trial court's decision to award or deny prejudgment interest may be overturned only upon a finding of a "manifest and palpable abuse of discretion." Under this deferential standard, an appellate court may not substitute its judgment for that of the trial court. Rather, an abuse of discretion occurs only when the evidence does not support the trial court's decision.

Alexander v. Inman, 974 S.W.2d 689, 697-698 (Tenn. 1998), citing *Myint v. Allstate Insurance Co.*, 970 S.W.2d 920 (Tenn.1998).

Here, we hold that the Chancellor erred in denying prejudgment interest on the \$63,000.00 Plaintiff was due as the amount she had paid for her interest in the partnership. Regardless of whether Plaintiff's termination was or was not for cause, it is undisputed that Plaintiff was due \$63,000.00 for her partnership interest at the date of her termination from employment with the Corporation. Plaintiff should be compensated for the loss of use of her partnership funds from October 16, 1997, her final date of employment, until the Final Order of the Trial Court was filed May 3, 1999. As the record indicates reasonable grounds for dispute between the litigants as to the value of Plaintiff's interest in the Corporation, and the award relating to the Plaintiff's interest in the Corporation being based upon the findings of the special master appointed by the Trial Court, there is no manifest and palpable abuse of discretion in the Chancellor's denial of prejudgment interest as to this remaining portion of the award. On remand, the Trial Court is to calculate and award, under the statutory limitations imposed by T.C.A. § 47-14-123¹, prejudgment interest on the \$63,000.00, with such interest to be based upon the period from her final employment date of October 16, 1997 to the date of the Final Order of the Trial Court, May 3, 1999.

¹ Prejudgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of the state as of April 1, 1979, may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum T.C.A. § 47-14-123.

Concerning the Trial Court's taxing the court costs solely to Plaintiff, Plaintiff cites T.R.C.P. rule 54.04, arguing that taxing costs against Plaintiff as prevailing party is an abuse of discretion. The relevant portion of the rule reads: "(1) Costs included in the bill of costs prepared by the clerk shall be allowed to the prevailing party unless the court otherwise directs, but costs against the state, its officers, or its agencies shall be imposed only to the extent permitted by law." Given the outcome at trial, it is certainly questionable whether or not Plaintiff was the "prevailing party." However, on appeal Plaintiff must show extraordinary circumstances to overcome the presumption in favor of the discretionary purview of the Trial Court in taxing the costs of the Trial Court. "Tenn.Code Ann. § 20-12-119 and Tenn.R.Civ.P. 54.04 give trial courts the authority to tax the costs incurred in the trial court. These determinations are within the trial court's discretion, and they will be reviewed on appeal only under very extraordinary circumstances." *Rogers v. Russell*, 733 S.W.2d 79, 88 (Tenn. Ct. App. 1986).² No such extraordinary circumstances appear in the record before us. The Judgment of the Trial Court as to the issue regarding taxation of court costs is affirmed.

Defendants assert error in the Judgment of the Trial Court in dismissing their counter-complaint for overpayment of wages to Plaintiff under the employment agreement at issue. However, in their brief Defendants fail to cite any supporting authorities material to their argument. References to the record supported by argument in the form of mere conclusions of law fail to establish any basis for appellate relief under T.R.A.P. Rule 27(a)(7). The Judgment of the Trial Court in dismissing the counter-complaint of Defendants is affirmed.

In summary, the Judgment of the Trial Court is reversed as to the denial of prejudgment interest on the \$63,000.00 from Plaintiff's final employment date of October 16, 1997 to the date of the Final Order of the Trial Court, May 3, 1999. We affirm the Judgment of the Trial

² (a) In all civil cases, whether tried by a jury or before the court without a jury, the presiding judge shall have a right to adjudge the cost.
(b) In doing so, he shall be authorized, in his discretion, to apportion the cost between the litigants, as in his opinion the equities of the case demand.
T.C.A. § 20-12-119.

Court as to all other issues, and remand this cause of action for computation and award of prejudgment interest to Plaintiff as set forth above, and any further proceedings, if necessary, consistent with this Opinion.

CONCLUSION

The Judgment of the Trial Court is affirmed in part and reversed in part, and this cause remanded for further proceedings consistent with this Opinion. Costs of this appeal are taxed to Appellant, Elizabeth D. LeBrun, M.D.

D. MICHAEL SWINEY, J.

CONCUR:

HERSCHEL P FRANKS, J.

CHARLES D. SUSANO, JR.,J.