IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 21, 2014 Session

JOYCE E. MONDAY, ET AL. v. EARL D. THOMAS, ET AL.

Direct Appeal from the Circuit Court for Fentress County
No. 2010-CV-85 John D. McAfee, Judge

No. M2012-01357-COA-R3-CV - Filed May 5, 2014

The trial court dismissed this tort action as barred by the statute of limitations upon determining that Plaintiffs had failed to comply with Rule 4.03(1) of the Tennessee Rules of Civil Procedure where they failed to return alias summonses until 235 days after they were issued. We reverse in part, vacate in part, and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed in part, Vacated in part and Remanded

DAVID R. FARMER, J., delivered the opinion of the Court, in which RICHARD H. DINKINS, J., and J. STEVEN STAFFORD, J., joined.

Lynda W. Simmons, Livingston, Tennessee, for the appellants, Joyce E. Monday and James Paris Monday.

Terrill Lee Adkins and Hannah Sylvia Lowe, Knoxville, Tennessee, for the appellees, Earl D. Thomas; Hugh Taylor and Rick Taylor, individually; Hugh Taylor, Rick Taylor and Greg Taylor, d/b/a J.S. Leasing, Inc. and Taylor Enterprises, Inc.

OPINION

This action arises from an October 2009 automobile accident. The only issue before this Court is whether the trial court erred by dismissing the action as time-barred upon concluding that Plaintiffs failed to comply with Rule 3 and 4.03 of the Tennessee Rules of Civil Procedure and that the statute of limitations accordingly was not tolled. The facts relevant to our disposition of this issue are not disputed.

On September 30, 2010, Plaintiffs Joyce Monday (Ms. Monday) and her husband, James Paris Monday (Mr. Monday; collectively "Plaintiffs" or "Appellants"), filed a

complaint for damages in the Circuit Court for Fentress County. In their complaint, Plaintiffs alleged that a vehicle operated by Ms. Monday was struck from behind by a semi-truck operated by Defendant Earl Thomas (Mr. Thomas). Plaintiffs further alleged that the truck operated by Mr. Thomas was owned by Defendants Hugh Taylor, Rick Taylor and Greg Taylor, individually and d/b/a J.S. Leasing, Inc. ("J.S. Leasing") and Taylor Enterprises, Inc. ("Taylor Enterprises"; collectively, "Defendants" or "Appellees"), and that Mr. Thomas operated the truck with Defendants' permission while on Defendants' business.[1] Summonses to Greg Taylor, Rick Taylor and Hugh Taylor d/b/a J.S. Leasing, Inc.; Rick Taylor; Hugh Taylor; Greg Taylor; Greg Taylor, Rick Taylor and Hugh Taylor d/b/a Taylor Enterprises, Inc.; and Earl D. Thomas were issued by the Clerk of the Court to Plaintiffs' counsel on September 30, 2010. On May 6, 2011, Plaintiffs' counsel requested that four alias summons be issued. The alias summons were not served and on December 7, 2011, Defendants' counsel entered a notice of special appearance and filed a motion to dismiss based on the statute of limitations for failure to comply with Tennessee Rules of Civil Procedure 3 and 4.03. On December 27, 2011, Plaintiffs' counsel returned the alias summonses and requested that four alias summonses be reissued. Plaintiffs filed their answer to Defendants' motion to dismiss on January 18, 2012, and the matter was heard by the trial court the same day. By order entered February 21, 2012, the trial court concluded that, as a matter of law, Plaintiffs had failed to comply with Tennessee Rule of Civil Procedure 4.03(1) where they failed to make a return of service until 251 days after the alias summonses were issued on May 6, 2011, and after Defendants had filed their motion to dismiss. The trial court held that Plaintiffs had failed to comply with Rule 4.03(1) by not returning the summonses within 90 days, and that Plaintiffs accordingly could not rely on Rule 3 to toll the statute of limitations. The trial court dismissed the action as barred by the one-year limitations period provided by Tennessee Code Annotated § 28-3-104. Plaintiffs filed a timely notice of appeal to this Court.

Issue Presented

Appellants present one issue for our review, as worded by them:

> Whether the trial court erred in dismissing Plaintiffs' action pursuant to Tennessee Rules of Civil Procedure 3 and 4.03(1) based on the statute of limitations.

Standard of Review

The interpretation of the Tennessee Rules of Civil Procedure presents a question of

[1]Ms. Monday claimed damages for physical injury and medical expenses in the amount of $100,000. Mr. Monday asserted damages in the amount of $20,000 for loss of consortium.

law, which we review *de novo* with no presumption of correctness afforded to the conclusion of the trial court. *Fair v. Cochran*, 418 S.W.3d 542, 544 (Tenn. 2013).

Discussion

The only issue presented by this appeal is whether the trial court erred by concluding that, pursuant to Rules 3 and 4.03 of the Tennessee Rules of Civil Procedure, as a matter of law the statute of limitations was not tolled where Appellants did not return the alias, unserved summonses issued in May 2011 within 90 days, and did not return them until December 27, 2011, after Defendants filed their motion to dismiss. Subsequent to the adjudication of this matter in the trial court, the Tennessee Supreme Court addressed the effect of the requisites of Rules 3 and 4.03 on the statute of limitations and held that "the plain language of the current version of Rule 3 does not link the effectiveness of the original commencement to toll a statute of limitations to the return of proof of service of process." *Fair v. Cochran*, 418 S.W.3d 542, 545 (Tenn. 2012)(citing *See* Tenn. R. Civ. P. 3 advisory commission cmt. (1998) ("The amendment . . . removes the former eventuality of failure to return process within 30 days.")). The court concluded:

> It is true that Rule 4.03 describes the manner of making a return if a summons is unserved or not served within ninety days, but no portion of Rule 4.03 mandates filing the return of proof of service within ninety days, although [Defendant] suggests this reading of the rule. Additionally, Rule 4.03(1) does not state that promptly returning proof of service to the court is necessary to accomplish service. To the contrary, "[t]he return of service is 'a written account of the actions taken by the person making service to show to whom and how the service was made, *or the reason service was not made*.'" *Watson v. Garza*, 316 S.W.3d 589, 593 (Tenn. Ct. App.2008) (quoting 3 Nancy Fraas MacLean, *Tennessee Practice Series-Rules of Civil Procedure Annotated* § 4:15 (4th ed.2008)). The return is a means to prove that service of process has actually been accomplished. *See Royal Clothing Co. v. Holloway*, 208 Tenn. 572, 347 S.W.2d 491, 492 (1961); *Brake v. Kelly*, 189 Tenn. 612, 226 S.W.2d 1008, 1011 (1950). When a dispute arises as to whether service of process has been accomplished, a trial court may properly consider any delay in filing the return when weighing the evidence and resolving the dispute. However, no language in Rule 4.03(a) states or implies that the failure to return proof of service promptly renders commencement ineffective to toll the statute of limitations. *So long as service of process is accomplished within ninety days of issuance of a summons, or new process is issued within one year of issuance of the previous process, a plaintiff may rely upon the original commencement to toll the statute of limitations.* Tenn. R. Civ. P. 3.

Id. at 546 (emphasis added; footnote omitted).

We observe that *Fair v. Cochran* addressed the effect of the plaintiff's failure to return proof of service in the context of alleged service of the original summons issued in the matter, and the court remanded the matter to the trial court to determine whether service had, in fact, been made within 90 days where no alias summons had been issued. *Id.* at 547. The supreme court did not limit its reasoning, however, to those instances in which service allegedly had in fact been made. Rather, as emphasized above, it definitively stated that the statute of limitations is tolled "[s]o long as service of process is accomplished within ninety days of issuance of a summons, or new process is issued within one year of issuance of the previous process."[2] *Id*. Accordingly, to the extent that new process was issued within one year of issuance of the previous process with respect to any Defendant in this case, the statute of limitations was tolled with respect to that Defendant.

Upon review of the record, however, we observe that, although the parties and the trial court reference all Defendants collectively, six summonses were issued when Appellants filed their complaint in September 2010 and it is undisputed that only four alias summons were issued in May 2011. It appears from the record that although summonses issued to Greg Taylor, Rick Taylor, Hugh Taylor and Taylor Enterprises were returned "unable to serve[,] the Defendant could not be found[,]" summonses were reissued in May 2011 to Greg Taylor, Hugh Taylor, Taylor Enterprises, and Mr. Thomas. We note that the record contains an affidavit of Appellants' counsel stating that Mr. Thomas was served by certified mail on November 12, 2010. The record also contains a copy of the return receipt and proof of service. Further, it does not appear from the record that summonses were reissued to Taylor Leasing or Rick Taylor in May 2011. It appears that process to Rick Taylor was not reissued until January 9, 2012, when alias summonses were also issued to Mr. Thomas, Greg Taylor, and Taylor Enterprises, and that no process was reissued to Taylor Leasing following the

[2] Although the supreme court's broad statement in *Fair v. Cochran* arguably may be considered dicta where service of the original summons allegedly had been made in that case and where no new summons was issued, we note that "inferior courts are not free to disregard, on the basis that the statement is *obiter dictum*, the pronouncement of a superior court when it speaks directly on the matter before it, particularly when the superior court seeks to give guidance to the bench and bar. To do otherwise invites chaos into the system of justice." *Holder v. Tennessee Judicial Selection Comm'n*, 937 S.W.2d 877, 882 (Tenn. 1996). We further observe the court's statement in *Fair* that Rule 4.03 "describes the manner of making a return if a summons is unserved or not served within ninety days" but does not "mandate[] filing the return of proof of service within ninety days[.]" *Fair*, 481 S.W.3d at 546. As Justice Holder observed in her concurring opinion, the court's conclusion in *Fair* "effectively render[s] Rule 4.03(1) meaningless" with respect to the accomplishment of service and the tolling of the statute of limitations so long as the requirements of Rule 3 have been met. *Id.* at 547 (Holder, J., concurring). Accordingly, we are persuaded that *Fair* is controlling in the current case with respect to the tolling of the statute of limitations.

original September 2010 summons. It also appears that no summons was issued to Hugh Taylor in January 2012, and that new process was not issued to Hugh Taylor until November 2012.

In light of the supreme court's holding in *Fair v. Cochran*, Appellants' failure to return process as served or unserved within 90 days of issuance does not mandate dismissal of the action based on the statute of limitations. However, the trial court did not determine whether Mr. Thomas was served in November 2010, as Appellants' counsel asserted in her December 2011 affidavit, nor did the trial court determine when and to which Defendants alias summonses were in fact issued. As noted above, although the trial court dismissed this matter with respect to all Defendants based on the statute of limitations, it appears that process was reissued with respect to some but not all Defendants within the one-year period mandated by the Rules. Accordingly, upon remand, the trial court must determine, as a factual matter, the extent to which process was timely reissued with respect to each Defendant.

Conclusion

We reverse the trial court's conclusion that this action is time-barred as a matter of law on the basis that Appellants did not return summons as unserved within 90 days of issuance. Consistent with *Fair v. Cochran*, if "new process is issued within one year of issuance of the previous process, a plaintiff may rely upon the original commencement to toll the statute of limitations." *Fair v. Cochran*, 418 S.W.3d 542, 546 (Tenn. 2013). In light of the foregoing, we vacate the trial court's judgment with respect to the individual and corporate Defendants and remand for further proceedings consistent with this Opinion. Costs of this appeal are taxed to the appellees, Earl D. Thomas; Hugh Taylor and Rick Taylor, individually; and Hugh Taylor, Rick Taylor, and Greg Taylor d/b/a J.S. Leasing, Inc. and Taylor Enterprises, Inc.

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DAVID R. FARMER, JUDGE