Dismissed and Opinion Filed February 9, 2016.

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-15-00459-CV

Richard K. Archer, M.D., Richard K. Archer, M.D.P.A., and as Representative and Trustee of the Richard K. Archer, M.D. Profit Sharing Account, Richard Archer, Archer Farms, LLC, Richard K. Archer, Individually and as Trustee of Profit Sharing Trust, Richard K. Archer, Individually and as Representative and/or Trustee of the Richard K. Archer Pension Plan, Richard K. Archer, Individually and as Representative of the Richard K. Archer Keogh, Richard K. Archer, Individually and as Representative of the Richard K. Archer IRA, A Business Entity Known as Reba Cattle, LLC, Ruth E. Archer, Richard K. Archer, Individually and as Representative and/or Trustee of the Richard K. Archer Profit Sharing Plan, and Richard K. Archer, Individually and as Trustee of the Richard K. Archer M.D.P.A. Profit Sharing Plan and Trust, Appellants

V.

Bobby Tunnell, Appellee

On Appeal from the 298th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-12-08161-M

MEMORANDUM OPINION

Before Justices Bridges, Francis, and Myers
Opinion by Justice Myers

Richard K. Archer, M.D., individually and as representative and trustee of numerous trusts and retirement plans, Richard K. Archer, M.D.P.A., Richard Archer, Ruth E. Archer, Archer Farms, LLC, and Reba Cattle, LLC bring this interlocutory appeal. Although this Court had jurisdiction over the appeal when the notice of appeal was filed pursuant to section 51.014(a)(9) of the Texas Civil Practice and Remedies Code, appellants' brief on appeal does not present an issue concerning any order over which this Court has jurisdiction. Appellee, Bobby

Tunnell, requests that we award him damages as a sanction against appellants under rule 45 of the Rules of Appellate Procedure because the appeal is frivolous. We dismiss appellants' appeal, and we award Tunnell damages against appellants and their counsel under Texas Rule of Appellate Procedure 45 as a sanction for pursuing this frivolous appeal.

BACKGROUND

Tunnell alleged that on August 3, 2011, he was a passenger in a pickup and traveling on a road where cattle had strayed onto the roadway. The pickup struck at least one of the cattle and then rolled about eight times. Tunnell was injured in the accident. Tunnell alleged appellants owned the cattle and the property from which the cattle had strayed.

Tunnell sued appellants for negligence and negligence per se. Appellants filed a motion to dismiss the suit asserting the suit alleged a health care claim under chapter 74 of Civil Practice & Remedies Code because the suit alleged the violation of safety standards and Richard K. Archer, M.D. was a physician and his professional association was a health care provider. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(13) (West Supp. 2015) (defining "health care liability claim" as "a cause of action against a health care provider or physician for . . . departure from accepted standards of . . . safety"). Appellants requested the trial court dismiss the suit with prejudice and award them their attorney's fees because Tunnell did not file an expert report as required by section 74.351(a) of the Civil Practice & Remedies Code. *See id.* § 74.351(a), (b).

Appellants also filed a motion for summary judgment asserting the trial court lacked jurisdiction to hear any claims involving the retirement plans because ERISA[1] preempts state laws on all issues involving retirement plans. Besides the preemption argument, appellants also asserted in the motion for summary judgment that Tunnell lacked standing to bring the claims,

[1] The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1461. Section 1144(a) provides that the act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title." *Id.* § 1144(a); *see Colorado v. Tyco Valves & Controls, L.P.*, 432 S.W.3d 885, 890 (Tex. 2014) (observing the preemptive effect of ERISA).

that Tunnell had no evidence appellants knowingly allowed the cattle to enter the roadway, and that Tunnell and the driver of the pickup were contributorily negligent.

Appellants also filed a motion to dismiss or abate requesting that the trial court "abate this suit or dismiss all references to Richard K. Archer's ERISA retirement plans for the reason this court lacks jurisdiction to hear ERISA matters or matters affecting an ERISA plan."

On April 10, 2015, after a hearing, the trial court signed a written order denying appellants' motion to dismiss due to the lack of an expert report. The trial court stated at the hearing that it denied the motion for summary judgment with respect to the ERISA arguments, but the court did not orally rule on the remaining grounds for summary judgment. The appellate record does not contain a written order denying the motion for summary judgment, nor does the record indicate that the trial court considered or ruled on appellants' motion to dismiss or abate.

On April 10, 2015, appellants filed a notice of appeal "giv[ing] notice of their intent to appeal the trial court's Order denying the defendants' Motion to Dismiss the Plaintiff's case for failure to serve an expert report pursuant to CPRC § 74.351."

On May 1, 2015, the supreme court issued its opinion in *Ross v. St. Luke's Episcopal Hospital*, 462 S.W.3d 496 (Tex. 2015). In that case, the supreme court concluded that for a suit asserting a departure from safety standards to be a health care liability claim, "there must be a substantive nexus between the safety standards allegedly violated and the provision of health care." *Id.* at 504.

On May 5, 2015, Tunnell's counsel sent a letter to appellants' counsel stating that after the supreme court's opinion in *Ross*, "it is now obvious that your position lacks any good faith basis in law or fact. . . . For these reasons, pursuing this appeal any further is a violation of your ethical obligations to the court and is sanctionable." Tunnell's counsel stated he intended to file

a motion for sanctions against appellants and their counsel unless the appeal was dismissed by May 11.

On May 7, 2015, appellants' counsel filed a "Status Report" with this Court. In this document, appellants' counsel "acknowledges the reversal by the Supreme Court in *Ross*" and stated appellants would "drop his [sic] appeal relative to the expert report requirement under the Health Care Liability claim in this case." However, counsel stated appellants have "another point of error regarding the lack of jurisdiction in the trial court below over the ERISA plan sued by appellee Tunnell." Counsel stated that although appellants would "abandon [their] claim that the case must be dismissed for lack of an expert report in the face of the recent *Ross* opinion, this appeal will not be dismissed forthwith to enable a review of the jurisdictional defect in the case."

On May 8, 2015, Tunnell's counsel prepared a letter to appellants' counsel pointing out that this Court would lack jurisdiction to review appellants' ERISA argument. Tunnell's counsel stated he would file a motion to dismiss the appeal with this Court on May 13 and that if appellants opposed the motion, then he would move for sanctions as well. Appellants asserted they did not receive this letter because it was transmitted by facsimile machine to the wrong telephone number.

On May 14, 2015, Tunnell filed a motion to dismiss for lack of jurisdiction and motion for sanctions. Tunnell asserted that this Court lacked jurisdiction over the appeal because appellants had abandoned their argument under section 74.351(b) and instead intended to assert a ground which this Court lacked jurisdiction to review in an interlocutory appeal, namely, whether ERISA preemption barred Tunnell's claims against one or more of the appellants. Tunnell also requested sanctions, asserting appellants had repeatedly pursued frivolous arguments in an effort to unnecessarily delay the trial and increase Tunnell's litigation costs. Tunnell also argued that appellants' section 74.351 assertion was frivolous even before *Ross*.

Tunnell requested that we award him damages of $2,205 for the attorney's fees he incurred for preparation of the motion to dismiss.

In response to the motion to dismiss and for sanctions, appellants stated they "move the Court to affirm the Trial Court's denial of the Motion to Dismiss rather th[a]n dismissal for want of jurisdiction. This request is supported by the Supreme Court's ruling in *Ross*." However, appellants did not address whether this Court had jurisdiction over their ERISA argument. They also denied Tunnell's accusation of bringing frivolous arguments and seeking delays to avoid trial and increase the litigation costs.

This Court denied Tunnell's motion to dismiss, stating this Court does have jurisdiction over the appeal under section 51.014(a)(9) because this is an appeal from an order denying relief sought by a motion under chapter 74.351(b). We also observed that although appellants asserted we had jurisdiction over the denial of their plea in abatement and motion for summary judgment, "review of the clerk's record fails to reveal the existence of any such orders." We also deferred ruling on the motion for sanctions and stated that the parties could address that matter further in their briefs.

In their appellants' brief, the only issue appellants assert is that the trial court erred by denying their motion to dismiss or abate and motion for summary judgment as to the ERISA retirement plans. Tunnell asserts this appeal is "patently frivolous," and he requests that we assess sanctions against appellants pursuant to Texas Rule of Appellate Procedure 45.

JURISDICTION OVER INTERLOCUTORY APPEALS

Before we can address appellants' issue of whether the trial court had jurisdiction over Tunnell's claims against the retirement funds, we must determine our jurisdiction to address that issue. Our jurisdiction is established exclusively by the Constitution of the State of Texas and by statutory enactments. *See, e.g.,* TEX. CONST. art. V, § 6; TEX. GOV'T CODE ANN. § 22.220

(West. Supp. 2015). Unless a statute specifically authorizes an interlocutory appeal, appellate courts have jurisdiction over final judgments only. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). If the record does not affirmatively demonstrate our jurisdiction, we must dismiss the appeal. *Brashear v. Victoria Gardens of McKinney, LLC*, 302 S.W.3d 542, 546 (Tex. App.—Dallas 2009, no pet.).

In this case, there is no written order denying appellants' motion for summary judgment or their motion to dismiss or abate. Texas Rule of Appellate Procedure 26.1 provides that a notice of interlocutory appeal "must be filed within 20 days after the judgment or order is signed." TEX. R. APP. P. 26.1(b). Therefore, an interlocutory appeal may be perfected only from a written order, not an oral ruling. *State v. $982,110*, No. 08-11-00253-CV, 2011 WL 4068011 at *1 (Tex. App.—El Paso Sept. 14, 2011, no pet.) (mem. op.). The court of appeals lacks jurisdiction over an interlocutory appeal authorized by statute when the trial court has not signed a written order. *City of Beaumont v. Jackson*, No. 09-14-00412-CV, 2014 WL 5776202, at *1 (Tex. App.—Beaumont Nov. 6, 2014, no pet.) (mem. op.).

In this case, there is no written ruling denying either appellants' motion for summary judgment or their motion to dismiss or abate. Accordingly, we have no jurisdiction to consider appellants' issues related to these motions. Moreover, even if the trial court had signed a written order denying either or both of the motions, we could not consider in this interlocutory appeal whether the trial court erred by denying the motions because no statute authorizes the interlocutory appeal of such an order. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 51.014.

Because appellants do not bring forward any issue this Court has jurisdiction to address, we dismiss appellants' appeal.

DAMAGES FOR FRIVOLOUS APPEAL

Tunnell asserts he should be awarded damages under Texas Rule of Appellate Procedure 45 because appellants' appeal is frivolous. After considering the record, briefs, and other papers filed in this Court, we may award damages to a prevailing party if we objectively determine that an appeal is frivolous. TEX. R. APP. P. 45;[2] *Owen v. Jim Allee Imports, Inc.*, 380 S.W.3d 276, 290 (Tex. App.—Dallas 2012, no pet.). An appeal is frivolous when the record, viewed from the perspective of the advocate, does not provide reasonable grounds for the advocate to believe that the case could be reversed. *Owen*, 380 S.W.3d at 290. The decision to grant appellate sanctions is a matter of discretion that an appellate court exercises with prudence and caution and only after careful deliberation. *Id.* Although imposing sanctions is within our discretion, we will do so only in circumstances that are truly egregious. *Id.*

In this case, appellants' appeal is frivolous. Appellants' counsel acknowledged in the "Status Report" and in their appellants' brief that the assertion that the trial court erred by denying their motion to dismiss under section 74.351(b) had no merit after the supreme court issued its opinion in *Ross v. St. Luke's Hospital*. Instead of dismissing the appeal as Tunnell demanded, appellants' counsel stated that appellants would assert an issue which this Court clearly lacked jurisdiction to consider. We even informed appellants and their counsel in the order denying Tunnell's motion to dismiss that "review of the clerk's record fails to reveal the existence of" any orders on appellants' motions asserting ERISA preemption.

[2] Rule 45 provides:

> If the court of appeals determines that an appeal is frivolous, it may—on motion of any party or on its own initiative, after notice and a reasonable opportunity for response—award each prevailing party just damages. In determining whether to award damages, the court must not consider any matter that does not appear in the record, briefs, or other papers filed in the court of appeals.

TEX. R. APP. P. 45.

After the supreme court's opinion in *Ross*, there were no reasonable grounds for an advocate to believe the case could be reversed. However, appellants did not dismiss this frivolous appeal. Instead, appellants' counsel filed a brief on the merits asserting ERISA preemption based on non-existent orders that this Court lacked jurisdiction to consider. No reasonable counsel could believe the ERISA-preemption argument was a reasonable ground for reversal in this case when there was no written order on a motion asserting the argument and no statute permits an interlocutory appeal from such an order. In these circumstances, we conclude that appellants and their counsel's actions are so egregious as to warrant the award to Tunnell of just damages from appellants and their counsel for their pursuit of this frivolous appeal.

Tunnell's counsel attached to his motion to dismiss the appeal an affidavit stating Tunnell sought an award of his attorney's fees for filing the motion. Counsel stated his hourly rate was $350 and that he spent approximately 6.3 hours preparing the motion to dismiss for a total attorney's fee of $2,205. Accordingly, we grant Tunnell's request for damages and award him damages of $2,205 against appellants and their counsel. We also grant Tunnell leave to file within ten days of the date of this opinion a request under rule 45 for just damages after the appeal became frivolous and egregious on May 1, 2015, with evidence to support the amount of just damages.

CONCLUSION

We dismiss the appeal, and we award Tunnell damages of $2,205 against appellants and their counsel under rule 45 for their pursuit of this frivolous appeal.

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/Lana Myers/
LANA MYERS
JUSTICE

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

Richard K. Archer, M.D., Richard K. Archer, M.D.P.A., and as Representative and Trustee of the Richard K. Archer, M.D. Profit Sharing Account, Richard Archer, Archer Farms, LLC, Richard K. Archer, Individually and as Trustee of Profit Sharing Trust, Richard K. Archer, Individually and as Representative and/or Trustee of the Richard K. Archer Pension Plan, Richard K. Archer, Individually and as Representative of the Richard K. Archer Keogh, Richard K. Archer, Individually and as Representative of the Richard K. Archer IRA, A Business Entity Known as Reba Cattle, LLC, Ruth E. Archer, Richard K. Archer, Individually and as Representative and/or Trustee of the Richard K. Archer Profit Sharing Plan, and Richard K. Archer, Individually and as Trustee of the Richard K. Archer M.D.P.A. Profit Sharing Plan and Trust, Appellants

No. 05-15-00459-CV V.

Bobby Tunnell, Appellee

On Appeal from the 298th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-12-08161-M.
Opinion delivered by Justice Myers. Justices Bridges and Francis participating.

In accordance with this Court's opinion of this date, this appeal is **DISMISSED**.

It is ordered that appellee Bobby Tunnell recover his costs of this appeal from appellants Richard K. Archer, M.D., Richard K. Archer, M.D.P.A., and as Representative and Trustee of the Richard K. Archer, M.D. Profit Sharing Account, Richard Archer, Archer Farms, LLC, Richard K. Archer, Individually and as Trustee of Profit Sharing Trust, Richard K. Archer, Individually and as Representative and/or Trustee of the Richard K. Archer Pension Plan, Richard K. Archer, Individually and as Representative of the Richard K. Archer Keogh, Richard K. Archer, Individually and as Representative of the Richard K. Archer IRA, A Business Entity Known as Reba Cattle, LLC, Ruth E. Archer, Richard K. Archer, Individually and as

Representative and/or Trustee of the Richard K. Archer Profit Sharing Plan, and Richard K. Archer, Individually and as Trustee of the Richard K. Archer M.D.P.A. Profit Sharing Plan and Trust.

It is further **ORDERED** that appellee Bobby Tunnell recover damages of $2,205 from appellants Richard K. Archer, M.D., Richard K. Archer, M.D.P.A., and as Representative and Trustee of the Richard K. Archer, M.D. Profit Sharing Account, Richard Archer, Archer Farms, LLC, Richard K. Archer, Individually and as Trustee of Profit Sharing Trust, Richard K. Archer, Individually and as Representative and/or Trustee of the Richard K. Archer Pension Plan, Richard K. Archer, Individually and as Representative of the Richard K. Archer Keogh, Richard K. Archer, Individually and as Representative of the Richard K. Archer IRA, A Business Entity Known as Reba Cattle, LLC, Ruth E. Archer, Richard K. Archer, Individually and as Representative and/or Trustee of the Richard K. Archer Profit Sharing Plan, and Richard K. Archer, Individually and as Trustee of the Richard K. Archer M.D.P.A. Profit Sharing Plan and Trust and from appellants' counsel Jonathan Bearrie and Philip R. Russ pursuant to Texas Rule of Appellate Procedure 45.

Judgment entered this 9th day of February, 2016.