

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 3, 2023 Session

**WESTFIELD GROUP INSURANCE A/S/O DAVID & CAROL NEIGER v.
TIFFANY EMBRY**

**Appeal from the Circuit Court for Davidson County
No. 21C1542 Joseph P. Binkley, Jr., Judge**

No. M2022-01301-COA-R3-CV

In this appeal, a defendant asserts that the trial court erred when it granted the plaintiff's motion to voluntarily dismiss its complaint while the defendant's motion to dismiss and for attorneys' fees was pending. We hold that a pending motion to dismiss does not preclude the plaintiff from voluntarily dismissing its case pursuant to Tenn. R. Civ. P. 41.01. Likewise, the defendant's request for attorneys' fees did not create a "vested right" preventing the plaintiff from voluntarily dismissing its case. The ruling of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which FRANK G. CLEMENT, JR., P.J., M.S., and CARMA DENNIS MCGEE, J., joined.

Davis Fordham Griffin, Nashville, Tennessee, for the appellant, Tiffany Embry.

Alan S. Kleiman, Memphis, Tennessee, for the appellee, Westfield Group Insurance.

OPINION

Tiffany Embry leased real property from Carol and David Neiger ("the Neigers") in Nashville, Tennessee. The Neigers insured their rental property through Westfield Group Insurance ("Westfield"). In February 2020, water damage occurred at the property. The Neigers filed a claim for damage under their homeowner's insurance policy, and Westfield covered the necessary repairs. On September 9, 2021, Westfield filed a complaint against Ms. Embry alleging that the water damage to the Neigers' property occurred due to her negligence and seeking reimbursement for the repairs in the amount of \$31,308.89.

On January 19, 2022, Westfield filed a motion for default judgment against Ms. Embry. On April 6, 2022, the trial court entered a default judgment in the amount of \$31,308.89, plus costs. After learning of the default judgment entered against her, Ms. Embry hired an attorney and filed a motion to set aside the default judgment. On May 11, 2022, the parties entered an agreed order to set aside the default judgment.

On June 1, 2022, Ms. Embry filed a Tenn. R. Civ. P. 12.02(6) motion to dismiss the complaint, arguing that Westfield had no right of subrogation against her under Tennessee law. Ms. Embry also requested attorneys' fees pursuant to Tenn. Code Ann. § 20-12-119¹ and set her motion for hearing on June 24, 2022. Before the hearing was held, Westfield filed a proposed order of voluntary nonsuit. On July 8, 2022, Ms. Embry filed a response in opposition to Westfield's request for nonsuit, arguing that Westfield was not entitled to a nonsuit while her motion to dismiss was pending. On July 18, 2022, the trial court entered an order finding that Ms. Embry's "objection is without merit" and granting the order of voluntary nonsuit.

Ms. Embry filed a motion to alter or amend the court's final judgment under Tenn. Rs. Civ. P. 59.02 and 59.04 asserting that the trial court "relie[d] upon errors of law causing injustice to Ms. Embry." After hearing arguments on the motion to alter or amend, the trial court entered an order denying the motion, finding that Westfield had "the right" to take a voluntary dismissal. The trial court found the matter analogous to *Hurley v. Pickens*, 536 S.W.3d 419, 420 (Tenn. Ct. App. 2016), a health care liability case in which this Court stated, "We find and hold that Plaintiff has the right to take a voluntary dismissal even while a motion to dismiss was pending." Ms. Embry appeals the trial court's decision.

¹ Tennessee Code Annotated section 20-12-119 provides, in part:

(c)(1) . . . [W]here a trial court grants a motion to dismiss pursuant to Rule 12 of the Tennessee Rules of Civil Procedure for failure to state a claim upon which relief may be granted, the court shall award the party or parties against whom the dismissed claims were pending at the time the successful motion to dismiss was granted the costs and reasonable and necessary attorney's fees incurred in the proceedings as a consequence of the dismissed claims by that party or parties. The awarded costs and fees shall be paid by the party or parties whose claim or claims were dismissed as a result of the granted motion to dismiss.

(2) Costs shall include all reasonable and necessary litigation costs actually incurred due to the proceedings that resulted from the filing of the dismissed claims, including, but not limited to:

- (A) Court costs;
- (B) Attorneys' fees;
- (C) Court reporter fees;
- (D) Interpreter fees; and
- (E) Guardian ad litem fees.

STANDARD OF REVIEW

A trial court's ruling on a motion to alter or amend is reviewed under the abuse of discretion standard. *Harmon v. Hickman Cmty. Healthcare Servs., Inc.*, 594 S.W.3d 297, 305 (Tenn. 2020). Our Supreme Court has described the abuse of discretion standard as follows:

The abuse of discretion standard of review envisions a less rigorous review of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal. It reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives. Thus, it does not permit reviewing courts to second-guess the court below, or to substitute their discretion for the lower court's. The abuse of discretion standard of review does not, however, immunize a lower court's decision from any meaningful appellate scrutiny.

Discretionary decisions must take the applicable law and the relevant facts into account. An abuse of discretion occurs when a court strays beyond the applicable legal standards or when it fails to properly consider the factors customarily used to guide the particular discretionary decision. A court abuses its discretion when it causes an injustice to the party challenging the decision by (1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.

Id. (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010) (citations omitted)). The trial court's interpretation of Tenn. R. Civ. P. 41.01 and its decision to grant a voluntary dismissal while a motion to dismiss is pending present an issue of law, which is reviewed de novo with no presumption of correctness. See *Renner v. Takoma Reg'l Hosp.*, No. E2018-00853-COA-R3-CV, 2019 WL 360333, at *2 (Tenn. Ct. App. Jan. 29, 2019) (citing *Whaley v. Perkins*, 197 S.W.3d 665, 670 (Tenn. 2006) and *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993)); *Hurley v. Pickens*, 536 S.W.3d 419, 421 (Tenn. Ct. App. 2016).

ANALYSIS

The question in this case is whether a plaintiff may take a voluntary dismissal² after a defendant has filed a motion to dismiss the matter without prejudice and has requested attorneys' fees. We begin with the text of the voluntary dismissal rule, Tenn. R. Civ. P. 41.01:

² The terms "voluntary nonsuit" and "voluntary dismissal" are generally used interchangeably in the caselaw.

(1) Subject to the provisions of Rule 23.05, Rule 23.06, or Rule 66 or of any statute, and except when a motion for summary judgment made by an adverse party is pending, the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties, and if a party has not already been served with a summons and complaint, the plaintiff shall also serve a copy of the complaint on that party; or by an oral notice of dismissal made in open court during the trial of a cause; or in jury trials at any time before the jury retires to consider its verdict and prior to the ruling of the court sustaining a motion for a directed verdict. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff's motion to dismiss, the defendant may elect to proceed on such counterclaim in the capacity of a plaintiff.

(2) Notwithstanding the provisions of the preceding paragraph, a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has twice dismissed in any court an action based on or including the same claim.

(3) 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 Court has observed that, generally speaking, “[t]he plaintiff . . . is the master of his or her complaint.” *Chimneyhill Condo. Ass’n v. Chow*, No. W2020-00873-COA-R3-CV, 2021 WL 3047166, at *13 (Tenn. Ct. App. July 20, 2021). Thus, “[f]or well over a century, plaintiffs in Tennessee have enjoyed the right to voluntarily dismiss an action without prejudice and refile the action within one year of the dismissal.” *Clark v. Werther*, No. M2014-00844-COA-R3-CV, 2016 WL 5416335, at *3 (Tenn. Ct. App. Sept. 27, 2016) (citing *Evans v. Perkey*, 647 S.W.2d 636, 640 (Tenn. Ct. App. 1982)). The right of a plaintiff to take a nonsuit is “‘free and unrestricted’ except in limited and well-defined circumstances.” *Robles v. Vanderbilt Univ. Med. Ctr.*, No. M2010-01771-COA-R3-CV, 2011 WL 1532069, at *2-3 (Tenn. Ct. App. Apr. 19, 2011) (quoting *Lacy v. Cox*, 152 S.W.3d 480, 484 (Tenn. 2004)); see also *Hurley*, 536 S.W.3d at 422. Indeed, Tenn. R. Civ. P. 41.01 “contemplates that a voluntary dismissal may be taken late in the proceedings, when both parties have expended significant time and expense.” *Adamson v. Grove*, No. M2020-01651-COA-R3-CV, 2022 WL 17334223, at *12 (Tenn. Ct. App. Nov. 30, 2022) (quoting *Douglas v. Lowe*, No. M2012-02276-COA-R3-CV, 2013 WL 6040347, at *7 (Tenn. Ct. App. Nov. 12, 2013)).

However, Tenn. R. Civ. P. 41.01 provides exceptions and “precludes a party from taking a voluntary nonsuit in a class action case, in a shareholder derivative action, in a case in which a receiver has been appointed, or while an opposing party’s motion for summary judgment is pending.” *Clark*, 2016 WL 5416335, at *3 (citing *Himmelfarb v. Allain*, 380 S.W.3d 35, 40 (Tenn. 2012)). Furthermore, a plaintiff’s unfettered right to a voluntary nonsuit is also limited by “an implied exception which prohibits nonsuit when it would deprive the defendant of some vested right.” *Lacy*, 152 S.W.3d at 484. Other than these exceptions, “Rule 41.01(1) affords a plaintiff the free and unrestricted right to voluntary dismissal without prejudice before the jury retires.” *Id.*

Applying the exceptions to voluntary dismissal discussed above, we can easily dispense with most of them: 1) this is Westfield’s first notice of voluntary dismissal; 2) there is no dispute that Westfield filed a written notice of nonsuit and provided it to Ms. Embry; 3) there was no motion for summary judgment pending; and 4) the case had not reached the stage of jury deliberations. Furthermore, the parties agree that Tennessee Rules of Civil Procedure 23.05, 23.06, and 66 are not applicable. Ms. Embry asserts that Westfield no longer retained the absolute right to take a voluntarily nonsuit because Ms. Embry’s motion to dismiss had “already been submitted to the trial court on the merits.” But, this Court has expressly rejected such an argument and has explained, “Rule 41.01 makes no exception for motions to dismiss.” *Clark*, 2016 WL 5416335, at *4 (citing *Rickets v. Sexton*, 533 S.W.2d 293, 294 (Tenn. 1976) (upholding the right of a plaintiff to take a voluntary nonsuit “in the face of the resistance of his adversary”). In fact, this Court has specifically stated, “We find nothing in Rule 41.01 which takes away plaintiffs’ right to a voluntary nonsuit when defendant had moved to dismiss plaintiffs’ suit.” *Willbanks v. Trousdale Cnty. Bd. of Educ.*, 1986 WL 1663, at *2 (Tenn. Ct. App. Feb. 7, 1986); *see also Solomon v. Solomon*, No. M2022-00958-COA-R3-CV, 2023 WL 3730597, at *3 (Tenn. Ct. App. May 31, 2023) (“[A] plaintiff can take a voluntary nonsuit even if a motion to dismiss is pending before the court.”). Under this caselaw, Westfield retained its right to voluntarily dismiss its complaint even though Ms. Embry’s motion to dismiss had been filed.

Ms. Embry is convinced that *Hamilton v. Cook*, No. 02A01-9712-CV-00324, 1998 WL 704528 (Tenn. Ct. App. Oct. 12, 1998), necessitates a different result. The trial court disagreed with this contention, and so do we. In *Hamilton*, the defendants filed a motion to dismiss plaintiffs’ complaint asserting, *inter alia*, failure to state a claim upon which relief could be granted and that the trial court lacked subject matter jurisdiction. *Hamilton*, 1998 WL 704528, at *2. The trial court held a hearing on defendants’ motion and, at the conclusion of the parties’ arguments, “the trial court took a short recess and then orally announced its ruling from the bench[,]” providing five specific reasons for granting defendants’ motion. *Id.* at *3. After this hearing, plaintiffs filed a notice of voluntary dismissal without prejudice under Tenn. R. Civ. P. 41.01. *Id.* The defendants filed a motion to strike plaintiffs’ notice, which the trial court granted. *Id.* The trial court entered a final order dismissing plaintiffs’ complaint, reiterating the five reasons it had announced

at the hearing. *Id.* On appeal, the *Hamilton* court held that prejudice would result to defendants if plaintiffs were permitted to take the voluntary nonsuit, reasoning:

[T]he [plaintiffs] had participated in a hearing on the Defendants' motion to dismiss at which the Defendants demonstrated valid defenses to a majority of the [plaintiffs'] claims for relief. Moreover, the trial court already had issued its oral ruling dismissing all claims against the Defendants. We hold that, under these circumstances, the trial court did not abuse its discretion in refusing to permit the [plaintiffs] to take a voluntary dismissal. Although the present case involves a non-jury proceeding, we consider it to be somewhat analogous to the situation in a jury proceeding where the plaintiff attempts to take a voluntary nonsuit after the trial court orally has granted the defendant's motion for a directed verdict.

Id. at *5.

We find *Hamilton* distinguishable from the case at bar. Here, the motion to dismiss was filed, but Westfield had not responded to the merits of the motion, the parties had not presented argument before the trial court, and the trial court had not provided its disposition of the motion through an oral ruling. Ms. Embry simply filed a motion to dismiss that had not been heard and, importantly, the trial court had not yet opined on the merits of the motion. *Hamilton* does not control this set of facts as Ms. Embry suggests.

We find, as did the trial court, that this case is more akin to *Hurley v. Pickens*, 536 S.W.3d at 419. In *Hurley*, defendants filed a motion to dismiss a healthcare liability suit for failure to comply with statutory requirements regarding pre-suit notice and a certificate of good faith. *Hurley*, 536 S.W.3d at 420. Then, while the motion to dismiss was pending, the plaintiff filed a notice of voluntary dismissal, which the trial court granted. *Id.* at 420-21. On appeal, the defendants argued that the trial court erred by allowing the plaintiff to take a voluntary dismissal while their motion to dismiss was pending because, as they pointed out, their action was "subject to dismissal with prejudice." *Id.* The *Hurley* court found nothing preventing the plaintiff from taking, and the trial court from granting, a voluntary dismissal while the defendants' motion to dismiss was pending and affirmed the lower court. *Id.* at 424-25. Like the plaintiff in *Hurley*, Westfield had the right to take a voluntary dismissal of its action against Ms. Embry while her motion to dismiss was pending.

Furthermore, we do not find merit to Ms. Embry's argument that her request for attorneys' fees created a "vested right" preventing Westfield from voluntarily dismissing its case. The plain language of Tenn. Code Ann. § 20-12-119(c)(3) belies this assertion:

