

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

RECIPIENT OF FINAL EXPUNCTION)	
ORDER IN MCNAIRY COUNTY)	
CIRCUIT COURT CASE NO. 3279,)	
Plaintiff,)	
VS.)	NO. 20-967-III
DAVID B. RAUSCH, DIRECTOR OF)	
THE TENNESSEE BUREAU OF)	
INVESTIGATION; and TENNESSEE)	
BUREAU OF INVESTIGATION,)	
Defendants.)	

MEMORANDUM AND RULE 54.02 FINAL ORDER
ON MOTIONS ARGUED 8/5/22

On August 5, 2022, there were four motions docketed for oral argument in this case. After conducting oral argument the Court ruled from the bench. Documenting that ruling, the following is ORDERED.

1. Plaintiff (Second) Motion for Judgment on the Pleadings—**GRANTED**
2. Plaintiff's Motion for Summary Judgment—**GRANTED**
3. Defendants' Motion to Dismiss Remaining Claims for Lack of Subject Matter Jurisdiction—**DENIED**
4. Defendants' Motion for a Protective Order to Limit the Scope of the Deposition of Rachel Russell—**DENIED AS MOOT UPON PLAINTIFF WITHDRAWING DEPOSITIONS AS UNNECESSARY IN LIGHT OF PLAINTIFF'S MOTIONS BEING GRANTED**

It further ORDERED that the Court holds the Defendants in civil contempt, based upon the findings and conclusions of law entered below, and determines that the Plaintiff shall recover his reasonable costs and attorney's fees incurred in bringing the Defendants into compliance with the expunction order entered in McNairy County Circuit Court Case No. 3279 (the "Expunction Order"). The Court declines to fine the Defendants.

It is additionally ORDERED, based upon the findings and conclusions of law entered below, that the Plaintiff's due process rights were violated by the Defendants which entitles the Plaintiff to recover under 42 U.S.C. § 1983 his reasonable costs and attorneys' fees. It is also ORDERED that a negative injunction is issued, pursuant to 42 U.S.C. § 1983, forbidding the Defendants and their agents from further violating the Plaintiff's rights, privileges, and immunities under the Expunction Order and Tennessee's expunction statute in contravention of the Plaintiff's federal constitutional right to due process.

It is additionally ORDERED that in light of Chancellor Lyle's August 31, 2022 retirement, and that that is the last day she will be performing chancellor's work, motions, if any, to alter or amend the rulings herein shall be filed by August 15, 2022; responses by August 22, 2022; and replies by August 24, 2022, with a ruling thereafter on the papers. Counsel stated in open court they did not object to these expedited filing deadlines.

It is ORDERED that the only matters not finally ruled upon herein are (1) quantifying the amount of the attorney's fees awarded to Plaintiff's Counsel as damages for the Count 2 contempt claim and with respect to Count 3 under 42 U.S.C. § 1983 for violation of Plaintiff's constitutional right to due process, and (2) whether Plaintiff's

additional theory of recovery of attorney's fees pursuant to Tennessee Civil Procedure Rule 37.03(2) for denial of requests for admissions by the Defendants also furnishes a basis for recovery of attorney's fees and, if so, quantification of those fees. These attorney fee recovery matters, by request and agreement of Counsel, remain pending, and shall be held in abeyance until after the appeal of the rulings herein is completed. It is therefore ORDERED that the rulings herein on the four motions listed above on page 1 are fewer than all the claims, but they are made final pursuant to Tennessee Civil Procedure Rule 54.02 upon the express determination by the Court that there is no just reason for delay and final judgment is entered as to these four motions.

The findings of fact, reasoning and authorities for the above rulings are as follows.

Background

This lawsuit was filed to obtain relief with respect to the Defendants' refusal to expunge certain records in compliance with the Expunction Order. The *Complaint* filed September 25, 2020, contained three counts:

Count 1— Tenn. Code Ann. § 1-3-121 Declaratory and Injunctive Relief;

Count 2— Civil Contempt—Tenn. Code Ann. § 29-9-102(3); and

Count 3— 42 U.S.C. § 1983.

The case proceeded with both Counsel prioritizing a ruling on the Count 1 declaratory judgment claim by filing competing partial motions for judgment on the pleadings. Denying the motions based upon the absence of facts in the pleadings

necessary for a ruling, the Court nevertheless issued conclusions of law of statutory construction in favor of the Defendants that their statutory duties excepted them from complying with the Expunction Order. On this issue the Court granted an interlocutory appeal.

On May 27, 2022, the Tennessee Supreme Court reversed this Court's interlocutory ruling, and the Supreme Court granted the Plaintiff's motion for partial judgment on the pleadings as to Count 1 and remanded the case. The Tennessee Supreme Court determined that the Defendants are not excepted from complying with the Expunction Order.

In accordance with the instructions on remand, on June 16, 2022, this Court entered an order on Count 1 of the *Complaint* granting Plaintiff's Motion for Partial Judgment on the Pleadings and ordering:

1. A declaration **SHALL ISSUE** that the Defendant TBI is acting illegally in violation of the expunction order entered in McNairy County Circuit Court Case No. 3279 and in violation of Term Code Ann. § 40-32-102(b);
2. A permanent injunction **SHALL ISSUE** compelling the Defendants to comply with the terms of the expunction order entered in McNairy County Circuit Court Case No. 3279 and compelling the Defendants to "remove expunged records from the [Plaintiff's] criminal history" pursuant to Tenn. Code Ann. § 40-32-102(b); and
3. A declaration **SHALL ISSUE** that the Plaintiff is entitled to all of the rights, privileges, and immunities of the expunction order that was entered in McNairy County Circuit Court Case No. 3279.

The June 16, 2022 order left pending Counts 2 and 3. They are the subject of the rulings and analysis herein.

Summary of Motions

The Plaintiff asserts in his two motions that there are no factual disputes material to the legal claims in Counts 2 and 3, and that judgment should be entered in Plaintiff's favor on Counts 2 and 3 for additional injunctive relief and recovery of costs and attorney's fees. The Defendants, for various reasons, oppose entry of judgment on these Counts. One of the Defendants' prominent defenses to the Plaintiff's motions is mootness. The Defendants' motion to dismiss the remainder of the case (Counts 2 and 3) asserts lack of subject matter jurisdiction derived from mootness. The entry by this Court on remand on June 16, 2022, of judgment on Count 1, the Defendants argue, renders moot Counts 2 and 3. The Defendants also seeks a protective order to limit the scope of depositions of the Defendants noticed by the Plaintiff to obtain information in opposition to Defendants' mootness claim.

Findings of Fact and Conclusions of Law

After studying the record and the argument of Counsel, the Court concludes that the case is not moot. As follows, Counts 2 and 3 present distinct claims and remedies from Count 1 that were not addressed by the judgment on the pleadings entered previously on Count 1 in this Court's June 16, 2022 order. Having determined Counts 2 and 3 are not moot, the Court denies Defendants' motion to dismiss. In addition, as follows, the Court determines that the Plaintiff is entitled to entry of judgment on Counts 2 and 3 of the

Complaint, with entry of additional injunctive relief and recovery of costs and attorney's fees.

Summary Judgment Granted on Count 2

The Court's analysis with respect to Count 2 begins with the premise that Count 2 asserts willful disobedience of the Expunction Order as the basis for a judgment of civil contempt. Further relevant is that paragraph 8 of the Prayer for Relief of the *Complaint* seeks recovery of reasonable costs and attorney's fees.

In terms of mootness, there is no dispute in the record that the Defendants did not comply with the Expunction Order prior to the Supreme Court's decision in this case. Thereafter, as of June 16, 2022, they were ordered to comply. The June 15, 2022 Affidavit of Rachel Russell, Deputy Counsel of Policy/CJIS Attorney for the TBI (Exhibit to Defendants' Motion to Dismiss), states that the Defendants have "fully processed" the Expunction Order.

As detailed below, finding the Affidavit to be admissible, and accrediting the Affidavit, the Court finds that the Defendants have now complied with the Expunction Order. That does not, however, render moot the Count 2 contempt claim, as asserted by the Defendants. The claim is not moot because the Defendants' compliance does not relieve them of paying reasonable costs and attorney's fees if they acted contemptuously.

When the contempt consists of the performance of a forbidden act, the cessation of the contemptuous conduct after the entry of the order prohibiting that conduct does not preclude a finding of civil contempt and an award of damages. Neither the plain language of section 29-9-105 nor that of section 29-9-102(3) requires that the disobedience of a court's order be

ongoing. *See City of Cookeville v. Humphrey*, 126 S.W.3d 897, 902 (Tenn.2004) (noting that where the language of a statute is clear and unambiguous, we must apply the statute in accordance with its plain language). Although the strike had ended, any disobedience of the injunction by the defendants would not be “rectified” until the defendants paid damages to Overnite making it whole. *See* Tenn.Code Ann. § 29–9–105 (1980 & 2000).

* * *

We further hold that an injured party may recover damages pursuant to Tennessee Code Annotated section 29-9-105 from the contemnor who performed the forbidden act, even though the contemptuous conduct is not ongoing.

Overnite Transp. Co. v. Teamsters Loc. Union No. 480, 172 S.W.3d 507, 511–12 (Tenn. 2005). Thus, if the Defendants are found to have been in civil contempt, attorney’s fees and costs are recoverable, and Count 2 is not moot.

The analysis for determining if the Defendants acted contemptuously requires examining four elements:

(1) the order alleged to have been violated must be lawful, (2) the order alleged to have been violated must be clear, specific, and unambiguous, and (3) the person alleged to have violated the order must have actually disobeyed or otherwise resisted the order, and (4) the person’s violation of the order must be willful.

Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth., 249 S.W.3d 346 (Tenn. 2008).

The Court finds there is no genuine issue of material fact that all of these elements are established in the record.

The two necessary elements for civil contempt—the Expunction Order is lawful and the Defendants did not obey the Expunction Order—are facts established in the decision of the Tennessee Supreme Court based upon the pleadings in this case. In addition, the

Court rejects the Defendants' argument that the third element for civil contempt is not present. That is, the Court finds that the Expunction Order is clear, specific and unambiguous.

With respect to the fourth element, willfulness, the Defendants argue that their "legal obligation under the expunction order was unclear until the Supreme Court ruled in this case," and that the reasonableness of their position is demonstrated by this Court ruling in their favor on the preliminary motions that this case fit an exception to the Expunction Order, quoting as follows.

Further, Defendants' legal obligation under the expunction order was unclear until the Supreme Court ruled in this case. This Court's order of March 22, 2021, demonstrates the reasonableness of Defendants' prior understanding of their duties. The court held that if an offense fits within a particular statutory category, "TBI compliance with an expunction order after sixty days of receipt of the order is not required" because "the TBI is not permitted to expunge a record involving [that type of] offense if the TBI determines that the offense is ineligible for expunction under section 40-32-101." (March 22, 2021 Mem. Order, 3, 6.)

Reply in Support of Defendants' Motion to Dismiss Remaining Claims for Lack of Subject-Matter Jurisdiction, August 3, 2022, at 13-14.

In the context of civil contempt proceedings, however, willfulness does not connote the same standard of culpability as in criminal law of a bad purpose or specific intent to do something the law forbids. *Konvalinka*, 249 S.W.3d at 357. Instead, in the civil contempt context willful conduct,

consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. Conduct is 'willful' if it is the product of free will rather than coercion. Thus, a person acts 'willfully' if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is

doing (citing *State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust*, 209 S.W.3d at 612).

Id.

In this regard, the record in this case establishes that the Defendants' noncompliance with the Expunction Order was not an accident nor was it inadvertent. The noncompliance was intentional and voluntary. The Defendants knew what they were doing and intended not to comply. As for this Court ruling in favor of the Defendants, this Court's reasoning and statutory construction of the words "and" and "so long as" in Tennessee Code Annotated sections 40-39-207(a)(2) and 209, as constituting an exception allowing the Defendants to exercise discretion in deciding whether to comply with the Expunction Order, was referred to only in a footnote by the Tennessee Supreme Court and was summarily rejected out of hand, indicating that the Tennessee Supreme Court did not consider Defendants' statutory construction defense to constitute much of a defense. Thus, the record establishes the element of willfulness.

Finally, with respect to the Defendants' argument that this Court cannot punish the contempt of another court's order, the Court does not adopt this argument based upon the unique facts of this case, and the reasoning and authorities on pages 26-32, adopted herein, of the *Plaintiff's Reply in Support of Plaintiff's Motion for Summary Judgment*, August 3, 2022.

The Court therefore finds the Defendants in civil contempt which, as quoted above, is not moot upon compliance with the Expunction Order by the Defendants because the Plaintiff's prayer for relief for damages in the form of costs and attorney's fees were not

addressed by the June 16, 2022 order entered by this Court on the Count 1 judgement on the pleadings. As noted in the orders section above, reserved for a later determination is the Plaintiff's additional basis for recovery of costs and attorney's fees, that being the Defendants' denial of requests for admissions, such as #20, when this Court has found the Expunction Order is clear, specific and unambiguous. *See* Tennessee Civil Procedure Rule 37.03(2).

For these reasons the Plaintiff's Motion for Summary Judgment on Count 2 is granted, and the Plaintiff shall be awarded his reasonable costs and attorney's fees under Tennessee Code Annotated section 29-9-105 for civil contempt of the Expunction Order.

Summary Judgment and Motion (Second) for Judgment on the Pleadings on Count 3

At the outset, on mootness, the Court finds that Count 3 is not rendered moot, as argued by the Defendants, with the entry of the June 16, 2022 order on the Count 1 judgment on the pleadings claim. That is because the Count 3 claim seeks entry of a negative injunction, pursuant to 42 U.S.C. § 1983, forbidding the Defendants and their agents from further violation of the Plaintiff's rights, privileges and immunities under the Expunction Order and Tennessee's expunction statute in contravention of the Plaintiff's federal constitutional right to due process. Also, the 42 U.S.C. § 1983 claim of Count 3 entitles the Plaintiff to recover attorney's fees. Thus, Count 3 seeks to prevent further and future violations of the Expunction Order such as publicizing the nature of the Plaintiff's expunged charge and recover attorney's fees; whereas the remedy for the declaratory judgment on Count 1 was an injunction requiring the Defendants to obey the Expunction

Order which practically speaking was for the Defendants to remove the expunged records from the person's criminal history. *See* TENN. CODE ANN. § 40-32-102(b). Count 3, then, is not moot.

With respect to recovery of attorney's fees, the Court finds that the record establishes that there is no genuine issue of material fact that the Plaintiff's due process rights were violated by the Defendants not complying with the Expunction Order. This is established in the decision of the Tennessee Supreme Court. In the section of the decision "TBI Authority to Refuse to Comply with Final Expunction Orders," the Supreme Court adamantly and summarily rejected the statutory construction of the Defendants and this Court. Part of this Court's statutory construction at page 4 of the March 22, 2021 *Memorandum and Order: (1) Denying Plaintiff's Motion for Partial Judgment on the Pleadings; (2) Denying Defendants' Motion for Partial Judgment on the Pleadings; and (3) Denying Defendants' Motion to File Under Seal* was that this Court found, as argued by the Defendants, that the Plaintiff was provided due process in Tennessee Code Annotated section 40-39-207(g)(1) if the Defendants exercised their discretion and did not comply with the Expunction Order. This statutory construction was summarily rejected by the Tennessee Supreme Court. Thus, it is clear from the matters recited as facts in the Supreme Court's decision and its rejection of this Court's statutory construction, that there is no genuine issue of material fact on this record that the Plaintiff was deprived of due process when the Defendants chose not to comply with the Expunction Order. Accordingly, having established liability under his Count 3 claim of deprivation of due

process, the Plaintiff is entitled under 42 U.S.C. § 1983 to recover his attorney's fees and costs.

The Court also finds that there are sufficient facts in the record to issue the negative injunction requested by the Plaintiff.

The evidence in the record of the extent of the Defendants' conduct in response to the decision of the Tennessee Supreme Court is the Rachel Russell Affidavit. It states in limited fashion that the Defendants' actions are expunction of the records of the Plaintiff's McNairy Case 3279 in accordance with Tennessee Code Annotated sections 38-6-118(d) and 40-32-101. Also in the record, though, is evidence that there are others similarly situated to the Plaintiff where the Defendants took the same position as in this case that compliance with expunction orders was not required.¹ Yet there is no affidavit filed with the Court or other evidence in the record that in light of the Tennessee Supreme Court's decision the Defendants have implemented measures to conform their policy and practice to the Supreme Court's decision that expunction orders must be complied with. This reticence and narrowness of the Defendants present in the record following the Tennessee Supreme Court's decision is not reassuring that there will be no further disseminations or publication by the Defendants with respect to McNairy Case No. 3279 going forward. For these reasons, the Court concludes that it is necessary to enter the negative injunction to prevent that risk.

¹ Exhibit C to the *Complaint* contains an October 29, 2019 email from Scott Sutherland of the Attorney General's Office stating that the TBI has "repeatedly" taken the position that it took in this case that was reversed by the Tennessee Supreme Court.

As for the Plaintiff's second motion for judgment on the pleadings, the Court adopts the Plaintiff's reasoning and authorities of his July 22, 2022 filings in support of *Plaintiff's (Second) Motion for Partial Judgment on the Pleadings* and August 3, 2022 *Plaintiff's Reply in Support of Plaintiff's (Second) Motion for Partial Judgment on the Pleadings* that the February 9, 2015 diversionary plea agreement constitutes a consent order. The failure of the Defendants to comply with the consent order violated the Plaintiff's due process rights.

Based on the foregoing, the Plaintiff's motions are granted, and judgment on the Count 3 claim is entered for the Plaintiff to recover reasonable costs and attorney's fees and for issuance of the above negative injunction.

Defendants' Motion for Protective Order

With respect to the Defendants' motion for protective order, the Plaintiff explains in its *Conditional Opposition*, filed August 3, 2022, that the depositions he noticed were to obtain discovery in opposition to the Defendants' claim of mootness. Above the Court has ruled the Plaintiff's Counts 2 and 3 are not moot. Accordingly, the discovery is not needed and shall be cancelled by the Court which, in turn, obviates the need for a ruling on the Defendant's motion for protective order.

Rachel Russell Affidavit

One final matter is that the Court overrules the Plaintiff's motion to exclude the Rachel Russell Affidavit. The Court finds the Affidavit states facts sufficient to establish personal knowledge and the Affidavit does not contradict previous positions taken by the

Defendants so as to cancel the Affidavit. The Court concludes that the Affidavit provides testimony not about a legal position previously asserted by the Defendants in this case. Instead, the Affidavit speaks to the physical actions of the Defendants on processing the Expunction Order after the reversal and upon remand from the Tennessee Supreme Court.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc by U.S. Mail, fax, or efile as applicable to:

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