IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
MIDDLE DISTRICT AT NASHVILLE

NANDIGAM NEUROLOGY, PLC ET AL,	)	
	)	
PLAINTIFFS/APPELLANTS.	)	
	)	
VS.	)	CASE #M2020-00553-COA-R3-CV
	)	
KELLY BEAVERS,	)	WILSON COUNTY
	)	CIRCUIT COURT,
DEFENDANT/APPELLEE.	)	CASE NO's. 2020-CV-89 &
	)	2020-CV-152

ON TRANSFER FROM THE CIRCUIT COURT
FOR WILSON COUNTY, TENNESSEE
JUDGE CLARA BYRD PRESIDING

REPLY BRIEF OF APPELLANTS

ANGELLO L. HUONG (BPR # 021209)
Attorney for Appellants Nandigam Neurology PLC
and Kaveer Nandigam, M.D.
435 Park Avenue
Lebanon, TN 37087
Phone (615) 453-7530
Fax (615) 453-7531
e-mail: angellohuong@hotmail.com

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES AND OTHER AUTHORITIES

CITATIONS TO THE RECORD

For purposes of this brief, references to the technical record shall continue to be designated by "R." along with the volume number and corresponding page number(s). References to the transcripts shall continue to be designated by "Tr." along with the volume number, corresponding page, and line number(s).

Although Appellee Beavers has filed a cross-appeal in this matter, for purposes of identifying the parties, Plaintiffs Nandigam Neurology PLC and Kaveer Nandigam, M.D. will continue to be referred to as "Appellants". References to Defendant Kelly Beavers will continue to be referred to as "Appellee".

References to Appellee's cross-appeal Brief shall be cited as "Appellee's Brief at [Page Number]".

LEGAL ARGUMENT

I. A NOTICE OF APPEAL OF THE CIRCUIT COURT'S TRANSFER ORDER OF MARCH 30,2020 WAS NOT REQUIRED.

Appellee's first argument is a *Notice of Appeal* of the Circuit Court's March 30, 2020 transfer order was required to be filed by Appellants.

As a brief summarization of the events which led this case to the Wilson County Circuit Court:

1) The General Sessions Court dismissed all of Appellants claims in the court order dated February 13, 2020 (R. I. 1).
2) Appellants there after filed a timely appeal pursuant to T.C.A. §27-5-108 to the Wilson County Circuit Court on February 18, 2020. (R. I. 126-127). It should be noted that Appellants *Notice of Appeal* from General Sessions expressly stated the appeal was being made to the "Circuit Court of Wilson County", and not to the "Court of Appeals". (R. I. 127).
3) Once the General Sessions appeal was docketed with the Wilson County Circuit Court (as Case #2020-CV-89), Appellee thereafter filed a *Petition to Dismiss* Appellants' appeal to Circuit Court on February 25, 2020 (R. II. 130-170). It should be noted Appellee's case caption on her *Petition* indicated it was being filed into Circuit Court Case #2020-CV-89 and mentions the case as being on "Appeal from Wilson County General Sessions Case# 2020-CV-152". (R. II. 130).
4. Upon the hearing date of Appellee's *Petition*, the Circuit Court determined Appellants' appeal from General Sessions should be heard by the Court of Appeals based upon the Circuit Court's interpretation of T.C.A. §20-17-106 that it lacked jurisdiction to hear the case. (R. II. 224). Accordingly, the Circuit Court transferred the case to the Court of Appeal for further resolution.

Appellee contends since Appellants did not file a *Notice of Appeal* within 30 days of the Circuit Court's transfer order of March 30, 2020, the Appellants have waived all rights to present any arguments as to the propriety of the case transfer. However, Appellee is incorrect in her conclusion.

The Circuit Court order of March 30, 2020 did not decide any of the parties' claims nor did the order resolve any matters on the merits. The Circuit Court merely transferred the case for further resolution to the Court of Appeals under the belief the matter was subsumed by T.C.A. §20-16-106—whether it be for a full disposition of all matters or a remand of the case back to Circuit Court. Additionally, the Circuit Court's order of March 30, 2020 did not state that it was "a final order of the court".

Since the March 30, 2020 order did not rule on any of the parties' substantive issues or claims from General Sessions and did not indicate it was a "final order", the order was merely an interlocutory order in nature. Furthermore, since the Circuit Court had already transferred the case for docketing with the Court of Appeals, the filing of an additional *Notice of Appeal* thereafter in order to appeal the Circuit Court's March 30, 2020 transfer of the case to the Court of Appeals would be superfluous, redundant, and would result in multiple docketing of the same case with the Court of Appeals clerk.

II. THE GENERAL SESSIONS COURT ORDER OF FEBRUARY 13, 2020 WAS A FINAL AND APPEALLABLE ORDER UNDER T.C.A. §27-5-108.

Appellee argues the General Sessions Court order of February 13, 2020 was not a final order, and thus not appealable, due to Appellee's request for attorney fees

remaining outstanding[1]. Appellee thereafter cited selected cases where claims for attorney fees prevented the finality of the case.

However, Appellants are able to cite multiple Tennessee case precedents contradicting Appellee's arguments that the determination of attorney fees prevents the finality of the General Sessions February 13, 2020 order.

An award of attorney fees is in the nature of discretionary costs. As such, they are ancillary or collateral to the underlying matter and do not involve the substantive merits of the case. Gunn vs. Jefferson County Economic Development Oversight Committee, Inc., 2019 Tenn. App. LEXIS 144, 2019 WL 1338665 (Tenn. Ct. App. 2019).

In Gunn, the trial court entered an order on June 5, 2018 granting the Plaintiffs a permanent injunction against the Defendant Jefferson County as well as an award of discretionary costs. Affidavits of costs were thereafter submitted to the court and the court entered an order awarding costs on July 16, 2018. Defendant thereafter filed a Notice of Appeal on July 23, 2018. On oral arguments on the Gunn appeal, the Court of Appeals *sua sponte* raised the issue of whether Defendant's Notice of Appeal was timely filed. The Gunn court noted the order which resolved the merits of the case was entered on June 5, 2018 but the Notice of Appeal was not filed until July 23, 2018—7 days after the court's entry of the July 16, 2018 order awarding costs but 48 days after the court's June 5, 2018 order granting Plaintiffs' permanent injunction. Thus, the Court of Appeals had to consider whether the time for filing a notice of appeal began running on June 5, 2018 or on July 16, 2018. The Court of Appeal determined the time for filing an appeal was only tolled by the filing of certain motions (i.e. Tenn. R. Civ. Proc. 50.02 motion for directed verdict, Rule 52.02 motion to amend, Rule 59.07 motion for a new trial, etc.). However, a motion

[1] Appellee's Brief at P. 38-43.

for discretionary costs fell under Tenn. R. Civ. Proc. 54.04—which was not one of the enumerated motions which tolled the time limits for filing a notice of appeal.

In deciding the Gunn case, the Court of Appeals made the following holdings:

1. Motions for discretionary costs are ancillary or collateral to the underlying matter. *Id* at Lexis *7.
2. A post-trial motion for discretionary costs is not part of the "whole merits of the case" that must be adjudicated in order to make the judgment final. *Id* at Lexis *7.
3. When an order is entered that adjudicates every pending matter other than a post-judgment motion for discretionary costs, the time for appeal under Rule 4 runs from the entry of the final order, not the order addressing the motion for discretionary costs. *Id* at Lexis *7.
4. Neither a motion for sanctions nor a motion for discretionary costs was among the motions which toll the time for taking an appeal under Rule 4(b). Final judgment was entered when the trial court dismissed all the claims raised in plaintiff's complaint (referring to the case of Goins vs. Lawson, 2017 Tenn. App. Lexis 466, 2017 WL 2954686 (Tenn. Ct. App. 2017)). *Id* at Lexis *8.

Accordingly, the Gunn court dismissed Defendant Jefferson County's appeal due to the untimely filing of its notice of appeal.

Numerous Tennessee cases have made similar holdings as to the finality of a case regardless of the pendency of an award of attorney fees:

■ An amended order adjudging costs was not the final order for purposes of triggering the time for filing an appeal where it did not alter or address any of the substantive claims or rights of the parties. Assessment of costs was merely a matter incident to the merits of the plaintiff's case and not such a controlling element of the

cause as to determine the finality of the decree. Even if the issue of whether discretionary costs should be awarded had been adjudicated by the trial court, leaving only the issue of the amount of discretionary costs at issue, such matter is merely incidental to the merits of the case and has no potential to affect the outcome of the proceeding, unlike a motion to amend or any of the other motions under Rule 4(b). Hitchi Capital American Corp. vs. Community Trust & Banking Co., 2016 Tenn. App. LEXIS 699, 2016 WL 5210860 (Tenn. Ct. App. 2016); Gunn at *14.

■ Judgment is final where it adjudicates the whole merits of the case. Richardson vs. Board of Dentistry, 913 S.W. 2d 446, 1995 Tenn. LEXIS 788 (Tenn. 1995). Like court costs, discretionary costs are incidental, or ancillary, to the underlying merits of the case. Roberts vs. Roberts, 2010 Tenn. App. LEXIS 738, 2010 WL 4865441 (Tenn. Ct. App. 2010).

■ A motion for discretionary costs does not "arrest the finality" of the trial court's judgment for purposes of appellate jurisdiction, regardless of whether the motion is filed prior to the entry of the final judgment. Greybeal vs. Sherrod, 2012 Tenn. App. LEXIS 674, 2012 WL 4459807 (Tenn. Ct. App. 2012).

As further persuasive authority, this court should follow the California decision of Melbostad vs. Fisher, 165 Cal. App. 4th 987, 81 Cal. Rptr. 3d 354, 2008 Cal. App. LEXIS 1192 (Cal. Ct. App. 2008) which specifically addresses the exact scenario within the same anti-SLAPP statutory framework as Appellants' current case. Since Tennessee's anti-SLAPP statutes closely follow the same model as California's anti-SLAPP statutes, the Melbostad case is extremely instructive as to this exact issue.

In Melbostad, the California Court of Appeals determined the granting of Defendant's anti-SLAPP motion equated to a dismissal of the entire action and, thus, was a final judgment—notwithstanding Defendant's pending claim for attorney fees.

Melbostad's failure to appeal the order of dismissal within 60 day of entry of the dismissal rendered his appeal untimely. In making its decision, the Melbostad court stated "in determining whether a particular decree is essentially interlocutory and nonappealable, or whether it is final and appealable…it is not the form of the decree but the substance and effect of the adjudication which is determinative…" *Id* at LEXIS *16. The attorney fee award in an anti-SLAPP case may be appealed as "an order made after a judgment" where it is preceded by a judgment or dismissal order disposing of plaintiff's action. *Id* at LEXIS *8.

In the instant case, the Wilson County General Session court order of February 13, 2020 granted Appellee's TPPA petition and dismissed all of Appellants claims in their entirety. This order was a final judgment in that it resolved all of the claims and merits of the case. Although Appellee contends there was a request for the assessment of attorney fees remaining, such request does not alter or change the finality of the dismissal of Appellants' claims in General Sessions. Accordingly, Appellee's argument that Appellants' appeal from General Sessions is interlocutory lacks adequate foundation.

Furthermore, had Appellants waited until the resolution of Appellee's attorney fee issue in Wilson County General Sessions court, Appellants would have disastrously forfeited their right to appeal under T.C.A. §27-5-108 by not submitting their notice of appeal within 10 days of the court's February 13, 2020 order which dismissed all of Appellants' claims.

III. AN APPEAL PURSUANT TO T.C.A. §20-17-106 IS INTERLOCUTORY IN NATURE AND DOES NOT OVERRULE OTHER TENNESSEE STATUTES GOVERNING APPEALS.

Appellee argues T.C.A. §20-17-106—which allows a party the right to an immediate appeal to the Court of Appeals upon a grant or a denial of a TPPA petition—should be read in a manner which forecloses any other avenue of appeal that a party may have. In support of her position, Appellee refers to T.C.A. §20-17-106 which states "The court's order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals." Appellee then argues and cites cases that a more specific statute concerning the same subject governs over the more general statute[2].

Such an argument is inherently flawed. It has been a longstanding legal tenet that the court must apply the plain meaning of a statute without a forced interpretation that would limit or expand the statute's application. When a statute is clear, a court will apply the plain meaning without complicating the task. A court's obligation is simply to enforce the written language. Suntrust Bank vs. Burke, 491 S.W.3d 693, 2015 Tenn. App. LEXIS 48 (Tenn. Ct. App. 2015). Legislative intent is to be ascertained whenever possible from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. Eastman Chemical Company vs. Johnson, 151 S.W.3d 503, 2004 Tenn. LEXIS 994 (Tenn. 2005).

In dissecting the language of T.C.A. §20-17-106, it is apparent the purpose of the statute is to allow a party an immediate right to an interlocutory appeal to the Court of Appeals upon the grant or denial of a TPPA petition to dismiss. Without such a statute, an aggrieved party would either be required to 1) request an

[2] Appellee's Brief at P. 44.

interlocutory appeal by permission from the trial court under Tenn. R. App. Proc., Rule 9 and then wait for the Court of Appeals to decide whether it will accept the interlocutory appeal, or 2) continue forward with trial and then appeal the grant or denial of the TPPA petition after final judgment is rendered.

The operative wording of T.C.A. §20-17-106 are the two words "immediately appealable" which indicates an aggrieved party can, but is not required to, immediately appeal the decision to the Court of Appeals. In the event a party elects not to pursue an immediate appeal, the other remaining legal avenues available by law and statute are still available to be utilized. In fact, T.C.A. §20-17-108(4) expressly confirms such a conclusion when it states "Nothing in this chapter…affects, limits, or precludes the right of any party to assert any defense, remedy, immunity, or privilege otherwise authorized by law." [Emphasis added by attorney]. The word "remedy" implies that any rights for a party to appeal under any other non-TPPA statute or Rule of Civil Procedure remains applicable.

In order to interpret T.C.A. §20-17-106 to effect the result Appellee wishes the court to grant her, the statute would have to read:

> *A court's order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter must be immediately appealed as a matter of right to the exclusive jurisdiction of the court of appeals."*

Such a strained interpretation of T.C.A. §20-17-106 would surely break and completely contradict long-standing statutory interpretation principles.

IV. APPELLEE BEAVERS CANNOT INVOKE THE COURT'S APPELLATE JURIDICTION BECAUSE SHE WAS THE PARTY WHO PREVAILED IN GENERAL SESSIONS COURT.

Appellee appears to take advantage of the wording of T.C.A. §20-17-106 by filing her own notice of appeal to the Court of Appeals on a matter in which she prevailed.

T.C.A. §20-17-106 states "The court's order dismissing or refusing to dismiss a legal action pursuant to a petition filed under this chapter is immediately appealable as a matter of right to the court of appeals." Although the technical wording of this statute appears to allow a party the right to appeal the successful grant of their own petition to dismiss, such gamesmanship should not be allowed. Appellee Beavers further requests the court confirm the dismissal of the case and to recognize the presumption of falsity doctrine is abrogated because the Supreme Court has ruled it unconstitutional. Accordingly, it appears Appellee Beavers has initiated her own appeal under T.C.A. §20-17-106 substantially for the purpose of requesting a declaratory judgment on issues which were not part of the underlying case. Insofar is Appellee is attempting to appeal her own victory in General Session court in order to expand the law even further beyond the scope of this case, her request should be denied.

V. APPELLEE'S REQUEST FOR APPELLATE ATTORNEY FEES AND COSTS SHOULD BE DENIED.

Lastly, Appellee requests appellate attorney fees and costs be awarded to her under T.C.A. §20-17-107(a)(1). Such a request is premature. It is a matter for the trial court to determine the amount of attorney fees to award a party. Under T.C.A.

§20-12-119 (relating to the award of discretionary attorney fees and costs), provision T.C.A. §20-12-119(c)(3) addresses the award of attorney fees and costs and states an award of fees and costs shall be made:

> only after all appeals of the issues of the granting of the motion to dismiss have been exhausted and if the final outcome is the granting of the motion to dismiss. The award of costs and attorneys' fees pursuant to this section shall be stayed until a final decision which is not subject to appeal is rendered.

Accordingly, this court should deny Appellee's request for her appellate fees and costs at this time.

CONCLUSION

Based upon the forgoing legal arguments and case precedents presented by Appellants, the court should:

1) Determine the General Sessions court order of February 13, 2020 to be a final judgment which resolves all of the parties claims and therefore is appealable to the Circuit Court under T.C.A. §27-5-108.

2) Determine T.C.A. §27-5-106 does not override and supersede all other statutes or Rules of Civil Procedure relating to appeals from General Sessions court.

3) Deny Appellee's cross-appeal.

4) Deny Appellee's request for appellate attorney fees.

RESPECTFULLY SUBMITTED:

/s/ Angello L. Huong
ANGELLO L. HUONG (BPR # 021209)
435 Park Avenue
Lebanon, TN 37087
Phone (615) 453-7530
Fax (615) 453-7531
e-mail: angellohuong@hotmail.com

Attorney for Plaintiffs/Appellants
Nandigam Neurology PLC and
Kaveer Nandigam, M.D.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing *Brief* was served electronically via the Court of Appeals e-filing system to:

Daniel A. Horwitz
4016 Westlawn Drive
Nashville, TN 37209
e-mail: daniel.a.horwitz@gmail.com

Sarah L. Martin
1020 Stainback Avenue
Nashville, TN 37207
e-mail: Sarahmartin1026@gmail.com

On this 14th day of December, 2020.

/s/ Angello L. Huong
ANGELLO L. HUONG
Attorney for Plaintiffs/Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the formatting requirements and word count limits for electronic filing under Supreme Court Rule 46, Section 3.02. The number of words contained in this brief, excluding the Title Page, Table of Contents, Table of Authorities, and Certificate of Compliance is 2,991 words using Microsoft Word, Version 2016.

/s/ Angello L. Huong
ANGELLO L. HUONG
Attorney for Plaintiffs/Appellants