IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
KNOXVILLE, MAY 1999 SESSION

LINDA GRAY CHANCERY	)	SEVIER
Plaintiff/Appellant	)	
VS.	)	Hon. Teleford E. Forgety, Chancellor
TENNESSEE RESTAURANT ASSN. SELF-INSURED and HONEYMOON HIDEAWAY, INC.	)	
Defendants/Appellees	)	No. 03S01-9807-CH-00075

For the Appellant:

Lewis A. Combs, Jr.
707 Market Street
Knoxville, Tenn. 37902

For the Appellee:

Ronald C. Newcomb
Robin M. King
P.O. Box 2231
Knoxville, Tenn. 37901-2231

M E M O R A N D U M O P I N I O N

Members of Panel:

Frank F. Drowota III, Justice
John K. Byers, Senior Judge
Roger E. Thayer, Special Judge

REVERSED and THAYER, Special Judge

REMANDED.

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel of the Supreme Court in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting to the Supreme Court of findings of fact and conclusions of law.

Plaintiff, Linda Gray, has appealed from the action of the trial court in dismissing her claim by sustaining a motion for summary judgment filed by defendants.

The complaint alleges plaintiff was injured on June 26, 1995, while on the business of her employer, when she was severely burned by hot coffee and that the burn caused permanent physical injury and psychological injury.

The summary judgment record consists of the plaintiff's deposition, numerous expert medical depositions of doctors seeing plaintiff both before and after the event in question, and other records.

Plaintiff's deposition states that on June 26, 1995, while at her business office, she realized she had left a map at home which she needed to assist her in obtaining a city permit to build a gazebo for weddings; that while she was in route to obtain the map, she stopped at a McDonald's restaurant to purchase coffee; that she remembered getting the coffee and putting it in a coffee holder in her car and then "going back to the road and making a right turn on the main road to Pigeon Forge and then I started feeling sick and I pulled over and that's all I remember until I get to Vickie's office." She stated she had not worked since being injured and that she is not able to work.

The record indicates there was no eyewitness to the event and she had been treated for epileptic-like seizures and psychological difficulties prior to the time in question and she continues to experience such problems.

Plaintiff contends there is medical evidence in the record indicating she spilled the coffee on herself and then blacked out as a result of the pain produced by the coffee spill; that when the record is considered in its most favorable light to her, summary judgment should not have been granted; and that the trial court was in error in weighing evidence in order to reach its conclusion.

Defendants contend she had an idiopathic seizure and then spilled the coffee as a result of the seizure; that the court acted properly in sustaining the motion as

plaintiff's injuries were the result of a non-work related idiopathic attack and that rulings in the cases of *Sudduth v. Williams,* 517 S.W.2d 520, 523 (Tenn. 1974) and *Dickerson v. Trousdale Mfg. Co.,* 569 S.W.2d 803, 804 (Tenn. 1978) support the trial court's ruling and it is clear the injury did not arise out of a hazard of the employment.

Numerous expert medical witnesses gave depositions which are part of the record. Some of these witnesses gave testimony supporting plaintiff's theory as to the sequence of events and other witnesses supported defendants' theory. We do not find it necessary to detail the testimony of these various witnesses because the trial court was of the opinion the expert medical testimony was not, standing alone, sufficient to support the motion and there was a conflict in the evidence as to the sequence of events. We agree with this conclusion.

However, the trial court found evidence in the record establishing that plaintiff had instituted a tort action against the McDonald's Corporation and that her complaint alleged she had purchased the coffee from McDonald's; that she suffered an epileptic seizure and as a result the coffee splashed over her body. The record also indicates a motion to amend these allegations of the complaint was pending before the Circuit Court in order to assert she purchased the coffee, spilled it on herself and then blacked out from painful injuries.

The Chancellor concluded that the complaint in the tort case was an admission against her interest and under Rule 803(1.2), Tenn. Rules of Evidence, the pleading was an admission which had not been explained away to the court's satisfaction. As we review the statements of the court, this admission appears to be the primary reason for sustaining the motion.

An order was duly entered on March 31, 1998, sustaining the motion for summary judgment. Before it became final, plaintiff filed on April 16, 1998 a motion under Rules 52 & 59, T.R.Civ.P., seeking to alter and amend the judgment with supporting affidavits from two doctors who had given testimony concerning new opinions as to the sequence of events and that this resulted from their receiving and examining the history given by plaintiff to Dr. Vickie S. Moore who saw her immediately after the accident.

The trial court overruled the motion concluding plaintiff had not carried the high burden of proof in seeking a new trial based on newly discovered evidence.

Ordinarily, the review of a workers' compensation case is de novo on the record accompanied by a presumption of the correctness of the findings of fact unless the preponderance of the evidence is otherwise. T.C.A. § 50-6-225(e)(2).

However, an appeal from a summary judgment order in a worker's compensation case is not controlled by the de novo standard of review provided by the Workers' Compensation Act but is governed by Rule 56, T.R.Civ.P.; *Downen v. Allstate Ins. Co.,* 811 S.W.2d 523 (Tenn. 1991). No presumption of correctness attaches to decisions granting summary judgment because they involve only questions of law; thus, the reviewing court must make a fresh determination concerning whether the requirements of Rule 56 have been met. *Gonzales v. Alman Const. Co.,* 857 S.W.2d 42 (Tenn. 1993).

In ruling on motions for summary judgment both the trial court and the supreme court must consider the matter in the same manner as a motion for a directed verdict made at the close of plaintiff's proof, i.e., it must view all affidavits and other records in the light most favorable to the opponent of the motion and all legitimate conclusions of fact therefrom in that favor. If after so doing a disputed issue of a material fact is made out, the motion must be denied. *Keene v. Cracker Barrel Old Country Store, Inc.,* 853 S.W.2d 501 (Tenn. App. 1992).

The pleadings in the tort action constitute an admission as contemplated by Rule 803(1.2), Tennessee Rules of Evidence. We note the rule specifically provides that statements admissible under this exception are not conclusive. The Advisory Commission comment concerning this last sentence in the rule states: "all party admissions are simply evidentiary, not binding, and are subject to being explained away by contradictory proof."

In examining the summary judgment record in its most favorable light to plaintiff, we are of the opinion the record is not sufficient to support the granting of the motion which dismissed the case. The admission of the original complaint in the tort action is merely evidence supporting defendants' contention. There is other evidence in the record such as expert medical testimony as well as the pending motion to amend the original complaint which could be considered as "contradictory proof." This contradictory evidence cannot be weighed as to its value in summary judgment proceedings because proceedings of this nature do not involve findings of

fact or the weighing of evidence. *Hamrick v. Spring City Motor Co.,* 708 S.W.2d 383, 388 (Tenn. 1986). Thus, we find an issue of fact does exist.

The cases upon which defendants rely, *Sudduth* and *Dickerson*, supra, were not disposed of at the summary judgment stage but from a hearing on the merits of the claim.

As to the trial court's action in declining to accept new affidavits after entry of the order sustaining the summary judgment motion, we would cite the cases of *Schaefer v. Larsen,* 688 S.W.2d 433 (Tn. Ap. 1984) and *Richland Cty. Club v. CRC Equities, Inc.,* 832 S.W.2d 554 (Tn. Ap. 1991). These decisions recognize that rules involving post trial motions after a hearing on the merits are different from post trial motions after sustaining a motion for summary judgment and carry different burdens of proof.

The judgment is reversed and the case is remanded to the trial court for entry of an order overruling the motion for summary judgment. Costs of the appeal are taxed to defendants.

_____
Roger E. Thayer, Special Judge

CONCUR:

_____
Frank F. Drowota III, Justice

_____
John K. Byers, Senior Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

FILED

August 4, 1999

Cecil Crowson, Jr.
Appellate Court
Clerk

LINDA GRAY		
	)	SEVIER CHANCERY
Plaintiff/Appellant,	)	No. 96-6-188
	)	
	)	
	)	No. 03S01-9807-CH-00075
v.	)	
	)	
	)	
TENNESSEE RESTAURANT ASSN. SELF-INSURED and HONEYMOON HIDEAWAY, INC.	)	Teleford E. Forgety,
	)	
	)	
	)	
Defendants/Appellees.	)	

JUDGMENT ORDER

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 facts and conclusions of law are adopted and affirmed and the decision of the Panel is made the Judgment of the Court.

Costs on appeal are taxed to the Appellant, Tennessee Restaurant Association Self -Insured and Honeymoon Hideaway, Inc., for which execution may issue if necessary.

08/04/99