

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 7, 2022 Session

FILED 03/06/2023 Clerk of the Appellate Courts
--

DAVID SEELY ET AL. v. GEICO ADVANTAGE INSURANCE COMPANY

Appeal from the Circuit Court for Davidson County
No. 19C2818 Thomas W. Brothers, Judge

No. M2021-01263-COA-R3-CV

This is a dispute between two insureds, David Seely and Subhadra Guanawardana (“Plaintiffs”), who co-own the insured vehicle, and their automobile insurance carrier, GEICO Advantage Insurance Company. The dispute arises from a vehicular accident in a McDonald’s restaurant parking lot. Following its investigation into the cause of the accident, GEICO determined that Mr. Seely was at fault when his vehicle collided with another. As a consequence, GEICO paid the claim asserted by the other motorist, placed an “at fault designation” on Plaintiffs’ Comprehensive Loss Underwriting Exchange (“CLUE”) reports,¹ and raised Plaintiffs’ premium. Thereafter, Plaintiffs commenced this action against GEICO asserting claims for (1) bad faith, (2) unconscionable contract, (3) violation of the Tennessee Consumer Protection Act, (4) violation of the Fair Credit Reporting Act, and (5) defamation. The trial court dismissed all claims, some pursuant to Tennessee Rule of Civil Procedure 12.02(6) for failure to state a claim, and the remaining claims were dismissed on summary judgment. This appeal followed. We affirm.

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

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which W. NEAL MCBRAYER and JEFFREY USMAN, JJ., joined.

David Seely and Subhadra Guanawardana, pro se, appellants.

C. Benton Patton and Jamie A. Leaver, Brentwood, Tennessee, for the appellee, GEICO Advantage Insurance Company.

¹ The Comprehensive Loss Underwriting Exchange is a claims history database created by LexisNexis designed to assist insurance companies in managing risk.

OPINION

FACTS AND PROCEDURAL HISTORY

The accident occurred on February 9, 2018, when Mr. Seely collided with another vehicle owned by Rebecca Wegman in a McDonald's parking lot. Ms. Wegman promptly submitted a property damage claim to GEICO, stating that she was parked at McDonald's parking lot when Mr. Seely's vehicle backed out of a parking spot and hit her vehicle. GEICO contacted both Plaintiffs to investigate Ms. Wegman's claim. Based on statements by Plaintiffs and Ms. Wegman, GEICO determined that Mr. Seely was at fault and paid Ms. Wegman's claim.

Four months later, on June 13, 2012, Mr. Seely informed GEICO that the accident was not his fault; instead, it was caused by brake failure, proof of which, he contended, was "on record." GEICO responded by asking Mr. Seely to provide evidence to support this claim. According to GEICO, Plaintiffs had not previously indicated that the accident was caused by a brake malfunction. On June 18, 2018, Mr. Seely provided GEICO with information from the National Highway Traffic Administration regarding brake component failures. Mr. Seely also provided receipts for brake caliper purchases relating to his vehicle.² After reviewing the information Mr. Seely provided, GEICO maintained its earlier decision that Mr. Seely was at fault. As a consequence, GEICO placed an "at-fault designation" on Plaintiffs' CLUE report. Because of the at fault designation, and acting in accordance with GEICO's Tennessee Rating Plan, GEICO also increased the premium on Plaintiffs' policy.

On May 28, 2019, Plaintiffs commenced this action against GEICO in the general sessions court. The general sessions court dismissed Plaintiffs' lawsuit and Plaintiffs timely appealed to the circuit court. On June 30, 2020, the circuit court ordered Plaintiffs to file a formal complaint to specify each cause of action Plaintiffs wished to assert; the order also required that GEICO file an answer to the complaint.

Plaintiffs filed their Complaint on July 20, 2020 alleging five causes of action: (1) bad faith, (2) unconscionable contract, (3) violation of the Tennessee Consumer Protection Act, (4) violation of the Fair Credit Reporting Act, and (5) defamation. More specifically, the five counts, as set forth in the complaint, read as follows:

Count I

40. Bad faith: Plaintiffs contend that GEICO committed bad faith in creating a contract that defies statute, deceiving insureds during the claims process

² Plaintiffs provided receipts for brake caliper purchases for their vehicle, a 1989 Dodge Dakota, dated October 15, 2015, February 24, 2018, and March 1, 2018.

and converting money received in an insurance contract. GEICO did not pay the claim in a fair and equitable manner as required by statute. In unjustly raising the Plaintiffs' premiums they found a way to recoup their loss several fold over the years. These actions violate of Tenn. Codes § 56-7-I 05, 56-8-103 and 56-8-105.

Count II

41. Unconscionable contract or clause: By intentionally crafting a Rating Plan that denies statutory protection to a specific group of insureds, Defendant created an unconscionable contract. Any adverse action taken using said contract should not be enforceable.

Count III

42. Tenn. Code § 47-18-101 et seq: By creating an unconscionable contract and hiding its impact from the affected insureds, GEICO has engaged in unfair and deceptive practices. Defendant unjustly enriches themselves by raising rates on insureds with no statutory justification.

Count IV

43. Fair Credit Reporting Act: By erroneously reporting the accident as "AF" on Plaintiffs' CLUE reports, and refusing to correct it upon notice, GEICO violated the Act. By failing to follow the dispute resolution process set forth in the FCRA 15 U.S.C. § 1681i(a)(5) and failing to re-underwrite or re-rate the insured, GEICO violated Tennessee Code § 56-5-406.

Count V

44. Defamation: By filing an erroneous entry in Plaintiffs' CLUE reports GEICO damaged not only their driving records but affected their creditworthiness and good names.

GEICO responded by simultaneously filing an Answer and a Partial Motion to Dismiss four of Plaintiffs' five claims: (1) bad faith, (2) unconscionable contract, (3) violation of the Tennessee Consumer Protection Act, and (4) violation of the Fair Credit Reporting Act. Pursuant to an order entered on September 29, 2020, the trial court granted the motion in part, dismissing three of the four causes of action. The court denied the motion as to Plaintiffs' unconscionable contract claim, stating:

Plaintiffs assert the accident for which the "at fault" designation was assigned is the result of a brake malfunction, not negligence on behalf of the driver.

Plaintiffs further assert the Defendant had the mechanical failure “on record.” Nevertheless, the Complaint claims insurance premiums were raised as a result of the accident, despite no act of negligence by the Plaintiffs. Therefore, the Plaintiffs’ claim of unconscionability is in essence a claim against the Defendant’s ability to create and enforce an insurance policy that directly contravenes existing statutory protections. Taking all relevant and material factual allegations in the complaint as true, the Court finds the Plaintiffs have sufficiently pled such facts as necessary to sustain a claim of unconscionable contract.

Plaintiffs subsequently filed a Motion to Alter or Amend, as well as a Motion to Amend the Complaint. On November 16, 2020, the trial court entered an Amended Order on GEICO’s Partial Motion to Dismiss that stated it “supersedes and replaces the prior order entered on September 29, 2020.” The amended order was almost identical to the September 29, 2020 order except for the fact the order stated that the dismissal of the three claims in question was “with prejudice.”

With regard to the motion to amend the complaint, in a separate order entered on November 20, 2020, the trial court denied the motion stating:

The Court denies the Motion to Amend, at this time, without prejudice to refile based upon this Court’s new Order ruling on the defendant’s Partial Motion to Dismiss. If plaintiffs intend to proceed with the Motion to Amend the Complaint the Motion will be filed, timely, after the Court’s revised ruling on defendant’s Partial Motion to Dismiss.

Thereafter, Plaintiffs filed a Motion for Summary Judgment regarding the two remaining claims - defamation and unconscionability. They also filed a second motion to amend the complaint. GEICO filed responses in opposition to both motions.

With regard to the second motion to amend the complaint, in an order entered on May 21, 2021, the trial court stated the basis for the denial of Plaintiffs’ Motion was two-fold. As to the Fair Credit Reporting Act claim, the court denied it because Plaintiffs had not set aside the order dismissing that claim; thus, there was no claim to be amended. As for the defamation claim, the order reads: “the requested amendment comes too late in this litigation given the fact that the case has now been set for trial . . . and that the time frame for discovery to be completed has passed.”

As for Plaintiffs’ Motion for Summary Judgment on its claims for defamation and unconscionable contract, the trial court denied their motion on various grounds. One, it found material facts in dispute in regard to the unconscionable contract claim; thus, the motion was denied in that respect. As for the defamation claim, which was based on the allegation that GEICO filed an erroneous entry in Plaintiffs’ CLUE reports, which

allegedly affected their credit worthiness and good names, the court found that Plaintiffs had the burden to prove that GEICO filed the at-fault designation report with malice or willful intent to injure Plaintiffs. The court denied Plaintiffs' motion stating:

Respectfully, the Court finds that this evidence is insufficient to support a finding of malice or willful intent to injure. Failure to remove an at-fault injury based solely on the assertion by the insured that the action was not at fault, and not supported by any of the evidence to support a finding that Geico had some purposeful intent to harm these two plaintiffs is insufficient for purposes of the motion for summary judgment, and do not sink to the level of personal hatred, ill will, culpable recklessness, a willful and wanton disregard of the rights and interests of the plaintiffs.

In addition, the Court does find as I noted earlier that plaintiffs are barred from recovery by 1681t subparts (b) (1) (F) which provide no requirement of [sic] prohibition may imposed on the laws of any state with respect to any subject matter regulated under 1681s (2) of this title.

So the Court respectfully finds that the defamatory behavior at issue here is the furnishing of an allegedly false, at-fault designation to a credit reporting agency and pursuant to 1681t (b) 1 (F), no requirement or prohibition may be imposed on any laws of any state with respect to the subject matter since it is regulated under 1681s (2). Accordingly, a defamation claim under Tennessee law would be barred.

Respectfully, the Court finds there are no genuine issues of material fact. The defendant is entitled to a judgment as a matter of law on the defamation claims in this matter, both under any attempt to present a standalone state claim under the Fair Credit Reporting Act.

Plaintiffs subsequently filed a Motion to Alter or Amend the trial court's July 23, 2021 order, which was denied. Plaintiffs also filed an Amended Notice of Deposition. GEICO responded by filing a Motion to Quash Plaintiffs' Amended Notice of Deposition, which the trial court granted. GEICO then filed a Motion for Summary Judgment on the only remaining claim, the unconscionable contract claim, which the trial court granted.

This appeal followed.

ISSUES

Plaintiffs set forth approximately twenty issues and sub-issues. We have determined that three of the issues Plaintiffs raised have been waived for failure to comply with

Tennessee Rule of Appellate Procedure 27(a). The remaining issues are restated and consolidated as follows:

1. Whether GEICO's Rule 12.02 Motion to Dismiss should have been denied as untimely filed?
2. Whether the trial court erred in granting GEICO's Rule 12.02 Motion to dismiss Plaintiffs' Bad Faith claims?
3. Whether the trial court erred in granting GEICO's Rule 12.02 Motion to dismiss Plaintiffs' Fair Credit Reporting Act claim?
4. Whether the trial court erred in denying Plaintiffs' Motions to Amend the Complaint?
5. Whether the trial court erred in denying Plaintiffs' Motions to Alter or Amend the July 23, 2021 Order?
6. Whether the trial court erred in summarily dismissing Plaintiffs' Unconscionable Contract Claim?
7. Whether the trial court erred in awarding GEICO Discretionary Costs?

STANDARDS OF REVIEW

A trial court's decision to grant a Rule 12.02(6) motion to dismiss is a question of law that we review de novo with no presumption of correctness. *See Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011).

This court reviews a trial court's decision on a motion for summary judgment de novo without a presumption of correctness. *See Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015). Accordingly, this court must "make a fresh determination of whether the requirements of [Tennessee Rule of Civil Procedure 56] have been satisfied." *Id.* In so doing, we accept the evidence presented by the nonmoving party as true, consider the evidence "in the light most favorable to the nonmoving party," and "draw all reasonable inferences in that party's favor." *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002).

With regard to the award of expenses related to a motion for discretionary costs, we review the trial court's decision under an abuse of discretion standard. *See Meyer Laminates (SE), Inc. v. Primavera Distrib., Inc.*, 293 S.W.3d 162, 168 (Tenn. Ct. App. 2008). To ascertain whether a decision constitutes an abuse of discretion, "we review the trial court's decision to determine whether the factual basis for the decision is properly supported by the evidence in the record, whether the trial court properly identified and applied the most appropriate legal principles applicable to the decision, and whether the trial court's decision was within the range of acceptable alternative dispositions." *Id.* (citing *Gooding v. Gooding*, 477 S.W.3d 774, 781 (Tenn. Ct. App. 2015)).

ANALYSIS

We begin our analysis by acknowledging that Plaintiffs represented themselves in the trial court and are pro se in this appeal. While we will be lenient concerning non-substantive matters of form, pro se litigants must comply with the same substantive and procedural rules as parties who are represented by lawyers:

Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.

Watson v. City of Jackson, 448 S.W.3d 919, 926 (Tenn. Ct. App. 2014) (citations omitted).

I. ISSUES WAIVED

We have determined that three of the issues Plaintiffs raised are waived for failure to comply with Tennessee Rule of Appellate Procedure 27(a).

As GEICO points out in its brief, Plaintiffs' appellate brief contains either no or insufficient citations or arguments explaining how the trial court erred in ruling on three issues: (1) the Tennessee Consumer Protection Act; (2) Plaintiffs' Motion to Alter or Amend the July 23, 2021 Order; and (3) GEICO's motion to quash a deposition.

Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of an appellate brief as required by Rule 27(a)(7) of the Tennessee Rules of Appellate Procedure constitutes a waiver of the issue. *Bean v. Bean*, 40 S.W.3d 52, 55-56 (Tenn. Ct. App. 2000) (citations omitted). Moreover, an issue is waived when it is simply raised without any argument regarding its merits. *Id.* at 56.

O'Shields v. City of Memphis, 545 S.W.3d 436, 443 (Tenn. Ct. App. 2017).

Because of the deficiencies in Plaintiffs' brief concerning the three issues identified above, we decline to address these issues. *See Bean*, 40 S.W.3d at 56; *see also England v. Burns Stone Company, Inc.*, 874 S.W.2d 32, 35 (Tenn. Ct. App. 1993).

II. GEICO’S MOTION TO DISMISS - TIMELINESS

Plaintiffs argue that the trial court erred by considering and granting, in part, GEICO’s Rule 12 Motion to Dismiss.

Plaintiffs contend the motion should not have been considered. Specifically, they contend “the motion to dismiss should have been struck due to non-compliance with [Tennessee Rule of Civil Procedure] 12.02, 7.01 and 8.02-04.” This contention is based on the fact that GEICO “simultaneously filed” its Partial Motion to Dismiss along with its Answer to the Complaint. Plaintiffs rely on the fact that Rule 12.02 requires a motion asserting any of these defenses be made before pleading if a further pleading is permitted. In support of this contention, Plaintiffs cite *Aylor v. Carr*, No. M2018-01836-COA-R3-CV at *9 (Tenn. Ct. App. July 1, 2019), which states “[t]he purpose of a Rule 12.02(6) motion is therefore to take the place of an answer, or at least to come before an answer, when filing an answer may be unnecessary to defeat a claim.”

For its part, GEICO states that its “Motion did not seek dismissal of Plaintiffs’ Complaint in its entirety. Therefore, the filing of a Partial Motion to Dismiss as to certain claims in the Complaint and an Answer was not procedurally improper. Further, the Answer incorporated by reference the defenses in the partial Motion to Dismiss.”

The trial court ruled on Plaintiffs’ timeliness argument as follows:

Tenn. R. Civ. P. 12.02 requires a Motion asserting any of the enumerated defenses, including a motion to dismiss for failure to state a claim, shall be made before pleading if a further pleading is permitted. Concerning the present Motion, the Court finds that a two-minute delay between filing an Answer, and filing a Motion to Dismiss is insufficient in making the Motion untimely. To hold otherwise would conflict with the judicial system’s general objective of disposing of cases on the merits.

The decision of this Court is further supported by the Defendant’s Answer in which the Defendant states the Answer and the Partial Motion to Dismiss are filed simultaneously. Likewise, Defendant’s Answer also raises the defenses filed in the Partial Motion to Dismiss by incorporating the document by reference. In light of the Defendant’s incorporation of the Partial Motion to Dismiss in the Answer by reference, and *the Order of this Court that the Defendant file a responsive pleading*, this Court finds the Defendant’s Partial Motion to Dismiss is timely filed.

(Emphasis added).

In the last sentence immediately above, the trial court references “the Order of this Court that the Defendant file a responsive pleading[.]” That reference is to the order wherein Plaintiffs were ordered to file a Complaint, which the court desired because the case arose from an appeal of the dismissal of Plaintiffs’ civil warrant in the general sessions court. In the same order, GEICO was ordered to file an Answer to Plaintiffs’ Complaint. Thus, it is apparent that GEICO filed its Answer in order to comply with the court’s unequivocal order that it do so, and simultaneously filed its Rule 12 Motion to Dismiss in order to not waive its right to challenge some of Plaintiffs’ claims via a Rule 12 motion. Realizing that GEICO’s filing of an Answer was in strict compliance with the trial court’s order, we find no error with the trial court’s conclusion that GEICO’s Partial Motion to Dismiss was timely filed. We also find that Plaintiffs suffered no adverse consequences from the simultaneous filing of the Rule 12 motion and the Answer. Thus, we affirm the trial court on this issue.

III. DISMISSAL OF COUNT I – THE BAD FAITH CLAIMS

Plaintiffs contend the trial court erred by dismissing the two claims asserted under Count I pursuant to Tennessee Civil Rule of Procedure 12.02 for failure to state a claim upon which relief could be granted. The two claims are: (1) Statutory Bad Faith; and (2) Common Law Tort of Bad Faith. We will discuss each in turn.

As our Supreme Court explained in *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422 (Tenn. 2011):

A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff’s proof or evidence. The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. A defendant who files a motion to dismiss “admits the truth of all of the relevant and material allegations contained in the complaint, but ... asserts that the allegations fail to establish a cause of action.”

In considering a motion to dismiss, courts “must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.” A trial court should grant a motion to dismiss “only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” We review the trial court’s legal conclusions regarding the adequacy of the complaint *de novo*.

Id. at 426 (internal citations omitted).

As for the Statutory Bad Faith claim, the trial court found:

Plaintiffs do not have standing to bring a claim pursuant to TENN. CODE ANN. § 56-7-105 because it is not even alleged that the claim was not paid. Plaintiffs' Amended Complaint contains no assertions that the Defendant failed to pay the loss associated with the result of the February 9, 2018 automobile accident. Instead, Plaintiffs' Complaint alleges the Defendant "did not pay the claim in a fair and equitable manner" when Defendant unjustly raised Plaintiffs' insurance premiums. Even when looked upon in the light most favorable, Plaintiffs' attempt to somehow equate an increase in premiums as a bad faith refusal to pay is insufficient to state a claim for which relief can be granted.

We note that Plaintiffs' appellate argument relies on allegations contained in their proposed Amended Complaint to survive the Rule 12 motion; however, Plaintiffs were not granted leave to file the amended complaint. Thus, such allegations may not be considered.

For its part, GEICO contends the allegation failed to state a claim for two reasons. One, "Plaintiffs have failed to provide any support for their argument that the bad faith failure to pay statute (T.C.A. § 56-7-105) expands beyond the scope of bad faith failure to pay." As GEICO correctly states, GEICO paid the claim asserted by Ms. Wegman. Further, the bad faith statute Plaintiffs' cite, Tennessee Code Annotated § 56-7-105, does not apply to automobile insurance policies. *See Giles v. GEICO Gen. Ins. Co.*, 643 S.W. 3d 171 (Tenn. Ct. App. 2021).

Accordingly, we affirm the dismissal of Plaintiffs' statutory bad faith claim.

As for Plaintiffs' common law tort of bad faith claim, we note, as the trial court did, that Tennessee does not recognize a general common law tort of bad faith by an insurer against an insured; the exclusive remedy is statutory. *See Cracker Barrel Old Country Store, Inc. v. Cincinnati Ins. Co.*, 590 F. Supp.2d 971 (M.D. Tenn. 2008). Thus, we affirm the dismissal of both bad faith claims under Count I.

IV. DISMISSAL OF COUNT IV: THE FAIR CREDIT REPORTING ACT CLAIM

Plaintiffs contend the trial court erred by dismissing their claim that GEICO violated the Fair Credit Reporting Act.

The trial court dismissed the claim on the finding that the Act only pertains to consumer reporting agencies and Plaintiffs' complaint presents no factual allegations that allege GEICO "is, or was, a consumer reporting agency."

As the trial court correctly reasoned:

In Count Four of the Complaint, Plaintiffs seek relief for violation of the Fair Credit Reporting Act pursuant to 15 U.S.C. §1681i(a)(5). . . .

15 U.S.C. § 1681i(a)(5), the statute under which the Plaintiffs do claim relief, creates an obligation in consumer reporting agencies to delete information if disputed claims are discovered to be inaccurate. The Plaintiffs do not present any facts to allege the Defendant is, or was, a consumer reporting agency.

Therefore, this Court finds the Defendant's Partial Motion to Dismiss is GRANTED in relation to Count Four of the Complaint.

Agreeing with the trial court's reasoning, we affirm the dismissal of Plaintiffs' Fair Credit Reporting Act claim.

V. DENIAL OF PLAINTIFFS' MOTIONS TO AMEND THE COMPLAINT

Plaintiffs contend the trial court erred by denying their motions for leave to file an amended complaint. After correctly citing authority that leave to amend a pleading should be freely given, Plaintiffs state in their appellate brief:

Plaintiffs first requested leave to amend within their response to the motion to dismiss, stating as follows: "Plaintiffs respectfully request the Court's leave to amend Count I to specify the tort of bad faith based on choice of law if necessary." ". . . [Tennessee] Code § 56-5-406 no longer exists. The correct statute is §56-5-206, and Plaintiffs request leave to amend if the Court deems fit." "If the Court deems the Complaint to be deficient in any way, Plaintiffs hereby request leave to amend it."

The Court did not acknowledge the request, and granted Defendant's motion to dismiss on 3 out of the 4 counts. The Order did not state whether the dismissal was with or without prejudice. Plaintiffs' motion to set aside, stated detailed reasoning why the claims should not be dismissed, and their intent to amend the complaint.

Immediately following their motion to alter/amend, Plaintiffs moved to amend the complaint. Following the Court's order denying said motion without prejudice to refile, Plaintiffs renewed the motion on 12/4/2020.

The proposed amended complaint corrected all curable deficiencies in the formal complaint. It stated the applicable sections of the FCRA; described the reasoning why the bad faith tort applied; specified the claims of breach of contract and unjust enrichment; and clarified the elements for each count and for damages.

(Citations to the record omitted).

GEICO responds to the foregoing argument noting:

Plaintiffs appeal two separate orders denying their Motions to Amend the Complaint – the Trial Court’s January 4, 2021 Order and the Trial Court’s May 21, 2021 Order. In its January 4, 2021 Order, the Trial Court denied Plaintiffs’ Motion to Amend Complaint because Plaintiffs had not set aside the Trial Court’s dismissal of the claims Plaintiffs sought to amend. In its May 21, 2021 Order, the Trial Court’s basis for the denial of Plaintiffs’ Motion was two-fold: 1) As to the Fair Credit Reporting Act claim, Plaintiffs have not set aside the previous dismissal and 2) As to the defamation claim, “the requested amendment comes too late in this litigation given the fact that the case has now been set for trial . . . and that the time frame for discovery to be completed has passed. . .”

In the order entered on January 4, 2021, the trial court stated that it previously dismissed, with prejudice, the claims Plaintiffs wished to amend. The court further noted that it had not set aside its dismissal of the claims at issue. In fact, Plaintiffs had not filed a motion to set aside the orders dismissing the claims at issue. Therefore, as the trial court explained in its order, “the Court having not set aside its partial dismissal plaintiffs are not allowed to amend their Complaint” citing *Lee v. State Volunteer Mut. Ins. Co.*, No. E2002-03127-COA-R3-CV, 2005 WL 123492 (Tenn. Ct. App. Jan. 21, 2005); *Morris Properties, Inc. v. Johnson*, No. M2007-00797-COA-R3-CV, 2008 WL 1891434, at *1 (Tenn. Ct. App. Apr. 29, 2008) and *Denton-Preletz v. Denton*, No. E2010-01756-COA-R3-CV, 2011 WL 5375141, at *1 (Tenn. Ct. App. Nov. 8, 2011).

The rule at issue, Rule 15.01, provides, in pertinent part, that “a party may amend [its] pleadings . . . by leave of court; and leave shall be freely given when justice so requires.” Tenn. R. Civ. Pro. 15.01. “While requiring leave to be freely given lessens the discretion of the trial court in granting or denying such motions, the court’s grant or denial of a motion to amend the pleadings is still generally subject to an abuse of discretion standard.” *Denton-Preletz*, 2011 WL 5375141, at *8 (citing *Merriman v. Cont’l Bankers Life Ins. Co.*, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1979); see also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S. Ct. 795, 28 L. Ed.2d 77 (1971)).

Notwithstanding the foregoing liberal policy, “[o]nce a judgment dismissing a case has been entered, the plaintiff cannot seek to amend its complaint without first convincing the trial court to set aside its dismissal pursuant to Rule 59 or 60 of the Tennessee Rules of Civil Procedure.” *Lee v. State Volunteer Mut. Ins. Co., Inc.*, No. E2005-03127-COA-R3-CV, 2005 WL 123492, at *11 (Tenn. Ct. App. Jan. 21, 2005) (citations omitted); see also *Morris Properties, Inc. v. Johnson*, No. M2007-00797-COA-R3-CV, 2008 WL

1891434, at *2 (Tenn. Ct. App. 2008). The claims at issue had been dismissed with prejudice and Plaintiffs had not filed a motion to set aside the dismissal prior to filing their motions to amend. Accordingly, we find no abuse of discretion in denying Plaintiffs' motions to amend the complaint.

For the reasons set forth above, we affirm the trial court's decisions to deny Plaintiffs' motions for leave to amend the complaint.

VI. SUMMARY DISMISSAL OF DEFAMATION CLAIM

Summary judgment should be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. P. 56.04. “The moving party [in this case GEICO] has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law.” *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008).

GEICO filed its Motion for Summary Judgment on the defamation claim on the basis that Plaintiffs' had no standing to pursue a private cause of action for defamation. In this regard GEICO relies on §1681h(e), which reads:

Except as provided in sections 616 and 617 [15 USCS §§1681n and 1681o], *no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 609, 610, or 615 [15 USCS §1681g, 1681h, or 1681m], or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report [,] except as to false information furnished with malice or willful intent to injure such consumer.*

GEICO also contends that the duty of furnishers who supply information to consumer reporting agencies is governed by § 1681s-2(a) of the Fair Credit Reporting Act, which reads: “A person shall not furnish any information relating to a consumer to any consumer reporting agency *if the person knows or has reasonable cause to believe at the information is inaccurate.*” (emphasis added).

In its brief, GEICO correctly notes that the basis for Plaintiffs' defamation claim was GEICO's filing of the at-fault entry with the CLUE reports. GEICO also notes that Plaintiffs failed to allege in the complaint and failed to identify any facts to establish that

GEICO posted the at-fault entry with malice or willful intent to injure Plaintiffs. Thus, GEICO contends it is entitled to summary judgment as a matter of law.

In ruling on the defamation claim, the trial court correctly found:

[B]y furnishing information to a credit reporting agency, the defendant's conduct is governed by Section 1681s(2) of the Fair Credit Reporting Act and *Section 1681s(2) limits enforcement of claims against furnishers of information, that would be GEICO, to claims that allege malice or intent to injure. All state law claims that do not allege such willfulness are pre-empted [by] Section 1681h(e) and any surviving claims alleging willfulness are pre-empted under 1681t subpart (b)(1)(F) if they involve subject matter regulated under 1681s(2) . . .* So, respectfully, I find that there is no standalone claim for defamation that can be pursued in this matter and the matter is totally governed by the Fair Credit Reporting Act because the only defamatory statement that is alleged is the one submitted to the credit reporting agencies”

The Plaintiffs further assert that the defendants removed one at fault designation from a certain report but failed to do so on other reports. Respectfully, the Court finds that this evidence is insufficient to support a finding of malice or willful intent to injure. Failure to remove an at-fault injury based solely on the assertion by the insured that the action was not at fault, and not supported by any of the evidence to support a finding that GEICO had some purposeful intent to harm these two plaintiffs is insufficient for purposes of the motion for summary judgment, and do not sink to the level of personal hatred, ill will, culpable recklessness, a willful and wanton disregard of the rights and interests of the plaintiffs.

(Emphasis added).

Plaintiffs counter, insisting that they disputed several key items in GEICO's Statement of Undisputed Facts in support of their motion for summary judgment, with specific references to the record. They also insist that they presented additional material facts relevant to the defamation claim. However, Plaintiffs did not present any evidence to support a claim of malice or willful intent on GEICO's part to injure Plaintiffs. As the trial court correctly noted, “all state law claims that do not allege such willfulness are pre-empted [by] Section 1681h(e) and any surviving claims alleging willfulness are pre-empted under 1681t subpart (b)(1)(F) if they involve subject matter regulated under 1681s(2).”

Thus, for the foregoing reasons, we affirm the summary dismissal of Plaintiffs' defamation claim.

VII. SUMMARY DISMISSAL OF THE UNCONSCIONABLE CONTRACT CLAIM

Plaintiffs' claim of an unconscionable contract, as stated in Count II of the complaint, reads: "By intentionally crafting a Rating Plan that denies statutory protection to a specific group of insureds, Defendant created an unconscionable contract. Any adverse action taken using said contract should not be enforceable."

GEICO filed a motion to summarily dismiss this claim on the basis that Plaintiffs had no standing to pursue a private cause of action for a violation of Tennessee Code Annotated § 56-7-1109. In the alternative, GEICO contended there was no dispute of material fact as to their compliance with Tennessee Code Annotated § 56-7-1109 because the Tennessee Department of Commerce and Insurance determined that GEICO's Rating Plan was compliant with Tennessee rules and statutory regulations governing automobile liability insurance companies doing business in the state of Tennessee. We shall first address the standing issue.

In their appellate brief, Plaintiffs contend:

1. Plaintiffs brought the claim under unconscionable contract doctrine in common law, stating that Defendant's contract is not compliant with TCA § 56-7-1109. Count II of the Complaint cited "Unconscionable Contract or Clause, as did all subsequent filings. Plaintiffs require standing only under contract law, not under TCA § 56-7-1109.
2. A private cause of action exists unless a statute specifically prohibits it. Neither TCA § 56-7-1109, nor TCA § 56-1-801 contains such a prohibition. There is no wording that even remotely bars private causes of action. [As the Trial Court had previously stated, words matter.]
3. Private causes of action have been brought against insurers for rating plans that enable premium increases non-compliant with TCA title 56. *Blackburn, v. Pre-Paid Legal*, 398 S.W.3d 630 (Tenn. Ct. App. 2010).

Pursuant to an order entered on September 29, 2021, the trial court held in favor of GEICO on both grounds it relied on in its motion. With regard to the standing issue, the trial court summarized Plaintiffs' unconscionable contract claim as follows:

[Plaintiffs] assert that the contract is unconscionable because it does not conform to Section 56-7-1109 of the Tennessee Code Annotated, and it therefore allows increases in premiums for nonemployee driver's negligence of the driver. Accordingly, the plaintiffs seek to recover by enforcing the statutory requirements concerning when increases in premiums are allowed.

Thus, the trial court reasoned that “the gravamen of the plaintiffs’ claim is enforcement of statutory provisions found in Section 56-7-1109.” We agree.

The trial court summarily dismissed the unconscionable contract claim by ruling from the bench. This ruling was transcribed and attached to the final order and incorporated by reference. Following the reasoning in *Affordable Construction Services v. Auto Owners Insurance Company*, 621 S.W.3d 693 (Tenn. 2021), the trial court noted:

“In order to bring a cause of action to enforce a statutory duty, plaintiffs must show that the legislature intended for a private right of action to exist.” The court then noted, citing the *Auto Owners* case referenced immediately above, that it could determine whether the legislature created a private right of action in one of two ways: “Based on the expressed terms of the statute or by implication through the statute’s structure and legislative history.” It then noted that the penalties provided in the statute were limited to a Class C misdemeanor. Therefore, the trial court concluded, the express penalty for a violation of the statute is “the misdemeanor action which would be a regulatory action taken by the State of Tennessee or a local government of some sort or the commissioner of insurance. And the Court finds that that’s the specific penalty provided.”

Then, relying on the reasoning in *Brown v. Tennessee Title Loans*, 328 S.W.3d 850 (Tenn. 2010), the trial court found that “there is no private right of action expressly included in the statute. Therefore, the plaintiff must show that the legislature was manifestly clear in its intent to imply a private right of action.” Following a review of the three factors to be considered in determining whether there is an implied private right of action under a statute, the trial court concluded:

In light of the regulatory and penal nature, the Court finds that a private right of action is not consistent with the underlying purposes of a legislation, and the legislation was not manifestly clear in showing that they intended to allow such a private right of action to exist. Therefore, 56-7-1109 provides neither an explicit or implicit private cause of action. As such, the Court finds that the defendant has negated an essential element of the plaintiffs’ claim and has demonstrated that the plaintiffs’ evidence at the summary judgment stage . . . is insufficient to establish their claim. Accordingly, the defendant’s entitled to judgment as a matter of law and the motion for summary judgment should be granted.

Having considered the cases relied on by the trial court, the factors to be considered, and the nature of Plaintiffs’ claim of an unconscionable contract, which, as the trial court found, is clearly based on the statute and not on contract, we agree with the trial court’s conclusion that GEICO is entitled to judgment as a matter of law because Tennessee Code

Annotated § 56-7-1109 provides neither an explicit nor implicit private cause of action. Thus, as GEICO correctly contends, Plaintiffs lack standing to enforce the sanctions provided in Tennessee Code Annotated § 56-7-1109 when an insurer fails to comply with the requisite rating plan.

Before we conclude, we acknowledge that Plaintiffs also challenged the propriety of the trial court's ruling by insisting that they needed more time to prepare a response to the motion. Plaintiffs also contend the trial court erred in considering affidavits GEICO submitted in support of its motion for summary judgment. As for the time to respond, this was a discretionary decision for the trial court to make. Because the issue was solely a question of law that did not require discovery or depositions of GEICO's witnesses and the case had been pending for more than a year, we find no abuse of discretion in requiring Plaintiffs to proceed with the hearing.

With regard to Plaintiffs' objection to the affidavits, we find that the affidavits were inconsequential in resolving the issue of whether Plaintiffs lacked standing. Although we find no error with the trial court considering the affidavits, if this was error, it was harmless.

For the foregoing reasons, we affirm the summary dismissal of Plaintiffs' unconscionable contract claim.

VIII. DISCRETIONARY COSTS

A "prevailing party" may request discretionary costs, such as "reasonable and necessary court reporter expenses for depositions or trials, [and] reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials." Tenn. R. Civ. P. 54.04(2). The purpose of awarding discretionary costs is to help "make the prevailing party whole," not to punish the losing party. *Freeman v. CSX Transp., Inc.*, 359 S.W.3d 171, 179 (Tenn. Ct. App. 2010) (quoting *Owens v. Owens*, 241 S.W.3d 478, 496-497 (Tenn. Ct. App. 2007)).

When deciding whether to award discretionary costs under Rule 54.04(2), the trial court should:

- (1) determine whether the party requesting the costs is the "prevailing party,"
- (2) limit awards to the costs specifically identified in the rule,
- (3) determine whether the requested costs are necessary and reasonable, and
- (4) determine whether the prevailing party has engaged in conduct during the litigation that warrants depriving it of the discretionary costs to which it might otherwise be entitled.

Mass. Mut. Life Ins. Co. v. Jefferson, 104 S.W.3d 13, 35-36 (Tenn. Ct. App. 2002) (citations omitted).

Whether to award discretionary costs pursuant to Rule 54.04(2) is within the discretion of the trial court, *Stalworth v. Grummons*, 36 S.W.3d 832, 835 (Tenn. Ct. App. 2000), and, on appeal, the appellant bears the burden of demonstrating that the award constitutes an abuse of discretion by the trial court. *Sanders v. Gray*, 989 S.W.2d 343, 345 (Tenn. Ct. App. 1998). We will only overturn a discretionary decision when the trial court has applied an incorrect legal standard, reached an illogical decision, based its decision on a clearly erroneous assessment of the evidence, or employed reasoning that causes an injustice to the complaining party. *Freeman*, 359 S.W.3d at 180 (citing *Mass. Mut. Life Ins. Co.*, 104 S.W.3d at 35).

The trial court found that GEICO was the prevailing party and awarded it \$1,825.60 for costs incurred in taking the depositions of Plaintiffs, which Plaintiffs contend was inappropriate. As stated in their brief,

Rule 54.04(2) allows deposition costs only if necessary and reasonable. In the instant case, deposing Plaintiffs for 4-5 hours was neither necessary nor reasonable. The depositions yielded nothing that couldn't have been obtained by written discovery. The deposition questions were either unrelated to this case, or asked and answered in written discovery. Importantly, the deposition testimony was not used at trial or any hearing, nor mentioned in any of the Court's orders. The claims were disposed of as a matter of law, not based on any facts gleaned from Plaintiffs' depositions.

We find Plaintiffs argument unpersuasive.

Applying the *Jefferson* factors identified above, GEICO was clearly the prevailing party, the trial court correctly limited GEICO's costs to those specifically identified in the rule, the costs were necessary and reasonable, and there is no evidence that GEICO engaged in conduct during the trial court proceedings that warrants depriving it of the discretionary costs. *See Jefferson*, 104 S.W.3d at 35–36.

Accordingly, we affirm the award of discretionary costs.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded for further proceedings consistent with this opinion. Costs of appeal are assessed against Plaintiffs, David Seely and Subhadra Guanawardana, for which execution may issue.

FRANK G. CLEMENT JR., P.J., M.S.