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ARKANSAS COURT OF APPEALS

DIVISION I
No. CA-10-831

CHARLEEN RUTH MORGAN, SPECIAL ADMINISTRATOR of the ESTATE of CHARLES R. MORGAN, Deceased
APPELLANT

V.

STEVEN C. LITTLE
APPELLEE

Opinion Delivered APRIL 20, 2011

APPEAL FROM THE IZARD COUNTY CIRCUIT COURT
[NO. CV-2006-77-2]

HONORABLE TIM WEAVER, JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

Appellant Charleen Ruth Morgan, special administrator of the Estate of Charles R. Morgan, deceased, appeals the May 28, 2010 order dismissing her deceased husband's circuit-court case against appellee Steven Little in Izard County. Appellant asserts that reversal is warranted for two reasons: (1) because the revivor order had been filed with the Izard County & Circuit Clerk, the circuit judge erred by ruling that it was without effect; and (2) because more than ninety days had passed after the revivor order had been filed, the circuit court lacked jurisdiction to set the revivor order aside. Because appellant's arguments are not preserved, we affirm the trial court's order.

On August 1, 2006, Charles R. Morgan filed his personal-injury complaint against Little in Izard County Circuit Court. Morgan sought damages for a November 14, 2003

automobile accident with Little. Fifteen months later, Morgan died. Appellant, Morgan's wife, was appointed special administrator of his estate and attempted to revive Morgan's action against Little. The day after the revivor order was signed, it was mailed to the Izard County & Circuit Clerk. The cover letter to the clerk referenced Izard County circuit case CV2006-77-2 and asked that the revivor order be filed. The clerk filed the revivor order, entitled "Order Appointing Special Administrator and Revivor of Claims," on February 14, 2008, in Izard County probate file number 2008-9, as the revivor order was styled with the number CIV_____, a handwritten 2008-9 in the blank, and headed "In the Circuit Court of Izard County, Arkansas, Probate Division."

On April 6, 2009, Little filed a motion to dismiss the tort action (No. CIV-2006-77-2), contending that Charles Morgan had died on November 13, 2007, and that the tort action had not been properly revived within a year from the time when the order might first have been made. Little sought dismissal pursuant to Arkansas Code Annotated section 16-62-109 (Repl. 2005). On April 16, 2009, appellant filed a response to the motion to dismiss, explaining the above sequence of events and asking that the motion be denied. She argued that revivor had been obtained within the one-year period following her husband's death. She claimed that under Amendment 80 to the Arkansas Constitution, a circuit court judge, regardless of the division in which he is sitting, has jurisdiction. She claimed, therefore, that the probate judge had jurisdiction to revive the civil action. She argued in the alternative that the statute of limitations was tolled by filing the revivor order in the probate division and that

there was excusable neglect in that her attorney was dealing with devastation from tornado destruction of one of his offices.

On May 28, 2010, the trial court granted the motion to dismiss. In the order dismissing the case with prejudice, the trial court explained in part:

> 4. It is uncontroverted that plaintiff's first action has never been revived.
>
> . . . .
>
> 6. Plaintiff opened an Estate in the Probate Division of this Court on February 6, 2008, appointing Charleen Morgan as the Special Administrator of the Estate of Charles Morgan, which is the "second action," with the probate case number designated as PR-2008-9.
>
> 7. On February 14, 2008, the Court (Weaver, J.) signed and entered an Order Appointing Special Administrator and Revivor of Claim in the second action.
>
> 8. The Court finds that an Order of Revivor entered in a different action, with a different case number, by a different judge has no effect on the first action, in this case, CV-2006-77-2.
>
> 9. Accordingly, the Court finds that the February 14, 2008 order in the second action, (PR-2008-9), has no effect and shall be stricken.
>
> 10. Defendant's Motion to Dismiss this action, (CV-2006-77-2), is hereby granted.

In her notice of appeal, appellant designated as the record on appeal the entire record in both the tort action and the probate action.[1] This appeal followed. Appellant raises two points of appeal:

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[1]Little contends that the probate file is not properly before us because no action from the probate division is being appealed. In addition, he takes the position that appellant has no standing with regard to the civil action because she was never substituted with an effective revivor order. Because these arguments are superfluous due to our holding that appellant failed to preserve her arguments for appeal, they will not be addressed.

I. Administrative Order Number 2 and Arkansas Rule of Civil Procedure 58 (2010) provide that a court order becomes effective when the circuit clerk files it. Here the circuit judge revived Morgan's action, and the County and Circuit Clerk filed the revivor order. But the circuit judge ruled that the revivor order had no effect. Did the circuit court violate Administrative Order Number 2 and Rule 58?

II. Arkansas Rule of Civil Procedure 60 (a) (2010) only gives a circuit court ninety days to vacate an order. But here the circuit court set aside the revivor order more than 750 days after it was filed. Did the circuit court abuse its discretion by asserting that it had jurisdiction to vacate the revivor order?

Little contends that neither of the two points on appeal was raised before the trial court. In response, appellant argues that, even though not specifically raised, the circuit court considered the issue of whether the revivor order filed in the probate case effectively revived the civil case. She cites *Gaines v. State*, 340 Ark. 99, 8 S.W.3d 547 (2000), for the proposition that an issue is preserved for appellate review when the trial judge was sufficiently apprised of it. In *Gaines*, the Arkansas Supreme Court stated that, in order to preserve an argument for appeal, there must be an objection in the trial court that is sufficient to apprise the court of the particular error alleged. *Id*. at 107, 8 S.W.3d at 552. Further, the supreme court stated that a party cannot change the grounds for an objection or motion on appeal, but is bound by the scope and nature of the arguments made at trial. *Id*.

Appellant cites *Thorne v. Arkansas Dep't of Human Servs.*, 2010 Ark. App. 443, 374 S.W.3d 912, to support that the record is taken as a whole when determining whether the trial judge was sufficiently apprised of an issue. In *Thorne* we held that Thorne's attorney

preserved the argument in part by claiming that the case was "purely a free exercise of religion case." *Id*. at 15. Further, the trial court stated as follows:

> [W]e have the intertwining of the allegations of the state concerning abuse in various forms and various forms of neglect coupled with the religious and spiritual beliefs of the mothers and fathers and families that are participants in this case. That right, as given to us as citizens of the United States, that is freedom of religion to believe as we cho[o]se I consider to be one of our most important rights and one that I, as a judge, believe that I am charged to protect within the law as within the facts.

Id. We concluded that, taking the record as a whole, Thorne had preserved the constitutional argument regarding the free exercise of religion. *Id* at 16.

Appellant further argues that legal authority can be used to reverse a trial judge's decision even when he was not presented with that authority. For this proposition, she cites *Deaver v. Faucon Properties, Inc.*, 367 Ark. 288, 239 S.W.3d 525 (2006). However, that case states that the Arkansas Supreme Court will not reverse a circuit court's decision on the basis of an argument not raised by the appellant. *Id*. at 295, 239 S.W.3d at 531. The supreme court relied on *Cummings v. Boyles*, 242 Ark. 923, 415 S.W.2d 571 (1967), where it held that an appellant waives any contention not argued in his brief on appeal. Therefore, appellant has misinterpreted the court's holding in *Deaver*, *supra*, in applying it to her argument here.

Finally, appellant contends that Arkansas Rule of Civil Procedure 60 pertains to subject-matter jurisdiction, and can be raised on appeal for the first time, citing *Associates Fin. Servs. Co. of Oklahoma, Inc. v. Crawford County Memorial Hosp. Inc.*, 297 Ark. 14, 759 S.W.2d 210 (1988). In that case, the Arkansas Supreme Court dealt with the issue of whether it had

before it a final, appealable order to determine if jurisdiction was proper in the appellate court. Rule 60 was not the issue there.

Appellant's argument and citation to authority can be distinguished, as noted above, from the instant case and support Little's contention that appellant failed to preserve her arguments for appeal. We hold that, because appellant did not give the trial court an opportunity to consider whether Administrative Order Number 2 and Arkansas Rules of Civil Procedure 58 and 60 were violated by his ruling, appellant's arguments were not preserved. This court will not address arguments raised for the first time on appeal. *Lipps v. Lipps*, 2010 Ark. App. 295.

Affirmed.

WYNNE and GLOVER, JJ., agree.