IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 2, 2022

MERRILL JEAN SMITH v. BUILT-MORE, LLC ET AL.

Appeal from the Chancery Court for Rutherford County
No. 2016-CV-713 J. Mark Rogers, Judge

No. M2021-00749-COA-R3-CV

In this appeal from a judgment enforcing a settlement agreement, the appellant contends that the trial court erred in granting her counsel leave to withdraw. She further contends that she lacked the capacity to agree to the settlement. We discern no error in granting counsel leave to withdraw. And because the appellant failed to file a transcript or statement of the evidence, we must presume that the trial court's findings relating to the appellant's capacity are supported by the evidence. So we affirm.

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

W. NEAL MCBRAYER, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and THOMAS R. FRIERSON, II, J., joined.

Merrill Jean Smith, Murfreesboro, Tennessee, pro se appellant.

Craig R. Allen and Drew H. Reynolds, Chattanooga, Tennessee, for the appellee, Built-More LLC.

Joseph M. Huffaker, Nashville, Tennessee, for the appellee, American Structural & Foundation Repair, Inc.

MEMORANDUM OPINION[1]

I.

[1] Under the rules of this Court, as a memorandum opinion, this opinion may not be published, "cited[,] or relied on for any reason in any unrelated case." TENN. CT. APP. R. 10.

Merrill Jean Smith owned improved real property in Murfreesboro, Tennessee. The structure on the property did not comply with the city's building code. So Ms. Smith hired Built-More LLC and American Structural & Foundation Repair, Inc. to remodel and repair the structure.

After disagreements arose between Ms. Smith and the contractors, Built-More and American Structural walked off the job before it was finished. Later, the City of Murfreesboro razed the structure.

Ms. Smith sued Built-More and American Structural for breach of contract, negligence, and negligent misrepresentation. After discovery, the parties participated in mediation and reached a settlement. And a short, handwritten settlement agreement was signed by all the parties. But when Built-More and American Structural tendered the settlement checks and sent a release of liability to Ms. Smith, she refused to accept the checks or sign the release. So Built-More and American Structural filed a motion to enforce the settlement.

The trial court held an evidentiary hearing on the motion to enforce. During Ms. Smith's testimony, her attorney asked for a recess to contact the Board of Professional Responsibility. After the recess, Ms. Smith's attorney asked for permission to withdraw, stating that he could no longer represent Ms. Smith. The trial court allowed the attorney to withdraw and continued the case to a later date.

The evidentiary hearing concluded one month later with Ms. Smith representing herself. The court found that Ms. Smith knew she reached a settlement of all her claims for a fixed sum. And she acknowledged her signature on the settlement agreement. Although Ms. Smith testified to medical issues that she claimed impaired her ability to participate in the mediation, the court did not accept her testimony. It also noted that there was no medical evidence "that any medical issues had any effect on Ms. Smith's conduct at the mediation." So the court granted the motion to enforce the settlement and dismissed Ms. Smith's claims with prejudice.

II.

As she did at the evidentiary hearing, Ms. Smith represents herself on appeal. Her brief does not meet the requirements of the Tennessee Rules of Appellate Procedure or of this Court. *See* TENN. R. APP. P. 27; TENN. CT. APP. R. 6. Yet, in appropriate circumstances, we give pro se appellants a certain degree of leeway in their briefing. *See, e.g.*, *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000) (excusing the "fail[ure] to comply with the rules concerning correct citations to the record"). Here, Built-More and American Structural were both able to brief the merits of the appeal. And neither asked for dismissal of the appeal based upon Ms. Smith's failure to comply with the rules. *See Crowe v. Birmingham & N.W. Ry. Co.*, 1 S.W.2d 781, 781 (Tenn. 1928)

(holding that it is not error for an appellate court to "refus[e] to consider a case upon its merits, where the appellant has not complied with the rules of that court"); *Duchow v. Whalen*, 872 S.W.2d 692, 693 (Tenn. Ct. App. 1993) (dismissing appeal for failure to comply with the Tennessee appellate rules). Although our authority to dismiss the appeal is not constrained by the appellees' decision to brief the merits, given the record, we find it appropriate to address the two issues that we perceive are raised by Ms. Smith.

Ms. Smith contends that she was prejudiced by the withdrawal of her attorney during the evidentiary hearing. The decision to grant or deny an attorney's "request to withdraw as counsel is a matter addressed to the court's discretion." *Odom v. Odom*, No. M2018-00405-COA-R3-CV, 2019 WL 3546437, at *4 (Tenn. Ct. App. Aug. 5, 2019). A trial court abuses its discretion if it applies the wrong legal standard, reaches "an illogical or unreasonable decision," or bases its decision "on a clearly erroneous assessment of the evidence." *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). Here, the trial court allowed Ms. Smith's counsel to withdraw after counsel examined his client and then consulted with the Tennessee Board of Professional Responsibility. Based on the court's order granting leave to withdraw, it is apparent that the circumstances mandated withdrawal of Ms. Smith's counsel. *See* TENN. SUP. CT. R. 8, Rule 1.16(a) (addressing mandatory withdrawal).

We discern no abuse of discretion in granting Ms. Smith's counsel leave to withdraw. As the comments to the Rules of Professional Conduct indicate, a "lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient." *Id.* Rule 1.16(a) cmt. 3. Ms. Smith claims she was prejudiced because she was left without counsel and the manner of the withdrawal cast doubt on her testimony. But the court continued the evidentiary hearing, over the objections of Built-More and American Structural, which afforded Ms. Smith an opportunity to obtain substitute counsel. And the trial court provided specific reasons for not crediting parts of Ms. Smith's testimony. None of these reasons were related to the withdrawal of Ms. Smith's counsel.

Ms. Smith also contends that the evidence preponderates against the trial court's finding that she had the requisite capacity to agree to the settlement. In non-jury cases, we review the record de novo with a presumption of correctness as to the trial court's determination of facts; we must honor those findings unless the evidence preponderates to the contrary. Tenn. R. App. P. 13(d); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). The trial court's conclusions of law are afforded no presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

Tennessee Rule of Appellate Procedure 24 requires an appellant to prepare a record conveying a "fair, accurate, and complete account" of what happened at trial so that we may evaluate the issues raised on appeal. TENN. R. APP. P. 24; *In re M.L.D.*, 182 S.W.3d

890, 894 (Tenn. Ct. App. 2005). To show evidence preponderates against the trial court's factual findings, the appellant must "provide . . . a transcript of the evidence or a statement of the evidence from which we can determine whether the evidence preponderates for or against the findings of the trial court." *In re M.L.D.*, 182 S.W.3d at 894-95. The recitation of facts and arguments contained in briefs do not constitute evidence that we may consider in lieu of evidence properly entered into the record. *Reid v. Reid*, 388 S.W.3d 292, 295 (Tenn. Ct. App. 2012); *Flack v. McKinney*, No. W2009-02671-COA-R3-CV, 2011 WL 2650675, at *2 (Tenn. Ct. App. July 6, 2011). Without a transcript or statement of the evidence, we must conclusively presume that the trial court's findings are supported by the evidence. *In re M.L.D.*, 182 S.W.3d at 895; *Word v. Word*, 937 S.W.2d 931, 932 (Tenn. Ct. App. 1996); *Leek v. Powell*, 884 S.W.2d 118, 121 (Tenn. Ct. App. 1994); *Flack*, 2011 WL 2650675, at *3. Thus, when an issue raised on appeal turns on the facts presented at an evidentiary hearing, the lack of a transcript or a statement of the evidence is generally "fatal" to that issue on appeal. *Piper v. Piper*, No. M2005-02541-COA-R3-CV, 2007 WL 295237, at *4 (Tenn. Ct. App. Feb. 1, 2007).

Here, Ms. Smith provided neither a transcript nor a statement of the evidence. So we presume that the court's finding that she had the requisite capacity was supported by the evidence.

III.

The trial court did not abuse its discretion in allowing her attorney to withdraw. And Ms. Smith's failure to provide a transcript or statement of the evidence precludes any review of the court's factual findings. So we affirm.

s/ W. Neal McBrayer
W. NEAL MCBRAYER, JUDGE