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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 3, 2023

IN RE ESTATE OF CHARLES LEONARD WELCH

**Appeal from the Probate Court for Davidson County
No. 19P1795 Andra J. Hedrick, Judge**

No. M2023-00118-COA-R3-CV

This appeal arises from a will contest by the decedent's children. Counsel for the contestants and counsel for the executrix engaged in settlement negotiations on behalf of their clients. The executrix submitted a motion to enforce the settlement. After an evidentiary hearing on the motion, the Probate Court granted the motion and entered an order of voluntary dismissal of the contestants' claims with prejudice. The contestants appeal. We affirm.

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

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and W. NEAL MCBRAYER, JJ., joined.

Radford H. Dimmick, Nashville, Tennessee, for the appellants, Kim Stangenberg, Kelly Welch, and Robert G. Welch.

Michael P. Dolan and Daniel C. Paulus, Nashville, Tennessee, for the appellees, Elizabeth Watson, Catherine Welch, and Estate of Charles Leonard Welch.

OPINION

I. FACTS & PROCEDURAL HISTORY

In September 2019, Charles Leonard Welch¹ ("Decedent") died from complications arising from mesothelioma.

In October 2019, Decedent's son, Robert G. Welch filed a petition to open a probate

¹ In the record, Charles Leonard Welch is sometimes referred to as Charles Leonard Welch, Jr. It is evident that both references are to the same person.

administration of the Decedent's estate in Probate Court for Davidson County. A few days later, Decedent's wife, Catherine Welch ("Executrix"), filed a "Petition to Admit Will to Probate" in the same court. The Probate Court consolidated the two matters, and Decedent's will was admitted to probate. Three children of the Decedent, Robert G. Welch, Kim Stangenberg, and Kelly Welch ("Contestants"), filed a complaint contesting the will and alleging undue influence.

Prior to Decedent's death, Decedent and Executrix, as husband and wife, jointly filed suits related to Decedent's mesothelioma against several construction companies and manufacturers in a West Virginia court. These suits were settled and dismissed by orders of the West Virginia trial court entered after Decedent's death. Counsel for Decedent and Executrix at Maune Raichle Hartley French & Mudd LLC ("MRHFM, LLC") in St. Louis held the settlement funds in trust.

In May 2021, Contestants filed a motion making a demand for a jury trial on their undue influence claim. Contestants also requested that the probate court order that MRHFM, LLC continue to hold the mesothelioma settlement funds in its trust account or for the settlement proceeds to be deposited with the probate court pending the outcome of the trial. Executrix responded with no objection to a jury trial and a request for the court to order Contestants to immediately provide a surety bond to the estate in an amount equal to the total settlement proceeds held by MRHFM, LLC. Contestants then filed a sur-reply stating that contestant Robert G. Welch had filed a petition in a West Virginia court to intervene in the mesothelioma litigation. Contestants also requested that the trial court order that neither the estate nor Executrix be allowed to take possession of the mesothelioma settlement funds pending further orders from either the probate court or the court in West Virginia.

In June 2021, after a hearing on Contestants' motion, the trial court granted the motion for jury trial but ordered that the settlement funds would continue to be held by MRHFM, LLC. It also found Executrix's second amended inventory filed in August 2020 stated that 75% of the settlement funds are from the Decedent's lifetime personal injuries and 25% of the settlement funds represent Executrix's loss of consortium claim. Contestants filed a motion to amend the order, arguing that the proportioning of the mesothelioma settlement funds was incorrect because there was no basis for the division between loss of consortium and personal injury funds, that the West Virginia court had retained jurisdiction to make any determination as to the distribution of the settlement funds, and that the Executrix was using the power of the trial court's order to avert jurisdiction of the West Virginia court. Executrix responded and maintained that the trial court did not make any ruling regarding the allocation of the mesothelioma settlement funds but was merely stating the contents of the second amended inventory. Executrix further argued that the Contestants had no basis for relief under Tennessee Rule of Civil Procedure 60.02. The trial court denied the Contestants' motion to amend the order.

On August 9, 2022, Contestants' counsel sent a letter via electronic mail to the Executrix's counsel stating that her clients had authorized her to extend an offer in settlement of all matters between the parties. The proposed terms of the settlement were that (1) the estate would pay \$25,000 to each contestant and (2) the estate and Executrix would forgive and file satisfaction of the court's order in other litigation pending between the parties in the Circuit Court of Davidson County requiring Contestants to pay attorney fees in the amount of \$13,494.75. On August 15, 2022, counsel for Contestants and counsel for Executrix had a telephone conversation discussing the August 9, 2022 letter and Executrix's counterproposals. Executrix's counsel made a counteroffer to pay \$15,000 to each contestant with an additional agreement to file a satisfaction of judgment in the other pending lawsuit. Executrix also requested information about the whereabouts and wellbeing of contestant Kelly Welch.

In an August 18, 2022 letter, Contestants' counsel stated that Contestants had authorized her to respond to the offer with another offer with the following terms: (1) the estate would pay \$20,000 to each contestant, (2) Executrix and Elizabeth Watson, daughter of Decedent, would file a satisfaction of judgment in the other pending lawsuit on the order for attorney fee payment, (3) each contestant would receive payment directly in their own name, (4) Contestants would advise the estate and Executrix on the location and well-being of Kelly Welch, (5) Kelly Welch's payment under the settlement would be held in a trust account until he is released from incarceration, and (6) the estate would give possession of several heirlooms to Contestants.

In an August 19, 2022 letter, Executrix's counsel responded to the letter with a counterproposal. The letter set out the terms of the proposal in five numbered paragraphs:

1. The Estate will agree to pay each of the contestants, Bobby Welch, Kim Strangenberg and Kelly Welch, the sum of \$20,000.00 (totaling \$60,000.00 in the aggregate) to fully, finally and forever resolve and settle all disputes between them, the Estate and each of our clients. . . .
2. The parties' will fully and forever release any and all claims that they have or may assert against each other through the date of this settlement. Our clients will forgive judgment they obtained for \$13,494.75 for attorney's fees in the Second Circuit Declaratory Judgment case (Davidson Co. Second Circuit Court, Docket No. 20C1889) and file a satisfaction of judgment.
3. *Each of your clients will immediately voluntarily dismiss, with prejudice, all complaints, claims, disputes and causes of action that they have (or could) assert in the Welch Estate proceedings here in the Davidson County Probate Court (Docket No. 19P1795) and the West Virginia mesothelioma litigation in the Circuit Court for Kanawha County, WV*

(Civil Action No. 03-C-9600);

4. The parties will immediately sign and file an Agreed Order with the Davidson County Probate Court to dissolve any prior Order entered in the Probate case that would restrict or prevent the Decedent's and Executrix's legal counsel at Maune Raichle Hartley French & Mudd's ability to disburse the remaining mesothelioma settlement funds that are held for the benefit of the Welch Estate to the Welch Estate; and
5. Our clients' will agree to gift possession of the following personal property items to the Contestants: . . .

(emphasis added). Executrix's counsel concluded the letter with a statement that "[t]his settlement shall not be complete or effective until and unless all parties sign the definitive Settlement Agreement and Release and other related documents."

On August 19, 2022, Contestants' counsel responded to the offer with another letter stating:

My clients have authorized me to accept the parameters of your counter-proposal with one additional detail to be included in the settlement and release document. The Contestants propose to include a no contact provision in the settlement agreement. We propose this include Karen James and Contestants' and Mrs. James' immediate family. This would include a liquidated damage clause for \$5000 and an attorney fee provision for violations.

Executrix's counsel replied on August 22, 2022, and stated that he would move forward with preparing all of the documents necessary to effect the settlement without the set liquidated damages. Executrix's counsel also stated that without the set liquidated damages provision, each party would be able to seek actual damages in the event of a violation of the no-contact provision. Executrix's counsel did not receive a response from Contestants' counsel until September 27, 2022, when Contestants' counsel wrote that her clients had multiple issues with the Settlement Agreement and alleged that Executrix had left a message on the phone of the wife of one of the contestants.

On September 30, 2022, Executrix filed a motion to enforce the settlement agreement and to obtain consent to transfer the mesothelioma settlement funds from the trust account of the law firm in St. Louis to the trust account of the Executrix's counsel. On the same day, Contestants' counsel filed a motion to withdraw as counsel of record. Executrix responded and argued that Contestants were trying to delay the proceedings by "disassociat[ing]" from their lawyer to get out of a global settlement agreement they proposed. Executrix asked the trial court to compel Contestants to honor the terms of the

settlement agreement before Contestants' counsel was allowed to withdraw. Executrix attached the written correspondence between the counsel for the parties. Contestants filed a response opposing Executrix's motion to enforce settlement and requesting a continuance for at least 60 days so that they could engage new counsel. After a hearing, the trial court granted the motion to withdraw. On the same day, the trial court issued another order continuing the pending motion to enforce settlement until a December hearing and stating that Contestants' former counsel would voluntarily appear at the hearing as a fact witness regarding all settlement discussions.

Contestant Robert G. Welch filed a response to Executrix's motion to enforce settlement. He argued that Contestants never agreed to the settlement offer "due to the changes that were made." He listed three changes that the Contestants did not agree to, which we quote verbatim from his response:

1. Added about withdrawing from the West Virginia case was never discussed, why would someone not licensed to practice in West Virginia try to affect a case there.
2. Personal items requested were whittled down and listed as is condition
3. Monetary penalty for executrix containing contestants were removed, executrix has continued to contact contestants spouse, stating "I know I not supposed to call"

He also stated that "Contestants council [sic] at the time on the record stated that there was no agreement." He attached to the response a transcript of proceedings from the October 14, 2022 hearing on Contestants' counsel's motion to withdraw wherein the Contestants' counsel stated "I will state that the contestants oppose his motion [to enforce settlement]." Executrix filed a reply stating that Contestants' counsel confirmed that her clients would dismiss with prejudice all the complaints and claims they have or could assert in both the probate proceedings as well as in the West Virginia mesothelioma litigation. Executrix also stated that she had agreed to provide three listed items of personal property of Decedent and that Contestants' counsel confirmed that her clients had authorized her to accept that offer. Executrix further stated that the liquidated damages clause was removed from the settlement and that Contestants clearly admitted that the clause was intended to be a penalty not based on any reasonable way to determine damages, which could not be upheld under Tennessee law. Executrix attached to the reply an affidavit from Executrix's counsel relaying the settlement communications and the written correspondence between the counsel for the parties. Executrix also attached proposed drafts of a Settlement and Asset Distribution Agreement, a Notice and Order of Voluntary Dismissal of the claims in the Decedent's estate, a Notice to Strike and Voluntary Dismissal of Robert G. Welch's Motion to Intervene in the mesothelioma litigation in West Virginia, and a Notice of Satisfaction of Judgment for Attorneys' Fees for the Second Circuit Court judgment.

In December 2022, the trial court held an evidentiary hearing on Executrix's motion to enforce settlement. At the conclusion of the hearing, the trial court asked Executrix's counsel to prepare an order granting the motion to enforce settlement with the terms from Executrix's counsel's August 19 letter along with the two additional provisions from Contestants' counsel's August 19 letter. The trial court also stated that the order entered from the hearing would serve as the signature of the parties on the Notice and Order of Voluntary Dismissal, the Notice to Strike and Voluntary Dismissal, and the Notice of Satisfaction of Judgment for Attorneys' Fees that Executrix attached to her reply.

The order the trial court ultimately entered which granted the motion described the settlement agreement with the following provisions:

1. The Estate shall pay each of the Contestants, [Robert] Welch, Kim Stangenberg and Kelly Welch, the sum of \$20,000.00 (totaling \$60,000.00 in the aggregate) to fully, finally, and forever resolve and settle all disputes between them, the Estate, and Catherine Welch, individually as well as in her capacity as Executrix of the Estate. . . .
2. The parties' will fully and forever release any and all claims that they have or may assert against each other through the date of this settlement. Each of Catherine Welch and Elizabeth Watson shall forgive the judgment they obtained for \$13,494.75 for attorney's fees in the Second Circuit Declaratory Judgment case (Davidson Co. Second Circuit Court, Docket No. 20C1889) and this Order shall be deemed to serve as conclusive evidence of the satisfaction of that judgment and undersigned counsel shall file the attached Satisfaction of Judgment with the Second Circuit Court attached to this Order as Exhibit B.
3. Each of the Contestants, [Robert] Welch, Kim Stangenberg and Kelly Welch, shall immediately voluntarily dismiss, with prejudice, all complaints, claims, disputes and causes of action that they have (or could) assert in the Welch Estate proceedings here in the Davidson County Probate Court (Docket No. 19P1795) and the West Virginia mesothelioma litigation in the Circuit Court for Kanawha County, WV (Civil Action No. 03-C-9600); and this Court shall hereby grant and sign the attached Notice and Order of Voluntary Dismissal (attached to this Order as Exhibit A) as this Order shall serve as the signature of the parties with respect to the such attached orders of dismissal in this probate action as well as the West Virginia action; and further, the undersigned counsel shall be authorized to proceed to file and record a copy of this Order as evidence of such dismissals with prejudice with the appropriate courts of record;

4. This Court hereby dissolves any prior Order entered in the present Probate case that would restrict or prevent the Decedent's and Executrix's legal counsel at Maune Raichle Hartley French & Mudd's ability to disburse the remaining mesothelioma settlement funds that are held for the benefit of the Welch Estate to the Welch Estate's counsel's trust account in order to fund this settlement between the parties and to fully and finally administer the Estate.
5. The Executrix shall immediately gift possession of the following personal property items to Contestant [Robert] Welch: . . .
6. It is further agreed that neither Catherine Welch nor Robert [G.] Welch, Kim Stangenberg, and Kelly Welch shall not [sic] contact each other after the entry of this settlement; provided, however, that Catherine Welch further agrees that she will not contact Karen James or any member of Karen James' immediate family following the entry of this settlement. The parties agree that any person violating this no contact provision shall be liable for liquidated damages of \$5,000.00 and the reasonable attorneys' fees incurred by the non-breaching party in obtaining such liquidated damages. For clarification purposes, this Court is not rendering any opinion on the enforceability of the stated liquidated damages provision.

In addition to the order granting the Motion to Enforce Settlement, the trial court also signed the Notice and Order of Voluntary Dismissal submitted by Executrix, dismissing the complaint with prejudice. Contestants appealed.

II. ISSUES PRESENTED

Contestants present the following issue for review on appeal:

1. Whether the trial court erred in mandating a voluntary dismissal with prejudice of the Appellants' underlying claims pursuant to Rule 41 of the Tennessee Rules of Civil Procedure against the will of the Appellants?

In her posture as appellee, Executrix presents the following issues for review on appeal, which we have slightly reworded:

1. Whether the trial court correctly entered its orders which effected the parties' agreement to voluntarily dismiss all of Contestants' claims against appellees with prejudice;
2. Whether the trial court correctly granted the Executrix's motion to enforce the

- settlement agreement;
3. Whether Contestants' appeal of this matter constitutes a frivolous appeal under Tennessee Code Annotated § 27-1-122,

For the following reasons, we affirm the decision of the probate court.

III. STANDARD OF REVIEW

The interpretation of the Tennessee Rules of Civil Procedure is a question of law. *Lacy v. Cox*, 152 S.W.3d 480, 483 (Tenn. 2004) (citing *Dial v. Harrington*, 138 S.W.3d 895, 897 (Tenn. Ct. App. 2003)). The proper standard of review for questions of law is de novo with no presumption of correctness. *Eberbach v. Eberbach*, 535 S.W.3d 467, 473 (Tenn. 2017) (citing *Barnes v. Barnes*, 193 S.W.3d 495, 498 (Tenn. 2006); *Taylor v. Fezell*, 158 S.W.3d 352, 357 (Tenn. 2005)).

IV. DISCUSSION

Voluntary Dismissal

Contestants argue that the trial court erred in “mandating” a voluntary dismissal with prejudice of the underlying claims “against [their] will” and ask us to reverse the order. Contestants state that “[t]here is nothing in the record which would indicate the Appellants voluntarily nonsuited or dismissed their action with or without prejudice at all.”

Tennessee Rule of Civil Procedure 41.01 provides for the right of a plaintiff to voluntarily dismiss an action. The plaintiff is the “master of his suit and may dismiss at his pleasure before trial.” *Rickets v. Sexton*, 533 S.W.2d 293, 294 (Tenn. 1976). Further, “[t]he lawyer for the plaintiff is the sole judge of the matter and the trial judge has no control of it.” *Id.*

Contestants solely rely on *Rickets* to support their argument that the trial judge cannot enter a voluntary dismissal for them. In *Rickets*, the Court stated that “the plaintiff is master of his suit” in the context of a trial judge’s refusal to grant a voluntary nonsuit after a plaintiff filed a notice of his voluntary dismissal. In this present case, Executrix submitted a notice and order of voluntary dismissal of the claims of the Contestants. Finding that the Contestants, through their attorney, had agreed to “immediately voluntarily dismiss their claims,” the trial court signed the order for voluntary dismissal based on the granting of the motion to enforce settlement. Therefore, we disagree with the Contestants’ assertion that the trial court’s order of voluntary dismissal with prejudice runs afoul of the rule in *Rickets*.

Though Contestants argue that they had opposed the motion to enforce settlement and summarily state that “[t]here is nothing in the record which would indicate a full

agreement was ever made or reduced to a writing between the parties,” Contestants cite no law or facts in the record to support their bare assertion that a binding settlement agreement was never made. This Court has no duty to verify a statement in a party’s brief without a citation by reviewing the record or constructing the argument on behalf of the party. *Bean v. Bean*, 40 S.W.3d 52, 56 (Tenn. Ct. App. 2000). Therefore, we decline to address Contestants’ argument that there was no agreement to voluntarily dismiss the action.

When the existence of a binding agreement remains unchallenged by the Contestants, without any citation to the record or to law, we do not reverse the trial court’s conclusion that a binding agreement existed between the parties. We have held before that a trial court’s decision to dismiss a case with prejudice is proper where the trial court has concluded that there is an enforceable agreement that resolves all claims. *See Allen v. Am. Yeast, Inc.*, No. W2017-00874-COA-R3-CV, 2018 WL 4846364 at *4 (Tenn. Ct. App. Oct. 4, 2018). The trial court found that Contestants, through their counsel, agreed that they would “immediately voluntarily dismiss, with prejudice, all complaints, claims, disputes and causes of action that they have (or could) assert in the Welch Estate proceedings” Therefore, we cannot agree with Contestants’ contention that the trial court “took from the Appellants their right to choose whether they would take a voluntary nonsuit,” and mandated a voluntary dismissal “against [their] will.”

For the foregoing reasons, we affirm the trial court’s order entering a voluntary dismissal with prejudice of the Contestants’ claims. Since we are affirming the trial court’s order, the appellees’ second issue is pretermitted.

Frivolous Appeal

Appellees ask this Court to award them attorney’s fees incurred in this appeal pursuant to Tennessee Code Annotation section 27-1-122, which allows an appellate court to award attorney’s fees when an appeal is deemed frivolous. *See Selitsch v. Selitsch*, 492 S.W.3d 677, 690 (Tenn. Ct. App. 2015); *Indus. Dev. Bd. of City of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995) (quoting *Combustion Eng’g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978)) (stating “[a] frivolous appeal is one that is ‘devoid of merit’”). Further, “[w]e must apply this statute strictly so that we do not discourage legitimate appeals.” *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 547 (Tenn. Ct. App. 2005). Although Appellants have not been successful in their appeal, we do not deem their appeal to be frivolous. Accordingly, we respectfully decline to exercise our discretion to award additional attorney’s fees to Appellees.

V. CONCLUSION

We affirm the trial court’s order. Costs of the appeal are taxed to the appellants, Kim Stangenberg, Kelly Welch, and Robert G. Welch, for which execution may issue if necessary.

CARMA DENNIS MCGEE, JUDGE