

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
October 18, 2013 Session

**ELLIOT H. HIMMELFARB, M.D. ET AL. v. TRACY R. ALLAIN**

**Appeal from the Circuit Court for Williamson County  
No. 07454 Michael Binkley, Judge**

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**No. M2013-00455-COA-R3-CV - Filed January 31, 2014**

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Physicians filed an action for malicious prosecution and abuse of process against Patient after Patient voluntarily dismissed her medical malpractice lawsuit against them. Following a change in the applicable case law, Physicians voluntarily dismissed their malicious prosecution and abuse of process claims. Patient moved for attorney fees under Tenn. R. Civ. P. 37.03(2) as a sanction against Physicians for their failure to admit a matter requested under Tenn. R. Civ. P. 36.01. Patient also sought discretionary costs. The trial court found that Physicians had reasonable grounds to believe they might prevail on their claims, but granted Patient a partial attorney fee award. We reverse the award of attorneys fees and affirm the award of discretionary costs.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part**

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Matthew Todd Sandahl, Franklin, Tennessee, for the appellant, Elliot H. Himmelfarb.

Christopher K. Thompson, Nashville, Tennessee, for the appellee, Tracy R. Allain.

**OPINION**

**FACTUAL AND PROCEDURAL BACKGROUND**

The Tennessee Supreme Court's opinion in *Himmelfarb v. Allain*, 380 S.W.3d 35

(Tenn. 2012), details the history of this dispute:

In April 2005, Tracy Allain was admitted to Vanderbilt University Medical Center (“VUMC”) for placement of a new port-a-cath.<sup>1</sup> After the procedure, a VUMC physician informed Ms. Allain that he had observed a guide wire in a vein leading to Ms. Allain’s heart. The physician believed that the guide wire had been left in Ms. Allain’s body during a previous port-a-cath procedure performed while Ms. Allain was a patient at Williamson Medical Center in December 2004.

On April 10, 2006, Ms. Allain filed a complaint in the Circuit Court for Williamson County against Williamson Medical Center, Dr. Elliot Himmelfarb, and Dr. Douglas York. Ms. Allain alleged that the hospital and Drs. Himmelfarb and York were negligent in leaving a guide wire in her vein during the December 2004 procedure. Both Dr. Himmelfarb and Dr. York filed an answer to the complaint alleging comparative fault against an unnamed party and denying liability.

In June 2006, a VUMC physician informed Ms. Allain that VUMC was responsible for the presence of the guide wire. Ms. Allain filed a complaint alleging medical malpractice against VUMC on June 23, 2006, and reached a settlement in that case on January 24, 2007. On July 14, 2006, Ms. Allain filed a notice of voluntary nonsuit of the complaint against Williamson Medical Center and Drs. Himmelfarb and York pursuant to Tennessee Rule of Civil Procedure 41.01. The trial court entered an order dismissing the case without prejudice on July 17, 2006.

Exactly one year later, on July 17, 2007, Dr. Himmelfarb and Dr. York filed a complaint against Ms. Allain alleging that Ms. Allain’s prior lawsuit against them constituted malicious prosecution and abuse of process. Ms. Allain filed an answer to the complaint denying the allegations and subsequently filed a motion for summary judgment claiming Drs. Himmelfarb and York could not prove the essential elements of their malicious prosecution or abuse of process claims.

The trial court denied Ms. Allain’s motion for summary judgment. The trial court did not address the abuse of process claim but found that issues of

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<sup>1</sup> A port-a-cath is a medical device that is implanted beneath the skin to allow easier access to a patient’s vein.

material fact existed with respect to the malicious prosecution claim. The trial court denied Ms. Allain's motion for interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. Following the denial of that motion, Ms. Allain filed an application for extraordinary appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure. The Court of Appeals granted the Rule 10 application and affirmed the trial court's denial of the motion for summary judgment, remanding the case to the trial court for further proceedings.<sup>2</sup> *Himmelfarb v. Allain*, No. M2010-02401-COA-R10-CV, 2011 WL 2410233, at \*9 (Tenn. Ct. App. June 9, 2011).

*Himmelfarb*, 380 S.W.3d at 37-38.

The Tennessee Supreme Court granted Ms. Allain permission to appeal and held that "a voluntary nonsuit taken pursuant to Tennessee Rule of Civil Procedure 41 is not a favorable termination on the merits for purposes of a malicious prosecution claim."<sup>3</sup> *Id.* at 37. Therefore, the Supreme Court concluded that Drs. Himmelfarb and York could not prove an essential element of their malicious prosecution claim, reversed this Court, and remanded the case to the trial court for entry of summary judgment for Ms. Allain on the malicious prosecution claim and for a final determination on the abuse of process claim. *Id.* at 41.

Upon proper motion and by order entered October 24, 2012, the trial court granted Drs. Himmelfarb and York leave to enter a voluntary nonsuit without prejudice on their malicious prosecution and abuse of process claims.

Ms. Allain moved the trial court for an order granting her request for attorney fees, expenses, and discretionary costs pursuant to Tenn. R. Civ. P. 37.03(2) and 54.04. In support of her motion, Ms. Allain included affidavits by her attorneys and their paralegal, as well as Dr. Himmelfarb's "denial" of her first request for admission which read, "Admit the underlying [medical malpractice] lawsuit was not terminated on the merits." Ms. Allain argued that, "[h]ad [Drs. Himmelfarb and York] admitted this single request for admission, the [malicious prosecution] case would have been disposed of early in this litigation."

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<sup>2</sup> Neither the trial court nor the Court of Appeals addressed the abuse of process claim. The Court of Appeals remanded the case to the trial court to address the abuse of process claim, recognizing that the appeal was limited to the claim of malicious prosecution.

<sup>3</sup> As the Court observed, to win an action for malicious prosecution, Drs. Himmelfarb and York were required to prove that Ms. Allain initiated a prior suit against them without probable cause, that she brought the prior suit with malice, and that the prior suit was terminated in their favor. *Id.* at 38 (citing *Christian v. Lapidus*, 833 S.W.2d 71, 73 (Tenn. 1992)).

Following a hearing<sup>4</sup> and by memorandum and order entered January 15, 2013, the trial court noted that, at the time Drs. Himmelfarb and York sued Ms. Allain for malicious prosecution, our Supreme Court “had not clearly adopted its present position that a non-suit, pursuant to Rule 41 of the Tennessee Rules of Civil Procedure, cannot support the required favorable termination of the underlying lawsuit . . . .” The trial court specifically found as follows:

It is clear that [Drs. Himmelfarb and York] had applied the previous law to this question as promulgated in Parrish v. Marquis, 172 S.W.3d 526 (Tenn. 2005) to support their position. It is equally clear that [their] denial of [Ms. Allain’s] First Request for Admissions that the underlying lawsuit was not terminated on its merits, submitted on January 11, 2008, was made on a good faith belief by [them] based on the case law as it existed at the time.

Nevertheless, the court partially granted Ms. Allain’s motion for attorney fees, expenses, and discretionary costs, awarding her a total of \$26,900.90.

Drs. Himmelfarb and York appeal.

#### ISSUES PRESENTED

The issues before us are whether the trial court abused its discretion in partially awarding the attorney fees that Ms. Allain requested as a sanction pursuant to Tenn. R. Civ. P. 37.03(2) and the calculation of discretionary costs.

#### STANDARD OF REVIEW

We review sanctions imposed by a trial court under Tenn. R. Civ. P. 37 for abuse of discretion. *Lyle v. Exxon Corp.*, 746 S.W.2d 694, 699 (Tenn. 1988); *Amanns v. Grissom*, 333 S.W.3d 90, 98 (Tenn. Ct. App. 2010). Under the abuse of discretion standard, a reviewing court cannot substitute its judgment for the trial court’s judgment. *Wright ex rel. Wright v. Wright*, 337 S.W.3d 166, 176 (Tenn. 2011). Rather, a reviewing court will find an abuse of discretion only if the trial court “applied incorrect legal standards, reached an illogical conclusion, based its decision on a clearly erroneous assessment of the evidence, or employ[ed] reasoning that causes an injustice to the complaining party.” *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008); *see also Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010).

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<sup>4</sup> The record does not contain a transcript of this hearing.

## ANALYSIS

### I. Attorney Fees

Tennessee abides by the American Rule regarding the payment of attorney fees. *State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 194 (Tenn. 2000). The rule requires litigants to pay their own attorney fees unless a statute or an agreement provides otherwise. *Id.* Tennessee Rule of Civil Procedure 37.03(2) provides for the recovery of expenses and attorney fees as a sanction<sup>5</sup> for the failure to admit a matter requested under Tenn. R. Civ. P. 36.01:

If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order *unless it finds that* (1) the request was held objectionable pursuant to Rule 36.01, or (2) the admission sought was of no substantial importance, or (3) *the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (4) there was other good reason for the failure to admit.*

Tenn. R. Civ. P. 37.03(2) (emphasis added).

In response to Ms. Allain's Rule 36 request, Drs. Himmelfarb and York denied that the underlying medical malpractice lawsuit in which Ms. Allain voluntarily nonsuited her complaint against them was not terminated on its merits. At the time the doctors filed their malicious prosecution complaint, and at the time of their response to the request for admission, Tennessee courts had not clearly addressed whether a voluntary nonsuit is a favorable termination for purposes of a malicious prosecution claim. Indeed, the Supreme Court noted that this issue, crucial to Dr. Himmelfarb and York's malicious prosecution claim, was one of first impression. *Himmelfarb*, 380 S.W.3d at 38. The Supreme Court also overruled prior case law on which Drs. Himmelfarb and York relied throughout this litigation. *Himmelfarb*, 380 S.W.3d at 41.

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<sup>5</sup> The Advisory Commission Comment to Tenn. R. Civ. P. 37.03 states that the rule "prescribes penalties for violation of pretrial procedures contained in Rules 26 through 36."

Having studied the record, we credit the trial court's express findings "that [Drs. Himmelfarb and York] had reasonable grounds to believe that they would prevail on the [malicious prosecution suit]," that their denial of Ms. Allain's request for admission "was made on a good faith belief<sup>6</sup> by [them] based on the case law as it existed at the time," and that "[they] had good reason to deny the Request for Admissions, including the basis of the filing of the underlying lawsuit." Moreover, we have determined that these findings are wholly inconsistent with an award of attorney fees to Ms. Allain pursuant to Tenn. R. Civ. P. 37.03(2), and the record lacks any explanation of why Drs. Himmelfarb and York were sanctioned under this Rule. Because Drs. Himmelfarb and York had reasonable grounds to deny the request for admission and because we find no evidence that would support an award of attorney fees in this case, we must conclude that the trial court erred. Accordingly, we reverse the award of attorney fees to Ms. Allain.

## II. Discretionary Costs

The trial court awarded Ms. Allain \$2,400.90 for discretionary costs.<sup>7</sup> Drs. Himmelfarb and York do not challenge the award of reasonable discretionary costs to Ms. Allain, but contend that the court's order is unclear as to how these costs were calculated. We disagree because the order lists the award of "Discretionary costs, the sum of \$2,400.90" separately from the amounts awarded to Ms. Allain for attorney fees, paralegal fees, and expenses and costs outside of discretionary costs. The discretionary costs award is exactly what Ms. Allain requested through an itemized list included in her attorney's affidavit and the trial court's order clearly delineates what portion of the total award to Ms. Allain was for discretionary costs. We affirm the award of \$2,400.90.

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<sup>6</sup> This good faith belief was, in part, based upon undisputed testimony that reflected negatively on the merits of the underlying medical malpractice case. The testimony established that Ms. Allain voluntarily dismissed her medical malpractice action against Drs. Himmelfarb and York when she determined that doctors at VUMC, not Drs. Himmelfarb and York, were at fault for leaving the guidewire in her vein.

<sup>7</sup> Ms. Allain filed two requests for discretionary costs, one pursuant to Tenn. R. Civ. P. 54.04 contained in her response to Drs. Himmelfarb and York's motion for leave to file the nonsuit and one pursuant to Tenn. R. Civ. P. 37.03(2). The trial court's final order does not say which rule it is using to award the discretionary costs, but Drs. Himmelfarb and York do not raise this as an issue, so we need not address it.

## CONCLUSION

For the reasons stated herein, we reverse the trial court's order granting attorney fees and affirm the award of discretionary costs. Costs of appeal are assessed one half against the appellant and one half against the appellee, for which execution may issue if necessary.

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ANDY D. BENNETT, JUDGE