IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 23, 2015 Session

JOHN A. BRUBAKER v. H. T. BECKHAM

Appeal from the Circuit Court for Cheatham County
No. 5971 George C. Sexton, Judge

No. M2014-01751-COA-R3-CV – Filed May 26, 2016

A dispute arose between the purchaser of real property and a prior owner over certain personalty, including equipment and motor vehicles, left on the real property. After the prior owner removed one item of personalty and dumped tree waste on the real property, the purchaser filed suit against the prior owner seeking, among other things, injunctive relief. Following a hearing, the trial court granted the requested injunctive relief and concluded that the personalty that remained on the real property was owned by the purchaser. The prior owner of the real property appeals the trial court's decision that the personalty remaining on the real property was abandoned. Because the trial court's order does not satisfy the requirements of Rule 52.01 of the Tennessee Rules of Civil Procedure, we vacate the judgment and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Vacated and Remanded

W. NEAL MCBRAYER, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

Jerry E. Farmer, Murfreesboro, Tennessee, for the appellant, H. T. Beckham.

Irene R. Haude, Nashville, Tennessee, for the appellee, John A. Brubaker.

OPINION

This case is before us for the second time. *See Brubaker v. Beckham*, No. M2011-

02247-COA-R3-CV, 2012 WL 424900 (Tenn. Ct. App. Feb. 8, 2012). In the prior appeal, we summarized the facts and procedural history of this case as follows:

> In April of 2009, Bank of America foreclosed on certain real property in Ashland City owned by H.T. Beckham. Bank of America purchased the property at the trustee's sale and subsequently sold the property to John A. Brubaker. A dispute then arose between Mr. Beckham, who still owns property adjoining the foreclosed parcel, and Mr. Brubaker. On January 22, 2010, Mr. Brubaker filed a complaint and application for injunction seeking to enjoin Mr. Beckham from entering the property and requesting a judgment for both damages to the real property and the value of certain personal property removed by Mr. Beckham. On June 18, 2010, the trial court entered an agreed order requiring Mr. Beckham to remove any personal property belonging to him within two weeks and to repair any damage caused by the move. On April 26, 2011, the trial court entered an order enjoining Mr. Beckham from dumping anything on the property and declaring all items remaining on the land to be the sole property of Mr. Brubaker. The order specifically reserved the issue of damages.
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> On May 25, 2011, Mr. Beckham filed a Motion for a New Trial. On May 27, 2011, Mr. Beckham filed an answer and counter-complaint raising issues concerning the parties' common boundary line and an easement. The counter-complaint requested that the court declare the ownership of the personal property located on the land, enjoin Mr. Brubaker from taking possession of or removing any of the personal property, enjoin Mr. Brubaker from coming upon the real property of Mr. Beckham, and award damages including attorney's fees. On October 4, 2011, the trial court denied the motion for new trial, holding that Mr. Beckham had abandoned his personal property, that the matter was never a boundary line dispute, and that "the pleadings may be amended to reflect the testimony at the hearing in this matter and the previous orders." Mr. Beckham filed his notice of appeal on October 12, 2011.

Id. at *1.

We dismissed the first appeal for want of a final judgment. *Id.* at *2. In doing so, we concluded that the trial court's orders of April 26 and October 4, 2011, did "not resolve all the claims raised by the parties." *Id.* at *1. The April 26, 2011, order "specifically reserved the issue of damages raised in the original complaint," and the October 4, 2011 order did not expressly dismiss the counter-complaint filed by Mr. Beckham. *Id.*

On remand, the Circuit Court for Cheatham County, Tennessee, entered an order on May 1, 2014, dismissing the counter-complaint. Subsequently, Mr. Brubaker filed a notice striking his claim for damages. The trial court then entered a final order on August 14, 2014. Mr. Beckham filed his notice of appeal on September 9, 2014.

ANALYSIS

Mr. Beckham raises a single issue for review: whether the trial court erred in concluding that the disputed personalty located on Mr. Brubaker's property was abandoned and awarding the personalty to Mr. Brubaker. Mr. Brubaker raises his own issue, namely that that the statement of the evidence submitted by Mr. Beckham is insufficient for appellate review of the trial court's decision. Mr. Brubaker also requests his attorney's fees on appeal. We first address the sufficiency of the statement of the evidence.

SUFFICIENCY OF THE STATEMENT OF THE EVIDENCE

An appellant bears the responsibility of "preparing the record and providing to the appellate court a 'fair, accurate and complete account' of what transpired at the trial level." *Jennings v. Sewell-Allen Piggly Wiggly*, 173 S.W.3d 710, 713 (Tenn. 2005) (quoting *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn.1993)). In the language of the Tennessee Rules of Appellate Procedure, the appellant must "have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(b). Where a transcript is unavailable, Rule 24(c) directs the appellant to prepare a statement of the evidence:

> **(c) Statement of the Evidence When No Report, Recital, or Transcript Is Available.** If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, or if the trial court determines, in its discretion, that the cost to obtain the stenographic report in a civil case is beyond the financial means of the appellant or that the cost is more expensive than the matters at issue on appeal justify, and a statement of the evidence or proceedings is a reasonable alternative to a stenographic report, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or the appellant's counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal.

Tenn. R. App. P. 24(c). Simultaneously with filing the statement of the evidence, the

appellant must provide notice to the appellee "accompanied by a short and plain declaration of the issues the appellant intends to present on appeal." *Id.* The appellee then has fifteen days after service of the notice and declaration to file objections to the statement of the evidence."

In challenging the statement of the evidence, Mr. Brubaker makes a two pronged argument. First, he argues that the statement of the evidence was not approved by the trial court. Second, he argues that, even if the statement of the evidence had been approved, the statement is not adequate for appellate review. Absent an adequate appellate record, "we must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings." *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992).

We can dispense with Mr. Brubaker's first argument quickly. Although a statement of the evidence must be approved, we deem a statement of the evidence approved when the trial judge declines to act within a certain time period.

> **(f) Approval of the Record by Trial Judge or Chancellor.** The trial judge shall approve the transcript or statement of the evidence and shall authenticate the exhibits as soon as practicable after the filing thereof or after the expiration of the 15-day period for objections by appellee, as the case may be, but *in all events within 30 days after the expiration of said period for filing objections. Otherwise the transcript or statement of the evidence and the exhibits shall be deemed to have been approved and shall be so considered by the appellate court*, except in cases where such approval did not occur by reason of the death or inability to act of the trial judge.

Tenn. R. App. P. 24(f) (emphasis added). In this instance, the record does not reflect that the trial judge approved, rejected, or modified the statement of the evidence, and more than thirty days had elapsed since the expiration of the period for filing objections. As a result, we consider the statement of the evidence as if it was approved by the trial judge. *Id.*

Although it is deemed approved, we still must determine whether the statement of the evidence "is sufficient for this Court to conduct a meaningful review of the issues on appeal." *Marra v. Bank of New York*, 310 S.W.3d 329, 336 (Tenn. Ct. App. 2009). The statement of the evidence here consists primarily of a recitation of the filings in the case and the trial court's rulings. However, the statement does include a narrative of the testimony offered by Mr. Beckham. Therefore, to this rather limited extent, we find the statement of the evidence sufficient to address the issue presented by Mr. Beckham.

ADEQUACY OF THE CIRCUIT COURT'S FINDINGS OF FACT

In non-jury cases, the Tennessee Rules of Civil Procedure require the trial court to make findings of fact and conclusions of law. Rule 52.01 provides as follows:

> In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rules 41.02 and 65.04(6).

Tenn. R. Civ. P. 52.01. Requiring findings of fact and conclusions of law serves three purposes:

> First, findings and conclusions facilitate appellate review by affording a reviewing court a clear understanding of the basis of a trial court's decision. Second, findings and conclusions also serve "to make definite precisely what is being decided by the case in order to apply the doctrines of estoppel and res judicata in future cases and promote confidence in the trial judge's decision-making." A third function served by the requirement is "to evoke care on the part of the trial judge in ascertaining and applying the facts." Indeed, by clearly expressing the reasons for its decision, the trial court may well decrease the likelihood of an appeal.

Lovlace v. Copley, 418 S.W.3d 1, 34-35 (Tenn. 2013) (citations omitted).

The issue raised on appeal by Mr. Beckham requires consideration of two orders of the trial court. After Mr. Beckham removed some of his personalty from the real property owned by Mr. Brubaker, the court held a hearing, after which it entered the following order on April 26, 2011:

> This matter came to be heard on the 4th day of April, 2011 before the Honorable Judge George Sexton upon Complaint of the Plaintiff, John A. Brubaker, testimony of the parties and the witness of the Plaintiff and the entire record upon all of which the Court finds as follows:
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> 1. The Defendant, H. T. Beckham, is hereby restrained and enjoined from dumping anything further on the property located at 1972 Sandy Run Road, Ashland City, Tennessee.

2. All items which remain on the property located at 1972 Sandy Run Road, Ashland City, Tennessee shall be the sole property of the Plaintiff, John A. Brubaker.

3. The award of damages to the Plaintiff is reserved.

Following the entry of the April 26, 2011 order, Mr. Beckham filed a Motion for New Trial. On October 4, 2011, the trial court denied the motion for new trial, but it also expanded upon its ruling concerning the personalty. In particular, the order provided as follows: "The Court previously found that Defendant abandoned his property and the property became that of the Plaintiff when Defendant failed to remove the property." The statement that the "Defendant abandoned his property" is the closest either order came to a conclusion of law; neither order included findings of fact.

Although "[t]here is no bright-line test by which to assess the sufficiency of factual findings, . . . 'the findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue.'" *Lovlace*, 418 S.W.3d at 35 (quoting 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2579 (3d ed. 2005)). Because the trial court's orders of April 26 and October 4, 2011, contain no findings of fact, we cannot determine the basis upon which the trial court based its decision. We are left to wonder what act or acts of Mr. Beckham showed his intent to repudiate ownership of the personalty. *See Griffis v. Davidson Co. Metro. Gov't*, 164 S.W.3d 267, 278-79 (Tenn. 2005) ("To justify finding abandonment of property or a vested right, we have long required there to have been some clear and unmistakable affirmative act indicating an intent to repudiate ownership."). Perhaps more importantly, we cannot determine precisely what personalty was awarded to Mr. Brubaker. The personalty is described only as "property located at 1972 Sandy Run Road, Ashland City, Tennessee." As personal property is, by definition, "movable or intangible," *Property*, Black's Law Dictionary (10th ed. 2014), the description found in the order is unhelpful.

In a situation where the trial court has failed to make sufficient factual findings, appellate courts typically pursue one of two remedies. *Lovlace*, 418 S.W.3d at 36. The first is "to remand the case to the trial court with directions to issue sufficient findings and conclusions." *Id.* The second is to "conduct[] a de novo review of the record to determine where the preponderance of the evidence lies." *Id.*

In this case, neither remedy is available. We are unable to remand the case to the trial court because the trial judge retired in August 2014. *See In re Estate of Oakley*, No. M2014-00341-COA-R3-CV, 2015 WL 572747, at *12 (Tenn. Ct. App. Feb. 10, 2015). We cannot conduct a de novo review on the record because the record consists only of a marginal

statement of the evidence, exhibits, and the technical record.

Our Court faced a similar situation in *In re Estate of Oakley*. In that case, we pointed out that Rule 36(a) of the Tennessee Rules of Appellate Procedure "authorizes appellate courts to grant 'the relief on the law and facts to which the party is entitled or the proceeding otherwise requires.'" *Id.* (quoting Tenn. R. App. P. 36(a)). In applying that rule to the situation in *In re Estate of Oakley*, we determined that "the trial court's failure to comply with Rule 52.01 of the Tennessee Rules of Civil Procedure requires this court to vacate the judgment and remand for a new trial." *Id.* We conclude that the same remedy is necessary in this case.

ATTORNEY'S FEES

Finally, Mr. Brubaker requests that we award him attorney's fees incurred in defending this appeal. As pointed out by Mr. Brubaker, an award of attorney's fees on appeal is a matter within this Court's sound discretion. *Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). When this Court considers a request for attorney's fees on appeal, we consider the requesting party's ability to pay such fees, the requesting party's success on appeal, whether the appeal was taken in good faith, and any other equitable factors relevant in a given case. *Darvarmanesh v. Gharacholou*, No. M2004-00262-COA-R3-CV, 2005 WL 1684050, at *16 (Tenn. Ct. App. July 19, 2005). When we consider all of the relevant factors in this case, we respectfully decline to exercise our discretion to award Mr. Brubaker his attorney's fees.

CONCLUSION

Because the orders do not satisfy the requirements of Rule 52.01 of the Tennessee Rules of Civil Procedure, we vacate the trial court's orders awarding certain personalty to Mr. Brubaker based on abandonment and remand for further proceedings consistent with this opinion. We deny Mr. Brubaker's request for an award of attorney's fees on appeal.

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W. NEAL MCBRAYER, JUDGE