

APPENDIX

1. Transcript of Proceedings in the "Remote by Zoom" hearing, Case No. 21C751
Held November 4, 2021 (13 pages)
2. Davidson County Circuit Court's denial of civil action, Case No. 21C751
Entered November 10, 2021 (4 pages)
3. Tenn. Court of Appeals' denial of appellate relief, Case No. M2021-01482-COA-R3-CV
Entered August 31, 2022 (16 pages)
4. Tenn. Court of Appeals' denial of the Rule 39 Petition to Rehear, Case No. M2021-01482-COA-R3-CV
Entered September 16, 2022 (2 pages)
5. Tenn. Sup. Ct.'s denial of the Trap Rule 11 petition, Case No. M2021-01482-SC-R11-CV
Entered November 16, 2022 (2 pages)

IN THE FIRST CIRCUIT COURT FOR DAVIDSON
AT NASHVILLE

DAVID AVERY,

)

Petitioner,

)

v.

)

CHERYL BLACKBURN et. al.,

)

Respondents.

)

Appendix:
Attachment #1

(13 pages)

Transcript of Proceedings

Before Hon. Hamilton V. Gayden, Jr.

Thursday, November 4, 2021

APPEARANCES:

For the Petitioner:

David Avery, #437427
140 Macon Way
Hartsville, TN 37074

For Respondent Cheryl Blackburn:

Mary Elizabeth McCullohs
P.O. Box 20207
Nashville, TN 37202

For Respondent Victor Johnson:

Lauren Kisner
P.O. Box 20207
Nashville, TN 37202

For Respondent Daniel Newbern:

Angela Williams
P.O. Box 196300
Nashville, TN 37219

(The aforementioned cause came on to be heard on Thursday, November 4, 2021, beginning at 1:00 p.m., before the Honorable Hamilton V. Gayden, Jr., Judge, via Zoom Videoconferencing, when the following proceedings were had, to-wit:)

THE COURT: Ok good afternoon. Let me go around and see who's here and who's missing. Mary, you're the Court Reporter?

MS. MCCULLOHS: No, I'm one of the Attorney Generals. I represent Judge Blackburn.

THE COURT: Alright.

MS. MCCULLOHS: I have this headset on because my voice is a little off and I wanted to make sure you could hear me clearly.

THE COURT: I can. Alright, Lauren Kisner?

MS. KISNER: Yes, Your Honor. I am another Attorney General representing former D.A. Victor Johnson.

THE COURT: Ok. And A.D. Williams?

MS. WILLIAMS: Hi, I'm Angela Williams and I represent Officer Daniel Newbern with Metro.

THE COURT: Alright. Ok, good afternoon, is this Mr. Avery?

MR. AVERY: Hey, how are you doing this morning? Can you hear me?

THE COURT: I can. Can you hear me?

MR. AVERY: Yes, sir.

THE COURT: Ok, Mr. Avery, we have three attorneys that were online before you were. That's general McCullohs representing Judge Blackburn, General Kisner

representing Victor Johnson, former Attorney General, and Angela Williams representing Officer Newbern. Is that right? Did I say that right, Ms. Williams? General Williams?

MS. WILLIAMS: Yes, Angela.

THE COURT: And then you. This is the style of the case is Avery vs. Judge Blackburn. So my question to you, Mr. Avery, I've already let you know and I'll do it on the record that this hearing will be remote by Zoom and if you object to that I need to know that because you have the right to appeal that and I'm not going to have this hearing unless you agree to have this hearing. So, my question to you is do you agree to have this hearing?

MR. AVERY: Yes, Your Honor, I agree to have this hearing.

THE COURT: Alright, this is your motion so go ahead. Go ahead, Mr. Avery, your motion.

MR. AVERY: Uh, yes. This case arises from the execution of fraudulent commercial documentation that has caused me irreparable damages and I have a copy of the original filing which was not answered timely by any of the Respondents and I also have copies of the issuance of the summons by The Court on June 1st, 2021 and none of the Respondents have timely filed their point for point counter affidavit in response to the claims against them. And I moved that this Court enter a default judgment that I filed on July the...on July the 16th I filed a motion for the court to enter a default judgment because none of the defendants entered their counter point for point affidavits in compliance with the actual filing, section 5 of the filing, which is the mutual contract between all parties. And also, for not honoring the Davidson County Sheriff's Department summons after it was served and issued by The Court. So, I move that this case, that immediate default judgment be entered in this case, in my favor for the relief sought. If there are any objections, please tell me why.

THE COURT: Ok, General McCullohs?

MS. MCCULLOHS: Yes, Your Honor. As I understand it, Mr. Avery has filed four Post Judgment Motions: A Motion to Strike the Motion to Dismiss, a Motion to Enter Default Judgment, Motion to Amend and Reissue Court Order, and a Motion to Enter a Bench Warrant. Now these are Post Judgment Motions. They are governed by Rule 60 of the Tennessee Rules of Civil Procedure and under Rule 60.02, Mr. Avery must first describe with specificity the basis for the relief he's requested and number two establish by clear and convincing evidence that he's entitled to the relief he's requested. As to the first element, Mr. Avery asks this court to take another look at its final judgment in the context of Judge Blackburn's failure to appear and defend herself.

Now Mr. Avery fails to meet the requirements of the second element because the facts and the law are against him. First, Mr. Avery requests that this court enter a default judgment against Judge Blackburn, but Judge Blackburn responded to Mr. Avery's writ well within the time allotted by Tennessee Rule of Civil Procedure 12.02, the time being within 30 days of receiving a copy of the summons and the writ. Judge Blackburn was served on June 14th, 2012 and she filed her motion to dismiss on July 9th. And I said 2012 I mean 2021. And she filed her motion to dismiss on July 9th, 2021 so there is no factual basis for a default judgment to be entered against Judge Blackburn.

Secondly, Mr. Avery asserts that this court improperly considered his initial filing as a writ of mandamus, but the court correctly construed it as such because Mr. Avery is asking this court to order Judge Blackburn to perform certain duties in her official capacity. Essentially, he claims that the criminal judgments entered against him in 2008 were fraudulent and wants this court to order Judge Blackburn to set aside these judgments. This, she can not do. As the court noted in its judgment order, first Mr. Avery has not established a clear right to this requested relief, secondly, Judge Blackburn has no duty to overturn Mr. Avery's criminal judgments, and third, Mr. Avery has another path for requesting the relief he desires which would be to contest the convictions via

habeas corpus petitions.

So, in conclusion because Mr. Avery has failed to establish via clear and convincing evidence that this court should revisit its judgment, his post judgment motions should be denied. Thank you.

THE COURT: Ok, Mr. Avery do you want to respond to counsel for Judge Blackburn?

MR. AVERY: Yes, Your Honor. The court is clothed with the authority to accommodate the relief I am asking for, and as a third party, Ms. McCullohs has failed to file a motion to intervene on behalf of Cheryl Blackburn. Ms. Blackburn did not enter or submit her point for point counter affidavit as required in the mutual contract in the actual filing. So that filing of her motion to dismiss is not applicable in this case. She failed to meet, to file the point for point counter affidavit. The allegations stated clearly in the filing, in the initial filing, which is a motion for relief and the affidavit in the nature of a writ of quo warranto. And quo warranto stands only to compel the defendants to actually...to compel the defendants to show by what authority did they act against me. The commercial documentation that was....the commercial documentation that Cheryl Blackburn and the other defendants have engaged in was in violation of Tennessee Code Annotated 47-25-1105(a) and I am well within right to receive the relief demanded in this suit, Your Honor. I disclosed everything, I have valid claims against each of the defendants with evidence showing that their signatures were on the documentation in question. And I also move for a full rescission of all charging instruments if any of the defendants object to my claims which were never disputed. I will accept Ms. Kisner, Ms. Williams, and Ms. McCullohs to stand as surety for the obligations associated with the accommodation of the relief requested.

Your Honor, the court's very own summons that was issued against the defendants was not honored by the defendants. And, Ms. Blackburn's motion to dismiss

submitted by Ms. McCullohs has no relevance to this case and is inapplicable and I move that the court does enter the default judgment in my favor for the relief sought. I am well within my right under the Bill of Rights to be accommodated by this court which is clothed with authority to accommodate the relief I'm requesting.

THE COURT: Ms. Kisner, do you want to reply for former Attorney General Johnson?

MS. KISNER: Your Honor, I do agree with General McCullohs as far as the fact that this post judgment motions filed by Mr. Avery, the relief for that would be under Rule 60 and that Mr. Avery has not provided basis for relief under Rule 60. He has provided an argument about there being a failure to appear by Defendant Johnson, however in this case Defendant Johnson was served on June 14th of 2021 and had until July 14th 2021 to respond. This court entered its order July 13th of 2021 so that had not lapsed for any sort of motion was required to be filed as far as a Rule 12 responsive motion.

And as far as this not being a writ of mandamus, Mr. Avery has only stated it is not a writ. He has not provided any right or any sort of factual basis of relief for this not being a writ of mandamus. Your Honor, it is construed as a writ of mandamus here in the sense that Mr. Avery is asking this court to compel performance of certain officials such as Judge Blackburn and defendant Victor Johnson. In the complaint filed by Mr. Avery he is alleged that Victor Johnson has unauthorized an indictment against his estate. I'm not exactly sure the estate he is referring to but as a D.A. at the time this case was going on in 2008, Victor Johnson had the authority to issue an indictment in this case so that is something that was within his prosecutorial duties and functions. So as far as fully rescinding that indictment that is not something that Mr. Avery has a right to. And also, as pointed out by this court in its order, there is another remedy available if he was seeking to overturn that conviction based on that indictment, which would've been a habeas corpus.

So, in this instance, Your Honor, Mr. Avery does not have a relief under Rule 60 as he has alleged in his Post Judgment Motions.

THE COURT: Mr. Avery, do you want to respond to?

MR. AVERY: Yes, I would, Your Honor. This is a commercial issue and I have in my hand a copy of the state seal which identifies the State of Tennessee as a corporation and therefore any commercial documentation that is submitted by any of its agents are commercial in nature and I have a right to contract, be advised of what the terms of those contracts and paperwork are involved. And in fact, the trust account, David Anthony Avery, is that. It is a trust account as disclosed in the initial filings. What these counsel are failing to realize is that in a commercial matter the defendants must stand as surety for the claims against them. And if they want to stand in place as surety for them then I will accept them as being surety in this commercial matter. And this matter is governed by the Uniform Commercial Code and my name does not appear as signed on any of the documentations alleged against me.

That's why I'm requesting a full rescission so we can determine the true holders of liability regarding those commercial transactions under commercial law. No one and none of them, none of the defendants have any verified valid claims against me as stated in the original filing. And, Your Honor, as Ms. Kisner highlighted, the fact that there was an order issued denying a writ of mandamus prior to the 30 days that the defendants had to even submit their point for point counter affidavits, which none of them did. And to add to that, anything filed by these third parties, Ms. Kisner, Ms. McCullohs, or Ms. Williams, are invalid. They do not suffice the point for point counter affidavit as disclosed in the mutual contract in the initial filing. And, Your Honor, for the record, I would like all parties to be advised that this court and the judge does have the authority to accommodate this relief upon the default of the defendants.

This is a commercial issue and I have a right to have those

documents alleged against me, supposedly charged against me, to be rescinded so that we can identify the true holders of liability regarding those. My signature does not appear on any of those documentations and I claim no liability for that. I am falsely imprisoned and I have proven it with the documentation that I have submitted to this court. And the defendants themselves have dishonored the court's summons and I just move that this court enter the default judgment immediately in my favor.

THE COURT: Ok, General Williams, do you want to respond for the officer?

MS. WILLIAMS: Yes, Your Honor. With respect to the allegations that Mr. Newbern failed to provide any type of written response within the 30 days is, from our position that statement is inaccurate. Mr., in this case, Mr. Newbern was served with the complaint on June 15th, 2021 and according to Rule 12 he would've had specifically 30 days to respond to such complaint. As has been mentioned by Ms. Kisner and Ms. McCullohs earlier, the order in this case dismissing the matter was entered on July 13th, 2021 prior to the 30 day time period that Mr. Newbern would have had to respond. So there is no way, or nothing that supports the allegation that Mr. Newbern was in default, that he failed to appear or make any type of appearance in this matter.

With respect to the second allegation that the court mistakenly construed, excuse me, Mr. Avery's motion as a writ of mandamus. From our position we agree that it should in fact be reviewed in this manner due to the extraordinary relief that is being sought in this case; specifically that Mr. Avery be released from prison, also the monetary amount that is being sought from Mr. Avery.

With respect to Mr. Newbern, looking at this document that has been filed it is our position that there are no specific details that have been pled which would allow Mr. Newbern, or allow Mr. Newbern to provide the type of relief that is being sought in this case. We have found nothing that has been presented to us that shows that there is anything stated or provided where

Mr. Newbern again can provide any of this type of relief. And Your Honor outside of the motions that have been filed, the Metropolitan Government just wants it noted for the record all of the claims that are potentially being put forth against our client, Mr. Newbern, are outside of the statute of limitations. The only thing that we can review or claim from the documents that have been filed is the possibility of a case for false imprisonment or, I'm sorry a case for false imprisonment or false arrest. In the state of Tennessee there is a one-year statute of limitations. This case at this point is now well over thirteen years old. We are completely outside of the statute of limitations in this matter and for that and that reason alone we asked that this case be dismissed against our client.

THE COURT: Mr. Avery, do you have a response?

MR. AVERY: Yes, Your Honor. In this case there is no statute of limitations on fraud. As in my initial filing I am alleging fraud; commercial fraud using commercial documentation against a state property. And for the record I would like the court to be advised that you, your judge are schooled in law and know that motions and writs are completely different vehicles. I initially filed a motion for relief in the affidavit in the nature of a writ of quo warranto which only compels the defendants to disclose by what authority did they act against me and infringe upon trust property. And I move that this, I have proven everything, and plus on top of that the defendants just have waived their defenses by failing to enter their point for point counter affidavits as required by the initial filing in section 5. It is a mutual contract that they are in breach of and they have dishonored the court summons and they have waived their defenses so they have no defenses and there is no statute of limitations on fraud, which is alleged and as far as my motion to, the only reason this motion to amend and re-issue the court order was filed only because the court entered an order denying a writ of mandamus, which was never filed. A motion for relief is not a writ of mandamus no matter what way you try to look at it or advise it or take it under advisement. It is in no way, shape, form, or fashion a writ of mandamus. It is a motion for relief and this court is authorized and clothed with the authority to

accommodate the relief sought, and I move that that this court enter the default judgment again in my favor for the relief sought immediately.

THE COURT: Ok, anybody else have anything else to say or add?

MR. AVERY: Before you continue, Your Honor, for the record, none of the defendants not their sureties who appeared to take the surety, be sureties, for the accommodation of the relief sought. I just want to add that none of them have any valid claims against me. I have caused, I have not caused any of them any harm or any problems with anything related to them. I am an innocent man and I have been doing prison time for fourteen years based on the presumption of a conviction executed under the color law by fraudulent commercial documentation against the state property, David Anthony Avery. I am a living man, I am not a corporate entity. And I am falsely imprisoned and I must be released, and this court can and should enter the default judgment in my favor.

THE COURT: Anything further?

MR. AVERY: No, sir.

THE COURT: The court will let you all know in writing. Thank you very much for your time today. Bye.

MS. MCCULLOHS: Thank you, Your Honor.

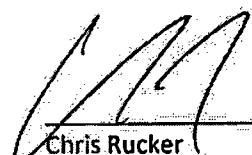
MS. KISNER: Thank you, Your Honor.

(Proceedings concluded at 1:25 p.m.)

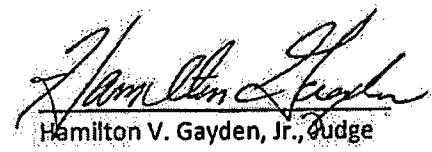
CERTIFICATE OF REPORTING

I hereby certify that I, Chris Rucker, reported the foregoing proceedings, and that the foregoing proceedings, consisting of pages 1 through 11, constitute a true and correct transcript of said proceedings to best of my ability.

I further certify that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome of the events in this action.



Chris Rucker



Hamilton V. Gayden, Jr., Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was sent electronically via the Court's Electronic Filing System and by mail on this the 17th day of December, 2021 to the following:

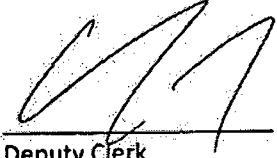
David Avery, #437427
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P.O. Box 20207
Nashville, TN 37202

Andrew McClanahan
P.O. Box 196300
Nashville, TN 37219

Angela Williams
P.O. Box 196300
Nashville, TN 37219



Deputy Clerk

IN THE FIRST CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

DAVID AVERY, #437427)
Plaintiff,)
v.) Case No. 21C751
CHERYL BLACKBURN, et. al.,)
Defendants.)

ORDER

This cause came to be heard on November 4th, 2021 on Plaintiff's Motion to Strike Defendant's Motion to Dismiss, Motion for Default Judgment, Motion to Amend or Reissue Court Order, and Motion to Issue Bench Warrant. After reviewing the briefs submitted and upon argument of the parties, the Court finds that all four motions are moot as a matter of procedure and therefore are denied.

Motion to Strike Judge Blackburn's Motion to Dismiss

Plaintiff is seeking to strike Judge Blackburn's Motion to Dismiss that was filed on July 9th. Plaintiff claims that the motion needs to be stricken because Judge Blackburn defaulted. Judge Blackburn was not served until June 14th so the Motion to Dismiss was timely filed. Since the Defendant's Motion to Dismiss was timely filed, the Plaintiff's Motion to Strike Defendant's Motion to Dismiss is denied.

Motion to Enter Default Judgment

Plaintiff is seeking a Default Judgment against all Defendants for failing to respond within 30 days of his complaint being filed. His Writ of Mandamus was filed on May 3rd but the Defendants were not served until June 14th, June 15th, and June 28th respectively. Defendant Blackburn filed her Motion to Dismiss through her attorney on July 9th, within 30 days of service. The Court entered an order denying the Writ of Mandamus on July 13th before the other Defendants responded to the Writ. The other

Defendants filed responses to these Post Judgment Motions on August 6th, August 20th, and August 31st.

This motion is denied as Defendants answered in a timely fashion making a Default Judgment improper.

Motion to Amend or Reissue Court Order

Plaintiff is claiming that The Court erred by not addressing the merits of the case in its July 13th order denying the Writ of Mandamus. At the time the order was entered The Court only had the petition for a Writ of Mandamus to use as a merit for the case. Plaintiff is also claiming that The Court did not take into account that the Defendants defaulted by not answering in a timely fashion. Since the Defendants answered properly under the local rules that claim is moot. Plaintiff also claims that The Court improperly characterized his petition as a Writ of Mandamus. The response from the Defendants on this motion state that it is a Writ of Mandamus in that the Plaintiff is seeking to coerce action from an elected official in their official capacity; The Court finds that the Plaintiff is seeking to coerce elected officials to act within their official capacity therefore making the Plaintiff's petition a Writ of Mandamus and therefore the Motion to Amend or Reissue Court Order is denied.

Motion to Issue Bench Warrant

Plaintiff is seeking a Bench Warrant for the Defendants for failing to appear to answer the summons that were issued. All Defendants have either appeared in some form either through counsel or by filing a Motion to Dismiss or a response to these Post Judgment Motions. This claim is moot as well and the Motion to Issue Bench Warrant is denied.

Conclusion

The Court finds that the Plaintiff fails to present clear and convincing evidence as to why these motions should be granted; only that the Plaintiff claims that the Defendants are in default for failing to answer. The Plaintiff does not provide a timeline that would support a finding of default. Defendants cite Rule 60.02 saying that "Mr. Avery must describe the basis for relief with specificity." Defendants go on to state that in all four motions, the Plaintiff essentially requests the same remedy with four separate

titles: an issuance of a default judgment. The Plaintiff has not provided any proof as to why that should be granted, and the timeline of filings do not support a default judgment. The Defendants also state that the classification as a Writ of Mandamus was proper under *Hayes v. Civ. Serv. Comm'n*, 907 S.W.2d 826 (Tenn. Ct. App. 1995). The Court reiterates its ruling that the petition for relief from the Plaintiff is a request for a Writ of Mandamus, which is denied.

As to Officer Newbern, T Court agrees with Defendants that the tort claim against him is barred under the one-year statute of limitations as the action took place in May of 2008 and that claim has a one-year statute of limitations.

All four motions are moot under the local rules. The initial denial and dismissal of the Writ of Mandamus was proper. On all four Post Judgment Motions by the Plaintiff, he is essentially seeking a Default Judgment but has not provided clear and convincing evidence as to why that judgment should be entered. Even if proof were to be provided by the Plaintiff, the timeline of the case would not support a Default Judgment. Therefore, all four of the Plaintiff's motions are denied.



Hamilton V. Gayden, Jr.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was sent electronically via the Court's Electronic Filing System and by mail on this the 10th day of November, 2021 to the following:

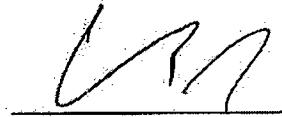
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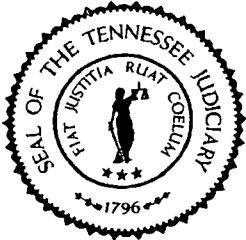
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Angela Williams
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Nashville, TN 37219



Deputy Clerk



Court of Appeals – Middle Division
Appellate Court Clerk's Office - Nashville
100 Supreme Court Building

Appendix:

Attachment #3

(16 pages)

David Anthony Avery #437427
Trousdale Turner Correctional Center
140 Macon Way
Hartsville TN 37074

Re: M2021-01482-COA-R3-CV - DAVID AVERY v. CH

Notice: Opinion - Filed

Attached to this cover letter, please find the referenced notice issued in the above case. If you have any questions, please feel free to call our office at the number provided.

cc: David Anthony Avery
Mary Elizabeth McCullohs
Lauren Danielle Kisner
Andrew David McClanahan
Judge Hamilton V. Gayden, Jr.

**IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE**

DAVID AVERY v. CHERYL BLACKBURN, ET AL.

**Davidson County Circuit Court
21C751**

No. M2021-01482-COA-R3-CV

Date Printed: 08/31/2022

Notice / Filed Date: 08/31/2022

NOTICE - Opinion - Filed

The Appellate Court Clerk's Office has entered the above action.

If an application for permission to appeal in the Tennessee Supreme Court is made pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, you must file an original and five copies of the application with the Appellate Court Clerk. ** You must attach a copy of the Opinion/Order of the Court of Appeals to each application. The application must be filed within 60 days after the Court's judgment was filed.

No extensions will be granted.

James M. Hivner
Clerk of the Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 1, 2022

FILED
08/31/2022
Clerk of the
Appellate Courts

DAVID A. AVERY v. CHERYL A. BLACKBURN ET AL.

No. M2021-01482-COA-R3-CV

The trial court dismissed the plaintiff's claims pursuant to Tennessee Rule of Civil Procedure 12, determining that he had failed to state a claim upon which relief could be granted. Following the trial court's denial of the plaintiff's motion for post-judgment relief, the plaintiff appealed to this Court. Discerning no reversible error, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and ARNOLD B. GOLDIN, J., joined.

David A. Avery, Hartsville, Tennessee, Pro Se.

Herbert H. Slatery, III, Attorney General and Reporter, and Mary Elizabeth McCullohs, Senior Assistant Attorney General, for the appellee, Cheryl A. Blackburn.

Herbert H. Slatery, III, Attorney General and Reporter, and Lauren D. Rota, Assistant Attorney General, for the appellee, Victor S. Johnson, III.

Wallace W. Dietz, Director of Law, and Andrew D. McClenahan and Angela D. Williams, Assistant Metropolitan Attorneys, Department of Law of the Metropolitan Government of Nashville and Davidson County, Nashville, Tennessee, for the appellee, Daniel D. Newbern.

OPINION

I. Factual and Procedural Background

The plaintiff, David A. Avery, filed a “Motion for Relief Affidavit in the Nature of a Writ of Quo Warranto” (“Motion for Relief”) on May 3, 2021, in the Davidson County Circuit Court (“trial court”), naming Judge Cheryl A. Blackburn; former District Attorney General Victor S. Johnson, III; and police detective Daniel D. Newbern as defendants. Mr. Avery is currently serving a forty-nine year sentence by reason of his convictions for aggravated robbery, especially aggravated robbery, reckless endangerment, and attempted second degree murder. *State v. Avery*, No. M2008-01809-CCA-R3-CD, 2009 WL 4724430, at *1 (Tenn. Crim. App. Dec. 10, 2009). Judge Blackburn presided over Mr. Avery’s criminal trial, and Mr. Johnson was the District Attorney General at that time. *Id.* Mr. Newbern was a detective who worked on the investigation. *Id.* Although Mr. Avery stated in his motion that he was seeking relief in the nature of “a writ of *quo warranto*,” the relief sought included (1) the setting aside of his criminal convictions, (2) his immediate release from incarceration, and (3) an award of compensatory damages in the amount of \$333,333,333.33.

On July 9, 2021, Judge Blackburn filed a motion to dismiss, pursuant to Tennessee Rule of Civil Procedure 12.02, asserting that she was entitled to sovereign immunity. On July 13, 2021, without reference to Judge Blackburn’s motion, the trial court entered an order of dismissal, determining that Mr. Avery’s motion should be construed as a petition for a writ of mandamus. The trial court dismissed Mr. Avery’s claims, finding that there was no recognized right to be enforced via writ of mandamus. The court noted that if Mr. Avery were seeking “redress for the underlying convictions, the proper remedy would [be] by way of habeas corpus, contesting the conviction.” Mr. Avery subsequently filed a motion seeking to strike Judge Blackburn’s motion to dismiss.

On July 20, 2021, Mr. Avery filed a motion seeking default judgments against the defendants. Mr. Avery argued that the defendants had failed to appear and defend the claims against them. On August 13, 2021, Mr. Avery filed a motion to amend, asserting that the trial court’s July 13, 2021 order of dismissal should be “amended” such that default judgment against the defendants would be entered in Mr. Avery’s favor. Mr. Avery further argued that the court erred by treating his Motion for Relief as a petition for writ of mandamus. Mr. Avery concomitantly filed a motion seeking issuance of “bench warrants” for the immediate apprehension of the defendants.

The defendants each respectively filed responses opposing Mr. Avery’s motions to amend, for default judgment, and for issuance of bench warrants for their arrest. The trial court scheduled a hearing regarding the pending motions, denying Mr. Avery’s request for transport due to COVID-19 protocols then in effect. The court stated that Mr. Avery would be allowed to appear virtually to participate in the hearing. Mr. Avery

subsequently filed pleadings objecting to the trial court's rescheduling of the motion hearing and seeking an order allowing him to be present in person for the rescheduled hearing.

On October 28, 2021, the trial court entered an order denying Mr. Avery's request to be transported to the hearing and rescheduling the motion hearing to November 4, 2021, to be conducted virtually. Following that virtual hearing, wherein Mr. Avery and counsel for the defendants were allowed to present arguments, the trial court entered an order on November 10, 2021, respecting the pending motions. The trial court denied Mr. Avery's motion to strike Judge Blackburn's motion to dismiss, determining that inasmuch as Judge Blackburn was not served with process until June 14, 2021, her July 9, 2021 motion was timely filed.

Relative to Mr. Avery's motion for default judgment, the trial court found that Judge Blackburn filed her motion to dismiss within thirty days of service such that default judgment against her would be improper. The court likewise found that default judgment as to the remaining defendants was improper because the court had entered an order denying Mr. Avery's petition on July 13, 2021, and the remaining defendants filed responses shortly thereafter.

Concerning Mr. Avery's claim that the trial court erroneously characterized his petition as one seeking a writ of mandamus, the court noted that Mr. Avery was attempting to force elected officials to act within their official capacity, citing *Hayes v. Civil Serv. Comm'n of Metro. Gov't of Nashville & Davidson Cnty.*, 907 S.W.2d 826, 828 (Tenn. Ct. App. 1995) ("Mandamus . . . is a special remedy in which the issues are severely limited. It is used to coerce the performance of official duties[.]"). As such, the court determined that it had properly construed Mr. Avery's petition as one seeking a writ of mandamus, and the court denied Mr. Avery's motion to amend.

Respecting Mr. Avery's request that bench warrants be issued compelling the defendants' arrests, the trial court noted that Mr. Avery had asserted that the defendants had failed to appear and answer in this matter. However, the court found that because the defendants had each respectively appeared by filing a motion or response, Mr. Avery's claim was moot. The court therefore denied his motion to issue bench warrants.

Finally, regarding Mr. Avery's motion seeking entry of default judgment, the trial court determined that Mr. Avery had failed to establish facts supporting a judgment by default. As the court noted, "the timeline of the case would not support a Default Judgment." The court further determined that the tort claim asserted against Mr. Newbern was barred by the one-year statute of limitations because Mr. Newbern's actions took place in 2008. The court accordingly denied Mr. Avery's motions. Mr. Avery timely appealed. Although Mr. Avery attempted to file a statement of the

evidence pursuant to Tennessee Rule of Appellate Procedure 24, the court determined that such statement did not meet Rule 24's requirements.

II. Issues Presented

Mr. Avery presents the following issues for this Court's review, which we have restated slightly:

1. Whether the trial court properly applied the Tennessee Rules of Civil Procedure to fully adjudicate and dispose of Mr. Avery's claims against the defendants.
2. Whether the trial court erred by failing to enter default judgment against the defendants because the defendants failed to timely submit answers to Mr. Avery's averments and thus have purportedly waived all defenses.
3. Whether Mr. Avery is entitled to relief due to the imposition of irreparable injuries upon him by the defendants "via commercial fraud under color of law."
4. Whether Mr. Avery's action is barred by the statute of limitations.
5. Whether Mr. Avery "is liable for any payment or performance obligations associated with the fraudulent commercial instruments executed against DAVID ANTHONY AVERY (Trust)" by the defendants.
6. Whether the defendants are "contractually bound by the terms and payment obligations of [Mr. Avery's] Public Notice Contract disseminated to the public-at-large regarding the unauthorized usages of DAVID ANTHONY AVERY (Trust)."

III. Standard of Review

As this Court has previously explained concerning *sua sponte* dismissals:

A trial judge has the authority to dismiss a claim *sua sponte* "when he is of the opinion that the complaint fails to state a claim upon which relief may be granted." *Huckeby v. Spangler*, 521 S.W.2d 568, 571 (Tenn. 1975). So we review the court's dismissal of the [claims] using the familiar standard of review for a Rule 12.02(6) motion to dismiss. *See Webb [v. Nashville Area Habitat for Humanity]*, 346 S.W.3d [422.] 426-27 [(Tenn. 2011)].

Kauffman v. Forsythe, No. E2019-02196-COA-R3-CV, 2021 WL 2102910, at *3 (Tenn. Ct. App. May 25, 2021). Regarding the review of a dismissal pursuant to Rule 12.02(6), our Supreme Court has elucidated:

A Rule 12.02(6) motion challenges only the legal sufficiency of the complaint, not the strength of the plaintiff's proof or evidence. The resolution of a 12.02(6) motion to dismiss is determined by an examination of the pleadings alone. . . .

In considering a motion to dismiss, courts “must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences.” *Tigg v. Pirelli Tire Corp.*, 232 S.W.3d 28, 31-32 (Tenn. 2007) (quoting *Trau-Med [of Am., Inc. v. Allstate Ins. Co.]*, 71 S.W.3d [691,] 696 [(Tenn. 2002)]); see *Leach v. Taylor*, 124 S.W.3d 87, 92-93 (Tenn. 2004); *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997); *Bellar v. Baptist Hosp., Inc.*, 559 S.W.2d 788, 790 (Tenn. 1978); see also *City of Brentwood v. Metro. Bd. of Zoning Appeals*, 149 S.W.3d 49, 54 (Tenn. Ct. App. 2004) (holding that courts “must construe the complaint liberally in favor of the plaintiff by . . . giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts”). A trial court should grant a motion to dismiss “only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002); see *Lanier v. Rains*, 229 S.W.3d 656, 660 (Tenn. 2007); *Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999); *Pemberton v. Am. Distilled Spirits Co.*, 664 S.W.2d 690, 691 (Tenn. 1984); *Fuerst v. Methodist Hosp. S.*, 566 S.W.2d 847, 848 (Tenn. 1978); *Ladd v. Roane Hosiery, Inc.*, 556 S.W.2d 758, 759-60 (Tenn. 1977). We review the trial court’s legal conclusions regarding the adequacy of the complaint de novo.

Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 426 (Tenn. 2011) (other internal citations omitted).

We respect Mr. Avery’s decision to proceed without benefit of counsel. We note that in reviewing pleadings, we “must give effect to the substance, rather than the form or terminology of a pleading.” *Stewart v. Schofield*, 368 S.W.3d 457, 463 (Tenn. 2012) (citing *Abshure v. Methodist Healthcare-Memphis Hosp.*, 325 S.W.3d 98, 104 (Tenn. 2010)). We note also that pleadings “prepared by pro se litigants untrained in the law should be measured by less stringent standards than those applied to pleadings prepared by lawyers.” *Stewart*, 368 S.W.3d at 462 (citing *Carter v. Bell*, 279 S.W.3d 560, 568 (Tenn. 2009); *Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct. App. 2003); *Young*

v. Barrow, 130 S.W.3d 59, 63 (Tenn. Ct. App. 2003)). Parties proceeding without benefit of counsel are “entitled to fair and equal treatment by the courts,” but we “must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.” *Hessmer*, 138 S.W.3d at 903.

IV. Post-Judgment Relief

The overarching issue to be addressed in this matter is whether the trial court should have granted to Mr. Avery post-judgment relief from its prior order dismissing Mr. Avery’s claims. The trial court found that because Mr. Avery’s original Motion for Relief sought to “coerce elected officials to act within their official capacity,” it should be treated as a petition for writ of mandamus. Mr. Avery posits that the trial court should have granted him the relief he requested.

In his Motion for Relief, Mr. Avery stated that he was seeking relief “in the nature of quo warranto.” “A quo warranto action will lie in a proceeding complaining of the wrongful acts of public officials[.]” *State ex rel. Vaughn v. King*, 653 S.W.2d 727, 729 (Tenn. Ct. App. 1982). However, as this Court has further explained:

Quo warranto is a common law remedy, which the General Assembly codified at Tenn. Code Ann. § 29-35-101, *et seq.* The procedure has been described as “a writ of inquiry as to the warrant for doing the acts of which complaint is made.” *State ex rel. Wallen v. Miller*, 202 Tenn. 498, 304 S.W.2d 654, 658 (1957) (quoting 44 Am. Jur., p. 88, Sec. 2). *Quo warranto* actions generally are initiated by a district attorney general. *See* Tenn. Code Ann. § 29-35-109. The reasoning for this limitation has been explained as follows:

In a sense—in a very important sense—every citizen and every taxpayer is interested in the enforcement of law, in the administration of law, and in having only qualified officers execute the law. But that general interest is not a private but a public interest. Being such, it is to be represented by the Attorney General or the district attorney, who are expected by themselves or those they authorize to institute quo warranto proceedings against usurpers in the same way that they are expected to institute proceedings against any other violator of the law. That general public interest is not sufficient to authorize a private citizen to institute such proceedings; for if it was, then every citizen and every taxpayer would have the same interest and the same right to institute such proceedings, and a public officer might, from the beginning to the end of his term, be harassed with proceedings to try his title.

State ex rel. Wallen v. Miller, 304 S.W.2d at 658 (quoting *Newman v. United States ex rel. Frizzell*, 238 U.S. 537, 547-48, 35 S. Ct. 881, 59 L. Ed. 1446 (1915)).

In limited circumstances, a private citizen may file a *quo warranto* action. See Tenn. Code Ann. § 29-35-110. However, the lawsuit still must be brought in the name of the district attorney general. *State ex rel. Wallen v. Miller*, 304 S.W.2d at 658-59. The plaintiff also is required to serve a copy of the complaint upon the district attorney general, who then must decide whether to join in the petition. *Bennett v. Stutts*, 521 S.W.2d 575, 577 (Tenn. 1975).

Dossett v. City of Kingsport, 258 S.W.3d 139, 144 (Tenn. Ct. App. 2007).

In this matter, Mr. Avery failed to comply with the above-referenced statutory requirements for filing a *quo warranto* action as a private citizen. See *id.* Therefore, as the trial court properly concluded, Mr. Avery could not proceed with a claim sounding in *quo warranto*.

Rather than analyzing Mr. Avery's claim as a *quo warranto* action, however, the trial court treated Mr. Avery's Motion for Relief as a petition for a writ of mandamus. As the United States Supreme Court explained long ago concerning the purpose of a writ of mandamus:

Blackstone, vol. 3, p. 110, says that a writ of mandamus is "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation or inferior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, and has no other specific means of compelling its performance."

Marbury v. Madison, 5 U.S. 137, 147 (1803). Likewise, our Supreme Court has elucidated:

Where the law plainly prescribes a specific duty or a specific act to be performed, which is due in point of it, but has been refused, if simply effecting a private right, or only omitted if of public concern, the court may interfere at the instance of the proper parties, and by mandamus set those public officials charged with the duty in motion, leaving to them, however,

the free exercise of their own judgment and discretion in the manner of performance.

State v. Meador, 284 S.W. 890, 891 (Tenn. 1926); *see State v. Irick*, 906 S.W.2d 440, 442 (Tenn. 1995) (“Mandamus is a summary remedy, extraordinary in its nature, and is to be applied only when a right has been clearly established, so that there remains only a positive ministerial duty to be performed[.]”) (quoting *Peerless Constr. Co. v. Bass*, 14 S.W.2d 732 (Tenn. 1929)). *See also Peerless Constr. Co. v. Bass*, 14 S.W.2d 732, 734 (Tenn. 1929) (explaining that “the purpose of a writ of mandamus is not to establish a legal right,” . . . “but to enforce one which has already been established.”) (quoting 38 C.J. Mandamus 582).

This Court has similarly clarified as follows:

A writ of mandamus is an “extraordinary remedy.” *Meighan v. U.S. Sprint Communications Co.*, 942 S.W.2d 476, 479 (Tenn. 1997). While it is normally used to compel public officials to perform their ministerial duties, *State ex rel Ledbetter v. Duncan*, 702 S.W.2d 163, 165 (Tenn. 1985), it may be used to prevent public officials from “palpably abusing their discretion” by performing discretionary acts in an arbitrary or oppressive manner. *Meighan v. U.S. Sprint Communications Co.*, 942 S.W.2d at 479. Mandamus is the proper remedy to enforce specific legal rights when the person seeking the writ has no other specific or adequate remedy. *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988); *State ex rel. Witcher v. Bilbrey*, 878 S.W.2d 567, 570-71 (Tenn. Ct. App. 1994).

Courts will not issue a writ of mandamus against a public official unless the proof shows that the official is clearly refusing to perform some nondiscretionary, ministerial act. *State ex rel. Cole v. Francisco*, 643 S.W.2d 105, 106 (Tenn. 1982). Conversely, where the party seeking mandamus has a clear, vested legal right, he or she is normally entitled to the writ. *State ex rel. Nashville Pure Milk Co. v. Town of Shelbyville*, 192 Tenn. 194, 207, 240 S.W.2d 239, 244 (1951). Such a right must be clearly established; mandamus will not lie where the right is doubtful. *State ex rel. Weaver v. Ayers*, 756 S.W.2d at 221; *Tusant v. City of Memphis*, 56 S.W.3d 10, 18 (Tenn. Ct. App. 2001).

An act is considered “ministerial” when the law prescribes and defines the duties to be performed “with such precision and certainty as to leave nothing to the exercise of [the official’s] judgment.” *Lamb v. State*, 207 Tenn. 159, 163, 338 S.W.2d 584, 586 (1960). Conversely, a “discretionary” act is one performed by an official who has the authority to

decide not only how the act will be performed but also whether or not the act will be performed at all. *Bradley v. State ex rel. Haggard*, 222 Tenn. 535, 540, 438 S.W.2d 738, 740 (1969); *Lamb v. State*, 207 Tenn. at 163, 338 S.W.2d at 586; *Tusant v. City of Memphis*, 56 S.W.3d at 18.

Johnson v. Tenn. Dep't of Corr., No. M2001-02424-COA-R3-CV, 2003 WL 22794498, at *2 (Tenn. Ct. App. Nov. 25, 2003).

In his Motion for Relief, Mr. Avery stated in pertinent part:

This action arises from the unlawful deprivation of my natural organic birthrights to contract and to remain at liberty under the color of law by the respondents (conspiracy against rights). . . .

Cheryl A. Blackburn, Davidson County Criminal Court, Division III entered fraudulent commercial judgments against DAVID ANTHONY AVERY (estate); . . . in an administrative nonjudicial commercial dispute between the STATE OF TENNESSEE v. DAVID ANTHONY AVERY (legal entities) by operation of law under the guise of a de facto "criminal prosecution" via Constructive Trust Account #2006-C-2451 while engaged in the unauthorized misappropriation of said estate with no delegation of authority to do so, in the clear absence of all jurisdiction, and with no verified claims that grants the usurpation of the beneficial interest contained in said estate. . . .

Victor S. Johnson III, District Attorney General also engaged in the unauthorized appropriation of DAVID ANTHONY AVERY (estate) in commercial intercourse by creating and endorsing the charging indictment (commercial instrument) against said estate; . . . which serves to evince the corporate existence of the STATE OF TENNESSEE and identifies its primary business operation as AGRICULTURE COMMERCE. . . .

Daniel Newburn, MNPD Detective also trespassed upon DAVID ANTHONY AVERY (estate) in commercial intercourse by creating and endorsing the True Bill (commercial instrument) against said estate also endorsed by David C. Torrence et al.; . . .

Exclusively resulting from the execution of the aforementioned commercial instruments ex rel. DAVID ANTHONY AVERY©(legal entity), I, David A.; of the family Avery am now, and have been subjected to and victimized by Human Trafficking, Involuntary Servitude, False Imprisonment and the malicious deprivation of my natural organic

birthrights to contract and to remain at liberty for the past 14 years without probable cause, and with no verified valid claims against me. . . .

Because the respondent's unlawful actions against me resulted in the unwarranted false imprisonment and deprivation of my natural organic birthrights, I demand to be afforded the "RIGHT TO BE HEARD," the alleged judgments must be set aside, and because proof of their actions is evinced by their own signatures on the specific commercial instruments that caused my injuries, all of the commercial instruments against said estate must undergo a FULL RESCISSION pursuant to UCC 3-202, and all of the respondents shall be required to personally represent themselves by submitting a point-for-point counter affidavit in writing to rebut the claims against them within thirty (30) days from the date on the face of this commercial instrument (contract). I am rightfully entitled to any and all relief available. However, aside from the relief mentioned above, I also seek the immediate release from my unlawful imprisonment, settlement of the estate and any trust accounts opened by any corporate entities or natural persons ex rel. DAVID ANTHONY AVERY (estate), and to be awarded the just and equitable compensation for the emotional distress, mental anguish and the physical and pecuniary injuries inflicted upon me under the color of law in the certain exact sum of \$333,333,333.33; i.e. Three Hundred Thirty Three Million Three Hundred Thirty Three Thousand Three Hundred Thirty Three Dollars and Thirty Three Cents USD or its equivalent in goods, services and property.

Although the basis for the relief sought by Mr. Avery is not clear or easily discernible, it appears that Mr. Avery has alleged that the defendants acted without proper authority when investigating, prosecuting, and trying him in relation to his criminal charges, resulting in his alleged injury. Further review of Mr. Avery's Motion for Relief, however, reveals that the relief sought included (1) the setting aside of his criminal convictions, (2) his immediate release from incarceration, and (3) an award of monetary damages.

Although monetary damages are not ordinarily recoverable in mandamus proceedings, *see Paduch v. City of Johnson City*, 896 S.W.2d 767, 770 (Tenn. 1995), we determine that the trial court did not err in treating Mr. Avery's motion as a petition for writ of mandamus based on the balance of the relief sought. *See Stewart*, 368 S.W.3d at 463 ("Courts must give effect to the substance, rather than the form or terminology of a pleading."). Mr. Avery clearly sought a ruling from the trial court commanding the defendants to release him from incarceration and directing his criminal convictions be set aside. However, even if the defendants had the authority to satisfy Mr. Avery's demands, and presuming all factual allegations in his motion to be true and giving him the benefit

of all reasonable inferences, Mr. Avery has not established a “clear, vested legal right” to such relief. *See Johnson*, 2003 WL 22794498, at *2.

This Court has clarified:

Tennessee courts will issue writs of mandamus only when the following three elements coexist: (1) the plaintiff’s clear right to the relief sought, *Peerless Constr. Co. v. Bass*, 158 Tenn. 518, 520, 14 S.W.2d 732, 733 (1929); (2) the defendant’s clear duty to perform the act the plaintiff seeks to compel, *State ex rel. Weaver v. Ayers*, 756 S.W.2d 217, 221 (Tenn. 1988); and (3) the absence of any other specific or adequate remedy, *State ex rel. Motlow v. Clark*, 173 Tenn. 81, 87, 114 S.W.2d 800, 802-03 (1938).

State ex rel. Hayes v. Civil Serv. Comm’n of Metro. Gov’t of Nashville & Davidson Cnty., No. 01-A-01-9002-CH-00061, 1990 WL 165073, at *2 (Tenn. Ct. App. Oct. 31, 1990)). Moreover, Mr. Avery, the party seeking mandamus, bears the burden of proving that his right to issuance of the writ is clear. *Delk v. State*, No. W2019-00224-COA-R3-CV, 2019 WL 3229773, at *4 (Tenn. Ct. App. July 18, 2019).

Affording Mr. Avery the benefit of all inferences that can be reasonably drawn from the pleaded facts, we conclude that Mr. Avery cannot establish any of the above-listed elements because he has alleged no clear right to the relief he desires and has failed to show that the defendants have a clear duty or even the authority to perform the acts he seeks to compel. We note that Mr. Avery was convicted by a jury for his crimes. *See State v. Avery*, 2009 WL 4724430, at *1. As such, the relief he desires would necessarily come from a direct appeal of his convictions or a petition for post-conviction relief. *See generally* Tenn. R. Crim. P. 37; Tenn. R. App. P. 3(b); Tenn. Code Ann. § 40-30-101, *et seq.* Although Mr. Avery had these other remedies available to him, he has now exhausted those remedies without obtaining relief. *See State v. Avery*, 2009 WL 4724430, at *21; *Avery v. State*, No. M2011-02625-CCA-R3-PC, 2012 WL 6570737, at *5 (Tenn. Crim. App. Dec. 17, 2012). Accordingly, the trial court properly determined that Mr. Avery failed to state a claim for writ of mandamus.

Furthermore, to the extent that Mr. Avery’s allegations could be construed as sounding in tort due to his claims of injury resulting from his conviction and incarceration and his pursuit of monetary damages, we conclude that he has similarly failed to state a claim in tort for which relief can be granted. We note that in a previous case, which involved tort claims of negligence/malpractice due to the defendant attorneys’ representation of the plaintiff during his criminal prosecution and challenged his resulting guilty plea, our Supreme Court elucidated that “the validity of criminal convictions are not designed to be tested in the civil tort arena.” *Gibson v. Trant*, 58 S.W.3d 103, 112-13 (Tenn. 2001). This principle was previously adopted by the United States Supreme Court in a case brought by a prisoner pursuant to 42 U.S.C. § 1983

concerning the validity of his conviction, when such conviction had not been reversed or invalidated. *See Heck v. Humphrey*, 512 U.S. 477, 486 (1994) (invoking the “hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments”).

Mr. Avery has generally alleged that negligent and/or intentional acts by the defendants resulted in injury to him. In doing so, Mr. Avery has presented general allegations of “fraud,” “misrepresentation,” and “malfeasance” by the defendants without any specific factual assertions to support such claims. “Great specificity in the pleadings is ordinarily not required to survive a motion to dismiss; it is enough that the complaint set forth ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002) (quoting *White v. Revco Disc. Drug Ctrs., Inc.*, 33 S.W.3d 713, 718 (Tenn. 2000) (citing Tenn. R. Civ. P. 8.01)). However, “the circumstances constituting fraud or mistake shall be stated with particularity.” *See* Tenn. R. Civ. P. 9.02.

Here, Mr. Avery has failed to state more than conclusory allegations concerning the defendants. He has alleged no facts whatsoever in support of his claims. Again, affording Mr. Avery the benefit of all inferences that can be reasonably drawn from the pleaded facts, we determine that Mr. Avery has failed to state a tort claim upon which relief can be granted.

Moreover, assuming, *arguendo*, that Mr. Avery were able to state tort claims against these defendants concerning the validity of his convictions and incarceration, any such claim would have accrued at or before the time of his convictions, which occurred more than fourteen years ago. Ergo, as the trial court properly found, Mr. Avery’s tort claims would be barred by the applicable statutes of limitations. *See generally* Tenn. Code Ann. § 28-3-104 (2017) (one-year statute of limitations applicable to most tort claims, including negligence and malicious prosecution); Tenn. Code Ann. § 28-3-105 (2017) (three-year statute of limitations applicable to claims of fraud and misrepresentation).

We reiterate that a trial court should dismiss a plaintiff’s claims “only when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” *Crews v. Buckman Labs. Int’l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002). Inasmuch as Mr. Avery can prove no set of facts entitling him to the relief he seeks, we conclude that the trial court properly dismissed his claims. Accordingly, the trial court did not abuse its discretion in denying Mr. Avery post-judgment relief from the dismissal order. *See Discover Bank v. Morgan*, 363 S.W.3d 479, 487 (Tenn. 2012) (“A trial court’s ruling on a post-judgment motion to alter or amend a judgment filed pursuant

to either Rule 59.04 or Rule 60.02 of the Tennessee Rules of Civil Procedure is reviewed under the abuse of discretion standard.”).¹

V. Remaining Issues

Mr. Avery contends that the trial court erred by failing to enter default judgment against the defendants because the defendants failed to timely submit answers to Mr. Avery’s averments and “have thus waived all defenses.” Based upon our review of the record, however, it is clear that Mr. Avery’s motion for default judgment was filed after the trial court had dismissed his claims. Having determined that the trial court properly denied Mr. Avery post-judgment relief from the dismissal order, we further determine that Mr. Avery’s motion for default judgment is now moot.

We also conclude that Mr. Avery’s remaining issues concerning commercial and contract law are unavailing, inasmuch as principles of contract and commercial law have no applicability to the validity of Mr. Avery’s criminal convictions or incarceration. Furthermore, despite his argument to the contrary, Mr. Avery is unable to bind others to a “Public Notice Contract,” which is unilateral in nature, in order to claim damages thereunder. *See Davidson v. Holtzman*, 47 S.W.3d 445, 453 (Tenn. Ct. App. 2000) (explaining that “contemplated mutual assent and meeting of the minds [required for a valid contract to be formed] cannot be accomplished by the unilateral action of one party” (quoting *Jamestowne on Signal, Inc. v. First Fed. Savings & Loan Assoc.*, 807 S.W.2d 559, 564 (Tenn. Ct. App. 1990))).

VI. Conclusion

For the foregoing reasons, we affirm the trial court’s dismissal of Mr. Avery’s Motion for Relief. Costs on appeal are assessed to the appellant, David A. Avery. This case is remanded to the trial court for collections of costs assessed below.

s/Thomas R. Frierson, II

THOMAS R. FRIERSON, II, JUDGE

¹ Mr. Avery insists that the trial court failed to fully adjudicate all of his claims in accordance with Tennessee Rule of Civil Procedure 54.02. We disagree. The trial court entered an order dismissing Mr. Avery’s claims pursuant to Tennessee Rule of Civil Procedure 12, and an order of dismissal for failure to state a claim upon which relief can be granted operates as an adjudication on the merits. *See Creech v. Addington*, 281 S.W.3d 363, 378 (Tenn. 2009).

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 1, 2022

FILED
08/31/2022
Clerk of the
Appellate Courts

DAVID A. AVERY v. CHERYL A. BLACKBURN ET AL.

No. M2021-01482-COA-R3-CV

JUDGMENT

This appeal came on to be heard upon the record from the Circuit Court for Davidson County and briefs filed on behalf of the respective parties. Upon consideration thereof, this Court is of the opinion that there is no reversible error in the trial court's judgment.

It is, therefore, ORDERED and ADJUDGED by this Court that the judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, David A. Avery. This case is remanded to the trial court, pursuant to applicable law, for collection of costs assessed by the trial court.

PER CURIAM

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

DAVID AVERY v. CHERYL BLA

Davidson County Circuit
21C751

No. M2021-01482-COA-I

Date Printed: 09/16/2022

Notice

Appendix:
Attachment #4
(2 pages)

NOTICE - Order - Petition to R

The Appellate Court Clerk's Office has entered the above action.

If you wish to file an application for permission to appeal to the Tennessee Supreme Court pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure, you must file an original and six copies with the Appellate Court Clerk. The application must be filed "within 60 days after the denial of the petition or entry of the judgment on rehearing." NO EXTENSIONS WILL BE GRANTED.

James M. Hivner
Clerk of the Appellate Courts

**IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE**

DAVID AVERY v. CHERYL BLACKBURN, ET AL.

**Davidson County Circuit Court
21C751**

No. M2021-01482-SC-R11-CV

Date Printed: 11/16/2022

Notice / Filed Date: 11/16/2022

NOTICE - Case Dispositional Decision - TRAP 11 Denied

The Appellate Court Clerk's Office has entered the above action.

James M. Hivner
Clerk of the Appellate Courts

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
11/16/2022
Clerk of the
Appellate Courts

DAVID AVERY v. CHERYL BLACKBURN, ET AL.

Circuit Court for Davidson County
No. 21C751

No. M2021-01482-SC-R11-CV

ORDER

Upon consideration of the application for permission to appeal of David Avery and the record before us, the application is denied.

PER CURIAM