



This is an appeal from the action of the Tennessee Claims Commissioner in denying the claimant relief sought by a motion filed pursuant to Rule 60.02, Tennessee Rules of Civil Procedure. Specifically, the claimant challenges the validity of Tennessee Claims Commission Rule 0310-1-1-.01(5)(c). Claimant insists that the rule is in contravention of Rule 56, Tennessee Rules of Civil Procedure and further is a violation of Article 11, Section 8 of the Tennessee Constitution. We respectfully disagree and affirm the judgment of the claims commissioner.

The claimant, Ms. Tuck, underwent a laparoscopic procedure performed by Dr. Eric DeFreitas on September 11, 1992. He allegedly injured her small bowel, but did not realize at the time that he had done so. She returned to Sweetwater Hospital Emergency Room on the two following days and saw Dr. DeFreitas on the third day. On Sept. 16, 1992, she went to the University of Tennessee Hospital because she still felt ill. On September 22, 1992, the bowel injury was discovered and repaired.

In August, 1993, Ms. Tuck filed a claim against the University of Tennessee Hospital with the Division of Claims Administration.

The claim was transferred to the Claims Commission on Oct. 25, 1993.<sup>1</sup>

On May 5, 1994, the defendant filed a motion for summary judgment with the Claims Commission together with a memorandum and an affidavit. Ms. Tuck did not respond. Subsequently, on March 15, 1995, the Claims Commission entered an Order of Dismissal without a hearing pursuant to Tennessee Claims Commission Rule 0310-1-1-.01(5)(c). Counsel for Ms. Tuck responded with a flurry of documents including a motion to vacate the dismissal pursuant to Rule 60.02, Tennessee Rules of Civil Procedure, a response to defendant's motion for summary judgment, answers to interrogatories, and a request for oral argument. The defendant then filed a motion in opposition. A hearing was held by telephone and both parties filed additional memoranda. On October 4, 1995, the commissioner entered his order denying the motion to vacate his previous order granting the summary judgment.

T. C. A. § 9-8-403 provides that proceedings before the claims commission are to be conducted in accordance with the Tennessee Rules of Civil Procedure "where applicable and otherwise pursuant to rules and regulations promulgated by the commission."

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<sup>1</sup> Ms. Tuck also filed suit against Dr. DeFreitas in a separate action in the circuit court of Monroe County, but those issues are not pertinent to this appeal.

Rule 56 of the Tennessee Rules of Civil Procedure provides in pertinent part as follows:

56.01 For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

56.02 For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

56.03 Motion and Proceedings Thereon. The motion shall be served at least thirty (30) days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

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Rule 0310-1-1-.01(5)(c) of the Tennessee Claims Commission provides as follows:

Each party opposing a motion shall serve and file a response no later than fifteen (15) days after service of the motion, except that in cases for motions for summary judgment the time shall be thirty (30) days after service of the motion. **Failure to file a response shall indicate that there is no opposition to the motion provided, however, the Commission may act on a motion prior to the time set forth.** ... (Emphasis added).

Appellant insists that the above rule conflicts with Rule 56, Tennessee Rules of Civil Procedure and accordingly is a nullity. We find no conflict between the two rules as applied to this case. The rule of the claims commission is a logical extension of Rule 56. It is clear, unambiguous and is within the rule-making authority of the Tennessee Claims Commission. See T.C.A. § 9-8-403. It seems to us that the courts of this state and the claims commission as a quasi judicial tribunal have the inherent power to adopt rules for the efficient conduct of business that comes before them. Indeed Rule 18 of the Rules of the Tennessee Supreme Court mandates the adoption of local rules of practice for the following purposes:<sup>2</sup>

Rule 18. Local rules of practice in the trial courts of Tennessee

(a) All trial courts shall adopt in writing local rules prescribing procedures for:

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<sup>2</sup>Rule 0310-1-1-.04 of the Rules of Procedure of the Claims Commission provides "[t]he claims commission and those who practice law before it is subject to the Tennessee Supreme Court Rules in the same manner as courts, where applicable.

- (1) setting cases for trial;
- (2) obtaining continuances;
- (3) disposition of pre-trial motions;
- (4) settlement or plea bargaining deadlines for criminal cases;
- (5) preparation, submission and entry of orders and judgments.

Trial courts may also adopt other rules not inconsistent with the Rules of Civil Procedure and Rules of Criminal Procedure.

The main thrust of the appellants argument that the commission's rule conflicts with Rule 56. T.R.C.P., is that the commission's rule does not provide for a hearing prior to dismissal if no response is received within the thirty (30) day period set out therein. Assuming, without deciding, that the hearing mentioned in Rule 56 means the hearing on the motion for summary judgment, it may be presumed conclusively under the Rule of the Commission that the hearing is waived if no response to a motion for summary judgment is forthcoming within the time prescribed by the rule.

Ignorance of the rules or a mistaken interpretation of the rules is not within itself reason to invoke Rule 60.02(1) [T.R.C.P.]. Kilby v. Sivley, 745 S.W2d 284. (Tenn. App. 1987). Further, in circumstances as here, where a party is provided an

opportunity to respond to a motion for summary judgment and an opportunity to be heard if a response is filed, does not conflict with Rule 56, T.R.C.P. It should also be noted that agreements between counsel to ignore the local rules of practice are not binding on the courts or the claims commission.

The rule of the Claims Commission may clearly be interpreted as a waiver of a right to a hearing if a response is not made within thirty (30) days. The Supreme Court in Phelps v. Tennessee Consolidated Retirement System, 650 S.W2d 371 (Tenn. 1983) defined waiver thus:

The principle of waiver as recognized in this State is defined as the voluntary relinquishment or abandonment of a known right or a privilege. (Citations omitted, p. 375).

Since the appellant must be presumed to know the law and the rules of the commission, a failure to respond to a motion for summary judgment within thirty (30) days is clearly a waiver to a right or privilege of a hearing if one exists. In Jenkins v. McKinney, 533 S.W2d 275 (Tenn. 1976) the Supreme Court speaking through Chief Justice Joe Henry noted that "[o]ral argument is especially unnecessary when only questions of law are concerned."

The court further noted in Jenkins that the "prevailing and better practice is to permit oral argument on motions for new trial; however, a failure to do so, in a civil case, does not invalidate the action of the trial judge nor offend the constitutional due process." Jenkins, at p. 279. It is our observation that, in cases such as the one under consideration here, the same rule is applicable. On motion for summary judgment, the trial court or commissioner is deciding a pure question of law and a failure to permit oral argument does not invalidate the judgment of the commissioner.

A motion for summary judgment goes to the merits of the litigation and one faced with such a motion may neither ignore it nor treat it lightly. Ferguson v. Tomerlin, 656 S.W2d 378 (Tenn. App. 1983).

Our resolution of the question of the validity of the commission's rule also answers the question relating to the constitutionality of the rule. We deem it unnecessary to discuss the first issue further.

The second issue charges the commissioner with abuse of discretion in denying relief under Rule 60.02, T.R.C.P. It has



long been settled that a T.R.C.P. 60.02 motion addresses itself to the sound discretion of the trial court. Underwood v. Zurich Ins. Co., 854 S.W2d 94, 97 (Tenn. 1993); Toney v. Mieller Co., 810 S.W2d 145, 147 (Tenn. 1991). Thus, instead of employing the standard of review in T.R.A.P. 13(d), we review denials of motions for post-judgment relief to determine whether the trial court abused its discretion. Banks v. Dement Constr. Co., 817 S.W2d 16, 18 (Tenn. 1991); John Barb, Inc. v. Underwriters at Lloyds of London, 653 S.W2d 422, 424 (Tenn.App. 1983). We find no abuse of discretion.

There is yet another reason why a rule 60.02 motion is inappropriate in this case. The order sustaining the motion for summary judgment was signed by the commissioner on March 15 and was received by the Tennessee Claims Commission on March 20, 1995. Further, the order reflects that it was served on counsel of record on March 15, 1995. Claimant's Rule 60.02 motion was received by the commission on April 7, 1995. Clearly, the judgment sought to be vacated was not final. Rule 60.02 by its terms applies only to final judgments.

In Campbell v. Archer, 555 S.W2d 110 (Tenn. 1977), it was established that the the function of this rule (rule 60.02) is to

give relief from final judgments; Rule 59, ... is the appropriate remedy for asserting alleged errors affecting a judgment which has not yet become final.

We note that in the claimant's motion, the claimant alternatively asks the court to reconsider its order of dismissal. Resolving doubt in favor of the claimant, we will treat the motion as a motion filed pursuant to Rule 59.04, i.e., a motion to alter or amend a judgment. While we find no cases in this jurisdiction which address the standard of review as it relates to Rule 59 motions to alter or amend a judgment, we do find authority that the standard is abuse of discretion in the granting or refusal to grant a new trial. See Esstman v. Boyd, 605 S.W2d 237 (Tenn. App. 1979).

Further, the circumstances of this case can be analogized to a judgment by default. It is well-settled that the setting aside of a default judgment is within the sound discretion of the trial court. A party seeking to set aside a default judgment has the burden of showing the party is entitled to relief. Nelson v. Simpson, 826 S.W2d 483, 485 (Tenn. App. 1991). Such a request for relief addresses itself to the sound discretion of the trial court. We will not disturb the trial court's judgment in the absence of a

showing that the lower court abused its discretion. Tennessee Department of Human Services v. Barbee, 689 S.W2d 863, 865-66 (Tenn. 1985).

In this case we note that no attempt was made to communicate with the claims commissioner regarding any difficulties in obtaining the services of an expert witness. The claimant filed a response to the motion for summary judgment after the summary judgment had been granted. The response included an affidavit by James Edward Anderson, M.D., which probably would have been sufficient to defeat a motion for summary judgment had it been timely filed. The record contains no explanation of why the claimant failed to respond to the motion in a timely fashion.

Under the present posture of the record, we are unwilling to find that the claims commissioner abused his discretion.

We find no reversible error in the actions of the claims commissioner. Accordingly, the judgment is affirmed in all respects. Costs are taxed to the appellant and this cause is remanded for the collection thereof.

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Don T. McMuray, J.

CONCUR:

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Herschel P. Franks, J.

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Charles D. Susano, Jr. J.

IN THE COURT OF APPEALS

TRINA TUCK,	)	TENNESSEE CLAIMS COMMISSION
	)	C. A. NO. 03A01-9510-BC-00355
	)	
Claimant - Appellant	)	
	)	
	)	
	)	
	)	
vs.	)	HON. MICHAEL S. LACY
	)	COMMISSIONER
	)	
	)	
	)	
STATE OF TENNESSEE,	)	AFFIRMED AND REMANDED
	)	
Defendant - Appellee	)	

**ORDER**

This appeal came on to be heard upon the record from the Tennessee Claims Commission, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was no reversible error.

Accordingly, the judgment is affirmed in all respects. Costs are taxed to the appellant and this cause is remanded for the collection thereof.

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