IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
November 17, 2022 Session

CITY OF MEMPHIS v. GEORGE EDWARDS BY AND THROUGH ELIZABETH W. EDWARDS

Appeal from the Chancery Court for Shelby County
No. CH-20-0267 JoeDae L. Jenkins, Chancellor

No. W2022-00087-COA-R3-CV

J. STEVEN STAFFORD, P.J., W.S., filed a dissenting opinion.

There is much in the Majority Opinion with which I agree. But on one significant question I must respectfully dissent: whether this Court should excuse the City's failure to brief a threshold issue.

As an initial matter, my colleagues conclude that the first issue that must be addressed in this case is whether the trial court correctly dismissed the City's petition for judicial review. I join in this conclusion. Here, the trial court's dismissal of the City's petition was on a procedural ground related to the City's failure to file the full administrative record despite over a year's delay. As such, the question of whether the trial court correctly dismissed the City's petition is a preliminary matter that must be resolved before we can reach the merits of the ALJ's decision.

Despite the fact that this is a threshold issue that must be determined before we can address the underlying merits of the ALJ's decision, my colleagues have concluded that the City has presented no more than a skeletal argument on this preliminary issue. Again, I agree, as there can be little dispute of this fact. The City's argument on the issue of the trial court's dismissal spans only three sentences and includes no citation to any relevant authorities. As the United States Court of Appeals for the First Circuit has explained:

> [I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones. As we recently said in a closely analogous context: Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to

spell out its arguments squarely and distinctly, or else forever hold its peace.

United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (internal citations and quotation marks omitted).

Finally, my colleagues correctly state the well-settled law in Tennessee that, typically, an argument raised only skeletally in a brief should be waived. *See, e.g.*, ***Sneed v. Bd. of Pro. Resp. of Sup. Ct.***, 301 S.W.3d 603, 615 (Tenn. 2010). Where I depart from the Majority Opinion, however, is in its conclusion that these deficiencies should be overlooked and the trial court's ruling reversed on the basis of an argument that was no more than skeletally briefed. In particular, I diverge from the decision of my colleagues to consider this issue despite the profound deficiencies in the City's brief in an apparent effort to reach the underlying decision by the ALJ. Respectfully, the Majority Opinion employs dubious reasoning to reach its result.

A fundamental principle of our legal system is that all similarly situated litigants deserve equal treatment under the law. *See, e.g.*, ***Jaami v. Conley***, 958 S.W.2d 123, 126 (Tenn. Ct. App. 1997) ("The equal protection clause requires that persons similarly situated receive the same treatment under the law."). To this end, we apply various judicial doctrines aimed at ensuring "evenhanded, predictable, and consistent" results. ***Frazier v. State***, 495 S.W.3d 246, 253 (Tenn. 2016) (quoting ***Payne v. Tennessee***, 501 U.S. 808, 827–28, 111 S. Ct. 2597, 115 L. Ed.2d 720 (1991)) (discussing the doctrine of stare decisis). Thus, while the law remains flexible, it is important that our decisions be viewed as consistent and predictable, as this "contributes to the actual and perceived integrity of the judicial process[.]" ***Id.*** (quoting ***Payne***, 501 U.S. at 827–28).

Another way that we achieve fairness and ensure the perceived integrity of the courts is by refusing to address questions unless they are properly raised. "The adversarial system of justice is premised on the idea that 'appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.'" ***Malmquist v. Malmquist***, No. W2007-02373-COA-R3-CV, 2011 WL 1087206, at *11 n.21 (Tenn. Ct. App. Mar. 25, 2011) (quoting ***State v. Northern***, 262 S.W.3d 741, 767 (Tenn. 2008) (Holder, J., concurring in part and dissenting in part)). "Parties must thoroughly brief the issues they expect the appellate court to consider." ***Nunn v. Tennessee Dep't of Corr.***, No. M2016-01518-COA-R3-CV, 2017 WL 4776748, at *31 (Tenn. Ct. App. Oct. 23, 2017) (quoting ***Waters v. Farr***, 291 S.W.3d 873, 919 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part)).

This Court has consistently held that arguments were waived when they were raised in a similar fashion to the case-at-bar. *See, e.g.*, ***Biles v. Roby***, No. W2016-02139-COA-R3-CV, 2017 WL 3447910 (Tenn. Ct. App. Aug. 11, 2017); ***Purifoy v. Mafa***, 556 S.W.3d 170 (Tenn. Ct. App. 2017); ***Tennessee Firearms Ass'n v. Metro. Gov't of Nashville & Davidson Cnty.***, No. M2016-01782-COA-R3-CV, 2017 WL 2590209 (Tenn. Ct. App.

June 15, 2017); ***Woodgett v. Vaughan***, No. M2016-00250-COA-R3-CV, 2016 WL 7220508, at *3 (Tenn. Ct. App. Dec. 13, 2016). In fact, some of these opinions were authored or joined in by the majority panel members. *See, e.g.*, ***McCartney v. McCartney***, No. M2020-00703-COA-R3-CV, 2021 WL 3578978, at *15 (Tenn. Ct. App. Aug. 13, 2021) (holding that an issue was waived even though the party cited some authority in that section of his brief because the party cited no authority as to the specific question at issue), *perm. app. denied* (Tenn. Nov. 19, 2021); ***Keeble v. Keeble***, No. E2019-01168-COA-R3-CV, 2020 WL 2897277, at *6 (Tenn. Ct. App. June 3, 2020) (holding that an issue was waived where the party "neither develop[ed] his arguments nor cite[d] authority to support his positions"); ***Jones v. BAC Home Loans Servicing, LP***, No. W2016-00717-COA-R3-CV, 2017 WL 2972218, at *8 n.8 (Tenn. Ct. App. July 12, 2017) (holding that to the extent that a party focuses exclusively on one issue in its brief, the other potential arguments that were raised in the trial court were waived on appeal); ***O'Shields v. City of Memphis***, 545 S.W.3d 436, 443 (Tenn. Ct. App. 2017) (agreeing with the City's argument that the appellant's argument was deficient); ***Bank of Am., Nat'l Ass'n v. Meyer***, No. M2014-01123-COA-R3-CV, 2015 WL 1275394, at *4 (Tenn. Ct. App. Mar. 17, 2015) (holding that an issue was waived where the party failed to "cite any case law or otherwise explain his position with regard to this theory"); *see also* ***In re Dyllon M.***, No. E2020-00477-COA-R3-PT, 2020 WL 6780268, at *5 (Tenn. Ct. App. Nov. 18, 2020) (holding that a party's failure to develop an argument as to certain issues would ordinarily be waived, but that the specific rules applicable to termination of parental rights cases required that the issues nevertheless be addressed). So waiver is an unfortunate, but commonplace, consequence of a party's failure to provide more than a skeletal argument.

It is true that this Court may suspend the appellate briefing requirements, but only when "good cause" exists for doing so. Tenn. R. App. P. 2; *see also* ***In re Terry S.C.***, No. M2013-02381-COA-R3-PT, 2014 WL 3808911, at *5 (Tenn. Ct. App. July 31, 2014) (holding that "good cause" may excuse a skeletal argument). Indeed, this Court has recently cautioned that we should exercise our discretion to suspend rules due to good cause only "sparingly[.]" ***Larry E. Parrish, P.C. v. Strong***, No. M2020-01145-COA-R3-CV, 2021 WL 4471113, at *3 (Tenn. Ct. App. Sept. 30, 2021) (citing ***Levitt, Hamilton, & Rothstein, LLC v. Asfour***, 587 S.W.3d 1, 11 (Tenn. Ct. App. 2019)) (involving whether the finality rule should be excused on the basis of good cause), *perm. app. denied* (Tenn. Feb. 10, 2022). Often, we choose to address issues despite deficient briefing where the appellant is self-represented, our ability to address the sole issue appealed is not hindered by the deficiencies, or the gravity of the issues is such that resolution is necessary. *See, e.g.*, ***Simmons v. Strickland***, No. W2020-01562-COA-R3-CV, 2022 WL 2115250, at *4 (Tenn. Ct. App. June 13, 2022) (involving a pro se party appealing only a single issue); ***In re Terry S.C.***, 2014 WL 3808911, at *5 (involving the termination of fundamental parental rights); ***Diggs v. Lasalle***, 387 S.W.3d 559, 563–64 (Tenn. Ct. App. 2012) (involving a pro se party appealing only a single issue), *perm. app. denied* (Tenn. Oct. 18, 2012). The Majority Opinion, however, offers little explanation of what good cause exists here and my review of the parties' briefs and the record fails to disclose any of the usual reasons for the

application of the good cause exception.

The Majority Opinion first suggests that we must waive the City's failure to brief this issue so that we can reach "the dispositive issue[.]" It is unclear to which issue the Majority Opinion is referring, as the Majority readily concedes that the trial court's ruling must be addressed before the merits of the ALJ's decision may even be considered. In other words, we can only address the correctness of the ALJ's decision if we first conclude that the trial court was wrong to dismiss the City's petition. But if we conclude that it was not an error to dismiss the petition, either by a review on the merits or through a waiver of that issue, then *that* issue is dispositive of this appeal. *See generally* Dispositive, *Black's Law Dictionary* (9th ed. 2009) ("Being a deciding factor; (of a fact or factor) bringing about a final determination."). On the other hand, if the trial court's dismissal of the petition for judicial review is affirmed on any basis, the City's argument as to the correctness of the ALJ's decision is pretermitted. Therefore, the ALJ's decision is not the sole dispositive issue of this appeal, but merely a secondary issue that is only reviewable if the trial court's dismissal is reversed. *See* ***Diggs***, 387 S.W.3d at 563–64 (noting that there was only a single dispositive issue).

The Majority Opinion also seems to suggest that the City's error here is somehow diminished by the fact that it briefed the wrong issue. But a failure to brief the correct issue is no less problematic than a failure to adequately brief the right issue, as both are attributable to the party's own action. Like the plaintiff with her complaint, the appellant is the master of his own appellate brief. *See* ***Merolla v. Wilson Cnty.***, No. M2018-00919-COA-R3-CV, 2019 WL 1934829, at *9 n.14 (Tenn. Ct. App. May 1, 2019) (quoting ***Loftis v. United Parcel Serv., Inc.***, 342 F.3d 509, 515 (6th Cir. 2003)). As such, it is generally a litigant or his or her counsel's discretion that determines which issues are raised on appeal and how they are addressed. *See* ***Little v. City of Chattanooga***, 650 S.W.3d 326, 340 (Tenn. Ct. App. 2022) (quoting ***State v. Draper***, 800 S.W.2d 489, 500 (Tenn. Crim. App. 1990)), *perm. app. denied* (Tenn. June 14, 2022). As a result, waiver applies even when the party "failed to brief the correct issue," as the Majority Opinion characterizes the City's failure here. *See* ***Payne v. Bradley***, No. M2019-01453-COA-R3-CV, 2021 WL 754860, at *7–8 (Tenn. Ct. App. Feb. 26, 2021) (holding that the appellant's argument was waived where appellant provided "only a skeletal argument actually addressing the very foundation of the trial court's ruling against her" and therefore had "not properly appealed the dispositive issue in this appeal").

Still, the Majority Opinion appears to excuse the City's failures as simply an error of discernment, rather than a deliberate choice. But even when a litigant makes a misguided choice in how to present his or her claims, we are not at liberty to "steer[] the [litigant's] case toward the [proper arguments] that have been abandoned by the litigant." ***Merolla***, 2019 WL 1934829, at *9 n.14. And even more importantly, it is apparent that the City, for whatever reason, *chose* to avoid much mention of the trial court's ruling in this appeal. Here, the trial court was clear that its ruling was on procedural grounds. As such, it was

equally clear that this issue was central to the City's success on appeal, as the dismissal of the petition for judicial review must be reversed before we can consider the correctness of the ALJ's ruling. The City simply chose to ignore that reality by avoiding this issue almost entirely in its appellate brief, with only a perfunctory attempt to address it.

Other parts of the City's brief illustrate the City's, admittedly inexplicable, strategy. First, the City's issues only broadly and tangentially discuss the error of the trial court in "uph[o]ld[ing]" the ALJ's decision to strike the release agreement. Of course, that issue somewhat obscures the actual disposition in the trial court, which upheld the ALJ's decision only by virtue of its dismissal of the City's petition for judicial review. *See also generally* ***Hodge v. Craig***, 382 S.W.3d 325, 335 (Tenn. 2012) ("[A] properly framed issue may be the most important part of an appellate brief. . . . The issues should be framed as specifically as the nature of the error will permit in order to avoid any potential risk of waiver." (citations omitted)).

Additionally, the City's statement of the case does not include *any* discussion of the trial court proceedings. *See* Tenn. R. App. P. 27(a)(5) (directing the appellant to include in his or her brief a statement of the case, which details "the course of proceedings, and its disposition in the court below"). Instead, the City appears to pretend that the case simply ended when the ALJ issued its ruling, ignoring the years of proceedings in the trial court that followed. The City's decision to ignore the procedural history of the case following the filing of its petition for judicial review therefore appears to result not from inadvertence or negligence, but an intentional strategy to focus almost exclusively on the ALJ's ruling.[1]

Moreover, if the City's failure to brief this issue was merely a case of a negligent failure to discern that this issue was important, the City could have addressed this issue in its reply brief. While reply briefs are generally not vehicles for correcting errors in initial briefs, ***Augustin v. Bradley Cnty. Sheriff's Off.***, 598 S.W.3d 220, 227 (Tenn. Ct. App. 2019), this Court has previously exercised its discretion to consider arguments raised in reply briefs when the opposing party had fair notice of the arguments. *See* ***Shaw v. Gross***, No. W2017-00441-COA-R3-CV, 2018 WL 801536, at *4 n.5 (Tenn. Ct. App. Feb. 9, 2018); ***Malco Theaters, Inc. v. Roberts***, No. W2010-00464-COA-R3-CV, 2011 WL 1598884, at *24–25 (Tenn. Ct. App. Apr. 26, 2011). But despite the fact that Appellee raised waiver in its responsive brief, the City chose to file no reply brief to better address the threshold issue. And the rules of this Court state that we are not required to grant relief to a party who fails to take the action necessary to correct an error. *See* Tenn. R. App. P. 36(a).

In sum, this case involves an institutional party well-represented by counsel that

[1] The City's decision to give little attention to this issue does not stem from a lack of space in its brief, as the certificate of compliance attached to the City's brief indicates that it is 2,373 words. Rule 30(e) of the Tennessee Rules of Appellate Procedure places a 15,000-word limit on initial briefs.

chose on appeal to avoid significant discussion of a dispositive issue. But my colleagues are not content for the City to be felled by the consequences of its own actions. Instead, they choose to address the threshold issue that they admit was inadequately briefed, citing cases both employed by the trial court in its ruling and newly uncovered. *Cf. generally* ***State v. Bristol***, 654 S.W.3d 917, 927 (Tenn. 2022) (discussing the requirement that a party be given notice and an opportunity to respond when the appellate court considered an unpreserved and unpresented issue). However, decades of caselaw and the very foundations of our adversarial justice system dictate that courts cannot and should not shoulder the burden of fashioning the arguments of the parties who have chosen not to do so for themselves. In the absence of good cause to excuse the City's failures, either demonstrated by the City directly or otherwise evident from the record,[2] I believe that these precedents demand that we treat the City as we have done countless other parties and waive consideration of whether the trial court properly dismissed the City's petition for judicial review. On that basis, the judgment of the trial court should be affirmed and all other issues pretermitted. I must therefore respectfully dissent from the Majority Opinion.[3]

s/ J. Steven Stafford
J. STEVEN STAFFORD, JUDGE

[2] Of course, because the City did not file a reply in response to Appellee's waiver argument, it never asked this Court to find good cause to excuse its deficient briefing. Thus, the City made no effort to demonstrate good cause. Still, we have exercised our discretion to find good cause even where no party has expressly requested that we do so. *See, e.g.*, ***Diggs***, 387 S.W.3d at 563–64.

[3] Because the City's waiver should prevent this Court from reaching the merits of either the trial court's or the ALJ's decisions, I express no opinion as to those issues.