

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 6, 2025 Session

FILED

11/06/2025

Clerk of the
Appellate Courts

FATIMA PAJAZETOVIC ET AL. v. RICHARD BAKER

Appeal from the Circuit Court for Davidson County
No. 20C-1547 Joseph P. Binkley, Jr., Judge

No. M2024-00372-COA-R3-CV

In this automobile collision case, the jury returned a verdict in favor of the plaintiffs. On appeal, the defendant challenges several rulings related to the admission and testimony of the plaintiffs' accident reconstruction expert. Because the defendant failed to file a motion for new trial raising these challenges, we conclude that they are waived, and so we affirm the judgment in favor of the plaintiffs. We award the plaintiffs their reasonable attorney's fees and costs under Tennessee Code Annotated section 27-1-122.

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

J. STEVEN STAFFORD, P.J., W.S., delivered the opinion of the court, in which ANDY D. BENNETT and JEFFREY USMAN, JJ., joined.

Joshua G. Offutt and Elizabeth B. Borsavage, Nashville, Tennessee, for the appellant, Richard Baker.

Eric Beasley and Steven Fifield, Goodlettsville, Tennessee, for the appellee, Fatima Pajazetovic, Sead Pajazetovic, Chamisa Melton, and State Farm Mutual Automobile Insurance Company.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

On July 16, 2020, Plaintiffs/Appellees Fatima Pajazetovic and Sead Pajazetovic (together, "Appellees") filed a complaint against Defendant Chamisa Melton and Defendant/Appellant Richard Baker ("Appellant") in the Davidson County Circuit Court ("the trial court"). The complaint alleged that Mrs. Pajazetovic was injured in an

automobile collision between herself and a car owned by Ms. Melton and operated by Appellant. The complaint further alleged that Appellant ran a stop sign and struck Mrs. Pajazetovic's vehicle while she was making a left-hand turn. Appellees asserted that Appellant acted negligently and violated various statutes in failing to maintain a proper lookout, failing to stop at a stop sign, and failing to exercise due care. The complaint further asserted that Ms. Melton should be liable for Appellant's wrongful acts and omissions. According to the complaint, Mrs. Pajazetovic suffered from physical and emotional injuries, lost wages, and lost earning capacity in the total amount of \$250,000.00;¹ Mr. Pajazetovic suffered from loss of consortium, loss of services, and loss of companionship in the total amount of \$25,000.00.²

On October 26, 2020, the alleged uninsured/underinsured motorist carrier ("Carrier," and together with Ms. Melton and Appellant, "Defendants") filed an answer denying liability. Appellant eventually filed an answer on May 26, 2021, denying the material allegations in the complaint and raising the affirmative defense of comparative fault. The trial court entered a scheduling order on June 22, 2022, ordering the disclosure of any expert witnesses to be made by September 1, 2022, for Appellees and November 15, 2022, for Defendants. That deadline was later extended to October 15, 2022, and December 29, 2022, respectively. Appellees made expert disclosures on October 14, 2022.

Relevant to this appeal, on July 14, 2023, Carrier filed a motion in limine to exclude the testimony and opinions of Appellees' accident reconstructionist, Winthrop Smith, Ph.D. Therein, Carrier argued that Dr. Smith's testimony would not substantially assist the trier of fact as required by Tennessee Rule of Evidence 702 because Dr. Smith reached his opinion merely by determining which of the witnesses was more credible. As Carrier explained,

There are no calculations or other scientific explanations contained in his report to explain the basis of his opinions as to the cause of the accident other than simply his review of the deposition testimony of the parties and witness. In other words, there are no calculations or measurements or anything that the Defendants can use to rebut the opinions of [D]r. Smith as there is nothing cited by [D]r. Smith as the basis of his opinions.

Thus, Carrier argued that Dr. Smith's testimony invaded the province of the jury and was not based on scientific or specialized knowledge. Carrier further argued that Appellees should not be permitted to supplement their disclosure to cure these issues at such a late date, as it would result in trial by ambush.

¹ The ad damnum clause was eventually amended to seek \$125,000.00 in damages.

² At some point, the claims by Mr. Pajazetovic were voluntarily dismissed, but the complaint was later amended to renew these claims.

Appellant and Ms. Melton joined in the motion on July 18, 2023. Therein, they asserted that Dr. Smith should not be permitted to testify as an accident reconstructionist without having observed the accident scene or the vehicles involved, spoken to investigators, or taken any scientific measures or calculations.

Appellees responded in opposition to the motion in limine on July 25, 2023, arguing that they properly disclosed Dr. Smith under Rule 26 of the Tennessee Rules of Civil Procedure and that his opinions complied with the rules of evidence. In particular, Appellees asserted that their disclosure was legally sufficient and that if Defendants wanted additional information about how Dr. Smith reached his conclusions, the proper method was to depose Dr. Smith; Defendants never attempted to do so.

On August 11, 2023, the trial court entered an order voluntarily dismissing Ms. Melton as a defendant. On August 23, 2023, the trial court denied the motions in limine intended to exclude Dr. Smith's testimony. Trial occurred but resulted in a hung jury. Carrier thereafter elected to defend solely in the name of Appellant.

In advance of the retrial of this matter, on January 12, 2024, Appellees filed a motion to deem Dr. Smith unavailable for trial under Tennessee Rule of Evidence 804,³ or for a continuance of the trial scheduled for early February. Therein, Appellees asserted that Dr. Smith's health issues prevented him from being at trial.⁴ In support, Appellees cited *Cullum v. Baptist Hospital System, Inc.*, No. M2012-02640-COA-R3-CV, 2014 WL 576012 (Tenn. Ct. App. Feb. 12, 2014), in which this Court reversed the exclusion of an expert's prior testimony because "the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination." *Id.* at *3 (quoting Tenn. R. Evid. 804(b)(1)).

Appellant responded by denying that Dr. Smith was unavailable and asking that no continuance be granted. Specifically, Appellant asserted that simply because Dr. Smith's present health condition "may" render him unable to testify, he was not unavailable under Rule 804(a)(4), which requires that the witness be "unable to be present or to testify at the hearing[.]" Appellant submitted that despite the amputation of Dr. Smith's legs and his 95% vision loss, he "should still be able to appear and testify at the second trial." Appellant further asserted that it would be highly prejudicial to allow the prior testimony of Dr. Smith, as Appellant would not be able to cross-examine Dr. Smith in front of the jury. Appellant argued that this inability was particularly prejudicial, given that Appellant had retained

³ Rule 804 provides, in relevant part, that "'Unavailability of a witness' includes situations in which the declarant: . . . is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity[.]" Tenn. R. Evid. 804(a) & (a)(4).

⁴ These issues included that he had lost 95% of his vision, in addition to the amputation of his leg that occurred prior to the first trial. The motion was supported by a declaration from Appellees' attorney detailing his knowledge of Dr. Smith's medical condition.

new counsel since the first trial. Appellant further argued that Rule 804(a) did not apply to non-medical expert witnesses, but merely to lay witnesses.

On January 17, 2024, Appellees notified the trial court that Dr. Smith had passed away. Appellees thereafter renewed their request that Dr. Smith be deemed unavailable. Therein, they asserted that any objections to Dr. Smith's inability to appear at trial were clearly moot, that Rule 804 applied to both lay and expert witnesses, that the same law firm had represented Carrier since it filed an answer, and that, in any event, Rule 804 requires that the *party* have the opportunity to fully cross-examine the witness, not a specific *attorney*.

On February 2, 2024, the trial court entered an order ruling that Dr. Smith was unavailable under Rule 804. The trial court therefore ruled that Appellees

may use Dr. Smith's prior trial testimony, which had been given as a witness on August 22, 2023, at the previous trial of this matter. Such presentation of testimony by Dr. Smith shall be presented to the jury pursuant to the Rules of Evidence, and recognizing this [c]ourt's previous evidentiary rulings from the bench during the first trial of this matter.

The second trial was held on February 5 and 6, 2024. The jury returned a verdict finding Appellant 100% at fault for the collision and awarding Mrs. Pajazetovic \$123,586.22 in damages; Mr. Pajazetovic was awarded \$2.00 in damages. The trial court entered an order of judgment on February 21, 2024, awarding damages to Appellees and assessing costs to Appellant.⁵ Appellant filed no post-trial motions but instead appealed to this Court.⁶

II. ISSUES PRESENTED

Appellant presents the following issues, which are taken from his brief:

1. Did the trial court err by severely limiting [Appellant's] cross-examination of [Appellees'] expert witness, thereby violating [Appellant's] fundamental right to confront and challenge expert testimony?
2. Did the trial court err in admitting the prior testimony of [Appellees'] expert witness in a second trial, despite [Appellant's] new counsel never having had a full and fair opportunity to cross-examine him?

⁵ An amended order was entered on February 26, 2021.

⁶ In the meantime, on February 16, 2024, Appellees filed a motion for discretionary costs, which was granted by order of March 15, 2024.

3. Did the trial court err in allowing [Appellees'] expert witness to testify despite [Appellees'] failure to provide an adequate Rule 26 disclosure, depriving the [Appellant] of necessary pre-trial discovery?

Along with arguing that the trial court's ruling should be affirmed in all respects, Appellees raise two additional issues: (1) that Appellant's issues have been waived by his failure to file a motion for new trial; and (2) that they are entitled to attorney's fees incurred in defending a frivolous appeal.

III. ANALYSIS

As is evident from the above, all of Appellant's issues on appeal stem from the trial court's evidentiary decisions regarding the testimony of Dr. Smith. In particular, Appellant asserts that Dr. Smith's testimony should have been excluded because he was not properly disclosed prior to the first trial, that the trial court erred in limiting Appellant's cross-examination of him during the first trial, and that his prior testimony should not have been admitted during the second trial. Rule 3(e) of the Tennessee Rules of Appellate Procedure provides, however, as follows:

in all cases tried by a jury, no issue presented for review shall be predicated upon error in **the admission or exclusion of evidence**, jury instructions granted or refused, misconduct of jurors, parties or counsel, **or other action committed or occurring during the trial of the case**, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

(emphasis added). As this Court has explained, "[a] motion for new trial is considered an important step of post-trial and appellate procedure in jury cases. It specifically affords the trial judge the opportunity to consider or reconsider alleged errors committed during the course of trial or other matters affecting the jury or the verdict." *Cortez v. Alutech, Inc.*, 941 S.W.2d 891, 894 (Tenn. Ct. App. 1996) (citing *McCormic v. Smith*, 659 S.W.2d 804, 806 (Tenn. 1983)). Consequently, "[i]n all civil cases tried to a jury, any ground not cited in the motion for new trial has been waived for the purposes of appeal." *Waters v. Coker*, 229 S.W.3d 682, 689 (Tenn. 2007) (citing *Boyd v. Hicks*, 774 S.W.2d 622, 625 (Tenn. Ct. App. 1989)).

In this case, there can be no dispute that Appellant filed no motion for new trial, challenging the trial court's evidentiary rulings or otherwise. This Court has held that where a pre-trial motion relates to the admission or exclusion of evidence, a motion for new trial is required to preserve the issue on appeal. *See, e.g., Robinette v. Johnson*, No. M2000-01514-COA-R3-CV, 2001 WL 694477, at *2 (Tenn. Ct. App. June 21, 2001) ("Clearly, the issues surrounding [the] Motion in Limine relate to the 'admission or exclusion of evidence.' Thus, [the] failure to include the alleged errors in his motion for

new trial constitutes a waiver of those issues.”). Tennessee courts have also held that issues related to the cross-examination of witnesses are likewise subject to the motion for new trial requirement. See *State v. Colvett*, 481 S.W.3d 172, 203 (Tenn. Crim. App. 2014) (holding that issue related to alleged misconduct during cross-examination was waived under Rule 3(e)); *State v. Watson*, No. 24, 1991 WL 153017, at *16 (Tenn. Crim. App. Aug. 14, 1991) (waiving the appellant’s argument that she was not permitted to cross-examine a witness); *State v. Brock*, 678 S.W.2d 486, 490 (Tenn. Crim. App. 1984) (holding that issues related to the scope of redirect and the cross-examination of the appellant were waived under Rule 3(e)).

On appeal, Appellant does not assert that his issues are not among those governed by Rule 3(e). Instead, he asserts that this Court should nevertheless consider the issues raised because, in allowing Dr. Smith to testify after his methodology and calculations were purportedly not properly disclosed and then allegedly limiting cross-examination on that issue, the trial court deprived Appellant of his fundamental right to cross-examine Dr. Smith under both the Tennessee and United States Constitutions. He further contends that the denial of the right to cross-examine Dr. Smith “undermines the fairness and integrity of the trial.” Finally, he contends that the trial court’s rulings with regard to Dr. Smith were plain error.

Respectfully, we disagree. Other than a vague reference to due process, Appellant has cited no authority to suggest that any of the alleged errors in this case rise to the level of constitutional violations. Indeed, the Tennessee Court of Criminal Appeals has held that an issue may be waived by failing to raise it in a motion for new trial even when a criminal defendant’s right to confront witnesses is implicated. See *Watson*, 1991 WL 153017, at *16 (“The appellant’s argument that she was denied her constitutional right to confront the witness who actually prepared the audit report has been waived. This issue was not raised in the motion for a new trial.”). In the absence of any authority otherwise, we decline to hold that the trial court’s decisions regarding the scope of cross-examination, the admission of Dr. Smith’s expert testimony, or the determination that he was unavailable under Rule 804 following his death in any way amount to a deprivation of due process such that the failure to file a motion for new trial was excused.

To the extent that Appellant asserts that the alleged errors in this case amount to plain error, we first question whether this doctrine has any place in this case. Indeed, the Court of Criminal Appeals recently indicated that plain error may be inapplicable in civil cases.⁷ See *In re Tenn. Bonding Co.*, No. W2024-01063-CCA-R3-CD, 2025 WL 1883602,

⁷ The plain error doctrine also comprises five elements, all of which must be established before the court will grant relief. See generally *State v. Martin*, 505 S.W.3d 492, 504 (Tenn. 2016). Appellant does not discuss this test or apply any of the elements to this case in his brief. As such, even to the extent that we might apply plain error, we decline to do so in the face of such a skeletal argument. See *Sneed v. Bd. of Pro. Resp. of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010) (“It is not the role of the courts, trial or appellate, to research or construct a litigant’s case or arguments for him or her, and where a party fails to develop an

at *16 (Tenn. Crim. App. July 8, 2025) (“While the cases of *State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000), and *State v. Adkisson*, 899 S.W.2d 626, 641–42 (Tenn. Crim. App. 1994), set forth the requirements of plain error relief in criminal cases, it is unclear whether those requirements apply in the instant context.”); *see also Waters v. Farr*, 291 S.W.3d 873, 919 n.22 (Tenn. 2009) (Koch, J., concurring in part) (“While the doctrine of plain error is frequently used by appellate courts to consider issues in criminal cases that were not raised in the lower courts, there is no doctrine analogous to ‘plain error’ in civil proceedings.”); *Carman v. Kellon*, No. M2019-00857-COA-R3-CV, 2020 WL 7422071, at *3 (Tenn. Ct. App. Dec. 18, 2020) (noting that the use of the term “accused” in *Smith* and *Adkisson* “suggests that [the plain error] doctrine is generally applicable to criminal cases rather than to civil cases”); *Lance v. Owner’s Ins. Co.*, No. E2015-00274-COA-R3-CV, 2016 WL 3092818, at *14 (Tenn. Ct. App. May 25, 2016) (stating that the plain error “test is not necessarily applicable in civil actions”). Instead, the Court of Criminal Appeals held that the proper lens to determine whether to address a waived issue in a civil appeal was under Rule 13(b) and 36(b) of the Tennessee Rules of Appellate Procedure. *In re Tenn. Bonding Co.*, 2025 WL 1883602, at *16; *see also Lance*, 2016 WL 3092818, at *14 (noting that Rule 36(b) essentially “incorporate[s] the plain error doctrine”).

Rule 13(b) provides this Court with the discretion to consider issues not properly presented for review “in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process.” Tenn. R. App. P. 13(b). Rule 36(b) further provides that “[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.” Tenn. R. App. P. 36(b). This Court has held that “review of an error is not warranted” under Rule 36(b) “unless (1) consideration of the error is necessary to do substantial justice and (2) the error affected the substantial rights of [the party complaining].” *Lance*, 2016 WL 3092818, at *14.

Respectfully, these requirements are not present in this case. Addressing Appellant’s issues will certainly not prevent needless litigation. And while the issues that Appellant raises are important to him, resolution of them is not necessary to prevent injury to the public or to prevent prejudice to the judicial process. Instead, the issues presented here are simply run-of-the-mill evidentiary issues, and Appellant’s arguments are little more than an attempt to avoid the clear application of Rule 3(e). *Cf. Mason v. Tenn. Farmers Mut. Ins. Co.*, 640 S.W.2d 561, 563–64 (Tenn. Ct. App. 1982) (“Defendant urges that pursuant to [Rule] 13(b) this court may review this issue regardless of its failure to raise same in its motion for a new trial. We do not believe [Rule] 13(b) was designed for circumstances such as these. Otherwise, there would be absolutely no reason for the adoption of [Rule] 3(e).” (footnote omitted)). Appellant cites no cases in which this Court or any other court utilized Rules 13(b) or 36(b) to address similar evidentiary-type issues

argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.”).

that were not properly preserved in the trial court. Indeed, of the two cases cited by Appellant in support of this argument, neither panel exercised its discretion to consider the waived issues. *See Smith*, 24 S.W.3d at 283 (“After a thorough review of the record in this case, we conclude that the plain error doctrine can afford no relief for the appellee.”); *Mason* 640 S.W.2d at 563–64 (declining to address a challenge to the jury instructions when the challenge was not raised in a motion for new trial).⁸

The parties had a full opportunity to litigate the evidentiary issues in the trial court. Each of the trial court’s rulings that are challenged on appeal are discretionary decisions, meaning that they are less likely to be reversed even if we were to reach their merits. *See State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000) (“A party seeking to have a lower court’s holding overturned on the basis of abuse of discretion undertakes a heavy burden. The abuse of discretion standard is intended to constrain appellate review and implies less intense appellate review and, therefore, less likelihood of reversal.” (quotation marks and citation omitted)). Finally, there is nothing in the record or Appellant’s briefs to explain or justify the failure to file a motion for new trial in this case.⁹ We decline to dilute Rule 3(e)’s motion for new trial requirement simply because Appellant has clothed his basic evidentiary arguments in terms of fundamental rights. As such, we decline to exercise our discretion to address Appellant’s evidentiary issues that were not properly presented to the trial court in a motion for new trial. The jury’s verdict must therefore be affirmed.

As a final matter, Appellees request their attorney’s fees incurred in defending a frivolous appeal under Tennessee Code Annotated section 27-1-122, which provides as follows:

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.

⁸ Appellant also vaguely references cumulative error but cites no law in support of that assertion. Even assuming arguendo that cumulative error is applicable in a civil appeal, cumulative error is likewise waived on appeal if not raised in a motion for new trial. *See State v. King*, 703 S.W.3d 738, 787 (Tenn. Crim. App. 2024) (“[T]he failure to raise cumulative error in the motion for new trial waives the issue on appeal.” (citing *State v. Davis*, 141 S.W.3d 600, 632 (Tenn. 2004))).

⁹ At oral argument, Appellant’s counsel suggested that the failure to file a motion for new trial was because doing so would be futile, that it was unnecessary to preserve the record, and that it would have caused delay. This statement suggests that the failure to file a motion for new trial was a strategic choice. Under the plain error analysis that Appellant asks that we apply in this case, however, plain error does not apply to alleged waivers that were done “for tactical reasons[.]” *Martin*, 505 S.W.3d at 504. Moreover, Appellant cites no authority to suggest that a motion for new trial is excused when counsel deems it futile. *Cf. Smith v. Benihana Nat’l Corp.*, 592 S.W.3d 864, 874 (Tenn. Ct. App. 2019) (holding that the appellant was required to file a motion for new trial despite appellant’s argument that filing such a motion was futile).

As this Court recently explained,

A successful party should not be forced to bear the costs and vexation of a baseless appeal, nor should appellate courts be saddled with such appeals. *See Henderson v. SAIA, Inc.*, 318 S.W.3d 328, 342 (Tenn. 2010). However, the courts must take care not to discourage legitimate appeals and should only impose a penalty pursuant to Tennessee Code Annotated § 27-1-122 in rare and obvious cases of frivolity. *Id.* Whether to award damages due to a frivolous appeal is a discretionary decision by the appellate court. *Young v. Barrow*, 130 S.W.3d 59, 66–67 (Tenn. Ct. App. 2003) (citing *Banks v. St. Francis Hosp.*, 697 S.W.2d 340, 343 (Tenn. 1985)).

Motealleh v. ReMax TriStar Realty, No. E2023-01407-COA-R3-CV, 2024 WL 5199839, at *4 (Tenn. Ct. App. Dec. 23, 2024), *perm. app. denied* (Tenn. Mar. 12, 2025).

Because Appellant failed to file a motion for new trial, all of the issues he raised in this appeal are waived. We therefore conclude that Appellant’s appeal had no reasonable chance of success. As such, we award Appellees their reasonable attorney’s fees and costs incurred in defending this appeal.

IV. CONCLUSION

The judgment of the Davidson County Circuit Court is affirmed, and we remand this matter to the trial court for further proceedings consistent with this Opinion, including the determination of damages pursuant to section 27-1-122. Costs of this appeal are taxed to Appellant Richard Baker, for which execution may issue if necessary.

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