IN DISCIPLINARY DISTRICT IX
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

IN RE: AMY P. WEIRICH
BPR No. 14441, Respondent,
An Attorney Licensed to Practice
Law in Tennessee
(Shelby County)

DOCKET NO. 2015-2533-9-KH

AMY WEIRICH MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

The Respondent Amy P. Weirich ("Mrs. Weirich") respectfully moves for summary judgment pursuant to Rule 56 of the Tennessee Rules of Civil Procedure and Rule 9 of the Tennessee Supreme Court Rules. Mrs. Weirich would show that there is no genuine issue of material fact and that she is entitled to a judgment of dismissal of this disciplinary proceeding as a matter of law.

This disciplinary proceeding results from the trial and appeals in the Noura Jackson criminal matter. The Opinion of the Tennessee Supreme Court is an exhibit to the Petition filed by the Tennessee Board of Professional Responsibility ("the Board"). The Board's Petition relies on this Opinion.

The Supreme Court held that the rebuttal closing argument of Mrs. Weirich violated the constitutional rights of Ms. Jackson. The five members of the Tennessee Supreme Court were among the nine judges who considered the rebuttal closing argument of Mrs. Weirich.

Rule 10 of the Tennessee Supreme Court Rules contains the Code of Judicial Conduct.

Rule 2.15 of Rule 10, along with its Comments, provides:

Rule 2.15 Responding to Judicial and Lawyer Misconduct

(A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

Comment

[1] Taking action to address known misconduct is a judge's obligation. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

[2] A judge who does not have actual knowledge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating

directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.

As is apparent, Rule 2.15 (B) and (D) are not permissive or advisory; they are mandatory. The Comments confirm this. Judge Kirby emphasized the mandatory nature of Rule 2.15 in *Green v. Champs-Elysees, Inc.*, 2014 WL 644726, stating that Rule 2.15 is one "requiring (a) judge with knowledge of a lawyer's violation of (the) Rules of Professional Conduct to inform (the) appropriate authorities". Id. at fn 9 (opinion attached).

Judge Kirby's description of Rule 2.15 came within the context of a disciplinary referral to the Board by the Court of Appeals.

With regard to Mrs. Weirich's rebuttal argument, two points are beyond refute:

First, all nine of the judges before whom the Noura Jackson matter was presented were thoroughly familiar with all of the facts and factors which related in any way to Mrs. Weirich's rebuttal. The Tennessee Supreme Court even waived its normal rules to allow a video viewing of the rebuttal closing argument although it ultimately declined to consider the video.

Second, the propriety of the rebuttal closing argument was considered by all nine of the judges.

In short, there can be no claim that Rule 2.15 did not come into play. All nine judges had actual knowledge of the relevant facts. All nine judges had specific occasion to consider the propriety of the argument. If there were ethical issues as the Board has alleged, they would unquestionably fall within the ambit of Rule 2.15.

Everything said thus far is clearly established in the record and is beyond dispute. This is a Motion for Summary Judgment only because one additional fact needs to be established in the record: Given the mandatory requirement of Rule 2.15, what did the Supreme Court – or any of the nine judges – do to satisfy the Rule's requirement if, as the Board alleges, there was an

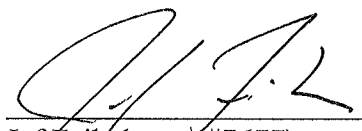
ethical violation. The answer, established by the parties' Stipulation which is Exhibit 1 hereto, is that not one of the nine judges did anything. There was no report to the Board by any of the nine judges.

The inaction of the nine judges - and particularly the Supreme Court – is conclusive as to the allegations in the Petition filed against Mrs. Weirich. Had the judges determined that there was any basis for a charge of unethical conduct to be lodged against Mrs. Weirich, every one of them was under an affirmative, mandatory duty to take action, most likely to make a referral to the Board. This is exactly what Judge Kirby did in *Green v. Champs-Elysees, Inc.*, supra. Not one of the nine judges did it here.

Rather, in the face of the judges' clear determination, the Board has chosen to substitute its judgement for theirs. This is obviously impermissible. The Supreme Court adopted our State's disciplinary rules, and it is the final arbiter of their meaning and when they have or have not been violated. By their inaction in the face of the requirement of Rule 2.15, the nine judges have spoken in this matter and their word is conclusive. The Petition filed by the Board must be dismissed.

Respectfully submitted,

BURCH, PORTER & JOHNSON, PLLC

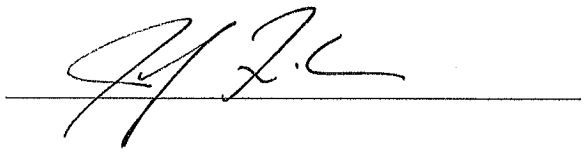


Jef Feibelman (#7677)
130 North Court Avenue
Memphis, TN 38103
Telephone: (901) 524-5109
Facsimile: (901) 524-5024
Email: jfeibelman@bpjlaw.com

Counsel for Respondent Amy P. Weirich

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been served upon Chief Disciplinary Counsel Sandy Garrett and Deputy Chief Disciplinary Counsel Krisann Hodges, Tennessee Board of Professional Responsibility, 10 Cadillac Drive, Suite 220, Brentwood, Tennessee 37027, by First Class US mail, postage prepaid on this 28th day of September, 2016.



IN DISCIPLINARY DISTRICT IX
OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY
OF THE
SUPREME COURT OF TENNESSEE

IN RE: **AMY P. WEIRICH**
BPR No. 14441, Respondent,
An Attorney Licensed to Practice
Law in Tennessee
(Shelby County)

DOCKET NO. 2015-2533-9-KH

STIPULATION

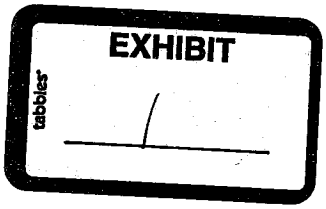
The parties do hereby stipulate that in the matter of *State of Tennessee v. Noura Jackson* no report to the Tennessee Board of Professional Responsibility was made by the trial judge, the members of the Tennessee Court of Criminal Appeals or the Tennessee Supreme Court. In making this stipulation the Tennessee Board of Professional Responsibility denies that the stipulated fact is of any materiality or relevance to any issue in this disciplinary proceeding.

Respectfully submitted,

Jef Feibelman (#7677)
BURCH, PORTER & JOHNSON, PLLC
130 North Court Avenue
Memphis, TN 38103
Telephone: (901) 524-5109
Facsimile: (901) 524-5024
Email: jfeibelman@bpjlaw.com

Counsel for Respondent Amy P. Weirich

Krisann Hodges (#17086)
Deputy Chief Disciplinary Counsel
BOARD OF PROFESSIONAL RESPONSIBILITY
10 Cadillac Drive, Suite 220
Brentwood, TN 37027
Telephone: (615) 361-7502



2014 WL 644726
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

John Wesley GREEN, Individually and as a Shareholder of Champs–Elysees, Inc.
v.
CHAMPS–ELYSEES, INC., Edna L. Green, Ellen Green, Personal Representative of the Estate of Mark Green, and Arthur Fourier, Individually and as the Board of Directors and Shareholders of Champs–Elysees, Inc.

No. M2013–00232–COA–R3–CV.
|
Sept. 24, 2013 Session.
|
Feb. 18, 2014.

Appeal from the Chancery Court of Davidson County, No. 05–2817–IV, Russell T. Perkins, Chancellor.

Attorneys and Law Firms

James D.R. Roberts, Jr. and Janet L. Layman, Nashville, Tennessee for Plaintiff/Appellants John Wesley Green and James D.R. Roberts, Jr.

Mark A. Baugh and Nancy A. Vincent, Nashville, Tennessee for Defendant/Appellees Champs–Elysees, Inc. and the Personal Representative of Mark Green.

HOLLY M. KIRBY, J., delivered the Opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and DAVID R. FARMER, J., joined.

OPINION

HOLLY M. KIRBY, J.

*1 This appeal stems from the denial of a Rule 60.02 motion, filed by an attorney on his own behalf, to set aside an order. The attorney tried unsuccessfully to derail a sheriff's sale of his client's property through the use of an elaborate contrivance. In the aftermath, contempt charges were filed against the attorney. In the ensuing civil contempt proceedings, the trial court entered an order that concluded that the trial court was unable to hold the errant attorney in civil contempt of court. The order included *obiter dictum* in which the trial court questioned the attorney's veracity as an officer of the court, stated that he could have been held in criminal contempt had he been charged with such, and referred the matter to the Board of Professional Responsibility. Over five years later, the attorney and his client filed the Rule 60.02 motion that is the subject of this appeal, asking the trial court to set aside the order with the offending *dicta*. The trial court dismissed the Rule 60.02 motion, finding that it either did not have subject matter jurisdiction to set aside the order or, in the alternative, that the motion to set aside was untimely and without merit. The attorney and his client appeal. We reverse the trial court's holding that it lacked subject matter jurisdiction to adjudicate the Rule 60.02 motion, but affirm the trial court's alternative holding that the motion to set aside is untimely and wholly without merit. In light of improper statements made in the attorney's appellate brief about the trial judge, we also find it necessary to refer the appellant attorney to the Board of Professional Responsibility.

FACTS AND PROCEDURAL HISTORY

This is the *fifth* appeal arising out of a long-running family business dispute.[1] In the underlying case, Plaintiff/Appellant John Wesley Green ("Son") sued his mother ("Mother") to enforce a contract in which Mother agreed to sell Son her stock in the family business, Defendant/Appellee Champs–Elysees, Inc. *See Green v. Green* ("*Green I* "), No. M2006–02119–COA–R3–CV, 2008 WL 624860 (Tenn.Ct.App. Mar. 5, 2008). Champs–Elysees, Inc. intervened and filed a counterclaim against Son. At all times pertinent to this appeal, Son was represented by attorney James D.R. Roberts, Jr. ("Attorney Roberts"), also an Appellant herein.[2]

In 2006, the trial court in the underlying case eventually granted summary judgment in favor of Mother and Champs–Elysees, Inc. and awarded a judgment to Champs–Elysees against Son in the amount of $46,000. *Green I*, 2008 WL 624860, at *2–3. Son appealed the trial court's decision in October 2006. This Court reversed the trial court's grant of summary judgment and the Supreme Court later affirmed the intermediate appellate court. *See Green v. Green* ("*Green II* "), 293 S.W.3d 493, 497 (Tenn.2009); *Green I*, 2008 WL 624860, at * 10.

In the meantime, while the first appeal was pending, Son was unable to post an appropriate bond for the appeal, so he was unable to avoid execution on the outstanding judgment against him. Consequently, Mother and Champs–Elysees, Inc. issued an attachment to sell Son's shares of stock in Champs–Elysees, Inc., in order to satisfy the judgment. The sheriff posted the required notice to sell the stock. Unfortunately, on the notice, the sheriff slightly misspelled the name of the company by omitting one "s"; the notice stated that the subject of the sale would be shares of "Champs–Elyees, Inc." as opposed to the correct spelling, "Champs–Elysees, Inc."

*2 Attorney Roberts noticed this misspelling on the notice of sale. Instead of shrugging it off as a harmless typographical error, Attorney Roberts apparently took the position that the misspelling made the notice of sale fatally defective and would render the sale invalid. On this basis, Attorney Roberts contacted the attorney for Mother and Champs–Elysees, Inc., Eugene Bulso, and asked him to delay the sale for correction of the notice and republication. Attorney Roberts also asked the sheriff to correct the spelling and republish the notice. Both requests were unavailing, so Attorney Roberts then filed a motion with the trial court, Chancellor Carol L. McCoy, seeking either a temporary injunction or alternatively to quash the execution date. The motion argued that the misspelling on the notice of sale would result in irreparable harm to Son because confusion over the name would surely reduce the proceeds from the sale.[3] The trial court denied this motion and permitted the sale to proceed as scheduled.

Meanwhile, about a week before the scheduled sheriff's sale of Son's stock, a personal friend of Attorney Roberts, George Christopher Armstrong, filed articles of incorporation with the Tennessee Secretary of State to create a new corporation. It so happened that the newly-formed corporation incorporated by Mr. Armstrong bore the name "Champs–Elyees, Inc.," the slightly misspelled version of the corporate name that appeared on the notice for the sheriff's sale of Son's stock in Champs–Elysees, Inc.

The day of the sheriff's sale, Attorney Roberts and Mr. Armstrong came to the sale early. They were armed with a video camera to capture the interaction among those in attendance. In addition to the sheriff's deputy, Attorney Roberts and Mr. Armstrong, Mr. Bulso, the counsel for Mother and Champs–Elysees, Inc., was present at the sale. In an apparent attempt to make a point about the misspelled name, Attorney Roberts engaged in a convoluted exchange with the sheriff's deputy about the property that was the subject of the sale:

MR. ROBERTS: Are you going to sell the property that's in the Notice of Sale?

[DEPUTY]: Property that's in the Notice of Sale?

MR. ROBERTS: Well, the Notice—

[DEPUTY]: I'm going to sell this right here (indicating).

MR. ROBERTS: No. Well, the Notice of Sale says it's Champs–Elyees, Incorporated.

[DEPUTY]: Oh.

MR. ROBERTS: Your notice right there.

[DEPUTY]: Oh. That's where I didn't type it right. And I think you're the one that called me on that.

MR. ROBERTS: Was there ever—

[DEPUTY]: I'm going to sell the one that's on this levy.

MR. ROBERTS: Was there ever any re-notice or any publication with the correct corporate name on it?

[DEPUTY]: No.

MR. ROBERTS: The reason I ask, this gentleman that's here—

MR. ARMSTRONG: I am the holder of the corporation that is named in your levy—or in this notice. I'm just wondering if you're planning to sell my shares this morning.

*3 [DEPUTY]: I misspelled this right here (indicating).

* * *

MR. ROBERTS: But there is actually, apparently, a corporation in the state of Tennessee under that name.

[DEPUTY]: Well, I can—I can—I'm selling off of this levy here (indicating).

* * *

MR. ROBERTS [to Mr. Armstrong]: You brought your stock certificate with you?

MR. ARMSTRONG: I have my stock certificate with me.

MR. ROBERTS [to the deputy]: If that's the property you're going to sell, I just want to make sure—

* * *

[DEPUTY]: I just misspelled the name on this notice.

MR. ROBERTS: Well, it says as evidenced by certificate—

At this point, Mr. Bulso apparently realized what Attorney Roberts had done, prompting him to sputter:

MR. BULSO: (Inaudible) kind of lawyer this man is.

[DEPUTY]: I'm not going to get into any kind of—Overlapping speech)

MR. BULSO: (Inaudible) go and file a corporation.

[DEPUTY]: We're going to sell this.

Despite Attorney Roberts' actions, the sheriff's deputy proceeded with the sale. The stock was purchased by Son's brother, Mark Green, an officer in Champs–Elysees, Inc.

In short order, Mr. Bulso filed a civil contempt petition against Attorney Roberts for his actions with regard to the sheriff's sale of Son's stock. The contempt petition accused Attorney Roberts of forming a bogus corporation in the misspelled corporate name that appeared on the notice for the sheriff's sale, for the purpose of obstructing and delaying lawful execution on his client's property. In response, Attorney Roberts maintained that he had done nothing improper.

The trial court scheduled a hearing on the contempt petition. Prior to the hearing, Mr. Armstrong was subpoenaed to appear and testify. Mr. Armstrong retained an attorney who filed a motion to quash the subpoena on the day of the scheduled hearing.

The contempt hearing convened as scheduled; Mr. Armstrong did not appear. His lawyer was present at the hearing but professed not to know Mr. Armstrong's whereabouts. The trial court issued a bench warrant for Mr. Armstrong's arrest. The hearing then proceeded with testimony from Attorney Roberts.

In response to Mr. Bulso's questions, Attorney Roberts testified that Mr. Armstrong secured the charter for the new corporation in the misspelled name, and that he, Attorney Roberts, did not approach Mr. Armstrong to do so. Attorney Roberts declined to answer further questions regarding his role with respect to the formation of the new corporation, citing the attorney-client privilege; he claimed that Mr. Armstrong retained him as his attorney on approximately the date the new corporation was incorporated and that Mr. Armstrong instructed him not to disclose privileged information. Attorney Roberts dodged questions on how Mr. Armstrong came to know about the misspelled corporate name on the sheriff's notice and what prompted Mr. Armstrong to decide to form the new corporation in the misspelled name, claiming variously that the answer either called for speculation or required him to divulge privileged information or that he did not remember. The hearing was then continued until Mr. Armstrong could be located.

*4 The next day, Mr. Armstrong appeared in court with his attorney to explain his failure to appear. In that appearance, among other things, Mr. Armstrong said that Attorney Roberts was not his attorney in 2006, the year in which the subject sheriff's sale was held; Attorney Roberts had represented Mr. Armstrong in a domestic matter several years prior but nothing since. The trial court promptly held Mr. Armstrong in willful contempt for his failure to appear at the hearing the day before and ordered him to appear for the rescheduled hearing on the contempt petition against Attorney Roberts.

At the rescheduled hearing on the contempt petition against Attorney Roberts, Mr. Armstrong acknowledged that he was a "very close friend of Mr. Roberts." He said that Attorney Roberts told him about the misspelled corporate name on the notice and "brought up the concept of forming the [new] corporation in the misspelled name." In response, Mr. Armstrong offered to incorporate such a corporation, as a favor to Attorney Roberts. Attorney Roberts' associate then set up the new corporation for Mr. Armstrong. Attorney Roberts, not Mr. Armstrong, brought the stock certificate for the newly formed corporation to the sheriff's sale.

On April 4, 2007, Chancellor McCoy issued an order on the contempt petition against Attorney Roberts. After recounting the proceedings and the testimony, the trial court stated:

> The Court finds Mr. Roberts' testimony in response to direct questions by Mr. Bulso about the formation of the new corporation to be evasive, and his testimony about the purpose for which the new corporation was formed and his role in its formation to be untruthful. Further, the Court finds that Mr. Roberts was not truthful about his professional relationship with Mr. Armstrong, misusing the attorney-client privilege in an attempt to avoid having to testify fully and completely as to his own conduct in the corporation's formation.

The trial court found that Attorney Roberts "intended to interfere with" the order permitting execution on the judgment against Son "by disrupting the judicial Sheriff's sale with the stock in the new company." However, despite Attorney Roberts' intent to disrupt the sale, the trial court observed, "the facts do not demonstrate that he actually disrupted the sale."

Chancellor McCoy's order noted that, at the outset of the contempt hearing, she inquired about whether the petition sought relief for civil or criminal contempt; Mr. Bulso told the trial court that he sought relief only for civil contempt. With that clarification, the order stated:

> This Court is of the opinion that Mr. Roberts' conduct rises to the level of criminal contempt pursuant to Tenn.Code Ann. § 29–9–102(2) and (3), but Mr. Roberts was not charged with criminal contempt, a serious charge that requires that he be given adequate notice of the charges against him, the right to counsel and to remain silent and that his guilt be established beyond a reasonable doubt. Given the due process requirements triggered by a criminal contempt action, the Court is of the opinion that it cannot impose additional sanctions upon Mr. Roberts for his conduct prior to and at the judicial sale, or for his involvement with Mr. Armstrong's conduct in the matter, including Mr. Armstrong failure to obey the subpoena. However, the Court finds Mr. Roberts' testimony throughout this proceeding to be evasive and untruthful, which causes the court grave concern about Mr. Roberts' veracity as an officer of the Court and as a witness under oath. Accordingly, the Clerk is directed to forward to the Board of Professional Responsibility a copy of the transcripts from the contempt hearing all orders issued pursuant to the Verified Petition for Contempt, including the Order in which Mr. Armstrong was found in contempt for wilful failure to obey his subpoena.

***5** Thus, the trial court stated that even though Attorney Roberts' conduct rose to the level of criminal contempt, he had not been charged with criminal contempt nor afforded the protections associated with a charge of criminal contempt. Therefore, the trial court declined to hold Attorney Roberts in contempt of court. However, in light of the trial court's understandable concern about Attorney Roberts' conduct, the trial court forwarded the transcripts of the proceedings to the Board of Professional Responsibility for its consideration. Nothing in the appellate record indicates that the trial court's April 2007 order was ever appealed.

After that, the underlying proceeding continued apace; eventually, in November 2011, the trial court conducted an eight-day trial. A notice of appeal for the underlying proceeding was filed on June 26, 2012. *See Green v. Green.* ("*Green IV* "), No. M2012–01352–COA–R3–CV, 2013 WL 1458890 (Tenn.Ct.App. Apr. 9, 2013).

Subsequently, in October 2012, over five years after the trial court entered its April 4, 2007 order on the contempt petition against Attorney Roberts, Appellants Son and Attorney Roberts filed a motion to set the order aside pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. In this motion, the Appellants argued that, during the November 2011 trial in the underlying proceeding, they supposedly learned for the first time that Chancellor McCoy had knowledge that the sheriff's sale of Son's stock "was not being legally conducted" because of the misspelling in the notice of the sale, and that Chancellor McCoy was actively involved in allowing the sale to proceed while Son's motion to quash was pending. The Appellants claimed that trial testimony by a court clerk caused them to realize Chancellor McCoy's true motivation behind the contempt proceedings and order;

they asserted that the order on the contempt petition was purportedly "entered for an improper purpose, i.e. to cover up the Court's knowledge of its own mistake." Based on this purportedly new knowledge, the Appellants asked the trial court to set aside the prior order and enter a new one on the contempt petition against Attorney Roberts. The Appellants wanted the *holding* in the substitute order to remain the same, i.e., dismiss the contempt petition against Attorney Roberts. However, the Appellants asserted that the substitute order should not include any of Chancellor McCoy's additional commentary regarding Attorney Roberts' conduct and the need for a referral to the Tennessee Board of Professional Responsibility.

This matter was heard by Chancellor Russell T. Perkins. Chancellor Perkins declined to hold a hearing on the Appellants' Rule 60 motion, citing a Local Rule permitting the trial courts to decide motions without a hearing "particularly repetitive and groundless motions." The trial court first stated: "Given that this case is on appeal, this Court may not have subject matter jurisdiction to entertain this motion." However, in the alternative, the trial court held, "if this Court has jurisdiction over the issues raised by this motion, the Court denies[4] it on the ground that the Motion [ ]: 1)[is] untimely, repetitive, and wholly without substantive merit; 2) does not meet any standards set out in Tenn. R. Civ. P. 60; and 3)[is] wholly groundless for all the reasons that Court has previously stated in denying similar motions."[5]

*6 Dissatisfied with this holding, in November 2012, Son and Attorney Roberts filed a motion to alter or amend the order denying their motion to set aside. In the motion to alter or amend, they argued that a "contempt proceeding is a separate proceeding from the underlying case" and that "the trial court has not lost jurisdiction to hear the Rule 60 motion." They maintained that the Rule 60 motion was filed within one year of learning about "the Court's involvement in the illegal Sheriff sale." The trial court denied the motion to alter or amend as well. As in the order adjudicating the Rule 60 motion, the trial court held that it was without subject matter jurisdiction because the appeal in the underlying lawsuit was pending, and in the alternative denied the motion as "untimely, repetitive, and wholly without substantive merit."

From this, the Appellants now appeal.

ISSUES ON APPEAL AND STANDARD OF REVIEW

On appeal, the Appellants argue that the trial court erred in denying their Rule 60 motion to set aside the April 4, 2007 order on the contempt petition against Attorney Roberts.[6] In the course of arguing this issue, the Appellants contend that the trial court did not have subject matter jurisdiction to adjudicate the contempt petition against Attorney Roberts while the underlying case against Son was pending on appeal after the 2006 summary judgment motion. Alternatively, in the event that it is determined the trial court did have subject matter to address the contempt petition, Appellants argue that this Court should set aside the April 4, 2007 order on the basis that it was not properly entered, rather done as "a means of covering up [Chancellor McCoy's] own bad acts."

"Whether a court has subject matter jurisdiction over a case is a question of law that we review *de novo* with no presumption of correctness." *Morgan Keegan & Co., Inc. v. Smythe,* 401 S.W.3d 595, 602 (Tenn.2013); *Northland Ins. Co. v. State,* 33 S.W.3d 727, 729 (Tenn.2000).

The trial court's disposition of a motion for relief from judgment under Rule 60.02 of the Tennessee Rules of Civil Procedure is reviewed on appeal under an abuse of discretion standard. *Pryor v. Rivergate Meadows Apartment Assocs. Ltd. Partnership,* 338 S.W.3d 882, 885 (Tenn.Ct.App.2009); *Hungerford v. State,* 149 S.W.3d 72, 76 (Tenn.Ct.App.2003). Under this standard of review, the appellate court will not substitute its judgment for that of the trial court; the trial court's ruling will not be set aside unless the trial court "applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." *Pryor,* 338 S.W.3d at 885 (quoting *Henry v. Goins,* 104 S.W.3d 475, 479 (Tenn.2003); *State v. Stevens,* 78 S.W.3d 817, 832 (Tenn.2002)).

ANALYSIS

Subject Matter Jurisdiction

In the course of making their argument that the trial court erred in holding that it did not have subject matter jurisdiction to adjudicate the Appellants' Rule 60 motion, they argue that if Chancellor Perkins was correct in holding that he lacked subject matter jurisdiction to adjudicate the Rule 60 motion, then Chancellor McCoy must have also lacked subject matter jurisdiction to adjudicate the contempt petition against Attorney Roberts.

It is unclear whether this circuitous argument is made as a genuine argument that Chancellor McCoy lacked subject matter jurisdiction or just as part of the original argument that Chancellor Perkins erred in his disposition of the Rule 60 motion. Moreover, the Appellants point to no place in the record in which the argument was made to the trial court below. Regardless, the argument involves subject matter jurisdiction, and questions involving subject matter jurisdiction are not waived even if they are not raised in the trial court. "[I]t is well-settled that subject matter jurisdiction cannot be waived...." *Bernatsky v. Designer Baths & Kitchens, LLC,* No.W2012–00803–COA–R3–CV, 2013 WL 593911, at *21 (Tenn.Ct.App. Feb. 15, 2013); Tenn. R.App. P. 13(b). Therefore, we will address it.

*7 The Appellants argue that, because the 2006 appeal in the underlying case was pending at the time the contempt petition against Attorney Roberts was filed, the trial court did not have subject matter jurisdiction to hear the contempt petition or enter an order on it; thus the trial court's April 4, 2007 order should be deemed void. The Appellants rely on the general proposition that "once a party perfects an appeal from the trial court's final judgment, the trial court effectively loses its authority to act in the case without leave of the appellate court." *First American Trust Co. v. Franklin–Murray Development Co., L.P.,* 59 S.W.3d 135, 141 (Tenn.Ct.App.2001).

We must reject this argument. "A contempt proceeding is *sui generis,* and is 'incidental' to the case out of which it arises." *Poff v. Poff,* No. 01–A–01–9301–CV00024, 1993 WL 73897, at *2 (Tenn.Ct.App. Mar. 17, 1993)(internal citation omitted). *See also Doe v. Bd. of Prof'l Responsibility of Supreme Court of Tennessee,* 104 S.W.3d 465, 474 (Tenn.2003). Thus, "[c]ontempt proceedings commenced after the entry of an otherwise final order in the underlying case should be viewed as independent proceedings." *Poff,* 1993 WL 73897, at *2. Accordingly, "a trial court can consider a petition for post-judgment contempt even while one of the parties is pursuing an appeal." *Glover v. Glover,* No. E2002–01690–COA–R3–CV, 2003 WL 465606, at * 1 n. 2 (Tenn.Ct.App. Feb. 25, 2003). *See also Vengrin v. State,* No. W2006–02539–CCA–R3–PC, 2008 WL 4071834, at *3 (Tenn.Ct.Crim.App., Aug. 29, 2008) (trial court had jurisdiction to adjudicate contempt action after appellant's conviction and sentence became final). In this case, Attorney Roberts was charged with contempt in the course of execution on the judgment that was on appeal; the contempt proceedings were related to, but independent from, the underlying case that was on appeal. Chancellor McCoy clearly had subject matter jurisdiction to adjudicate the contempt petition filed against Attorney Roberts.

Failing this, the Appellants next contend that Chancellor Perkins erred in ruling that he did not have subject matter jurisdiction to adjudicate the Rule 60.02 motion to set aside the 2007 order on the contempt petition against Attorney Roberts. The Appellants argue that the Rule 60.02 motion to set aside "stems from the contempt proceedings and not from the underlying case." In response, Appellee Champs–Elysees maintains that the trial court correctly held that it did not have jurisdiction to consider the Rule 60.02 motion because the motion was filed while the underlying case was pending on appeal again in 2012. Champs–Elysees points out that the Tennessee Supreme Court has stated: "If a party wishes to seek relief from the judgment during the pendency of an appeal, he should apply to the appellate court for an order of remand." *Spence v. Allstate Ins. Co,* 883 S.W.2d 586, 596 (Tenn.1994).

We agree with the Appellants on this issue. The Appellants filed the Rule 60.02 motion to set aside the April 2007 order on the contempt petition against Attorney Roberts. As discussed above, the contempt petition was *sui generis,* related to the underlying case but independent from it. For the reasons discussed above, the fact that the underlying case was pending on appeal did not deprive Chancellor Perkins of subject matter jurisdiction to adjudicate the Appellants' Rule 60.02 motion to set aside. Thus, to the extent that Chancellor Perkins held that the trial court did not have subject matter jurisdiction to consider the Rule 60.02 motion,[7] we must respectfully reverse that ruling.

Rule 60.02 Motion

***8** The Appellants next argue that the trial court abused its discretion in denying the Appellants' Rule 60.02 motion to set aside the April 4, 2007 contempt order. As noted above, the trial court below held that the Rule 60.02 motion was "untimely, repetitive, and wholly without substantive merit." We agree with the trial court.

At the outset, we must question whether Rule 60.02 can apply at all in this situation. Chancellor McCoy's April 2007 order in fact *dismissed* the contempt petition against Attorney Roberts. On appeal, the Appellants do not seek relief from the *holding* in the 2007 order; rather, the Appellants seek only to set aside the *dicta* in the order stating that Attorney Roberts was untruthful and that his conduct amounted to criminal contempt of court. However, we do not reach the issue of whether

60.02 is a vehicle for such relief; rather we assume *arguendo* that it is applicable, only for the purpose of this appeal.

Rule 60.02 provides for an "exceptional remedy." *Nails v. Aetna Insurance Co.*, 834 S.W.2d 289, 294 (Tenn.1992); *see also Steioff v. Steioff*, 833 S.W.2d 94, 97 (Tenn.Ct.App.1992). Rule 60.02 seeks "to strike a proper balance between the competing principles of finality and justice." *Jerkins v. McKinney*, 533 S.W.2d 275, 280 (Tenn.1976); *Jackson v. Jewell*, No. M2011–01838–COA–R3–CV, 2012 WL 2051103, at *2 (Tenn. Ct.App. June 6, 2012). It serves as "an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules." *Jackson*, 2012 WL 2051103, at *2 (citing *Thompson v. Firemen's Fund Insurance Co.*, 798 S.W.2d 235, 238 (Tenn.1990)). "Because of the importance of this principle of finality, the escape valve should not be easily opened." *Rogers v. Estate of Russell*, 50 S.W.3d 441, 445 (Tenn.Ct.App.2001). As to timeliness, Rule 60.02 provides that such a motion "shall be made within a reasonable time" after entry of the judgment from which relief is sought. Tenn. R. Civ. P. 60.02; *Rogers*, 50 S.W.3d at 445.

In this case, the Appellants' Rule 60.02 motion was filed on October 18, 2012, over five and half years after the April 2007 order adjudicating the contempt petition against Attorney Roberts. The Appellants claim that the five-and-a-half year time period is reasonable and that there is valid basis for setting aside the 2007 order because they learned important new information in the course of the November 2011 trial in the underlying proceeding. They point to testimony in the trial from a court clerk that the sheriff's sale proceeded at Chancellor McCoy's direction. They contend that the court clerk's testimony indicated that Chancellor McCoy "knew the facts of the situation" and nevertheless permitted the sheriff's sale to proceed.[8] They improperly insinuate, without any basis, that the Chancellor McCoy was untruthful and utilized the contempt proceedings to cover up some sort of misconduct.

***9** Upon careful review of the record, we agree with the trial court that the Appellants' Rule 60.02 motion is both untimely and wholly without merit. We reject it entirely.

The Appellants' argument is not only without merit, it is also high irony. In the trial court below, Chancellor McCoy appropriately felt it necessary to report Attorney Roberts' misconduct—a charade cooked up to disrupt the sheriff's sale—to the Board of Professional Responsibility of the Supreme Court of Tennessee. In this appeal, the Appellants make unwarranted accusations impugning the integrity of the learned trial judge for the purpose of deflecting attention away from Attorney Roberts' flagrant misconduct in the trial court below. The Appellants' baseless and improper assertions about Chancellor McCoy now compel us to direct the Clerk of the Appellate Courts to send to the Board of Professional Responsibility a copy of this Opinion, the Appellants' appellate briefs, and the recording of the oral argument in this appeal, for the Board's consideration as to whether Attorney Roberts has committed further misconduct in the course of this appeal.[9]

We find no abuse of the trial court's discretion in denying the Appellants' Rule 60.02 motion to set aside the April 4, 2007 contempt order, and so affirm the trial court's denial of the motion on its merits.

All other arguments raised on appeal are pretermitted by this decision.

CONCLUSION

The decision of the trial court is reversed in part and affirmed in part. Costs on appeal are assessed against Appellants John Wesley Green and James D.R. Roberts, Jr. and their surety, for which execution may issue if necessary.

All Citations

Not Reported in S.W.3d, 2014 WL 644726

Footnotes

1 For a more complete recitation of the facts and tortured procedural history of this case, see *Green v. Green*, ("*Green II*"), 293 S.W.3d 493 (Tenn.2009); *See Green v. Green*, ("*Green IV*"), No. M2012–01352–COAR–3–CV, 2013 WL 1458890 (Tenn .Ct.App. Apr. 9, 2013); *Green v. Green*, ("*Green III*"), No. M2007–00591–COA–R3–CV, 2009 WL 3672806, at * 1 (Tenn.Ct.App. Nov. 4, 2009) and *Green v. Green*, ("*Green I* ") No. M2006–02119–COA–R3–CV, 2008 WL 624860 (Tenn.Ct.App. Mar. 5, 2008).

2 Appellant Roberts and Son may be referred to collectively herein as the "Appellants."

3 Neither the motion to quash nor the order adjudicating it are in the appellate record.

4 The original order used the language "would deny." A corrected order entered the same day changed it to "denies."

5 The trial court added: "[T]his Court respectfully declines to exert veto power over credibility and other findings made by another Chancellor more than five years ago, particularly where, as here, those findings have absolutely no bearing on the merits of this case ."

6 In the body of the Appellants' brief, they argue that the trial court erred in denying the motion to set aside the order denying their Rule 60 motion to alter or amend. The Appellants did not list this in the Statement of Issues in their brief. Consequently, this issue is deemed waived on appeal and we decline to address it. *See Childress v. Union Realty Co., Ltd.*, 97 S.W.3d 573, 578 (Tenn.Ct.App.2002) ("We consider an issue waived where it is argued in the brief but not designated as an issue.").

7 The trial court's order stated that it "may not" have subject matter jurisdiction.

8 In their appellate brief, the Appellants make several arguments that might have been appropriate on appeal had the 2007 order been appealed. For example, the Appellants contend that the trial court allegedly violated Tennessee Code Annotated § 26–2–408 in failing to resolve a motion to quash prior to the sheriff's sale. It is important to note that "Rule 60.02 does not 'permit a litigant to slumber on her claims and then belatedly attempt to relitigate issues long since laid to rest.' " *Furlough v. Spherion Atl. Workforce, LLC*, 397 S.W.3d 114, 128 (Tenn.2013) (quoting *Thompson*, 798 S.W.2d at 238). Arguments that could have been raised in an appeal of the trial court's April 2007 order are irrelevant to an appeal from the denial of a Rule 60.02 motion filed over five years after the 2007 order became final, so we decline to address them.

9 Rule 8.2(a)(1) of the Tennessee Rules of Professional Conduct provides that a lawyer "shall not make a statement ... with reckless disregard as to its truth or falsity concerning the ... integrity of ... a judge." Tenn. Sup.Ct. R. 8.2(a)(1) (2011). *See also*, Tenn. Sup.Ct. R. 10, R. 2.15(B) (requiring judge with knowledge of a lawyer's violation of Rules of Professional Conduct to inform appropriate authorities).

End of Document