IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 14, 2023 Session

LORING JUSTICE ET AL. v. THOMAS HANAWAY

Appeal from the Circuit Court for Knox County
No. 1-238-17 E. Jerome Melson, Judge

No. E2022-00447-COA-R3-CV

Plaintiff Loring Justice brought this health care liability action against Thomas Hanaway, Ph.D. ("Defendant"), a psychologist who provided family counseling and therapy to Plaintiff's minor child and the child's mother, Kim Nelson ("Mother"). Defendant moved for summary judgment, arguing among other things that he was entitled to immunity as a court-appointed psychologist and testifying witness. Defendant provided therapy as a result of an order by the Roane County Juvenile Court in long-running litigation between Plaintiff and Mother. The Juvenile Court's order stated that "there will be a transition from the current therapist, Dr. Nancy Brown, to a new therapist to be selected by the Mother." The issue is whether the trial court correctly deemed Defendant to be a court-appointed therapist and granted Defendant summary judgment on grounds of immunity. We affirm the judgment of the trial court.

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

KRISTI M. DAVIS, J., delivered the opinion of the Court, in which JOHN W. MCCLARTY and THOMAS R. FRIERSON, II, JJ., joined.

Linn Guerrero, Knoxville, Tennessee, for the appellant, Loring Justice.

Joshua Counts Cumby, Donna Boyce, and F. Laurens Brock, Nashville, Tennessee, for the appellee, Thomas Hanaway, Ph.D.

OPINION

I. BACKGROUND

The seeds of this action were planted in 2004, when Mother filed a complaint in Roane County Juvenile Court against Plaintiff to establish paternity of their unborn child and to obtain child support, prenatal and birth expenses, attorney's fees, and a temporary

restraining order. Their child was born in February of 2005. Mother and Plaintiff were never married. The litigation stretched on through a dormant stage, although "there was no easing of tensions between [them]," and "following a lengthy period of discovery, the case finally made it to trial" that ended in March of 2017. *Nelson v. Justice*, No. E2017-00895-COA-R3-CV, 2019 WL 337040, at *2, *3 (Tenn. Ct. App. Jan. 25, 2019), *overruled on other grounds by In re Mattie L.*, 618 S.W.3d 335, 343 (Tenn. 2021).

At the Juvenile Court trial, both Defendant and his predecessor, Dr. Nancy Brown, testified. In *Nelson*, this Court provided the following background about Dr. Brown's testimony:

> Dr. Nancy Brown, a licensed clinical psychologist since 1986, testified on behalf of Father. Over the course of this two-year trial, she testified three times. The trial court appointed Dr. Brown to conduct family therapy for [the child] and Father.
>
> * * *
>
> With respect to parental alienation, Dr. Brown testified that it "really is not a diagnosis." Nevertheless, she concluded that parental alienation was occurring in this case. Specifically, she concluded that Mother was alienating [the child] from Father. When the court asked her to discuss the facts supporting her conclusion, Dr. Brown was unable to do so. She then admitted that her only experience with parental alienation was "with an article" about parental alienation.
>
> * * *
>
> The trial court removed Dr. Brown from her role as court-appointed family therapist and discredited her testimony, finding that "[h]er decision to conduct collateral therapy with [Father] without court approval certainly creates the appearance of bias and impropriety."

2019 WL 337040, at *7-8. The *Nelson* Court summarized Defendant's testimony as follows:

> Dr. Tom Hanaway testified on behalf of Mother. He is a licensed clinical psychologist and family therapist who earned his Ph.D. in 1975. After the court removed Dr. Brown from the case, Mother engaged Dr. Hanaway to conduct family therapy with Father and [the child].
>
> * * *

> Dr. Hanaway testified that he found no evidence of parental alienation by Mother. Instead, he observed that Mother encouraged [the child] to spend time with Father and to have a relationship with him. Dr. Hanaway admitted that he believed [the child] was playing his parents "off of each other," but he believed Father failed to take enough responsibility for what he had done to contribute to the situation.
>
> Dr. Hanaway testified that he felt bullied by Father. Specifically, Father threatened to depose Dr. Hanaway and subpoena him to court when he refused to do something Father wanted him to do. Father's behavior ultimately caused Dr. Hanaway, who was seventy-six years old at the time of trial, to have anxiety, stomach aches, and difficulty sleeping at night. Based on his experience with Father, Dr. Hanaway opined that [the child] had probably had experiences with Father that frightened him. Dr. Hanaway recommended that the parties find a new family therapist. The trial court found Dr. Hanaway credible.

Id. at *8, *9.

The Juvenile Court entered the order at the center of the current controversy on February 1, 2016. It states in pertinent part:

> There will be a transition from the current therapist, Dr. Nancy Brown, to a new therapist to be selected by the Mother. Until such time as that transition takes place, the Father and minor child's therapy sessions with Dr. Brown will continue[.]
>
> * * *
>
> [T]he parties will continue to see Dr. Nancy Brown in therapy until such time as the new therapist is engaged and the transition to the new therapist has been made.
>
> The parties shall sign releases for the new therapist to speak with Dr. Brown, and Dr. Brown will assist the new therapist in making the transition as the parties' therapist. The Court notes that the basis for the change in therapists from Dr. Brown to a new therapist is based upon the possible perceived conflict. . . . [O]nce the transition to the new therapist is made, the therapist shall set out a goal and a plan as to how the therapy shall be conducted.

At the time the Juvenile Court made its ruling at the hearing in late December of 2015, Plaintiff was practicing law. His law office sent Defendant a copy of the trial court's

ruling and Dr. Brown's contact information shortly thereafter. According to Defendant's affidavit,

> I was approached by [M]other . . . to replace Dr. Nancy Ellen Brown as the court-appointed family therapist for [Mother and Plaintiff] and their minor child.
>
> As a result, I was appointed by the Juvenile Court for Roane County, Tennessee, to conduct family therapy with the parties in the matter [of] *Nelson v. Justice*[.] I also assisted the Court by testifying at trial regarding my opinions formed as a result of conducting court-appointed family therapy with the parties. At no time did I engage in activity with the parties outside the parameters of my court-appointed duties.

By the time *Nelson v. Justice* was tried, it had evolved into a custody battle in addition to the issues initially raised by Mother. Defendant testified as quoted above. The Juvenile Court "determined that [Plaintiff] engaged in conduct that necessitated limiting his residential parenting time with the child [and] fashioned a residential parenting schedule that severely restricted the father's parenting time." *Nelson*, 2019 WL 337040, at *1. On appeal, this Court affirmed, stating that "Mother has prevailed on every issue on appeal, and Father's brief is largely a compilation of conclusory statements with little actual argument or citation to authority." *Id.* at *27.

On July 7, 2017, Plaintiff filed the instant action in Knox County Circuit Court ("the trial court"), alleging breach of the standard of care for treatment, fraud, negligence, and "wanton and reckless conduct." Specifically, Plaintiff alleged:

> Defendant made several comments to [Plaintiff] about his sexual attraction for [the child's] mother, her appearance, and in one case about how he was sexually attracted to [the child's] mother but not sexually attracted to [Plaintiff].
>
> This is profoundly weird in contravention [of] the standard of care and basic ethics of the profession of psychology.
>
> Defendant told [Plaintiff] not to worry about his comments because he has had better looking women in his office than [Mother].
>
> . . . Defendant told Dr. Brown he looks forward to working with [Mother] because he found her sexually attractive.

> Defendant's comments regarding the sexual attractiveness of his patients to his patient, [Plaintiff], breached the standard of care.
>
> Defendant cursed at [Plaintiff], referring to him as a "God dam*e* lawyer" and referred to [the child] as a "shi*" and to [Mother] as an "irrational bitc*."
>
> Defendant has testified inconsistently about statements he made to Plaintiff.

(Numbering and emphasis omitted; "Dr. Hanaway" in original replaced with "Defendant" throughout; redaction in original).

Defendant filed a motion for summary judgment, supported by an accompanying memorandum in which he argued that he "was selected to serve as court-appointed therapist," citing *Ghayoumi v. McMillan*, No. M2005-00267-COA-R3-CV, 2006 WL 1994556, at *7 (Tenn. Ct. App. July 14, 2006), for the proposition that

> the federal courts and numerous state courts have expanded the doctrine of absolute judicial immunity to include persons serving as an integral part of the judicial process on the reasoning that these persons must be able to act freely without the threat of a law suit. These authorities have convinced us the doctrine of immunity in Tennessee should protect a psychologist appointed by the court to assist the court in the evaluation and assessment of a family in a domestic dispute so the psychologist will be free from intimidation and harassment by a dissatisfied litigant.

Following discovery, the trial court conducted a hearing on February 18, 2022. The trial court granted Defendant summary judgment, stating in pertinent part as follows:

> The Order from Juvenile Court for Roane County . . . contained the following language:
>
> There will be a . . . transition from the Current therapist, Dr. Nancy Brown, to a new therapist to be selected by the Mother. Until such time as that transition takes place, the Father and minor child's therapy sessions with Dr. Brown . . . will continue to take place[.]
>
> It is undisputed that Dr. Nancy Brown served as a court-appointed therapist in the Juvenile Court matter and was removed by the order of the Court.
>
> * * *

> It is reasonable based on the language of the Order that the then current therapist, Dr. Nancy Brown's treatment would be transferred to another therapist to be selected by the mother. It is undisputed that the Juvenile Court ordered the mother to find a replacement therapist for Dr. Brown. It is also undisputed, the mother identified [Defendant] as a replacement therapist.
>
> It is reasonable from the record to conclude that [Defendant] was replacing the court-appointed therapist, Dr. Nancy Brown, and would therefore be stepping into Dr. Nancy Brown's shoes and occupying the same status as that which Dr. Brown had enjoyed.
>
> [Plaintiff] cannot demonstrate any prejudice based upon his prior knowledge of the entry of this Order and the fact that although Defendant filed a Supplemental Memorandum of Law in support of Motion for Summary Judgment a month ago, [Plaintiff] did not offer any response to the brief.
>
> It is appropriate to conclude that [Defendant] did step into the shoes of the court appointed therapist, Dr. Nancy Brown as the new Court appointed therapist.
>
> The [Juvenile Court] Order signed by Judge Ash sets forth enumerated paragraphs on specific directions provided to the contemplated additional therapist. It is undisputed the additional therapist was [Defendant]. Further undisputed that [Defendant] undertook for a period of approximately six months, to provide services in this matter.
>
> The Court finds it was contemplated by stepping into the shoes of the court-appointed therapist, [Defendant] is entitled to the same benefit of the doctrine of immunity as that which could have been claimed by Dr. Nancy Brown as Court appointed therapist had she remained in the case.

(Numbering in original omitted).

II. ISSUES

Plaintiff raises the issue of whether the trial court erred by granting Defendant summary judgment on the ground that Defendant was entitled to quasi-judicial immunity as a psychologist appointed by the Juvenile Court to assist the court in the evaluation and assessment of a family in a domestic dispute.

Plaintiff attempts to raise as an issue for the first time on appeal the question of whether Defendant's "acts and stunningly inappropriate language to describe the family

were so outside of any alleged court-appointed duties that [Defendant] would not enjoy quasi-judicial immunity" even if the trial court correctly interpreted the Juvenile Court's order to deem Defendant a court-appointed therapist. Plaintiff did not raise this issue in the trial court. Consequently, it has been waived on appeal. *See, e.g.*, *Black v. Blount*, 938 S.W.2d 394, 403 (Tenn. 1996) ("Under Tennessee law, issues raised for the first time on appeal are waived.").

III. STANDARD OF REVIEW

A trial court may grant summary judgment only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. The propriety of a trial court's summary judgment decision presents a question of law, which we review de novo with no presumption of correctness. *Kershaw v. Levy*, 583 S.W.3d 544, 547 (Tenn. 2019).

"The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Martin v. Norfolk S. Ry.*, 271 S.W.3d 76, 83 (Tenn. 2008). As our Supreme Court has instructed,

> when the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense.

Rye v. Women's Care Ctr. of Memphis, 477 S.W.3d 235, 264 (Tenn. 2015). "[I]f the moving party bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if uncontroverted at trial, would entitle it to a directed verdict." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986)).

When a party files and properly supports a motion for summary judgment as provided in Rule 56, "to survive summary judgment, the nonmoving party may not rest upon the mere allegations or denials of its pleading, but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, set forth specific facts . . . showing that there is a genuine issue for trial." *Rye*, 477 S.W.3d at 265 (internal quotation marks and brackets in original omitted). "Whether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, '[t]he nonmoving party

must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'" *TWB Architects*, 578 S.W.3d at 889 (quoting *Rye*, 477 S.W.3d at 265).

IV. ANALYSIS

There is no genuine issue of material fact presented in this case. The only issue is the proper interpretation of the Juvenile Court's order to substitute a new therapist in place of Dr. Brown. Plaintiff argues that the question of whether the Juvenile Court intended Defendant to be a "court-ordered" psychologist is one of fact that a jury should decide. But it is well established that "[t]he interpretation of a trial court's order is a question of law we review de novo." *In re Estate of Thompson*, 636 S.W.3d 1, 20 (Tenn. Ct. App. 2021) (citing *Byrnes v. Byrnes*, 390 S.W.3d 269, 277 (Tenn. Ct. App. 2012)). As we stated in *Byrnes*, "in making that determination, we ascertain the intent of the court, and, if possible, make the order in harmony with the entire record in the case and to be such as 'ought to have been rendered.'" 390 S.W.3d at 277 (quoting *Lamar Adver. Co. v. By-Pass Partners*, 313 S.W.3d 779, 785 (Tenn. Ct. App. 2009)). "The determinative factor is the intention of the court as collected from all parts of the judgment." *Stephens v. Home Depot U.S.A., Inc.*, 529 S.W.3d 63, 73 (Tenn. Ct. App. 2016).

In this case, it is abundantly clear from the record and the language of the Juvenile Court's order that it intended Defendant to "step into the shoes of the court appointed therapist . . . as the new court appointed therapist," as held by the trial court. Defendant's involvement in family therapy was the direct consequence of the Juvenile Court's order that "there will be a transition from the current therapist, Dr. Nancy Brown, to a new therapist to be selected by the Mother." The Juvenile Court ordered Mother to find and select a new therapist, which she did.

Moreover, the Juvenile Court's order contains specific written directives to the parties to execute releases to assist the new therapist, and to the new therapist to "set out a goal and a plan as to how the therapy shall be conducted." It appears from the record that it was the Juvenile Court's exercise of its authority to appoint an expert psychologist to conduct therapy, testify, and "to assist the court in the evaluation and assessment of a family in a domestic dispute," *Ghayoumi*, 2006 WL 1994556, at *7, that precipitated Defendant's involvement in this case.[1] We find no error in the trial court's decision to

[1] Plaintiff argues on appeal that the Juvenile Court did not comply with Tenn. R. Evid. 706, which requires that a court-appointed expert "shall be informed of the witness's duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate." He did not cite Rule 706 or argue its application before the trial court, which therefore had no opportunity to rule upon it. Of course, Plaintiff did argue generally in the trial court that Defendant should not be deemed a court-appointed expert. We find no violation of Rule 706 in the Juvenile Court's written order effectively appointing the substitute therapist selected by Mother.

deem Defendant immune from this action as a court-appointed psychologist. *See id.; Wilder v. Swann*, No. 3:1-CV-93, 2011 WL 4860041, at *5-6 (E.D. Tenn. Oct. 13, 2011) (applying *Ghayoumi* to hold that Defendant was entitled to quasi-judicial immunity as a court-appointed psychologist in an unrelated federal case).

Finally, Plaintiff argues that Defendant failed to comply with Tenn. R. Civ. P. 56 because Plaintiff "had no mechanism or opportunity to respond to the newly-filed [Juvenile Court] order under Rule 56." The Juvenile Court order was filed on January 19, 2022, as an exhibit to Defendant's supplemental memorandum in support of his motion for summary judgment, after the trial court had entered an agreed order allowing Defendant to amend his answer. As the trial court correctly held, the record reflects that there was no surprise or unfairness to Plaintiff whatsoever in the summary judgment procedure followed here. Plaintiff and his counsel were present at the hearing where the Juvenile Court ordered the substitution of the treating psychologist, and the excerpts from the transcript of the hearing reflect that Plaintiff well understood the order. He, or his counsel, was the one who sent a copy of it to Defendant shortly thereafter.

Secondly, Defendant's motion for summary judgment plainly and expressly argued that he is "immune from suit as both a court-appointed psychologist and testifying witness." Plaintiff had ample notice and opportunity to fully respond to this argument. As the trial court observed, "although Defendant filed a Supplemental Memorandum of Law in support of Motion for Summary Judgment a month ago, [Plaintiff] did not offer any response to the brief." Plaintiff's argument that Defendant failed to comply with Rule 56 is without merit.

V. CONCLUSION

The judgment of the trial court is affirmed. Costs on appeal are assessed to the appellant, Loring Justice, for which execution may enter if necessary.

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KRISTI M. DAVIS, JUDGE