

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 27, 2015 Session

MARK CLAYTON v. ROY HERRON, ET AL.

**Direct Appeal from the Circuit Court for Davidson County
No. 14-C-1743 Thomas W. Brothers, Judge**

No. M2014-01497-COA-R3-CV - Filed February 20, 2015

The trial court dismissed Plaintiff's *pro se* complaint for failure to state a claim. Due to the deficiencies in Plaintiff's brief on appeal, we find that he waived consideration of any issues on appeal and hereby dismiss the appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal is Dismissed

BRANDON O. GIBSON, J., delivered the opinion of the Court, in which ARNOLD B. GOLDIN, J., and KENNY ARMSTRONG, J., joined.

Mark Clayton, *Pro se*.

James Gerard Stranch, III, Benjamin A. Gastel, and Seamus Timothy Kelly, Nashville, Tennessee, for the appellees, Roy Herron, J. Gerard Stranch, IV, Mark Epps, Alan Secrest, County Party Development Committee, Sylvia Woods, Jay Bailey, Jeanette Jackson, Keith Jackson, Terry Lee, Dr. Geeta McMillan, and Barbara Wagner.

OPINION

I. FACTS & PROCEDURAL HISTORY

Mark Clayton ("Plaintiff") filed this lawsuit against Roy Herron, J. Gerard Stranch, IV, Mark Epps, Alan Secrest, County Party Development Committee, Sylvia Woods, Jay Bailey, Jeanette Jackson, Keith Jackson, Terry Lee, Dr. Geeta McMillan, and Barbara Wagner ("Defendants") on April 29, 2014. According to Plaintiff's complaint, he is "a two-time Democratic candidate and one-time nominee for US Senate in the Tennessee Democratic Party." Plaintiff claimed that the Defendants falsely stated that Plaintiff "is not a 'real Democrat'" and misappropriated funds to wage a third-party write-in campaign against him. According to Defendants, this litigation arose out of the Tennessee Democratic

Party's decision to disqualify Plaintiff from appearing on the August 2014 democratic primary ballot for the office of Governor of the State of Tennessee. In any event, Plaintiff's thirty-page *pro se* complaint asserted numerous "causes of action" against the defendants, including violations of Tennessee Code Annotated sections 39-16-702 and/or 703 (criminal statutes regarding perjury and aggravated perjury); section 39-13-302 (a criminal statute regarding false imprisonment); section 2-19-104 (part of the Title governing elections, which makes it a Class C misdemeanor to make false statements with the purpose of misleading a person in the performance of such person's official duties); section 2-19-113 (stating that any election official or member of a board or commission holding office under this title who willfully or fraudulently violates any of the provisions of this title made for the protection of elections commits a Class A misdemeanor); section 29-35-101 (providing that an action lies in the name of the state against a person or corporation engaging in certain corporate misdeeds); and section 29-39-102(h)(2) (addressing the amount of damages recoverable if a defendant intentionally falsified, destroyed or concealed records containing material evidence with the purpose of wrongfully evading liability in a case).

Defendants filed a motion to dismiss for failure to state a claim, arguing that Plaintiff cannot prosecute alleged criminal acts via a civil action and that the Defendants and the Tennessee Democratic Party had a Constitutional right to freely choose their nominee for political office. After oral argument on the motion, the trial court entered an order granting Defendants' motion to dismiss on July 3, 2014. The trial court found that it was without authority to grant any relief on the criminal counts and that the complaint failed to otherwise state a claim for relief, as it "utterly fail[ed] to detail the factual basis upon which relief could be granted under the counts as plead." Plaintiff timely filed a notice of appeal.

II. DISCUSSION

Our ability to review the merits of this appeal is hindered by the state of the brief submitted by Plaintiff. Briefs submitted to the Tennessee Court of Appeals are governed by Rule 27 of the Tennessee Rules of Appellate Procedure, which provides:

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

- (1) A table of contents, with references to the pages in the brief;
- (2) A table of authorities, including cases (alphabetically arranged), statutes and other authorities cited, with references to the pages in the brief where they are cited;
- (3) A jurisdictional statement in cases appealed to the Supreme Court directly from the trial court indicating briefly the jurisdictional grounds for the appeal to the Supreme Court;

- (4) A statement of the issues presented for review;
- (5) A statement of the case, indicating briefly the nature of the case, the course of proceedings, and its disposition in the court below;
- (6) A statement of facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record;
- (7) An argument, which may be preceded by a summary of argument, setting forth:
 - (A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which maybe quoted verbatim) relied on; and
 - (B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);
- (8) A short conclusion, stating the precise relief sought.

The brief submitted by Plaintiff wholly fails to comply with these requirements. It does not include the table of contents required by subsection (1), the table of authorities required by subsection (2), a statement of issues presented for review as required by subsection (4), a statement of the case pursuant to subsection (5), a statement of facts section or references to the record in accordance with subsection (6), or an argument section containing references to the record and the applicable standard of review as required by subsection (7). Plaintiff's brief states that it "incorporates all docket entries and case law" from a separate federal lawsuit involving these same parties, and he submitted two separately bound volumes, formatted like his brief, but containing filings from the separate lawsuit in addition to other lawsuits, news stories, and an affidavit. Plaintiff's actual brief contains no references to the record and lists no issues presented for review. As for authority, Plaintiff's brief vaguely mentions "Tennessee's Open Meetings Act," "Tennessee's Declaratory Relief Act," "Tennessee Tort law" and "Title Two (2) of the Tennessee Code," in addition to the names of a few cases without any indication as to where these cases can be found or the courts that issued the opinions.

Rule 6 of the Rules of the Court of Appeals of Tennessee requires an appellate brief to contain a written argument in regard to each issue on appeal, with a statement of the alleged erroneous action of the trial court, as well as a specific reference to the record where such action is recorded. The Rule further provides,

No complaint of or reliance upon action by the trial court will be considered

on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.

Tenn. R. Ct. App. 6(b).

“Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue.” *Forbess v. Forbess*, 370 S.W.3d 347, 355 (Tenn. Ct. App. 2011) (quoting *Bean v. Bean*, 40 S.W.3d 52, 55-56 (Tenn. Ct. App. 2000)); *see also Tellico Village Property Owners Ass’n, Inc. v. Health Solutions, LLC*, No. E2012-00101-COA-R3-CV, 2013 WL 362815, at *3 (Tenn. Ct. App. Jan. 30, 2013) (*no perm. app. filed*) (quoting *Branum v. Akins*, 978 S.W.2d 554, 557 n.2 (Tenn. Ct. App. 2001)) (“Where a party makes no legal argument and cites no authority in support of a position, such issue is deemed to be waived and will not be considered on appeal.”) In addition, “Appellants . . . must include in their . . . brief a statement of the issues they desire to present to the court and an argument with respect to each of the issues presented.” *Craig v. Hodge*, 382 S.W.3d 325, 334-335 (Tenn. 2012). “[A]n issue may be deemed waived when it is argued in the brief but is not designated as an issue in accordance with Tenn. R. App. P. 27(a)(4).” *Id.* (citing *ABN AMRO Mortg. Grp., Inc. v. S. Sec. Fed. Credit Union*, 372 S.W.3d 121, 132 (Tenn. Ct. App. 2011); *Childress v. Union Realty Co.*, 97 S.W.3d 573, 578 (Tenn. Ct. App. 2002)). “The requirement of a statement of the issues raised on appeal is no mere technicality.” *Owen v. Long Tire, LLC*, No. W2011-01227-COA-R3-CV, 2011 WL 6777014, at *4 (Tenn. Ct. App. Dec. 22, 2011). The appellee is entitled to fair notice of the appellate issues so as to prepare his or her response, and more importantly, “this Court is not charged with the responsibility of scouring the appellate record for any reversible error the trial court may have committed.” *Id.* “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 argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.” *Sneed v. Bd. of Prof’l Responsibility of Sup. Ct.*, 301 S.W.3d 603, 615 (Tenn. 2010).

Although we realize the “legal naivete” of a pro se litigant, “we must not allow him an unfair advantage because he represents himself.” *Frazier v. Campbell*, No. W2006-00031-COA-R3-CV, 2006 WL 2506706, at *3 (Tenn. Ct. App. Aug. 31, 2006) (citing *Irvin v. City of Clarksville*, 767 S.W.2d 649, 651-52 (Tenn. Ct. App. 1989)). “Pro se litigants who invoke the complex and technical procedures of the courts assume a very heavy burden.” *Irvin*, 767 S.W.2d at 652. They are entitled to fair and equal treatment, but they must follow the same substantive and procedural requirements as a represented party, and they may not shift the burden of litigating their case to the courts. *Whitaker v. Whirlpool Corp.*, 32 S.W.3d

222, 227 (Tenn. Ct. App. 2000).

“[T]he Supreme Court has held that it will not find this Court in error for not considering a case on its merits where the plaintiff did not comply with the rules of this Court.” *Bean*, 40 S.W.3d at 54-55 (citing *Crowe v. Birmingham & N.W. Ry. Co.*, 156 Tenn. 349, 1 S.W.2d 781 (1928)). “[A]ppellate courts may properly decline to consider issues that have not been raised and briefed in accordance with the applicable rules.” *Waters v. Farr*, 291 S.W.3d 873, 919 (Tenn. 2009). “We have previously held that a litigant’s appeal should be dismissed where his brief does not comply with the applicable rules, or where there is a complete failure to cite to the record.” *Commercial Bank, Inc. v. Summers*, No. E2010-02170-COA-R3-CV, 2011 WL 2673112, at *2 (Tenn. Ct. App. July 11, 2011). Plaintiff’s brief wholly fails to comply with Rule 27’s provisions regarding the content of briefs. He did not include a single reference to the appellate record, he did not properly cite applicable law, and perhaps the most glaring omission is that he did not raise any issues to suggest that the trial court erred in dismissing his case. We therefore decline to examine the merits of any issues on appeal.¹

III. CONCLUSION

For the aforementioned reasons, this appeal is dismissed, with costs taxed to the appellant, Mark Clayton, for which execution may issue if necessary.

BRANDON O. GIBSON, JUDGE

¹We note that the appellees in their brief on appeal pointed out the deficiencies in Plaintiff’s appellate brief, and Plaintiff then filed a reply brief citing some statutes and caselaw. However, “[a] reply brief is a response to the arguments of the appellee. It is not a vehicle for raising new issues.” *Owens v. Owens*, 241 S.W.3d 478, 499 (Tenn. Ct. App. 2007) (citing Tenn. R. App. P. 27(c); *Denver Area Meat Cutters & Employers Pension Plan v. Clayton*, 209 S.W.3d 584, 594 (Tenn. Ct. App. 2006)). “A reply brief is limited in scope to a rebuttal of the argument advanced in the appellee’s brief.” *Clayton*, 209 S.W.3d at 594. It would be fundamentally unfair to permit an appellant to advance new arguments in the reply brief, as the appellee may not respond to a reply brief. *Id.*