IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 27, 2014

WARREN TYWON FOWLER v. JOY R. McCROSKEY, IN HER OFFICIAL CAPACITY AS CLERK OF THE CRIMINAL COURT OF KNOX COUNTY

Appeal from the Circuit Court for Knox County
No. 3-235-13 Deborah C. Stevens, Judge

No. E2013-02365-COA-R3-CV-FILED-JULY 31, 2014

The plaintiff, a state prison inmate, appeals the trial court's grant of summary judgment in favor of the defendant criminal court clerk. The plaintiff alleges that the court clerk induced a breach of contract by assessing him with court costs he asserts the State agreed to waive in return for his pleading guilty to felony charges. The trial court found that the plaintiff could not use his affidavit to raise a genuine issue of material fact regarding an alleged oral promise made by the prosecutor when the criminal judgments and written plea agreement, taken together, unambiguously assessed court costs to the plaintiff. The court therefore found that the plaintiff was unable to prove an essential element of his claim. Discerning no error, we affirm.

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

THOMAS R. FRIERSON, II, J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., C.J., and D. MICHAEL SWINEY, J., joined.

Warren Tywon Fowler, Whiteville, Tennessee, Pro Se.

Charles F. Sterchi, III, Deputy Law Director, Knoxville, Tennessee, for the appellee, Joy R. McCroskey.

OPINION

I. Factual and Procedural Background

The plaintiff, Warren Tywon Fowler, entered a plea agreement with the State on April 30, 2007, in which he agreed to plead guilty to the charges of attempted murder in the first

degree and especially aggravated kidnapping, both Class A felonies. Following the entry of his guilty pleas, Mr. Fowler was sentenced by the Knox County Criminal Court to twenty years' incarceration at 100% for the attempted first-degree murder conviction and twenty years' incarceration at 100% for the especially aggravated kidnapping conviction, with the two sentences to be served concurrently. He was subsequently housed at the Hardeman County Correctional Facility.

Approximately one year later, Mr. Fowler received a memorandum from the Department of Correction's Central Trust Fund Administration, dated March 27, 2008, informing him that the State had paid $712.50 on his behalf for court costs assessed in the criminal case and that the Department would be collecting reimbursement from Mr. Fowler's inmate trust fund account by deducting fifty percent of every deposit made. *See* Tenn. Code Ann. § 40-25-143(b) (2012) (authorizing the Department of Correction to "collect from the inmate trust fund account of the defendant those moneys necessary to reimburse the state for the payment of the costs" when the defendant has been found indigent).

On April 3, 2013, Mr. Fowler filed a complaint against Martha Phillips, the former clerk of the Knox County Criminal Court.[1] He alleged that in assessing court costs against him, Ms. Phillips had induced the State to breach its contract, namely the plea agreement entered into by Mr. Fowler and the district attorney who prosecuted his criminal case. Mr. Fowler asserted in his complaint that deductions were taken from his trust fund account monthly from April 11, 2008, through April 27, 2012. Pursuant to the Tennessee Prisoner Litigation Reform Act, Mr. Fowler filed along with his complaint a uniform civil affidavit of indigency and an inmate affidavit, stating that he had filed no previous lawsuits. *See* Tenn. Code Ann. §§ 41-21-801 to -818 (2010).

Joy McCroskey, the clerk of the Criminal Court at the time, filed a motion to dismiss the action concomitantly with a motion for summary judgment on July 31, 2013. Mr. Fowler subsequently filed a response and an affidavit. Following a hearing conducted on September 20, 2013, which Mr. Fowler was unable to attend due to his incarceration, the trial court first noted that Ms. McCroskey was by then the criminal court clerk and was the proper defendant of this action. The court then treated Ms. McCroskey's motion as one for summary judgment and delineated findings supporting its grant of that relief, memorializing those findings in a written order entered October 15, 2013. Mr. Fowler timely appealed.

[1]Mr. Fowler styled his complaint to be filed in the Knox County Circuit Court, but he included the docket number of the criminal case, which caused the complaint originally to be filed with the Knox County Criminal Court. On May 10, 2013, the Criminal Court entered an order transferring the instant action to the Circuit Court.

II. Issue Presented

Mr. Fowler presents one issue on appeal, which we restate as follows:

Whether the trial court erred by granting summary judgment in favor of Ms. McCroskey upon its finding that Mr. Fowler was unable to prove an essential element of his claim for inducement of breach of contract.

III. Standard of Review

For actions initiated on or after July 1, 2011, such as the one at bar, the standard of review for summary judgment delineated in Tennessee Code Annotated § 20-16-101 (Supp. 2013) applies. *See Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18, 25 n.2 (Tenn. 2011). The statute provides:

> In motions for summary judgment in any civil action in Tennessee, the moving party who does not bear the burden of proof at trial shall prevail on its motion for summary judgment if it:
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> (1) Submits affirmative evidence that negates an essential element of the nonmoving party's claim; or
>
> (2) Demonstrates to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.

Tenn. Code Ann. § 20-16-101.[2]

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[2]As this Court has explained:

> Section 20-16-101 was enacted to abrogate the summary-judgment standard set forth in *Hannan* [*v. Alltell Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008)], which permitted a trial court to grant summary judgment only if the moving party could either (1) affirmatively negate an essential element of the nonmoving party's claim or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan*, 270 S.W.3d at 5. The statute is intended "to return the summary judgment burden-shifting analytical framework to that which existed prior to *Hannan*, reinstating the 'put up or shut up' standard." *Coleman v. S. Tenn. Oil Inc.*, No. M2011-01329-COA-R3-CV, 2012 WL 2628617, at *5 n.3 (Tenn. Ct. App. July 5, 2012).
> *Walker v. Bradley County Gov't*, No. E2013-01053-COA-R3-CV, 2014 WL 1493193 at *3 n.3 (Tenn. Ct. App. Apr. 15, 2014). *See also Sykes*, 343 S.W.3d at 25 n.2.

The grant or denial of a motion for summary judgment is a matter of law; therefore, our standard of review is *de novo* with no presumption of correctness. *Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013) (citing *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 799 (Tenn. 2010)). "A summary judgment is appropriate only when the moving party can demonstrate that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Dick Broad. Co.*, 395 S.W.3d at 671 (citing Tenn. R. Civ. P. 56.04; *Hannan v. Alltell Publ'g Co.*, 270 S.W.3d 1, 5 (Tenn. 2008)). Pursuant to Tennessee Rule of Civil Procedure 56.04, the trial court must "state the legal grounds upon which the court denies or grants the motion" for summary judgment, and our Supreme Court has recently instructed that the trial court must state these grounds "before it invites or requests the prevailing party to draft a proposed order." *Smith v. UHS of Lakeside, Inc.*, ___ S.W.3d ___, No. W2011-02405-SC-R11-CV, 2014 WL 3429204 at *12 (Tenn. July 15, 2014).

In reviewing pleadings, we "must give effect to the substance, rather than the form or terminology of a pleading." *Stewart v. Schofield*, 368 S.W.3d 457, 463 (Tenn. 2012) (citing *Abshure v. Methodist Healthcare-Memphis Hosp.*, 325 S.W.3d 98, 104 (Tenn. 2010)). We note also that pleadings "prepared by pro se litigants untrained in the law should be measured by less stringent standards than those applied to pleadings prepared by lawyers." *Stewart*, 368 S.W.3d at 463 (citing *Carter v. Bell*, 279 S.W.3d 560, 568 (Tenn. 2009); *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003); *Young v. Barrow*, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003)). Parties proceeding without benefit of counsel are "entitled to fair and equal treatment by the courts," but we "must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe." *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003).

IV. No Inducement of Breach of Contract

Mr. Fowler contends that the trial court erred by granting Ms. McCroskey summary judgment because his affidavit, filed with his response to Ms. McCroskey's statement of facts, demonstrated that he and the State entered into an oral agreement that he would not pay court costs related to his criminal case if he pled guilty. Ms. McCroskey contends that inasmuch as Mr. Fowler's affidavit is the only evidence he was able to present of such an oral agreement, he is relying only on parol evidence, which is inadmissible when the written plea agreement is unambiguous. We agree with Ms. McCroskey.

In his complaint, Mr. Fowler alleged that Ms. McCroskey's predecessor had induced a breach of his plea agreement with the State. It is well settled that Tennessee courts "apply principles of contract law to construe a plea agreement and determine the appropriate remedy for its breach." *Caldwell v. Neal*, No. M2010-00473-COA-R3-CV, 2010 WL 5549036

(Tenn. Ct. App. Dec. 28, 2010) (citing *State v. Mellon* 118 S.W.3d 340 (Tenn. 2003)). Mr. Fowler in his pleadings did not specify whether he was bringing this action under the common law theory of inducement of a breach or the statutory action codified at Tennessee Code Annotated § 47-50-109 (2013). Our analysis is essentially the same, however, as only the respective remedies would differ between the common law and statutory actions. *See Givens v. Mullikin*, 75 S.W.3d 383, 405 (Tenn. 2002) (explaining that the common law and statutory forms of an action for inducement to breach a contract are identical, except that a plaintiff asserting a common law action may recover punitive damages, instead of the treble damages mandated by the statute); *see also Stewart*, 368 S.W.3d at 463 (stating that pleadings prepared by *pro se* litigants should be measured by "less stringent standards than those applied to pleadings prepared by lawyers.").

As to the statutory action, Tennessee Code Annotated § 47-50-109 provides:

> It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of the contract. The party injured by such breach may bring suit for the breach and for such damages.

Our Supreme Court has summarized the elements of both the common law and statutory actions as follows:

> In order to recover on a theory of inducement to breach a contract, a plaintiff must allege and prove seven elements: (1) that a legal contract existed; (2) that the defendant was aware of the contract; (3) that the defendant intended to induce a breach of that contract; (4) that the defendant acted with malice; (5) that a breach of the contract occurred; (6) that the breach was a proximate result of the defendant's conduct; and (7) that the breach injured the plaintiff. *See Quality Auto Parts Co. v. Bluff City Buick Co.*, 876 S.W.2d 818, 822 (Tenn. 1994); *Baker v. Hooper*, 50 S.W.3d 463, 468 (Tenn. Ct. App. 2001).

Givens, 75 S.W.3d at 405. Within the context of an action for inducement of breach of contract, the required element of "malice is 'the wilful violation of a known right."' *Crye-Leike Realtors, Inc. v. WDM, Inc.*, No. 02A01-9711-CH-00287, 1998 WL 651623 at *6 (Tenn. Ct. App. Sept. 24, 1998) (quoting *Dorsett Carpet Mills, Inc. v. Whitt Tile & Marble Distrib. Co.*, 1986 WL 622 at *6 (Tenn. Ct. App. Jan. 2, 1986)).

In its final judgment, the trial court incorporated its specific findings of fact, transcribed at the conclusion of the hearing. In pertinent part, the trial court stated:

> First, with regard to the issue of the fact that Mr. Fowler sued Martha Phillips, the Clerk of the Criminal Court who is deceased, and that the current clerk is Joy McCroskey, the Court finds that in light of the fact that Mr. Fowler is appearing pro bono, that the Court's got to give him the benefit of the doubt and that it did get to the Clerk of the Criminal Court, and, therefore, it would not be proper to dismiss it because he failed to name the correct party, however, the Court did issue a–there was a plea agreement that was signed by Mr. Fowler on April 30th, 2007.
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> The Court also finds that there is a document, a certified copy document in the file titled Waiver of Trial by Jury and Acceptance of Guilty–Acceptance of Plea of Guilty order signed by [Knox County Criminal Court] Judge Leibowitz dated April 30th, 2007. I think for purposes of the record should note that the plea agreement does not address fines and costs.
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> It also states that it is merely a recommendation and the Court is not bound to file that recommendation, but that it was intended to be a document that dealt with a recommendation of sentencing that Judge Leibowitz then entered that order and the Waiver of Trial by Jury and Acceptance Plea of Guilty Order stated that the defendant, Mr. Fowler, desired to enter a plea of guilty and accept the recommendation of the State as to punishment, and then subsequently entered two judgments, both of which assessed costs, both for the Criminal Injuries Compensation Fund and court costs in the attempt of first-degree murder judgment; that would have been a total of $700.50 to be paid by the defendant, and in the especially aggravated kidnapping judgment entered the same day, it would have been a total of $260.50.
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> And, again, both of those documents are signed by Judge Leibowitz and the Court has certified true copies of those judgments in the file, which appears to distinguish it from the Neal case in which there was a question as to whether or not the Court [fines]–or court costs–were even pleaded in that file, and clearly, in this case, there is a judgment that assesses those costs and that the clerk, Ms. McCroskey and/or Ms. Phillips, would have been required to follow the order of the Court in assessing those costs.

> And this Court finds again, as correctly pointed out, the *Caldwell v. Neal* case was decided under the *Hannan v. Alltel* standard, whereas this case, Mr. Fowler's case, should be decided under the current statute of T.C.A. 20-16-101, which has been in effect since 2011, and based upon all of those factors, the Court finds that the summary judgment is well taken and should be granted.

Upon a thorough review of the record, we agree with the trial court's grant of summary judgment. Mr. Fowler could not prove an essential element of his claim: the existence of the portion of the plea agreement that he alleged had been breached. Two judgments were entered by the Criminal Court reflecting and ordering payment of the court costs at issue. The first judgment demonstrates a sentence of twenty years' incarceration for the conviction of attempted first degree murder. Under the section entitled "Court Ordered Fees and Fines" are listed $50.00 owed to the Criminal Injuries Compensation Fund and $650.50 owed in court costs. The second judgment demonstrates a sentence of twenty years' incarceration, to be served concurrently with the first sentence, based upon the conviction of especially aggravated kidnapping. Under the section entitled "Court Ordered Fees and Fines" on this second judgment are listed $50.00 owed to the Criminal Injuries Compensation Fund and $210.50 owed for court costs. Alongside the costs listed on each judgment form, respectively, appears the phrase, "Cost to be Paid by," followed by a checked box next to the word, "Defendant."

Both judgments were entered on the same date–April 30, 2007–that Mr. Fowler filed his Waiver of Trial by Jury and Request for Acceptance of Plea of Guilty, otherwise referred to as the plea agreement. Mr. Fowler does not dispute that he voluntarily signed the plea agreement, which includes the following statement: "My decision to plead guilty is voluntary and not the result of force or threats or of promises apart from the plea agreement." As noted by the trial court, the plea agreement also includes a provision stating that the recommendation of a sentence made by the District Attorney General as a result of Mr. Fowler's pleading guilty "is only a recommendation and that the Court is not bound by this recommendation in any way." (Emphasis in original.) The plea agreement does not include any reference to court fines or costs. In its order, also entered on April 30, 2007, waiving a trial by jury and accepting Mr. Fowler's guilty plea, the Criminal Court stated in pertinent part:

> IT FURTHER APPEARING TO THE COURT that the defendant intelligently and understandingly waives his/her right to a trial by jury of his/her own free will and choice, without any threats or pressure of any kind or promises, other than the recommendation of the State as to punishment, desire[s] to enter a plea of guilty and accept the recommendation of the State as to punishment.

The Criminal Court's order references no promise made to Mr. Fowler that court fines or costs would be waived.

Mr. Fowler argues that the trial court erred by "rejecting" the statement made in his affidavit that the prosecutor promised he would pay no court costs and that this promise had been part of the plea agreement heard by the Criminal Court. Mr. Fowler's argument fails to recognize that his affidavit constitutes parol evidence that the trial court could not consider to alter the plain meaning of an unambiguous written contract. *See Dick Broad. Co.*, 395 S.W.3d at 672 (explaining that the parol evidence rule "does not permit contracting parties to 'use extraneous evidence to alter, vary, or qualify the plain meaning of an unambiguous written contract'") (quoting *Staubach Retail Servs.-Se., LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 525 (Tenn. 2005)) (other internal citations omitted).

The trial court specifically referenced this Court's decision in *Caldwell v. Neal*, which Mr. Fowler had attached to his response to the motion for summary judgment. In *Caldwell*, this Court reversed a summary judgment that had been granted to a court clerk because "there [was] a genuine issue of material fact as to whether [the plaintiff-inmate] was required to pay the costs of the criminal proceedings." *See* 2010 WL 5549036 at *2. Although the three criminal judgments at issue in *Caldwell* all stated that the plaintiff was responsible for paying court costs, the spaces provided for the amount of court costs were either blank or in one instance actually listed an amount of "$0.00." *Id.* We agree with the trial court that *Caldwell* is factually distinguishable from the instant action in that the plea agreement and judgments at issue in this action are unambiguous and clearly demonstrate that Mr. Fowler was assessed with specific costs at the time of the Criminal Court's acceptance of his guilty plea.

The trial court properly found that Mr. Fowler could not use his affidavit to raise a genuine issue of material fact when the meaning of the written plea agreement was plain and unambiguous. Pursuant to Tennessee Code Annotated §20-16-101, summary judgment was appropriate because the plea agreement and judgments presented by Ms. McCroskey negated Mr. Fowler's claim that the agreement waived court costs and also demonstrated that Mr. Fowler's affidavit was insufficient to establish that such a waiver agreement existed.

V. Conclusion

For the reasons stated above, we affirm the order of the trial court granting summary judgment to Ms. McCroskey. The costs on appeal are assessed against the appellant, Warren

Tywon Fowler. This case is remanded to the trial court, pursuant to applicable law, for collection of costs assessed below.

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THOMAS R. FRIERSON, II, JUDGE