

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
February 20, 2014 Session

**PHILIP H. MORSON v. TENNESSEE DEPARTMENT OF MENTAL  
HEALTH AND DEVELOPMENTAL DISABILITIES, ET AL.**

**Appeal from the Circuit Court for Davidson County  
No. 10C892 Don R. Ash, Judge**

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**No. M2013-01218-COA-R3-CV - Filed May 14, 2014**

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A doctor employed by a state mental health facility lost his job in a reduction in force. He claims this action was the result of complaints he made about the facility. The trial court granted summary judgment in favor of the defendants. Because the doctor failed to present evidence to establish an issue of material fact (after the defendants shifted the burden to the doctor), we affirm the trial court's decision.

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

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

Allen Woods and Larry Woods, Nashville, Tennessee, for the appellant, Phillip H. Morson.

Robert E. Cooper, Jr., Attorney General and Reporter; William E. Young, Solicitor General; and Michael Markham, Senior Counsel, for the Tennessee Department of Mental Health and Developmental Disabilities.

**OPINION**

**FACTUAL AND PROCEDURAL BACKGROUND**

Dr. Philip H. Morson, a licensed doctor of osteopathy, began working for the Western Mental Health Institute ("Western"), a state psychiatric hospital, in 1991. He was hired into a physician position. In his job at Western, Dr. Morson diagnosed and treated patients for various mental illnesses.

In 2009, Dr. Morson's position as a physician was eliminated as part of a reduction in force ("RIF"). He transferred to a physician position with the Tennessee Department of Health, but ended up resigning from this position and retiring in July 2009 due to the long commute and health issues.

In June 2010, Dr. Morson filed suit against the Tennessee Department of Mental Health and Developmental Disabilities ("the Department") and Virginia Trotter Betts, Commissioner. He filed an amended complaint on July 14, 2010. Dr. Morson alleged that, in late 2004 and early 2005, the hospital had "discharged four patients contrary to the Plaintiff's advice to his supervisor" and that all four patients had died shortly after their discharge. He further alleged that one of the other doctors at Western, Dr. Sherwin Yaffe, had "routinely prescribed many times the maximum dosages of psychotropic medications" to his patients, and that five of his patients had died "suddenly of unknown causes." Dr. Morson alleged that he "immediately reported his concerns regarding those problems" to Dr. Roger Pursley, the chief executive officer of the hospital. When nothing was done, Dr. Morson alleged, he wrote to Governor Phil Bredesen. When the governor did not act, Dr. Morson contacted an aide to the governor, Kathy Thomas, who referred the matter to the Commissioner of the Department, who referred the matter to the Department's Human Resources Director, Vickie Graham. Ms. Graham met with Dr. Pursley and Dr. Morson, but Dr. Morson was not satisfied with the outcome of the meeting.

According to Dr. Morson's allegations, the RIF "was the first action taken by the Department after the Plaintiff had made his report in 2005, and was therefore the Department's first opportunity to rid itself of the Plaintiff under the guise of a larger personnel action." He asserted three claims: (1) a claim that the Department violated Tenn. Code Ann. § 50-1-304<sup>1</sup> by terminating him for "refusing . . . to remain silent about illegal activities"; (2) a claim that the Commissioner's actions in eliminating Dr. Morson's position in the RIF caused "a detrimental change in the employment status of the reporting party [Dr. Morson] by reason of the report" under Tenn. Code Ann. § 33-2-416<sup>2</sup>; and (3) a claim that the Department and the Commissioner violated Tenn. Code Ann. § 8-50-116,<sup>3</sup> which protects

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<sup>1</sup>Tennessee Code Annotated section 50-1-304(b) states: "No employee shall be discharged or terminated solely for refusing to participate in, or refusing to remain silent about, illegal activities."

<sup>2</sup>Tennessee Code Annotated section 33-2-416(b)(3), applicable to the Department of Mental Health and Substance Abuse Services, provides: "Any person making a report under the provisions of this part shall have a civil cause of action for appropriate compensatory and punitive damages against any person who causes a detrimental change in the employment status of the reporting party by reason of the report."

<sup>3</sup>Tennessee Code Annotated section 8-50-116(b)(1) states, in pertinent part:  
No head of any state department, agency, or institution . . . shall recommend or act to

a state employee who reports “acts which endanger the health or safety of the public or employees” from discharge, demotion, or other detrimental actions regarding his or her employment.

In response to Dr. Morson’s complaint, the defendants filed a motion for summary judgment arguing that “the undisputed proof affirmatively negates an essential element of each claim.” The defendants also asserted that they were immune from liability under Tenn. Code Ann. § 8-50-116. In support of their motion, the defendants filed a statement of undisputed material facts; portions of Dr. Morson’s deposition; Dr. Morson’s interrogatory responses; an e-mail dated September 24, 2003 sent by Dr. Morson to the governor’s office; portions of Ms. Graham’s deposition; portions of the deposition of Dr. James Varner (a physician at Western); portions of Dr. Pursley’s deposition; portions of the deposition of Dr. Ronald Bruce (a physician at Western); and the affidavits of Commissioner Betts and Dr. Pursley.

In her affidavit, Commissioner Betts stated that the governor issued a directive in “approximately 2008” that each department reduce its budget; the state “conducted an initial reduction in force (RIF) through a voluntary buyout program.” When this proved insufficient, a second RIF was implemented in 2009, and every department was directed to reduce its number of employees. The Tennessee Department of Human Resources gave each department guidelines for implementing the RIF. Commissioner Betts asserted that, “The 2009 RIF was not used as a means for [the Department] to target and remove any specific employees.” She recollected that “Dr. Morson was included in the 2009 RIF because he is a doctor of osteopathy and not a psychiatrist.” Commissioner Betts had the ultimate authority to approve the Department’s RIF plan; she stated that she had “no recollection of being aware of any reports about patient care that Dr. Morson made in 2003 when I approved the 2009 RIF.”

In his affidavit, Dr. Pursley, Chief Executive Officer of Western, stated that he had the authority to terminate any employee whom he had reason to believe was reporting to work “while impaired due to substance abuse.” He further asserted: “In approximately 2006,

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discharge, demote, suspend, reassign, transfer, discipline, threaten or otherwise discriminate against a state employee regarding the state employee’s evaluation, promotion, compensation, terms, condition, location or privileges of employment . . . because the employee . . . reports or attempts to report, verbally or in writing:

...

(D) Acts which posed an unreasonable and specific danger to the health or safety of the public or employees . . . .

I was informed by the clinical director that Dr. Morson appeared to be impaired while on duty at Western.” Dr. Pursley stated that he “was aware that [Dr. Morson] had experienced prior substance abuse issues.” He did not want to put Dr. Morson’s medical license at risk, so he allowed Dr. Morson to seek treatment and remain employed at Western.

Dr. Morson opposed the defendants’ motion for summary judgment and submitted portions of the following depositions: Dr. Morson, Dr. Pursley, Ms. Graham, Dr. Varner, Doris Prewitt (an employee at Western), and Dr. Bruce.

The motion was heard on September 7, 2012, and the trial court entered its order on September 19, 2012, granting the defendants’ motion for summary judgment. Noting that Dr. Morson had conceded that Commissioner Betts was entitled to summary judgment on the claim against her, the court began by granting summary judgment on that claim. As to the claim against the Department under Tenn. Code Ann. § 50-1-304, the trial court reasoned as follows:

Defendants contend that the proof affirmatively negates the existence of an exclusive causal connection between Plaintiff’s reports in 2003 and his inclusion in the 2009 reduction in force (RIF). Defendants have provided affidavits and deposition excerpts which indicate that Plaintiff’s position was included in the RIF because he was the least qualified doctor at the psychiatric hospital in which he worked. The hospital wanted to retain as many board eligible and board certified doctors as possible. He is a Doctor of Osteopathy and is neither board eligible nor board certified. The Court concludes that this proof does affirmatively [negate] the existence of exclusive causal connection.

This shifts the burden to Plaintiff to produce evidence which shows a genuine issue of material fact exists, and the Court concludes that Plaintiff has failed to produce evidence that establishes a causal connection between his inclusion in the 2009 RIF and any reports he made in 2003. Plaintiff attempts to meet this burden by contending that Defendants’ reason for including him in the RIF is pretextual and that the real reason is because of reports he made six years previously. Plaintiff’s strongest proof of pretext is the fact that the hospital subsequently employed temporary doctors after his employment ended. The Court has considered this proof. However, the temporary doctors that were employed were all either board eligible or board certified, and thus, better qualified than Plaintiff. The use of these better qualified temporary doctors is consistent with the reason Defendants proffered for including Plaintiff in the 2009 RIF, i.e., that he was less qualified than the other doctors. Having failed to produce any evidence from which a reasonable trier of fact could infer that

Plaintiff's inclusion in the 2009 RIF was connected to the reports he made in 2003, Plaintiff fails to carry his burden. The Court grants Defendants summary judgment on this claim.

(Footnote omitted). As to the remaining claim against the defendants under Tenn. Code Ann. § 8-50-116, the trial court recognized that this statute “does not require an exclusive causal connection between a report and the adverse action.” Nevertheless, the court found that the defendants had negated “the existence of a causal connection” and that Dr. Morson “simply failed to produce any evidence from which a reasonable person could infer the existence of a connection between his inclusion in the RIF and the reports.” Therefore, the court granted summary judgment on this claim as well.

On January 4, 2013, Dr. Morson filed a motion to set aside the court's order of September 19, 2012, pursuant to Tenn. R. Civ. P. 60. He asserted that he failed to file a timely notice of appeal due to excusable neglect. In support of his motion, Dr. Morson submitted an affidavit in which he explained why he had failed to timely file his notice of appeal. He also submitted an affidavit from Robert O'Connell, Executive Director of the Tennessee State Employees Association (“TSEA”); Mr. O'Connell detailed his communications and actions regarding Dr. Morson's request for TSEA representation. In response to the defendants' arguments in opposition to Dr. Morson's Rule 60 motion, Dr. Morson submitted a supplemental affidavit. In an order entered on May 6, 2013, the trial court granted Dr. Morson's request for Rule 60 relief and ordered that Dr. Morson had “thirty days from the entry of this order to perfect his appeal.” Dr. Morson filed a timely notice of appeal from that order.

The two issues on appeal are (1) whether the trial court erred in granting Dr. Morson's motion for Rule 60 relief; and (2) whether the trial court erred in granting the defendants' motion for summary judgment.

#### ANALYSIS

##### (1)

The defendants argue that the trial court erred in granting Dr. Morson's request for Rule 60 relief.<sup>4</sup> Dr. Morson asserts that the trial court acted within its discretion in finding that his failure to file a timely notice of appeal was the result of excusable neglect.

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<sup>4</sup>Tennessee Rule of Civil Procedure 60.02 provides, in pertinent part, that the court may relieve a party from a final judgment for “mistake, inadvertence, surprise, or excusable neglect.”

We review a trial court's decision on a Rule 60 motion for relief under an abuse of discretion standard. *J & B Invs., LLC v. Surti*, 258 S.W.3d 127, 132 (Tenn. Ct. App. 2007). "A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." *Caldwell v. Hill*, 250 S.W.3d 865, 869 (Tenn. Ct. App. 2007) (quoting *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001)). Under this standard, we are required to uphold the ruling "as long as reasonable minds could disagree about its correctness." *Id.* The abuse of discretion standard does not permit an appellate court to substitute its judgment for that of the trial court. *Id.* Thus, under the abuse of discretion standard, we give great deference to the trial court's decision. *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003).

A party seeking relief under Rule 60 has the burden of demonstrating sufficient grounds for relief, and such relief is to be granted "in only the most extraordinary circumstances." *Jefferson v. Pneumo Servs. Corp.*, 699 S.W.2d 181, 186 (Tenn. Ct. App. 1985). The causes for a party's failure to meet a deadline can range from "forces beyond its control to forces within its control." *State ex rel. Sizemore v. United Physicians Ins. Risk Retention Grp.*, 56 S.W.3d 557, 567 (Tenn. Ct. App. 2001). It has been stated that "[t]he former [forces beyond one's control] will almost always substantiate a claim of excusable neglect; the latter [forces within one's control] will not." *Id.* Excusable neglect may include "situations in which failure to comply with a filing deadline is attributable to a filer's negligence." *Id.* However, "[a]n attorney's mere oversight or negligence, without more, does not automatically amount to excusable neglect." *Ferguson v. Brown*, 291 S.W.3d 381, 388 (Tenn. Ct. App. 2008). Similarly, neither a lawyer's busy schedule nor his or her ignorance of the proper procedure rises to the level of excusable neglect. *Food Lion, Inc. v. Washington Cnty. Beer Bd.*, 700 S.W.2d 893, 896 (Tenn. 1985).

Determining whether neglect is excusable "is an equitable determination 'taking account of all relevant circumstances surrounding the party's omission.'" *Sizemore*, 56 S.W.3d at 567 (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)). These circumstances include the following:

- (1) the danger of prejudice to the party opposing the late filing,
- (2) the length of the delay and its potential impact on proceedings,
- (3) the reason why the filing was late and whether that reason or reasons were within the filer's reasonable control, and
- (4) the filer's good or bad faith.

*Id.*

Based upon the affidavits of Dr. Morson and Mr. O'Connell, the trial court made the following findings of fact, which are not challenged on appeal:

1. On September 19, 2012, the Court entered an order granting summary judgment to the Defendants but the court clerk's office did not send any notice of entry of this order.
2. Following the hearing on the summary judgment motion, Plaintiff's counsel notified Mr. Morson via telephone that he had thirty days from the entry of an order to file an appeal.
3. Plaintiff told his counsel he wanted to consider an appeal and he would discuss it with the Tennessee State Employees Association ("TSEA").
4. A few days after the hearing on the motion for summary judgment, Plaintiff contacted Bob O'Connell at TSEA and asked whether his case qualified under TSEA guidelines for TSEA to assist him in pursuing an appeal.
5. Mr. O'Connell submitted the request to TSEA's standard committee review-system and Plaintiff's request was evaluated.
6. Ultimately, the evaluation committee approved TSEA to assist Dr. Morson with an appeal. This occurred shortly before Mr. O'Connell was scheduled to travel out of state for an extended period (in excess of two weeks). Before he departed, he left a message for Allen Woods [Dr. Morson's attorney] "regarding Dr. Morson's further appeal."
7. Mr. Woods returned the call and left a message, but Mr. O'Connell had already departed the state. When he returned from traveling, Mr. O'Connell contacted The Law Offices of Woods and Woods to authorize them to assist Dr. Morson with an appeal.
8. Mr. O'Connell, however, did not contact the attorneys until thirty-three days after the Order granting summary judgment had been entered.
9. Mr. Woods did not receive notice from the clerk of the entry of the summary judgment order pursuant to T.C.A. 21-1-706.<sup>[5]</sup>

(Citations to the record omitted). The question becomes, then, whether these facts are sufficient to constitute "excusable neglect" so that the trial court did not abuse its discretion in granting Dr. Morson's request for relief from the judgment.

The defendants argue that the trial court erred in granting relief to Dr. Morson because he failed to "state when his lawyer did become aware of the entry of the Order," and that both plaintiff and his lawyer were "on notice" to expect the filing of the order because the lawyer approved the proposed order on September 10, 2012. The defendants further assert that Dr. Morson "fails to indicate when O'Connell originally contacted his attorney with approval and

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<sup>5</sup>As the defendants point out, Tenn. R. Civ. P. 58 provides that the trial court must mail or deliver a copy of a judgment to a party or counsel "[w]hen requested by counsel or pro se parties." Dr. Morson does not provide any evidence, or even assert, that he made such a request.

left a message or when his attorney attempted to return the call.” Finally, the defendants emphasize that Dr. Morson “provided no explanation for why it took another two and a half months [after his attorneys received approval from the TSEA to represent him] to file his Rule 60.02 Motion.”

Dr. Morson asserts that his failure to file a timely notice of appeal was essentially caused by the bureaucratic process to get TSEA approval, a process over which he had little control. In granting Dr. Morson’s motion for Rule 60 relief, the trial court determined that “the failure by Mr. Morson to file a timely notice of appeal due to various administrative challenges constitutes ‘excusable neglect.’” Applying the abuse of discretion standard to the trial court’s decision, we cannot say that the court applied an incorrect legal standard, that its decision “is against logic or reasoning,” or that it has caused an injustice to the defendants. *Caldwell*, 250 S.W.3d at 869. We find no abuse of discretion.

(2)

We now proceed to the issue of whether the trial court erred in granting the defendants’ motion for summary judgment.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Tenn. R. Civ. P. 56.04. Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ’g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party’s favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we must determine whether factual disputes exist. *Byrd v. Hall*, 847 S.W.2d 208, 211 (Tenn.1993). If a factual dispute exists, we must determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Id.*; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App.1998). To shift the burden of production to the nonmoving party who bears the burden of proof at trial, the moving party must negate an element of the opposing party’s claim or “show that the nonmoving party cannot prove an essential element of the claim at trial.” *Hannan v. Alltel Publ’g Co.*, 270 S.W.3d 1, 8-9 (Tenn. 2008).<sup>6</sup>

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<sup>6</sup> Tennessee Code Annotated section 20-16-101 (2011), a provision that is intended to replace the summary judgment standard adopted in *Hannan*, is inapplicable to this case. *See Sykes v. Chattanooga Hous. Auth.*, 343 S.W.3d 18, 25 n.2 (Tenn. 2011) (noting that section 20-16-101 is only applicable to actions filed on or after July 1, 2011). Dr. Morson initiated this action in June 2010.



Dr. Morson argues that the trial court failed to view the evidence in the light most favorable to him. The main thrust of his position is that the trial court erred in concluding, in Dr. Morson's words, that "there is no causality between the whistle blowing and the termination of Dr. Morson because the events are six year apart." He asserts that "[t]here is ample circumstantial evidence to suggest Plaintiff's complaints were the reasons he was included in the RIF" and that this issue should be weighed by a factfinder. We cannot agree with Dr. Morson's position.

With respect to Dr. Morson's claim under Tenn. Code Ann. § 50-1-304, the trial court properly found that the defendants presented evidence that Dr. Morson's position "was included in the RIF because he was the least qualified doctor at the psychiatric hospital in which he worked." This evidence negated the existence of an exclusive causal connection between Dr. Morson's "whistleblowing" and the elimination of his position and shifted the burden to Dr. Morson to produce evidence showing a genuine issue of material fact. Dr. Morson asserts that the RIF was pretextual and points to the hospital's hiring of temporary doctors after his position was eliminated. The evidence concerning the temporary workers does not, however, support Dr. Morson's position because these doctors were either board eligible or board certified, thus having the qualifications that Dr. Morson lacked. Moreover, Dr. Pursley and Dr. Varner both testified that the temporary doctors were hired for one- or two-month stints to cover for vacations or other staff absences.

Dr. Morson's claim under Tenn. Code Ann. § 8-50-116 does not require an exclusive causal relationship between a report and the adverse action. As stated above, the defendants presented evidence that Dr. Morson's position was eliminated because he was the least qualified doctor on staff, thereby shifting the burden to Dr. Morson to show some causal relationship between his reporting of problems at the hospital in 2005<sup>7</sup> and his job loss in 2009. Dr. Morson argues that political officials bear grudges and can exact vengeance years later and that the trial court thus erred in granting summary judgment. The defendants presented evidence that there was a RIF in 2008 in which the hospital eliminated a psychiatrist position. They also produced evidence that, in 2006, Dr. Morson was permitted to seek treatment for drug problems and to remain on staff; Dr. Pursley had the authority to fire an employee for being impaired due to substance abuse but chose to allow Dr. Morson to keep his position. Thus, the hospital had other opportunities to terminate Dr. Morson's employment prior to the 2009 RIF. Dr. Morson presented no evidence of an actual causal connection between his reports and the elimination of his position; rather, he offers only conjecture about what can or might happen. The trial court properly determined that Dr.

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<sup>7</sup> The parties disagree as to the time of Dr. Morson's most recent complaints. Taking the view most favorable to Dr. Morson, we use his date of 2005.

Morson “simply failed to produce any evidence from which a reasonable person could infer the existence of a connection between his inclusion in the RIF and the reports.”

We find no error in the trial court’s decision granting summary judgment in favor of the defendants on all claims.

#### CONCLUSION

The judgment of the trial court is affirmed. Costs of appeal are assessed against the appellant, and execution may issue if necessary.

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ANDY D. BENNETT, JUDGE

