IN THE COURT OF APPEALS
AT KNOXVILLE

CHESLEY LEA JACKSON and WILMA JEAN WILSON,	)	ANDERSON CHANCERY
	)	C.A. NO. 03A01-9804-CH-00182
Plaintiffs-Appellants	)	
vs.	)	HON. WILLIAM E. LANTRIP, CHANCELLOR
BOBBY J. DOTSON and wife, ANDREA DOTSON, and DENVER DOTSON,	)	REVERSED AND REMANDED
Defendants-Appellees	)	

J. PHILIP HARBER, Clinton, for Appellants

PHILIP R. CRYE, Clinton, for Appellees

O P I N I O N

McMurray, J.

This case was heard at a bench trial and at the conclusion of the plaintiffs' proof, the defendants moved the court for an involuntary dismissal of the plaintiffs' case. Rather than rule on the motion at that time, the court allowed the plaintiffs to reopen their proof. After additional proof was introduced and the plaintiff rested, the defendants renewed their motion for dismissal.

After the renewal of the motion to dismiss, the court began to discuss the evidence in the case. The following colloquy then took place:

> THE COURT: Mr. Stuart, [addressing the plaintiffs' attorney], the court cannot find that you've carried the burden of proof. The testimony from this witness relates to a 1976 endeavor. The Court notes that the deed from the Dotson property is a 1969 deed that was done prior to that date. And nothing that Mr. Jackson has offered in the record raises or presents sufficient evidence for the Court to find that the plaintiff has carried the requisite burden of proof.
>
> MR. STUART: Well, your honor, I'd like to take a non-suit.
>
> THE COURT: Mr. Stuart, I want you to give me some law that you can do that after the court's ruling.
>
> MR. STUART: Well, I can't. I was just hoping that you were explaining the ruling you were about to make.
>
> THE COURT: Have I granted your motion or not yet? I don't know—you interrupted me—whether or not I had said it. I probably hadn't. Well I—
>
> MR. STUART: I can tell which way you were headed.
>
> THE COURT: Well, I think you have and I don't think I've said the magic words yet. So I'm going to give Mr. Stuart the benefit of the doubt and allow him to take a voluntary dismissal of the plaintiffs' case.

An order was entered on November 24, 1997, allowing the voluntary dismissal. Thereafter, on January 29, 1998, the defendants filed a motion pursuant to Rule 60, Tennessee Rules of Civil Procedure, asking the court to amend the order of voluntary dismissal to provide that the dismissal was with prejudice. The grounds for the motion were that the court had allowed a non-suit

after the motion to dismiss had been sustained. The court granted the motion. It is from the order granting this motion that this appeal resulted.

We are of the opinion that the trial court erred in granting the Rule 60 motion. Clearly, the transcript of the proceedings demonstrates that the court was seriously considering granting the defendants' motion for an involuntary dismissal. The motion was not, however, granted nor was the court required to grant the motion at that time. Rule 41.02(2), Tennessee Rules of Civil Procedure, provides as follows:

> (2) After the plaintiff, in an action tried by the court without a jury, has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence; ... . (Emphasis added.)

It is clear from this rule that the trial court was under no obligation to grant the defendants' motion at the stage of the proceedings in which the motion was made. The record clearly reflects that it did not. Further, under Rule 60, Tennessee Rules of Civil Procedure, we find no authority that allows a trial court, after a judgment has become final, to amend the final judgment by simply changing its mind about the granting of a nonsuit without prejudice. If the record reflected that the motion to dismiss had

in fact been granted, then the provisions of Rule 60.01 regarding "clerical mistakes" or possibly the provisions of Rule 60.02 relative to "mistake" might be available as remedies to correct the mistake. Such is not the case here, however.

It is significant to note that the availability of voluntary dismissals is much greater now than before the adoption of the present rules of civil procedure. In Willbanks v. Trousdale County Boardd of Education, 1986 WL 1663 (Tenn. App. Feb 7, 1986), the court noted correctly that "Rule 41.01 follows the liberal practice of allowing voluntary dismissals that existed in the circuit court before the adoption of the Tennessee Rules of Civil Procedure. The drafters of the Rule intended that the Rule not be restrictive but that the liberal practice of the circuit court be extended to the chancery court." Therefore, with this proposition in mind, we can look to cases involving "motions for directed verdict" in the circuit courts for guidance as to when a voluntary dismissal can be taken.

The appellees rely upon the case of Weedman v. Searcy, 781 S.W.2d 855 (Tenn. 1989) as authority for their position that the plaintiffs' motion came too late. We believe, however, that Weedman is more appropriate authority for the position of the appellants. In Weedman, the Supreme Court stated the following proposition:

> In a non-jury case, until the case has finally been submitted to the trial court for a decision, the plaintiff

> has a right to a voluntary dismissal. ... In the non-jury case, until the matter has been finally submitted to the trial judge for decision, the "trial" of the case has not been concluded. The trial judge may order further proof to be taken, may reopen the proof for various purposes, extend the time for filing briefs, and the like. Dismissal as a matter of right continues to be available at least until written post-trial briefs have been filed pursuant to order of the trial judge and until the matter has been finally submitted to the court for determination on the merits. That point had not been reached in the present case when the motion of appellee was made.

Id. At 857

In the instant case, the trial court had announced only that it could not find that the plaintiffs had carried their burden of proof and began to explain how they had not done so. The Court, at this point, had not exercised its discretion to dismiss the case, allow the proof to be reopened by the plaintiffs or hear the defendants' proof if the defendants wished to present any, or order the filing of post trial briefs.

Perhaps the rule is best stated in Bellisomi v. Kenny, 206 S.W.2d 787 (Tenn. 1947):

> ... The judge is ... left a sound discretion to be exercised according to what he thinks is required of a tribunal engaged primarily in dispensing justice. If he thinks the purpose can best be served by cutting off the right to a non-suit, then ... he can announce his formal decision immediately after the motion for a directed verdict and argument thereon, if any, and then, if he choose, give the reasons for his decision.
>
> Upon the other hand, if he thinks that justice requires, he can leave that right temporarily intact by first discussing the issues of law and fact, withholding

> definite action on the motion until he has concluded, ... all in the expectation that the plaintiff will anticipate the decision and take advantage of the opportunity thus afforded him if he care to do so. (Citation omitted.)
>
> * * * *
>
> To sum up, the judge can cut off the right to a non-suit by a definite announcement of his decision, either before or after a discussion of his reasons, ... or, following the making of the motion and the discussion with respect thereto, if any, he may withhold a formal announcement of his decision until he makes it in directing the jury to return a verdict. But in either event, it is the definite formal announcement of the decision ... which ends the right to a non-suit ... . (Emphasis added.)

Id. At 789.

In view of the cited authorities, and for the reasons stated, we believe that the trial court erred in amending the final judgment to reflect a dismissal with prejudice. We, therefore, reverse the judgment of the trial court and remand the case for such other and further action required consistent with this opinion. Costs are assessed to the appellees.

_____
Don T. McMurray, Judge

CONCUR:

_____
Herschel P. Franks, Judge

_____
Charles D. Susano, Jr., Judge

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BOBBY J. DOTSON and wife, ANDREA DOTSON, and DENVER DOTSON Defendants-Appellees	)	REVERSED AND REMANDED

JUDGMENT

This appeal came on to be heard upon the record from the Chancery Court of Anderson County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was reversible error in the trial court.

We reverse the judgment of the trial court and remand the case for such other and further action required consistent with this opinion. Costs are assessed to the appellees.

PER CURIAN