IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 12, 2014

EASTER BAUGH v. LARRY MOORE

Appeal from the Chancery Court for Coffee County
No. 0461 Vanessa Jackson, Judge

No. M2013-02224-COA-R3-CV – Filed February 25, 2015

In the first appeal of this action to quiet title to real property, which was the former home of the parties' common ancestor, Plaintiff was declared the owner of the real estate. Thereafter, the same two parties disputed who owned the personal property in the home. The trial court conducted an evidentiary hearing and determined that Plaintiff owned some of the personal property, and Defendant owned the remaining personal property. Being dissatisfied with that determination, Defendant filed a motion for new trial contending Plaintiff made false statements under oath, which was denied. In this appeal, Defendant contends the evidence preponderates against the trial court's ruling concerning the ownership of the personal property. He also appeals the denial of his motion for a new trial. Because Defendant has not provided a verbatim transcript of the evidence or a statement of the evidence pursuant to Tenn. R. App. P. 24, we have no evidence to review. Lacking any evidence to review, we presume the evidence presented supports the trial court's decisions. Defendant's contention that he is entitled to a new trial must also fail because his motion was not supported by any evidence, and he offered nothing more than bare assertions that Plaintiff made false statements at trial. We find no merit to either contention and affirm the trial court in all respects. We have also determined that this appeal was devoid of merit; thus, it constitutes a frivolous appeal under Tenn. Code Ann. § 27-1-122. Accordingly, Plaintiff is entitled to recover the reasonable and necessary attorney's fees and expenses she incurred on appeal. For the foregoing reasons, we affirm the trial court in all respects and remand with instructions for the trial court to award Plaintiff her reasonable and necessary attorney's fees and expenses.

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

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

Larry James Moore, Nashville, Tennessee, Pro se.

Gerald Leighton Ewell, Jr., Tullahoma, Tennessee, for the appellee, Easter Baugh.

OPINION

Easter Baugh ("Plaintiff") is the daughter of the late James Biles who previously owned the real property in dispute. Larry Moore ("Defendant") is the son of Sallie Nelson who was the sister of James Biles.

In 2004, Plaintiff commenced this action to declare void a quitclaim deed that purported to convey the real property in dispute from James Biles to his sister, Sallie Nelson, and to quiet title to the property in Plaintiff as the sole heir of Mr. Biles. *See Baugh v. Thomas*, No. M2010-01054-COA-R3-CV, 2011 WL 1380215, at *1 (Tenn. Ct. App. Apr. 12, 2011). Plaintiff contended that the deed was invalid because it was obtained by undue influence exerted by Defendant on her father. Defendant opposed the petition contending the deed to his mother was valid; he also claimed ownership of the property based on the fact his mother deeded the property to him.

Following a bench trial in February 2007, the trial court ruled that Defendant unduly influenced Mr. Biles to deed the property to his mother, declared the deed to his mother void, and ruled that Plaintiff was the sole owner of the real property. Defendant appealed, and we affirmed the trial court. Defendant then filed an Application for Permission to Appeal to the Supreme Court of Tennessee which was denied on August 31, 2011.

This brings us to the present dispute. In March 2013, Plaintiff filed a motion requesting Defendant to remove his personal property from the premises. Following a hearing on the motion, the trial court entered an order on April 11, 2013, instructing Defendant to submit a list of the personal property he claimed to own and which he desired to remove. On the following day, Defendant filed a motion requesting that he be given the keys to the home so he could stay on the premises while he finalized his list.

Three days later, on April 15, 2013, Defendant filed an itemized list of personal property for which he claimed ownership. Plaintiff timely objected to Defendant's list, identifying furniture, pictures, a refrigerator, a 1986 Crown Victoria and a 1986 Ford Truck which she contended were not Defendant's personal property. An evidentiary hearing was scheduled on the matters in dispute for July 8, 2013. On the morning of the hearing, Defendant notified the court clerk that he would not be present; nevertheless, the hearing proceeded in his absence.

The resulting order, which was entered on August 12, 2013, reads:

> The Court reviewed the history of this matter noting that the position(s) taken by [Defendant] since adverse results in the Court of Appeals had been to delay [Plaintiff]'s effective possession of the property and that the Court's previous Ruling and Order had been, in the Court's opinion, very generous to [Defendant] concerning the allowance of time to remove his articles from the residence.
>
> The Court notes that, in his Motion, [Defendant] asserts he needs to and requests that the Court allow him to "stay at the house," a position obviously frivolous in that his only need to be on the premises is to remove his belongings.
>
> The Court further notes that the Court's Final Judgment declares the deed recorded in Warranty Deed Book 283, page 207, Register's Office of Coffee County, Tennessee, to be "void and of no effect;" thus, the purported conveyance of household goods and effects contained therein is likewise void and of no effect.
>
> After considering the list submitted by [Plaintiff], the Court finds those items were owned by the deceased and that [Defendant] has no interest herein.

The trial court additionally granted Defendant four opportunities to access the residence to remove his personal property, namely, from 8:00 a.m. to 4:00 p.m., on August 19, 20, 21, and/or 23, 2013. The trial court noted that any personal property remaining on the premises after 4:00 p.m. on August 23, 2013, would be deemed Plaintiff's property. Finally, the trial court denied Defendant's April 12, 2013, motion in its entirety.

On August 22, 2013, Defendant filed a motion asking the court to reconsider its findings and, further, requested an extension of time to remove his property. Defendant maintained that one of the bedroom sets and the two vehicles were rightfully his. He further asked for a new trial, contending Plaintiff had "perjuried [sic] herself under oath." His motions were denied by the trial court on August 29, 2013, and this appeal followed. It does not appear that Defendant ever retrieved his personal property.

THE ISSUES

Defendant failed to identify issues for appellate review in his brief as required by Tenn. R. App. P. 27(a)(4); nevertheless, we have discerned that the issues Defendant wishes to raise are the following:

1. Whether sufficient evidence supports the trial court's distribution between the parties of personal property remaining on the subject property.

2. Whether the trial court erred in denying Defendant's request for a new trial on its distribution of personal property.

ANALYSIS

We acknowledge that Defendant is representing himself, pro se, in this court. "Pro se litigants are entitled to fair and equal treatment. Pro se litigants are not, however, entitled to shift the burden of litigating their case to the courts." *Whitaker v. Whirlpool Corp.*, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000) (citations omitted). "Pro se litigants must comply with the same substantive and procedural law to which represented parties must adhere." *Lance v. York*, 359 S.W.3d 197, 201 (Tenn. Ct. App. 2011) (citing *Hodges v. Tenn. Att'y Gen.*, 43 S.W.3d 918, 920-21 (Tenn. Ct. App. 2000)).

It is the duty of the appellant to prepare a record which conveys a fair, accurate, and complete account of what has transpired in the trial court with respect to the issues that form the basis of the appeal. Tenn. R. App. P. 24(a); *In re M.L.D.*, 182 S.W.3d 890, 894 (Tenn. Ct. App. 2005); *State v. Boling*, 840 S.W.2d 944, 951 (Tenn. Ct. Crim. App.1992). Mere statements of a party or his counsel, "which are not appropriate proffers or not effectively taken as true by the parties, cannot establish what occurred in the trial court unless supported by evidence in the record." *State v. Thompson*, 832 S.W.2d 577, 579 (Tenn. Ct. Crim. App. 1991).

Defendant has not provided a transcript of the evidence pursuant to Tenn. R. App. P. 24(b) or a statement of the evidence pursuant to Tenn. R. App. P. 24(c); therefore, the issues on appeal are before this court on the technical record only.[1]

"In the absence of a transcript of the evidence, there is a conclusive presumption that there was sufficient evidence before the trial court to support its judgment, and this Court must therefore affirm the judgment." *Coakley v. Daniels*, 840 S.W.2d 367, 370 (Tenn. Ct. App. 1992) (citing *McKinney v. Educator and Executive Insurers, Inc.*, 569 S.W.2d 829, 832 (Tenn. App. 1977)). To the extent that the issues on appeal depend on factual determinations, the lack of a transcript or statement of the evidence is essentially fatal to the party having the burden on appeal. *See Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992) (holding that without an appellate record containing the facts, the

[1]Defendant has provided a transcript dated February 5, 2007, from the initial trial on the suit to quiet title. All issues related to that trial have previously been tried to judgment and appealed. Therefore, this transcript has no bearing on the issues presently before us.

court must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings).

I. The Sufficiency of the Evidence

Defendant contends the evidence does not support the trial court's conclusion that certain items of personal property belonged to the late Mr. Biles, and, therefore, Plaintiff owns the personal property as his sole heir. Specifically, Defendant contends that Plaintiff should not have been awarded a bedroom set, the 1986 Crown Victoria, and a 1986 Ford Truck.

It is well settled that factual findings of the trial court are accorded a presumption of correctness, and will not be overturned unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d). The burden is upon the appellant to show that the evidence preponderates against the judgment of the trial court. *Coakley*, 840 S.W.2d at 370 (citing *Capital City Bank v. Baker*, 442 S.W.2d 259, 266 (Tenn. Ct. App. 1969)). "The burden is likewise on the appellant to provide the court with a transcript of the evidence or a statement of the evidence from which this court can determine if the evidence does preponderate for or against the findings of the trial court." *Id*. The burden remains even when the appellant is a pro se litigant. *See id*.; *see also Reid v. Reid*, 388 S.W.3d 292, 294 (Tenn. Ct. App. 2012); *Irvin v. City of Clarksville*, 767 S.W.2d 649, 653-54 (Tenn. Ct. App. 1988).

By failing to provide a transcript or statement of the evidence presented to the trial court upon which that court relied to determine who owned the personal property, we have no way to determine that the evidence relied upon by the trial court was insufficient to support the court's findings of fact and the conclusions based on those facts. Accordingly, we must conclusively presume that the findings of fact made by the trial court concerning ownership and distribution of the personal property remaining in and on the premises were supported by the evidence. *Sherrod*, 849 S.W.2d at 783; *Coakley*, 840 S.W.2d at 370; *McKinney*, 569 S.W.2d at 832. Therefore, this issue is without merit.

II. Motion for a New Trial

We turn our attention to whether the trial court erred by denying Defendant's motion for a new trial. Defendant filed a motion for a new trial contending that he would show that Plaintiff perjured herself, and that statements by Plaintiff and her counsel are "embellished or reverse truths." Attached to the motion were documents that related to his first appeal; one of the attachments was a police report from October 2011. The trial court denied the motion, stating the motion was "not well taken."

Tenn. R. Civ. P. 59.02 affords a party a means to seek a new trial within thirty days after judgment has been entered. *See Whitworth v. Whitworth*, No. E2008-01521-

COA-R3-CV, 2009 WL 2502002, at *5 (Tenn. Ct. App. Aug. 17, 2009); *see also Ferguson v. Brown*, 291 S.W.3d 381, 387 (Tenn. Ct. App. 2008). Under Rule 59, a trial court is afforded wide latitude in granting a motion for a new trial, and this court will not overturn such a decision absent an abuse of discretion. *See Boggs v. Rhea*, No. E2013-02859-COA-R3-CV, 2014 WL 5780810, at *7 (Tenn. Ct. App. Nov. 6, 2014); *see also Loeffler v. Kjellgren*, 884 S.W.2d 463, 468 (Tenn. Ct. App. 1994).

Although Defendant attached documents to his motion for a new trial, those documents provided no evidence to support his claim that Plaintiff committed perjury or that her counsel embellished the truth. He also failed to identify any statement or testimony that was allegedly false; he merely stated that he "will show Easter Baugh perjuried [sic] herself under oath." Under these circumstances, we find no error with the trial court's decision to deny Defendant's motion for a new trial.

III. FRIVOLOUS APPEAL DAMAGES AND ATTORNEY'S FEES

For her only issue, Plaintiff seeks an award of damages under Tennessee Code Annotated § 27-1-122, as well as her attorney's fees on appeal. She contends that this appeal is frivolous, pointing to Defendant's failure to provide an adequate record, his failure to file a brief in compliance with Tenn. R. Civ. P. 27, and his failure to present any justiciable issues.

Tennessee Code Annotated § 27-1-122 states that when it appears to a reviewing court that the appeal was "frivolous or taken solely for delay, the court may, either upon the 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."

A "frivolous" appeal is one that is "devoid of merit," or where there is little prospect that it can ever succeed. *In re Nathaniel C.T.*, 447 S.W.3d 244, 248 (Tenn. Ct. App. 2014) (quoting *Morton v. Morton*, 182 S.W.3d 821, 838 (Tenn. Ct. App. 2005)). While a successful litigant should not have to bear the expense of a "groundless" appeal, *see Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 342 (Tenn. 2010); *Davis v. Gulf Ins. Group* 546 S.W.2d 583, 586 (Tenn. 1977), it is a penalty "which is to be used only in obvious cases of frivolity and should not be asserted lightly or granted unless clearly applicable - which is rare." *Henderson*, 318 S.W.3d at 342 (citing *Wells v. Sentry Ins. Co.*, 834 S.W.2d 935, 938-39 (Tenn. 1992); *Davis*, 546 S.W.2d at 586).

Being mindful that we should tread carefully before concluding that an appeal is frivolous, we have concluded that the issues raised by Defendant are so devoid of merit that they had no reasonable chance of success. Accordingly, this appeal is frivolous, and Plaintiff is entitled to the costs she incurred in defending against it.

IN CONCLUSION

The judgment of the trial court is affirmed in all respects and we remand the case to the trial court for the assessment of damages, to include reasonable attorney's fees, resulting from the frivolous appeal pursuant to Tennessee Code Annotated § 27-1-122. Costs of appeal are taxed against the Appellant, Larry Moore, for which execution may issue if necessary.

_____

FRANK G. CLEMENT, JR., JUDGE