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

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

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO REVISE OR, ALTERNATIVELY, FOR PERMISSION TO APPEAL THE COURT'S MARCH 22, 2021 INTERLOCUTORY ORDER

Defendants, the Tennessee Bureau of Investigation ("TBI") and TBI Director David B. Rausch, hereby respond in opposition to Plaintiff's motion to revise or, alternatively, for permission to appeal from the order this Court issued on March 22, 2021 ("March 22 Order"). In that Order, the Court denied the parties' respective motions for partial judgment on the pleadings, ruling that while the TBI has a statutory obligation to comply with expunction orders under Tenn. Code Ann. § 40-32-102(b), it also has a statutory obligation to comply with the statutory "carve out" in Tenn. Code Ann. §§ 40-39-207(a)(2) and 40-39-209 that prevents it from expunging records of sexual offenses. March 22 Order at 3. The Court determined that this "carve out" provides the TBI with an affirmative defense in this case that could be established by proper proof that the records at issue are subject to the carve-out—proof that is ascertainable from Plaintiff's unredacted criminal record. March 22 Order at 13-14.

Plaintiff's motion to revise that Order under Tenn. R. Civ. P. 54.02, or for permission to appeal under Tenn. R. App. P. 9, should be denied.

ARGUMENT

I. Revision Is Unwarranted Because Plaintiff Previously Argued or Could Have Argued Every Point Raised in Plaintiff's Motion to Revise.

A. Legal Standard

Rule 54.02(1) of the Tennessee Rules of Civil Procedure authorizes trial courts to revise any order or other form of decision at any time prior to the entry of a final judgment. Rule 59.04 authorizes parties to file motions to alter or amend after the entry of a final judgment. Due to the similarity between these two rules, courts have interpreted Rule 54.02 as permitting parties to file motions to revise interlocutory orders in the same, limited instances when it would be appropriate to move under Rule 59.04 for amendment of a final judgment. *See Harris v. Chern*, 33 S.W.3d 741, 744 (Tenn. 2000). Revision under Rule 54.02 is therefore appropriate when (1) there has been a change in the controlling law, (2) new evidence becomes available, or (3) revision is necessary to correct a clear error of law or prevent injustice. *Lockwood v. Hughes*, No. M200800836COAR3CV, 2009 WL 1162577, at *7 (Tenn. Ct. App. Apr. 28, 2009).

Rule 54.02 motions "should not be used to raise or present new, previously untried or unasserted theories or legal arguments." *Rehrer v. Rehrer*, No. E201001907COAR3CV, 2011 WL 13165343, at *5 (Tenn. Ct. App. Sept. 15, 2011) (quoting *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005)). Nor should they be used "to relitigate old matters." *Williams v. Shelby Cty. Bd. of Educ.*, No. 217CV02050TLPJAY, 2020 WL 3798876, at *2 (W.D. Tenn. July 7, 2020)

(quoting *In re Regions Morgan Keegan Secs., Derivative, and ERISA Litig.*, No. 07-2784, 2010 WL 5464792, at *1 (W.D. Tenn. Dec. 30, 2010)).[1]

B. Analysis

Plaintiff's motion should be denied because it provides no basis on which to revise this Court's March 22 Order. Plaintiff does not argue that the relevant law has changed since the date of the Court's Order, nor does Plaintiff present any new evidence. Plaintiff also fails to demonstrate any need to "correct a clear error of law or prevent injustice." Plaintiff does maintain that the Court was "wrong" and that its ruling undermines Plaintiff's rights, but these assertions simply rehash Plaintiff's previous arguments. Plaintiff is essentially relitigating old matters or raising arguments that could have been raised in the many responses and replies Plaintiff filed before the March 22 Order.

Moreover, Plaintiff's assertions ignore the fundamental bases for this Court's ruling. For example, while Plaintiff insists that the TBI has no role to play in determining expungement eligibility, "because expungement determinations are exclusively within the province of the judiciary," Motion at 3-4 (citing statutes), this Court relied on the "explicit text" of §§ 40-39-207(a)(2) and 40-39-209 to conclude that "the TBI is not permitted to expunge a record involving an SOR offense if the TBI determines that the offense is ineligible for expunction," March 22 Order at 6. And while Plaintiff says that the Court's ruling will have "enormous consequences," because the statutory exception identified by the Court is not narrow but "actually broad," Motion at 5, this Court stressed precisely the opposite. *See* March 22 Order at 4 ("Central to the foregoing

[1] *See Harris*, 33 S.W.3d at 745 n.2 ("Federal case law interpreting rules similar to our own are persuasive authority for purposes of construing the Tennessee rule.").

analysis is that the carve out/exception only applies if the offense sought to be expunged is a sexual offense, as identified in Tennessee Code Annotated section 40-32-101(a)(1)(D).").

Finally, Plaintiff asserts that "this Court has ruled that rather than being permitted to decline to reveal or acknowledge the existence of the charge after receiving an expungement order, . . . a petitioner must, instead, come forward with evidence demonstrating what the charge was." Motion at 9 (internal quotation marks omitted). But that is just incorrect. This Court has not required Plaintiff to prove the nature of the offense at issue here. Instead, the Court ruled that the statutory "carve out" provides the TBI with an affirmative defense, "with the result that the Defendants have the burden of proof on this defense." March 22 Order at 9 & n.4; *see also Sherrill v. Souder*, 325 S.W.3d 584, 596 (Tenn. 2010) (noting that the party asserting an affirmative defense bears the burden of proof).

In the end, all of Plaintiff's concerns can be fully addressed on appeal after entry of a final judgment. They provide no grounds for revising the March 22 Order. *See Bailey v. Real Time Staffing Servs., Inc.*, 927 F. Supp. 2d 490, 501–02 (W.D. Tenn. 2012) ("When the parties simply 'view the law in a light contrary to that of [the court],' the 'proper recourse' is not to file a motion to reconsider but rather to file an appeal." (quoting *Dana Corp. v. United States*, 764 F. Supp. 482, 489 (N.D. Ohio 1991))), *aff'd on other grounds*, 543 F. App'x 520 (6th Cir. 2013), and *aff'd on other grounds*, 543 F. App'x 520 (6th Cir. 2013).

II. An Interlocutory Appeal Is Unnecessary Because Plaintiff Will Not Be Irreparably Injured, there Is No Protracted Litigation to Be Avoided, and the Court's Order Does Not Disrupt the Uniformity of the Law.

A. Legal Standard

There is no right to appeal from an interlocutory order. Tenn. R. App. P. 9(a). Rather, parties must receive permission from the trial court to appeal. *Id.* And due to judicial disfavor of

"piecemeal litigation," permission to appeal from an interlocutory order is not given freely. *State v. Gilley*, 173 S.W.3d 1, 5 (Tenn. 2005). Accordingly, interlocutory appeal is reserved for limited circumstances, namely to (1) prevent irreparable injury, (2) prevent needless litigation, or (3) develop a uniform body of law. Tenn. R. App. P. 9(a). Interlocutory appeals are not appropriate "even from fully consummated decisions, where they are but steps toward final judgment" and subject to review on appeal from that final judgment. *State v. Gawlas*, 614 S.W.2d 74, 75 (Tenn. Crim. App. 1980) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

B. Analysis

There is no reason for an interlocutory appeal of the March 22 Order. *First*, an immediate appeal is not needed to prevent irreparable injury. When considering irreparable-injury arguments, courts are to examine the "severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective." Tenn. R. App. P. 9(a). The alleged injury here is not severe, and the situation can be fully and effectively addressed on review of a final judgment.

Plaintiff suggests there is an urgent need for appellate review due to the "severe" injury caused by Plaintiff's criminal history containing the offense at issue. Motion at 11. But the timeline of this lawsuit belies any urgency or severity. The record reflects that Plaintiff was aware of this alleged injury in October 2019, (Compl. Att. C at 1-6), yet Plaintiff waited nearly a year to file a complaint in September 2020. Plaintiff also claims, again, that this Court's ruling requires Plaintiff to provide evidence of the nature of the offense. As discussed above, however, that assertion is incorrect.

Second, an interlocutory appeal would not "prevent needless, expensive, and protracted litigation." Tenn. R. App. P. 9(a). When considering protracted-litigation arguments, courts are

to consider "whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation." *Id.* Although Plaintiff is "reluctant to make any predictions about 'the probability of reversal,'" Motion at 12, Defendants submit that there is *no* probability of reversal. As this Court has observed, the provisions of Tenn. Code Ann. §§ 40-39-207(a)(2) and 40-39-209 are "clear [and] unambiguous." March 22 Order at 5. Furthermore, in light of the Court's ruling that "if an offender has been convicted of a sexual offense, . . . TBI compliance with an expunction order after sixty days of receipt of the order is not required," March 22 Order at 3, there is no reason to anticipate that further litigation in this case will be "expensive, and protracted." This Court has stated with respect to Count 1 of the complaint that Defendants' affirmative defense can be established upon proper proof of Plaintiff's unredacted criminal record. And like Count 1, Counts 2 and 3 of the complaint rely on Plaintiff's allegation that the TBI failed to comply with the expunction order of the McNairy County Circuit Court. (Complaint at 15, 17.)

Finally, an interlocutory appeal is not needed to develop a unform body of law. When considering such arguments, courts are to look to "the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment." Tenn. R. App. P. 9(a). Contrary to Plaintiff's assertion, Motion at 12, the March 2021 Order does not conflict with *Konvalinka v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 249 S.W.3d 346, 355 (Tenn. 2008). *Konvalinka* did not address and has no bearing on situations like the one here, i.e., situations in which statutes impose an independent obligation on a state agency notwithstanding the requirements of a court order.

This Court held that the legislature specified *two* statutory conditions precedent to the TBI expunging an offender's records: (1) there must be an expungement order, *and* (2) the offense being expunged must be eligible for expunction. March 22 Order at 6. As discussed, the question Plaintiff seeks to present for immediate appellate review can certainly be reviewed upon entry of a final judgment. No interlocutory appeal is needed either to prevent irreparable harm or to prevent protracted and needless litigation, and certainly not to develop a uniform body of law.

CONCLUSION

For the stated reasons, Plaintiff's motion to revise or, alternatively, for permission to file an interlocutory appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2021, a true and exact copy of the foregoing has been sent by email (by agreement) and by the Court's e-filing system, to:

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