IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

MICHAEL RAY PINSON,	)	
	)	Weakley Circuit No. 0364
Plaintiff/Appellant	)	
v.	)	
	)	
O.K. SMITH, JR., M.D.	)	Appeal No. 02A01-9502-CV-00017
	)	
	)	
and	)	
	)	
NELWYN TODD PORTER,	)	
Executrix of the Estate of	)	
IRA FORD PORTER, M.D., Deceased	)	
	)	
Defendants/Apellees	)	

FILED

February 27, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CIRCUIT COURT OF WEAKLEY COUNTY
AT DRESDEN, TENNESSEE
THE HONORABLE CREED McGINLEY, JUDGE

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DISMISSED

WILLIAM H. INMAN, SENIOR JUDGE

CONCUR:

W. FRANK CRAWFORD, PRESIDING JUDGE

DAVID R. FARMER, JUDGE

O P I N I O N

This action for damages for asserted medical malpractice, filed October 15, 1987 in the Circuit Court of Weakley County, was dismissed on Motion for Summary Judgment, RULE 56, RULES OF CIV. PRO. The Order granting the Motion, which concluded the rights of the plaintiff, was entered on August 18, 1994.

The plaintiff filed his Notice of Appeal 39 days later, on September 26, 1994 which precipitated a Motion to Dismiss the Appeal as not having been filed within thirty days after entry of the Judgment appealed from, RULE 4, RULES OF APPELLATE PROCEDURE, a requirement which is jurisdictional in civil cases and cannot be waived. *Jefferson v. Pneumo Services Corp.,* 699 S.W.2d 181 (Tenn. App. 1985).

The crucial issue here is whether the plaintiff's "Motion to Make Additional Finding," filed September 12, 1990, effectively extended the time within which to file the Notice of Appeal as provided by Section (b) of RULE 4. [1] The relief sought by the Motion was that the trial court make a specific factual finding as to whether the plaintiff was of unsound mind within the meaning of the Disability Statute, TENN. CODE ANN. § 28-1-106. The Motion was denied Sept. 22, 1994, and if it may qualify as one filed pursuant to RULE 52.02, TENN. R. CIV. PRO., the time for appeal by the plaintiff began to run from the date of the entry of the Order denying the "Motion to Make Additional Finding," which was September 22, 1994, and thus the appeal was timely filed if it designated the judgment appealed from. Conversely, if the "Motion to Make Additional Finding" does not qualify as one made pursuant to RULE 52.02, the 30-day limitation of RULE 4, T.R.A.P. bars

our consideration of the merits of this appeal.

TENN. R. CIV. PRO. 52.02 provides:

> Upon motion of a party made not later than thirty (30) days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial

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[1] RULE 4(B), T. R. A. P. provides that, in a civil action, if a timely motion is filed under RULE 52.01 to make additional findings of fact, the time for appeal shall run from the entry of the Order denying such Motion.

> court an objection to such findings or has made a motion to amend them or a motion for judgment.

We note at this juncture that judgment was entered pursuant to RULE 56, which relieved the trial judge of the necessity of finding the facts or making conclusions of law. RULE 52.01, TENN. R. CIV. PRO. Even so, findings of fact are not appropriate under RULE 56 because there is no presumption of correctness of summary judgments since they involve questions of law only. The plaintiff, for reasons not entirely clear, wanted the trial judge specifically to find that the plaintiff was of unsound mind,[2] an exercise in futility since the contrary finding was inherent in the granting of summary judgment. The motion, if granted, would necessarily have had the effect of the trial court reversing itself. The Order granting summary judgment made no finding of fact subject to a RULE 52.02 challenge; as held in *Brewer v. Brewer,* 14 TAM 34-12 (Tenn. App. W.S., July 14, 1989):

> "Implicit in RULE 52.02 is the obvious fact that in the judgment heretofore entered the court had made findings of fact which were being challenged by the RULE 52.02 motion. The obvious conclusion is that RULE 52.02 does not apply to the case at bar for no findings of fact were ever made by the trial court in the first place."

In summary, we hold that the "Motion to Make Additional Finding" does not qualify as a RULE 52.02 Motion activating the grace of RULE 4(B), T.R.A.P. and thus did not extend the time for the plaintiff to file his Notice of Appeal.

We note in passing that a Notice of Appeal is required to designate the judgment from which relief is sought. RULE 3(f), T.R.A.P. The Notice of Appeal in this case does not appeal the Order granting summary judgment; rather, it purports to appeal the denial of the Motion to Make Additional Finding. The impermissibility of this procedure is apparent. A Motion to Make Additional Findings is not a Motion to Alter or Amend or for a New Trial. See. RULE 4(b) T.R.A.P.

The Motion to Dismiss the appeal is accordingly granted. Costs are assessed to the appellant.

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[2]In an effort to avoid the application of the three-year statute of repose in medical malpractice cases, T.C.A. 29-26-116(a)(3).

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William H. Inman, Senior Judge

CONCUR:

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W. Frank Crawford, Presiding Judge

_____
David R. Farmer, Judge