IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 4, 2013 Session

THOMAS R. MEEKS v. CARRIE GASAWAY, ET AL.

Appeal from the Circuit Court for Montgomery County
No. MCCCCVOD112331 Clayburn Peeples, Judge

No. M2012-02083-COA-R3-CV - Filed December 30, 2013

A bail bondsman filed suit against an attorney over title to several pieces of land. The suit went to trial before a jury, but the parties settled before a verdict was announced. The attorney subsequently sued the bail bondsman's attorneys for malicious prosecution and other torts. The defendant attorneys filed a Rule 12.02(6) motion to dismiss, arguing that the parties' agreement to settle the underlying case negated one of the elements of a malicious prosecution claim, "a final and favorable termination" of the underlying suit in favor of the defendant. The motion also argued that the complaint did not sufficiently allege the elements of the other causes of action. The trial court granted the defendants' motion to dismiss, finding that the plaintiff attorney had failed to state a claim for relief under any of the causes of action. We affirm the trial court.

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

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Joseph Napiltonia, Franklin, Tennessee, for the appellant, Thomas R. Meeks.

Dominic Joseph Leonardo, Nashville, Tennessee; Mitchell Todd Hingson, Clarksville, Tennessee, for the appellees, Carrie Gasaway, Edward Farmer, and Gasaway, Long, & Farmer, PLLC; Fletcher Long, Clarksville, Tennessee, Pro Se.

OPINION

I. THE BUSINESS RELATIONSHIP

Thomas Meeks is a criminal defense attorney and a member of the Montgomery County bar. Patrick Gafford is a bail bondsman in the same county. Mr. Meeks and Mr. Gafford worked together for many years and were lifelong friends whose families were always close. Their friendship came to an end, however, when Mr. Gafford brought suit against Mr. Meeks in a Montgomery County court. After the resolution of that lawsuit, Mr. Meeks sued Mr. Gafford's attorneys for malicious prosecution.

Mr. Meeks bought two pieces of real property, placed title to that property in Patrick Gafford's name, and authorized Mr. Gafford to use that property as collateral for his bail-bonding business, "Gafford 101st Bonding Company." According to Mr. Meeks, the property was subject to an oral trust that required Mr. Gafford to manage and control the property in the best interest of Mr. Meeks, without encumbering or transferring the property without Mr. Meeks' consent. Mr. Gafford used the trust properties as collateral to operate his bonding company for over a decade.

Mr. Meeks protected his interests in the real property by having Mr. Gafford execute a quitclaim deed every four or five years that conveyed the two properties to Mr. Meeks. The plan was for Mr. Meeks to retain the quitclaim deeds but not record them, so long as Mr. Gafford continued to act in Mr. Meeks' best interest. In the event of a breach of the trust or the occurrence of some catastrophic event or injury to Mr. Gafford, Mr. Meeks would record the deeds. The last of those quitclaim deeds was executed on April 16, 2001, but not recorded.

In 2006, the friendship between Mr. Gafford and Mr. Meeks fell apart. In February and May of 2006, Mr. Gafford executed and recorded his own quitclaim deeds to the two properties in the Montgomery County Register's Office, conveying the property from "Patrick Gafford, grantor" to "Patrick Lee Gafford, d/b/a Gafford -101st Bonding Co."

After learning of Mr. Gafford's action, Mr. Meeks filed and recorded the 2001 quitclaim deed to the disputed properties that Mr. Gafford had executed in his favor. Mr. Meeks then sent a letter to Mr. Gafford by way of the bondsman's attorney, Carrie Gasaway,[1] advising him that he had recorded the 2001 quitclaim deed, and that Mr. Gafford had defaulted on the parties' oral trust agreement by recording his own quitclaim deeds. Mr.

[1] Mr. Meeks had previously served as the attorney for both Mr. Gafford personally and for his bonding company.

Meeks demanded that Mr. Gafford cease and desist from pledging the trust property as collateral against any bail bonds in the future.

Mr. Gafford, through Ms. Gasaway, responded by claiming that Mr. Meeks had forged Mr. Gafford's name on the 2001 deed, and asked the Montgomery County prosecutor to indict Mr. Meeks for forgery and for manufacturing a fraudulent deed. On February 27, 2007, Mr. Gafford was interviewed by two prosecutors and two TBI special agents. Ms. Gasaway was present at the interview, which included questions about a host of matters that were in contention between the parties.

Following the interview, Mr. Gafford signed a six-page sworn statement under oath which was witnessed by the two TBI special agents.[2] Referring to the April 2001 quitclaim deed, Mr. Gafford twice denied that he had signed it, but near the end of the interview, he stated, "[i]t appears to be my signature on this deed. I've signed things maybe I shouldn't have sometimes. If there was a piece of paper from Tom's office I would sign it." Following further inquiries, the TBI prepared an investigative report on August 17, 2007.

II. THE PRIOR LITIGATION

On October 10, 2007, Mr. Gafford filed a complaint in the Montgomery County Circuit Court to quiet title and to establish his ownership to the two properties. Although the appellate record does not contain the pleadings filed in that case, it appears that Mr. Gafford alleged in his complaint that Mr. Meeks forged his signature on the 2001 quitclaim deed. Mr. Meeks filed an answer and counter-complaint, in which he asserted that Mr. Gafford's signature on the deed was genuine, and he asked the court to award him treble damages related to the cutting of timber by Mr. Gafford on the disputed properties.

The trial of the matter was conducted on January 18 and 19, 2011. Fletcher Long and Edward Farmer, associates of Ms. Gasaway, represented Mr. Gafford at trial. The jury was selected, and several witnesses testified, including Mr. Meeks. About halfway through the trial, and following the cross-examination of Mr. Meeks, the parties began settlement negotiations. The settlement they reached was memorialized as a judgment of the court on February 15, 2011.

The settlement and judgment divested title to all the disputed properties from Mr. Gafford and his bail bonding agency and vested title to them in fee simple absolute solely in the name of Mr. Meeks. Pursuant to the settlement, Mr. Meeks was also awarded a judgment

[2] It appears that the often-rambling statement was simply a transcript of Mr. Gafford's utterances to the TBI agents during his interview, which Mr. Gafford and the agents subsequently signed.

against Mr. Gafford for discretionary costs in the amount of $8,100. The judgment barred both parties from making any other applications for discretionary costs and stated that neither party was awarded attorney fees. It also declared that "[a]ll other claims, Counter-Claims, or other claims of any sort or kind regardless of how denominated between the parties are hereby dismissed with prejudice." The judgment also provided that the court costs paid by Mr. Meeks "with regards to his counterclaim" were to be applied to the cost bill.

III. THE MALICIOUS PROSECUTION ACTION

On September 28, 2011, Mr. Meeks filed a Complaint against Ms. Gasaway for malicious prosecution in the Montgomery County Circuit Court and asked for a jury trial. Fletcher Long, Edward Farmer, and Gasaway, Long & Farmer, PLLC were also named as defendants. Mr. Meeks alleged that the defendants had acted in bad faith and without probable cause by encouraging Mr. Gafford to file suit against Mr. Meeks.[3] The complaint also included claims for negligence, invasion of privacy, negligent and intentional infliction of emotional distress and outrageous conduct, all of which allegedly arose from the defendants' participation in the prior case.[4] Mr. Meeks asked for an award of compensatory damages in the amount of $150,000 and punitive damages of $500,000.

The defendants filed a Tenn. R. Civ. P. 12.02(6) motion to dismiss, arguing that Mr. Meeks had not made factual allegations that, even taken as true, would state a claim for any of the causes of action. The trial court held a hearing and granted the defendants' motion at the conclusion of the hearing.[5] The court's decision was documented in a final order dismissing all claims. This appeal followed.

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[3]The defendants have not raised any issue regarding whether lawyers who merely represent a plaintiff in the underlying case can be liable in a subsequent malicious prosecution case. Therefore, we need not discuss the law regarding the proper defendants in such claims.

[4] Intentional infliction of emotional distress and outrageous conduct are not two separate torts, but are simply different names for the same cause of action. *Bain v. Wells*, 936 S.W.2d 618, 622 fn. 3 (Tenn. 1997); *Moorhead v. J.C. Penney Co., Inc.*, 555 S.W.2d 713, 717 (Tenn. 1977).

[5]On the morning of the hearing, the defendants amended their motion to dismiss by asserting for the first time that they were also entitled to prevail on Mr. Meeks' negligence claims because of the passing of the statute of limitations. During the course of the hearing, the attorney for Mr. Meeks complained that because of the late filing of the statute of limitations defense, he should be given more time to prepare a response. After consulting with his client, however, he announced that he was voluntarily striking his claims for negligence and negligent infliction of emotional distress and would go forward on his remaining claims.

IV. REVIEW OF DECISION TO DISMISS

A Rule 12.02(6) motion to dismiss for failure to state a claim tests only the legal sufficiency of the complaint itself and not the strength of the plaintiff's evidence. *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Riggs v. Burson*, 941 S.W.2d 44, 47 (Tenn. 1997); *Cook v. Spinnakers of Rivergate, Inc*., 878 S.W.2d 934, 938 (Tenn. 1994). "The basis for the motion is that the allegations contained in the complaint, considered alone and taken as true, are insufficient to state a claim as a matter of law. . . . The motion admits the truth of all relevant and material averments contained in the complaint but asserts that such facts do not constitute a cause of action." *Cook*, 878 S.W.2d at 938 (citations omitted); *see Lewis v. Allen,* 698 S.W.2d 58, 59 (Tenn. 1985); *Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690, 691 (Tenn. 1984).

Mr. Meeks argues that the trial court erred because it considered matters outside his complaint in reaching its determination, while failing to give him the benefit of another rule that comes into play when such matters are considered. Mr. Meeks contends that when either or both parties submit evidentiary materials outside the pleadings in support of or in opposition to a Tenn. R. Civ. P. 12.02(6) motion and the trial court considers those materials, the trial court must convert the motion to dismiss into a motion for summary judgment. Tenn R. Civ. P. 12.03; *Staats v. McKinnon*, 206 S.W.3d 532, 543 (Tenn. Ct. App. 2006)*; Pacific Eastern Corp. v. Gulf Life Holding Co.*, 902 S.W.2d 946, 952 (Tenn. Ct. App. 1995). Had the trial court converted Mr. Gafford's motion to dismiss into a motion for summary judgment, Mr. Meeks argues he would have been entitled to the benefit of extra time to gather and present evidence pertinent to the motion. *See* Tenn. R. Civ. P. 56.04.

The "matters outside the complaint" that Mr. Meeks refers to came up during the malicious prosecution hearing when the trial court asked the defendants' attorney what had occurred during the underlying proceeding. In the course of responding, the attorney stated that in a still earlier proceeding before a different judge to raise Mr. Gafford's bonding limit, Mr. Meeks misrepresented the actual ownership of the property that was to be used as collateral, and that Mr. Meeks admitted the misrepresentation during his testimony in the underlying case. The attorney also asserted that Mr. Meeks sought to settle that case because of fear that his admission might expose him to sanctions.

The trial judge questioned the attorney further about those allegations and then made the following remarks:

> Based on what they've said, it sounds like there's no way that you could call this a termination in favor of the plaintiff or even a neutral termination. That's based on what they've said. And I'm uncomfortable making a ruling based on

something I've only heard from attorneys, but I suspect that what they said is correct. . . .

After a bit more discussion, however, the judge ruled from the bench that even without considering the attorney's statement, the undisputed facts were insufficient to allege a cause of action for malicious prosecution. The court accordingly granted the defendants' motion to dismiss. Neither the final order in this case, nor the ruling from the bench upon which it is based, includes any reference to evidence outside the complaint, other than the court's declaration from the bench that the defendants were entitled to a judgment of dismissal even in the absence of any such evidence.

Matters outside the pleadings were brought to the attention of the trial court, through representations of attorneys. However, the trial court's ruling from the bench and its final order show that it excluded from its decision-making any consideration of those outside matters. We do not believe the court abused its discretion in so doing. It lies within the discretion of the trial court to receive evidence outside the pleadings and convert a motion to dismiss into a motion for summary judgment. *Hixon v. Stickley*, 493 S.W.2d 471, 473 (Tenn. 1973); *Jacox v. Memphis City Bd. Of Educ.*, 604 S.W.2d 872, 873-74 (Tenn. Ct. App. 1980); *Oak Ridge Tool-Engineering, Inc. v. Boeing Tennessee Inc.*, C.A. 157 1988 WL 117904, at *2 (Tenn. Ct. App. Nov. 7, 1988).

V. THE ELEMENTS OF MALICIOUS PROSECUTION

In order to establish the essential elements of malicious prosecution, a plaintiff must prove that (1) the defendant had instituted a prior suit or judicial proceeding without probable cause, (2) the defendant brought such prior action with malice, and (3) the prior action was finally terminated in plaintiff's favor. *Himmelfarb v. Allain,* 380 S.W.3d 35, 38 (Tenn. 2012) (citing *Christian v. Lapidus*, 833 S.W.2d 71, 73 (Tenn. 1992)). The parties herein focus their arguments on the third of these elements.

There is no dispute regarding the finality of the settlement agreement in the prior case. Instead, this appeal is centered on the question of whether the prior lawsuit's termination was favorable to Mr. Meeks. "The 'favorable' component is required because a judgment in favor of the original plaintiff is conclusive of probable cause, unless procured by fraud." *Christian*, 833 S.W.2d at 74.

When a criminal case concludes with a judgment of acquittal or a civil case ends with a judgment of no liability against the defendant after a trial on the merits, such a judgment is almost always deemed final and favorable to the defendant for malicious prosecution purposes. *Christian v. Lapidus*, 833 S.W.2d at 74. Indeed, in some jurisdictions, these are

the only kinds of judgments that are deemed sufficiently favorable to support a subsequent malicious prosecution claim. *See*, *e.g.*, *Hewitt v. Rice,* 154 P.3d 408, 410 (Colo. 2007); *Ferreira v. Gray, Cary, Ware & Freidenrich,* 104 Cal. Rptr. 2d 683, 684 (Cal. App. 2001); *Broadnax v. Greene Credit Serv*., 694 N.E.2d 167, 172 (Ohio App. 1997) (citing *Ash v. Ash*, 651 N.E.2d 945 (Ohio 1995)).

Because, *inter alia*, the stricter standard allows a plaintiff to institute a lawsuit with malice and without probable cause, while escaping liability for malicious prosecution by simply dismissing the suit prior to trial, Tennessee uses a more flexible approach. *See Christian*, 833 S.W.2d at 74. The question of what qualifies as a favorable termination of a prior lawsuit for the purpose of a subsequently filed malicious prosecution claim has been discussed a number of times by Tennessee courts. It is clear that a judgment that results in a favorable termination must be made on the merits, not on procedural or technical grounds. *Himmelfarb*, 833 S.W.2d at 38 (citing *Parrish v. Marquis*, 172 S.W.3d 526, 531 (Tenn. 2005)).

In *Himmelfarb*, the Court addressed a question of first impression, *i.e*., whether a voluntary nonsuit taken by the plaintiff is a favorable termination for purposes of a malicious prosecution claim. After examining the holdings of other jurisdictions, the Court declined to follow those jurisdictions that examine the circumstances under which a voluntary nonsuit is taken to determine if those circumstances show that it was a favorable termination. *Id*. at 39-40. In doing so, the Court explicitly overruled that part of *Parrish v. Marquis* that instructed courts to "examine the circumstances of the underlying proceeding" to determine whether the result was favorable to the defendant. *Id*. at 41 (quoting *Parrish v. Marquis,* 172 S.W.3d at 531).

Instead, the Court held that a voluntary nonsuit without prejudice is not a favorable termination for purposes of establishing the elements of a malicious prosecution claim. *Id*. at 40. The court recognized the policy reasons supporting its conclusion:

> [T]here are sound policy reasons supporting our conclusion that a voluntary nonsuit without prejudice is not a favorable termination. Malicious prosecution actions have the potential to create a chilling effect on the right to access the courts. *Cf. Kauffman v. A.H. Robins Co.*, 223 Tenn. 515, 448 S.W.2d 400, 404 (1969) ("The freedom to use the courts and other tribunals having some quasi-judicial functions should not be impeded."). The threat of a malicious prosecution action may reduce the public's willingness to resort to the court system for settlement of disputes. *Hewitt*, 154 P.3d at 416. We decline to adopt a rule that would deter litigants with potentially valid claims from filing those claims because they are fearful of a subsequent malicious

> prosecution action. Nor do we wish to deter parties from dismissing their claims when a dismissal is the appropriate course of action.

Himmelfarb, 380 S.W.3d at 41.

The Tennessee Supreme Court has also held that "abandonment or withdrawal of an allegedly malicious prosecution is sufficient to establish a final and favorable termination so long as such abandonment or withdrawal was **not accompanied by a compromise or settlement**, or accomplished in order to refile the action in another forum." *Christian*, 833 S.W.2d at 74 (emphasis added).

This holding excluding termination by compromise and settlement as a favorable termination was a restatement of the rule long applied by a line of prior Tennessee cases, that a party that settled a claim was precluded from filing a later action for malicious prosecution based on that same claim. *See Foshee v. Southern Finance & Thrift Corp.*, 967 S.W.2d 817, 819 (Tenn. Ct. App. 1997); *Landers v. Kroger Co.*, 539 S.W.2d 130, 133 (Tenn. Ct. App. 1976); *Martin v. Wahl*, 66 S.W.2d 608 (Tenn. Ct. App. 1933); *Bowman v. Breeden*, 1988 WL 136640 (Tenn. Ct. App. Dec. 20, 1988). Courts in other jurisdictions have reached the same conclusion. *See*, *e.g.*, *Laster v. Star Rental, Inc.*, 353 S.E.2d 37, 38 (Ga. App. 1987)(". . . the rule seems to be well settled that where the termination of the prosecution has been brought about by compromise and agreement of the parties, an action for malicious prosecution cannot be maintained") (citing *Waters v. Winn*, 82 S.E. 537 (Ga. 1914)); *see also*, Restatement of Torts 2d, § 660 (1977).

The reasoning behind this rule can be found in the public policy of Tennessee, which supports and favors settlement agreements in compromise of litigation. *See Harbour v. Brown for Ulrich*, 732 S.W.2d 598, 599 (Tenn.1987) ("the resolution of disputes by agreement of the parties is to be encouraged"); *Third Nat'l Bank v. Scribner*, 370 S.W.2d 482, 487 (Tenn. 1963) ("the policy of the law is to favor compromise."); *Emmco Insurance Co. v. Beacon Mut. Indemnity Co.*, 322 S.W.2d 226, 230 (Tenn. 1959) ("The law favors compromises."); *Heggie v. Cumberland Electric Membership Corp.*, 790 S.W.2d 284, 286 (Tenn. Ct. App. 1990); *Alexander v. Rhodes*, 474 S.W.2d 655, 659 (Tenn. Ct. App. 1971).

If a settling party were to remain unprotected from a subsequent suit for malicious prosecution, it would discourage the settlement of claims and thereby undermine the policy favoring such settlement. Additionally, as set out earlier, courts are not to "examine the circumstances of the underlying proceeding" to determine whether the result was favorable to the defendant. *Himmelfarb.* 833 S.W.2d at 40. In particular, "[r]elaxing the standard of favorable termination by allowing the jury to consider the facts and circumstances underlying the parties' decision to settle a case would lower the burden of proof in a malicious

prosecution case and deter the settlement of cases". *Hewitt v. Rice,* 154 P.3d 408, 416 (Colo. 2007).

Applying this reasoning to the case before us, we cannot agree with Mr. Meeks that because Mr. Gafford ultimately abandoned his insistence that his signature had been forged and settled his claim by surrendering the two disputed pieces of property, it can hardly be doubted that the settlement was on the merits or that it was favorable to Mr. Meeks. First, the dropping of claims to the property was only one part of a negotiated settlement, reached during trial. Mr. Meeks also dismissed his counterclaim. The circumstances surrounding the settlement agreement are not subject to examination by this court or the trial court, and no judgment on favorability can be made. Second, judgments based on settlements between the parties are explicitly excluded from being considered as favorable terminations for the purposes of a malicious prosecution claim.

We, therefore, agree with the trial court that the allegations in Mr. Meeks' complaint are not sufficient to state a claim for malicious prosecution. Accordingly, we affirm the trial court's dismissal of that claim.

VI. OTHER CLAIMS

Mr. Meeks also challenges the trial court's dismissal of his claims for invasion of privacy and intentional infliction of emotional distress. Defendants raised similar failures to allege facts necessary to state a claim for those torts.[6] The basis for these claims was the action to quiet title that had been brought by Mr. Gafford.

Tennessee recognizes the common law tort of invasion of privacy, and a plaintiff can recover damages for "an unreasonable intrusion into his or her private affairs." *Givens v. Mulliken*, 75 S.W.3d 383, 411 (Tenn. 2002).

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive

[6] In the original motion to dismiss, Defendants argued that all of Mr. Meeks' claims should be dismissed as deficient under Rule 12.02(6) for failure to state a claim. An amended motion to dismiss sought dismissal of the claim of simple negligence on the additional ground that the statute of limitations had run. At the hearing, Mr. Meeks dismissed his negligence claim. Although the trial court's order states, *inter alia*, that the invasion of privacy and intentional infliction of emotional distress claims were dismissed on statute of limitations grounds, that was a misstatement. As the order also states, the trial court dismissed all the individual causes of action for failure to state a claim, *i.e.*, the complaint did not allege the necessary elements.

to a reasonable person.

Id. (quoting *Roberts v. Essex Microtel Associates, II, L.P.*, 46 S.W.3d 205, 211-12 (Tenn. Ct. App. 2000) (quoting Restatement 2d of Torts, § 652B)).

Stated simply, liability can arise only when a defendant has "intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs." *Givens*, 75 S.W.3d at 412 (quoting Restatement 2d of Torts, § 652B cmt. c).

Mr. Meeks asserted in his complaint that Ms. Gasaway encouraged Mr. Gafford to make unsupported and offensive allegations against him, or to file the suit to quiet title, but did not explain exactly how these allegations amounted to an invasion of his privacy. Having reviewed the complaint, including the portions quoted in Mr. Meeks' brief, we can find no factual allegations that would support the elements of the tort.

Specifically, there are no facts alleged regarding any "private seclusion" that Mr. Meeks had "thrown about his person or affairs," especially his business dealings with Mr. Gafford. A lawsuit filed by a former business partner does not constitute invasion of privacy, even when the complaint reveals details about a business arrangement that the defendant would rather not become public. As an attorney, Mr. Meeks was aware that his dealings with Mr Gafford could become the subject of litigation if the relationship ended badly. Finally, there are no facts alleged that would support the element requiring that the alleged intrusion be highly offensive to a reasonable person.

The last claim was for intentional infliction of emotional distress, also known as outrageous conduct. In order to establish liability for that tort, a plaintiff must show that the defendant's conduct was intentional or reckless; that the conduct was so outrageous that it was not to be tolerated by a civilized society; and that the conduct caused a serious mental injury to the plaintiff. *Rogers v. Louisville Land Co.*, 367 S.W.3d 196, 201 (Tenn. 2012). Stated slightly differently, the elements of that tort are: (1) the conduct of the defendants has been so outrageous in character, and so extreme in degree, as to be beyond the pale of decency, and to be regarded as atrocious and utterly intolerable in a civilized society; and (2) the conduct results in serious mental injury. *Id.,* at 205; *Lourcey v. Estate of Scarlett*, 146 S.W.3d 48 (Tenn. 2004).

The requirement of a serious mental injury has been further explained as "serious or severe emotional injuries which disable a reasonable, normally constituted person from coping adequately with the stress." *Rogers*, 367 S.W.3d at 207 (citing *Ramsey v. Beavers*, 931 S.W.2d 527, 532 (Tenn. 1996)). There is no recovery for "every minor disturbance to a

person's mental tranquility," nor for "hurt feelings, trivial upsets, or temporary discomfort." *Id.*

Taking the allegations of Mr. Meeks' complaint as true, as we must do when ruling on a Rule 12.02(6) motion to dismiss, we find no factual allegations that Mr. Meeks suffered a serious and severe emotional injury from the filing of the prior lawsuit by Mr. Gafford or the allegations made therein.

Finally, Defendants ask us to award them damages for a frivolous appeal. A frivolous appeal is an appeal that is so devoid of merit that it has no reasonable chance of succeeding. *Combustion Engineering, Inc. v. Kennedy,* 562 S.W.2d 202, 205 (Tenn. 1978); *Wakefield v. Longmire*, 54 S.W.3d 300, 304 (Tenn. Ct. App. 2001). Tenn. Code Ann. § 27-1-122 empowers appellate courts to award damages against parties whose appeals are frivolous, or brought solely for delay. These damages may include, but are not limited to, costs and expenses incurred by the appellee as a result of the appeal. *Jackson v. Aldridge*, 6 S.W.3d 501, 504 (Tenn. Ct. App. 1999) (citing *Wells v. Sentry Ins. Co.*, 834 S.W.2d 935, 938 (Tenn.1992)).

Determining whether to award damages for a frivolous appeal is a matter that lies within the sound discretion of the court. *Banks v. St. Francis Hospital*, 697 S.W.2d 340, 343 (Tenn. 1985); *Glanton v. Lord*, 183 S.W.3d 391, 401 (Tenn. Ct. App. 2005). We have concluded, acting within our discretion, that such damages are not warranted in this case.

VII.

The judgment of the trial court is affirmed. We remand this case to the Circuit Court of Montgomery County for any further proceedings necessary. Tax the costs on appeal to the appellant, Thomas R. Meeks.

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PATRICIA J. COTTRELL, JUDGE