

STATE OF TENNESSEE, ex. rel.,)
DOUGLAS M. SIZEMORE,)
Commissioner of the Department)
of Commerce and Insurance for the)
State of Tennessee,)
)
Plaintiff/Appellee,)
)
VS.)
)
MUTUAL INSURANCE COMPANY)
OF TENNESSEE,)
)
Defendant/Appellant.)

Davidson Chancery Court
Case No.77-739-II

Appeal No.
01A01-9604-CH-00191

FILED

October 18, 1996

Cecil W. Crowson
Appellate Court Clerk

**IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE**

**APPEAL FROM THE DAVIDSON COUNTY
CHANCERY COURT OF NASHVILLE, TENNESSEE**

HONORABLE ELLEN HOBBS LYLE, CHANCELLOR

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PRO SE FOR DEFENDANT/APPELLANT

AFFIRMED.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE
WILLIAM C. KOCH, JR., JUDGE

STATE OF TENNESSEE, ex. rel.,)	
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MUTUAL INSURANCE COMPANY)	
OF TENNESSEE,)	
)	
Defendant/Appellant.)	

OPINION

This appeal arises from the termination of the receivership of Mutual Insurance Company of Tennessee which originated on May 12, 1977. The former president of the corporation and a claimant against the estate has appealed from the final order of the Trial Court which reads as follows:

This cause came on to be heard before the Honorable C. Allen High on May 5, 1995, upon the motion of the Special Deputy Commissioner David S. Weed, for an order permitting him to remit the remaining unclaimed assets of the receivership to the Division of Unclaimed Property, to approve the final accounting, to dissolve the receivership, to release the Special Deputy Commissioner from any further obligations and to dismiss the case. Whereupon after consideration of the motion, arguments of counsel and statements of Donald R. O'Guin, Sr. and the entire record in this cause, the Court found that the motion was well taken and should be granted.

IT IS THEREFORE ORDERED, ADJUSTED AND DECREED that:

1. The Special Deputy Commissioner remit the remaining unclaimed assets of the receivership to the Division of Unclaimed property;
2. The final accounting of the Special Deputy Commissioner is approved;
3. The receivership is dissolved;
4. The Special Deputy Commissioner is released from any further responsibilities; and
5. The case is dismissed.

Appellant presents the following issues for review:

- I. That the final order of May 22, 1995 is void and not enforceable.
- II. That the final order of May 22, 1995 is not a final order.
- III. That the order of March 14, 1996 is contravening to Tennessee rules of appellate procedure.
- IV. That defendant has a right to examine receiver as to his administration of the receivership.
- V. Appellant is not bared from filing counterclaims against insolvent insurer and the receiver for insolvent insurer who has brought suit against appellant.

The third issue relates to the production of the record on appeal, and will therefore be considered first. The judgment under review was entered on May 22, 1995. Notice of appeal was filed June 20, 1995. Ninety days from June 20, 1995, was allowed for preparing and filing a verbatim or narrative statement of the evidence. T.R.A.P. Rule 24(c). This period expired on September 18, 1995. On October 23, 1995, over 30 days after the expiration of the time allowed for filing an evidentiary record, appellant filed the following motion:

REQUEST FOR PRODUCTION OF DOCUMENTS

Comes now the Defendant, Cross-Plaintiff, Claimant and Policy holder of Mutual Insurance Company of Tennessee, Donald R. O'Guin, Sr. and respectfully request that the Plaintiff produce the transcripts of the hearings held on September 27 and 28, 1977 on Plaintiff's Petition For Rehabilitating Mutual Insurance Company of Tennessee. This transcript to be filed with the Defendant's record on appeal.

Respectfully submitted,

(Signed)

Donald R. O'Guin, Sr.
2204 Lebanon Road
Nashville, TN 37214
(615) 883-7188

The Receiver responded that he had been unable to locate the requested documents and that the time for making them a part of the appellate record had expired.

On March 14, 1996, the Trial Court sustained the receiver's objection to the request for documents and reiterated a previous ruling rejecting a narrative of proceedings held on July 8, 1994. A notice of appeal from the March 14, 1996, order was filed on April 11, 1996.

The documentary material sought by appellant was evidentiary in character should have been tendered at the May 5, 1995, hearing. The record contains no evidence of any effort to obtain or tender it on or prior to that date. The Trial Court correctly overruled appellant's belated request for production of documents.

Appellant's second issue insists that the May 22, 1995, order is not a final order because the claims of the receiver against him and his cross claims have not been adjudicated, citing T.R.A.P. Rule 3(a). If appellant's position is correct, his appeal must be dismissed at his cost.

However, the allegedly unresolved issues were presented to this Court in a former appeal of this same case and were resolved by the opinion filed by this Court on April 28, 1993. For this reason appellant's fifth issue is not available to appellant in the present appeal.

Appellant's fourth issue is not supported by citations to the record demonstrating timely application to the Trial Court for examination of the receiver and refusal of such application by the Trial Court. See Rule 6(a) (1-3) of the Rules of this Court.

Appellant's first issue asserts that the May 22, 1995, order is void and unenforceable. Appellant asserts that he received no notice of the receiver's motion file on April 21, 1995, for the relief granted on May 22, 1995. However, appellant concedes that he learned of the motion on May 3, 1995, and that, on the same date, he filed a response in opposition, and that he was present at the hearing on May 5, 1995.

Appellant cites no other reason why the May 22, 1995, order is unenforceable. He insists that “an order obtained by violation of the rules of the court is void and unenforceable.” No authority is cited to support this broad insistence. If a party is prejudiced by the violation of a rule, he is entitled to appropriate relief, but prejudice must be shown in order to obtain such relief. No such prejudice is shown.

By reply brief, appellant relies upon oral statements in his narrative statement of the evidence which was untimely filed and rejected by the Trial Judge. It therefore is not a proper part of the record and cannot be considered by this Court.

Appellant’s brief points out a technical frailty in the May 22, 1995, order which should be noted. The order, quoted above, undertakes to authorize disbursement of remaining funds and discharges the receiver. The two provisions are not properly contained in the same order. A fiduciary should not be discharged until he has presented satisfactory evidence of the faithful performance of all of his duties. Gibson’s Suits in Chancery Seventh Edition § 372, p. 351, 75 C.J.S. Receivers § 94.

Having authorized the disbursement of funds remaining in the Receivers hands, the Trial Court should have reserved judgment upon the request for discharge until the Receiver submitted his final accounting showing the disbursement completed in accordance with the order of the Court. Then, and then only would a final discharge be in order.

Nevertheless there is no complaint or showing that the Receiver failed to perform the order of the Court. Without such a showing, a reversal of the order in this appeal would be presumptuous.

Out of an abundance of caution, it would be good practice for the Receiver to file his final report showing the disbursement and request final release.

At the bar of this Court, appellant argued that funds representing uncashed checks for distribution to claimants should not be forfeited to the State but should be distributed to remaining claimants. This argument ignores the rights of the claimants who have not cashed their checks as set out in T.C.A. § 66-29-123(a).

No reversible error is found in the judgment of the Trial Court or its subsequent order, which are affirmed. Costs of this appeal are assessed against the appellant

AFFIRMED.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE

WILLIAM C. KOCH, JR., JUDGE