IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
September 21, 2009 Session

KEITH BROOKS v. PACCAR, INC. d/b/a PETERBILT MOTORS COMPANY

Direct Appeal from the Circuit Court for Davidson County
No. 09C-78 Amanda McClendon, Judge

No. M2009-00602-WC-R3-WC - Mailed - January 7, 2010
Filed - February 10, 2010

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tennessee Code Annotated § 50-6-225(e)(3) for a hearing and a report of findings of fact and conclusions of law. The employee filed an action in Chancery Court. He later filed a notice of voluntary nonsuit and immediately refiled his action in Circuit Court. An order dismissing the Chancery Court action was filed several days later. The employer moved to dismiss the Circuit Court action, noting that the Chancery Court action was still pending at the time the Circuit Court action was filed. The Circuit Court granted the motion. Employee has appealed, contending that the trial court erred in its interpretation of Tenn. R. Civ. P. 41. We affirm the judgment.

Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit Court Affirmed

JON KERRY BLACKWOOD, SR. J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., J., and DONALD P. HARRIS, SR. J., joined.

Stanley A. Davis, Nashville, Tennessee for the appellant, Keith Brooks.

Terry L. Hill and Lauren S. Disspayne, Nashville, Tennessee for the appellee, Paccar, Inc.

MEMORANDUM OPINION

Factual and Procedural Background

The operative facts are not disputed. Keith Brooks ("Employee") alleges that he sustained a compensable injury on February 1, 2007. He initially filed suit against Paccar, Inc. ("Employer") on January 29, 2008 in the Chancery Court of Davidson County. On January 9, 2009, he filed a notice of voluntary nonsuit at 1:43 p.m. At 1:54 p.m., he then filed this action in the Circuit Court of Davidson County. The Chancery Court entered an order of voluntary dismissal on January 15, 2009.

Employer filed a motion to dismiss this action, contending that the filing was "not valid," because the Chancery Court action, which involved identical issues and parties, was still pending at the time it was filed. Employee argued that the Chancery Court suit was no longer viable as of the moment of filing of the notice of voluntary nonsuit, and therefore was not "pending" when this action was filed eleven minutes later. The trial court granted Employer's motion and dismissed the complaint.

Standard of Review

This appeal presents a question of law only. A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Perrin v. Gaylord Entm't Co., 120 S.W.3d 823, 826 (Tenn. 2003); Ganzevoort v. Russell, 949 S.W.2d 293, 296 (Tenn. 1997).

Analysis

Employee asserts that Tenn. R. Civ. P. 41.01 gives a plaintiff the right to take a voluntary nonsuit at any time before trial, and that "the lawyer for the plaintiff is the sole judge of the matter and the trial judge has no control over it." Rickets v. Sexton, 533 S.W.2d 293, 294 (Tenn. 1976). From that premise, he submits that his action in Chancery Court ceased to be pending at the moment his notice of voluntary nonsuit was filed. He relies upon three decisions to support his position: Rickets, Id, Parker v. Vanderbilt, 767 S.W.2d 412, 422 Fn.3 (Tenn. Ct. App. 1988) and Sizemore v. Sizemore, No. E2005-01166-COA-R3-CV, 2007 WL 2198358 (Tenn. Ct. App. July 30, 2007).

In Rickets, the trial court "disallowed" the plaintiffs' motion for a voluntary dismissal. 533 S.W.2d at 294. On the same day the court then entered an order dismissing the action with prejudice when plaintiffs did not appear when the case was called for trial. The Supreme Court reversed, holding that the action had ended with the filing of the notice of voluntary nonsuit, stating that the "plaintiff is master of his suit and may dismiss at his pleasure before trial, and without the concurrence of the trial judge." Id. On that basis,

Employee argues that the Chancery Court action was terminated upon the filing of the notice of voluntary nonsuit, notwithstanding the subsequent order of dismissal.

Parker v. Vanderbilt was a medical malpractice case which involved multiple defendants. The trial court granted summary judgment to several, but not all of the defendants. 767 S.W.2d at 420-21. The plaintiff filed a voluntary nonsuit as to the remaining defendants, and then filed a Tenn. R. Civ. P. 59 motion to alter or amend the previous orders.[1] The motion to alter or amend was denied, and the plaintiff appealed. Defendants filed a motion to dismiss, asserting that the notice of appeal was not timely because plaintiff's Rule 59 motion should have been filed within thirty days of the partial summary judgment orders, rather than the notice of voluntary nonsuit which disposed of all remaining claims. Id. The Court of Appeals denied the motion, holding that the prior orders were not appealable judgments under Tenn. R. Civ. P. 59.01. In doing so the court, citing Rickets v. Sexton, stated in a footnote that "It is the date of the filing of the written notice of voluntary dismissal, not the entry of the confirmatory order, that triggers the commencement of the time within which a Tenn. R. Civ. P. 59 motion or notice of appeal must be filed." Id., 767 S.W.2d at 422 n.3.

Sizemore v. Sizemore directly involved the application of the doctrine of prior case pending. In that case, a notice of voluntary nonsuit had been filed in the Circuit Court of Washington County in July 2003, but no order of dismissal was entered. On the same day that the nonsuit was filed, the plaintiff filed an identical action in Chancery Court. That case proceeded to trial in the Chancery Court action in October 2004. The defendant participated in the trial. Judgment was entered in January 2005. Five months after the judgment was entered, and two years after the filing of the Chancery Court action, the defendant filed a motion contending Chancery Court lacked subject matter jurisdiction, that the judgment was void, because the Circuit Court action was still pending. Id. at 6. The trial court denied the motion, and the Court of Appeals affirmed, holding that the plaintiff had failed to raise the issue in a timely fashion, and further noting that the Chancery Court action was "over as far as [the plaintiff] was concerned," at the time the nonsuit was filed. Id. at 7.

The trial court in this case relied upon Evans v. Perkey, 647 S.W.2d 636 (Tenn. Ct. App. 1982) and Tenn. R. Civ. P. 41.01(3) to reach its conclusion that the Chancery Court action was still pending at the time the Circuit Court action was filed. In Evans, the issue before the court was the commencement of the one-year period provided by Tenn. Code Ann. § 28-1-105, the "saving statute." The plaintiffs had filed a notice of voluntary nonsuit of their medical malpractice action on August 8, 1980. Id. at 637-8. An order of dismissal was entered by the trial court twenty-one days later, on August 29, 1980. The plaintiffs

[1]The motion was titled "Motion for New Trial." The Court of Appeals found that the substance of the motion was to alter or amend the previous orders, and treated it as such.

subsequently sought to re-file their action on August 31, 1981.[2]

The defendants in Evans v. Perkey argued that the one-year period for refiling began on the date that the notice of voluntary nonsuit was filed, and the second suit was therefore barred because it was not timely. Plaintiffs contended that the one-year period commenced on the date that the order of dismissal was entered. The trial court dismissed the case, the Court of Appeals reversed, holding that the entry of a judgment was necessary for the final adjudication of a case. Id. at 640-1.

The result in Evans v. Perkey is consistent with the subsequent amendment to Tenn. R. Civ. P. 41.01, which became effective on July 1, 2004. That amendment added section (3), which states: "A voluntary nonsuit to dismiss an action without prejudice must be followed by an order of voluntary dismissal signed by the court and entered by the clerk. The date of entry of the order will govern the running of pertinent time periods." This language, in our view, leaves little room for interpretation. A voluntary dismissal under Rule 41.01 does not become effective until an order is entered. The cases relied upon by Employee were all decided under prior law. The events in this case occurred after Rule 41.01(3) became effective, and the result is governed by its terms. We conclude that the Chancery Court action was still pending at the time this case was filed in the Circuit Court of Davidson County. The issue was raised in a timely manner by Employer, and the trial court correctly dismissed the complaint.

Conclusion

The judgment of the Circuit Court is affirmed. Costs are taxed to Keith Brooks and his surety, for which execution may issue if necessary.

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JON KERRY BLACKWOOD, SENIOR JUDGE

[2]August 29, 1981 fell on a Saturday, which effectively made August 31 the one-year anniversary of the entry of the order of dismissal.

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JUDGMENT

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid by Keith Brooks and his surety, for which execution may issue if necessary.

PER CURIAM