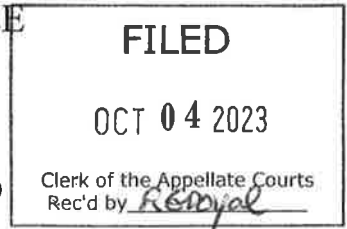


IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
June 21, 2023 Session



DONNA F. HOWARD v. JAMES C. HOWARD

Appeal from the Chancery Court for Knox County
No. 201860-1 Clarence E. Pridemore, Jr., Chancellor

No. E2022-01385-COA-R3-CV

This appeal involves a motion filed pursuant to Tennessee Rule of Civil Procedure 60.02, seeking to set aside the attorney's fee provision contained within a final divorce decree. The trial court denied the motion without hearing evidence from the parties or stating the basis for its decision. Because we are unable to adequately review the matter due to the trial court's lack of findings of fact and conclusions of law and the lack of evidence in the appellate record, we vacate the trial court's order and remand for further proceedings.

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

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

Jerrold L. Becker, Knoxville, Tennessee, for the appellant, Donna F. Howard.

P. Richard Talley, Dandridge, Tennessee, for the appellee, C. Edward Daniel.

OPINION

I. Factual and Procedural Background

Donna F. Howard ("Plaintiff") and James C. Howard ("Defendant") have been involved in several actions filed in the Knox County Chancery Court ("trial court"). On June 4, 2020, while the parties were married, Defendant allegedly shot Plaintiff in the shoulder while she was lying in bed. On June 23, 2020, Plaintiff obtained an order of protection against Defendant. Subsequently, on July 8, 2020, Plaintiff filed a civil tort action against Defendant concerning the June 4, 2020 shooting incident. In her tort complaint, Plaintiff sought compensatory damages in the amount of \$250,000; punitive

damages in the amount of \$250,000; a temporary and permanent injunction to prevent Defendant from coming around Plaintiff; and any other remedy to which Plaintiff was entitled.

On February 18, 2021, Plaintiff filed a complaint for divorce against Defendant. In the complaint, Plaintiff alleged that Defendant was guilty of inappropriate marital conduct or, in the alternative, that the parties maintained irreconcilable differences. To support these grounds, Plaintiff averred that Defendant had “shot the Plaintiff in the shoulder and made statements that it was his intent to kill her.”

In each of these aforementioned legal actions filed in the trial court, Plaintiff was represented by attorney C. Edward Daniel (“Attorney Daniel”). On May 26, 2021, a final divorce decree was entered in the divorce case. In this decree, the trial court granted a divorce to the parties based on irreconcilable differences, referencing a signed marital dissolution agreement (“MDA”). The decree also contained a provision regarding attorney’s fees, wherein the court stated as follows in pertinent part:

An attorney fee lien shall be granted against the Plaintiff, Donna Fowler Howard, pursuant to T.C.A. 23-2-102 on any judgments, assets, and/or property, real or personal awarded to her including but not limited to the sale of the guns and ammunition in this case to Eddie Daniel for \$105,00[0].00 for attorney fees plus statutory interest. Said fee was incurred for representation by Mr. Daniel in the Order of Protection, Personal Injury lawsuit and the divorce.

Plaintiff personally signed the decree, approving its entry by the court. The court further provided in the decree that Attorney Daniel was discharged of his duties to Plaintiff. The parties concomitantly executed an MDA, wherein Plaintiff stipulated that she would submit an order of dismissal with prejudice to resolve her pending tort claim against Defendant.

On November 3, 2021, Plaintiff, through her newly retained counsel, Jerrold L. Becker, filed a motion to set aside the attorney’s fees provision contained in the final divorce decree pursuant to Tennessee Rule of Civil Procedure 60.02. Plaintiff averred that Attorney Daniel had engaged in fraud and misrepresentation, had “breached and abused his confidential relationship with her,” and had coerced her into agreeing to the final divorce decree “in an effort to benefit himself despite knowing that such was inequitable and unethical.” Plaintiff’s main postulate was that Attorney Daniel’s fee of \$105,000.00 was grossly unconscionable, exorbitant, and unethical by reason of the simplicity and straightforwardness of each of the three instances of legal representation that he had undertaken on her behalf. In addition, Plaintiff claimed that Attorney Daniel had agreed to be paid a percentage of her recovery in the tort action but that no monies were recovered therein. Plaintiff also claimed that Attorney Daniel had attempted to

charge a fee for her divorce action predicated on a percentage of the marital estate's value, which action violated the Tennessee Rules of Professional Conduct. Plaintiff requested that the trial court conduct a hearing on the matter and set aside solely the attorney's fee portion of the final divorce decree. Plaintiff also requested an award of attorney's fees and costs from Attorney Daniel.

On September 16, 2022, the trial court entered an order concerning Plaintiff's Rule 60 motion, seeking to set aside the attorney's fee provision contained in the final divorce decree. In this order, the court simply stated that after reviewing the record and hearing arguments of counsel, Plaintiff's motion was denied.

Plaintiff timely filed a notice of appeal. On October 26, 2022, Plaintiff filed a motion seeking a stay in the trial court regarding enforcement and execution of the lien for attorney's fees and statutory interest awarded to Attorney Daniel in the final divorce decree. In this motion, Plaintiff stated that when her counsel appeared to argue her Rule 60.02 motion at the scheduled August 1, 2022 hearing, the trial court asked the parties to brief the issue of whether the attorney's fee provision could be severed and set aside without requiring that the entire final divorce decree be set aside based on Tennessee Rule of Civil Procedure 60. Plaintiff stated that she filed a brief concerning this issue on August 3, 2022. Attorney Daniel responded by filing a motion for summary judgment. Plaintiff averred that the trial court subsequently issued the order denying the Rule 60.02 motion without hearing arguments or proof concerning the attorney's fee provision or addressing the motion for summary judgment. The record contains no ruling concerning the motion to stay.

II. Issues Presented

Plaintiff presents the following issues for our review, which we have restated slightly:

1. Whether the trial court abused its discretion by failing to rule on the severability of an attorney's fee provision of a final judgment, an issue which the trial court raised *sua sponte* in response to Plaintiff's Rule 60.02 motion.
2. Whether the trial court abused its discretion by denying Plaintiff's Rule 60.02 motion without conducting an evidentiary hearing.

III. Standard of Review

As our Supreme Court has explained:

In reviewing a trial court's decision to grant or deny relief pursuant to Rule 60.02, we give great deference to the trial court. *See Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993). Consequently, we will not set aside the trial court's ruling unless the trial court has abused its discretion. *See id.* An abuse of discretion is found only when a trial court has "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *State v. Stevens*, 78 S.W.3d 817, 832 (Tenn. 2002) (quoting *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997)). The abuse of discretion standard does not permit an appellate court to merely substitute its judgment for that of the trial court. *See Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

Henry v. Goins, 104 S.W.3d 475, 479 (Tenn. 2003).

IV. Propriety of Order Denying Rule 60 Relief

Plaintiff contends that the trial court abused its discretion by failing to rule on the severability of the attorney's fee provision contained in the parties' final divorce decree, an issue which the trial court raised *sua sponte* in response to Plaintiff's Tennessee Rule of Civil Procedure 60.02 motion. Plaintiff further argues that the trial court abused its discretion by denying her Rule 60.02 motion without conducting an evidentiary hearing.

With regard to a movant's evidentiary burden when filing a Rule 60.02 motion, the Supreme Court has provided the following guidance:

[W]e have characterized relief under Rule 60.02 as an "exceptional remedy," *Nails v. Aetna Ins. Co.*, 834 S.W.2d 289, 294 (Tenn. 1992), "designed to strike a proper balance between the competing principles of finality and justice," *Jerkins v. McKinney*, 533 S.W.2d 275, 280 (Tenn. 1976). Rule 60.02 provides an "escape valve," *Thompson v. Firemen's Fund Ins. Co.*, 798 S.W.2d 235, 238 (Tenn. 1990), that "should not be easily opened." *Toney v. Mueller Co.*, 810 S.W.2d 145, 146 (Tenn. 1991). We have reversed relief granted under Rule 60.02 where the judgment was "not oppressive or onerous." *Killion v. Tenn. Dep't of Human Servs.*, 845 S.W.2d 212, 214 (Tenn. 1992). "[R]elief under Rule 60.02 is not meant to be used in every case in which the circumstances of a party change after the entry of a judgment or order, nor by a party who is merely dissatisfied with a particular outcome." *Henderson [v. SAIA, Inc.]*, 318 S.W.3d [328,] 336 [(Tenn. 2010)].

A party seeking relief under Rule 60.02 must substantiate the request with clear and convincing evidence. "Clear and convincing evidence

means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992). “In other words, the evidence must be such that the truth of the facts asserted [is] ‘highly probable.’” *Goff v. Elmo Greer & Sons Constr. Co.*, 297 S.W.3d 175, 187 (Tenn. 2009) (quoting *Teter v. Republic Parking Sys., Inc.*, 181 S.W.3d 330, 341 (Tenn. 2005)). In general, “the bar for attaining relief is set very high and the burden borne by the movant is heavy.” *Johnson v. Johnson*, 37 S.W.3d 892, 895 n.2 (Tenn. 2001).

Furlough v. Spherion Atlantic Workforce, LLC, 397 S.W.3d 114, 127-28 (Tenn. 2013) (emphasis added) (other internal citations omitted). In the case at bar, Plaintiff filed a verified motion seeking to set aside the attorney’s fee provision contained in the final divorce decree, wherein Plaintiff included factual allegations concerning Attorney Daniel’s time and effort expended during his representation of her. Plaintiff further provided a brief history of the prior proceedings and Attorney Daniel’s representations made to Plaintiff during those proceedings. Plaintiff signed the motion under oath, stating that the facts set forth therein were true, and attached various documents in support. No responsive pleading or affidavit executed by Attorney Daniel appears in the appellate record.

The transcript from the trial court’s August 1, 2022 hearing in this matter reflects that the court initially requested opening remarks from counsel. Following opening statements by counsel for both parties, the court inquired of Plaintiff’s counsel whether Plaintiff was seeking to set aside the final divorce decree in its entirety. When Plaintiff’s counsel replied that Plaintiff was seeking to set aside the attorney’s fee provision only, the court noted, “I don’t think I can set it aside without setting aside the whole order. It was an order signed on by the parties and entered in court under oath.”

Following a lengthy discussion among both attorneys and the trial court, the court stated:

I need to think about this 60.02 issue first before we get into Mr. Daniel’s fees whether they’re reasonable or not.

* * *

Why don’t I talk to my law clerk? I want to make sure we have our ducks in a row and both of you all probably [] brief this about whether or not setting aside the final decree, just one part of it, not the whole thing, but only one part. . . .

And we'll hear you again in a week or two on the issue of whether or not the court can set aside a portion of a final decree under 60.02 without setting aside the whole thing.

The trial court then concluded the hearing.

In her appellate brief, Plaintiff represents that both parties filed respective briefs regarding the severability issue and Rule 60.02 within a few days following the hearing, although these briefs do not appear in the appellate record. Subsequently, on September 16, 2022, and without conducting any further hearing or accepting evidence on the matter, the trial court entered an order, which directs in full:

This cause having come to be heard before this Court upon Plaintiff's Verified Motion to Set aside Attorney's Fees Provision of Final Judgment for Divorce Pursuant to T.R.C.P. Rule 60.

After argument of respective counsel and review of the record as a whole this Court finds that Plaintiff's Motion shall be DENIED.

Having thoroughly reviewed the record in this matter, we determine that there exists a threshold question that must be addressed: whether the trial court, in its order denying Plaintiff's Rule 60 motion, made sufficient findings of fact and conclusions of law in support of its ruling such that appellate review is possible. As this Court has previously elucidated:

We concede that the express language of Rule 60.02 places no affirmative duty on the trial court to make findings of fact or conclusions of law in disposing of a Rule 60.02 motion. However, this Court has previously indicated that, with respect to a Rule 60.02 motion, we are "unable to adequately review" a trial court's discretionary decision and provide the appropriate amount of deference to that decision when the trial court fails to make appropriate findings of fact and conclusions of law. *Spigner v. Spigner*, No. E2013-02696-COA-R3-CV, 2014 WL 6882280, at *6 (Tenn. Ct. App. Dec. 8, 2014) (quoting *Rogin v. Rogin*, No. W2012-01983-COA-R3-CV, 2013 WL 3486955, at *7 (Tenn. Ct. App. 2013)).

Parimore v. Parimore, No. W2016-01188-COA-R3-CV, 2017 WL 657771, at *4 (Tenn. Ct. App. Feb. 17, 2017). The *Parimore* Court proceeded to analyze the evidence in the record in order to determine whether the husband had met his burden under Rule 60.02 despite the lack of findings by the trial court. *Id.* However, such course of action is not possible in this matter because (1) the parties were never afforded the opportunity to present their evidence and (2) we are unable to discern the specific basis for the trial court's ruling.

As previously explained, although Plaintiff did present some evidence to the trial court associated with her verified motion, when the parties and their counsel appeared for the hearing on August 1, 2022, the trial court did not consider evidence from the parties. Rather, the court asked both counsel to brief the issue of whether the attorney's fee provision could be vacated without setting aside the final divorce decree in its entirety. The court then clearly indicated that a subsequent hearing would occur in the matter after the court had time to consider the severability issue.

Despite the trial court's announcement that a subsequent hearing would be held, the trial court proceeded to enter an order denying the motion without conducting any further hearing and without stating the precise basis for the ruling. As such, we are unable to discern whether the trial court may have concluded that the attorney's fee provision contained in the final divorce decree could not be severed and set aside, whether the court may have concluded that Plaintiff would not be entitled to relief based on any set of facts, or whether the court's ruling was predicated on a different basis entirely.

For this reason, we determine that the trial court erred by failing to make sufficient findings of fact and conclusions of law in its order denying Plaintiff's Rule 60.02 motion. We are simply unable to "soldier on" under these circumstances due to the trial court's failure to hear the parties' evidence on the Rule 60.02 motion and the lack of a stated basis for the court's ruling. Accordingly, we conclude that the trial court's September 16, 2022 order denying Rule 60.02 relief must be vacated.

V. Conclusion

For the foregoing reasons, we vacate the trial court's order denying Plaintiff's Rule 60.02 motion and remand this matter to the trial court for further proceedings consistent with this opinion. Costs on appeal are assessed one-half to the appellant, Donna F. Howard, and one-half to the appellee, C. Edward Daniel.

s/ Thomas R. Frierson, II

THOMAS R. FRIERSON, II, JUDGE