

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 3, 2023

JOHNNA MCCALL ET AL. v. UNITED PARCEL SERVICE ET AL.

Appeal from the Circuit Court for Davidson County
No. 22c754 Amanda J. McClendon, Judge

No. M2022-01112-COA-R3-CV

A mother and father filed a personal injury action in 2022 on behalf of their adult daughter, who was allegedly injured in a car accident in 2007 when she was four years old. The daughter was not represented by counsel, and her parents purported to represent her. The trial court dismissed the daughter's claims due to the running of the statute of limitations. On appeal, the daughter argues (through her mother/conservator) that the dismissal was in error because she lacks mental capacity. Because the daughter did not file suit pro se and was not represented by counsel, we conclude that the trial court properly granted the defendants' motion to dismiss for failure to state a claim upon which relief can be granted.

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

ANDY D. BENNETT, J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, C.J., and J. STEVEN STAFFORD, P.J., W.S., joined.

Johnna McCall, Huntsville, Alabama, pro se.

David A. Chapman, Janet Strevel Hayes, and Sallie Papajohn Neese, Knoxville, Tennessee, for the appellees, United Parcel Service, Inc., and Langley Jernigan.

OPINION

This lawsuit relates to an automobile accident that occurred on September 27, 2007.¹ The plaintiffs, Terry McCall, Johnna McCall, and Jacob McCall, were passengers in a car that collided with a truck owned by United Parcel Service, Inc. ("UPS"). Terry McCall is the mother of Johnna and Jacob McCall, twins born on June 8, 2003. Johnna and Jacob

¹ Because the trial court resolved this case by granting the defendants' motion to dismiss under Tenn. R. Civ. P. 12.02(6), we will take as true the relevant factual allegations of the complaint. *See Riggs v. Burson*, 941 S.W.2d 44, 47 (Tenn. 1997).

McCall were four years old at the time of the accident. The UPS truck was driven by Langley T. Jernigan.

On April 19, 2022, Terry McCall, acting pro se, filed this lawsuit against UPS and Mr. Jernigan. The complaint identified Terry McCall as well as Johnna and Jacob McCall as the plaintiffs. The complaint was signed by Terry McCall only. Two days later, an amended complaint was filed; the amended complaint was signed by Terry McCall and Martin McCall, who is the father of the twins. Neither Johnna McCall nor Jacob McCall signed the original complaint or the amended complaint. In their amended complaint, plaintiffs asserted causes of action for negligence, negligent entrustment, and negligent hiring and retention and requested compensatory damages.

The defendants, UPS and Mr. Jernigan, filed a motion to dismiss the amended complaint for failure to state a claim upon which relief can be granted, asserting that the plaintiffs' claims were barred by the one-year statute of limitations for personal injuries set forth at Tenn. Code Ann. § 28-3-104. After a hearing, the trial court entered an order on August 9, 2022, granting the defendants' motion to dismiss. In its order, the court found that Terry McCall conceded at oral argument that her cause of action was barred by the statute of limitations. The trial court determined that the complaint filed by Terry McCall and Martin McCall on behalf of their adult children was ineffective to toll the statute of limitations as to the claims of Johnna and Jacob McCall. Johnna McCall filed a notice of appeal from the trial court's order. Neither Terry McCall nor Jacob McCall appealed.

The trial court rejected a statement of the evidence submitted by the appellant and approved a statement of the evidence submitted by the appellees. The statement of the evidence approved by the court indicates that, despite the trial court's ruling at the beginning of the hearing that each individual plaintiff could only argue his or her own claims, Terry McCall presented arguments on behalf of Johnna and Jacob McCall. Terry McCall conceded to the trial court that Johnna McCall had never been adjudicated incompetent or disabled. She claimed that Johnna McCall had been on an individualized educational plan ("IEP") when she was in school. According to the statement of the evidence, no additional proof of Johnna's IEP was presented to the trial court.

On March 7, 2023, this Court granted the defendants' motion to strike the appendix submitted with Johnna McCall's appellate brief. On March 13, 2023, Johnna McCall filed a motion for consideration of post-judgment facts signed by Terry McCall and Johnna McCall. The post-judgment facts consist of the contents of the appendix to Johnna McCall's appellate brief. This Court reserved judgment on the motion to consider post-judgment facts pending submission of the case for a decision on the merits.

ANALYSIS

On appeal, we are asked to decide two issues: (1) whether this Court should grant the appellant's motion to consider post-judgment facts; and (2) whether the trial court erred in dismissing Johnna McCall's complaint as barred by the statute of limitations.

We must begin by addressing the fact that Johnna McCall is arguably attempting to proceed pro se on appeal. Her appellate brief is signed by Johnna McCall and by Terry McCall as conservator of Johnna McCall. A pro se litigant is "entitled to fair and equal treatment by the courts." *Young v. Barrow*, 130 S.W.3d 59, 62 (Tenn. Ct. App. 2003). The following principles apply to pro se litigants:

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.

Id. at 62-63 (citations omitted); *see also Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003). Thus, this Court may not excuse Johnna McCall from complying with the procedural and substantive rules governing this case. Moreover, as will be discussed below, Johnna McCall may represent herself, but she may not be represented by a non-attorney.

1. Post-judgment facts.

Tennessee Rule of Appellate Procedure 14 governs the authority of this Court to consider post-judgment facts. The Rule provides, in pertinent part:

The Supreme Court, Court of Appeals, and Court of Criminal Appeals on its motion or on motion of a party may consider facts concerning the action that occurred after judgment. Consideration of such facts lies in the discretion of the appellate court. While neither controlling nor fully measuring the court's discretion, consideration generally will extend only to those facts, capable of ready demonstration, affecting the positions of the parties or the subject matter of the action such as mootness, bankruptcy, divorce, death, other judgments or proceedings, relief from the judgment requested or granted in the trial court, and other similar matters.

TENN. R. APP. P. 14(a). The Rule specifies that an appellate court may consider "facts concerning the action that occurred after judgment." *Id.* The advisory commission comment to Tenn. R. App. P. 14 states, in part, that the consideration of post-judgment

facts that are “unrelated to the merits and not genuinely disputed” may be “necessary to keep the record up to date.” The comment further clarifies that, “This rule is not intended to permit a retrial in the appellate court.”

Caselaw interpreting Tenn. R. App. P. 14 explains that, while an appellate court has the discretion to consider post-judgment facts, the appropriate post-judgment facts to be considered are “those facts ‘capable of ready demonstration, affecting the positions of the parties or the subject matter.’” *Hall v. Bookout*, 87 S.W.3d 80, 87 (Tenn. Ct. App. 2002) (quoting TENN. R. APP. P. 14(a)). Moreover, in accordance with the rule and its advisory comment, an appellate court may consider facts “occurring after judgment which are unrelated to the merits or not genuinely disputed.” *Book-Mart of Fla., Inc. v. Nat’l Book Warehouse, Inc.*, 917 S.W.2d 691, 693 (Tenn. Ct. App. 1995). Thus, an appellate court should not consider evidence that could be disputed in the trial court or from which different conclusions could be drawn. *Blue v. Church of God Sanctified, Inc.*, No. M2021-00244-COA-R3-CV, 2022 WL 2302263, at *9 (Tenn. Ct. App. June 27, 2022) (citing *Duncan v. Duncan*, 672 S.W.2d 765, 767 (Tenn. 1984)).

The post-judgment facts at issue here consist of the following: (1) a Sumner County Schools psychoeducational evaluation, (2) Sumner County Schools and Huntsville City Schools IEP records, (3) a psychological evaluation dated August 23, 2022, and (4) letters of guardianship dated November 18, 2022, and letters of conservatorship dated December 15, 2022, from the Probate Court of Madison County, Alabama. We decline to consider the school records (items 1 and 2) because these documents existed at the time of the trial court’s ruling and, therefore, do not contain facts “that occurred after judgment” as required by Tenn. R. App. P. 14(a). The other two sets of documents (items 3 and 4) are offered to establish Johnna McCall’s competency, which is a disputed issue in this case. The facts in these documents do not qualify as being “unrelated to the merits and not genuinely disputed.” TENN. R. APP. P. 14, cmt. We, therefore, decline to exercise our discretion to consider items 3 and 4.

We deny the motion to consider post-judgment facts.

2. Statute of limitations.

The defendants filed a motion to dismiss this case, including Johnna McCall’s claims, pursuant to Tenn. R. Civ. P. 12.02(6), for failure to state a claim upon which relief can be granted based upon the statute of limitations. *See Young ex rel. Young v. Kennedy*, 429 S.W.3d 536, 546 (Tenn. Ct. App. 2013) (stating that a claim subject to dismissal due to the expiration of the statute of limitations fails to state a claim upon which relief can be granted). The propriety of a trial court’s dismissal of a motion to dismiss for failure to state a claim presents a question of law, which we review de novo with no presumption of correctness. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 894-95 (Tenn. 2011).

The applicable statute of limitations in this case is found at Tenn. Code Ann. § 28-3-104(a)(1)(A), which provides for a one-year statute of limitations for injuries to the person. The accident at issue occurred on September 27, 2007. Because Johnna McCall was a minor at that time, we must consider the effect of Tenn. Code Ann. § 28-1-106, which states, in pertinent part:

(a) If the person entitled to commence an action is, at the time the cause of action accrued, either under eighteen (18) years of age, or adjudicated incompetent, such person, or such person's representatives and privies, as the case may be, may commence the action, after legal rights are restored, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from restoration of legal rights.

(b) Persons over the age of eighteen (18) years of age are presumed competent.

(c)(1) If the person entitled to commence an action, at the time the cause of action accrued, lacks capacity, such person or such person's representatives and privies, as the case may be, may commence the action, after removal of such incapacity, within the time of limitation for the particular cause of action, unless it exceeds three (3) years, and in that case within three (3) years from removal of such incapacity, except as provided for in subdivision (c)(2).

.....

(d) For purposes of this section, the term "person who lacks capacity" means and shall be interpreted consistently with the term "person of unsound mind" as found in this section prior to its amendment by Chapter 47 of the Public Acts of 2011.

Johnna McCall turned eighteen years of age on June 8, 2021. Under Tenn. Code Ann. § 28-1-106(a), her legal rights were restored once she reached age eighteen, and the one-year statute of limitations would expire on June 8, 2022. Her parents filed a complaint on her behalf on April 19, 2022.

On appeal, Johnna McCall asserts that the trial court erred in dismissing her case. For the reasons discussed below, we cannot agree.

A. Unauthorized practice of law.

Terry and Martin McCall filed the initial and amended complaints on behalf of their daughter, Johnna McCall. Johnna McCall did not sign the pleadings. The trial court dismissed Johnna McCall's causes of action because they were not properly asserted within the one-year statute of limitations, which expired on her nineteenth birthday, on June 8, 2022. In its order, the court found:

This Court further finds that because a claim asserted in a pleading by a person who is not entitled to practice law is a nullity, Terry McCall and Martin McCall's attempt to bring this cause of action on their children's behalf was ineffective to toll the statute of limitations period for either Johnna McCall or Jacob McCall and is void *ab initio*.

Under Tennessee law, a person may represent himself or herself in any court of the state. Tenn. Code Ann. § 23-1-109. The right of self-representation only allows a person to conduct and manage his or her "own case." *Id.* Only a licensed attorney may engage in the practice of law in Tennessee. Tenn. Code Ann. § 23-3-103; *Beard v. Branson*, 528 S.W.3d 487, 495 (Tenn. 2017) (citing *Vandergriff v. ParkRidge E. Hosp.*, 482 S.W.3d 545, 553 (Tenn. Ct. App. 2015)). The practice of law encompasses the "rendition of services for others that call for the professional judgment of a lawyer," *Petition of Burson*, 909 S.W.2d 768, 775 (Tenn. 1995) (quoting EC 3-5 of the Code of Professional Responsibility²), and these services include the preparation and filing of pleadings and appearing as an advocate in a representative capacity. *Old Hickory Eng'g & Mach. Co. v. Henry*, 937 S.W.2d 782, 786 (Tenn. 1996); Tenn. Code Ann. § 23-3-101(3).

On appeal, Johnna McCall, through her mother and conservator, relies upon Tenn. R. Civ. P. 17.03, which states, in pertinent part:

Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, or if justice requires, he or she may sue by next friend.

Johnna McCall argues that this Rule gives her mother, as her conservator, authority to file suit on her behalf. Rule 17.03 allows a conservator to "sue or defend" as a party in a lawsuit on behalf of the ward. Rule 17.03 "does not authorize a parent to practice law while acting on behalf of [the minor child]." *Vandergriff*, 482 S.W.3d at 553.

Because neither the complaint nor the amended complaint was signed by Johnna McCall³ or by a licensed attorney, the complaints were nullities and had no effect. *See id.*

² We note that, "The Code of Professional Responsibility was replaced by the Rules of Professional Conduct, and there is no comment equivalent to Ethical Consideration 3–5 in the new Rules; nevertheless, the changes do not affect the standard to be applied." *Tenn. Env't Council, Inc. v. Tenn. Water Quality Control Bd.*, 254 S.W.3d 396, 403 (Tenn. Ct. App. 2007).

³ Tennessee Rule of Civil Procedure 11.01(a) requires that pleadings filed by an unrepresented party must be signed by the party.

Therefore, the trial court did not err in dismissing the claims asserted on behalf of Johnna McCall.

B. Mental incapacity.

On appeal, Johnna McCall argues that the statute of limitations was tolled pursuant to Tenn. Code Ann. § 28-1-106(a) because she is not competent.

In addition to citing the unauthorized practice of law by the parents, the defendants argue that Johnna McCall's mental capacity was not properly raised.⁴ Tennessee Code Annotated § 28-1-106(b) provides for a presumption that a person over the age of 18 is competent. The original and amended complaint did not include any assertion that Johanna McCall was incompetent or lacked mental capacity. The defendants moved for dismissal based on the statute of limitations. Johanna McCall did not amend her pleadings to allege incapacity.

As stated above, the claims filed on behalf of Johnna McCall were void because they were not filed by her or by a licensed attorney. Thus, at the hearing on the motion to dismiss, there was no case for Johnna McCall properly before the court. Her parents' attempts to file suit and to represent Johnna were invalid and of no effect. *See Vandergriff*, 482 S.W.3d at 554. Thus, the trial court properly dismissed the case without considering the issue of mental capacity.

CONCLUSION

The judgment of the trial court is affirmed. Costs of this appeal are assessed against the appellant, and execution may issue if necessary.

/s/ Andy D. Bennett
ANDY D. BENNETT, JUDGE

⁴ The defendants also argue that, even if mental capacity were at issue here, Tenn. Code Ann. § 28-1-106(a) required Johnna McCall to establish that she was "adjudicated incompetent" at the time the cause of action accrued. Although this case does not require us to decide the issue, we note that Tenn. Code Ann. § 28-1-106 was amended in 2011 and 2016 and that those amendments affect the proper test to apply in determining mental incapacity under the statute. *See* John A. Day, *Harmed Twice*, 52-SEPT. TENN. B.J. 30, 30 (2016); L. Mathew Jehl, Note, *Amending Tennessee's Incapacity Statute: It "May Not Be A Sexy Story, But It's One, Frankly, That . . . Will Help People,"* 49 U. MEM. L. REV. 575, 588-89 (Winter 2018-19).