

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 15, 2013 Session

**JENNIFER L. AL-ATHARI AND HAIDER AL-ATHARI v. LUIS A.  
GAMBOA AND MORGAN SOUTHERN, INC.**

**Appeal from the Circuit Court for Davidson County  
No. 10C2024 Thomas W. Brothers, Judge**

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**No. M2013-00795-COA-R3-CV - Filed December 30, 2013**

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A woman driving a passenger vehicle was involved in a motor vehicle accident with a tractor trailer. The woman and her husband filed a complaint alleging negligence and loss of consortium against the other driver and against the owner of the tractor trailer. The Plaintiffs did not comply with the deadlines set out in the Scheduling Order and, as a result, they were precluded from introducing medical testimony or records in support of their claims. On the day set for trial, the Plaintiffs told the court they were not prepared to try their case and wanted to go home. The trial court dismissed the case without prejudice, with the option of filing a new complaint within a year, and the Plaintiffs appealed. We hold the trial court did not abuse its discretion in dismissing the Plaintiffs' Complaint, and, accordingly, affirm the trial court's judgment.

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

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Jennifer L. Al-Athari and Haider Al-Athari, Antioch, Tennessee, Pro Se.

Steven Douglas Parman, Nashville, Tennessee for the appellee, Morgan Southern, Inc.

**OPINION**

**I. PROCEDURAL HISTORY**

Jennifer L. Al-Athari and Luis A. Gamboa were involved in a motor vehicle accident in July 2009. When the collision occurred, Mrs. Al-Athari was driving a family vehicle, and

Mr. Gamboa was driving a tractor trailer that was owned by Morgan Southern, Inc. Mrs. Al-Athari and her husband, Haider Al-Athari, filed a Complaint on June 2, 2010, asserting negligence against Mr. Gamboa and Morgan Southern. Mrs. Al-Athari alleged that the collision caused her to suffer personal injuries, physical and mental pain and suffering, loss of enjoyment of life, and possibly permanent injury. Mr. Al-Athari claimed that he suffered loss of consortium as a result of the accident. Mrs. Al-Athari sought an award of damages in the amount of \$75,000, and Mr. Al-Athari sought an award of damages in the amount of \$15,000.

Morgan Southern filed an Answer denying liability. The record contains no evidence that Mr. Gamboa was ever served with the Complaint despite numerous attempts to have him served.<sup>1</sup> The trial court entered a Scheduling Order on June 18, 2012. The court set deadlines for mediation, medical depositions, scheduled a case management conference, and set the trial for January 14, 2013.

Mr. and Mrs. Al-Athari had two different attorneys represent them over the course of this case, and each attorney filed a motion to withdraw from representation based on his inability to communicate effectively with Mr. and Mrs. Al-Athari regarding the case's management. The trial court granted each attorney's motion and granted Mr. and Mrs. Al-Athari thirty days to obtain replacement counsel each time it permitted their attorney to withdraw. Mr. and Mrs. Al-Athari filed a motion on October 23, 2012, seeking permission to represent themselves.

Because Mr. Gamboa was never served with the Complaint, the case proceeded against Morgan Southern. On December 12, 2012, Morgan Southern filed a motion *in limine* asking the court to exclude from evidence "any testimony or documentation concerning medical diagnoses, medical and/or other treatment bills allegedly incurred by plaintiffs, physical impairment and/or limitations." The basis for Morgan Southern's motion was that the Scheduling Order provided a deadline of December 1, 2012, for medical depositions to be taken, and the Al-Atharis had failed to take any medical depositions by that date.

This motion was heard on January 4, 2013. The Al-Atharis did not appear for this hearing. The trial court granted the defendant's motion on January 11. The court wrote, "It appearing to the Court that the motion is well taken and should be granted, it is accordingly ORDERED that Plaintiffs are precluded from introducing at the trial of this cause any

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<sup>1</sup>According to Morgan Southern, an original summons was issued for Mr. Gamboa on June 2, 2010, and was returned on July 30 with the notation "not to be found." An alias summons was then issued on August 2, 2010, which was returned "not to be found" on September 7. A third summons was apparently issued on September 8, 2010, and was returned marked "not to be found" on September 27.

testimony or documentation concerning medical diagnoses, medical and /or other treatment bills allegedly incurred by Plaintiffs, physical impairment and/or limitations.”

Morgan Southern subsequently filed three other motions *in limine* seeking to preclude the Al-Atharis from introducing evidence regarding (1) Mr. Gamboa’s legal status in the United States or the process by which Morgan Southern hired Mr. Gamboa, (2) any offers of compromise or settlement or statements made during the parties’ attempted mediation, and (3) Morgan Southern’s liability insurance coverage. The trial court granted each of these motions *in limine* on January 14, 2013.

On January 7, 2013, one week before the trial was scheduled, the Al-Atharis filed a motion asking the court to continue the trial to allow Mrs. Al-Athari to finish her medical treatment. The court denied the motion on January 14, stating in an Order that the motion was “not well-taken.”

The trial against Morgan Southern was scheduled to take place on January 14, 2013. When the judge asked Mr. and Mrs. Al-Athari whether they were ready to proceed on January 14, Mr. Al-Athari asked whether they had the right to remain silent. The judge indicated that unlike a criminal trial, their silence could be used against them. Mr. and Mrs. Al-Athari then indicated that they did not wish to proceed and wanted to go home. The judge decided at that point to dismiss the Al-Atharis’ case involuntarily, without prejudice. The judge announced that Mr. and Mrs. Al-Athari would have one year from the date of its Order to refile their Complaint and start the case all over again if they wished. The Order of Dismissal was dated January 18, 2013, and it stated:

This cause came on to be heard for trial on January 14, 2013. The Plaintiffs specifically represented that they did not wish to go forward. It further appearing to the Court that the Plaintiffs were not properly prepared to proceed with the trial of the case, the Court determined that it would dismiss the case involuntarily, without prejudice, pursuant to Rule 41.02. It is accordingly

ORDERED that this case be, and the same hereby is, dismissed without prejudice. Costs are taxed to the Plaintiffs for which let execution issue if necessary.

Following the trial court’s dismissal of their Complaint, Mr. and Mrs. Al-Athari filed numerous motions including a motion for reconsideration, a motion for judgment on the pleadings, and a motion for a new trial. The trial court denied all of the Al-Atharis’ motions, explaining that they were “not well-taken.”

## II. ISSUES ON APPEAL

Mr. and Mrs. Al-Athari duly filed a notice of appeal. In their brief, Mr. and Mrs. Al-Athari review the proceedings before the trial court and the trial court's rulings, but they do not specify which rulings they would like us to review on appeal. Under the circumstances, and in the absence of more specific direction from the Al-Atharis, we will review the trial court's decisions granting Morgan Southern's four motions *in limine*, the court's denial of Mr. and Mrs. Al-Athari's motion for a continuance, and the court's dismissal of the Complaint. Morgan Southern contends the Al-Atharis filed a frivolous appeal and seeks damages pursuant to Tenn. Code Ann. § 27-1-122.

We review each of the trial court's rulings at issue under an abuse of discretion standard. *See Singh v. Larry Fowler Trucking, Inc.*, 390 S.W.3d 280, 284 (Tenn. Ct. App. 2012) (appellate court reviews trial court's ruling on motion *in limine* under abuse of discretion standard); *State v. Schmeiderer*, 319 S.W.3d 607, 617 (Tenn. 2010) ("granting of a continuance lies within the sound discretion of the trial court"); *Hodges v. Attorney General*, 43 S.W.3d 918, 921 (Tenn. Ct. App. 2000) (decisions to dismiss for failure to prosecute are discretionary and reviewing court will second-guess trial court only if it has acted unreasonably, arbitrarily, or unconscionably). Under the abuse of discretion standard, a trial court's ruling

"will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000). A trial court abuses its discretion only when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

*Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

### A. Morgan Southern's Motions *in Limine*

We turn first to the trial court's judgments granting Morgan Southern's motions *in limine*. Morgan Southern's first motion *in limine* sought to preclude Mr. and Mrs. Al-Athari from introducing testimony or documentation concerning medical diagnoses, medical and/or other treatment bills allegedly incurred by plaintiffs, or physical impairment and/or limitations. The basis for Morgan Southern's motion was that the Scheduling Order set a deadline of December 1, 2012, for medical depositions to be taken, and that as of December 12, 2012, when Morgan Southern filed its first motion *in limine*, the Al-Atharis had taken no medical

depositions.

The law requires a plaintiff seeking to recover damages resulting from a personal injury to present competent expert testimony (1) to prove medical expenses were necessary and reasonable and (2) to establish that a plaintiff's physical injury was in fact caused by the incident at issue. *See Borner v. Autry*, 284 S.W.3d 216, 218 (Tenn. 2009) (injured plaintiff bears burden to prove medical expenses are necessary and reasonable by presenting competent expert testimony); *Miller v. Choo Choo Partners, L.P.*, 73 S.W.3d 897, 901 (Tenn. Ct. App. 2001) (causation of medical condition must be established by medical expert).

Mr. and Mrs. Al-Athari did not appear at the hearing on this motion, and the record contains no evidence that they ever asked the court to modify the Scheduling Order to provide them more time to procure expert medical testimony. The Al-Atharis have not presented any legal argument explaining how the trial court abused its discretion in granting Morgan Southern's first motion *in limine*, and we find no error in the court's judgment granting this motion. We therefore affirm the trial court's judgment in this regard.<sup>2</sup>

With regard to Morgan Southern's other three motions *in limine*, we conclude the trial court did not abuse its discretion in granting any of those motions. The second motion *in limine* concerned Mr. Gamboa's legal status and the process by which Morgan Southern hired Mr. Gamboa. The Al-Atharis did not assert a negligent hiring or negligent entrustment claim against Morgan Southern; Mr. Gamboa's immigration status and the process by which he was hired is therefore not relevant to their case.<sup>3</sup>

Morgan Southern's third and fourth motions *in limine* concerned areas that are well-settled and governed by the Tennessee Rules of Evidence and Tennessee Rules of Civil Procedure. With regard to Morgan Southern's motion to exclude evidence of Morgan Southern's offer to compromise or settle the Al-Atharis's claims, Rule of Evidence 408 states in pertinent part:

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<sup>2</sup>Mr. and Mrs. Al-Athari complain that Morgan Southern's attorney is required to represent both Mr. Gamboa as well Morgan Southern. The record contains no evidence, however, that Mr. Gamboa was ever served with the Complaint. Unless Mr. Gamboa is properly served, the Al-Atharis cannot proceed against him. Mr. and Mrs. Al-Athari also assert their former attorney(s) did not adequately represent them. If the Al-Atharis have claims against their former attorneys, they must initiate a separate action; they cannot bring claims against an individual not named as a defendant in their Complaint.

<sup>3</sup>If, after filing their Complaint, the Al-Atharis discovered information supporting additional claims against Morgan Southern, they could have filed a motion to amend their Complaint to include additional causes of action against Morgan Southern.

Evidence of (1) furnishing or offering to furnish or (2) accepting or offering to accept a valuable consideration in compromising or attempting to compromise a claim, whether in the present litigation or related litigation, which claim was disputed or was reasonably expected to be disputed as to either validity or amount, is not admissible to prove liability for or invalidity of a civil claim or its amount or a criminal charge or its punishment. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Similarly, Tennessee Rule of Civil Procedure 68 provides that evidence of an offer of judgment is not admissible.

Morgan Southern's final motion was to exclude any evidence of Morgan Southern's liability insurance coverage. Tennessee Rule of Evidence 411 makes it clear that evidence of liability insurance coverage may not be introduced to prove negligence:

Evidence that a person was or was not insured against liability is not admissible upon issues of negligence or other wrongful conduct. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

*Goff v. Elmo Greer & Sons Const. Co., Inc.*, 297 S.W.3d 175, 198 (Tenn. 2009) (intentional admission of insurance coverage evidence during trial may be grounds for mistrial).

#### **B. Mr. and Mrs. Al-Athari's Motion for Continuance**

One week prior to the date the trial was scheduled to begin, Mr. and Mrs. Al-Athari filed a motion asking the court to continue the trial because Mrs. Al-Athari's medical treatment was not yet completed. The trial court denied this motion on February 14, 2013.

A motion for a continuance is addressed to the sound discretion of the trial judge and his ruling on the motion will not be disturbed in the absence of an abuse of discretion to the prejudice of the defendant. An abuse of discretion is demonstrated by showing that the failure to grant a continuance denied [a party] a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted.

*State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995) (citations omitted).

Mr. and Mrs. Al-Athari have not presented evidence that they were denied a fair trial or that continuing the trial would have resulted in a different outcome. Regardless of whether or not Mrs. Al-Athari's medical treatments were continuing, the trial court's earlier Order granting Morgan Southern's first motion *in limine* precluded Mr. and Mrs. Al-Athari from introducing any evidence concerning Mrs. Al-Athari's medical diagnoses, medical and/or other treatment bills allegedly incurred, or physical impairment and/or limitations. Accordingly, we affirm the trial court's denial of Mr. and Mrs. Al-Athari's motion for a continuance.

### **C. Dismissal of Complaint**

The final ruling we review is the trial court's Order of Dismissal which dismissed Mr. and Mrs. Al-Athari's Complaint without prejudice. The trial court gave Mr. and Mrs. Al-Athari every opportunity to go forward with their case on January 14, 2013. It was only after Mr. and Mrs. Al-Athari indicated they did not intend to present any evidence and just wanted to go home that the court declared its intention to dismiss the Plaintiffs' case involuntarily, without prejudice, pursuant to Tennessee Rule of Civil Procedure 41.02. Rule 41.02(1) states:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

The Court of Appeals has reviewed this rule and explained,

This rule is necessary to enable the court to manage its own docket, and to protect defendants against plaintiffs who are unwilling to put their claims to the test, but determined to subject them to the continuing threat of an eventual judgment. Like the decision to grant or deny a continuance, a trial court's decision to dismiss a case for failure to prosecute is within its sound discretion, and will not be reversed unless there is abuse of that discretion.

*Osagie v. Peakload Temporary Servs.*, 91 S.W.3d 326, 329 (Tenn. Ct. App. 2002) (citing *Mallard v. Tompkins*, 44 S.W.3d 73 (Tenn. Ct. App. 2000), *Russell v. Crutchfield*, 988 S.W.2d 168 (Tenn. Ct. App. 1998), and *Blake v. Plus Mark, Inc.*, 952 S.W.2d 413 (Tenn. 1997)).

The trial court did not dismiss Mr. and Mrs. Al-Athari's Complaint until it was apparent they were not prepared to try their case. By dismissing their case without prejudice, the trial court gave the Al-Atharis an opportunity to prepare their case. The trial court made it clear in open court that Mr. and Mrs. Al-Athari have up to one year from the date of the court's order dismissing the case to file a new complaint and start their case all over again.

Mr. and Mrs. Al-Athari do not explain on appeal how the trial court abused its discretion by dismissing their Complaint for failure to prosecute. We hold the trial court did not abuse its discretion in so ruling and, accordingly, affirm the trial court's judgment dismissing their case without prejudice.<sup>4</sup>

#### **D. Sanctions for Frivolous Appeal**

Morgan Southern contends this appeal is frivolous, within the meaning of Tenn. Code Ann. § 27-1-122, and asks this Court to award them damages. According to § 27-1-122,

When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

The fact that a party is successful on appeal does not automatically entitle him or her to damages under this statute. However, a successful party should not have to bear the cost of a frivolous, or groundless, appeal. *Barnett v. Tennessee Orthopaedic Alliance*, 391 S.W.3d 74, 84 (Tenn. Ct. App. 2012). An appeal is frivolous if it is devoid of merit or has no reasonable chance of success. *Young v. Barrow*, 130 S.W.3d 59, 66 (Tenn. Ct. App. 2003) (citing *Combustion Eng'g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978) and *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977)).

We do not believe the Al-Atharis filed this appeal for purposes of delay, but we find the appeal is frivolous within the meaning of the statute and that the Al-Atharis should have known they had no reasonable chance of success on appeal. The Al-Atharis did not comply with the deadlines the trial court set in the Scheduling Order, they had no competent medical proof to support their claims for relief,<sup>5</sup> and they informed the court on the day the case was set for trial that they did not wish to proceed with their trial. On appeal, the Al-Atharis fail to articulate any basis upon which this Court could conclude the trial court erred in granting Morgan Southern's motions *in limine*, denying their motion for a continuance, or in dismissing their Complaint. Moreover, the trial court dismissed Mr. and Mrs. Al-Athari's Complaint

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<sup>4</sup>Based on our holding that the trial court did not abuse its discretion in dismissing the Plaintiffs' Complaint, we also hold the trial court did not err in denying the post-trial motions Mr. and Mrs. Al-Athari filed seeking a new trial or other relief.

<sup>5</sup>We cannot consider the proposed evidence the Al-Atharis submit to this Court because that evidence was not properly introduced or submitted to the trial court and is therefore not a part of the official record. *See generally* Rule 26 of the Tennessee Rules of Civil Procedure, governing discovery methods.



without prejudice.

We remand this case to the trial court to determine the appropriate amount of damages to which Morgan Southern is entitled for the frivolous appeal pursuant to Tenn. Code Ann. § 27-1-122.

### **III. CONCLUSION**

The trial court's rulings are affirmed in all respects. Costs of this appeal shall be taxed to the appellants, Jennifer Al-Athari and Haider Al-Athari, for which execution shall issue if necessary.

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PATRICIA J. COTTRELL, JUDGE