IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 4, 2016

MARIANNE GREER v. PHILIP ERNEST COBBLE

Appeal from the Circuit Court for Knox County
No. 108701 Clarence E. Pridemore, Jr., Chancellor

No. E2015-01378-COA-R3-CV
FILED-MAY 11, 2016

This is the second appeal of this case involving the distribution of a marital estate. Appellant appeals the order denying him relief pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure (Rule 60.02). Because the appellate record contains no transcript or statement of the evidence conveying an accurate and complete account of what transpired as required by the Tennessee Rules of Appellate Procedure, we conclude that the findings made by the trial court were based upon sufficient evidence. Affirmed and remanded.

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

KENNY ARMSTRONG, J. delivered the opinion of the Court, in which THOMAS R. FRIERSON, II, and ANDY D. BENNETT, JJ., joined.

Philip Ernest Cobble, Knoxville, Tennessee, *Pro Se*.

Shelley S. Breeding, Knoxville, Tennessee, for the appellee, Marianne Greer.

OPINION

This is the second appeal of this case, which began in the fall of 2007 when Ms. Marianne Greer ("Wife" or "Appellee") filed a complaint for divorce in the Circuit Court

of Knox County against Philip Ernest Cobble ("Husband" or "Appellant"). ***Greer v. Cobble***, No. E2012–01162–COA–R3–CV, 2013 WL 4121792 at *1 (Tenn. Ct. App. Aug. 15, 2013) ("***Greer I*** "). The first appeal concerned the parties' settlement agreement, which purportedly reflected the parties' agreement regarding the division of their property. An order, proposed by Wife, was signed by counsel for both parties and entered by the trial court. Husband later filed a *pro se* notice of appeal containing allegations that he did not agree to the terms of the settlement and that it was incomplete. ***Greer I***, 2013 WL 4121792 at *1. For purposes of continuity, we recite a brief case history based upon our opinion in ***Greer I***.

In December 2011, the parties announced to the trial court that they had reached a settlement agreement. However, the parties were unable to agree on the details of an order. Both parties submitted proposed final orders. On January 23, 2012, counsel for Husband noted that the parties were "very close to an agreed order," with the only area of disagreement being a life insurance policy on Husband's life and two cemetery plots.

On March 30, 2012, counsel for the parties appeared for a hearing in chambers, and the court signed and entered the order presented by Wife's counsel. The signed final order was entered on April 27, 2012. On May 9, 2012, counsel for both parties signed an order approving the entry of the order which was approved by the trial court. In relevant part, this order provided:

> 1. The Court approves and enters the Final Order proposed by Plaintiff, Marianne Greer ("Wife").
> 2. Defendant, Philip Cobble ("Husband"), is awarded the marital property currently located at his condominium.
> 3. Husband and Wife are also awarded the items of real property identified in the hand-written list attached to the asset list identified as Exhibit 1 at the trial of this matter. This award does not include the Ron Williams painting currently located at Defendant's office.
> 4. Wife shall make an Affidavit of the marital property, identified in Trial Exhibit 1, that does not exist.
> 5. The marital property not awarded herein or awarded pursuant to the Final Order will be divided by the parties. Wife shall select an item of such marital property first; then the parties will alternate selecting items until all items have been claimed.

The record, however, shows that no exhibit (either "1" or "A") was attached to the final order. Husband, acting *pro se*, filed a notice of appeal on May 29, 2012, ***Greer I***, 2013 WL 4121792 at *4, arguing that he did not agree to the terms of the settlement and that the final order was fundamentally flawed because the exhibit was not included with the final order. ***Id.*** In ***Greer I***, we determined that the record was incomplete due to the fact

that the exhibit reflecting the distribution of the marital property was not in the record. Therefore, we were unable to definitively determine whether a final judgment had been entered. ***Greer I***, 2013 WL 4121792, at *5. We remanded the case back to the trial court with instructions "to make specific findings of fact as to the parties' agreement regarding the marital assets, to whom the items are assigned, and the value given to each item. Additionally, the trial court [was] instructed to place on the record the declarations of the parties regarding whether or not there are any remaining issues requiring resolution." ***Id.***

On June 25, 2014, Appellant filed a motion for clarification, in which he alleged that there were "other remaining issues requiring resolution in this case aside from the division of marital property listed in the herein referred exhibit." The hearing on Appellant's motion for clarification was heard by the trial court on July 14, 2014. At the hearing, Appellant argued that the issues before the trial court included the award and division of the 529(k) account, the life insurance policies, the 2007 tax debt, and Appellee's attorney's fees. Appellant also argued that his previous attorney entered the final orders without his authority. During the hearing, the trial court noted that if there was a basis under Rule 60 for setting aside the order, then Appellant should file the appropriate motion so that those issues could be addressed. Ultimately, the trial court found that the issues raised by Appellant "were resolved by prior orders, and all other issues, including the division of personal property, have been resolved. . . ." The trial court instructed Appellee's counsel to prepare a final order incorporating the 2012 final order, the order of May 9, 2012, and the 2013 mediated agreement that divided the parties' personal property. This order was entered on August 20, 2014.

On November 4, 2014, Appellant filed a motion for relief pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. However, Appellant's Rule 60.02 motion is not contained in the record. Appellee filed a response to Appellant's Rule 60.02 motion on November 20, 2014. On June 1, 2015, the trial court heard Appellant's Rule 60.02 motion and two motions concerning execution on a judgment filed by Appellee. The trial court denied Appellant's Rule 60.02 motion and granted both of Appellee's motions. The trial court found that Appellant's motion was "not proper under Rule 60, and the issues raised by [Appellant] . . . should have been addressed on appeal." The order on these motions was entered on July 20, 2015. Appellant filed a timely notice of appeal on July 27, 2015.

Appellant raises two issues for review as stated in his brief:

> 1. Did the trial court error (sic) when it refused to hear a Motion for Relief under rule 60.02 when the [trial] court had earlier stated on the record that such motion would be considered.

> 2. Did the trial court error (sic) by failing to comply with a mandate given by this Appellate Court in a previous decision and opinion when it failed to consider the unresolved issues declared by the Defendant.

Additionally, the Appellee requests attorney's fees on appeal.

Rule 60.02 provides that "[o]n motion and upon such terms as are just" a court may relieve a party from a final judgment even after the passage of thirty days. The bases for relief set forth in Rule 60.02 are:

> (1) mistake, inadvertence, surprise or excusable neglect;
> (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
> (3) the judgment is void;
> (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or
> (5) any other reason justifying relief from the operation of the judgment.

Tenn. R. Civ. P. 60.02. Motions made under Rule 60.02 must be filed "within a reasonable time," although motions asserting the grounds of mistake, inadvertence, surprise, excusable neglect, or fraud must be filed not more than one year after the judgment in question was entered. ***Id***.

The general purpose of Rule 60.02 is "'to alleviate the effect of an oppressive or onerous final judgment.'" ***Black v. Black***, 166 S.W.3d 699, 703 (Tenn. 2005) (quoting ***Killion v. Dep't of Human Servs.***, 845 S.W.2d 212, 213 (Tenn. 1992)). Rule 60.02 seeks "to strike a proper balance between the competing principles of finality and justice" ***Jerkins v. McKinney***, 533 S.W.2d 275, 280 (Tenn. 1976); ***Jackson v. Jewell***, No. M2011-01838-COA-R3-CV, 2012 WL 2051103, at *2 (Tenn. Ct. App. June 6, 2012) by providing "an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules." ***Id.*** (citing ***Thompson v. Firemen's Fund Insurance Co.***, 798 S.W.2d 235, 238 (Tenn. 1990)). "Because of the importance of this principle of finality, the escape valve should not be easily opened." ***Rogers v. Estate of Russell***, 50 S.W.3d 441, 445 (Tenn. Ct. App. 2001). Accordingly, a party seeking relief from a judgment under Rule 60.02 bears the burden of proving that it is entitled to relief by clear and convincing evidence. ***McCracken v. Brentwood United Methodist Church***, 958 S.W.2d 792, 795 (Tenn. Ct. App. 1997). Evidence is clear and convincing when it leaves "'no serious or substantial doubt about the correctness of the conclusions drawn.'" ***Goff v. Elmo Greer & Sons Constr. Co.***, 297 S.W.3d 175, 187 (Tenn. 2009) (quoting ***Hodges v. S.C. Toof & Co.***, 833

S.W.2d 896, 901 n. 3 (Tenn.1992)). "In other words, the evidence must be such that the truth of the facts asserted be 'highly probable.'" ***Henderson v. SAIA, Inc***., 318 S.W.3d 328, 335 (Tenn. 2010) (quoting ***Goff***, 297 S.W.3d at 187 (internal citations omitted)).

Tennessee law is clear that the disposition of motions under Rule 60.02 is best left to the discretion of the trial judge. ***Underwood v. Zurich Ins. Co.***, 854 S.W.2d 94, 97 (Tenn. 1993); ***Banks v. Dement Constr. Co.***, 817 S.W.2d 16, 18 (Tenn. 1991); ***McCracken***, 958 S.W.2d at 795. The standard of review on appeal is whether the trial court abused its discretion in granting or denying relief. ***Henderson***, 318 S.W.3d at 335. This deferential standard "reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives," and thus "envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal." ***Lee Medical, Inc. v. Beecher***, 312 S.W.3d 515, 524 (Tenn. 2010).

A trial court abuses its discretion when it causes an injustice by applying an incorrect legal standard, reaching an illogical decision, or by resolving the case "on a clearly erroneous assessment of the evidence." ***Id.*** The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. ***Eldridge v. Eldridge***, 42 S.W.3d 82, 85 (Tenn. 2001). Upon review of a discretionary decision by the trial court, the "appellate courts should begin with the presumption that the decision is correct and should review the evidence in the light most favorable to the decision." ***Henderson***, 318 S.W.3d at 335 (citing ***Overstreet v. Shoney's, Inc.***, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999)); *see also* ***Keisling v. Keisling***, 196 S.W.3d 703, 726 (Tenn. Ct. App. 2005).

Furthermore, we are cognizant that Mr. Cobble is proceeding *pro se*. The courts should take into account that many *pro se* litigants have no legal training and little familiarity with the judicial system. ***Garrard v. Tenn. Dep't of Corr***., No. M2013-01525-COA-R3-CV, 2014 WL 1887298, at *3 (Tenn. Ct. App. May 8, 2014)(internal citations omitted). It is well-settled that "*pro se* litigants are held to the same procedural and substantive standards to which lawyers must adhere." ***Brown v. Christian Bros. University***, No. W2012-01336-COA-R3-CV, 2013 WL 3982137, at *3 (Tenn. Ct. App. Aug. 5, 2013), *perm. app. denied* (Tenn. Jan. 15, 2014). While a party who chooses to represent himself or herself is entitled to the fair and equal treatment of the courts, ***Hodges v. Tenn. Att'y Gen.***, 43 S.W.3d 918, 920 (Tenn. Ct. App. 2000), "[p]ro se litigants are not ... entitled to shift the burden of litigating their case to the courts." ***Whitaker v. Whirlpool Corp.***, 32 S.W.3d 222, 227 (Tenn. Ct. App. 2000).

In this case, the record does not contain a copy of the Appellant's Rule 60.02 motion, nor is there a transcript of the hearing or a statement of the evidence pursuant to Tennessee Rule of Appellate Procedure 24(c). Accordingly, in the absence of any record

of the relevant proceedings, this Court cannot make a meaningful review of this issue. The burden is upon the appellant to show that the evidence preponderates against the judgment of the trial court. ***Coakley v. Daniels***, 840 S.W.2d 367, 370 (Tenn. Ct. App. 1992) (citing ***Capital City Bank v. Baker***, 442 S.W.2d 259, 266 (Tenn. Ct. App. 1969)). "The burden is likewise on the appellant to provide the court with a transcript of the evidence or a statement of the evidence from which this court can determine if the evidence does preponderate for or against the findings of the trial court." ***Id***.

The Tennessee Rules of Appellate Procedure place the responsibility for the preparation of the transcript or a statement of evidence on the parties, and the appellant has the primary burden to see that a proper record is prepared and filed in this Court. Tenn. R. App. P. 24; ***McDonald v. Onoh***, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989). If no transcript is available, Tennessee Rule of Appellate Procedure 24 provides:

> If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available ... the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal.

Tenn. R. App. P. 24(c). In other words, we cannot decide factually-based issues without the relevant facts that were presented to the trial court. As an appellate court, "[w]e evaluate, under prescribed standards of review, what other tribunals or fact finders have done to determine if there are reversible errors in their rulings. We are prevented from doing so unless the totality of the evidence that led to those factually-driven determinations is laid before us." ***Robbins v. Money***, No. 03A01-9703-CV-00072, 1997 WL 406653, at *3 (Tenn. Ct. App. July 22, 1997). This Court's review is limited to the appellate record, and it is incumbent upon the appellant to provide a record that is adequate. ***Chiozza v. Chiozza***, 315 S.W.3d 482, 489 (Tenn. Ct. App. 2009)(internal citations omitted). "In the absence of a transcript of the evidence, there is a conclusive presumption that there was sufficient evidence before the trial court to support its judgment, and this Court must therefore affirm the judgment." ***Coakley***, 840 S.W.2d at 370 (citing ***McKinney v. Educator and Executive Insurers, Inc.***, 569 S.W.2d 829, 832 (Tenn. App. 1977)).

Because we can make no meaningful review absent a transcript or statement of the evidence, we pretermit Husband's remaining issue concerning the previous mandate given by Court in ***Greer I***, and whether it failed to consider any issues raised by Appellant. Additionally, we affirm the trial court's refusal to grant Appellant relief pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure.

The Appellee argues that this Court should award her attorney's fees for having to defend this appeal. Specifically, Appellee argues that this appeal is frivolous and is solely a means to prolong the dispute between the parties. Tennessee Code Annotated section 27-1-122 states that:

> 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.

Tenn. Code Ann. § 27-1-122. "In considering a request for attorney's fees on appeal, we consider the requesting party's ability to pay such fees, the requesting party's success on appeal, whether the appeal was taken in good faith, and any other equitable factors relevant in a given case." ***Moran v. Wilensky***, 339 S.W. 3d 651, 666 (Tenn. Ct. App. 2010)(citing ***Archer v. Archer***, 907 S.W. 2d 412, 419 (Tenn. Ct. App. 1995)). From our review of the entire record, we cannot conclude that the appeal was frivolous, or that the appeal was taken for any subversive purpose. Accordingly, we exercise our discretion to deny Appellees' request for attorney's fees.

For the foregoing reasons, we affirm the judgment of the trial court. The case is remanded for such further proceedings as may be necessary and are consistent with this opinion. Costs of the appeal are assessed against the Appellant, Philip Ernest Cobble and his surety, for all of which execution may issue if necessary.

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KENNY ARMSTRONG, JUDGE