

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

July 31, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

JERRY HARB and MAIDGA HARB,)

Plaintiffs/Appellees,)

VS.)

SERVICE TRANSPORT, INC.)
and STEVEN C. McLEMORE,)

Defendants/Appellants.)

Knox Circuit No. 3-759-95

Appeal No. 03A01-9708-CV-0365

APPEAL FROM THE CIRCUIT COURT OF KNOX COUNTY
AT KNOXVILLE, TENNESSEE
THE HONORABLE WHEELER ROSENBALM, JUDGE

JAMES T. SHEA, IV
BAKER, McREYNOLDS, BYRNE,
O'KANE, SHEA & TOWNSEND
Knoxville, Tennessee
Attorney for Appellants

ALBERT J. HARB
HODGES, DOUGHTY & CARSON
Knoxville, Tennessee
Attorney for Appellees

AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

DAVID R. FARMER, J.

Plaintiff/Appellee, Jerry Harb ("plaintiff"), suffered various injuries in an automobile

accident on November 30, 1994. The jury awarded plaintiff a total of \$73,100 by order dated June 2, 1997--\$71,000 in compensatory damages and \$2,100 for plaintiff's property damage claim. On or around June 16 or 17 of that same year, plaintiff's counsel called defense counsel and inquired as to why the judgment had not been paid. Defense counsel stated that a Motion for New Trial or Remittitur ("motion") had been filed with the trial court on June 10, 1997. He did not prepare a transmittal letter, nor did he hand deliver or mail a copy of said motion to plaintiff's counsel as required by Rule 5 of the Tennessee Rules of Civil Procedure. A copy of said motion was faxed to plaintiff's counsel on June 16 or 17. The copy, however, was not date stamped by the trial court, nor did it contain any other indications that it had been filed with the court. On July 9, 1997, plaintiff's counsel called the Knox County Circuit Court to determine what motions had been filed. The court informed him that no such motion had been filed. Plaintiff's counsel informed defense counsel that the court had no record of the motion. Thereafter, on July 17, 1997, defense counsel forwarded a copy of the motion to the court which was filed that same day.

On July 17, 1997, defendants filed a Motion to Correct the Record of the Court, seeking relief under Tenn. R. Civ. P. 60.01. On August 1 of that same year, the trial court conducted a hearing concerning the filing of defendants' Rule 60.01 motion. Several witnesses testified at the hearing. Defense counsel testified that he dictated the motion on June 9 or 10. As mentioned *supra*, he admitted not preparing a transmittal letter, nor giving plaintiff's counsel a hand-delivered or mailed copy of the motion. He also indicated that he did not receive a stamped filed copy back from the court.

Judy Hamilton, defense counsel's secretary, testified that she had typed said motion and gave the motion to a runner to file with the court.

Thomas Hendrix, a clerk/runner in defense counsel's office, testified that he did indeed deliver documents to the courthouse on June 10, but could not be certain that he filed the motion in question on that day. He stated that he did not have personal knowledge of the specific documents that he hand delivered.

Two clerks from the Knox County courthouse also testified. Melony Shaustick, a file clerk who had worked for the court for three years, testified as to procedures in the clerk's office. She stated that the process for filing motions in the court consisted of marking an original and a file copy for the clerk and then taking all motions to the minute clerk, Joanne Nichols. She testified that pleadings which are misfiled or misplaced turn up in a matter of a few days.

Joanne Nichols testified as to her procedures upon receiving motions as minute clerk. She stated that upon receiving the motions, she places them on her computer, makes a copy, and puts it on her next motion date. After checking her computer in order to determine when the motion in question had been filed, the first entry revealed that the motion was filed on July 17, 1997. She further testified that she had performed a search for the motion in order to determine if the motion had been lost or misplaced somewhere in the office. Her search proved fruitless as she failed to find the motion defense counsel contends was filed on June 10, 1997.

Accordingly, the trial court held that the defendants had not carried their burden of establishing that the motion was filed on June 10, 1997, in order to gain Rule 60.01 relief. This appeal followed.

It is true that the rules do contemplate a mechanism whereby certain time limits may be defeated by the trial court under the exceptional circumstances where it is authorized to grant relief from its own judgments or orders under Rule 60 of the Tennessee Rules of Civil Procedure. Such relief is available from "[c]lerical mistakes in judgments, orders or other parts of the record, and errors therein arising from oversight or omissions...." Tenn. R. Civ. P. 60.01. The court may also relieve a party from a final judgment for the reasons of "mistake, inadvertence, surprise or excusable neglect...." Tenn. R. Civ. P. 60.02.

In this instance, Mr. Shea filed for relief under Tenn. R. Civ. P. 60.01 for the alleged

clerical mistakes of the circuit court clerks. The trial court did not doubt that Mr. Shea had prepared the motion in question, and that he, in fact, gave it to his secretary with instructions to have it filed with the clerk of the court. The trial court was also cognizant of the fact that Mr. Shea's secretary testified that she, indeed, carried out these instructions. However, the trial court noted that the runner who delivered documents to the courthouse testified that he did not recollect delivering the motion in question on June 10, 1997, and the court clerks have no record of receiving said motion. As such, the court reiterated the strong presumption in favor of the court clerks properly performing their duty when receiving and recording incoming documents.

In the end, the trial court concluded from all the evidence that defendants had failed to carry their burden of establishing that the motion in question was in fact filed on June 10, 1997. After a careful review of the record we agree with the judgment of the trial court.

There is a strong presumption at law that all court officials have performed their duty. *Cox v. City of Bristol*, 191 S.W.2d 160 (Tenn. 1945); *Burns v. Duncan*, 133 S.W.2d 1000 (Tenn. Ct. App. 1939). "In the absence of proof to the contrary, it will be presumed that official acts or duties have been properly performed." *Burns v. Duncan*, 133 S.W.2d at 1006.

In the instant case, we agree with the trial court that the evidence in the record does not overcome this presumption. We have no doubt that defense counsel prepared a motion for a new trial on or about June 9 or 10 of 1997, and gave this motion to his secretary with instructions to have it filed with the Knox County Circuit Court. However, there is some question as to whether or not the runner actually filed the motion in question. The two court clerks testified as to their filing procedures when documents are left in their possession. The clerks also testified to the fact that their efforts to locate defense counsel's motion for new trial was fruitless. As a result of the runner's testimony, there is a missing link in the defendants' chain of custody. As such, the presumption that court officials have performed the function of their jobs properly cannot be overcome. The

conclusion to be drawn from such evidence is that although the motion may have been properly prepared, it was never filed in the Knox County courthouse.

In light of evidence set forth in the record, we cannot say that plaintiff's motion was filed in the Knox County Circuit Court on June 10, 1997. Accordingly, we affirm the judgment of the trial court.

HIGHERS, J.

CONCUR:

CRAWFORD, P.J., W.S.

FARMER, J.