

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE

November 26, 2012 Session

**SHEILA PASCHALL EX REL MURRAY PASCHALL ET AL. v. SGS NORTH
AMERICA, INC. ET AL.**

**Appeal from the Circuit Court for Maury County
No. 14099 Jim T. Hamilton, Judge**

**No. M2012-00399-WC-R3-WC - Mailed: December 28, 2012
FILED JANUARY 30, 2013**

In this worker's compensation action, the widow of the decedent sought workers' compensation benefits for her husband's death. She filed suit twice but voluntarily non-suited each of those actions. She filed suit a third time, and her husband's employer moved to dismiss, contending that the third action was barred by the statute of limitations and by Tenn. R. Civ. Pro. 41.01(2). The trial court granted the motion to dismiss, and the widow has appealed, contending that her third action was timely filed. We reverse the decision of the trial court.¹

**Tenn. Code Ann. § 50-6-225(e) (2008) Appeal as of Right; Judgment of the Circuit
Court Reversed**

WALTER C. KURTZ, SR. J., delivered the opinion of the Court, in which SHARON G. LEE, J. and DONALD P. HARRIS, SP. J., joined.

B. Keith Williams and James R. Stocks, Lebanon, Tennessee, for the appellant, Sheila Paschall.

David J. Deming and Laurenn S. Disspayne, Nashville, Tennessee, for the appellees, SGS North America, Inc., and Ace American Insurance Company.

¹Pursuant to Tenn. Sup. Ct. R. 51, this workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel for a hearing and a report of findings of fact and conclusions of law.

MEMORANDUM OPINION

Factual and Procedural Background

The complaint in this action alleges that Sheila Paschall is the widow of Murray Paschall and the mother of his dependent children. The complaint further alleges that Mr. Paschall died on August 18, 2009, in Maury County and that his death arose from, and occurred, in the course of his employment with SGS North America, Inc. (“SGS”). This is Ms. Paschall’s third action for workers’ compensation death benefits. The first action was filed on May 12, 2010, in the Chancery Court of Maury County. An order of voluntary dismissal was entered on June 7, 2010. On that same date, Ms. Paschall re-filed her action in the Circuit Court of Maury County (the “second action”). The complaint in that action was identical to the complaint in the earlier Chancery Court action. The parties entered into a scheduling order in the second action, and the case was set for trial on December 6, 2011. On November 30, 2011, a few days before the scheduled trial date, an order of voluntary non-suit was entered in the second action. On the same date, Ms. Paschall re-filed her action, again in the Circuit Court of Maury County (the “third action”), along with a motion to set. The complaint in the third action was identical to the complaints in the first and second actions. SGS filed a motion to dismiss the complaint, supported by copies of the complaints and orders from the two earlier actions. In its motion, SGS asserted the third action was barred by operation of Tenn. R. Civ. Pro. 41.01(2). At the hearing on its motion, SGS elaborated on its position by arguing that the action was barred by the one-year statute of limitations created by the “savings statute” set forth in Tenn. Code Ann. § 28-1-105 (2000). In her response to SGS’s motion and argument before the trial court, Ms. Paschall asserted that the one-year savings statute period did not commence until the filing of her second non-suit in November 2011, because the first non-suit and re-filing occurred during the original one-year statute of limitations set out in Tenn. Code Ann. § 50-6-203(e)(1) (2008).²

The trial court granted SGS’s motion and dismissed the complaint. Ms. Paschall has appealed, contending that the trial court erred in its application of Tenn. R. Civ. Pro. 41.01 and Tenn. Code Ann. § 28-1-105 to this case.

²Tenn. Code Ann. § 50-6-203(e)(1) requires a survivor to file a request for a benefit review conference (“BRC”) within one year of the date of the employee’s death. Section 50-6-203(g)(1) provides that in the event of an impasse, the parties have ninety days in which to file a civil action. The complaint alleges that an unsuccessful BRC occurred on May 12, 2010, the date the first action was filed. Therefore, the limitation period in this case expired no earlier than August 10, 2010.

Standard of Review

This appeal does not involve any disputed issues of fact. Rather, Ms. Paschall challenges the trial court's interpretation and application of Tenn. R. Civ. Pro. 41.01 and Tenn. Code Ann. § 28-1-105. "The interpretation of a statute and its application to undisputed facts involve questions of law." Seiber v. Reeves Logging, 284 S.W.3d 294, 298 (Tenn. 2009). A trial court's conclusions of law are reviewed de novo upon the record with no presumption of correctness. Id.; Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

Analysis

The trial court found that Ms. Paschall's action was barred by operation of both Tenn. R. Civ. Pro. 41.01(2) and Tenn. Code Ann. § 28-1-105. We conclude that its interpretations of both Rule 41.01(2) and of the savings statute were incorrect, and the judgment is therefore reversed.

Tenn. R. Civ. Pro. 41.01(2) states: "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." SGS argued, and the trial court agreed, that this provision permits an action to be re-filed only one time and that a second voluntary non-suit bars additional re-filings. This interpretation is incorrect. The 2006 Advisory Commission comments to Rule 41.01(2) state:

Although Rule 41.01(2) allows two nonsuits without prejudice, a plaintiff must carefully consider the *separate* issue of whether the saving statute, Tenn. Code Ann. § 28-1-105, authorizes a recommencement of the plaintiff's action after a nonsuit. A plaintiff should note that taking a second nonsuit, which is permitted by Rule 41.01(2), does not initiate a second one-year period for recommencing the action under the saving statute. See Payne v. Matthews, 633 S.W.2d 494, 495-96 (Tenn. Ct. App. 1982) (stating, "It has long been held that after the taking of any nonsuit to the original action, any additional suits would have to be filed within one year of the first nonsuit to be within the purview of Tenn. Code Ann. § 28-1-105.").

(emphasis added).

We find it clear from the language of the comment and Payne, that a plaintiff's right

to re-file is extinguished by the filing of a third, rather than a second non-suit.

The quoted portion of Payne sets out the general rule that if a second non-suit is taken, the action must be re-filed within one year of the first non-suit or it will be time-barred by operation of Tenn. Code Ann. § 28-1-105. That section states in pertinent part:

If the action is commenced within the time limited by a rule or statute of limitation, but the judgment or decree is rendered against the plaintiff upon any ground not concluding the plaintiff's right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff, or the plaintiff's representatives and privies, as the case may be, may, from time to time, commence a new action within one (1) year after the reversal or arrest.

Tenn. Code Ann. § 28-1-105(a).

However, the general rule described in Payne is subject to an exception. In Balsinger v. Gass, 379 S.W.2d 800 (Tenn. 1964), our Supreme Court held that the one-year period contained in section 28-1-105 does not commence when an action is filed, non-suited, and re-filed within the original limitation period. Id. at 804-05. This exception was recognized by the Court of Appeals in Creed v. Valentine, 967 S.W.2d 325, 326 n.1 (Tenn. Ct. App. 1997). See also, Freeman v. CSX Transp., Inc., No. M2010-01833-COA-R9-CV, 2011 WL 1344727, *6 (Tenn. Ct. App. 2011).

The present case falls squarely within the rule announced in Balsinger. Ms. Paschall's first action was non-suited on June 7, 2010. Her second action was filed on the same date. The limitation period provided by Tenn. Code Ann. § 50-6-203(g)(1) expired no earlier than August 10, 2011.³ Because the second action was filed within the original statute of limitation period, the one-year savings statute period set forth in Tenn. Code Ann. § 28-1-105 did not commence. Balsinger, 379 S.W.2d at 804-05. Rather, the savings statute commenced to run on the date of the second non-suit, November 30, 2011. For that reason, we find that Ms. Paschall's third action was timely filed (within the one-year savings statute period) and that the trial court erred by granting SGS's motion to dismiss.

³Tenn. Code Ann. § 50-6-203(g)(2) provides that an injured employee has no less than one year from the date of accident to file suit. If that section is applied to this action for death benefits, the limitation period expired on August 19, 2010.

Conclusion

The judgment of the trial court is reversed. The case is remanded to the trial court for further proceedings. Costs are taxed to SGS North America, Inc., Ace American Insurance Company, and their surety, for which execution may issue if necessary.

WALTER C. KURTZ, SENIOR JUDGE

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JUDGMENT

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 fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs are taxed to SGS North America, Inc., Ace American Insurance Company, and their surety, for which execution may issue if necessary.

PER CURIAM